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Domestic Relations Law--The New Cooling-Off and Conciliation Provisions

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State, holding that a debt, whether liquidated or not, is a sufficient basis on which to predicate quasi in rem jurisdiction, at least to the value of the debt.[85] The court found the equal protection argument to be without merit since the defendant's treatment was the same as that of any other non-resident defendant who is insured by a carrier doing business in New York. Furthermore, defendant here was in no worse position than a resident New Yorker who is subject to in personam jurisdiction.

As to the due process defense, the court held that it was not legally insufficient and, thus, concluded that it could not be dismissed on motion. The court seemed disturbed by the consequence CPLR 320(c) might have on the defendant's right to have an adequate and realistic opportunity to appear and be heard in defense. Analyzing 320(c) to have a leverage effect, the court recognized that while the attachment of the contractual obligations only gives the New York court jurisdiction to declare rights in that property, the *condition* attached to defendant's right to defend its interest in that property is that it submit to in personam jurisdiction. The court further realized that if the defendant had defaulted, judgment would be rendered against him, and the attached obligations, after evaluation, would be paid to the plaintiff. Then, under CPLR 6204, the insurer would be discharged from his obligations to investigate, defend and indemnify the defendant if the plaintiff later brought suit in defendant's home state. This would deprive the defendant, both in New York and in its home state, of the defense for which it contracted unless it submitted to in personam jurisdiction.

DOMESTIC RELATIONS LAW—THE NEW COOLING-OFF AND CONCILIATION PROVISIONS

Marriage is often acclaimed the cornerstone of an ordered society, and yet, until comparatively recently, there has been an unfortunate failure of our domestic relations laws to provide effective means to salvage marriages needlessly headed to complete or partial dissolution. Traditionally, the machinery of the law had been primarily directed toward the alteration or extinguishment of the status. However, the general consensus of the domestic relations bar is that many couples reluctantly pursue marital litigation when they might, with professional guidance, attempt to reconcile their differences.

This note will attempt to survey the various methods that have recently been developed to foster reconciliation with a view

[85] *See* Pennoyer v. Neff, 95 U.S. 714 (1878). The Court relied mainly upon New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916) and Harris v. Balk, 198 U.S. 215 (1905).

toward comparison between the New York and sister-state "cooling-off" statutes and conciliation procedures.

The Need for New Legislation

It was early recognized that often a marital action is hastily instituted because of an emotional experience temporarily alienating the parties. But, once the papers are filed and the accusations involving heretofore private and intimate details are exposed to judicial and public view, the possibility of a reconciliation becomes considerably more remote.[86]

To make the courts less accessible for divorce actions, Illinois, for a period of some ten years, had a "cooling-off" statute which postponed the filing of the complaint in divorce actions for sixty days from the date of service of the summons.[87] Until the recently reformed divorce law, there was no such "cooling-off" period existent in New York because the same advantages were thought to have been afforded by the interlocutory decree interval.

In New York, the decision or report of a court or referee in annulment and divorce actions must be filed and an interlocutory judgment entered within fifteen days after the party becomes so entitled.[88] Three months after entry of the interlocutory judgment, such judgment becomes final as of course.[89] During the three

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[86] Miner, *Conciliation Rather Than Reconciliation*, 43 ILL. L. REV. 464 (1948); N.Y. JOINT LEGISLATIVE COMM. ON MATRIMONIAL & FAMILY LAWS, REPORT, LEG. DOC. No. 26, at 66 (1958).

[87] The statute has recently been amended to provide the plaintiff with the option of either commencing the divorce action as any other civil case or filing a praecipe for summons. The sixty-day "cooling-off" period is no longer in effect. ILL. ANN. STAT. ch. 40, § 7a (Smith-Hurd Supp. 1966) and historical and practice notes thereto.

Some states have provided for a "cooling-off" period by requiring a delay between the commission of the offense which justifies the matrimonial action and the filing of the papers to commence it. *See, e.g.*, N.J. REV. STAT. § 2A:34-2 (1951); N.C. GEN. STAT. § 50-8 (Supp. 1965). The primary purpose of these statutes is to provide the couple with a period during which they can reflect upon their situation and possibly reconcile their differences. *See* Riddell v. Guggenheim, 281 F.2d 836 (9th Cir. 1960); Pantle v. Pantle, 19 Ill. App. 2d 353, 153 N.E.2d 740 (1958). Other reasons given to justify these "cooling-off" statutes are that they prevent fraud and collusion, and, in the case of statutes providing for delay between filing the complaint and the trial, they give the defendant time to prepare his case. Boring v. Boring, 155 Kan. 99, 122 P.2d 743 (1942); Calvert v. Calvert, 130 Ohio St. 369, 199 N.E. 473 (1936).

