# MATRIMONIAL CAUSES

## *Matrimonial Causes Act section 37(1)—"harsh and oppressive . . . or contrary to the public interest" as ground for refusal of decree.*

Section 28(m) of the Commonwealth Matrimonial Causes Act provides that a petition for dissolution of marriage may be based on the ground—

> "that the parties to the marriage have separated and thereafter have lived separately, and apart for a continuous period of not less than five years immediately preceding the date of the petition, and there is no reasonable likelihood of cohabitation being resumed."

The section is clear in its meaning and has not caused judicial concern in its interpretation. Regrettably section 37(1) which limits the scope of section 28(m) is as vague in its terms as the latter is precise. In the words of Nield J.:—

> "I suppose this is the most extraordinary sub-section that has ever been passed by any legislature in the world. Its meaning is vague and uncertain in the extreme. In my opinion it puts an obligation on the Court which should not be put on the Court. Its connotation is so doubtful and uncertain that I venture to think no ordinary member of the community would have any idea of what it might or could mean."[1]

The sub-section reads—

> "Where on the hearing of a petition for a decree of dissolution of marriage on the ground specified in paragraph (m) of section twenty-eight of this Act . . ., the Court is satisfied that by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant a decree on that ground on the petition of the petitioner, the Court shall refuse to make the decree sought."

As would be anticipated there have, in the first few years of its operation, been conflicting views judicially expressed as to the meaning to be given to various parts of the section.

In *Painter* v. *Painter*[2] the South Australian Full Court in the most authoritative pronouncement on the section to date, upheld a decision of Mayo J. who had closely analysed it. The only other Full Court to consider the section was that of Queensland.[3]

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1. *Taylor* v. *Taylor* (No. 2). 1961 2 F.L.R. 371, 372.
2. [1963] S.A.S.R. 24.
3. *Kearns* v. *Kearns* 4 F.L.R. 394.

The decision in *Painter's Case* has restored section 28(m) after decisions in New South Wales and Victoria had threatened to stultify it.

*Taylor's Case*[4] was the first reported case in which section 37(1) rose for judicial interpretation. The facts of the case supported the decision but unfortunately Nield J. seized the opportunity to pronounce upon the whole question of the ground specified in section 28(m). In that case the husband petitioner, had, both before and after the commencement of the separation, been guilty of adultery. Many of the acts of adultery had not been disclosed in his discretion statement. The respondent wife was found to be without fault in respect of the cause of separation and further, she remained willing, at all times to resume cohabitation with her husband. The wife, defending the action claimed that to grant a decree of dissolution would be "harsh and oppressive" within the meaning of section 37(1) because:—

(1) She was opposed to divorce on religious grounds,
(2) She was without fault in any form,
(3) She was at all ready times ready to reconcile with her husband,
(4) If the decree was granted she would bear the opprobrium of the community visited upon a divorced person.

Nield J. would have been on strong ground had he refused to exercise the discretion, given him by section 37(3) regarding the petitioner's adultery. Eight or ten acts of adultery had not been disclosed to the Court and there is copious authority that refusal to grant a decree under such circumstances is justified.[5] However, the learned Judge upheld the wife's contention that the grant of a decree would be "harsh and oppressive" holding that this would be so, by reason of the fact of the opposition to the decree by the wife, who was legally and morally blameless and willing to be reconciled with her husband.

His Honour supported his views by reference to the history of similar legislation in New Zealand, which initially, had given the Court an unfettered discretion to dissolve a marriage where the parties had been separated for three years. Sir John Salmond in *Lodder* v. *Lodder*[6] and *Mason* v. *Mason*[7] held that where a marriage had irremediably failed, public policy did not require the refusal of a decree of dissolution, notwithstanding the fact that the respondent was entirely blameless. As a result of these decisions of Salmond J. the New Zealand legislation was amended to impose an absolute bar where the decree was opposed by a blameless spouse. Nield J. thus assumed that the New Zealand legislature did not agree with Salmond J.'s interpretation of their intention. His Honour,

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4. 2 F.L.R. 371.
5. *McRae* v. *McRae* (1906) V.L.R. 778.
*Allen* v. *Allen* [1942] S.A.S.R. 257.
*Adams* v. *Adams* (1928) V.L.R. 90.
*Apted* v. *Apted* (1930) P. 246.
*Gillooly* v. *Gillooly* (1950) 2 AER 1118.
6. (1921) N.Z.L.R. 876.
7. (1921) N.Z.L.R. 955.

if these references are to have any meaning, implies that because the New Zealand Parliament found it necessary to amend their legislation to determine the principle of public policy, the Commonwealth Parliament, although not imposing the limitation contained in the New Zealand amendment must have intended the same limitation to apply to the Australian Act. As the history of the New Zealand legislation is set out in the judgment of the High Court in *Pearlow* v. *Pearlow*[8] the Commonwealth Legislature must be taken to have been aware of it, as was pointed out in *Painter's Case* by the Full Court. The necessary inference follows that as no such limitation was inserted, none was intended.

