THE RESIDUAL DISCRETION TO MAKE A SEPARATION ORDER:

Myers v. Myers

In the opening words of s. 19(1) of the Domestic Proceedings Act 1968, the Legislature has conferred a discretion upon a Magistrate's Court, when it is hearing an application for a separation order, to make such an order on any of three grounds which are then defined. The nature and extent of this discretion is of importance to those who desire to predict with some certainty the likely outcome of an application for a separation order. Prior to the decision in *Myers v. Myers*,[1] it appeared that even where an applicant could demonstrate he was within the defined statutory grounds, the court nevertheless had a statutory discretion to refuse to grant an order. As will be seen, this wide view of the Magistrate's residual discretion was conclusively rejected by the Court of Appeal in that case. However, in delivering the judgment of the Court of Appeal, Woodhouse J. did recognize that there may still be 'exceptional' cases where the residual discretion could be exercised against an application even though a ground for a separation order had been made out. It is proposed to delay consideration of when such an 'exceptional' case might arise and deal firstly with the factors that will still be relevant to the exercise of the discretion when, in fact, it may still be exercised under s. 19(1) of the 1968 Act. This necessitates a consideration of the law concerning the exercise of the discretion to make or refuse a separation order prior to the 1968 Act.

RESIDUAL DISCRETION UNDER THE DESTITUTE PERSONS ACT 1910

The discretion to grant or refuse a separation order under the Domestic Proceedings Act 1968 was preceded by a similar discretion under the Destitute Persons Act 1910 which governed matters relating to separation until the beginning of 1970. The residual discretion under s. 18(1) of the latter Act was contained in these words:

"The Magistrate may, if he thinks fit, having regard to all the circumstances of the case, . . ." (make a separation order).

It might be supposed that the exercise of the discretion under the present statute could be closely modelled upon earlier decisions dealing with its exercise under the 1910 Act but in fact, the exercise of the earlier discretion was influenced by factors that can have little relevance today. This becomes apparent from *Bulman v. Bulman*[2] where F.B. Adams J. stated that:

> ". . . separation orders ought not to be made unless there is some reasonable necessity for them. The making of such

1. [1972] N.Z.L.R. 476.
2. [1958] N.Z.L.R. 1097, 1104.

> orders is a very serious matter, involving far-reaching consequences . . . They are for the protection of the wife."

This judicial warning as to the need for caution in exercising the discretion to grant a separation order is no longer completely valid, especially in regard to the new ground contained in s. 19(1)(a) of the Domestic Proceedings Act 1968, for a number of reasons. Firstly, the granting of a separation order no longer automatically exposes the defendant to criminal sanctions if he or she tries to contact or molest the other spouse while the order is in force. The criminal sanctions which previously flowed from the granting of a separation order alone are now available only where a separate non-molestation order has been made. Secondly, in *Bulman v. Bulman*[3] F.B. Adams J. emphasized the inability of a husband to escape from the consequences of a separation order once it had been made under the 1910 Act, so that the husband was forever in the wrong with no hope of getting relief. This problem has also disappeared under the 1968 Act since the obtaining of a separation order no longer entitles the applicant to resist any later attempt by the defendant to become reconciled and, in addition, there is now provision under s. 22 for the discharge of a separation order in the light of any change in the circumstances since the order was made. It will readily be realized, therefore, that the principles on which the discretion was exercised in granting or refusing separation orders under the 1910 legislation can now have limited application only.

As regards separation orders particularly, it is clear from the judgment of Wild C.J. in *Maffey v. Maffey*[4] that the Domestic Proceedings Act 1968 had substituted for the previous arid and acrimonious enquiries that had to be made into marital faults, the important concept that proof of complete marital breakdown should be the true and civilized reason for making a separation order. This is the fundamental reason why different factors will now be taken into account in the exercise of the residual discretion. The emphasis on matrimonial breakdown as a ground for a separation order under s. 19(1)(a) perhaps implies some adoption of the principle in *McNally v. McNally*[5] that it may be improper to refuse a separation order where to grant it would merely recognize the status quo. In that case F.B. Adams J. considered that it was beyond question that the discretion would be exercised in favour of the wife when to grant her a separation order would be no more than a recognition and legal effectuation of the wife's undoubted right to live separately which was held to arise from the husband's continuous course of adultery in living with another woman as man and wife.