[88] DRL § 241. While the interlocutory decree has been retained, its significance as a conciliatory measure is greatly diminished by the new "cooling-off" period and conciliation procedures. The interlocutory period, however, still remains as a final alternative to dissolution. *See* DRL § 242.

[89] DRL § 242.

month interval, however, the marriage is still in esse,[90] and the court has authority, if sufficient cause is shown, to execute an order denying such automatic finality to the judgment.[91] Reconciliation would be, of course, a sufficient reason.

The value of the interlocutory interval as a period in which the parties may resolve their differences is weakened by the possibility of a claim of condonation. An attorney may advise his client not to have any contact with the other spouse so as to avoid the possible assertion of the defense. Likewise, the injured spouse may regard attempts to reconcile differences during this period as a trick to upset the judgment.[92]

The remainder of this article will explore New York attempts at "cooling-off" and conciliation conferences with references to sister-state experiences where valuable for further elucidation.

Cooling-Off

Effect of the Statute

With additional grounds for divorce being introduced in New York, the aforementioned inability of the interlocutory system to induce reconciliation became more pronounced and made the Illinois "cooling-off" device more attractive. Consequently, Section 211 of the Domestic Relations Law was enacted to require a 120-day period after service of the summons before the complaint could be served in a divorce or separation action.[93] Service of the complaint upon the expiration of unsuccessful conciliation proceedings, however, is authorized in a divorce action before the termination of the 120-day period.[94]

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[90] *In re* Crandall, 196 N.Y. 127, 89 N.E. 578 (1909); Pettit v. Pettit, 105 App. Div. 312, 93 N.Y.S. 1001 (3d Dep't 1905).

[91] DRL § 242. *See* Burgher v. Burgher, 184 Misc. 682, 54 N.Y.S.2d 683 (Sup. Ct. Broome County 1945).

[92] Note, *A "Cooling-off" Period in Divorce Actions*, 24 BROOKLYN L. REV. 313, 317-18 (1958).

[93] The wisdom of completely excluding mention of annulment proceedings in section 211 may be questioned. An annulment may be granted for numerous reasons spanning from the fact that a former spouse is living to the fact that one of the spouses is underage. Section 211 should be made applicable at least to the less reprehensible grounds. Many of these marriages are potentially good and since the impediment which renders them voidable is not always significantly against public policy, their continuance should sometimes be encouraged.

[94] DRL § 211. As will be discussed in detail later, participation in conciliation proceedings is mandatory if the couple is pursuing a divorce action. If the conciliation official determines that participation will serve no purpose, the procedures will come to an early end and the complaint may be filed before the termination of the 120-day period. Inasmuch as the conciliation provisions do not apply to those commencing separation actions, this possibility of prematurely serving a complaint does not exist.

Although the "cooling-off" device as applied to matrimonial actions is new in New York, it has been available in other states for many years. Some statutes have been regarded as jurisdictional, *i.e.*, viewed as a limitation upon the power of the court, and, thus, decrees entered prior to the expiration of the period are void.[95] If the decree is entered after the statutory period, but is predicated upon a trial terminating before, some courts still regard the decree as a nullity.[96] It should be noted that the statutes held to be jurisdictional contain language directed not only to the parties, but the court as well, and thus prevent the courts from hearing evidence or granting relief within the prescribed period since the prohibition goes to subject matter jurisdiction.[97] The provisions are therefore mandatory and their terms cannot be dispensed with or waived.[98]

The New York statute, however, which merely precludes plaintiff's service of complaint in a separation action, may be more easily construed as procedural.[99] The statute is concerned only with pleading. Ostensibly, it contains no language that could be read as a prohibition upon the exercise of jurisdiction.[100] On its face, it contains no language that could be read as a prohibition upon the exercise of jurisdiction. If a hidden purpose of the statute is to limit the court's jurisdiction, a statutory amendment or judicial construction will be necessary to reveal it. Therefore, in separation actions, where conciliation proceedings

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[95] Givens v. Givens, 304 S.W.2d 577 (Tex. Civ. App. 1957). *Contra,* Edelson v. Edelson, 58 So. 2d 148 (Fla. 1952); Jackson City Bank & Trust Co. v. Frederick, 271 Mich. 538, 260 N.W. 908 (1935).

