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New York State Supreme Court

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COMMENTARY

COMPULSORY CONCILIATION FOR NEW YORK?

WILLIAM B. LAWLESS*

. . . The failure to provide in the divorce courts any considered procedure for saving marriages that are not hopelessly wrecked, is patently inconsistent with the professed belief in the importance of the family.
. . . The courts may themselves be able to salvage many marriages.¹

It has been proposed that a state commission to study matrimonial statutes be created in New York.² While this proposal has merit, New York state should in any event adopt legal procedures requiring compulsory conciliation where parties to a marriage undertake formal proceedings for legal separation or divorce.

Perhaps the most remarkable progress in this direction has been made in California and in Wisconsin, and we believe the experiences of these two states provide a helpful pattern for new procedures in New York. We think that New York law dealing with conciliation in marriage must be amended and strengthened if our courts are to curb effectively the run-away divorce rate and check consequent juvenile delinquency. We shall suggest specific proposals for consideration by the legislature.

I. NEW YORK

Present New York conciliation procedures provide for voluntary proceedings when requested but are not required as a condition precedent for taking a decree of divorce, or separation, whether by default or contest. Emotional litigants usually in a highly excited state are left to decide for themselves whether they wish to undertake proceedings for conciliation. The machinery of the court operates only if one of the litigants chooses to activate it and then it is a minor contraption without staff, or trained counselors in most areas.

Originally, the Tweed Commission would have had noncontested matrimonial actions (divorce, annulment, separation and dissolution proceedings) in a special family part of the supreme court in New York City and in the county court outside New York City. Contested matrimonial matters were to be handled in a trial part of the supreme court.³ However, in 1958 the Temporary Commission revised its view and urged the creation of a family court in New York City and the setting up of a family division of the county court in upstate New York. It proposed that the supreme court retain jurisdiction over matrimonial actions except the trial of the issue of status.⁴

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1. Gellhorn, and Special Comm'n, of Assn. of Bar of N.Y. City, *Children and Families in the Courts of New York City*, as cited in Bodenheimer, *The Utah Counseling Experiment*, 7 Utah L. Rev. 443, 474 (1961).

2. N.Y. Legislature, 1965 Session, Senate Intro. 1213, Print 1217.

3. Rep., Temp. Comm'n on the Courts 99 (July 2, 1956).

4. Rep., Temp. Comm'n on the Courts, Legis. Doc. No. 36, 18-20 (1958).

After the Tweed Commission was abolished and the legislature failed to enact its recommendations, the task of planning reorganization of the courts was referred to the Judicial Conference by the Governor. The Judicial Conference recommended establishment of a state-wide family court and it was eventually created by amendment to the State Constitution and legislation known as the Family Court Act. Conciliation of spouses was included as an additional function of the family court. However, jurisdiction to grant divorce, annulment, marital separation and dissolution of marriage was to remain in the supreme court contrary to the Tweed Commission recommendation. Apparently this was accepted by the Tweed group as a compromise with the ideal.⁵

As a practical matter few supreme court justices in this state refer matrimonial cases to the family court for the reason that the family court is not yet adequately staffed to pursue such work. This is rather an anomalous view inasmuch as the family court is by law provided with a probation service in each county,⁶ and the supreme court wholly lacks staff trained in marriage counseling, psychiatry and psychology.

Constitutional Change

The Family Court Act was passed to implement the new Judiciary Article VI of the State Constitution approved by the electorate on November 7, 1961, effective September 1, 1962. Earlier the Constitution of 1894 permitted the legislature to establish children's courts or courts of domestic relations.⁷ The new Judiciary Article VI expressly provides that the family court shall have jurisdiction over proceedings for conciliation of spouses.⁸ The legislature implemented this provision by enacting Article 9 of the Family Court Act which makes available an "informal conciliation procedure to those whose marriage is in trouble,"⁹ and gives the family court original jurisdiction over proceedings. All statements made in these proceedings are confidential and are not admissible in evidence in any subsequent proceeding or action.¹⁰

