Case Comments

DIVORCE — 3 YEAR SEPARATION — CALCULATION OF THE THREE YEAR PERIOD — EFFECT OF TWO PERIODS OF RECONCILIATION, EACH BEING LESS THAN NINETY DAYS

KEN ARENSON*

In *Crawford* v. *Crawford*[1] the Manitoba Court of Appeal reaffirmed the objective of reconciliation in the *Divorce Act*[2] by (paradoxically) granting the divorce sought. In doing so, the Court moved the law a step away from the mechanical interpretation of the reconciliation provisions of the Divorce Act, and brought it more into line with the way in which married couples actually behave as they go through the agony of separating, attempting to reconcile and finally giving up all hopes of making the marriage work.

In the Crawford case, sixteen months after the marriage broke down, two unsuccessful attempts at reconciliation took place over a period of slightly more than three months. The first period was for eighteen days, followed by three days of separation, and the second period was for eighty-one days. Thirty-eight months after the parties first separated, a petition for divorce was presented under Section 4(1)(e) of the Divorce Act[3]. The trial judge[4] found that on both occasions the primary purpose of the resumption of cohabitation was reconciliation. He decided that he was unable to grant the divorce because of Section 9(3)(b):

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* Ken Arenson, Senior Partner in the law firm of Arenson & Co., was counsel for the Petitioner in the case of *Crawford* v. *Crawford*.

1. [1976] 3 W.W.R. 767 (Man. C.A.)
2. R.S.C. 1970 c. D-8.
3. Section 4 of the Divorce Act reads:

   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 and wife are living separate and apart, on the grounds 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) where spouses have been living separate and apart,

   (i) for any reason other than described in subparagraph (ii), for a period of not less than three years,

   . . . immediately preceding the presentation of the petition.
4. Dewar C.J.Q.B.

> 9(3) For the purpose of paragraph 4(1)(e), a period during which a husband and wife have been living separate and apart shall not be considered to have been interrupted or terminated . . .
>
> (b) by reason only that there has been a resumption of cohabitation by the spouses during a single period of not more than ninety days with reconciliation as its primary purpose.[5]

The learned Chief Justice had this to say:

> "The effect of the statute is to require that a single period not in excess of ninety days' duration and having the appropriate purpose be disregarded in computing the three year period of separation. Here, there are two such periods, either one of which in the absence of the other would permit a finding that the statutory requirement for dissolution of the marriage on the grounds pleaded has been satisfied. The two occurrences, however, preclude a finding of that kind because the petitioner has failed to establish an uninterrupted period of separation for three years immediately preceding the presentation of the petition.[6]

In this interpretation, Dewar C.J.Q.B. was eventually supported by Freedman C.J.M. dissenting in the Court of Appeal. The same interpretation had been placed on the section by MacPherson J. of the Saskatchewan Queen's Bench in *Busch* v. *Busch*[7]. However, there were already two Manitoba trial decisions to the contrary. In *Lavallee* v. *Lavallee*[8], Hunt J. granted the petition where there were four periods of cohabitation in attempts at reconciliation within the three years prior to the petition being presented under Section 4(1)(3)(ii). Granting the petition, Hunt J. said:

> "In my opinion, that section provides that I not consider sincere and commendable attempts at reconciliation as being interruptions or terminations of the separation period so as to prevent a decree being granted unless there is a period of such attempt of more than ninety days. There has been no single period over ninety days of resumption of cohabitation in this case."[9]

Likewise in *Shimkus* v. *Shimkus*[10], Deniset J. granted a decree notwithstanding three periods of cohabitation in attempted reconciliation (although none was for more than ninety days) for the following reasons:

> "The Divorce Act has been written in such a way as to make it clear that one of its purposes is to encourage and facilitate reconciliation. Thus, several attempts to bring the parties together cannot be considered to have interrupted or terminated the period during which the parties have been separated and it is in that light that one must interpret Section 9(3)(b) of the Act. To look at it otherwise is to ignore human nature and behaviour and is not realistic."[11]

Most practitioners in matrimonial law will heartily agree with those sentiments.

5. *Supra* n.2.
6. October 23, 1975 Manitoba Queen's Bench, unreported.
7. (1973) 10 R.F.L. 105.
8. (1975) 17 R.F.L. 91.
9. *Supra* n.8, at p.92.
10. July 4, 1975 Manitoba Queen's Bench, unreported.
11. *Supra* n. 10, at p.5.

In the Crawford case, Hall J.A. speaking for the majority said:

> "I do not think that a spouse is limited to a 'single period' of resumption of cohabitation for the purpose of reconciliation. There may be more than one such period. The only proviso is that no single period be of more than 90 days duration."

Section 2(d) of the Divorce Act offers a helpful parallel. In narrowing the meaning of "condonation", that section excluded from its ambit

> . . . resumption of cohabitation during any single period of not more than ninety days . . .

Section 2(d) differs from Section 9(3)(b) by changing the word "any" to "a" in the phrase "any single period".

Trial decisions in Manitoba[12], Ontario[13] and Saskatchewan[14] had interpreted Section 2(d) to allow more than one attempt at reconciliation. Is there a significant difference (*any* significant difference?) between Section 2(d) and Section 9(3)(b) justifying several attempts at reconciliation when the grounds alleged are adultery or cruelty but only one attempt when the petition is presented under Section 4(1)(3)[15]?