On the other hand, it is clear that under the 1968 Act the adultery of one spouse may not in any particular case create a state of serious disharmony between the parties to the marriage under

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3. Ibid.
4. [1971] N.Z.L.R. 690, 693.
5. [1960] N.Z.L.R. 964.

s. 19(1)(a). For instance, it is possible to imagine the case of inebriated spouses who attend a party at which the wife commits an isolated act of adultery whilst her husband is incapable of imitating her. In these circumstances, it may well be that no state of serious disharmony results so that the wife's adultery will not in fact give the husband any right to a separation order under the ground in s. 19(1)(a).

THE DECISION IN MYERS v. MYERS

The parties in this case were married in 1958 and had three young children. After a time, difficulties arose between husband and wife which were apparently of a trivial nature but which developed into a state of disharmony on account of their inability to resolve their differences. For instance, the wife complained that the husband criticized her housekeeping and cooking whilst the husband readily admitted this but maintained that it was purely constructive criticism. Attempts were made to resolve the state of developing incompatibility with the help of independent conciliators but with no success. In the Supreme Court,[6] White J. came to the conclusion that:

> "The parties seemed to be incapable of examining their own actions with a real sense of responsibility towards their marriage and the family they had produced. Instead, they hardened in their attitude to one another."

In 1969, the wife left her husband and with the three children went to live with her parents. She maintained herself by working and provided maintenance for her children. In 1970, the wife issued proceedings for custody, maintenance and separation. The first two matters were settled and it was with regard to the third that the case was concerned.

The wife's application for a separation order was decided upon the ground stated in s. 19(1)(a) of the Domestic Proceedings Act 1968 which at that time read as follows:

> "That there is a state of serious disharmony between the parties to the marriage of such a nature that it is unreasonable to require the applicant to continue or, as the case may be, to resume, cohabitation with the defendant, and that the parties are unlikely to be reconciled."[7]

There are three elements to this ground and they must coexist before the jurisdiction to make an order can arise. In *Myers v. Myers*, the Magistrate at first instance decided that the three elements were in fact established. In his judgment, although a state of serious disharmony between the parties did not exist when the wife left home, at the time of the hearing such a state had come into existence

6. Unreported, 4 June, 1971, Wellington.
7. The wording of s. 19(1)(a) has since been altered by s. 2 of the Domestic Proceedings Amendment Act 1971, to the effect that it must now be unreasonable to require the parties to cohabit with each other.

due to the deterioration in their relationship since they had parted. Furthermore, the disharmony was of such a nature that it was 'unreasonable to require the applicant . . . to resume cohabitation' with her husband. The Magistrate accepted that it was common ground between the parties that by this time they were 'unlikely to be reconciled'.

But having decided that the ground for the making of a separation order under s. 19(1)(a) was established, the Magistrate then went on to exercise his residual discretion against the making of a separation order. In adopting this course, he placed considerable weight upon the conduct of the wife. First, he thought that the final deterioration in the relationship had arisen largely because the wife had left home and then instituted proceedings which had led to a prolonged hearing. Second, he considered that the wife had not endeavoured sufficiently to effect a reconcilation with her husband. Third, the Magistrate was influenced strongly by the principles of public policy contained in these words:

> "There is little to be said for the sanctity of marriage if a wife can leave home in circumstances such as exist in this case, and obtain separation and maintenance orders against her husband. She has the remedy of divorce after four years and I think she must be content with that".[8]

On this (with respect) superficially attractive reasoning, the Magistrate exercised his residual discretion to refuse the wife a separation order.-

There followed an appeal by the wife to the Supreme Court which afforded White J. the opportunity of reviewing the exercise of the residual discretion in the court below. Although His Honour recognized the importance of marital breakdown as the factor that primarily entitles an applicant to a separation order under the 1968 legislation, he stated that all aspects of the public interest as they affect a particular case must also be weighed in exercising the discretion under s. 19(1) of the Domestic Proceedings Act 1968. Having put forward this general proposition, he then progressed to this important conclusion:

> "In my opinion, the fact that the intention of the statute is that matrimonial breakdown has taken the place of matrimonial fault does not mean that matrimonial fault is irrelevant in exercising the discretion against making an order, but that the conduct must be of a nature, or have results of such importance in the public interest that a broken marriage in the terms of paragraph (a) should not result in a separation order".[9]

It is suggested that this indicates an attempt to keep alive the concept of matrimonial fault, at least in a shadowy and hypothetical

8. Unreported, 9 October, 1970, Wellington.
9. Unreported, 4 June, 1971, Wellington.

area where the blameworthy conduct may have consequences seriously prejudicial to the public interest. As will become evident, the Court of Appeal was far more stringent in limiting the residual discretion of the Magistrate under s. 19(1) and the tenor of its judgment renders doubtful the validity of White J's. belief in the continuing relevance of matrimonial fault.

