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British Development in Alternative Dispute Resolution in Divorce*

*David Carey Miller***

I. INTRODUCTION

A number of related factors can be identified in the British developments towards the availability of some form of alternative dispute resolution in divorce. Both English and Scots law have made adjustments in recognition of the inevitability of widespread divorce in modern life. English law, especially, has attempted to protect the threatened family unit by introducing reconciliation requirements as part of a package of divorce reform; however, these devices have proved to be impotent. Reform of the substantive grounds of divorce has been followed by some changes—or proposed changes—to the traditional contest based procedure.

Most recently, the focus of attention has shifted towards conciliation processes which, on the premise of unavoidable divorce, place the emphasis upon reducing the destructive intensity of litigation. These developments will be covered under the following headings: The move to easy divorce in English and Scots law; Reconciliation and conciliation: responses to the problem of increasing divorce; Reform of procedure; and, The growing role of conciliation.

II. THE MOVE TO EASY DIVORCE IN ENGLISH AND SCOTS LAW

In Britain, the post-war era produced a dramatic decline in matrimonial stability. Consequently, in both legal systems of the United Kingdom, the law has moved away from the previously pervasive notion of matrimonial fault as a basis for divorce. Matrimonial fault has been replaced by the concept of “retrievable breakdown” which has ushered in an era of easy, or relatively easy, divorce.¹ The inevitability

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1. See, England Matrimonial Causes Act, 1973, § 1; Divorce (Scotland) Act, 1976, § 1.

of this, in modern circumstances, was beyond question. Indeed, even the Church of England recognized the compelling case for reform:

[A] divorce law founded on the doctrine of breakdown would not only accord better with the social realities than the present law does, but would have the merit of showing up divorce for what in essence it is—not a reward for marital virtue on the one side and a penalty for marital delinquency on the other; not a victory for one spouse and a reverse for the other; but a defeat for both, a failure of the marital “two-in-ship” in which both its members, however unequal their responsibility, are inevitably involved together.²

Despite this general recognition of reform, there was concern by many that the relaxation of divorce requirements would lead to an ever-increasing divorce rate. These fears seem to be justified.

Even though a high incidence of divorce can not be wholly ascribed to ease of termination of the matrimonial relationship,³ there has been a considerable increase in the divorce rate in both England and Scotland following the reforming legislation.⁴ Latest figures indicate that marriage in the United Kingdom has decreased, while the divorce rate has increased.⁵ The divorce rate in the United Kingdom has increased more dramatically in the recent past than in the United States,⁶ confounding the general British view that any widespread tendency to terminate marriage at will is a trans-Atlantic phenomenon.

Recognition of the inevitability of an increased divorce rate has led to a shift in emphasis. Interest now tends to be less on how divorce can be stopped and more on how its damaging consequences can be alleviated. At the root of this shift is the concern for the welfare and well-being of children. There is a deep but inarticulate fear that serious social implications growing from the effects of divorce on children may

2. Society for Propagation of Christian Knowledge, *A DIVORCE LAW FOR CONTEMPORARY SOCIETY*, para. 26 (1966).

3. CLIVE, *THE LAW OF HUSBAND AND WIFE IN SCOTLAND*, 441 (2nd ed. 1982) (hereinafter, Clive) contends that there is no evidence for the proposition that easier divorce leads to a less responsible attitude towards marriage. The law, however, has long reflected an entrenched view that easier divorce would tend to undermine the stability of marriage. This was noted in the recent Booth Report but the committee was “[N]ot convinced that the procedure by which a marriage is to be dissolved has any bearing upon the reason why that marriage has failed.” *See REPORT OF THE MATRIMONIAL CAUSES PROCEDURE COMMITTEE*, para. 2.12 (hereinafter BOOTH REPORT).

4. In Scotland the introduction of easier divorce in the 1976 Act produced a rapid increase in the annual divorce rate: by 1979 the 1977 total of 4,775 had leapt to 8,972. *See CLIVE, supra* note 3, at 440-41.

5. The number of marriages in the U.K. fell from 396,000 in 1984 to 393,000 in 1985. In 1984 158,000 final divorce orders were granted and in 1985 the figure had risen to 175,000. *See* Governmental Statistical Serv., *SOCIAL TRENDS* 46, 49 (1987), (hereinafter *SOCIAL TRENDS*).

6. 375% as against 208% over the period 1965 to 1980. *Demographic Y.B.* 517-18, U.N. Doc. ST/ESA/STAT/SER.R/13, U.N. Sales No. E/F. 84.XIII.1 (1983).

exist. The opening sentences of a recent document from the Law Commission expresses this fear in statistical terms: "Thirty years ago only about 20,000 children were involved in divorce but in 1984 there were 144,501 divorces⁷ and 58% of these involved one or more children under the age of 16: in total 148,600 children."⁸

The stark—and to many unattractive—facts of the state of the nation's matrimonial well-being has led to concern for preserving the family unit from a natural pragmatism: the best must be made of an irreversibly high incidence of divorce. When children are involved, modern thinking tends to focus upon minimizing the suffering and damage caused by termination of marriage. This has produced some imaginative radical thinking about the process of divorce.⁹

III. RECONCILIATION AND CONCILIATION: RESPONSES TO THE PROBLEM OF INCREASING DIVORCE

A. *Reconciliation and Conciliation Defined*

In the United Kingdom two main strands in the response to escalating divorce have been defined: reconciliation and conciliation. As a matter of language the distinction is somewhat arbitrary but it represents an important conceptual difference: that between an attempt to repair the relationship and save the marriage; and, on the premise of actual termination, the decision to proceed with divorce but with the aim of, as far as possible, moderating the degree of contentiousness and easing the process for those involved.

The Finer Report¹⁰—a document which has been highly influential in the field of family law—first applied the distinction as a matter of definition:

By reconciliation we mean the reuniting of the spouses. By conciliation we mean assisting the parties to deal with the consequences of the established breakdown of their marriage, whether resulting in a

7. These figures refer to England and Wales only.

8. Law Reform Commission, *150,000 Children Divorced a Year: Who Cares?*, 1986, at 1 (a memorandum published by *The Law Commission*, Conquest House, 37-38 John Street, Theobalds Road, London WC1N2BQ). The writings of Dr. John Bowlby demonstrate the importance of stable affectionate bonds to a child's health and psychological development. See generally BOWLBY, *ATTACHMENT AND LOSS* 1-3 (1969, 1979, 1980). For a concise work of general relevance see BOWLBY, *THE MAKING AND BREAKING OF AFFECTIONAL BONDS* (1979).