[96] *See* Garrett v. State, 118 Neb. 373, 224 N.W. 860 (1929). If only a portion of the evidence is taken before the end of statutory period, however, at least one jurisdiction will honor the decree. Pavell v. Pavell, 168 S.W.2d 283 (Tex. Civ. App. 1943). Another court has held that only evidence admitted after the statutory period may be considered. Brown v. Brown, 6 Pa. D. & C. 698 (1925).

[97] *E.g.*, NEB. REV. STAT. § 42-305.02 (1960).

[98] Beeler v. Beeler, 218 S.W. 553 (Tex. Civ. App. 1920).

[99] Although section 211 applies to divorce as well as separation actions, this discussion must be restricted to the latter because of section 215-g. This section provides that no divorce action shall be brought to trial until a final report is filed by a conciliation commissioner (to be discussed later) or the termination of the 120-day "cooling-off" period. This language apparently is intended to limit the subject matter jurisdiction of the court. It does not apply to separation actions which are only discussed in section 211.

[100] *Compare* "No suit for divorce shall be *heard* or *tried* until after service has been had or perfected . . . but in no event . . . until sixty days after the filing of plaintiff's petition" NEB. REV. STAT. § 42-305.02 (1960) (emphasis added) *with* "an action for divorce or separation shall be commenced by the service of a summons. A verified *complaint* in such action *may not be served* until the expiration of one hundred and twenty days from the date of service of the summons or the expiration of conciliation proceedings . . . whichever period is less." DRL § 211 (emphasis added). *Cf.* DRL § 215-g.

are not required, the courts may be inclined to entertain a suit prior to the expiration of 120 days if both parties join in a stipulation agreement to dispense with the remainder of the period. Such an agreement under proper circumstances may be sufficient indication of the irreconciliability of the couple to convince the court that further delay would be ineffectual. If there is no indication of fraud, and the defendant does not need the additional time to prepare his defense, the court could very well honor such an agreement and proceed immediately.[101]

The Statutory Period

The computations necessary to determine when the statutory period ends have been the subject of some litigation.[102] In states where the delay is imposed between the time of filing the complaint and the commencement of the trial, it has been held that if the plaintiff amends the complaint but does not alter the cause of action, the "cooling-off" period is computed from the time the original complaint is filed.[103] Such a problem would never arise in New York since the waiting period occurs between the filing of the summons and the complaint.

An analagous question could arise concerning the satisfaction of the waiting period if the service of summons was defective and another was subsequently served, with the computations starting from the time of the first service. So long as there is a total of 120 days during which the plaintiff can reflect upon his action there would seem to be no harm in computing the period from the time of the first service. More often than not, the defendant will be aware of the plaintiff's activities and will be afforded an opportunity to appeal to him and possibly effect a reconciliation. If, under an unusual circumstance, the defendant does not know of the institution of the action, the court might then compute the period from the time of the second service so as to enable the defendant to appeal to his spouse.

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[101] *See* Dyer v. Dyer, 300 Ky. 559, 189 S.W.2d 842 (1945). The court could justify this action despite the statute by arguing that section 211 was never intended to apply to hopelessly irreconcilable couples. The primary purpose of the provision is to provide the spouses with a period for serious reflection before continuing the action. Such would be an idle gesture if the evidence conclusively demonstrated that the delay would be fruitless.

[102] For two interesting cases concerning computations of time and discussing what a difference a day makes, see Boring v. Boring, 155 Kan. 99, 122 P.2d 743 (1942), and Snow v. Snow, 223 S.W. 240 (Tex. Civ. App. 1920). This subject is now expressly treated by statute in New York. N.Y. GEN. CONSTR. LAW § 20.

[103] Hipple v. Hipple, 121 Kan. 495, 247 P. 650 (1926); Van Dyck v. Van Dyck, 121 S.W.2d 642 (Tex. Civ. App. 1938).

