

*CALCULATING THE PERIOD OF
LIVING SEPARATE AND APART
UNDER S.4(1)(e) OF THE DIVORCE ACT:
HARRISON V. HARRISON RE-VISITED*
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I. Introduction

Nearly fifteen years after its enactment, the proper interpretation of s.4(1)(e) of the *Divorce Act*¹ remains uncertain. This incongruous and socially bankrupt provision is sufficiently convoluted that it is hardly surprising that its interpretation should produce competing conclusions. Essentially, it provides for the dissolution of a marriage that has permanently broken down by reason of a period of living separate and apart. That time period must immediately precede the presentation of the petition and the required duration depends upon whether that period is caused by the petitioner's desertion or not. Although there is some difficulty in their application, the concepts of "living separate and apart", "desertion", and "immediately preceding the presentation of the petition" are now well settled. The matters of continuing uncertainty are these: (1) What is the proper test for determining whether a period of living separate and apart is by reason of the petitioner's desertion? and (2) When must the permanent breakdown of the marriage occur in order for a divorce to be obtained under this provision? The answer to the first question enables the calculation of the period of living separate and apart required to be established in a given case, while the second question refers to the nature of the presumption established by s.4(2) of the Act.²

The first of these two matters was considered in two relatively recent case annotations written by Professor McLeod³ as Editor of the *Reports of Family Law*. The earlier annotation concerns the decision of the Court of Appeal of British Columbia in *Harrison v. Harrison*,⁴ and it is substantially reproduced in a student-oriented family law casebook compiled by Professor Hovius.⁵ Under a section headed "Calculating the Requisite Periods", the readers of that casebook are invited to weigh the alternative interpretations of s.4(1)(e) as outlined by Professor McLeod. The first annotation began with the suggestion that the *Harrison* case should be contrasted with the decision in *Gushta (Gusta) v. Gushta (Gusta)*,⁶ and near the end of that annotation Professor McLeod

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1. *Divorce Act*, R.S.C. 1970, c. D-8. This provision reads as follows: S.4.(1). In addition to the grounds specified in section 3, and subject to section 5, a petition for divorce may be presented to a court by a husband or wife where the husband or wife are living separate and apart, on the ground that there has been a permanent breakdown of their marriage by reason of one or more of the following circumstances as specified in the petition, namely:....
(e) The spouses have been living separate and apart
(i) for any reason other than that described in subparagraph (ii), for a period of not less than three years, or
(ii) by reason of the petitioner's desertion of the respondent, for a period of not less than five years, immediately preceding the presentation of the petition.
2. *Ibid.* This provision reads as follows: S.4.(2). On any petition presented under this section, where the existence of any of the circumstances described in subsection (1) has been established, a permanent breakdown of the marriage by reason of those circumstances shall be deemed to have been established.
3. Professor McLeod, who is still the Editor of the *Reports of Family Law*, is a member of the Faculty of Law of the University of Western Ontario.
4. (1978), 7 R.F.L. (2d) 67 (B.C.C.A.). The annotation to this report begins at page 67, there part of the decision itself commencing at page 72. This decision is also reported in 6 B.C.L.R. 393.
5. *Family Law, Cases, Notes and Materials*, (Carswell Company Limited, 1980). Professor Hovius is also a member of the Faculty of Law of the University of Western Ontario.
6. (1977), 2 R.F.L. (2d) 342; [1978] 1 W.W.R. 272 (Man. C.A.).

stated that "the conclusions of the Courts of Appeal in *Harrison* and *Gushta* are both contradictory and obscure."⁷ Although other Appellate Courts had also neglected to avail themselves of the opportunity to do so,⁸ Professor McLeod lamented the failure of these particular Courts of Appeal to provide a full and clear analysis of s.4(1)(e). The major part of this first annotation is then devoted to the merits of the three interpretations that seem to him to be possible.

The second, and shorter, annotation relates to the decision of the Manitoba Court of Appeal in *Janiuk v. Janiuk*⁹ and while it affords him the opportunity of repeating his dissatisfaction with that Court's earlier decision in *Gushta*, it adds nothing of substance to Professor McLeod's earlier opinion. In this second annotation, Professor McLeod observed that, in *Janiuk*, "the Manitoba Court of Appeal re-affirmed its basic philosophy as set out in *Gushta*. In the instant case, however, the Court did not advert to either previous decision." After a brief review of *Janiuk*, he concluded his annotation with this paragraph:

Under the *Harrison* analysis it is possible that the decree could have been sustained. The decision in *Harrison* is at odds with that of *Gushta* and *Janiuk*. In light of this contradiction, it is unfortunate that the reasons for judgment of O'Sullivan J.A. did not advert to the two previous decisions in an attempt to reconcile or at least explain the disparity.¹⁰

It is submitted that Professor McLeod's conclusion that the principal judgments in question are "contradictory and obscure" is unfounded, and that his analysis of s.4(1)(e) is both logically untenable and inconsistent with the main body of jurisprudence under the Divorce Act.¹¹

II. Concerning the Alleged Contradiction Between *Gushta* and *Harrison*

In the *Gushta* case, which does not seem to be particularly remarkable, the petitioner deserted his wife on November 4th, 1973. Nine and one-half months later they entered into a separation agreement. The petition was filed November 18, 1976, three years and four days after the period of living separate and apart had begun. Although the petitioner was not in desertion at the time the petition was filed, he had been in desertion for about the first nine months of the three year period immediately preceding the presentation of the petition. The Court of Appeal, not surprisingly, took the view that a separation agreement does not operate retroactively so as to extinguish the petitioner's desertion *ab initio*. By way of an *obiter dictum*, it was indicated that the petitioner could obtain a divorce under s.4(1)(e)(i) any time after the third anniversary of the separation agreement, because he would have accumulated three years of

7. *Supra* n. 4, at 71.

8. Including the Court of Appeal of Ontario in *March v. March* (1971), 4 R.F.L. 1: [1971] 2 O.R. 278, to which Professor McLeod refers in his annotation.

9. (1980), 13 R.F.L. (2d) 86 (Man. C.A.). The annotation begins at page 86, and the report of the decision starts at page 87. The decision can be found as well in 3 Man. R. (2d) 62.

10. *Supra* n. 9, at 87.

11. Having just returned to the teaching of Family Law after an absence that began before Professor McLeod's first annotation was published, I trust that the belatedness of these comments on his views will be excused.

living separate and apart without desertion on his part.¹² It would have been helpful had Matas J.A., who delivered the opinion of the Court, gone beyond the facts of the case before him in order to provide a complete analysis of s.4(1)(e), indicating how it applies to various kinds of situations that might arise. However, his failure to make that excursion does not render his judgment any more obscure than it was unexpected.

