South Carolina Law Review

Volume 28 | Issue 5 Article 5

Spring 3-1-1977

Marriage Counseling Through the Divorce courts--Another Look

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MARRIAGE COUNSELING THROUGH THE DIVORCE COURTS — ANOTHER LOOK

I. INTRODUCTION

The blessing, or spectre, of no-fault divorce is now upon us, representing more a fact to be accepted than an issue to be debated. Twenty-seven states now allow divorce upon proof of irretrievable breakdown while another thirty-seven, including our own, provide incompatibility or living apart as a valid ground.[1] Indeed, it should be safe to say that South Carolina's statute,[2] which provides both fault and no-fault grounds, may well be an antiquated hybrid quietly living out its last years. Nonetheless, full-fledged no-fault has often proved to be a bitter pill and many courts and legislatures have felt the need to sweeten the pill, resorting either to fulsome declarations of the sanctity of marriage or to provisions for mandatory court-supervised conciliation attempts.

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1. *See* Freed & Foster, *Taking Out the Fault But Not the Sting*, 12 TRIAL 10 (1976).

2. S.C. CODE ANN. § 20-101 (Cum. Supp. 1975) establishes five grounds for divorce:

> No divorce from the bonds of matrimony shall be granted except upon one or more of the following grounds, to wit:
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> (1) Adultery;
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> (2) Desertion for a period of one year;
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> (3) Physical cruelty;
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> (4) Habitual drunkenness; *provided,* that this ground shall be construed to include habitual drunkenness caused by the use of any narcotic drug; or
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> (5) On the application of either party if and when the husband and wife have lived separate and apart without cohabitation for a period of three continuous years. A plea of res judicata or of recrimination with respect to any other provision of this section shall not be a bar to either party obtaining a divorce on this ground.

South Carolina is unique in relation to other states in that its divorce laws are limited by the state constitution. S.C. CONST. art. 17, § 3 (amended 1969) provides:

> Divorces from the bonds of matrimony shall be allowed on the grounds of adultery, desertion, physical cruelty, continuous separation for a period of at least three years or habitual drunkenness.

For a summary of the history of divorce in South Carolina, see Shaw v. Shaw, 256 S.C. 453, 182 S.E.2d 865 (1971); Brown v. Brown, 215 S.C. 502, 56 S.E.2d 330 (1949).

Efforts to liberalize the "no-fault" three year separation provision have been limited to attempts to reduce the time required for divorce by voluntary separation while retaining the traditional fault grounds. A modest proposal along these lines was cast in the form of a joint resolution filed in 1974 calling for a constitutional amendment to reduce the present separation requirement from three years to six months. This quickly died in committee. However, legislative efforts have been renewed as evidenced by the filing of H.R. 2440 (2/3/77) proposing the reduction of the separation period from three years to one year and H.R. 2439 (11/17/76) calling for a reduction from three years to six months.

Apart from the palliative effect of court-imposed conciliation, few efforts at social engineering have offered such promise and produced such disappointment. Assuming, however, that the concept of conciliation maintains some viability, that South Carolina may look to conciliation as a part of any future no-fault statute, and that conciliation may indeed obviate some of the evils of the "quickie" divorce, this note will examine those systems which have failed along with those which have had some success. Finally, some legislative possibilities will be suggested based on the lessons of the recent past.

II. EARLY EXPERIMENTS WITH CONCILIATION STATUTES

For our purposes, we might define conciliation broadly as any court-ordered or court-sanctioned hearing, conference or counseling referral for the purpose of harmonizing parties in a domestic dispute.