This conclusion is strengthened by the fact that White J. chose not to rest his decision on considerations of fault. After stating his opinion that marital fault might still be relevant in some circumstances, he went on to decide that in this case the Magistrate had actually given undue weight to the appellant's blameworthy conduct and insufficient weight to the concept of matrimonial breakdown as the basis for an order. According to White J. the Magistrate had concentrated on the wife's complaints and actions rather than on all the circumstances including matters arising from the husband's dissatisfactions. Therefore, after considering again the specific elements that make up the ground in s. 19(1)(a) and deciding that they had been properly found to exist, White J. concluded that the Magistrate had exercised his residual discretion on the wrong basis and that a separation order should be granted to the wife.

This decision resulted in a motion from the husband to the Court of Appeal for leave to appeal from the judgment of White J. pursuant to s. 124(4) of the Domestic Proceedings Act 1968. In the result, leave was granted and the appeal dismissed. The point of law which the Court of Appeal had to determine was whether or not a Magistrate has an unfettered discretion to refuse to make a separation order when the statutory ground in s. 19(1)(a) of the 1968 Act has been shown to exist. Counsel for the appellant argued that there was indeed such an unfettered discretion, leading Woodhouse J. to ask whether this would not mean that the Magistrate could hold that it was unreasonable for the parties to live together under s. 19(1)(a), yet in the exercise of his discretion in effect hold that it is reasonable that they should live together. To this, counsel for the appellant replied that despite the apparent absurdity, s. 19(1) does not in fact state that a separation order must inevitably be made once it has been determined that the ground for one exists. This was undoubtedly correct but the Court of Appeal rapidly set about correcting a situation which in their eyes threatened to defeat the whole policy of the Domestic Proceedings Act 1968 by allowing Magistrates to introduce considerations of fault through the 'back door' of their residual discretion.

The judgment of the Court of Appeal was delivered by Woodhouse J. who, though upholding the decision in the Supreme Court, adopted a more stringent approach than did White J. in the Supreme Court. The initial part of the rather short judgment of the Court of Appeal describes the general changes wrought by the Domestic Proceedings Act 1968 which have been mentioned. In particular, Woodhouse J. noted that prior to the making of a separation order, there is now a new and continuing emphasis on attempting to salvage

the failing marriage by means of conciliation procedures but if these fail, the purpose of a separation order is then to give formal recognition to an existing and peculiarly personal state of affairs and not to isolate responsibility on either spouse for causing the matrimonial breakdown.

Turning next to the specific area within which the residual discretion might operate, Woodhouse J. pointed out that the limits upon the discretion are clearly indicated by the greater or lesser detail with which each of the grounds in s. 19(1) have been defined. In the case of s. 19(1)(a), there are three significant criteria which point to a condition of complete matrimonial breakdown. The jurisdiction to make an order arises only on proof of serious disharmony, the unreasonableness of requiring a resumption of cohabitation, and the improbability of reconciliation. According to Woodhouse J.,[10] each element necessarily involves some initial exercise of discretion;

> "But once an affirmative assessment has been made concerning each of those criteria and the jurisdiction to make an order has thereby been established then the area left within which the residual discretion might operate will have largely disappeared and the cases where it could or should be exercised against the application will be exceptional."

Unfortunately, Woodhouse J. did not go on to say exactly when such an 'exceptional' case may occur, giving rise to the obvious question whether such a case will arise from marital fault. Certainly, White J. in the Supreme Court thought that matrimonial fault might still be relevant in exercising the residual discretion against the making of an order if the fault was of such importance in the public interest that an order should not be made. Nowhere did the Court of Appeal express clear disapproval of this opinion. However, Woodhouse J. did go on to observe that the Magistrate made a fundamental error in weighing his discretion in failing to recognize the importance of the concept of matrimonial breakdown as the new basis for an order and at the same time reverting to some extent to the attribution of blame for the situation. Whereas White J. in the Supreme Court had criticized only the placing of undue weight on blameworthy conduct, Woodhouse J. attacked any reversion to the attribution of blame whatsoever. The result is that White J's statement in the Supreme Court that marital fault may still be relevant in exercising the discretion against making a separation order is apparently rendered meaningless.