Although the reader of the *Harrison* case might find the language of McFarlane, J.A. concerning the effect of the particular separation agreement in question somewhat lacking in perspicuity, it is submitted that the conclusion reached does not stand in contradiction of the decision in *Gushta*. In *Harrison*, the petitioner left the matrimonial home on September 30, 1973, in circumstances that do not make it clear whether he was in desertion in doing so. According to the husband, the parties "had been for some time in minimal communication under the same roof", and they had "an existing arrangement" that he described as "incompatibility". The wife testified that she had thought that they had nevertheless worked out a *modus vivendi*, "a reconciliation of some sort". Because of this, she said that when her husband left the home "as far as I'm concerned, that is desertion". However, so far as the reader is aware, the parties may have been living separate and apart before the husband left the home, and such a state of affairs would not have ended by reason of a partial, or half-hearted, reconciliation.¹³ Whether the husband is in desertion is not for the wife to decide, but for the court.

Obviously, there is a dearth of information provided in the report, and the answers to some of the questions one might have liked to have put to the parties might have made it clear which, if either, was in desertion, and when. Be that as it may, the bottom line is that the judges in the Court of Appeal concluded that there was no desertion in fact on or after the 30th of September, 1973, and there is nothing in the report of the case that demonstrates that they were wrong. Moreover, even if they were wrong on the facts, the *ratio decidendi* of their judgment must reflect the facts as found by them, not as Professor McLeod, or anyone else might think they were.

Where a certain degree of obscurity does enter the *Harrison* case, is in the discussion of the effect of the separation agreement. However, nowhere in that case is it said or implied that the separation agreement did, or that any separation agreement could, operate retroactively so as to re-write the history of a marriage and wipe out a clear case of desertion as though it had never happened. If the Court had said such a thing, then it would have been wrong, and it would be pointless to try to reconcile such an aberrant conclusion with the general body of jurisprudence, let alone with *Gushta*. Rather, it seems to have been tentatively suggested that one of the recitals might be taken to have

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12. Amongst the many cases in addition to *Gushta*, *Harrison* and *Janiuk* that make this point are: *Reeves v. Reeves* (1969), 23 R.F.L. 359(Ont. S.C.); *Burke v. Burke* (1972), 7 R.F.L. 244 (Ont. S.C.); *Rathwell v. Rathwell* (1974), 16 R.F.L. 387 (Sask. Q.B.); *MacDonald v. MacDonald* (1976), 26 R.F.L. 296 (P.E.I. S.C.). The *MacDonald* case makes the additional point that an agreement regarding the financial situation of separated spouses does not necessarily involve a consent to the separation, and that desertion therefore remains possible.
 13. *Mummary v. Mummary*, [1942] P. 107 (P.D.A.); *Bartram v. Bartram*, [1950] P. 1 (C.A.); *Perry v. Perry*, [1952] P. 203 (C.A.); *Schiach v. Schiach*, [1941] 2 D.L.R. 590 (Sask. K.B.); *Smith v. Smith*, [1961] 30 D.L.R. (2d) 548 (B.C.S.C.). See as well cases under the *Divorce Act* dealing with s.2 "condonation" and with s.9(3)(b).

acknowledged that the parties had already been living separate and apart by mutual consent at the end of September, some three and one-half months before they signed the formal agreement. If so, then, in the absence of evidence that the agreement was collusive, the subsequent evidence of the wife which was given nearly three years later and contradicted the truth of her own signed statement, is not likely to be accepted. In the circumstances of the case "nothing has been shown which would justify her (the respondent) denying the statements solemnly made in that agreement".¹⁴

However, without offering any analysis either of the facts or of the recital in question, Professor McLeod states categorically that "The agreement does not state that there was never desertion between the parties but only that since the date of the agreement the desertion had been terminated".¹⁵ In fact, the only recital in the agreement that is re-produced in the report makes no such statement, and it contains no reference at all to desertion. It reads as follows:

'AND WHEREAS differences *have arisen* between the parties hereto *resulting* in their separation on or about the 30th day of September, 1973, and *they have agreed to henceforth* live separate and apart from each other and enter into the arrangements hereinafter set forth.'¹⁶

While it may be argued that this recital was not particularly well-drafted, the emphasized words appear to make the provision susceptible to the interpretation given it by the Court. Since the differences referred to were the cause of the separation on September 30th, 1973, they clearly arose before that date. The congruence between "differences *have arisen*" and "*they have agreed*" might be taken to show that the time at which they so agreed also pre-dated the 30th of September, and that "*henceforth*" means "from September 30th onwards". (Admittedly "thenceforth" would have been a better word.) Thus, on or about September 30th they agreed henceforth to live apart, and they agreed as well that at some future point in time they would enter into the arrangements contained in the agreement. That point in time was reached on January 15th, 1974, on which date "the arrangements" were reduced to writing and "hereinafter set forth" and signed by the parties. The reader may not be any more comfortable with that interpretation of the recital than McFarlane, J.A. appears to have been; but that would seem to be what he was getting at. Given that interpretation, the agreement would indicate that mutual consent to live apart occurred on or about September 30th, 1973. A separation agreement does not have to be in writing, and an unwritten agreement (express or implied) may be superseded by a written agreement without the latter forcing the court to conclude that the former never existed. I take it that it was because McFarlane, J.A. had some doubts about this interpretation of the recital that he said "if I be wrong in that, then it seems to me that a desertion in the legal sense has not been shown here to have existed or occurred *in fact* [i.e., quite apart from the construction of the agreement] on 30th September, 1973."¹⁷

14. *Supra* n. 4, at 74. Parentheses added.

15. *Id.*, at 70.

16. *Id.*, at 73. Emphasis added.

17. *Id.*, at 74. Emphasis and parenthetical observation added.

In substituting his version of the facts for those actually found by the Court of Appeal, Professor McLeod has, in effect, rewritten the *Harrison* case so as to find in it support for his theory of the proper interpretation of s.4(1)(e). That theory is that the petitioner is permitted to have been in desertion during the three years immediately preceding the petition, as long as he is not in desertion on the day the petition is filed. As will be seen presently, the only "judicial" support for such an interpretation is Professor McLeod's misconception of *Harrison*. However, it is rather clear that the British Columbia Court of Appeal would have handed down a different decision had they viewed the facts of that case as Professor McLeod does. It should be remembered that the trial judge had found as a fact that the petitioner had been in desertion from September 30th, 1973, to January 15th, 1974, when the written agreement was signed. Having so found, he dismissed the action because the petitioner had been in desertion for over three months at the start of the three-year period of living separate and apart required to be established. His judgment was reversed *not because he was wrong on the law, but because he was wrong on the facts!*

At the beginning of his judgment, McFarlane, J.A. said that "The important question, then, for decision is whether on the evidence here there was a desertion of the respondent by the appellant on the 30th of September, 1973."¹⁸ At the end of his judgment he said "For these reasons, I am of the opinion that the finding of desertion on the 30th of September 1973, was clearly wrong and cannot be supported. *It follows* that I would allow the appeal and direct the grant of a decree nisi of divorce."¹⁹ One would have thought that had the majority of the Court of Appeal reversed the trial judge because he had the law wrong, they would have said so, and that they would not have belaboured the ill-drafted separation agreement, the construction of which would then have been irrelevant.