Relief which may be had during the period

A question arises regarding the wife's ability to move for temporary alimony, maintenance and counsel fees during the "cooling-off" period. Under prior New York law, alimony and maintenance could be granted only where the movant could evidence reasonable probability of success in the action.[104] Where the wife was unable to show a cause of action, she was denied all incidental relief.[105] Under the recently enacted section 236,[106] it was held in *Insetta v. Insetta*[107] that the court now has complete discretionary power to make such allowances for support and maintenance notwithstanding the wife's failure to prove her cause of action.

In *Crocker v. Crocker*,[108] the court held that in the light of these developments and the purpose of the "cooling-off" statute, a motion for temporary alimony and counsel fees may still be entertained simultaneously with or immediately after the commencement of a separation action. The court emphasized that the wife should not be allowed to show the specifics of her case and thus jeopardize any reconciliation efforts. The court analogized incidental motions in a separation action with those in a divorce action where the statute allows such relief on a mere showing of the husband's financial ability and the movant's needs.[109] Importantly, the court held that the filing of the complaint in a separation action before the termination of the "cooling-off" period necessitates the dismissal of the action.[110]

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[104] Kingston v. Kingston, 283 App. Div. 355, 128 N.Y.S.2d 78 (3d Dep't 1954) (decided under CPA § 1164, the predecessor to DRL §§ 236-37).

[105] Fein v. Fein, 261 N.Y. 441, 185 N.E. 693 (1923); Kamman v. Kamman, 167 App. Div. 423, 152 N.Y.S. 579 (4th Dep't 1915).

[106] Section 236 authorizes the court to grant alimony to the wife "notwithstanding that the court refuses to grant the relief requested by the wife (1) by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to the husband in an action in which jurisdiction over the person of the wife was not obtained, or (2) by reason of the misconduct of the wife, unless such misconduct would itself constitute grounds for separation or divorce, or (3) by reason of a failure of proof of the grounds of the wife's action or counterclaim."

[107] 20 App. Div. 2d 544, 245 N.Y.S.2d 133 (2d Dep't 1963). *Accord*, Frank v. Frank, 26 App. Div. 2d 837, 274 N.Y.S.2d 294 (2d Dep't 1966).

[108] 54 Misc. 2d 738, 283 N.Y.S.2d 362 (Sup. Ct. Queens County 1967).

[109] DRL § 215-e.

[110] Crocker v. Crocker, 54 Misc. 2d 738, 283 N.Y.S.2d 362 (Sup. Ct. Queens County 1967).

Conciliation

Prior Conciliation Schemes

The value of conciliation proceedings became apparent to the New York legislature long before it embraced the "cooling-off" concept.[111] The first significant legislation in New York was Section 1165-b of the Civil Practice Act which empowered the justices of the Supreme Court to establish a voluntary marital conciliation service.[112] One of the major weaknesses of the Act was that it required the continued consent of both parties throughout the conferences.

The judicial reorganization of 1962 established the Family Court,[113] and conferred upon it jurisdiction over "proceedings for [the] conciliation of spouses. . . ." [114] Supplementary legislation provides that one spouse may initiate the proceedings by filing a petition in the Family Court expressing the need for counseling by the court's Probation Service because the marriage is in trouble.[115] It also mollifies the mutual consent provision of the CPA. Now the court has the power upon application of the petitioner to order the reluctant spouse to attend a conciliation conference if, after a hearing, the court concludes that such attendance could possibly effectuate reconciliation.[116]

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[111] While the "cooling-off" section in question became effective September 1, 1967, conciliation proceedings in varying forms and degrees have been available in New York for over ten years. The first significant conciliation program was instituted without precise statutory authority but rather by the exercise of the judicial rule-making power of the Supreme Court. The First Judicial District established Part XII in 1955 to exclusively hear matrimonial actions and proceedings. The justices had discretionary power to refer cases to two caseworkers, and outside assistance was sometimes utilized. This machinery was used primarily for the negotiation of agreements concerning custody, support and maintenance rather than reconciliation. Additionally, the justices who served in Part XII complained of the lack of funds to adequately staff and maintain these auxiliary services. *See* N.Y. JOINT LEGISLATIVE COMM. ON MATRIMONIAL & FAMILY LAWS, REPORT, LEG. DOC. NO. 26, at 60, 66 (1958).

[112] With the enactment of the CPLR, this section was transferred to Section 154(a) of the Judiciary Law and has recently been repealed by N.Y. Sess. Laws 1966, ch. 254, § 13.

[113] N.Y. CONST. art. VI, § 13(a).