Of course, it may certainly be argued to the contrary that the Court of Appeal did intend to keep the door shut against applicants who are 'exceptionally' at fault. But if this was the case, it is surprising that the Court of Appeal did not express its intention in a less ambiguous manner. For instance, the Court of Appeal might have envisaged as an exceptional case where the applicant has proved

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10. [1972] N.Z.L.R. 476, 479.

the existence of all three elements that make up the ground under s. 19(1)(a) but it has transpired during the hearing that the major cause of the serious disharmony has been the applicant's own conduct, and the sole reason why the parties are unlikely to be reconciled is the applicant's own refusal to consider any reconciliation on any terms. However, if in fact the Court of Appeal has not totally barred considerations of fault from entering into either the initial or residual discretions then if an applicant has been mainly responsible for bringing about the state of serious disharmony by his or her own wrongdoing, the Magistrate would not need to utilise his residual discretion but could achieve the same result by holding that it was not 'unreasonable to require the parties to cohabit' in the exercise of his initial discretion as to whether the elements of the ground in s. 19(1)(a) exist.

At any rate, it now seems safe to assert that a Magistrate may not generally take into account considerations of justice arising from fault in the exercise of his residual discretion.[11] As pointed out, the exception to this may lie in the undefined 'exceptional' cases alluded to in the Court of Appeal. But if it is accepted that in referring to exceptional cases where the residual discretion might still operate the Court of Appeal was not envisaging any reversion to the attribution of fault, then it is suggested that the reference to exceptional cases is intended to cover circumstances where the policy of the Act requires that the applicant should be refused a separation order even though he or she has made out the ground under s. 19(1)(a) for one. Thus, the attitudes of the applicant and the defendant towards any question of reconciliation may justify the exercise of the residual discretion against the applicant — a course that Henry J. was prepared to adopt in *Edwards v. Edwards*,[12] since he considered that, with some co-operation from the applicant, the marriage in that case should not end in total breakdown. On the other hand, it would seldom be appropriate to exercise the residual discretion against an applicant where the defendant has consented to the order, especially after resort to the conciliation procedure. But to attempt to enumerate all the factors that may affect the residual discretion is a futile exercise as the Court of Appeal itself stated:

> "It is as undesirable as it is impossible to attempt to specify or categorise the factors which could or should be taken into account in the area of the discretion mentioned in s. 19(1). The court is obliged to deal with infinitely variable human attitudes and behaviour and each case will involve individual considerations."[13]

INITIAL DISCRETION IN s. 19(1)(a) OF THE ACT

When commenting upon the three elements that make up s. 19(1)(a), Woodhouse J. (with respect) correctly pointed out that

11. Contra, Inglis, *Family Law*, 2nd ed., 328.
12. Unreported, 30 September, 1970.
13. [1972] N.Z.L.R., 476, 480.

"Each element necessarily involves some initial exercise of discretion".[14] The problem arises, therefore, whether by means of this initial discretion, a Magistrate may take into account questions of fault and thus circumvent the limitations placed upon the exercise of the residual discretion by the Court of Appeal.

The Magistrate dealing with a separation application under s. 19(1)(a), appears to have considerable freedom in deciding whether or not 'there is a state of serious disharmony between the parties to the marriage.' This is a matter that the Magistrate is best able to decide having heard and seen the parties before him and an appellate court would be unlikely to disturb a Magistrate's finding on this element of the ground in s. 19(1)(a).

However, once a Magistrate has decided that a state of serious disharmony does exist, it seems that consequent upon the decision in *Myers v. Myers* it will now follow almost as a matter of course that it is unreasonable to require the parties to cohabit with each other, and the only ground upon which a separation order will then be refused is that the parties are unlikely to be reconciled with each other. To allow a Magistrate to decide otherwise would mean that he could still introduce considerations of fault into his initial determination as to whether the ground under s. 19(1)(a) is made out; and this despite the fact that the Court of Appeal has probably outlawed these same considerations of fault with regard to the exercise of the residual discretion. If the policy of the Domestic Proceedings Act 1968 as regards separation orders is really to remove the need for the previous arid enquiries that had to be made into marital fault, then considerations of fault should logically be banished not only from the exercise of the residual discretion but also from the initial determination of the criteria within s. 19(1)(a). But even if the Court of Appeal is taken to have allowed the future exercise of the residual discretion on fault principles in 'exceptional' cases, it is suggested that this will nevertheless limit the Magistrate to exercising his initial discretion on fault principles only in 'exceptional' cases also.