Conciliation is no radical idea, having been implemented in some form in several states and in many foreign countries.[3] It made its first appearance in the United States in a 1919 Michigan statute[4] and was adopted by Wisconsin in 1933[5] and California in 1939.[6] The possibilities for conciliation, or so-called therapeutic divorce, were also recognized by members of the judiciary, notably Judge Paul Alexander of Toledo.[7] Judge Alexander was an early critic of the adversary climate of the divorce court and spoke out against the frustrating limitations imposed on him by that climate, noting:

> Plaints of all sorts greet the judges of the family courts. Some are so common they seem to ring in our ears: "I didn't

3. McIntyre, *Conciliation of Disrupted Marriages by or Through the Judiciary*, 4 J. FAM. L. 117 (1964), lists Switzerland, Germany, Finland, Sweden, Japan and the USSR. To this list may be added many of the Commonwealth nations whose experience is worthy of note in view of their similar legal system and their extensive history of conciliation experiments. *See* Finlay, *Australian Divorce Law and Marriage Conciliation*, 3 FAM. L.Q. 344 (1969); Bodenheimer, *The New Canadian Divorce Law*, 2 FAM. L.Q. 213 (1968); Payne, *Statutory Reconciliation Provisions in Australia and New Zealand*, 11 CAN. B.J. 226 (1968).

4. MICH. COMP. LAWS ANN. §§ 551.337, 728.18 (West 1969).

5. WIS. STAT. ANN. § 247.15 (West 1957).

6. CAL. CIV. CODE §§ 1730-1771 (West 1972).

7. Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633 (1956). The article represents an early, rather dated account of Judge Alexander's conciliation efforts. One regrets that the author did not expand further upon the intriguing term "therapeutic divorce."

> want no divorce, I was just tryin' to bring him to his senses;" "all I wanted was him to quit drinkin' and come home;" "I just filed for divorce because I didn't know what else to do;" "divorce won't do me no good, I want him to bring his pay check home;" "If you'd only make her quit that factory job we'd get along swell;" "Judge, will you help me get back my refrigerator?"[8]

In response, Judge Alexander succeeded in securing funds for a staff of marriage counselors to assist him, and the system he devised evolved into a statutory enactment for Ohio.[9]

The concept of conciliation, particularly mandatory conciliation, did not actually come into vogue until the 1960's. However, many of the statutes which resulted now appear ill-conceived and some have been repealed. Many of the ones which remain are administered in halfhearted fashion and many lawmakers, indeed many counselors, seem convinced that the court counselor is but a vestige of yet another noble experiment—a well-meaning albatross hung on the necks of judges, lawyers and litigants alike.

The following are typical among summaries of the conciliation experiments' shortcomings. As one author states:

> Although it seems logical for court systems to provide conciliation facilities for families in trouble, some such services do little more than increase the cost and delay of final resolution, subjecting the parties to a long, drawn-out series of interrogations by well-meaning social workers, court aids and other appointees. The benefits of consultive case work have been challenged by several recent studies and have never been completely endorsed by hard-headed marital lawyers.[10]

A second author notes:

> Experience suggests that the provisions . . . remain in the realm of pious hope. By the time a matrimonial cause reaches a hearing the parties are too far apart, one of them, at least, is

8. Alexander, *The Family Court—An Obstacle Race?*, 19 U. PITT. L. REV. 602, 608 (1958).

9. Raskin & Katz, *"Therapeutic Approach" to Divorce Proceedings*, 7 CLEV.-MAR. L. REV. 155 (1958). *See also* note 7 *supra*.

10. Coulson, *Family Arbitration—An Exercise in Sensitivity*, 3 FAM. L.Q. 22, 22-23 (1969). The article, written by a member of the American Arbitration Association, is generally critical of court conciliation efforts. The author is generally pessimistic about the prospects of saving marriages but notes that "[t]o the extent that family squabbles can be resolved without creating the intense polarization that almost inevitably flows from marital litigation, the costly by-products of family fracturization may be minimized." *Id.* at 22.