Indeed, in a separate judgment in which he reached the same conclusion, Seaton, J.A., who was in direct communication with the other members of the Court, clearly understood them to be resting their decision on the absence of desertion on and after September 30th, 1973, with which finding he agreed. However, he took the view that, even had there been desertion prior to the signing of the agreement, that desertion was not the cause of the living separate and apart. Rather, in his view, the parties were living separate and apart by reason of incompatibility. Thus, when the real *Harrison* case stands up, it is seen to be devoid of any support for Professor McLeod's thesis, and there is simply no contradiction at all between that case and *Gushta* as the annotation maintains.

Professor McLeod was dissatisfied with *Gushta* both because it does not provide an exhaustive analysis of s.4(1)(e) and it is inconsistent with his view of that section. When the decision in the *Janiuk* case was handed down, not only did he renew his complaint about the Manitoba Court of Appeal with another annotation, but he suggested that that Court failed to take into account the intervening decision of the British Columbia Court of Appeal which might

18. *Id.*, at 72.

19. *Id.*, at 74. Emphasis added.

have led them to a different conclusion. He stated that “[u]nder the *Harrison* analysis it is possible that the decree could have been sustained.” However, the analysis of the *Harrison* case to which Professor McLeod refers is his, not the Court’s, and not only is that decision actually supportive of *Janiuk*, but even Professor McLeod’s analysis of *Harrison* could not have led to the granting of a divorce decree in that case.

In *Janiuk*, it was found as a fact that the petitioner had been in desertion throughout the entire period of living separate and apart, and since that period was less than five years at the date he filed his petition, his action was dismissed. There had been a suggestion that at some point of time less than three years before the petition was filed, the respondent’s wife had consented to the separation by locking her husband out, which therefore would have meant the petitioner would not have been in desertion when he commenced his action. The Court said that even had this been the fact the petition would have been premature because the parties would not have been living separate and apart for a three-year period entirely free of desertion by the petitioner. It is this obiter dictum, and not the decision on the facts as found, that might have been different had the Court accepted Professor McLeod’s “analysis” of *Harrison*.

The decision in *Janiuk* is short, simple and to the point, and not only is this obiter dictum in keeping with the Court’s earlier judgment in *Gushta*, it seems to be in accordance with every reported judgment granting a divorce under s.4(1)(e)(i) of the *Divorce Act*. While *Janiuk* does not provide the in-depth treatment of the provision that Professor McLeod feels that case warranted (even though a discussion of the point of interest to him would have been obiter), merely for that Court to have repeated its earlier position is hardly a basis for asserting that its decision “serves to confuse the area more”. Furthermore, as to any chiding of that Court for not having attempted “to reconcile or at least explain the disparity” between *Gushta* and *Harrison*, the writer attempted to show they should have done, since there is no disparity, there is nothing that wants explanation.

III. Calculating the Periods Under S.4(1)(e)(i) and (ii)

According to Professor McLeod, the decision in *Harrison v. Harrison* involved (as would, presumably, a consideration of any s.4(1)(e) petition) “two aspects: (1) When are the parties to be regarded as living apart because of the petitioner’s desertion? and (2) What is the relevant time at which to judge the reason for the parties living separate and apart?”²⁰ Regarding the first question, once it is known in principle under what circumstances spouses are, or are not, to be regarded as having been living separate and apart because of the desertion of the petitioner, then it can be determined in any given case whether the petitioner must specify clause (ii) rather than clause (i), and the earliest date upon which he could commence his action can be calculated. Since the second question cannot be meant to elicit the answer “when the judge is mulling over his decision”, it seems to suggest that there is a *point of time* occurring within the period of separation (whether the first moment, or the

20. *Id.*, at 68.

last, or some particular moment in between) upon which the character of the entire episode will depend. Presumably, once we have established just what is the legally relevant *point* of time, we can apply this principle to any case in order to determine which of the clauses of paragraph (e) must be specified, and what is the earliest date upon which the petition could be filed. Thus, by examining their purpose it can be seen that these two questions are virtually the same; they are asking "What is the test for determining whether the parties are living separate and apart by reason of desertion?" The only real difference between them is that, by implying that the test *must* involve a *point* of time, the second question is narrower through having partially begged the first.

Professor McLeod indicates that the only member of the Court in *Harrison* to have considered the first of his questions was Seaton, J.A., whose meaning he found "cryptic" and unsatisfactory. We are to assume that the other members of the Court concentrated on his second question. In fact, none of them was concerned with indentifying a given moment in time upon which the character of the separation must depend, and the judgment of McFarlane, J.A., with whom Taggart, J.A. agreed, is inconsistent with the suggestion that there is any particularly relevant *point* of time. Be that as it may, after dealing with the views of Seaton, J.A. as to whether there can be both desertion and a living separate and apart without the former being the cause of the latter, Professor McLeod went on as follows:

The more difficult legal issue in the case is the question of what is the relevant time for determining the reason for the parties living separate and apart. Neither the Court of Appeal in *Gushta* nor the Court of Appeal in *Harrison* systematically examined the possible alternatives to this question: (1) Must the petitioner establish that he has been living separate and apart for three years and at the time the proceedings are commenced he is not in desertion? or (2) Must the petitioner establish that he has been living separate and apart for three years and at the time the parties commenced living separate and apart he was not in desertion? or (3) Must the petitioner establish that at the time proceedings were commenced he was not in desertion and had not been so for three years immediately preceding the presentation of the petition?²¹

Professor McLeod finds the third of these alternatives to be the most reasonable on its face and the one most in keeping with the words of the section, yet he rejects it because he believes its application would lead to a "conclusion [that] seems so patently unreasonable that it ought not to be reached."²² He finds the first and second alternatives much simpler and more straightforward. Although he does not give reasons for preferring the first to the second of these alternatives, he concludes that "the desirable course of action would appear to be to adopt the conclusions of the *Harrison* case and to

21. *Id.*, at 68-69.