[114] N.Y. CONST. art. VI, § 13(b)(6).

[115] FCA § 921.

[116] FCA § 924. This power should be utilized sparingly. One commentator urges that the best way to salvage a marriage is by positive motivation—an appeal to the rewards, hungers, and desires stimulating human action and attitudes, as opposed to negative motivation accomplished through threats such as court orders. Cayley, *Conciliation Counseling in a Family Court*, 30 FED. PROBATION 27 (1966). Apparently cognizant of this fact, the Act allows the Probation Service to "invite" the petitioner's spouse to attend the conference and only if he does not subsequently attend is any coercive procedure authorized. FCA §§ 922, 924.

If the petitioner's spouse attends one conference, either voluntarily pursuant to an "invitation" or by the coercion of a court order, and then fails to attend any others, the court upon due notice may hold hearings to determine whether the proceedings should terminate. If the court decides that further conferences are feasible, it may direct the spouses to attend another conference.[117] The reluctant spouse cannot be made to attend beyond ninety days after the petition is filed unless there is a subsequent consent.[118]

The recent amendment to the divorce law significantly narrows the scope of these Family Court activities. As will be discussed later, a conciliation bureau is established to conduct *all* conciliation proceedings after the institution of divorce actions. This use of the word "all" apparently strips the Family Court of conciliatory jurisdiction in divorce cases once a suit has been commenced, thus leaving to the Family Court couples who have not yet taken legal action or who are involved in separation or annulment actions.

Divorce Conciliation

Before discussing in detail the conciliation provisions of the new divorce law, some examination of sister-state experiments in this area might be of value since they are the source of the New York formula.

In 1960, Wisconsin established a state-wide family court with jurisdiction limited to marital disputes. As in New York, there is a mandatory "cooling-off" period before filing the complaint. Reconciliation attempts are automatically required during this period for those pursuing divorce and separation actions. When a complaint is eventually filed, it must contain only the statutory grounds for relief but not specific allegations of misconduct.[119] Thus, the incendiary elements of some divorce pleadings are prohibited.

Prior to the inauguration of the state-wide program, Milwaukee County conducted voluntary conciliation proceedings and statistics disclose the relative effectiveness of the two systems. In the four years preceding the creation of compulsory conciliation, thirty-nine percent of the actions were discontinued before trial as compared to forty-eight percent during a comparable period under the compulsory system.[120]

In contrast is the method available in Los Angeles County. As in the New York Family Court, one spouse *may* file a petition

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[117] FCA § 925.
[118] FCA § 926.
[119] Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U.L. REV. 353, 358-60 (1966).
[120] *Id.* at 359.

for conciliation and the other spouse may be compelled to appear. After a joint meeting, the parties are counseled separately with the objective of having the spouses enter a "husband-wife agreement" resolving the issues of contention between them and establishing mutually agreed upon remedies. Once the parties sign the agreement, it is submitted to the judge and made an order of the court, although the agreement is terminable by either party. Third persons who cause disharmony, such as in-laws, may be named as parties to the proceedings and thereby subject themselves to citations for contempt if they interfere with conciliation efforts.

In 1963, 64.2 percent of all petitions filed resulted in reconciliation where both parties participated in the conference. Records over an eight year period showed that three out of four couples so reconciled were still living together. It should be noted, however, that in 1963 there were only 4,395 petitions for reconciliation while there are over 35,000 divorces filed in Los Angeles County each year.[121]

New York's Joint Legislative Committee analyzed these and other programs [122] before expanding the state's conciliation system, structured primarily on the Wisconsin system. It establishes a conciliation bureau administered and supervised by a supreme court justice [123] empowered to appoint conciliation commissioners, special guardians, and counselors. The commissioners and guardians must be attorneys admitted to practice in New York for at least five years,[124] and the counselors' qualifications are fixed by each appellate division.[125] No social work training or experience is required by statute for any of these positions.

Within ten days after commencing a divorce action, the plaintiff must file a notice of the action with the bureau in the district where he or she resides or the action is deemed discontinued.[126] The notice must contain the names, ages, and addresses of the parties and any minor, handicapped or incompetent children of the couple. Upon such filing, the supervising justice refers the matter to a commissioner, and if there are any minor, handicapped or incompetent children, the commissioner may request a

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[121] *Id.* at 364-67.