The Magistrate does appear to retain a fairly wide discretion in deciding the third requirement under s. 19(1)(a): whether 'the parties are unlikely to be reconciled'. This conclusion is supported by the decision of Mr. D. G. Sinclair S.M. in *Davies v. Davies*.[15] In dealing with an application by the wife for a separation order under s. 19(1)(a), the Magistrate decided that there existed a state of serious disharmony of such a nature that it was unreasonable to require the wife to continue cohabitation. However, he was not satisfied that the spouses were unlikely to be reconciled and this despite two unsuccessful attempts by the conciliators to bring about a reconciliation. This decision accords with the general emphasis on reconciliation that is evident in the Domestic Proceedings Act 1968 and

14. Ibid, 479.
15. Unreported, 1 May, 1970, Auckland.

therefore it is unlikely that an appellate court would interfere with such an exercise of the initial discretion.

In short, it appears that Magistrates still have a fairly wide initial discretion under s. 19(1)(a) to decide whether there is a state of serious disharmony and whether the parties are unlikely to be reconciled. However, the decision of the Court of Appeal in *Myers v. Myers* suggests that in all, apart from possibly exceptional cases, a Magistrate will no longer be able to introduce considerations of fault in deciding whether it is unreasonable to require the parties to cohabit. As Inglis has pointed out,[16] whether it is unreasonable to require the parties to continue cohabitation is referable to the degree of disharmony, not to the cause of the disharmony. Therefore, it is suggested that the discretion to decide whether it is unreasonable to require the parties to cohabit has largely disappeared once it is decided that a state of serious disharmony exists.

At this point, mention must be made of the fact that since the decision in *Myers v. Myers*, the Domestic Proceedings Act 1968 was altered by s. 2 of the Domestic Proceedings Amendment Act 1971. The effect of the alteration is that the court must now be satisfied that it is unreasonable to require the 'parties' to cohabit with 'each other', not merely that it is unreasonable to require the 'applicant' to cohabit with the 'defendant'. By thus removing the emphasis on the applicant's position, it is suggested that the fault principle has been reduced in emphasis even further by the Legislature. Instead of proceeding with a limited enquiry into the interests of the applicant alone, regard must now be paid to the actual marital situation that will be created if the 'parties' are required to continue or resume cohabitation. This accords with the object of s. 19(1)(a) as a whole which is to define existing situations so that the issue is not the isolation of responsibility for marital trouble but estimation of its effects. In addition, the alteration in the wording of s. 19(1)(a) is probably intended to reinforce the emphasis on reconciliation in the Act by removing from the applicant the disruptive onus of having to show why it is unreasonable that he or she should not be required to cohabit with the defendant. Instead, there appears now to be a need to demonstrate something more than that the 'applicant' has a good reason for living apart from the 'defendant' and this may slightly add to the applicant's overall burden in obtaining a separation order.

APPLICABILITY OF MYERS v. MYERS to SECTION 19(1)(b) and (c) OF THE ACT

The decision of the Court of Appeal in *Myers v. Myers* was solely concerned with an application for a separation order under s. 19(1)(a) and it is suggested that it can have only very limited application to questions under s. 19(1)(b) or (c). This is particularly so since part of the justification for severely limiting the residual

16. Supra, n. 11, p. 327.

discretion under s. 19(1)(a) was stated to be the considerable detail with which the ground of marital breakdown had been defined there. By contrast, paragraphs (b) and (c) state particular grounds upon which an order can be made without going into any general detail concerning the circumstances prevailing between the parties.

As a result, there appears to be some need for a flexible residual discretion in the case of applications under either s. 19(1)(b) or (c) where the assault or other behaviour complained of by one spouse may not necessarily reflect the true marital situation. Thus, if a wife applied for a separation order under s. 19(1)(b) on the ground that her husband had assaulted her and it appeared to the court that the wife was largely at fault in provoking her husband and that there was a likelihood of reconciliation, then it does not seem realistic or desirable that an appellate court should be able to reverse the Magistrate on the grounds that he had breached the rule in *Myers v. Myers*, if he had exercised his residual discretion against the wife. The ground for a separation order under s. 19(1)(b) is narrowly worded and arises from the conviction of the defendant within the preceding six month period of an offence of violence against the applicant or a child of the family, or for any sexual offence against a child of the family if the applicant is a married woman. Obviously, a factor that might influence the Magistrate's discretion under this ground is whether, even though the ground itself has been established, the defendant's offence is likely to be repeated. This consideration is justified by the whole tenor of the 1968 Act which indicates that the grounds upon which separation orders are to be made must be real and substantial, and not grounds of an almost technical character, and it is suggested that this also makes it necessary to look at the conduct of the applicant who is seeking an order under s. 19(1)(b).