22. *Id.*, at 69. It may be noted that Professor McLeod seeks support for his rejection of the third alternative by stating that "the cases have held that where a husband is in desertion his petition under s.4(1)(e)(i) should be dismissed even though the parties have lived separate and apart for more than five years." He cites no cases in support of this statement. In any event, the question is not whether such a husband could succeed under clause (i), but under clause (ii). I am unaware of any case that holds that a husband who has been living separate and apart for at least five years nevertheless lacked the requisite time under clause (ii) simply because he has not been in desertion all of that time. If there be such cases, I would have no hesitation in saying that they are badly decided and ought not to be followed. There have been cases in which it was held that a petitioner in desertion longer than five years could not succeed *under clause (i)*. In some of these cases it was indicated that clause (ii) should have been specified instead of, or as an alternative to, clause (i). See, for instance, *Schartner v. Schartner* (1970), 10 D.L.R. (3d) 61 (Sask. Q.B.) and *Struk v. Struk* (1970), 14 D.L.R. (3d) 630 (Sask. Q.B.). See also, the discussion, *infra*, of *Affleck v. Affleck*, *infra* n. 34.

determine the nature of the separation at the time proceedings are commenced.’’²³ However, this preference is qualified by the *caveat* that, if the petitioner is not in desertion at the time proceedings are commenced because of a separation agreement ending his or her prior desertion, then that ‘‘agreement must be a real agreement and not merely a collusive device to quickly obtain a divorce otherwise not obtainable at the time.’’²⁴ The ‘‘patently unreasonable’’ conclusion to which, in Professor McLeod’s view, the third (and otherwise most reasonable) alternative would lead is that, if the parties entered into a separation agreement four years after the petitioner’s desertion, the petitioner could not obtain a divorce under clause (i) of s.4(1)(e) until three years after the agreement, which is to say a total of seven years. His reason for so concluding is this:

After the agreement, the parties would not be living separate and apart because of the petitioner’s desertion but by mutual consent. For the husband to petition for divorce on the third alternative it would be necessary for him to establish the reason, *at the time proceedings were commenced*, why the parties were living separate and apart, i.e., not desertion, and that they had been living in that state for the requisite period of time preceding the presentation of the petition, i.e., three years.²⁵

It is doubtful that Professor McLeod would concede that under his third alternative the petitioner in his illustration could obtain his divorce one year after the agreement under clause (ii) of s.4(1)(e), since there would not then be any basis for finding that alternative to be unreasonable. Thus, it must be Professor McLeod’s view that, under the third alternative, the petitioner in his illustration cannot use *either* clause (i) *or* clause (ii) until the seven years have passed, and that it is this conclusion that is an undoubted absurdity.

With respect, it is submitted that the ‘‘patently unreasonable’’ conclusion that Professor McLeod attributes to his third alternative results from his having confused it with a fourth alternative that a full analysis of the provision would have revealed. We are not given the benefit of his reasons for even suggesting his third alternative; but had the premises that *do* support that alternative been articulated they would have shown that there is a fork in the sequence of reasoning involved, with the two branches leading to opposite interpretations. Whereas one of those branches leads to a conclusion that coincides with his third alternative, the other leads to a fourth alternative that is actually the basis of the erroneous illustration that he offers, supposedly by way of a *reductio ad absurdum*, in repudiation of the third alternative. However, before turning to that analysis, his first and second alternatives must be dealt with.

Curiously, a useful starting point in this regard is a closer consideration of what it is that might be ‘‘patently unreasonable’’ in the illustration meant to debunk the third alternative. Is it that the petitioner would have been living

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23. *Id.*, at 71. Emphasis added. Of course, it is not the conclusions of the *Harrison* case that he advocates be adopted; it is his conclusions, based on a false reading of *Harrison* that he recommends.
24. *Id.*, at 71. Either the first of his alternatives is the correct approach or it is not, and its validity does not depend on such a caveat which, in the light of s.9(1)(b) of the *Act*, is unnecessary.
25. *Id.*, at 69. The emphasized words may amount to a begging of the question Professor McLeod propounds, namely, ‘‘What is the relevant time for determining the reason for the parties living separate and apart.’’ His preferred answer is ‘‘at the time proceedings are commenced’’. Is the unwanted consequence he attributes to the third alternative derived in part from the simultaneous application of his first alternative?

separate and apart for seven years before he could obtain a divorce under s.4(1)(e), whereas common sense indicates the maximum period should be five years even for a deserter? If so, consider the similarly unreasonable consequence that flows from his first (and preferred) interpretation. Suppose that two years after the parties separated by mutual consent the wife makes a sincere request to resume cohabitation which the husband without justification rejects, thus placing himself in desertion.²⁶ Assuming no change in their situation, the husband would be in desertion at the time he presented the petition, and (according to Professor McLeod) he would have to show that he had been in desertion for five years, which is a total of seven years of living separate and apart.²⁷ We are invited to reject the only interpretation that is "reasonable on its face and is in keeping with the wording of the section" because, on Professor McLeod's hypothesis (which happens to be false), it leads to a "patently unreasonable" consequence in its application. Instead, he suggests that we espouse an interpretation that is neither reasonable nor in keeping with the wording of the section, or is at least less so, and which in fact leads to virtually the same "patently unreasonable" consequence.

However, perhaps the two situations can be distinguished on the basis that it is not unreasonable to make someone presently in desertion wait seven years, but that it is obviously unreasonable to make someone wait any longer who has just ended four years of desertion through entering into a separation agreement. Such a rationalization is not particularly convincing. In the example he cites, the husband destroyed the marriage by his desertion of four years and now, on the strength of a belated separation agreement, Professor McLeod would allow him to obtain a divorce right away. In the other example, the marriage was already moribund owing to the parties' mutual consent to live apart permanently. Two years later (or it might even be three years less a day with the husband poised to file his petition the next morning) the wife decided unilaterally that she wanted to try again, but because she was *bona fide* and the husband was not prepared to cooperate in such a venture he becomes technically a deserter and has to wait seven (or perhaps eight) years. Though one is likely to have less sympathy for the husband in his example than in the other, any interpretation that would make either of them wait seven years from the original separation in order to obtain a divorce would be unfortunate — and, as will be seen, unnecessary.

It is important to note that Professor McLeod's first alternative would allow the divorce where there are three years of living separate and apart immediately preceding the presentation of the petition, even if the petitioner has been in desertion for virtually all of that time, as long as he is not in desertion on the last day of that period. Obviously, on the hypothesis of this alternative, any desertion by the petitioner during the three years in question, other than on the last day, is irrelevant. Otherwise, the court would be looking to some factor other than whether the petitioner was, or was not, in desertion at

26. *Clark v. Clark*, [1939] 2 All E.R. 392 (P.D.A.); *Parry v. Parry*, [1939] 3 All E.R. 779 (C.A.)

27. Indeed, even if the offer to resume cohabitation were to come on the eve of the third anniversary of their mutually-agreed upon separation, if it were *bona fide* and the wife were guilty of no conduct justifying the husband in living apart (and unless the length of the separation itself were regarded as justifying the refusal), he is now in desertion, and though but a day away from a divorce under clause (i), Professor McLeod would have him wait five years and one day more (for a total of eight years) in order to obtain his divorce under clause (ii).

the time he filed his petition. In adopting this alternative, not only does Professor McLeod reject the decision in *Gushta*, which he wrongly believes to be irreconcilable with *Harrison*, but in the process he rejects the real *Harrison* case and overlooks a great many similarly-decided cases.²⁸ In *Gushta*, the petitioner was not in desertion when he presented his petition, and the parties had been living separate and apart for over three years. Moreover, the separation agreement in that case was not “merely a collusive device to quickly obtain a divorce otherwise not obtainable”, which is the only (and unnecessary) *caveat* Professor McLeod attaches to the first alternative. Thus, his first, and preferred, alternative is untenable. Not only has it been rejected by the courts, but it seems analytically incorrect and productive of the very kind of “patently unreasonable” consequence he wrongly attributes to the third alternative.