In the Ontario case, dealing with Section 2(d), Galligan J. said:

> "I feel therefore that estranged couples should be encouraged to attempt reconciliation. However, a husband or wife might be reluctant to attempt reconciliation if it was felt that their position might be prejudiced thereby. It is my view that the law should be interpreted so as to encourage reconciliation not to discourage it."[16]

Section 9(3)(b) and 2(d) both require that the cohabitation have reconciliation as its primary purpose. The Courts have treated this requirement seriously. Three Ontario trial decisions[17] held that *recreational sex* between the parties after separation is antithetical to the phrase "living separate and apart" under Subsection (e) of Section 4(1). Recreational sex means sexual intercourse other than for the purpose of attempting reconciliation. This narrow view, that sexual intercourse is the *sine qua non* of marriage was rejected by the Ontario Court of Appeal in *Deslippe* v. *Deslippe*.[18]

In the Deslippe case there was one act of recreational sex between the parties within the three years prior to the presenta-

12. *Cherniski* v. *Cherniski & Syr* (1971) 2 R.F.L. 118.
13. *Nielsen* v. *Nielsen* (1971) 2 R.F.L. 109.
14. *Leaderhouse* v. *Leaderhouse* (1972) 4 R.F.L. 181.
15. In *Armstrong* v. *Armstrong* (1972) 4 R.F.L. 164, a decision of an Ontario trial court, the decision included an obiter statement that Section 2(d) allowed only one attempt at reconciliation.
16. *Nielson* v. *Nielson supra* footnote 13, p.114.
17. *Foote* v. *Foote* (1971) 2 R.F.L. 221
Dimaggio v. *Dimaggio* (1972) 4 R.F.L. 3
Goodland v. *Goodland* (1974) 15 R.F.L. 149.
18. (1975) 16 R.F.L. 38.

tion of the petition under Section 4(1)(e). Brook J.A. speaking for the Court said:

> "In the case at bar there was no resumption of cohabitation. There was no restoration of the marriage state and neither party sought to enjoy or give way to a marital right. Each had rejected the marriage and the other as enjoying any special marital privileges. The parties were living separately and they were living apart, having put an end to their household and marital home and this isolated act should be given no more effect as putting an end to the state of their separation than in fact it had or was intended to have."[19]

In only one of the cases involving recreational sex[20] did the Court consider whether Section 9(3)(b) had curative powers, and in that case decided that it did not, because there were two occasions of such activity, without deciding whether one occasion would have been excusable.

How is it that there was such division of opinion on the proper meaning to be given to Section 9(3)(b)? At least part of the problem stemmed from a failure of the Courts to recognize that Section 9(3) is an exclusionary provision. Without defining circumstances when the parties *shall* be deemed no longer to be living separate and apart, it sets out two circumstances when they shall *not* be deemed no longer to be living separate and apart.

It is apparent from a reading of Section 9(3)(a)[21] that Parliament expected that the Courts would give consideration to the *intention* of the parties in deciding a case presented under Section 4(1)(e).

It follows therefore that Section 9(3)(b) does not prevent the Court from granting the decree sought when "... the parties have been *living separate and apart.*"[22] and this is so regardless of whether the true meaning of the Section allows for one, or more than one, period of less than ninety days' cohabitation.

One would think that a petition presented under Section 4(1)(e) requires determination of the relationship of the parties and if there is a finding that the marriage state has broken down, and has remained so for more than three years prior to the presentation of the petition, then the decree should issue. In making this determination, careful attention must be paid to any attempts at reconciliation. A successful attempt will vitiate the breakdown, that is, restore the marriage state.

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19. *Deslippe* v. *Deslippe supra* footnote 18. p.44.

20. *Goodland* v. *Goodland supra* footnote 17.

21. 9(3) For the purpose of paragraph (3) of Subsection 1 of Section 4, a period during which a husband and wife have been living separate and apart shall not be considered to have been interrupted or terminated (a) by reason only that either spouse has become incapable of forming or having an intention to continue to live so separate and apart or of continuing to live so separate and apart of his or her own volition, if it appears to the Court that the separation would probably have continued if such spouse had not become so incapable.

22. *Deslippe* v. *Deslippe supra* footnote 18. p.43. The emphasis was placed there by Brooke J.A.

The function of Section 9(3)(b) is to make this determination simpler by directing the Court to ignore the question of whether an attempted reconciliation was successful when the period of cohabitation was less than ninety days, and, since the Crawford decision any number of additional attempts to reconcile will be allowed, providing that none are in excess of ninety days. The petitioner will still have the evidentiary burden of showing that none of these attempts were successful, that is, of showing that the marriage broke down more than three years prior to the presentation of the petition and *notwithstanding attempts to the contrary* remained broken down.

The next development in the law should be a decision which builds on the Crawford case and only puts the petitioner to the burden of showing that cohabitation for *more* than ninety days did not result in actual reconciliation.

In the Crawford case, Hall J.A. said:

> "I believe that the interpretation I have given to Section 9(3)(b) is consistent with the objectives of reconciliation that the Divorce Act seeks to encourage."[23]

As long as the Courts continue to acknowledge that the objective of the Divorce Act is reconciliation, further developments in the law are to be expected, even at the risk of apparent paradox.

23. *Supra* n.1, at p.768.