The third ground for a separation order under s. 19(1)(c) is the successor to the ground of cruelty under the Destitute Persons Act 1910 and it is expressed in the following terms:

'That since the marriage any act or the behaviour of the defendant affecting the applicant has been such that in all the circumstances the applicant cannot reasonably be required to continue or, as the case may be, resume cohabitation with the defendant.'

If an applicant who was himself largely at fault were to plead this ground, then he would probably fail to establish that 'in all the circumstances' he could not reasonably be required to cohabit with the defendant. In other words, the act or behaviour of the defendant would not be so inexcusable as to relieve the applicant of the duty to cohabit, having regard to the latter's own conduct. That is not to say that the residual discretion has no part to play in applications under s. 19(1)(c) but rather that it will be exercised, not on considerations of fault on the applicant's part, but rather on the possibility of reconciliation (as in *Davies v. Davies*),[17] and on the likelihood of repetition of the act or behaviour complained of.

17. Unreported, 1 May, 1970, Auckland.

Therefore, it is suggested that the decision in *Myers v. Myers* would correctly be restricted to applications under s. 19(1)(a) since the terms in which paragraphs (b) and (c) of s. 19(1) are worded themselves exclude the possibility of any exercise of the residual discretion by a Magistrate which is contrary to the policy of the Act.

CONCLUSION

Although the decision of the Magistrate's Court in *Myers v. Myers* was perhaps not surprising when one recalls the trivialities from which the state of marital disharmony had grown, it was unacceptable to a Court of Appeal which undoubtedly considered, despite the merits of this particular case, that the Magistrate was setting the Domestic Proceedings Act 1968 off to a bad start by reintroducing fault principles which had supposedly been buried with the Destitute Persons Act 1910. Under the latter Act, separation proceedings had often been characterized by bitter disputes as to which spouse was to blame for the marital breakup and this situation had benefited no one. With this history in mind, the Court of Appeal took preventive action by conclusively rejecting the argument that a Magistrate has an unfettered residual discretion to make or withhold a separation order.

At the outset, it was noted that the nature and extent of this discretion is of considerable importance to those who desire to predict the outcome of separation order applications with any degree of certainty. One viewpoint on the effect of *Myers v. Myers* in this regard was expressed by Mr. Sullivan S.M.[18] who stated that following this decision, he found it difficult to imagine circumstances where a Magistrate would have any residual discretion left once the ground for a separation order under s. 19(1)(a) had been made out by an applicant. As a result, he foresaw a decrease in applications for separation orders in the future and an increase in separation agreements because of the increased certainly in many cases that an order would be made if the dispute was taken to the Magistrates Court.

However, it is suggested that the belief that increased predictability in the making of separation orders will result from the decision in *Myers v. Myers* is extremely dubious for the following reasons:

1. The continuing doubt as to what the Court of Appeal meant by 'exceptional' cases where the residual discretion may still operate against an applicant who has made out the ground for a separation order. If these cases arise from marital fault, then the possibility always remains that a blameworthy applicant will not necessarily succeed in obtaining a separation order even though the ground for one has been made out. However, such cases are unlikely to be numerous.

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18. Speaking at Victoria University of Wellington, June, 1972.

2. The wide area of initial discretion remaining to Magistrates, who continue to have considerable freedom in determining whether a state of serious disharmony exists and whether the parties are unlikely to be reconciled. Consequently, the difficulty in predicting the outcome of any particular separation order application is further increased.

3. The doubtful result brought about by the alteration of the wording of s. 19(1)(a) by s. 2 of the Domestic Proceedings Amendment Act 1971.

In short, although the Court of Appeal has succeeded in removing part of what it regarded as the cancer of Magistrate's discretion, the 'disease' still persists elsewhere in s. 19(1)(a); predictability as to the outcome of separation applications has not been effectively increased; and in all, the decision in *Myers v. Myers* may not have such far-reaching effects on the everyday handling of applications for separation orders as might at first have seemed likely.

P. GURNEY.