PAINTER v. PAINTER[1]

Matrimonial Causes—Separation for five years—Refusal to make decree —Harsh or oppressive to the respondent—Matters to be considered— Matrimonial Causes Act 1959, *sections* 28 (*m*), 37 (1) (*Cth*).

The Matrimonial Causes Act 1959 (Cth), by section 28 (m) introduced[2] as a ground for divorce separation for five years where there is no reasonable likelihood of cohabitation being resumed. Sections 36 and 37 of the Act deal with proceedings under section 28 (m). Section 37 (1) provides:

> 37. – (1.) Where . . . 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.

The purpose of section 28 (m) is to give legal effect to an existing factual situation, namely, that the marriage has come to an end. The Attorney-General in his second reading speech put the case in the following manner:

> Here, the public interest in family life comes down on the side of allowing each of these separated parties to regularize their relationships or to assume regular relationships in the future. On this view, no sense is seen, in the public interest, in denying the possibility of family life to each when all is irretrievably lost between them. No sense is seen in possibly condemning either or both of them to irregular relationships which, in honour, cannot result in families. Nor is the existing capacity of an innocent party to withold dissolution indefinitely seen as necessarily just or conformable to the public interest.[3]

It is against this legislative background that several judicial pronouncements have been made as to the operation of the absolute bar to relief contained in section 37 (1).[4] Although not the most recent,

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[1] [1963] S.A.S.R. 24; (1963) 4 F.L.R. 216. Supreme Court of South Australia; Napier C.J., Chamberlain and Hogarth JJ. The Court delivered a written judgment.

[2] This ground is based upon the ground in s. 15 (j) of the Matrimonial Causes and Personal Status Code 1948-1957 (W.A.). There was a somewhat similar ground in s. 6 (k) of the Matrimonial Causes Act 1929-1941 (S.A.).

[3] Vol. H. of R. 23, 2231.

[4] *Grosser v. Grosser* (1961) 2 F.L.R. 152—Supreme Court of Tasmania: Burbury C.J.; *Taylor v. Taylor* (No. 2) (1961) 2 F.L.R 371—Supreme Court of New South Wales: Nield J.; *Judd v Judd* (1962) 3 F.L.R. 207; [1962] V.R. 112—Supreme Court of Victoria: Monahan J.; *Painter v. Painter* (1962) 3 F.L.R. 370; [1963] S.A.S.R. 12—Supreme Court of South Australia: Mayo J.; *Baily v. Baily* (1962) 3 F.L.R. 476—Supreme Court of Tasmania: Gibson J.; *Painter v. Painter* [1963] S.A.S.R. 12—Supreme Court of South Australia: Full Court; *Kearns v. Kearns* [1963] Qd.R. 102—Queensland Supreme Court: Full Court; *McDonald v. McDonald* (1963) 4 F.L.R. 76—Supreme Court of New South Wales: Dovey J.; *Lamrock v. Lamrock* (1963) 4 F.L.R. 81—Supreme Court of New South Wales: Wallace J.

the decision of greatest authority is that of the Full Supreme Court of South Australia in *Painter v. Painter*.[5]

In *Painter v. Painter* the parties who were married in 1913 lived together, reasonably happily, until about the end of 1935. Towards the end of 1941 the petitioner committed adultery with a young lady working in his office with whom he had formed an attachment some years earlier. As a result, she became pregnant and in March 1942 the petitioner left his wife to live with her. They had lived together ever since, had two children and wished to marry.

The husband's petition under section 28 (m) came before Mayo J.[6] and the respondent opposed the petition alleging that in the particular circumstances of the case it was harsh and oppressive to her in so far as she opposed the decree, being, herself, an innocent party; divorce was contrary to her religious beliefs; her status as a deserted wife was preferable to that of a divorced woman, and the divorce would have an adverse effect upon her health. Mayo J. granted the relief sought. The respondent appealed to the Full Court which dismissed the appeal and upheld the decision at first instance.

The respondent placed great reliance on the decisions of *Taylor v. Taylor* (No. 2)[7] and *Judd v. Judd*[8] but the Full Court while agreeing with much that was said in those cases was unable to subscribe to the view that a divorce which is opposed by the innocent party is, of necessity, harsh and oppressive within the meaning of section 37 (1).

'Harsh and oppressive' refers to '*injuria*' to the individual and the words connote some grave or substantial detriment, and some real, as opposed to fanciful, injustice to the respondent, *following on* the making of the decree. Furthermore in determining whether harshness or oppressiveness would result from the making of the decree the Full Court realized that it must not ignore the purpose and intent of the Act, and it went on to say:

> There was, no doubt, a time when the provisions of section 28 (m) would have been regarded as sympathy misdirected; but, it appears that Parliament is prepared to accept the fact that human beings

[5] [1963] S.A.S.R. 24.

[6] [1963] S.A.S.R. 12; (1962) 3 F.L.R. 370.

[7] (1961) 2 F.L.R. 371. Nield J. came to the conclusion that where an innocent respondent opposed the decree, was opposed to the separation and sought reconciliation and where divorce was contrary to her religious convictions, it would be both harsh and oppressive to the respondent and contrary to the public interest to pronounce a decree in the petitioner's favour. His Honour arrived at this conclusion notwithstanding the New Zealand decisions of *Lodder v. Lodder* [1921] N.Z.L.R. 876 and *Mason v. Mason* [1921] N.Z.L.R. 955 which emphasised the policy reasons behind a similar provision and held that, *prima facie*, a decree should be made notwithstanding that the respondent was blameless and opposed the decree.