[122] For further discussion of court-oriented conciliation systems presently in use in various states, see N.Y. JOINT LEGISLATIVE COMM. ON MATRIMONIAL & FAMILY LAWS, REPORT, LEG. DOC. No. 8, at 49-83 (1966).

[123] The supervising justice is designated by a majority of the justices of the appellate division of the judicial department in which the district is located. DRL § 215.

[124] DRL § 215-b(b), (d).

[125] DRL § 215-b(c). The appellate division is authorized to make use of outside agencies established in the various judicial districts.

[126] DRL § 215-c(a).

special guardian for them who is then made a party to the proceeding.[127]

All parties must attend the first conference but if sufficient cause is shown to the commissioner, a certificate of "no necessity" may be secured and the conciliation procedures will terminate.[128] If one of the parties fails to appear at the first conference, however, the commissioner may request the supervising justice to issue an order directing such party to appear or be punished for contempt.[129] After the parties attend the first conference but the commisioner deems that no further proceedings would be fruitful, he may issue a certificate of "no *further* necessity," report the same to the supervising justice, and the proceedings are at an end.[130]

If, alternately, the commissioner believes that further conferences may be beneficial, he may refer the parties to a counselor for conferences to commence ten days thereafter. The counselor may, with the consent of the parties, make use of physicians, psychiatrists, or clergymen of the religious denomination to which the parties belong.[131]

If the conference with the counselor does not effect a reconciliation, a report is filed with the commissioner and a conciliation hearing requested. This final report must be filed within thirty days after referral of the matter to him.

The proceedings are at an end if the commissioner does not consider a hearing necessary.[132] In the event, however, that reconciliation is deemed possible, he may fix a date for the conciliation hearing to be held within thirty days after the date of the counselor's final report.[133] The commissioner must give notice to each party and attendance by them is mandatory,[134] but at such hearing each party has the right to be heard, present evidence, cross-examine witnesses, and be represented by counsel.[135] Any party, as well as the commissioner, has the power to subpoena witnesses, books, documents and any other evidence.[136]

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[127] DRL §215-c(b)(1). Special guardians are to protect the interest of these children by making recommendations as to their custody, maintenance and support. DRL § 215-c(c).

[128] DRL § 215-c(b)(2). After the conciliation procedures are thus terminated, the plaintiff need not wait for the expiration of the 120-day "cooling-off" period in order to serve the complaint. DRL § 211.

[129] DRL § 215-c(b)(3).

[130] DRL § 215-c(b)(4)(b).

[131] DRL § 215-c(e).

[132] DRL § 215-d(a).

[133] DRL § 215-d(a), (d).

[134] DRL § 215-d(a).

[135] DRL § 215-d(b).

[136] DRL § 215-d(c).

Compulsory Reconciliation

One of the more controversial sections of the new conciliation article[137] is section 215-d(e). Pursuant to this section, the commissioner, on the basis of the evidence submitted at the hearing, may conclude that a reconciliation is possible and in the best interest of all concerned. He must submit his finding to the supervising justice and apply for a sixty-day order compelling the parties to attempt a reconciliation.

As previously discussed, most marriage experts question the efficacy of coerced reconciliation.[138] Furthermore, it is questionable whether contempt proceedings may be instituted for failure to comply with the sixty-day order. All other references to orders appearing in Article 11-B have an accompanying provision authorizing contempt proceedings for non-compliance.[139] If the exclusion of any reference to contempt proceedings in section 215-d(e) was intended to manifest an absence of judicial power to do so, a serious question may be raised as to the propriety of authorizing unenforceable court orders. In the event, however, that the exception for this section is construed as a mere inadvertance, and contempt citations are issued for non-compliance, some serious constitutional questions would be raised.

Assuming, arguendo, that contempt proceedings are authorized by section 215-d(e), they must be based on the party's failure to "attempt to effect a reconciliation." It has been held that contempt proceedings are so similar in nature to criminal prosecutions that the requirements of due process must be satisfied.[140] A criminal statute must explicitly establish a standard of guilt and clearly specify proscribed conduct. It cannot be so vaguely drafted that reasonable men might differ as to its meaning and application, or due process will be violated.[141] Likewise, a court order in the marital sphere must be precise and leave no reasonable doubt about the extent of its command.[142] Consequently, vagueness may well be a good defense in a contempt proceeding.[143]