9. This radical thinking is not limited only to the United Kingdom because the same problems have had to be faced in many countries. Indeed, a greater measure of radical reform has occurred elsewhere. See, e.g., Australian Family Law Act, Austl. Acts, 374, 1975 providing a process integrating the traditional judicial form with reconciliation and conciliation functions.

10. REPORT OF THE COMMITTEE ON ONE-PARENT FAMILIES, vols. 1 & 2, 1974, Cmnd. No. 5629 (hereinafter FINER REPORT). The Committee was chaired by the Hon. Sir Morris Finer.

divorce or a separation, by reaching agreements or giving consents or reducing the area of conflict upon custody, support, access to and education of the children, financial provision, the disposition of the matrimonial home, lawyers' fees, and every other matter arising from the breakdown which calls for a decision on future arrangements.¹¹

B. Introduction of Reconciliation In England

In England, the introduction of some form of reconciliation procedure was mooted in 1946 when the Lord Chancellor, Viscount Jowitt, appointed a committee under the chairmanship of Mr. Justice Denning to examine divorce practice and to consider whether any machinery should be made available for the purpose of attempting a reconciliation between the parties, either before or after proceedings had been commenced. The Denning Report was not optimistic about the prospects of reconciliation procedures built into the adversary trial process:

The prospects of reconciliation are much more favorable in the early stages of marital disharmony than in the later stages. At that stage both parties are likely to be willing to co-operate in an effort to save the marriage; but if the conflict has become so chronic that one or both of the parties has lost the power or desire to co-operate further, the prospects sharply diminish. By the time the conflict reaches a hearing in the divorce court, the prospects are as a rule very small.¹²

Despite these reservations the Law Commission¹³ recommended that reconciliation procedures be built into the divorce process. Today, a number of provisions in the governing Matrimonial Causes Act 1973 aim to preserve the marriage. One textbook writer has implied that the emphasis upon reconciliation followed, almost as a matter of dogma, from the newly introduced unitary basis of divorce in irretrievable breakdown.¹⁴ Certainly, reconciliation becomes a logical and legitimate option when divorce is no longer seen as a right to terminate on the basis of matrimonial fault.

11. *Id.* vol. 1, at 176.

12. REPORT OF THE COMMITTEE ON PROCEDURE IN MATRIMONIAL CAUSES, Final Report, 1947, Cmnd. No. 7024, at 10. This conclusion was shared by a Royal Commission under the chairmanship of Lord Morton of Henryton: "If matters are allowed to develop into a condition of chronic disharmony one or perhaps both of the spouses will probably have lost the ability or desire to make any attempt to restore the marriage, and by the time steps have been taken to institute divorce proceedings the prospects of bringing husband and wife together again are greatly reduced." REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE, 1956, Cmnd. No. 9678.

13. The Law Commission, REFORM OF THE GROUNDS OF DIVORCE - THE FIELD OF CHOICE, Cmnd 3123 (hereinafter REFORM OF THE GROUNDS OF DIVORCE).

14. P.M. BROMLEY, FAMILY LAW 228 (6th ed. 1981).

Another writer has provided a perceptive analysis of the relationship between the touchstone of irretrievable breakdown and reconciliation:

[T]he fact that irretrievable breakdown is now the central concept of the law of divorce indirectly offers to the word "reconciliation" an opportunity to achieve a new primary meaning. The reason is this. Although it would be both impossible and undesirable to contain within the bounds of a rigid definition the notion that a marriage has broken down irretrievably, it is permissible to expect the development of some consistency in the understanding of the notion. In fact the language of the Act suggests something negative in the way of definition: a marriage has broken down irretrievably when there is no "possibility of a reconciliation between the parties." The greater the perceived prospect of reconciliation the closer the court comes to being satisfied . . . that the marriage has not broken down irretrievably.¹⁵

This reformed position provides for divorce within a context recognizing that reconciliation should be encouraged.¹⁶ The departure from fault based divorce, strong in notions of contest and penalty, has introduced the possibility of liberating the divorce procedure from its former limitations. The provision for reconciliation, complementary to divorce based upon irretrievable breakdown of marriage, is a perfectly consistent compromise and, of course, one which reflects the policy that, if possible, the marriage should be preserved.¹⁷

The provisions for reconciliation, first introduced in the Divorce Reform Act 1969, are now contained in section six of the Matrimonial Causes Act 1973. Sub-section (1) states that the rules of court shall provide for certification by the petitioner's attorney whether he has advised his client to seek reconciliation. Sub-section (2) empowers a court, *mero motu*, to adjourn proceedings when the court finds that a reasonable possibility of reconciliation exists between the parties to the marriage.

Experimental machinery to implement these legislative principles

15. Griew, *Marital Reconciliation - Contexts and Meanings*, 30 CAMBRIDGE L.J. 294, 305 (1972).

16. The reforms represent a change of direction rather than a radical break with the past and any assessment is likely to depend upon the point of view of the commentator; one may note, for example, the view expressed by Lisa Parkinson: "The attempt to superimpose the concept of irretrievable breakdown of marriage on top of the concept of the matrimonial offense has produced a kind of historical and moral layercake, in which a thin layer of twentieth century liberalism has been spread over a thick slab of Victorian moral values." L. PARKINSON, *CONCILIATION IN SEPARATION AND DIVORCE*, 16 (1986) (hereinafter PARKINSON).

17. The Law Commission in its report *REFORM OF THE GROUNDS OF DIVORCE*, *supra* note 13, at 10, recognized that good divorce law should seek "[t]o buttress, rather than to undermine, the stability of marriage"

was initially set up locally; but later, these principles were made available in the form of a written practice direction. The provisions lay down a procedure which allows the court to refer a case to the court welfare officer because there appears to be a reasonable possibility of reconciliation, or because the court feels that conciliation might serve a useful purpose.¹⁸

C. *The Impotency of Reconciliation in England*

For the operation of reconciliation to be meaningful, one must set the scene of the grounds for divorce within which reconciliation operates. Here it should be emphasized that, in practice, the changes have not produced any significant deviation in the circumstances of increasing divorce.