As to Professor McLeod’s second alternative, which he does not adopt but finds “much simpler and more straightforward” than the third, the following observation, made shortly after the *Divorce Act* was promulgated, bears repetition:

It must not be thought that simply because the original cause of the separation was the petitioner’s desertion of the respondent, then the circumstances necessarily fall within the second clause of the paragraph. This could be so only had the provision been worded in some such fashion as this: “the spouses *separated and have since lived apart...* (ii) by reason of the petitioner’s desertion of the respondent, for a period of five years.” However, the use of the present perfect continuous tense (“the spouses *have been living separate and apart...* by reason of the petitioner’s desertion”) indicates that it is not the original parting, but a continuous living apart for a particular length of time which, if it is attributable to the petitioner’s desertion, will bring the case within one branch of the provision rather than the other. Where the petitioner’s desertion ended, but the spouses continue to live separate and apart, it cannot be said that they are now living separate and apart by reason of the desertion. Consequently, from the time the desertion ended, “the spouses have been living separate and apart for [a] reason other than [the petitioner’s desertion of the respondent].” It follows that, where the petitioner is not presently in desertion, it may not be necessary to establish a five-year period of living separate and apart, and this is so even if the petitioner had deserted the respondent less than five years prior to the petition.²⁹

As it happens, Professor McLeod’s second alternative has more to recommend it than does his first. After all, it is difficult to comprehend how a condition existing on the *last* day (and perhaps only on that day) of a period of living separate and apart could possibly be the *cause* of all that preceded. However, if a petitioner *started* the clock running on a period of living separate and apart by deserting the respondent, it is not unreasonable to suggest that his desertion caused the living separate and apart; and this is so even where the parties remain separate and apart following the termination of his desertion by a separation agreement, or by any other circumstance.

This is the view expressed by Dr. Mendes De Costa in *Studies in Canadian Family Law*,³⁰ relying in part on the decision of the Ontario Court of Appeal in

28. *Supra* n. 12. All of these cases make it clear that, even though the petitioner was not in desertion at the time he filed his petition, and even though the parties have been living separate and apart for at least three years, the petition is premature unless the petitioner was innocent of desertion throughout the three years.

29. Hubbard, “Domestic Relations: *The Divorce Act, 1968*” (1968), 3 *Ottawa Law Review* 172, at 198.

30. Ch. 7, at 497-498. These volumes are edited by Dr. Mendes Da Costa.

March v. March.³¹ In that case, the wife, who had a drinking problem, left the matrimonial home. There was no definite finding made as to whether she was thereby in desertion, but there was no further communication between the spouses. The husband, who had entered into a "common law" union some two months after his wife's departure, presented a petition under s.4(1)(e)(i), the separation having lasted more than four years. The petition was undefended. At the trial it was held that, because the husband's conduct effectively prevented reconciliation, should his wife have wished to return to him, he was therefore in desertion of her and could not succeed under clause (i). In allowing the appeal, Mr. Justice McGillivray, in a very short judgment delivered orally on behalf of the Court, concluded that: "the only inference that can be drawn is that the petitioner's living with another woman in itself did not prevent the operation of s.4(1)(e)(i) of the *Divorce Act*. On all the evidence it cannot be said that the marital breakdown was 'by reason of the petitioner's desertion' as provided in s.4(1)(e)(ii). Complete non-communication between the parties during that period supports that conclusion."

The *March* case is unfortunately vague. However, it is consistent with the view that, not having brought about the initial separation through desertion, the husband did not become a deserter because of his subsequent misconduct. His wife's complete non-communication indicated that she had no interest in resuming cohabitation. Indeed, this view is the only one that is compatible with all the jurisprudence. The adultery of one spouse will justify the other living separate and apart, and adultery prior to separation may be tantamount to constructive desertion if it drives the other spouse away. But where spouses are already living separate and apart by mutual consent, the subsequent adultery of one of them does not automatically place him or her in desertion of the other. Moreover, the *animus deserendi* of a deserting spouse (as the wife in the *March* case appears to have been) is not ended without a sincere offer of reconciliation being made. Since the respondent's *animus* appears to have continued notwithstanding the petitioner's adultery, the consent of the respondent would preclude the desertion of the petitioner.³² In my submission, that is all that the *March* case stands for. However, Mr. Justice McGillivray's conclusion is also *prima facie* consistent with the proposition that, where the parties are living separate and apart, *not* "by reason of the petitioner's desertion," but for "any reason other than that," then s.4(1)(e)(i) applies, even if it happens that the petitioner is also in desertion.

This was the view of the *March* case taken by Seaton, J.A. in *Harrison*. Since clause (i) requires that the living separate and apart not be by reason of the petitioner's desertion, it must be determined whether the petitioner had been in desertion at all and, if so, whether that desertion caused the living separate and apart. Seaton, J.A. seems to say that even while a petitioner is in desertion, the living separate and apart is not to be regarded as a consequence thereof if that episode is "by reason of an inability to live together, incompatibility." Professor McLeod's criticism of this "cryptic statement" is altogether too tentative. While the petitioner's desertion and the living separate and apart

31. [1971] 2 O.R. 278; (1971), 4 R.F.L. 1 (Ont. C.A.).

32. *Id.*, 278 at 279 (O.R.); 1 at 2. (R.F.L.).

are co-extensive, the former is by *definition* the cause of the latter. However, this leaves open the question whether, where the desertion is for less than the total period of living separate and apart, that total period is to be regarded as being by reason of the petitioner's desertion, or as being for a reason other than that. This question involves a consideration of the third and fourth alternatives.

Dr. Mendes Da Costa's view of the *March* case is that it indicates that s.4(1)(e)(ii) does not apply where the initial separation was not caused by desertion. After discussing briefly the decision in that case, he continues as follows:

Assume, however, that a husband and wife separated by mutual consent in 1968. And assume that in 1970 the wife expressed a genuine desire to return to the matrimonial home and that her husband unreasonably refused to resume cohabitation with her, and, as a consequence, that he thereupon deserted her. The words of s.4(1)(e), namely, that the spouses "have been" living separate and apart, and the requirement that the prescribed period of three or five years must be "immediately preceding" the presentation of the petition, seem to stipulate that the husband, as petitioner, can proceed only under s.4(1)(e)(ii); so that he will not be able to successfully petition for divorce under s.4(1)(e) until 1975, i.e., five years after his desertion of his wife. But it is suggested that whether s.4(1)(e)(i) or s.4(1)(e)(ii) applies should depend upon the facts existing at the date spouses initially begin to live separate and apart. If this is so, then the husband, notwithstanding his desertion, would still be able to invoke s.4(1)(e)(i); with the result that both parties could forthwith petition for divorce.³³

With all deference to Dr. Mendes Da Costa, there is no reason to prefer his interpretation of the *March* case to either of the other two possibilities mentioned, but there is good reason to reject it. In saying that where the initial separation was not caused by desertion s.4(1)(e)(ii) does not apply, he also says that where desertion *is* the initial cause then that subparagraph *does* apply. Although his view excites sympathy in the example he gives (at least amongst those who regret the presence of the matrimonial offence concept in section 4), an example that has the opposite effect may be given.