If a court order pursuant to section 215-d(e) is issued, reasonable men could differ as to its scope and extent. Will one conversation attempting to reach a compromise suffice? Must the parties seek professional marital counseling? The problem of definiteness might be resolved by the court's drafting an order specifically delineating the required conduct. But if the court

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[137] DRL art. 11-B.
[138] *See supra* note 117.
[139] DRL §§ 215-c(b)(3), 215-d(c).
[140] Lynch v. Uhlenhapp, 248 Iowa 68, 78 N.W.2d 491 (1956).
[141] Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Instruction, 368 U.S. 278 (1961).
[142] G. v. Souder, 305 S.W.2d 883 (Mo. Ct. App. 1957).
[143] Brody v. District Ct., 250 Iowa 1217, 98 N.W.2d 726 (1959).

drafts such a specific order, the problem of coercion arises. In the case of *People* ex rel. *Bernat v. Bicek*,[144] Illinois' highest court held a conciliation statute unconstitutional because, *inter alia*,[145] the statute was coercive. Noting that the conciliation statute did not require, as a prerequisite, the consent of the parties to attempt a reconciliation, "there would be an element of compulsion present which . . . basic law does not sanction" when a party opposes such efforts.[146]

Conclusion

The new divorce law is a significant step in bringing New York in line with recent prophylactic concepts concerning the role of law in marital litigation. However, there are several inadequacies which should be investigated and corrected.

As discussed above, section 215-g prohibits the trial of a divorce action until the conciliation commissioner's final report is filed with the supervising justice or the 120-day "cooling-off" period expires. Therefore, if the conferences continue for an extended period, the conciliation efforts will not be thwarted, for at least 120 days, by a simultanous trial of the action. However, the absence of a delay provision applicable to separation actions creates a possibility of such a concurrent trial. For example, suppose the wife institutes a separation action necessitating the 120-day delay, and, toward the end of the "cooling-off" interval, the husband institutes a suit for divorce which incidentally requires the couple to attend conciliation conferences. There is no statutory prohibition to trying the wife's separation action after her "cooling-off" interval ends, and concurrently holding the conciliation conferences incident to the husband's divorce action. Apparently

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[144] 405 Ill. 510, 91 N.E.2d 588 (1950).

[145] Another constitutional objection to the statute was that it authorized the assistance of representatives of the religious denominations to which the parties belonged. The court challenged the use of the state-established and tax-supported instrumentality by religious groups to spread their faith. The court also recognized a conceptual problem of inviting representatives of faiths which categorically opposed divorce under any circumstances. How can such representatives "be expected to respond to an invitation to repair to and aid a civil court when their religion considers the proceedings a nullity?" 405 Ill. at 525-26, 91 N.E.2d at 596. This problem might easily be resolved by realizing that the religious denomination worrying the court, obviously the Roman Catholic Church, does *not* consider the proceedings a nullity for all purposes. All incidental relief granted in divorce actions is not condemned. The decree is dishonored only to the extent that it purports to dissolve the marriage. Such a distinction is important in the New York context due to section 215-c(e) which also authorizes the use of the clergy by the conciliation bureau.

[146] People *ex rel.* Bernat v. Bicek, 405 Ill. 510, 91 N.E.2d 588 (1950).

the court could not consolidate the actions because the conciliation bureau has no jurisdiction over separations.[147]

There should be a provision authorizing a stay of separation actions while court-sponsored conciliation conferences are in progress. In this manner, the inconsistency between divorce and separation provisions, which may give rise to an inadvertent subversion of the intent to promote reconciliation, will be eliminated. The conciliation procedures of both the family court and the conciliation bureau provide ample judicial review of the couple's progress in order to filter out those who are merely using the program for stalling tactics.

There are also problems concerning the prerequisites for employment with the conciliation bureau. The only statutory qualifications for commissioners and special guardians is five year membership in the bar although their duties may often require nonlegal counseling. Required attendance in a comprehensive course in social work would certainly increase their effectiveness. Additionally, the statute gives each appellate division the discretion in formulating the rules for the appointment of counselors. The counselor plays the most vital role in the proceedings and uniform qualifications should be established by the Judicial Conference or the legislature to assure consistent quality of counseling throughout the state. Such state-wide prerequisites would significantly lessen the possibilities of political patronage inherent in the present system.

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[147] Brinkmann v. Brinkmann, 54 Misc. 2d 882, 283 N.Y.S.2d 680 (Sup. Ct. N.Y. County 1967) (dictum).