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Notes and Comments

OFFERS OF RECONCILIATION IN MARYLAND DIVORCE LAW

It is generally understood that most domestic relations law developed under the influence of an overriding concern with preserving the sanctity of the marriage relationship. In decreeing divorces the courts in a sense were forced to perform a function in which they, or rather the society which they served, did not believe. Under a strong and lingering religious influence, the hands-off policy of the courts reflected society's desire that marriages not be terminated except in extreme situations. As the Maryland Court of Appeals said in dealing with a factually complicated desertion case:

It is not the province of the courts to settle marital disputes or to determine what husbands and wives should do in order to live harmoniously together. These are intensely personal matters which the parties must determine for themselves. What the courts have to do is determine the effect of actions that the parties have already taken and to adjudicate their legal rights based on these actions. In so doing, it is not the judicial province to encourage separations or to labor to find grounds for divorce where such grounds do not clearly appear. On the contrary, it has always been recognized that legal separations should not be decreed for light and trivial causes.¹

As a corollary to this general policy, reconciliations of estranged spouses were to be encouraged whenever possible. The Maryland General Assembly certainly had this in mind when it included the phrase "beyond any reasonable expectation of reconciliation" as one of the requirements for a divorce on grounds of either desertion or voluntary separation.² And the Maryland judiciary has just as certainly been guided by this consideration in its development of the law of divorce so as to favor spouses who attempt reconciliation in good faith and to penalize spouses who unjustifiably reject such attempts.³ It can fairly be said from this that encouragement of reconciliation

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

2. MD. ANN. CODE art. 16, § 24 (Supp. 1969). It is interesting to note that the new Maryland provision making an uninterrupted five-year separation a ground for divorce, independent of considerations of desertion and voluntary separation, does not include any such language concerning reconciliation. MD. ANN. CODE art. 16, § 24 (Supp. 1969).

3. See notes 12-28 *infra* and accompanying text.

is a concept deeply embedded in the Maryland divorce law, both as a general policy and as working rules developed by the legislature and the courts. Section 26A of article 16 of the Maryland Code purports to change these working rules by disallowing the use of offers of reconciliation either as a defense to, or as a ground for, a divorce.

In all actions for divorce an offer of reconciliation or an attempt to reconcile by one spouse without the concurrence of the other spouse shall not be available as a defense to a divorce nor in and of itself be a bar to a divorce; nor shall the refusal of a spouse to accept an offer of reconciliation made by the other spouse or the rejection by a spouse of any attempt at reconciliation made by the other spouse be available as a defense to a divorce nor in and of itself be a bar to or a ground for a divorce.⁴

It is the purpose of this comment to analyze the extent to which this change in the law affects not only the underlying social and judicial policies favoring reconciliation, but also the law of desertion and voluntary separation in Maryland.

THE LAW INVOLVING OFFERS OF RECONCILIATION PRIOR TO ARTICLE 16, SECTION 26A

Offers of reconciliation are important only in cases involving voluntary separation and desertion because these are the only two grounds for divorce in Maryland which require a separation of the spouses with a certain intent, i.e., the intent to terminate the marital relation. As the intent changes, so does the characterization of the separation. Since offers of reconciliation are evidence of the intent involved in the separation, they *should* be relevant in desertion and voluntary separation cases. The same situation is not presented with respect to other grounds for divorce, such as adultery, where an offer of reconciliation by itself could not affect the characterization of the original act, since intent to terminate the marriage relation is not an element of the offense.

The Desertion Cases

Desertion is a ground for both an *a mensa*⁵ and an *a vinculo* divorce⁶ in Maryland. An *a vinculo* desertion must last for eighteen

4. MD. ANN. CODE art. 16, § 26A (Supp. 1969). Maryland stands alone in enacting such legislation.

5. MD. ANN. CODE art. 16, § 25 (1966).

6. MD. ANN. CODE art. 16, § 24 (Supp. 1969). For an explanation and comparison of a *vinculo* and a *mensa* divorces, see Comment, *The Confusing Maryland Domestic Relations Procedures*, 4 MD. L. REV. 275, 281-85 (1940).

months,⁷ while an *a mensa* desertion has no duration requirement except that it must continue until the divorce action is begun.⁸ Aside from this difference, the elements of desertion in both instances are substantially similar.⁹ The basic elements of desertion are an end to cohabitation and an intention on the part of the offending party to terminate the marriage relationship without cause.¹⁰ Additionally, the elements must continue uninterrupted for the entire period of the desertion.¹¹ It is in reference to the intent requirement, which must exist throughout the entire separation period, that offers of reconciliation become significant.

There are three situations discernible in the desertion cases in which important legal consequences have resulted from the fact that an offer of reconciliation was made. The first involves a spouse who, after clearly deserting, returns and offers to renew the marriage relationship, only to be rejected.¹² Assuming the offer of reconciliation is in good faith and the rejection is unjustified,¹³ it is clear that the original deserter no longer has the requisite intent to end the marriage relationship. Thus, providing that the eighteen month period has not run before the making of the offer, proof of the offer and its rejection formerly was a good defense to a suit by the spouse originally deserted.¹⁴ Furthermore, the party who rejected the offer may have been guilty

7. MD. ANN. CODE art. 16, § 24 (Supp. 1969).

8. MD. ANN. CODE art. 16, § 25 (1966); *Miller v. Miller*, 153 Md. 213, 138 A. 22 (1927).

9. The statute defining *a vinculo* desertion requires that it be "beyond any reasonable expectation of reconciliation." MD. ANN. CODE art. 16, § 24 (Supp. 1969). Art. 16, § 25, defining the *a mensa* grounds for divorce, does not contain this requirement. Moreover this difference seems to have no practical significance which is discernible in case law.