Suppose H deserted W in 1979, but that they entered into a separation agreement in 1980, terminating the desertion. Must H wait until 1984 in order to present a petition under paragraph (e)? In any case, Dr. Mendes Da Costa's view, which is really Professor McLeod's second alternative, is not consonant with subsequent decisions and would now appear to have been rejected by the courts,³⁴ one such decision being that of the Manitoba Court of Appeal in *Gushta* in which (admittedly as an *obiter dictum* in that particular case) it was said that the petitioner, whose original desertion started the clock running, did not have to wait until five years of living separate and apart had transpired, since his desertion was ended by a separation agreement less than two years after it had begun. It was said that the petition could be filed three years after the separation agreement terminated the petitioner's desertion, which happened to be less than four years after the petitioner deserted.

It is submitted that a proper interpretation of s.4(1)(e) must begin with the recognition that what the provision requires to be either "by reason of the petitioner's desertion", or "for any reason other than" the petitioner's deser-

33. *Supra* n. 30, at 497-498.

34. *Supra* n. 12. The court's insistence that the three year period under clause (i) be entirely innocent of desertion by the petitioner is just as inconsistent with the second alternative as it is with the first.

tion, is the *period* of living separate and apart (i.e., a *continuum*, an unbroken block of time), and not a condition existing, perhaps fleetingly, at a fixed point in time, whether at the beginning, or at the end, or at any isolated and frozen moment during that block of time. It is because they fix on a point of time, rather than on a period of time, that neither of Professor McLeod's first two alternatives is valid. Indeed, and with all deference, it would appear that the manner in which Professor McLeod framed his initial question obscures this fundamental distinction and tends to impel one down the wrong path. Since paragraph (e) forges a link between the petitioner's desertion and a period or block of time, it is simply misleading to ask "What is the relevant time (meaning 'point of time') at which to judge the reason for the parties living separate and apart?" Rather, the question that should be put is this "What constitutes a period (i.e., a continuum, a *block* of time) of living separate and apart by reason of desertion?" This, in turn, raises two further questions that point to a fourth possibility in addition to Professor McLeod's third alternative; (1) "Must *every moment throughout the continuum be attributable to the petitioner's desertion* in order for that period to be by reason of such desertion?," or, (2) "Is the period one that is by reason of the petitioner's desertion if *during any part of it the petitioner was in desertion?*"

Professor McLeod's third alternative must be based on an affirmative answer to the second of the questions just posed. If a period of living separate and apart is by reason of the petitioner's desertion where any part (and not necessarily all) of it is so attributable, then logically we must define a period of living separate and apart *for any reason other than the petitioner's desertion* as being one that is entirely desertion-free on the petitioner's part. This would mean that, in order to bring himself within clause (i), then (if I may convert his third alternative from a question into a statement) "the petitioner must establish that at the time proceedings were commenced he was not in desertion and had not been so for three years immediately preceding the presentation of the petition." However, it would also follow that, since *ex hypothesi* a period of living separate and apart is *not for a reason other than the petitioner's desertion if any part* of it is so tainted, then it *is* by reason of such desertion *if any part (and not necessarily all)* of it is so attributable. Consequently, if clause (i) of section 4(1)(e) requires three years of living separate and apart entirely free from desertion on the petitioner's part in order for the period to be for any other reason than his desertion, then clause (ii) is satisfied if there are five years of living separate and apart during any part of which (and not necessarily for all of which) the petitioner was in desertion. Professor McLeod seems to have overlooked this logical corollary of his third alternative. In fact, what he has done is this: he has applied the third alternative to clause (i), and then he has misapplied to clause (ii) its logical contradictory, namely, the fourth alternative.

The fourth alternative requires further elaboration. This particular alternative would follow from an affirmative answer to the question posed above as to whether every single moment throughout the entire period must be attributable to the petitioner's desertion in order for the period to be by reason of such desertion. Such an affirmative answer would mean that a petitioner could not

succeed under clause (ii) unless for every single moment during the five years immediately preceding the presentation of the petition he had been in desertion.

This interpretation is suggested by Disbery, J., of the Saskatchewan Court of Queen's Bench in *Affleck v. Affleck*.³⁵ With neither a full analysis of the problem before him, nor any consideration of the implications for clause (i) involved in such a proposition, he indicated that under clause (ii) of s.4(1)(e) the petitioner must have been in continuous desertion throughout the five years of living separate and apart. Because the reference to "desertion" appears in clause (ii), there may be a tendency to start with that clause; but one must not forget to work backwards to see the impact on clause (i). This temptingly facile approach is that, since we are dealing with a *period* which must be *by reason of desertion*, therefore, there must be desertion throughout. While this approach may appear to be aided by English cases, they are really quite inapplicable when viewed in their proper context. Disbery, J. referred to *Crowther v. Crowther*,³⁶ in which an English statute providing a remedy for three year's desertion was construed as requiring that the respondent have been in desertion throughout the three years. The English statute in question is, of course, totally different from s.4 of our *Divorce Act*. The English provision granted a remedy for the victim of the *offence* of desertion. In the context of a matrimonial offence framework for divorce, a petitioner could hardly obtain relief on the ground of the respondent's desertion for a period of three years if the respondent were not in desertion for that length of time. However, under s.4(1) of our *Divorce Act* marriages are dissolved not on the basis of an *offence*, but because of breakdown. Section 4(1)(e)(ii) is not an adjunct of section 3 (as though it had somehow strayed into the wrong provision), creating a right to a divorce on the basis of the offence of desertion — and, incongruously, the petitioner's desertion at that!

In order to construe s.4(1)(e) properly one should begin with clause (i). That clause provides a remedy where the marriage has broken down because of three years of living separate and apart. This is the principal clause, and Parliament could (and should) have stopped there. But it was decided instead, *not to provide a special remedy for a deserting spouse* (as though it were even appropriate to speak of granting anyone a remedy for his own wrong), *but to punish a deserting spouse*. The object of punishing him was not to invite him to remain in desertion even longer than he otherwise might have done, lest he lose a right to a remedy for which he had been accumulating time but rather, to discourage the unilateral abandonment of marriage in the hope of getting a divorce on the basis of a three-year separation. Parliament was simply warning potential deserters that they would have to accumulate an additional two years of living separate and apart. The period required is three years, if the petitioner is innocent of desertion during that time; but it is five years if, *at any time* during the last three years, the petitioner has been in desertion. Since Disbery, J. found that the parties had not even been living separate and apart during the three years preceding the petition, whether by reason of desertion or not, it is

35. (1973), 15 R.F.L. 25. [1974] 1 W.W.R. 341 (Sask. Q.B.).