> too anxious for a final determination of the suit and too much bitterness has been engendered to allow any reasonable prospect of reconciliation. It is only on the rarest of occasions that attempts are made . . . to effect a reconciliation after the hearing has begun, and it is doubtful if any such attempt has been successful.[11]

The results of the court induced, or court coerced, conciliation entered into when at least one of the parties has evidenced a belief that the marriage is beyond salvaging, have been disappointing, at least in terms of saved marriages. This fact was a prime determinant in the Utah legislature's decision to repeal an early conciliation statute[12] and has been cited as the reason why a three-year experiment with conciliation initiated by the courts of New Jersey failed to produce any legislative response.[13] Of those systems still in operation, the assessment has been sometimes less than favorable. A 1972 survey of eleven attorneys who had together handled over 1,000 divorce cases under New York's highly-touted mandatory conciliation procedures reported that none recalled any cases "in which the bureaus appeared to have helped their clients to reconcile or to produce observable changes in their behavior."[14]

In a more traditionally legal sense, both the procedure and the concept of conciliation statutes are fraught with difficulty. This is particularly true in fault jurisdictions where legislatures or courts must face issues such as: the admissibility in subsequent adversary proceedings of statements made during conciliation conferences; the effect of conciliatory resumption of cohabitation on the defense of condonation; and the tolling of the statutory period required for establishing desertion.[15] If this were not

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11. Selby, *The Development of Divorce Law in Australia*, 29 M.L.R. 473, 487 (1966), *quoted in* Payne, note 3 *supra*, at 234.

12. Bodenheimer, *New Approaches of Psychiatry: Implications for Divorce Reform*, 1970 UTAH L. REV. 191. Bodenheimer was an enthusiastic supporter of the original Utah effort yet an excellent analyst of its shortcoming. *See* Bodenheimer, *The Utah Marriage Counseling Experiment: An Account of Changes in Divorce Law and Procedure*, 7 UTAH L. REV. 443 (1961).

13. 31 ALB. L. REV. 114 (1967).

14. McLaughlin, *Court-Connected Marriage Counseling and Divorce: The New York Experience*, 11 J. FAM. L. 517, 529 (1971). The article is generally critical of the New York mandatory system.

15. The failure to face such issues at the legislative stage has sometimes proved troublesome. With no clear statutory guidance, the British courts have severely clouded the confrontation issue. *See* Irvine, *The Concept of Reconciliation and the Matrimonial Causes Act 1963*, 82 LAW Q. REV. 525 (1966).

enough, at least one court has found the very concept of mandatory conciliation procedures unconstitutional as an invasion of privacy.[16]

It must be noted, however, that a state's bad experience with conciliation is often brought upon itself. There are inherent limitations in all such statutes but in Utah the procedures were further hamstrung by hostility between bench and bar and the social service agencies, all of whose roles were poorly defined, by the use of counseling techniques such as protracted psychotherapy which were ill-suited to the judicial process, and by a haphazard screening and referral service through which 21 percent of those referred were never even interviewed and counselors attempted to reconcile marital difficulties with only one of the parties participating in the process.[17] In establishing their rules, the New Jersey courts neglected to provide themselves with subpoena power, thus losing a proven device for inducing the cooperation of a recalcitrant spouse without necessitating a loss of face.[18] New York has added to the evils inherent in the Utah system by the use of arbitrary screening by questionnaire and by the use of lawyer-conciliators who are offered little training and few guidelines and whose legal

16. People *ex rel* Bernat v. Bicek, 405 Ill. 510, 91 N.E.2d 588 (1950). The Illinois Supreme Court seemed to object most strongly to the apparently unbridled discretion of the trial judge, to the fact that clerics were brought into civil proceedings at state expense, and to the manner in which the parties' private lives were delved into in a formal hearing. *But see* 18 U. CHI. L. REV. 342, 345-46 (1951). The commentator takes the court to task for its distinguishing similarly inquisitorial proceedings in agency hearings for the adoption of dependent children. The court insisted that such hearings were not adversary in nature. This is a weak argument in light of the fact that adoption proceedings were adversary in form, at least for many years, in Illinois (as they still are in South Carolina) while divorce actions are being stripped of their adversary trappings in some jurisdictions.

The commentator was less successful in attacking the court's constitutional objections, noting only that divorce is not a right at common law but a privilege bestowed by legislation. This argument is of dubious merit since the bounds of due process are clearly not so dependent on context: a proceeding, whether it bestows a privilege or protects a right, cannot violate a person's additional right to due process. The court's first amendment objections were not addressed.