Present New York Procedure

Under this act a spouse may originate a conciliation proceeding by filing a petition stating that his or her marriage is in difficulty and that the conciliation services of the family court are needed.¹¹ On filing of a petition the probation service is authorized to confer with the petitioner and may invite the petitioner's spouse to attend such conferences as appear to be advisable in conciliating the spouses.¹² If petitioner's spouse does not attend a conference

5. Paulsen, *The New York Family Court Act*, 12 Buffalo L. Rev. 420, 423 (1963).

6. N.Y. Family Ct. Act § 252.

7. See Oughterson, *Family Court Jurisdiction*, 12 Buffalo L. Rev. 467 (1963).

8. New York Const. art. VI, § 13(b)(6).

9. N.Y. Family Ct. Act § 912.

10. N.Y. Family Ct. Act § 915.

11. N.Y. Family Ct. Act § 921.

12. N.Y. Family Ct. Act § 922.

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to which he or she is invited after a petition is filed, the petitioner may apply to the court for an order directing such appearance.¹³ The court may issue such an order if it concludes after hearing that it will serve the purposes of the proceeding.¹⁴

If the petitioner's spouse attends a conference on invitation or by order and thereafter does not attend any conciliation conference, the court may hold a hearing to determine whether the proceedings shall be continued.¹⁵ If it concludes that conciliation in family court is not feasible, it may refer the parties so interested to social or religious agencies in the community and shall then terminate the proceedings under this article. If, on the other hand, the court concludes that further effort at conciliation should be undertaken, it may direct the spouses to attend another conciliation conference.¹⁶ The Act also provides for a termination of the proceedings ninety days after filing of the petition unless both parties consent to its continuation.¹⁷

Contrast New York's procedure for conciliation with California and Wisconsin.

II. CALIFORNIA

In 1939, California passed its enabling act which is presently codified,¹⁸ but only Los Angeles county formally established a conciliation court and provided it with a full-time staff. In 1954, implementing legislation was passed which established high professional qualifications and standards for the marriage counselors of the court.

During 1962, 6,270 applications or referrals were made to the Los Angeles court of conciliation, resulting in 4,095 formal petitions being filed. In those cases where both parties appeared for a formal conference, 63.8 per cent resulted in a reconciliation. Court statistics show that during the past five years three out of four such reconciled couples are still living together a year later.¹⁹ This result did not come about by miracle or magic; rather it is the product of twenty-five years of effort and experience.

The court has acquired great impetus since that time. The presiding judge of the Los Angeles county conciliation court believes that the success of that court lies (1) in the establishment of conciliation proceedings under the control of the court (rather than relying on voluntary extra-judicial efforts) and (2) the utilization of trained marriage counselors.

Procedure in Los Angeles County

Any resident of Los Angeles county may file petition to the conciliation court whether represented by counsel or not. Reasonable fees may be awarded

13. N.Y. Family Ct. Act § 924.

14. N.Y. Family Ct. Act § 924.

15. N.Y. Family Ct. Act § 925.

16. N.Y. Family Ct. Act § 925.

17. N.Y. Family Ct. Act § 926.

18. Cal. Code of Civ. Proc. §§ 1730-1772.

19. Report of the Conciliation Court of Los Angeles County, Preface of Roger Alton Pfaff, Presiding Judge (Jan. 1, 1963).

an attorney in a conciliation case. It may be filed prior to or after a divorce complaint has been filed. If the petition is filed prior to a divorce complaint, no divorce proceedings may be instituted for a period of thirty days after the conciliation court hearing. On the other hand, if a complaint for divorce has been filed, filing a petition for conciliation does not stay further proceedings in the divorce action. Where a petition is filed the procedure is interesting.

Each day one or more senior counselors are made available for conducting preliminary interviews with persons interested in reconciling. These individuals may either walk in off the street without court procedures, or they may be referred to the conciliation court by a commissioner or judge hearing a domestic relations case. Preliminary conferences seek to accomplish two important results: (1) they permit estranged couples to have an immediate consultation with an experienced marriage counselor which tides over the couple until they can appear for a formal conference, and (2) they eliminate the filing of useless and agitating petitions which otherwise would take up considerable amount of court and counselling time.