As stated above, the Matrimonial Causes Act 1973 introduced "irretrievable breakdown" as the sole basis for divorce; but, in truth, the legislation provides for five different factual conditions which may constitute irretrievable breakdown. Regardless of the circumstances alleged, all petitions are subject to a bar to divorce within one year of marriage.¹⁹ Arguably, this is consistent with the policy implicit in the no-

18. The full text of the practice direction is as follows:

(a) Where the court considers that there is a reasonable possibility of reconciliation or that there are ancillary proceedings in which conciliation might serve a useful purpose, the court may refer the case, or any particular matter or matters in dispute therein, to the court welfare officer. (b) The court welfare officer will, after discussion with the parties, (experience having shown that reconciliation is unlikely to be successful in the absence of readiness to cooperate on the part of the spouses) or that conciliation might assist the parties to resolve their disputes or any part of them by agreement. (c) If the court welfare officer decides that there is not such reasonable prospect, he should report accordingly to the court. (d) If the court welfare officer decides that there is some reasonable prospect of reconciliation, or that conciliation might assist the parties to resolve their disputes or any part of them by agreement, he will, unless he continues to deal with the case himself, refer the parties to either (i) a probation officer, or (ii) a fully qualified marriage guidance counselor recommended by the branch of the appropriate organization concerned with marriage guidance and welfare; or (iii) some other appropriate person or body indicated by the special circumstances (e.g. denominational) of the case. (e) The person to whom the parties have been referred will report back to the court welfare officer, who in turn will report to the court. These reports will be limited to a statement whether or not reconciliation has been effective, or to what extent (if at all) the parties have been assisted by conciliation to resolve their disputes or any part of them by agreement." 1 All E.R. 894 (1971).

19. Section 1 of the Matrimonial and Family Proceedings Act 1984 repealed § 3 of the Matrimonial Causes Act 1973 in terms of which no petition could be presented within three years of marriage unless the court gave leave on the basis of, either, exceptional hardship suffered by the petitioner, or, exceptional depravity on the part of the respondent. These criteria to allow relief from the three year bar proved to be unworkable — see *Fay v. Fay*, 2 All E.R. 922 (1982) — hence the reform unconditionally barring the commencement of proceedings within one year of marriage; a reform which was probably the primary factor in a 6% increase in the number of

tion of irretrievable breakdown; it is hardly possible to say that a marriage has irretrievably broken down if it has not endured for a reasonable period. The conditions which may constitute proof of irretrievable breakdown are provided for in section (2) of the Matrimonial Causes Act 1973 which states in pertinent part:

(a) that the respondent has committed adultery and the petitioner finds it impossible to live with the respondent; (b) that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; (c) that the respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition; (d) that the parties of the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition . . . and the respondent consents to a divorce being granted; (e) that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition²⁰

Despite these factual conditions the most usual cause of action in divorce amounts to an allegation of fault, and reconciliation is hardly ever resorted to once legal proceedings have commenced. The new English order of irretrievable breakdown, applied in a context of provisions encouraging reconciliation, has not, on the statistical evidence, achieved the Law Commission's objective of buttressing the stability of marriage. In 1969 the number of divorce petitions filed stood at 70,575. In 1971, when the new legislation came into operation, the figure was 110,017 and by 1984 it had risen to 178 940—all within the context of a relatively static total population.²¹ Hardly a morsel of approval of the reconciliation procedures has come from the pens of the expert commentators. One, having been thoroughly dismissed in 1971,²² repeated the

petitions filed over the previous year. See SOCIAL TRENDS, *supra* note 5, at 48.

20. The bar to petitions within one year of marriage provided for in § 3(1) can only have practical effect in respect of facts (a) and (b) (adultery and behavior) because longer time limits are specifically prescribed in respect of petitions presented on facts (c), (d) and (e).

21. PASSINGHAM & HARMER, *LAW AND PRACTICE IN MATRIMONIAL CAUSES* 2 (4th ed. 1985) (hereinafter *LAW AND PRACTICE*).

22. "The reconciliation provisions are a sham." Freeman, *The Search for a Rational Divorce*, 24 *CURRENT LEGAL PROBS.* 178 210 (1971). This seemingly extreme statement may well be justified; as Lisa Parkinson has shown the efficacy of § 6(1) of the 1973 Act is questionable on the ground that technical compliance requires no more than certification by the petitioner's solicitor that he has *not* discussed with his client the possibility of reconciliation (it may be significant that the example of a standard certificate regarding reconciliation given in *LAW AND PRACTICE*, *supra* note 21, at 502, is to this negative effect). Moreover, a critical point is that the legal aid scheme does not cover what a solicitor might do by way of attempted reconciliation. This suggests, as Lisa Parkinson has put it, that "the law's apparent concern to facilitate reconciliation has been reserved for the minority whose financial means are above the prescribed limits." PARKINSON,

charge in 1978 and went on to question the principle and policy of reconciliation:

Seven years ago I described the reconciliation provisions as a "sham" and I stand by what I said then. . . . Reconciliation has its dangers and pitfalls as well. It often operates under an ideology which emphasizes restoration of the equilibrium with a minimum of change. It makes the assumption that uniting the family, preserving family relationships, is an important social goal. Whether it is valuable or not must depend on the marriage and not on the value to society of stable marriages.²³

D. Absence of Reconciliation Provisions in Scots Law

Scots law, by contrast, has no active statutory requirement providing for reconciliation pending the granting of a divorce.²⁴ The Scottish Law Commission report²⁵ which, eventually,²⁶ led to reform of the grounds of divorce concluded that, "once an action has been raised, reconciliation is pretty well out of the question."²⁷ Moreover, there is no counterpart of the English law provisions requiring legal practitioners to draw a client's attention to marriage reconciliation agencies. The Scottish Law Commission took the view that this "would be an ineffective formality."²⁸

The absence of Scottish provisions for compulsory reconciliation attempts during the course of divorce proceedings may possibly be taken to show skepticism for any vain attempt to restore a bolted marriage to the matrimonial stable. This difference between Scots and En-

supra note 16, at 20.