More to the point is the nature of the Illinois statute and its rather offensive cast of the grant of authority. Any draftsman would be well advised to heed the court's objections, keep reconciliation proceedings out of the courtroom and off the record, provide for limits to judicial discretion, set a fixed initial time period for coerced conciliation attempts, require that at least one of the parties desires the counseling and assure that all statements will be privileged. If clerics are allowed in the reconciliation process it should not be at state expense and should only be at the behest of the parties. *Compare* the Illinois statute set out in *Bicek with* CAL. CIV. CODE §§ 1730-1771 (West 1972), particularly the provisions of §§ 1768, 1769, 1771.

17. McLaughlin, note 14 *supra.*

18. 31 ALB. L. REV., note 13 *supra,* at 118.

training is, as one commentator has suggested, little more than a justification for higher salaries.[19]

It is the opinion of this writer that all of these practical problems can be avoided and that many of the more basic limitations of conciliation can themselves be minimized. Before analyzing this proposition, however, we might do well to reflect on one statutory conciliation approach which has never worked very well, the approach of South Carolina.

South Carolina has a place among those states offering statutory avenues to reconciliation to their troubled marrieds by virtue of section 20-110 of the South Carolina Code, which provides:

> In all cases referred to a master or special referee, such master or special referee shall, except in default cases, summon the party or parties within the jurisdiction of the court before him and shall in all cases make an earnest effort to bring about a reconciliation between the parties if they appear before him. No judgment of divorce shall be granted in such case unless the master or special referee to whom such cause may have been referred shall certify in his report or, if the cause has not been referred, unless the trial judge shall state in the decree that he has attempted to reconcile the parties to such action and that such efforts were unavailing.[20]

The South Carolina court system has hardly been overburdened by the statute's requirements, however, particularly since the 1955 decision of *Frazier v. Frazier*.[21] The supreme court held that the simple recitation, "Finding that a reconciliation between the parties could not be effected, I have considered the testimony carefully,"[22] was sufficient to satisfy the statute. Suffice it to say that, with no really meaningful machinery available to judges investigating conciliation possibilities, few holdings have been so honored in the observance. During 1976, the Standing Master for Richland County heard 124 references.[23] While the total number of divorces granted in the county during that time is not yet known, 1,076 divorces were obtained during 1975, an increase of 120 over the previous year.[24]

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19. McLaughlin, note 14 *supra*, at 539.

20. S.C. CODE ANN. § 20-110 (1962).

21. 228 S.C. 149, 89 S.E.2d 225 (1955).

22. *Id.* at 170, 89 S.E.2d at 236.

23. This statistic is based on an unofficial review of the 1976 docket of the Office of the Standing Master for Richland County.

24. Bureau of Vital Statistics, South Carolina Department of Health & Environmental Control.

While judges, masters and referees are required to make, and no doubt do make, at least some effort to effect a reconciliation, the figures would seem to indicate a significant systems failure. It is interesting to note that ten reconciliations occurred in Richland County during the past year, two during the actual hearings and eight during the waiting period preceding.[25] It is also worth noting, however, that the reference to the master occurs, if at all, many weeks after the original filing for divorce, by which time enmities are hardened and the couples are often more concerned with the material effects of the breakup they now see as imminent. No matter how valuable the master's services may be, once the situation has reached this stage, he is hardly in a position to dispense marital first aid before major surgery is required.

The reconciliation statute has rarely been discussed in detail by the supreme court[26] through the question of its effects has arisen in some bizarre contexts, most notably in *Fennell v. Littlejohn.*[27] There, during the delay occasioned by the referee's conciliation process, the plaintiff-husband found his apparently unreconciled wife engaged in an adulterous relationship with the defendant. Since no final decree of divorce had issued, the court upheld plaintiff's action in criminal conversation and the jury award of $10,000.00, leaving him no doubt deeply appreciative of the referee's otherwise futile efforts.