After a petition for conciliation has been filed, a counselor is assigned to the case and a hearing date set. When the couple appears, the general procedure is as follows: The counselor first confers with both parties and explains the purpose and procedure to be followed. He defines his role as a third and neutral party, his interest being primarily with them as a family unit. He explains that all information given to him is privileged and may not be otherwise used in any legal proceedings between them. Each party is thereafter interviewed separately. While one party is being interviewed, the other party is given a copy of a typical form of a husband-wife agreement to read in the waiting room and when the first interview is completed, the other party is given the agreement to read. At the conclusion of individual interviews, the counselor then has a final conference with both parties. In many instances one such session with the parties results in reconciliation and the signing of the husband-wife agreement which the Judge also signs.

The husband-wife agreement is a unique document authored by Judge Louis H. Burke, now Presiding Justice of the District Court of Appeal in California.²⁰ Judge Burke, while acting as the Presiding Judge of the Court of Conciliation prepared the agreement which consists of approximately 25 pages and covers practically every facet of married life and common marital problems. There are also special individual form agreements, eight in all, which may be inserted covering problems not encountered in the ordinary case, such as third parties in the home, step-children, agreement to utilize the services of Alcoholics Anonymous or covering a third-party romantic interest. When this agreement is signed by both parties, the counselor and the judge, it becomes a formal court order punishable by contempt. It should be noted, however, that the court's contempt power in conciliation cases is more in the nature of a psycho-

20. See Burke, *With This Ring* (1958).

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logical weapon. However, in extreme cases, the power may be used and in at least one instance in the history of the court, the judge sentenced a husband and a female third party respondent to 5 days in jail for a flagrant violation of the reconciliation agreement. The purpose of the husband-wife agreement is to reduce to writing and restrain the parties from the principal points of friction in their marriage. The overzealous club lady agrees to restrict activities and the overindulgent Martini man agrees to a reasonable limit.

In some cases, it is necessary for long term counseling to supplement the work of the conciliation court and since the court is not equipped to engage in this phase of counseling, a referral arrangement has been worked out with various family service agencies such as the Catholic Welfare Bureau, the Jewish Family Service and other community agencies.

Marriage Counselors

Since professional marriage counselors acting under court supervision are responsible for the success of the Los Angeles conciliation court, we may well ask: "Who are marriage counselors?" This question is answered well in a recent article on the subject, but briefly, they are trained specialists in the field of marriage relations.²¹

Marriage counseling is a young profession struggling to establish strict standards of professional competence. The American Association of Marriage Counselors set standards for membership which include a graduate degree (M.A. or M.S.) in the behavioral sciences, at least three years of practice in their profession subsequent to obtaining a graduate degree, specific training in marriage counseling, and psycho-therapy; they must be persons with maturity and integrity.

While the number of marriage counselors is proportionately small, well trained and experienced practitioners can be found in most areas of the country.

California has enacted legislation requiring certain educational prerequisites and subjecting marriage counselors to specific restrictions on the practice of marriage counseling. A government agency is empowered to revoke a counselor's license for failure to comply with the provisions of the statute.²²

III. WISCONSIN EXPERIENCE

The Wisconsin Family Code requires that an effort be made to effect a reconciliation between the parties in every action for divorce or legal separation.²³ In seeking to effect the reconciliations, as well as in safeguarding the interests of children involved in court cases, the family court utilizes modern marriage counseling and social service techniques. In the determination of the legal rights of the parties involved, the family court is a court of legal pro-

21. For an excellent article see Smith, *A Lawyer's Guide to Marriage Counseling*, 50 A.B.A.J. 719-722 (1964).

22. Cal. Bus. & Prof. Code § 17847.

23. WISC. STAT. ANN. § 247.081 (Supp. 1965).

cedures operating under state law. It is a partnership of two disciplines, the law and social service.

In addition to requiring that efforts be made to effect reconciliations between the parties, the Wisconsin Family Code of 1960 made important procedural and substantive changes in the handling of actions affecting marriage in the state. It declared the public policy of the state to be that ". . . Marriage . . . is the foundation of the family and of society . . . the impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned."²⁴ Thus, the trial court does not function solely as an arbiter between two parties. Rather, in its role as a family court, the trial court represents the interests of society in promoting the stability and best interests of the family.