23. Freeman, *When Marriage Fails - Some Legal Responses to Marriage Breakdown*, 31 CURRENT LEGAL PROBS. 109, 120 (1978). See also, Levine, *The Divorce Reform Act 1969*, 33 MOD. L. REV. 632, 644 (1970); O'Neill, *The Matrimonial Causes Act 1973*, 36 MOD. L. REV. 638, 639 (1973).

24. § 2(1) of the Divorce (Scotland) Act provides for the continuation of any pending action for such period as the court considers appropriate for the purpose of attempting reconciliation.

25. Scottish Law Commission, *DIVORCE: THE GROUNDS CONSIDERED*, 1967, Cmnd. No. 3256 at 10 (hereinafter *DIVORCE: THE GROUNDS CONSIDERED*).

26. The matter was controversial. The Church of Scotland Report of the Social and Moral Welfare Board to the General Assembly 1969, 460-70, favored a single ground of breakdown actionable after two years' separation. There were seven failed bills over a period of a many years before reforms, similar to those introduced in England in 1969, were achieved in Scotland in 1976.

27. *Supra* note 25, at 11.

28. *Supra* note 25 at 32. The Court of Session, however, in a statement directed to practitioners, has identified the desirability of an early referral to marriage guidance where appropriate: "[L]egal practitioners who are consulted about marital problems with a view to consistorial proceedings should try to identify, at as early a stage as possible, those cases in which the parties might benefit from the expert advice and guidance of a marriage counsellor, and in those cases should encourage the parties to seek such advice and guidance." Practice Note of 11 March 1977.

glish law, however, shows no indication that Scotland is less concerned with the preservation of marriage than Britain is. The Scottish reforms seem to reflect a greater pragmatism in not providing for formal attempts at reconciliation after litigation has commenced.²⁹ Moreover, Scots law may be seen to acknowledge the concept of matrimonial fault, in that, there is no overriding bar on all divorce pending the passing of a minimum period from the date of marriage.

In Scotland, The Divorce (Scotland) Act 1976, lists the factual circumstances which constitute irretrievable breakdown. These are: adultery, behavior, and desertion.³⁰ The central grounds for divorce in modern Scots law was labeled "desertion" at common law. Desertion has built into it a policy which requires the expiry of a period of time, the length of which is determined by the circumstances.

Modern Scots law, reflected in the Divorce (Scotland) Act 1976, requires irretrievable breakdown of marriage as the sole ground for divorce. Three of the five prescribed ways in which irretrievable breakdown can be established involve a "waiting period." Wilful desertion without reasonable cause is actionable if during a continuous two-year period following the desertion "there has been no cohabitation between the parties, and the pursuer has not refused a genuine and reasonable offer by the defender to adhere."³¹ A divorce may be granted on the grounds of non-cohabitation but only after a continuous five-year period during which "there has been no cohabitation between the parties at any time . . ."³² unless the defender consents to the granting of a divorce in which case only a two-year period is applicable.³³

Besides adultery³⁴ the only other basis for proof of irretrievable breakdown is "behavior", the modern equivalent of "cruelty" in earlier law. Even here, the behavior complained of must be such "that the pursuer cannot reasonably be expected to cohabit with the defender."³⁵ The leading modern authority on marriage has explained the operation of this requirement and commented that it is open to the court "to conclude that a spouse can reasonably be expected to live with behavior . . . which he or she finds intolerable."³⁶ Because this issue must be

29. E. M. Clive sees the 1976 Act as "[A] compromise between, on the one hand, a desire for non-fault divorce and, on the other, a desire for clear justiciable issues which would not necessitate a costly, time-consuming and counter-productive inquest into whether a marriage had really broken down." CLIVE, *supra* note 3, at 438.

30. Divorce (Scotland) Act § 1(2).

31. Divorce (Scotland) Act § 1(2)(c).

32. *Id.* at § 1(2)(e).

33. *Id.* at § 1(2)(d).

34. *Id.* at § 1(2)(a).

35. *Id.* at § 1(2)(b).

36. CLIVE, *supra* note 3, at 447-48.

determined at the time of trial "a divorce could be refused if the court were satisfied that a husband had reformed his ways since the acts complained of and that the pursuer could now reasonably be expected to cohabit with him."³⁷ Moreover, the cohabitation contemplated an apparently long term. Conduct of a transient nature will not necessarily create an action.³⁸ It seems that even the "behavior" cause of action reflects, to some degree, the policy that spouses should persevere to make the marriage work.

Scots law does not reflect the same overt policy requiring irredeemably breakdown which runs through the entire notion of divorce in modern English law. In Scotland, when the only basis for divorce is non-cohabitation, the policy is applied on a more selective basis, with emphasis on "giving the marriage a chance." It seems logical that the policy's strength diminishes when a divorce is sought because of adultery or intolerable behavior. Indeed, it seems a strange paradox where the law, in its preoccupation with the preservation of marriage in an age of easy divorce, fails to recognize that there are situations in which immediate divorce is justified.

Another striking difference between the English and Scottish systems is the apparent faith of English law in reconciliation provisions built into divorce procedure. Scots law has rejected reconciliation because it is seen as unlikely to achieve its objective. One other explanation for the Scottish point of view is that there is a limit to the extent to which the law can minister to the ills of society.

IV. REFORM OF PROCEDURES APPLYING TO DIVORCE

Few would dispute the view that a comprehensive overhaul of the process of divorce is amply justified by changes which have occurred in post-war British society. Society has virtually abandoned any view that the family unit can be bolstered by restricting access to termination of the marriage relationship. The climate of a different attitude towards divorce has led to a questioning of the appropriateness of applying the normal litigious dispute process in matters where personal relationships usually figure prominently.³⁹ When children are involved the substan-

37. *Id.* at 447.

38. *Id.* at 448.

39. A comment in the BOOTH REPORT, *supra* note 3, at para. 2.28, refers to the now well-recognized argument:

When matrimonial causes ceased to be a matter for the ecclesiastical courts they became subject to the general procedure which governed civil proceedings in England and Wales and thus were subject to the adversarial hearing and the procedures leading to it. The fundamental principle of such a hearing is that the court does not itself elicit information, but comes to its decision on evidence adduced before it. There was a

tive law has long recognized that overriding priority may have to be given to a child's best interests. The courts have acknowledged the view that *how* dissolution occurs may be very material to the extent to which a child is affected.