36. [1951] A.C. 723 (H.L.).

suggested that he might not have insisted upon his statement had it been brought home to him that its logical corollary would necessitate his interpreting clause (i) to mean that a petitioner could succeed thereunder even though he had been in desertion for thirty-five of the last thirty-six months of living separate and apart. It is interesting to note that Seaton, J.A., in the *Harrison* case, took a different view of the English decisions, finding that "cases interpreting different legislation are of no help to us."³⁷

The suggestion that clause (ii) requires that every moment of the period of living separate and apart be attributable to the petitioner's desertion may be, at first sight, beguiling. It is precisely this proposition that Professor McLeod applied in his illustration when, after using his third alternative to determine his petitioner's position under clause (i), he inadvertently contradicted that alternative in dealing with that petitioner's position under clause (ii). If one is going to apply this fourth alternative to a petition under the second branch of paragraph (e), then one must be consistent and apply *its* necessary corollary to the first branch of the same paragraph, that is, the petitioner need only establish that at some moment during the three years immediately preceding the presentation of the petition he was not in desertion. He could then say that, because he was not in desertion for every single moment during the period, the period is not by reason of his desertion. It would not matter then whether his only moment of not being in desertion was the day the separation began, or the day he filed his petition, or any given day in between.

Thus, to return to Professor McLeod's illustration wherein the petitioning husband deserted his wife in January of 1971 and entered into a separation agreement in January of 1975, under the third alternative the petitioner *could* have obtained a divorce in January of 1976. He could at that time have established five years of living separate and apart during part of which (indeed, for most of which) he was in desertion. The five-year period, not being desertion-free, would be a period of living separate and apart by reason of the petitioner's desertion, and clause (ii) would apply. This conclusion is not the result of "combining" clauses (i) and (ii);³⁸ it is a result of interpreting clause (ii) in a manner consistent with the interpretation of clause (i).

It would seem to have been a failure to deal with these two clauses consistently that lead Professor McLeod to conclude that the husband in his illustration would have had to have waited until January of 1978 to apply for a divorce under clause (ii). That consequence would depend upon finding that in order for a period of living separate and apart to be by reason of the petitioner's desertion, every single moment of that period would have to be attributable to the petitioner's desertion. However, that proposition *is* the fourth alternative, the necessary corollary of which is that a period of living separate and apart is for a reason other than the petitioner's desertion if for any moment during that period the petitioner had not been in desertion, even though he had been in desertion for most of it. But, if Professor McLeod is going to apply the fourth alternative to clause (ii) *and* be consistent, this would mean that the husband in his illustration would have been able to petition for divorce the day after the

37. *Supra* n. 4, at 75.

38. As Professor McLeod states, "Nowhere does the statute indicate that the ground can be combined to reach a maximum period."
Supra n. 4 at 71

separation was entered into in January of 1975 because he could have shown that the parties had been living separate and apart for the immediately-preceding three years, a part of which (namely the last day) was not attributable to his desertion and therefore, (*ex hypothesi*), the three-year period was for a reason other than his desertion.

As to which of these alternatives, the third or the fourth is to be preferred, there does not seem to be any *a priori* reason to construe paragraph (e) in accordance with one of them rather than the other. However, it is in projecting their effects that the third alternative is seen to be more appropriate. It happens as well that it is the only one that is consistent with most (if not all) of the decided cases. Under the fourth alternative, a petitioner who is presently in desertion could bring himself within clause (i) by establishing that he has not been in desertion for the full three-year period preceding the petition, during which period the spouses have in fact been living separate and apart. This would be the case, for example, even where only one week after the parties separated by mutual consent the petitioner unjustifiably rejected a *bona fide* offer to resume cohabitation which would put him or her in desertion from then on. When considering what the law ought to be, there may be nothing wrong with granting a divorce to such a petitioner where the living separate and apart has lasted only three years (for thirty-five months and three weeks of which he or she has been in desertion) but such a consequence seems quite inconsistent with the provision having in it any reference at all to the deserting spouse. It seems clear that Parliament was unable to rid itself of the influence of the matrimonial offence philosophy even here, and that some added delay is intended to be imposed on a spouse who is in desertion.

If it is correct to say that a petitioner presently in desertion cannot come within clause (i), even though the period of his desertion is less than the three-year period of living separate and apart that he has established, it follows that clause (i) applies only where the required three-year period is wholly free from desertion on the petitioner's part. In other words, a period of living separate and apart cannot be said to be "for any reason other than the petitioner's desertion" if any part of the period that has been identified is by reason of such desertion. It is worth repeating that by logical necessity the corollary of this proposition is that, if any part of the identified period is by reason of the petitioner's desertion, then even if not every moment of it is by reason of such desertion, the entire period is by reason of the petitioner's desertion.

Whichever of these alternatives, the third or the fourth, is preferred, what is clearly a logical fallacy is to use one interpretation for the first part of paragraph (e) in order to say that a three-year period of living separate and apart is by reason of the petitioner's desertion should any part of it be so attributable, and then to resort to the contradictory interpretation for the second part of the same paragraph in order to say that a five-year period is not by reason of the petitioner's desertion unless every part or moment of it is so attributable. This is precisely the logical fallacy into which Professor McLeod appears inadvertently to have slipped. His third alternative implies that clause (i) requires a desertion-free period in order for that period not to be by reason of desertion, the corollary of which is that a period any part of which is tainted with desertion is a period by reason of desertion. He is then led to reject this interpretation by

conjuring up an example that is actually a contradiction — not a projection — of that alternative.

IV. The Link Between Paragraph (e) and Marriage Breakdown

At the outset it was indicated that there are two matters concerning paragraph (e) of s.4(1) that remain somewhat contentious. The first of these, which has to do with the test for determining whether a period of living separate and apart is by reason of the petitioner's desertion, has been dealt with at length. The second, which remains to be considered, is this: When must the permanent breakdown of the marriage occur in order for a divorce to be obtained under this provision?

On the face of s.4(1), the marriage must in fact have broken down permanently, and that breakdown must have been caused by one of the sets of circumstances set out in paragraphs (a) to (e) of that subsection. Were it not for subsection (2) of section 4, it would seem that, even if the marriage had actually broken down permanently *and* one of the circumstances existed, the marriage could not be dissolved under s.4(1) if the breakdown had in fact been caused by something other than the circumstance in question. The purpose of s.4(2) is to create a presumption that, where the circumstance is established, then a permanent breakdown of the marriage by reason thereof is also established. The contentious issue is whether that presumption is conclusive or rebuttable.