Under the Code, an action for divorce or legal separation is commenced by service of a summons only, the complaint to be served after 60 days have elapsed, with a second 60 day waiting period before the case can be tried. The legislature purposely chose to have matrimonial actions commenced by service of a summons only and the complaint limited to setting forth the statutory grounds on which divorce is sought in order to reduce the points of friction between the couple which sometimes arise from the vicious charges and counter-charges contained in the pleadings themselves. However, the defendant does have the right to secure a bill of particulars.

Since the state Code requires that an effort be made to effect reconciliation in every action for divorce or legal separation, in Milwaukee county this statutory mandate is the responsibility of the Family Conciliation Department. While the family court commissioners and family court judges seek to reconcile differences between the parties at pre-trial hearings and pre-trial conferences, the primary responsibility for seeking to effect reconciliations is delegated to the staff of trained marriage counselors of the Family Conciliation Department. Although the principal work of this department in the marriage counseling field relates to parties involved in pending court cases, referrals are made by agencies, attorneys, clergymen and individuals in cases where there is no divorce or separation pending. During 1963, 869 such special service cases were handled. During 1963, 10,419 face-to-face interviews were had by the marriage counselors, compared to 8,844 such interviews in 1962. A check of the cases dropped by the litigants before trial discloses that 66% of such cases had been given personal counseling by the Department. In Milwaukee county, for the four years preceding the adoption of the Family Code, the percentage of divorce cases dismissed before trial was 39%. For the five years of operating under the Family Code, the percentage of cases dismissed before trial has increased to 48%. All such dismissals are not true reconciliations and not all reconciliations are permanent. However, an extensive check of cases reconciled conducted by the Family Conciliation Department during 1964 indicated that only 15% of couples

24. WISC. STAT. ANN. § 245.001 (Supp. 1965).

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reconciled by the department had returned to court later on in another action for divorce.

CONCLUSION

The effort toward marriage conciliation in New York compared with those undertaken in California and Wisconsin, not to mention Ohio, Michigan and other mid-western states which adopted procedures some time ago, leaves us with a feeling that New York has not kept pace in this crucial area of family law. Surely, no sense of seaboard sophistication justifies our rejecting successful programs from sister states, jealous though we are of New York's reputation for pioneering in the fields of legal and social reform. We also recognize that legislation of this kind was found unacceptable to the bar in New Jersey and Utah. Still we believe that New York should require: (1) the filing of a summons only to institute matrimonial actions; (2) compulsory marriage conciliation as practiced in Los Angeles county; (3) the establishment of highly trained marriage counselors in the Family Court; (4) certification by the marriage counselor that further attempts at conciliation are not feasible but said certification not to be issued for at least sixty days after the filing of the summons; (5) adoption of statutes similar to California's which provide for the licensing and high-standard training of marriage counselors; and (6) adoption by the New York state legislature of a forceful statement of policy similar to Wisconsin that the state does have an interest in reconciling marriages.

If these steps were undertaken, the inadequate provisions of the Family Court Act would be buttressed and if the experience in California and Wisconsin is a criterion, a comparatively large number of matrimonial disputes would be resolved as a result of the joint action by judge and social worker.

It may be claimed that the expense of such a program is prohibitive. However, this has not been true in Los Angeles county where a large migrant population puts on the courts a substantial number of matrimonial cases. Los Angeles county presently employs eleven full-time marriage counselors at a salary of \$8,580.00 a year on a five-step increment plan to the top salary of \$10,668.00. It requires necessary office space, a clerk to do the clerical work and a typist or transcriber-typist. It is necessary to have a counselor's office, a waiting room and a clerk's office with sufficient filing space. Cost is not prohibitive.

Indeed, Professor Gellhorn is correct when he says that the courts themselves may be able to salvage many marriages particularly if they have the will and the procedures available. It is to be hoped that the New York legislature will take a hard look at conciliation techniques as a first step in updating New York's matrimonial procedures.