Law reform, and especially comprehensive reform, only takes place where various conditions coexist; the status quo, in any given area, is very likely to prevail unless change, even though clearly warranted, is specifically promoted by some strong motivating factor within favorable circumstances of feasibility and finance. In England the case for reform is especially pressing because of the confusion created by the historical overlap in matrimonial jurisdiction between divorce and magistrates' courts. This confusion was only partially cured by the Domestic Proceedings and Magistrates' Courts Act 1978.

The influential Finer Committee Report, in 1974, recommended the introduction of a unified family court incorporating a welfare service.⁴⁰ Support for the idea has grown and reform is now urged by a significant lobby.⁴¹ It seems that there are two connected strands of development; first, an ongoing process of the reform of procedure and second, a significant growth in the recognition of the role of conciliation which had led to the quite rapid expansion in the availability of professional conciliation services. In Scotland the development has been in the growth of voluntary conciliation services; yet, there has been no indication that conciliation is likely to be built into formal divorce procedure.⁴² For this reason, what follows only relates to English developments.

A. *Reform in England: The Booth Report*

When the dissolution of marriage appears to be a process in which the court in effect rubber stamps a form of actual or tacit resolution

strongly held view that by its very nature an adversarial procedure enhances bitterness and hostility and encourages parties to embark upon a disputed case with ideas of 'winning' or 'losing' very much in mind.

40. FINER REPORT, *supra* note 10, vol. 1, at 173-76.

41. Parkinson quotes the comment of Baroness Faithful in launching the Family Courts Campaign in 1985: "children and families simply cannot afford to wait another 20 years, when legal issues involving children and families have multiplied rapidly, but are still being dealt with in and out of date and confusing variety of court situation." PARKINSON, *supra* note 16, at 43. To date, English law has responded in characteristic fashion, by ad hoc change and piece-meal adjustment.

42. In March 1985, an amendment to the Divorce (Scotland) Act providing statutory provisions for reconciliation was introduced but abandoned after debate. *See*, HANSARD, 21 March 1985.

arrived at by the parties, one can better understand the increasingly significant role of divorce procedure.⁴³

Existing English divorce procedure dates from an age in which the substantive law of divorce was firmly rooted in the concept of fault. Prior to the introduction of "irretrievable breakdown" in 1971 all divorce suits, whether defended or undefended, were heard in open court although the increase in the number of undefended divorces had already led to a more perfunctory hearing, typically consisting of unchallenged evidence by the petitioner alone. The reform for the grounds of divorce did not touch the requirement of a formal hearing even though "by then the procedure had come to be generally regarded as an unnecessary, costly and degrading ordeal for the parties and an undignified end to a marriage."⁴⁴ In 1973, however, a special procedure was introduced to provide, in an undefended suit, for the issue of a decree of divorce or judicial separation upon the petitioner's affidavit without the need for a court appearance. Initially, this procedure applied only where there was no child under sixteen and where divorce proceeded on the basis of two year's separation with the respondent's consent. In 1977, however, the procedure was extended to all undefended suits whether or not there were children. But besides this important change the procedure of divorce remains that of a past era;⁴⁵ a particularly paradoxical situation given that the reforms of substantive law have actually elevated the importance of procedure.

The vast majority of modern divorces are undefended and "divorce" is essentially a matter of a signpost procedure rather than a judicial process. Because of the domination of adjectival over substantive rules it obviously follows that the "atmosphere" of the legal process of divorce is largely determined by the nature of the procedure. Changing the way those involved respond and react involves reform of divorce procedure.

The most influential up-to-date English thinking on the divorce process is contained in the *Report of the Matrimonial Causes Procedure Committee* (Booth Report) published in 1985. This committee,

43. Although the court remains subject to a statutory duty to inquire into the facts alleged (§ 1(3) of the Matrimonial Causes Act 1973) the scope for this is limited in the usual modern undefended divorce typically granted on the basis of the petitioner's affidavit and proof of service. However, where the divorce order sought provides for financial arrangements, or where there are children of the marriage, the court has a definite inquisitorial role. (See Matrimonial Causes Act 1973 §§ 24 and 41).

44. BOOTH REPORT, *supra* note 3, at para. 2.3. See also, Murch, *Judicial Hearings of Undefended Divorce Petitions*, 38 MOD. L. REV. 609 (1975).

45. See the BOOTH REPORT, *supra* note 3, at para. 2.4: "Many of the present procedures are based upon the fault concept of divorce, and their origin can be traced back to the 1857 statute"

chaired by the Honorable Mrs. Justice Booth, was created following a recommendation by the Law Commission, to examine the procedure and practice of divorce. The Committee's specific terms of reference were:

to recommend reforms which might be made— (a) to mitigate the intensity of disputes; (b) to encourage settlements; and (c) to provide further for the welfare of the children and the family, having regard to the desirability of achieving greater simplification and the saving of costs.⁴⁶

The tenor of measures proposed by the Booth Committee is very clearly directed towards mitigating the contentious character of divorce proceedings. This is evidenced by a variety of recommendations for changes of the existing form and from proposals regarding a positive and central role for conciliation. The two aspects are complementary in that the suggested modifications to existing form are intended to produce a changed "atmosphere," more receptive to the notion of conciliation. For example, it is proposed that where divorce is sought on account of the "behavior" of the other party⁴⁷—the most usual allegation of fact supporting a claim of irretrievable breakdown—no particulars of the behavior alleged should be given in the initiating document.⁴⁸

Responses to consultation carried out by the Booth Committee "generally acknowledged that lengthy and detailed particulars of behavior in the petition were unhelpful and could give rise to considerable bitterness between divorcing spouses."⁴⁹ Similar thinking lies behind the proposal that joint applications for divorce should be competent where termination is sought on the basis of two years' separation and the consent of both spouses.⁵⁰

V. THE GROWING ROLE OF CONCILIATION

A. *The Early Roots of Conciliation*

The central feature of the Booth Report—from the point of view of an alternative approach to the traditional form of resolution in divorce—is the major role envisaged for an active process of conciliation.