In *Judd* v. *Judd*,[9] Monahan J. on somewhat similar facts came to a similar decision to that of Nield J. in *Taylor's Case*. The judgment in *Judd's Case* was handed down only two months after *Taylor's Case* and the latter case was not cited. Monahan J. also felt that the opposition of a blameless wife opposed to divorce on religious grounds was sufficient to characterise the effect of the decree as harsh and oppressive. The decision in that case can also be justified on the basis of adultery not disclosed to the Court.

The next decision was *Baily* v. *Baily*[10] in which Gibson J. distinguished *Taylor's Case* and handed down what, it is submitted, is the first real approach to the true intention disclosed in section 28(m). The petitioner was the husband, who had left his wife, and in earlier proceedings had petitioned for divorce on the ground of constructive desertion. The matter eventually reached the High Court, and the result was that a decree was refused. The High Court held that although the facts did not establish constructive desertion, nevertheless, the husband had just cause for leaving his wife. The husband's only complaint was that cohabitation with his wife was impossible because of a skin ailment causing her severe mental distress. As a result of the finding of the High Court neither husband nor wife could be found blameworthy in causing the separation. The wife filed an answer to the fresh petition under section 28(m) complaining that in the circumstances, the granting of a decree would be "harsh and oppressive". In granting a decree Gibson J. held that the Act clearly envisaged the dissolution of marriages where no blame or misconduct was imputable to the respondent and such being the case no stigma could attach to the respondent. He also held that despite the adultery of the petitioner since the commencement of the separation, his discretion should be favourably exercised.

With the law in this unsatisfactory position Mayo J. was called upon in *Painter* v. *Painter* to consider similar arguments to those raised in *Taylor's Case* and *Judd's Case*.

The facts before Mayo J. were as follow:—

After thirty years of marriage from which there had been no surviving offspring, Mr. Painter formed an attachment to his secretary. Intimate relations developed as a result of which the secretary

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8. (1953) 90 C.L.R. 70.
9. 3 F.L.R. 207.
10. 3 F.L.R. 476.

became pregnant. Upon being informed, Mrs. Painter offered to have the child, when born, adopted to the marriage. This proposal was, however, not accepted and shortly afterwards the husband took up residence with the expectant mother. The couple had continued to cohabit, to the date of hearing of the petition, a period of twenty years, and there were then two children of the union, aged twenty and fifteen years respectively. The former secretary had by deed poll changed her name to Painter.

In these circumstances the husband petitioned for divorce under section 28(m). The wife defended the proceedings claiming, inter alia, that the granting of a decree would be harsh and oppressive. She stated that she was willing, in fact desirous, of having her husband return to her, that she was blameless in causing the separation, that she was opposed to divorce on religious grounds and that a decree would detrimentally affect her health. In granting a decree Mayo J. made the following points:—

1. Under section 37(1) it is the *grant* of the decree rather than its *consequences*, which require consideration and in so far as the conduct of the petitioner has caused unhappiness to the respondent this exists whether or not a decree is granted.
2. Although the language of the sub-section can be taken to introduce a subjective test as to the factors that would make a decree harsh and oppressive it does not follow that a decree should necessarily be refused where a respondent's temperament is peculiarly susceptible to disturbance.
3. Where section 37(1) applies there is no judicial discretion. (In this finding His Honour followed *Judd* v. *Judd* and *Taylor* v. *Taylor*).
4. The opposition of the respondent of itself is not a basis for the refusal of a decree.
5. The use of "harsh *and* oppressive" conjunctively indicates that the words are not used as synonyms. "Harsh" may be intended to relate to the immediate impact of a decree and oppressive to the continued adverse consequences. For a decree to be refused both limbs of the phrase must apply.
6. It is doubtful whether the religious beliefs of the respondent could ever be a basis for refusing a decree. In the present case there was insufficient proof of the religious devotion or active belief that would be necessary before such an objection could be sustained.
7. The inclusion of the words "any other reason" did not appear to add to the section as the conduct of the petitioner and "public interest" appeared to exhaust the field.
8. Limitations in the "public interest" cannot be defined, but include the encouragement of people to live in conformity with moral standards and to train their children accordingly, together with the discouragement of immorality and sexual promiscuity.
9. The "particular circumstances" may include adultery, desertion or any other matrimonial offence, however section 36 requires the Court to grant a decree although the separation was caused only by the conduct of the petitioner or by his desertion. Section 37(3) gives the Court a discretion with regard to a petitioner's

adultery. The Act therefore contemplates some further circumstance aggravating the desertion or adultery to justify refusal of a decree after the parties have been separated for five years.