All this is not to say that the South Carolina Supreme Court has not taken the conciliation statute seriously. In the 1963 case of *Brown v. Brown,*[28] Justice Bussey spoke for a unanimous court when he insisted on "an earnest effort toward reconciliation by the court in every case where both parties are before the court, and a certification with respect thereto by the court."[29] Justice Bussey noted that, "It has long been settled that the public policy of this state relating to marriage is to foster and protect it, to make it a permanent and public institution, to encourage the parties to live together, and to prevent separation."[30]

While the court went out of its way to complain of the record's silence on the issue of attempted reconciliation (the lower court decision was reversed on other grounds and the reconcilia-

25. *See* note 23 *supra.*
26. *But see* Case v. Case, 243 S.C. 447, 134 S.E.2d 394 (1964).
27. 240 S.C. 189, 125 S.E.2d 408 (1962).
28. 243 S.C. 383, 134 S.E.2d 222 (1963).
29. *Id.* at 387, 134 S.E.2d at 224.
30. *Id.*

tion issue was not raised by the parties), the opinion left intact the *Frazier* interpretation of section 20-110.[31] In addition, the court's strong and welcome words probably would never have been written had the record contained a perfunctory *Frazier* recitation.

Thus, public policy aside, there is virtually no reconciliation inquiry made during default hearings; the letter of the law seems to require an earnest certification rather than an earnest inquiry even in contested divorces; when an earnest inquiry is made, it is made by a judicial officer who has never been trained to be a marriage counselor; and an inquiry begun weeks or months after the parties have filed for divorce stands little chance of success, no matter how earnest.

III. PURPOSE AND PROMISE — ANOTHER EVALUATION

The rationale behind holding bench and bar somehow accountable for the preservation of salvageable marriages may be a philosophical one, but such a rationale would also seem to be in keeping with the judiciary's often-expressed belief in the sacred place of marriage within our social fabric.[32] In evaluating a Canadian statute which placed an affirmative duty on both court and counsel to advise parties of reconciliation services available and to require that affidavits be submitted by counsel substantiating their compliance with this provision, one commentator remarked:

> The feeling was that these provisions are weak and rather meaningless since compliance by the attorney as well as the judge may be more or less automatic and perfunctory. . . . This is very true, but the recognition in a nationwide law that courts and lawyers have a function to perform in the preservation of families is a first step which has not yet been taken in most of our states.[33]

While this function cannot extend to actual attorney counseling, as this may raise ethical problems in subsequent advisory

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31. *See* text accompanying note 22 *supra*.

32. The State has always busied itself about the domestic relations; about marriage and who may contract it, and how women may be protected from the force and stratagem of men; about children, their education, and their employment; about morality and how it shall be preserved in the family. Those forces which operate to impair the integrity of the family will finally sap the foundations of the State.

State v. English, 101 S.C. 304, 309-10, 85 S.E. 721, 722 (1915).

33. Bodenheimer, note 3 *supra*, at 224-25.

relationships, it does not seem incongruous to require divorce attorneys to provide their clients with lists of marriage counselors. Divorce lawyers may do well to realize that they exist like the divorce courts, "not for the purpose of promoting the dissolution of marriages, but for the purpose of discharging the painful duty of dissolving them when all reasonable hope of reconciliation between the parties has come to an end."[34]

In developing a workable statute to aid in the conciliation of marriages, the first determination to be made is what is to be conciliated. This is not as facile an observation as it may seem.

Sweden recently abandoned compulsory reconciliation and, indeed, shifted the focus of reconciliation counseling from the area of marriage rehabilitation to the area of practical problem solving during and after divorce proceedings. Again, the legislature was acutely aware of the limitations of conciliation statutes:

> Although it believed that prevention of hasty divorce was in the public interest, the committee doubted whether compulsory mediation which developed negative attitudes in the spouses, could achieve this aim.[35]

It should be noted, however, that the 1974 Swedish divorce statutes evidenced an overall shift of attitude: "The present reform of Swedish family law is characterized by an interest in legislation as a means to settle disputes rather than to promote family stability. . . ."[36] Thus, the entire thrust of Swedish divorce law, which is premised on the notion that divorce is an absolute right, provides a rather limited application for marital reconciliation.