46. See BOOTH REPORT, *supra* note 3, at para. 1.1.

47. Matrimonial Causes Act, 1973, § 1(2)(b).

48. To be an "Application for a Divorce" rather than a "petition" because the latter word—deriving from the practice of the ecclesiastical courts and so synonymous with the concept of a matrimonial offence—"introduces at the outset an accusatorial tone to the proceedings." See BOOTH REPORT, *supra* note 3, at para. 4.3.

49. *Id.*, at para. 4.17.

50. Matrimonial Causes Act, 1973, § 1(2)(d). See BOOTH REPORT, *supra* note 3, at para. 4.6.

This vindicates the position of a growing body of those concerned with divorce⁵¹ that the emphasis upon conciliation is the best way forward in modern circumstances. This broadly accepted view by the various professional practitioners is a natural response to day-to-day experience and the simple fact that a cooperative attitude between the spouses is beneficial to all parties affected by divorce and may well be a critical factor as far as children are concerned. As a matter of the philosophy of divorce the significant point of the Booth Report is a definite movement toward open negotiated agreements between the spouses within a framework designed to promote fairness and protect minor children.⁵²

Before looking at the relevant specific proposals of the Booth Committee concerning conciliation it is worth noting the most salient aspects of the development in divorce practice; a development which, of course, is the *raison d'être* for the recommendations for reform.⁵³

Although a practice of conciliation applied to divorce has been known for some time, its role, until relatively recently, was undefined and haphazard.⁵⁴ The crystallization of a concept of conciliation, within an accepted context, has only emerged recently. Two important factors in the development of an established notion of conciliation have been its recognition in the practice directive in 1971 and the clear identification accorded it in the 1974 Finer Report⁵⁵ as a process distinct from reconciliation. But, of course, recognition of the potential value of conciliation is only a natural by-product of pioneering work done by social scientists. A significant development has been the collaboration between social welfare workers and psychologists in the immediate post-war era.⁵⁶

What is striking about the development of conciliation from a

51. Marriage guidance counselors, social workers, probation officers, court personnel, and legal practitioners.

52. The committee's conception of conciliation shows the emphasis upon the role of the parties: "It is of the essence of conciliation that responsibility remains at all times with the parties themselves to identify and seek agreement on the issues arising from the breakdown of their relationship. The conciliator's role is to assist the parties in this process." See BOOTH REPORT, *supra* note 3, at para. 3.10.

53. In this I rely heavily on a recent work—the only British text on conciliation in divorce—by Lisa Parkinson, an established divorce conciliation practitioner who has been involved in the vanguard of developments. PARKINSON, *supra* note 16.

54. A report, in 1936, on social services in courts of summary jurisdiction suggests that the use of conciliation was common in matrimonial causes but it seems that its primary role was "[i]n deflecting wives from legal action against their husbands." *Id.*, at 58.

55. FINER REPORT, *supra* note 10, at 67.

56. The Tavistock Institute of Human Relations in London has had a major role in the development of both theory and practice and, importantly, in training programs. In 1948 a Family Discussion Bureau was formed by the Family Welfare Association with professional psychologist input from the Tavistock. See Institute of Human Relations, *Social Casework in Marital Problems* 3-10 (1955).

loose and even nebulous collection of ideas to a potentially important part of the machinery of modern divorce is the fact that a conservative legal system has, in little more than a decade, assimilated a process which is extra-legal in the sense that it works through ways not known to traditional legal means of dispute resolution. As suggested above, a primary factor in the "rapid growth of conciliation schemes from 1975"⁵⁷ has probably been the recognition of the nature of marriage as a relationship between consenting individuals open to possible termination by consent, subject to controls to promote fairness and to protect any children. Although conciliation is a concept in a sense foreign to the law, it does promote a number of objectives with which the legal system would identify. Conciliation is a response to various concerns with which the legal system would identify. These concerns include:

1. Concern to provide an alternative to the adversarial system in the divorce courts.
2. Concern to protect children involved in their parents' divorce.
3. Concern to give people more control over their own affairs and reduce their reliance on formal institutions.
4. Concern to achieve greater administrative efficiency by processing contested cases more quickly.
5. Concern to reduce public expenditure, particularly on legal aid.
6. Concern to stem the rising tide of divorce.⁵⁸

The development of divorce conciliation in England has occurred in two broad forms: in-court and out-of-court. Significantly, however, both developments commenced in the Bristol area.

B. In-court Conciliation

In-court conciliation was initiated by the judiciary and court registrars as an attempt to reduce the number of defended divorces. The system was based upon cooperation between court personnel, legal representatives and probation service welfare officers designated to act in divorce conciliation.⁵⁹ When a respondent defended a divorce action the parties and their solicitors were called before the registrar. The registrar, after clarifying the issues in dispute, exercised his discretion as to the utility of suggesting that the parties have a private discussion with a welfare officer. The system proved effective, and under the distinguishing label "mediation," the system was extended to undefended divorces where there was a dispute over custody or access. In the initial years the results from the system's operation proved promising. More than

57. PARKINSON, *supra* note 16, at 67.

58. *Id.*, at 67-71 where the author expands on these points.

59. On the special role of the probation service in the context of the summary jurisdiction of the English courts, see REPORT OF THE DEPARTMENTAL COMMITTEE ON THE PROBATION SERVICE, 1962, Cmnd. No. 1650, at 50-57.

half of the cases proceeding to mediation were settled. In 1981 Bristol County Court Registrar Parmiter reported benefits to the parties and their children in the reduction of bitterness and more expeditious resolution; moreover, savings in time and funds were beneficial to the system as a whole.⁶⁰ Of course, the fact that the actual process of divorce is satisfactorily settled does not necessarily mean that the dispute is finally resolved especially in relation to the ongoing issues of maintenance and access. A possible weakness of "in-court" conciliation or mediation is the natural tendency to judge success in terms of administrative efficiency, and to use as the primary criterion of satisfactory resolution the achieving of an agreed basis for a court order.⁶¹