10. The postulated decree in section 37(1) is contrary to public interest; nothing is said as to a decree in favour of such interest. Nevertheless the interests of illegitimate children, whose position is sought to be regularised following the granting of a decree, are not to be overlooked.

For the enumerated reasons His Honour held that section 37(1) had no application to the case before him and that he should exercise the discretion under section 37(3) in favour of the petitioner. He therefore granted a decree.

On appeal to the Full Court, the judgment of Mayo J. was upheld. Their Honours, Napier C.J., Chamberlain and Hogarth JJ. delivered a joint judgment. The Court held that the Act clearly contemplated that prima facie, whatever the cause of separation, a spouse was entitled to a dissolution of marriage after separation for five years. They refused to follow *Taylor's Case* or *Judd's Case* in so far as they held that the opposition of an innocent respondent was of necessity, sufficient to make a divorce harsh and oppressive. Their Honours assumed that when the legislation was enacted Parliament was aware of the precedents established in the six Australian States, and in view of *Pearlow* v. *Pearlow* that it was aware of the corresponding legislation in New Zealand. Reading the statute against this background Their Honours had no doubt that the intention expressed in Section 28(m) was to provide for the dissolution of marriages so irreparably broken down that the parties had lived apart continuously for five years, and to do so irrespective of consent, or of responsibility for the failure of the marriage. These considerations were of course subject to section 37(1) which provides for the exceptional case with unusual circumstances. Unless the respondent could show that she would be seriously and unjustly affected by a decree it could not be said that the decree was harsh and oppressive. The religious beliefs of the respondent on their own could not be a ground for refusing a decree although they could be a factor to be taken into account together with other circumstances. The Court could not assent to the view that a status of a deserted wife, was so much more desirable than that of a divorced woman and that to deprive her of the status of deserted wife would be harsh and oppressive.

Their Honours inclined to the view that proof that a decree would detrimentally affect the respondent's health might, taken in conjunction with other circumstances, afford grounds for refusing a decree. In the present case, they felt that as the trial Judge, having seen and heard the witnesses, had rejected the suggestion, they could attach little importance to it.

The decision of Mayo J. in *Painter's Case* has since been followed in *McDonald* v. *McDonald*[11] by Dovey J. in N.S.W., the judgment of the Full Court not then being available.

In another New South Wales decision,[12] Wallace J. while holding that precedents were of little value in a case revolving about section

11. 4 F.L.R. 76.
12. *Lanrock* v. *Lanrock* 4 F.L.R. 81.

37(1) approved *McDonald's Case* and proceeded along similar lines to those adopted in *Painter* v. *Painter.*

In *Kearns* v. *Kearns*[13] the Full Court of the Supreme Court of Queensland proceeded independently of other decisions on section 37(1), but arrived at principles closely approximating to those enunciated in the principal case.

It is hoped that the result is to be a uniform interpretation of Section 37(1) without the need for recourse to the High Court for an authoritative pronouncement. It is hoped that following *Painter's Case* a uniform interpretation of section 37(1) will prevail in which full scope will be given to the intention of the Federal Parliament in enabling hopelessly broken marriages to be painlessly ended. The case has done much to redirect the law into what is thought to have been its intended path and to have partially rectified the section's inauspicious start in the decisions in the Eastern States. Whatever guidance one's personal beliefs may offer, it must be accepted that the place for the determination of the political and social questions involved in legislation of this type is the parliament. This portion of the Act, being new to the Eastern States was long debated before finally being enacted. Perhaps the vagueness of section 37(1) was intended to provide it with an easier passage through parliament. Whatever considerations gave rise to the birth of the section it is submitted that it is not a proper judicial function to impose upon it, an interpretation flavoured by personal feelings of social or spiritual need. The judicial task is to give full effect to the spirit and intendment of the Act as a whole, according to the intention manifested therein and this it is submitted has been done in *Painter* v. *Painter.*

13. 4 F.L.R. 394.

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## MERCANTILE LAW

### *Unauthorized Disposition by Non-owner—Agency—Parol Evidence Rule—Hire Purchase Agreements Act*

*General Distributors Limited* v. *Paramotors Limited*[1] was a case of much import for the used car-finance company trade in South Australia. On its outcome depended much of the value of finance companies' methods of securing their interests under variations of what is well known as the floor-plan system. Its importance is shown by the fact that Parliament saw fit to legislate to remove some of its undesirable consequences very soon after judgments were handed down. The legislation unfortunately, it will be submitted, failed to get at the real crux of the problem; and much of the undesirable effect of the case

1. [1962] S.A.S.R. 1.