While no court this side of Reno would be likely to make such a policy decision, American courts have been ambivalent at best in their conception of their role in the marital rehabilitation business. Though often waxing poetical on the subject of marital sanctity, courts have been loathe to assume responsibility for the job of marital preservation, both on practical and constitutional grounds:

> It is not the province of the courts to settle marital disputes or to determine what husbands and wives should do in order to live harmoniously together. These are intensely personal mat-

34. Cohen v. Cohen, [1940] A.C. 631, 645.

35. Sage, *Dissolution of the Family Under Swedish Law*, 9 FAM. L.Q. 375, 382-83 (1975).

36. *Id.* at 375.

> ters which the parties must determine for themselves. What the courts have to do is determine the effect of actions that the parties have already taken and to adjudicate their legal rights based on these actions.[37]

This is a fine statement of judicial orthodoxy, but also an unwitting indictment of judicial impotence. Courts need not dictate the terms of the marriage relationship, but in a time when the churches, the extended family and other traditional sources of marital aid and stability are themselves becoming less of a factor in our social structure, the courts represent one of the few institutions capable of providing a forum for problem solving and a dispensary for initial counseling services. If marriages are indeed the building blocks of our society, the judiciary is in pathetic shape if it is suited to do no more than sweep up the debris after watching the foundations crumble. Furthermore, apart from any societal needs, the marital relationship is such a complex of human needs, its dissolution a trauma of such magnitude, that society and its legal system should be required to provide something more sophisticated than our adversary judicial system for dealing with the situation.

The last two decades have witnessed an awakening on the part of all branches of government to the potential for disaster inherent in a laissez-faire attitude towards marriage. A recent legislative proposal in California would go so far as to require all persons under the age of eighteen applying for a marriage license to submit a certificate from a licensed marriage counselor to the effect that the parties were emotionally equipped to enter into the relationship.[38] It was argued that even if the eager youngsters would learn little in the brief sessions with the counselor, their willingness to postpone gratification would at least serve as evidence of sincerity and stability.

To some this may smack of 1984, but few can find fault with the pioneer efforts in judicial sensitivity undertaken by Judge Alexander in Ohio or by the Conciliation Court of Los Angeles in California. We may do well to consider the latter in some detail.[39]

The conciliation court system[40] began in California in 1939 at

37. Flohr v. Flohr, 195 Md. 482, 488, 73 A.2d 874, 876 (1950).

38. Ganley, Henry, & Porteus, *Divorce, Law and Psychology*, 7 HAWAII B.J. 73, 101 (1973).

39. For the mechanics of the California system, see 37 BROOKLYN L. REV. 366, 369-73 (1971).

40. *See* note 6 *supra*.

a time when no-fault divorce was hardly the current thing in legislation. The court has countywide jurisdiction and is open to any resident at any time. The system is voluntary and one of the parties is usually highly motivated as a consequence. The court has subpoena power, however, to induce the other party to attend and can also use this power to join the occasional girl friend or mother-in-law as well. These additional parties are asked to sign a non-interference clause in a husband-wife agreement executed by the spouses. This form document runs to at least twenty-five pages and the couple is encouraged to add clauses to cover their own unique situation. The signing of the document provides an air of formality which seems to have a salutary effect on future counseling. The parties then participate in a series of conferences covering anything from the abstract to the thoroughly mundane in an effort to live up to their agreement.

The California legislature specifically rejected the mandatory conciliation approach when it was proposed by the Governor's Commission on the Family, noting that:

> (1) the effectiveness of counseling depends on the willingness of the spouses, (2) the power of the state should not be injected into such a matter of private concern as marriage, and (3) the cost was not justified in view of the lack of evidence of significant effect upon family stability.[41]

These concerns, however, do not prevent California's conciliation courts from providing a varied and valuable service to its citizens.