C. *Out-of-court Conciliation*

An independent out-of-court conciliation service came into being in the mid-1970s through the initiative of certain members of a Bristol committee—the embryo of the Bristol Courts Family Conciliation Service (BCFCS). The Bristol Committee's purpose was to work towards implementation of the Finer recommendations. The group, with input from academic and practicing lawyers as well as the welfare agencies, promoted general support for the notion of conciliation prior to the stage of judicial proceedings. Because the contemplated route for conciliation was the solicitor's office, the motivation of the legal profession was crucial. Yet, because the actual conciliation service would be provided by non-lawyers, the project was a joint one. Obtaining financial support was a major difficulty, but eventually the Lord Chancellor's Department backed the scheme and in 1978 the trustees of the Nuffield Foundation made a three-year grant to BCFCS conditional upon central government providing in the second year one-third and in the third year two-thirds of the service's funding requirement.⁶² The pre-court services offered by BCFCS complemented the in-court conciliation available to divorce litigants at the Bristol County Court:

- a) in its early availability, before an application was made to the court and even before a divorce petition had been filed; b) in its quick accessibility in crisis situations, without the delay of awaiting a court appointment or for legal aid to be granted; c) in its availability to unmarried as well as married couples; d) in its acceptance of self-

60. See Parmiter, *Bristol In-Court Conciliation Procedure*, 78 LAW SOC'Y. GAZ. 196 (1981).

61. See PARKINSON, *supra* note 16, at 73.

62. *Id.* at 75-76.

referrals from couples who were anxious to avoid any court proceedings; e) in its independence of statutory authority.⁶³

D. Development of Conciliation In England

The 1980s have seen a mushrooming of conciliation services in both the independent out-of-court form and in the in-court form operating through the probation service. Nevertheless, from the point of view of regional spread, the development has been somewhat random, probably because local motivation is a key factor.⁶⁴ Importantly, however, certain developments do promote uniformity of approach between existing services.

In 1983, the National Family Conciliation Council (NFCC) came into being as a result of efforts to coordinate conciliation services. Soon after its inauguration the NFCC joined with committees representing the legal profession to draw up a code of practice. In 1983, the Solicitors' Family Law Association, an influential body with over one thousand members, adopted a code of professional practice with implications for conciliation. These developments point to the possibility of a major national rationalization in England but, inevitably, the respective merits of the two systems then come into issue although, arguably, a case may be made for combining an independent system providing early conciliation with an in-court service.

1. Conciliation and the judicial process

It has been argued that conciliation is incompatible with the judicial process; however, social changes—reflected in changes in the substantive law—may well warrant the modification of existing adjectival law as it applies to the termination of marriage and the necessary ancillary decisions. The possibility of conciliation within the judicial process, or preferably, by referral from the judicial process to an independent service, should be open to parties despite the failure of an early attempt prior to the commencement of litigation. On the other hand, the continuity of a relatively successful early conciliation should surely be maintained regardless of the fact that the parties dispute has entered the stage of formal judicial proceedings. The legal process must reflect the substantive law and, of course, this means that it will be many-faceted and open to development and change.⁶⁵ The true position would

63. *Id.* at 76.

64. The development in Scotland has been solely through the growth of voluntary conciliation but more on this later.

65. "Those in dispute surrender the decision-making power to someone else, with the result

appear to be that modern English matrimonial causes procedure is in the process of responding to a demand to accommodate conciliation.⁶⁶

2. *Recommendations by the Booth Committee*

The natural growth of conciliation schemes in various forms means that a relative plethora of models are available and considered rationalization can hardly proceed without an assessment of respective merits. But recent developments have made it clear that influential thinking would prefer to leave out-of-court conciliation as a local voluntary service. In-court conciliation, on the other hand, is likely to play a part, in some shape or form, in reformed divorce procedure. While recognizing the value of introducing conciliation at the earliest possible stage, the Booth Committee was concerned with divorce procedure, this naturally led it to in-court conciliation. It should be noted that the Booth Committee was reported in the light of the Report of the Inter-departmental Committee on Conciliation, published in 1983.

The Inter-departmental Committee had been established to review existing arrangements for conciliation, including cost implications, with a view to future developments. This report—by no means well received in all quarters⁶⁷—favored the development of in-court conciliation as part of the normal divorce process. Out-of-court conciliation, on the other hand, was thought to be better left as a voluntary service;⁶⁸

that the important meanings and values become those of a third party. But beyond this fundamental attribute of third-party decision, the characteristics of the process are almost infinitely variable. The model can accommodate a range of umpires from judges of a national legal system to private arbitrators chosen by the disputants; greater or less procedural formality (including more or less flexibility as to the manner in which the issues for decision are selected and presented); inquisitorial or adversarial procedures; variation in the criteria to be taken into account in decision-making; the presence or absence of specialist intermediaries between disputant and umpire; and a number of different approaches to adherence and enforcement." Roberts, *Mediation in Family Disputes*, 46 MOD. L. REV. 537, 546 (1983).

66. This would appear to be borne out by a practice direction, "A Judge or Registrar, before ordering an enquiry and report by a Court Welfare Officer, should, where local conciliation facilities exist, consider whether the case is a suitable one for attempts to be made to settle any of the issues by the conciliation process, and if so, a direction to this effect should be included in the order. If conciliation fails, any report which is ordered must be made by an officer who did not act as a conciliator." Principal Register of the Family Division, CHILDREN: ENQUIRY AND REPORT BY A WELFARE OFFICER (1986).

67. See Westcott, *Report of the Inter-Departmental Committee on Conciliation*, 47 MOD. L. REV. 215 (1984); see also PARKINSON, *supra* note 16, at 180 "[A] disappointing and poorly researched report"

68. "Voluntary action has advantages which a public service does not, and is often a good way of applying local help so as to benefit individuals directly without the involvement of a bureaucracy. The voluntary base of some present conciliation services gives them a good deal of strength. The enthusiasm and commitment of their personnel combines with a willingness to make effective use of limited budgets is a feature of conciliation schemes as it is of other areas of the voluntary sector. Some of this strength might be lost were these services to be provided by the State

but, one wonders to what extent this thinking reflects a reluctance to contemplate the more radical and more expensive reform which would necessarily be involved in the general introduction of out-of-court conciliation. In any event, following a recommendation of the Inter-departmental Committee,⁶⁹ a project unit was set up in September 1985 to monitor and assess, over a three year period, the effectiveness and economics of different forms of conciliation.⁷⁰ The unit, located at the University of Newcastle, is due to report in 1988 and its recommendations will be potentially important to the future role of conciliation in England, especially regarding the issue of public funding.