In *Toth v. Toth*,³⁹ the respondent walked out on the petitioning husband at the wedding reception, announcing that she had married him solely to obtain marital status for immigration purposes. After the passage of one year he petitioned on the basis of s.4(1), the ground being permanent marriage breakdown, and the circumstance relied on was paragraph (d), it being alleged that the marriage had not been consummated, and that the respondent, for a period of not less than one year, had refused to consummate it. Borins, L.J.S.C. was of the view that the marriage was not unconsummated *owing to* the respondent's undoubted refusal, because the petitioner must also be ready to consummate in order for it to be held that the failure is the result of the respondent's refusal. This petitioner happened to admit that, following the traumatic circumstance of his wife's desertion on their wedding day, he would no longer have been ready to consummate the marriage even had his wife sought reconciliation, and this provided the Court with one of its reasons for dismissing the action. More importantly, Judge Borins expressed the view that s.4(2) creates a rebuttable presumption only, because "in the absence of *clear indications to the contrary* the word 'deemed' in a statute must be interpreted as 'deemed until the contrary is proved': *Gray v. Kerlake*."⁴⁰ Since this particular marriage had obviously broken down permanently almost *ab initio*, its breakdown could not be attributed to the circumstance alleged, even if that circumstance had been established.

39. (1976), 23 R.F.L. 282; 13 O.R. (2d) 203; 70 D.L.R. (3d) 539 (Ont. S.C.).

40. [1958] S.C.R. 3; 11 D.L.R. (2d) 225 (S.C.C.).

A strange consequence of this view is that the Toth marriage could *never* be dissolved under s.4, because the marriage was held to have actually broken down prior to the fulfilment of the circumstances involved in any of the paragraphs of section 4. This seems to create an absurdity, since the precise moment of permanent breakdown in any section 4 petition cannot possibly be known with certainty, and it might well have occurred before the fulfilment of the circumstances of whichever paragraph is relied on.

Consider the predicament of a petitioner whose husband is missing. Suppose that after two years the petitioner had given up on the marriage, formed a common law relationship with someone else by whom she had had a child, and with whom she was planning marriage at the earliest opportunity. Such a petitioner's marriage would obviously have permanently broken down in fact before the third anniversary of the disappearance of the missing spouse. In such circumstances (unless the missing spouse were some day found), the *Toth* case would have us conclude that the petitioner could never obtain a divorce in Canada. The missing spouse is not guilty of any offences, and so resort to section 3 would be precluded. The presumption of causality having been rebutted by the evidence before the court, relief under section 4 could never be granted either. The best the petitioner could do would be to obtain an order for the presumption of death of the missing spouse seven years after the event; but if that spouse should subsequently be shown to have been alive at the time of any marriage contracted thereafter by the remaining spouse, that second marriage would be bigamous and void.

Does anyone seriously believe that every divorce granted under section 4(1)(e) dissolved a marriage that was viable right up until the required years of living separate and apart had been accumulated? Surely it would be absurd to dismiss a petition under s.4(1)(e)(i) because on the day before the third anniversary of their separation it became incontrovertibly clear that the marriage of the parties had already broken down permanently? Had only they remained open for one day more to the possibility of reconciliation, however remote, then they would have had a divorce on the ground of breakdown. But actual breakdown, coming one day early, put the dissolution of their marriage out of their reach! Ah well, such is life! Happily, other judges have not been troubled by this point, and it has not proved the stumbling block for them that it was for Judge Borins. For instance, in *El-Sohemy v. El-Sohemy*,⁴¹ Goodman J., of the Ontario Supreme Court, granted a divorce under s.4(1)(e)(i) to a wife notwithstanding his finding of fact that the marriage had permanently broken down in December of 1972, some three and one-half years before her petition was filed. In *Mason v. Mason*,⁴² Clements L.J.S.C. found as a fact that the marriage had broken down permanently about three months after the separation had begun. Nevertheless, he granted a divorce under s.4(1)(e)(i). Again, in *Henderson v. Henderson*,⁴³ the same judge found that the period of living separate and apart was the result of the breakdown of the marriage, not *vice versa*, and he granted a decree under this same provision. Undoubtedly, other examples could be found.

41. (1980). 17 R.F.L. (2d) 1 (Ont. S.C.).

42. (1981). 21 R.F.L. (2d) 233 (Ont. S.C.).

43. (1981). 22 R.F.L. (2d) 368 (Ont. S.C.).

Judge Borins' view in the *Toth* case raises an interesting conundrum. Since paragraph (e) requires that the period relied upon must immediately precede the presentation of the petition, and since that period is a part of the circumstances that must cause the breakdown, then the breakdown cannot occur before the petition is filed without taking the case out of paragraph (e). However, section 4(1) applies only where the marriage has broken down permanently at the time the petition is presented. Therefore, under his hypothesis, it is impossible for paragraph (e) ever to apply.⁴⁴

It is submitted that the absurdity of these consequences amounts to the "clear indication to the contrary" referred to in *Gray v. Kerlake*, and therefore, the presumption is s.4(2) must be taken to be conclusive rather than rebuttable.⁴⁵

V. Conclusions

According to this submission, the proper interpretation and application of paragraph (e) of section 4(1) may be summed up in three propositions.⁴⁶ First, where at the time of the petition the spouses have been living separate and apart for a period of not less than three years and then only if no part of that period is attributable to the petitioner's desertion shall the permanent breakdown of the marriage be deemed to have been established. The petitioner's desertion prior to the commencement of the required three-year period is irrelevant. Secondly, where the petitioner cannot bring himself within the first proposition, the permanent breakdown of the marriage shall be deemed nevertheless to have been established upon proof that the spouses have been living separate and apart for period of not less than five years immediately preceding the petition, notwithstanding any element of desertion on the petitioner's part. Thirdly, once either of the circumstances alternatively required by paragraph (e) has been established, that circumstance is conclusively deemed to have caused the permanent breakdown of the marriage.

44. The same would hold true for paragraphs (a), (b) and (c) as well.

45. Another indication to the contrary may be found in s.9(1)(d) which requires the court to refuse the decree if there is a reasonable expectation that co-habitation will soon be resumed. Dr. Mendes Da Costa expressed the view that ss.(2) provides the necessary connecting link between each of paragraphs (a) to (e) of ss.(1) and the requirement of permanent breakdown. "This language cannot, it is considered, be negated by evidence that a permanent breakdown of marriage has not in fact occurred. For the *Divorce Act* has provided its own qualifications to the deeming requirement of s.4(2); namely, s.9(1)(d)." See *Supra* n. 30, at 465.

46. The first two of these propositions are taken verbatim from a view expressed nearly fifteen years ago in the article referred to in *Supra* n. 29, at 199-200. Nothing that has transpired in the intervening years would appear to warrant their reconsideration.