The California system provides for staff counselors associated directly with the courts. As early as 1971, the Los Angeles County Conciliation Court had a staff of eleven counselors, each with a masters degree and ten years experience in counseling.[42] An alternative to this approach is that of Australia where any social service agency, counseling service, or church group can apply for certification as a recognized court-qualified counselor and can accept referrals and government subsidies through the courts after meeting certain statutory requirements.[43]

The Australian system, and indeed most of those adopted in

41. California Legislature Assembly Comm. on Judiciary, Report on Assembly Bill No. 530 & Senate Bill No. 252, Report of 1969 Divorce Reform Legislation 3-4 (Assembly Daily Journal, August 8, 1969), *quoted in* Ganley, Henry, & Porteus, note 38 *supra*, at 76-78.

42. 37 BROOKLYN L. REV., note 39 *supra*, at 370.

43. Finlay, note 3, *supra*.

Commonwealth countries, employs the additional device of requiring court and counsel to make an affirmative effort to reconcile the parties and requiring affidavits to this effect.[44] On a more technical level, the Australian statute evidences the ease with which a legislature can codify the role of court conciliation in the context of the difficulties raised by condonation and collusion.[45]

Thus far we have been discussing the mechanics of approach. More general questions remain, however, concerning the basic limitations of court conciliation and how they might be minimized.

As has been noted above, the single most frustrating aspect of such systems is that no real counseling can begin until the marriage has reached a substantial crisis, usually a crisis from which at least one of the parties feels there is no chance of return. D. M. McIntyre provides a good summary of the problem and hints at a possible partial solution:

> There is evidence that conciliation would be most effective if instituted prior to the filing of a divorce suit upon such actions as non-support, assault, delinquency of the children, dependency and neglect and other court actions which indicate that a marriage has started to deteriorate. But these matters typically are not within the jurisdiction of the court supervising conciliation procedures. For optimum effectiveness, therefore, the conciliation service should be made easily accessible to courts receiving "non-divorce" family cases.[46]

Expanding the jurisdiction of South Carolina's existing family courts to allow for greater referral possibilities from other courts and from other agencies is a possible, albeit a partial, solution to the problem of delayed intervention. The State of Washington has taken a step in this direction with a family court act which provides in relevant part:

> Whenever any controversy exists between spouses which may result in the dissolution or annulment of the marriage or the disruption of the household, and there is any minor child of the spouses or either of them whose welfare might be affected thereby, the family court shall have jurisdiction over the controversy and over the parties thereto and all persons having any relation to the controversy. . . .[47]

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44. Payne, note 3 *supra.*
45. *Id.*
46. McIntyre, note 3 *supra,* at 127.
47. Family Court Act, WASH. REV. CODE § 26.12.090 (1951).

The idea of referring criminal cases, which arise in a domestic setting and thereby give stark testimony to a marriage in trouble, is an idea yet to be applied on any meaningful level anywhere in this country.

But, the most pervasive problems with reconciliation procedures are attitudinal, stemming from the lawyer's lack of commitment to the spirit of conciliation and the social scientist's overcommitment to unrealistic expectations. As regards the former, consider the following remarks of one conciliation commissioner from New York:

> [W]e are issuing certificates of no need for conciliation in over 90% of all cases without any hearing [basing the decision that no counseling was needed on the pleadings and a questionnaire] and without ever asking a lawyer to come down. . . .
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> We had a case where a wife had her husband in Court 15 times and he was held in contempt twice for something else. One of the children is an idiot and is up in some institution and the man has beaten his wife a dozen times, and now they want to come in for a conciliation conference.[48]

The reaction of the attorneys in the Commissioner's audience was intriguing. Not one attorney questioned the success of the counseling or inquired about the methods used or even about the goals of the program. Certainly none questioned the wisdom of staffing a marital conciliation system with commissioners who found a beaten wife or a retarded child appropriate subjects for hyperbolic humor. The questioning concerned only the techniques available for minimizing the nuisances visited upon the bar by a law to which none present seemed committed.