a. Initial hearings. The Booth recommendations urge for conciliation in defended cases or those involving children. The proposal asks for an initial hearing before the registrar within ten weeks of the commencement of divorce proceedings. The informal hearing's purpose would be to dispose of aspects of the matter through appropriate orders made by the registrar based upon the extent of the parties agreement; to define the issues in dispute and to make conciliation available. The decision whether to take part in conciliation should, in the view of the Booth Committee, rest with the spouses; but, the court at the initial hearing, should have power to refer the parties to a welfare officer "for the purpose of discussing the nature of conciliation and its relevance to the dispute"⁷¹ The process would be a two-stage one with actual conciliation only following an initial hearing concerned solely with the question of proceeding to conciliation.

b. Confidential information. The major adjustments to existing procedure proposed in the Booth report follow from the view that "conciliation should form a recognized part of the legal procedure" with the aim to "marshal such reasonableness and objectivity as exist and to direct the parties towards solving the essentially practical problems which arise."⁷² The need for confidentiality concerning matters disclosed in conciliation gives some indication of the nature of the organ proposed to be implanted into the fundamentally adversary divorce process: "Our firm view is that conciliation requires that there should be a full and free exchange between the parties and that this is unlikely to occur if

with a salaried professional staff." REPORT OF THE INTER-DEPARTMENTAL COMMITTEE ON CONCILIATION, para. 5.11.

69. *Id.* at para. 5.18-5.22.

70. The INTER-DEPARTMENTAL COMMITTEE REPORT (para 3.14) notes the salient differences between the various schemes. The variations are essentially different permutations of the stages in which the relevant personnel are involved. *Id.* at para. 3.14.

71. *Id.* at para. 4.59.

72. *Id.* at para. 3.11.

there is a possibility of matters disclosed in conciliation being referred to in subsequent proceedings."⁷³

E. Prospects of Reform Following The Booth Report

What are the prospects of reform on the basis of the Booth recommendations; if the report is shelved, can a way forward be predicted? The cost factor could well deter implementation of these progressive proposals. The initial hearing would mean that solicitors "may have to do significantly more work than they currently do . . . in undefended suits;"⁷⁴ and, the powers that be may well balk at proposals which would inevitably produce an increased call on public funds through legal aid payments. A failure to introduce in-court conciliation as part of the divorce process will, of course, mean that the existing and expanding structure of conciliation services will continue to have a growing role, albeit, subject to local variations of form and availability. The possibility of a system whereby court-referred conciliation work is contracted out to an independent service is questionable. This would be more cost effective than a system relying primarily on professional welfare officers.⁷⁵

F. Developments of Conciliation In Scotland

The development in Scotland of a wholly independent out-of-court service may, given sufficient growth, demonstrate an advantage in a system free from association with the formal and, inevitably, to some degree legalistic divorce process. On the other hand, it could not match the uniform availability which is a feature of conciliation built into divorce procedure.⁷⁶ In a relatively small jurisdiction, a number of voluntary conciliation centers, serving the various regions, may achieve sufficient rationalization and uniformity of service to avoid the need for a

73. *Id.* at para. 4.60.

74. *Id.* at app. 1 para. 2.

75. PARKINSON, *supra* note 16, at 207-08.

76. Scotland has no equivalent of the English registrar, a quasi-judicial officer of the court whose role lends itself well to convening an informal hearing with a view to encouraging conciliation. Nor does Scotland have an equivalent of the English probation service operating as a separate social welfare arm of the courts. Since the Social Work (Scotland) Act 1968 (§ 27) forensic social reports have been provided by local authority welfare workers; but even before the Act the Scottish position was markedly different from the English probation service and probation officers had no significant role as conciliators in matrimonial work; See REPORT OF THE DEPARTMENTAL COMMITTEE ON THE PROBATION SERVICE, para. 138. One researcher saw this difference as likely to mean that the Scottish legal profession would be slower to recognize the benefits of conciliation "[g]iven that conciliators are usually drawn from social work, and social workers and lawyers have less experience of working together than in England." See J. FORSTER (The Scottish Council for Single Parents), DIVORCE CONCILIATION at 14 (1982).

process-based system which could well be incapable of the level of success of a service detached from the legal bureaucracy. This seems to be the way developments are moving under the umbrella body of the Scottish Association of Family Conciliation Services formed in June 1986.⁷⁷

VI. CONCLUSION

As the above discussion demonstrates a number of related factors can be identified in the British developments towards the availability of some form of alternative dispute resolution in divorce. Both English and Scots law have made adjustments in recognition of the inevitability of widespread divorce in modern life. English law, especially, has attempted to protect the threatened family unit by introducing reconciliation requirements as part of a package of divorce reform; however, these devices have proved to be impotent. Reform of the substantive grounds of divorce has been followed by some changes—or proposed changes—to the traditional contest based procedure.

Most recently, the focus of attention has shifted towards conciliation processes which, on the premise of unavoidable divorce, place the emphasis upon reducing the destructive intensity of litigation. Even though these developments have been different in England and Scotland there is a growing indication of a movement towards reconciliation in an attempt to protect children from the effects of divorce.

From the point of view of legal institutions, what is happening in both England and Scotland illustrates an awareness of law concerned with people and their personal family relationships and the need to protect individuals from pragmatic forces generated by new social conventions for divorce. This need is bringing about change in advance of actual law reform.⁷⁸ Despite the inertia and procrastination which hamper efforts to reform family law and the structure of the courts, stones which are thrown into the family law pond do not necessarily sink without trace. The ripples have spread out from many local centers over the last ten years, not only in a widening circle of small practical experiments but more fundamentally in an interdisciplinary approach to the problems of marriage breakdown and divorce.⁷⁹

77. For an assessment of the first two years of the Scottish Family Conciliation Service, serving the Lothian area, see REPORT OF THE CENTRAL RESEARCH UNIT OF THE SCOTTISH OFFICE, THIRD REPORT, 1986.

78. The most recent British development is solicitor mediation, involving a single legal practitioner acting as neutral mediator on behalf of both parties. See Dyer, *The Divorce Solicitors Who Don't Take Sides*, LAW MAG. 33, 34(1987).

79. PARKINSON, *supra* note 16, at 209.