[8] [1962] V.R. 112. Monahan J. held that to grant a decree in favour of the petitioner would be harsh and oppressive to the respondent and in so finding he took into account the fact that the respondent was an innocent party, the petitioner's failure to maintain his wife and children, the petitioner's adulterous relationships with other women, the respondent's opposition to the decree on religious grounds and that in all the circumstances of the case the granting of a decree in favour of the petitioner would be a 'crowning indignity' to the respondent.

> have passions, which at times get out of control, and that, as the result of an unlawful union, children are liable to be born. The purpose and intent of the Act, as we see it, is to give relief in such cases, and we are not prepared to characterize the normal operation of the statute as harsh and oppressive.[9]

The Court then addressed itself to each ground put forward by the respondent. Her opposition to the decree was, of itself, irrelevant and amounted to no more than a failure to face and accept the fact that the marriage had broken down. What the Court had to consider was whether her position would be made worse by the decree. Unless she was seriously and unjustly affected it could not be said that the decree was harsh and oppressive.[10]

The Court gave little weight to the respondent's objection to the divorce on religious grounds but it did recognize that such an objection could be a matter for consideration in conjunction with other circumstances.[11] At first instance Mayo J. did not consider whether religious objections could in conjunction with other circumstances be a matter for consideration but the approach of the Full Court seems to be justified for in two New South Wales cases[12] which purport to follow the decision of Mayo J. views similar to those of the Full Court are expressed. The Full Court concluded by saying:

> It seems to us that, if the appellant is genuinely convinced that the marriage tie is indissoluble by human judgment, the decree will not alter her belief or her position. She can disregard it.[13]

The Court rejected the argument that it would be harsh and oppressive to grant the decree because the respondent would lose her status of a married woman, for such a result was the inevitable consequence of a divorce. Furthermore the Court rejected the argument that the status of a deserted wife was preferable to that of a divorced woman. The Court made no express reference to the 'social stigma' that is alleged to attach to the description of a person as 'divorced' but the decision quite clearly rules out any such consideration and on this point also the observations of Nield J. in *Taylor v. Taylor* (No. 2)[14] must be said to have been rejected.[15]

As to the suggestion that the respondent's health would be detrimentally affected if the decree was made the Court was of the opinion that if such allegations were clearly proved they might, taken in conjunction with other circumstances, afford ground for refusing the decree.

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[9] [1963] S.A.S.R. 24, 27. This is a clear rejection of the approach taken by Nield J. in *Taylor v. Taylor* (No. 2) (1961) 2 F.L.R. 371 whose decision has not been followed by subsequent courts. The views expressed in *Judd v. Judd* (1962) 3 F.L.R. 207 can be reconciled with the wider interpretation.

[10] *Cf.* the approach of Nield J. in *Taylor v. Taylor* (No. 2) (1961) 2 F.L.R. 371.

[11] *Cf.* the approach of Nield J. in *Taylor v. Taylor* (No. 2) (1961) 2 F.L.R. 371.

[12] *McDonald v. McDonald* (1963) 4 F.L.R. 76; *Lamrock v. Lamrock* (1963) 4 F.L.R. 81.

[13] [1963] S.A.S.R. 24, 28.

[14] (1961) 2 F.L.R. 371, 373.

[15] In *Lamrock v. Lamrock* (1963) 4 F.L.R. 81 Wallace J. expressly denied that such alleged considerations affected to the application of s. 37 (1).

The Court concluded that in cases such as this, a great deal must depend on the impressions of the trial judge who has the advantage of seeing and hearing the parties and their witnesses, and that an appellate court would not lightly interfere with exercise of discretion by the trial judge.

This conclusion, together with the statement in *Lamrock v. Lamrock*[16] that few, if any, cases which are decided under section 37 (1) can be used as precedents in subsequent cases, gives full effect to the words ' in the particular circumstances of the case ' as they appear in section 37 (1). These words were considered by Mayo J. at first instance[17] and by Dovey J. in *McDonald v. McDonald*[18] and it was said in both cases that while the language of the section can be taken to introduce a subjective test, it did not necessarily mean that a decree should be refused where the respondent's temperament is extremely prone to be affected by the slightest adversity.

In looking at the cases decided on sections 28 (m) and 37 (1) it becomes clear that the views expressed by the Full Court in *Painter v. Painter* represent the current judicial thought in relation to the interpretation of section 37 (1) and that this approach is one which gives full effect to the legislative intent in introducing section 28 (m) as a ground for matrimonial relief. The approach of Nield J. in *Taylor v. Taylor* (No. 2)[19] has either been expressly rejected or not followed and can now be disregarded as bad law.

The general operation of section 37 (1) is discussed by Mayo J.,[20] and while going further than the Full Court, his views are consistent with the decision of the Full Court and have been applied by Dovey J. in *McDonald v. McDonald* [21] and Wallace J. in *Lamrock v. Lamrock*,[22] both of which were decided without the benefit of the decision of the Full Court.

Therefore, keeping in mind that each case is to be decided by reference to its own particular facts, it would seem that the propositions of law applicable to the operation of section 37 (1) can be found in the judgments of Mayo J. and the Full Court in *Painter v. Painter* as applied in *McDonald v. McDonald*[23] and *Lamrock v. Lamrock*.[24] Such an interpretation appears to be in accordance with the intention of Parliament and is in conformity with earlier decisions in Australia and New Zealand in respect of similar provisions.

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[16] (1963) 4 F.L.R. 81, 83.
[17] (1962) 3 F.L.R. 370; [1963] S.A.S.R. 12.
[18] (1963) 4 F.L.R. 76.
[19] (1961) 2 F.L.R. 371.
[20] (1962) 3 F.L.R. 370; [1963] S.A.S.R. 12.
[21] (1963) 4 F.L.R. 76.
[22] (1963) 4 F.L.R. 81.
[23] (1963) 4 F.L.R. 76.
[24] (1963) 4 F.L.R. 81.