Perhaps Spellman's rather limited view of his own function stemmed in part from a legitimate fear of the burgeoning case load foisted on him by the mandatory procedures of the New York divorce law. In contrast, however, Conciliation Commissioner Irving C. Maltz reported that he routinely called a conciliation conference in those cases involving:

48. Spellman, *Conciliation Under the New Divorce Law*, 25 N.Y. COUNTY B. BULL. 154, 159 (1967-68). The Commissioner was addressing a symposium sponsored by the New York County Bar Association. Perhaps one should keep in mind the clubby atmosphere of the forum when evaluating Commissioner Spellman's remarks which seem rather self-serving in their cynicism. When asked whether the entire conciliation process should be dropped, Spellman answered, "I haven't made up my mind but I won't be angry at anyone who does." *Id.* at 168.

> parties separated for less than one year; recent marriages; young couples who may have unrealistic attitudes about marriage; mature couples married for many years who may have to make relationship readjustments after children have grown; parties residing in the same household; either party requests conference because he or she desires a reconciliation or wish[es] help in resolving questions of visitation, custody and/or settlement of issues in general . . . [or when] the attorneys . . . request one . . . .[49]

Commissioner Maltz's attitude seems to evidence a balance between those cynics and illusionaries who would evaluate conciliation only in terms of demonstrably saved marriages and who would condemn or praise it accordingly. If counseling can serve to lessen the trauma of marital breakup, it is valuable even in those cases where a true reconciliation is unrealistic. In the context of societal needs, this value may be measured in children who are not fought over or in adults capable of bringing a greater degree of maturity and wisdom to their subsequent marriages. If judicial pronouncements are to be taken at face value, however, and if our commitment to the preservation of marriages is greater than Sweden's, some form of conciliation is not only a valuable social tool but an outright social obligation.

In no other area has legal theory shown such universal concern for an institution and legal practice shown such universal indifference to that institution's human components. Psychology has provided us with better guidelines to recognize the signs of marital breakdown and with treatment techniques that are better suited to the kinds of marital first aid which courts could reasonably be expected to render. Especially as we make marriages increasingly easier to terminate, we must consider the implementation of those guidelines and techniques into the structure of our divorce proceedings.

IV. CONCLUSION

Most argue that no-fault divorce is a desirable alternative to our present emotionally abrasive adversary system. All agree, however, that no-fault is inevitable and a consideration of the experiences of other states with conciliation statutes should be undertaken by our legislators as South Carolina takes further steps in the direction of no-fault.

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49. 37 BROOKLYN L. REV., note 39 *supra*, at 381.

It is the opinion of this author that these experiences show that a successful conciliation component in any divorce law should probably avoid mandatory court counseling upon the filing of any divorce petition. Instead, conciliation should be based upon individual application and upon referrals in a variety of situations affecting the marital status or evidencing its breakdown. Except in cases of assault or child abuse, these referrals should be made only when one party shows a willingness to cooperate. The court should be equipped, however, with the power to subpoena recalcitrant or overly proud spouses and meddling third parties. These referrals should be made within the structure of a family court to well-trained counselors either attached to or certified by the court. The purpose of these referrals should be marital first aid, with additional referral to marriage counselors in church groups, social service agencies or private organizations to follow if necessary. To this end, protracted psychotherapy might be avoided in favor of group counseling and other techniques more suitable for quick, effective assistance within the obvious limits of any court supervised procedure. Individual techniques[50] successfully employed by other states should be considered. Finally, since any true no-fault provisions in this state will probably come into being only in a compromise statute which retains some if not all of the traditional fault grounds, the conciliation provisions must be carefully drafted in order to avoid conflict with the establishment of the ground of desertion, the defense of condonation or the charge of collusion.

In a more basic sense, lawmakers must accept the limitations of counseling and look for its rewards in terms of broad societal interests rather than in the number of terminated divorce proceedings; and lawyers must act responsibly to help preserve what most Americans feel is a vital societal resource rather than perpetuate an adversary relationship that is blind to psychological reality and community needs.

John V. MacLean

50. Examples of such techniques are California's husband/wife agreement and New York's practice of commencing divorce with a mere summons and without a complaint or series of allegations.