10. *E.g.*, *Wood v. Wood*, 227 Md. 211, 176 A.2d 229 (1961) (*a vinculo*); *Miller v. Miller*, 153 Md. 213, 138 A. 22 (1927) (*a mensa*).

11. *E.g.*, *Hubbard v. Hubbard*, 127 Md. 617, 96 A. 860 (1916).

12. *E.g.*, *Thurlow v. Thurlow*, 212 Md. 222, 129 A.2d 170 (1957); *Hokemeyer v. Hokemeyer*, 194 Md. 223, 71 A.2d 15 (1950); *Kruse v. Kruse*, 179 Md. 657, 22 A.2d 475 (1941).

13. See notes 55-59 *infra* and accompanying text.

14. *E.g.*, *Hokemeyer v. Hokemeyer*, 194 Md. 223, 71 A.2d 15 (1950) (*dicta*); *Simmont v. Simmont*, 160 Md. 422, 153 A. 665 (1931). In *Dunnigan v. Dunnigan*, 182 Md. 47, 31 A.2d 634 (1943) and *Kirkwood v. Kirkwood*, 165 Md. 547, 170 A. 180 (1934), offers of reconciliation raised in defense were made after the institution of the divorce action by the other spouse. Such offers were not given the same consideration as offers made before trial. In *Kirkwood*, where the wife offered to reconcile during her own suit for constructive desertion, the court said that "The wife must recover upon a cause of action subsisting at the time of her suit. . . ." 165 Md. at 553, 170 A. at 183. As to other reasons for excluding offers, see notes 55-59 *infra* and accompanying text.

of desertion from the time of the rejection:¹⁵ by rejecting a valid offer, the innocent party became the guilty party. The necessary elements of desertion — separation and intent to end the marriage relation — still existed. However, the intent to end the marriage, and thus the responsibility for the continuation of the separation, switched from one party to the other.¹⁶

A second situation arose when a husband and wife separated without the separation qualifying as a voluntary separation under the Maryland statute,¹⁷ and without any ground for divorce on either side.¹⁸ Under these circumstances, if one spouse made a bona fide offer to reconcile which was unjustifiably rejected, the spouse who rejected the offer became responsible for the continuation of the separation and could be guilty of desertion.¹⁹ Although the separation as it commenced was faultless, the two elements of desertion coincided when the offer was rejected and from this point constituted desertion.²⁰

The third desertion situation in which offers of reconciliation were given some importance arose when the deserted spouse offered to reconcile with the deserting spouse and was rejected.²¹ In the process of proving desertion, the deserted spouse would then use the rejection of this offer as evidence of a continuing intent to end the marriage relationship on the part of the deserter.²² It should be noted that in this situation the rejection of the offer was used only to prove a pre-existing desertion as to which there was other evidence. By contrast, in the first two situations, the rejection of the offer was used in and of *itself* to create either a ground for, or a defense to, desertion. In those situations, the offer effected a change in the respective legal positions of the parties as they existed prior to the offer: an original

15. *E.g.*, *Hornstein v. Hornstein*, 195 Md. 627, 75 A.2d 103 (1950); *Backus v. Backus*, 167 Md. 19, 172 A. 270 (1934).

16. It should be understood that this case would involve two separate eighteen month periods. The first one, beginning with the original desertion, is terminated by the rejection of the offer. The period measuring the rector's desertion would have a difficult starting point, *i.e.*, the point at which the offer is rejected. *See, e.g.*, *Hornstein v. Hornstein*, 195 Md. 627, 75 A.2d 103 (1950).

17. MD. ANN. CODE art. 16, § 24 (Supp. 1969).

18. *E.g.*, *Jester v. Jester*, 246 Md. 162, 228 A.2d 829 (1967); *Dearholt v. Dearholt*, 178 Md. 405, 13 A.2d 538 (1940).

19. *E.g.*, *Kaleta v. Kaleta*, 247 Md. 517, 233 A.2d 468 (1967); *Dearholt v. Dearholt*, 178 Md. 405, 13 A.2d 538 (1940); *Lynch v. Lynch*, 166 Md. 300, 170 A. 764 (1934).

20. As the Maryland Court of Appeals said in dealing with an *a mensa* desertion: "Separation and intention to abandon must concur in order to constitute cause of divorce on ground of abandonment; but they need not be identical at their commencement." *Hubbard v. Hubbard*, 127 Md. 617, 620-21, 96 A. 860, 862 (1916).

21. *E.g.*, *Heinmuller v. Heinmuller*, 133 Md. 491, 105 A. 745 (1919); *Buckner v. Buckner*, 118 Md. 101, 84 A. 156 (1912).

22. *E.g.*, *Stumpf v. Stumpf*, 228 Md. 350, 179 A.2d 893 (1962); *Kline v. Kline*, 179 Md. 10, 16 A.2d 924 (1940).

deserter suddenly had a valid defense or even a claim of desertion of his own or a separation amounting to a legal stalemate could be transformed into desertion. In light of the language of section 26A, this distinction as to the effect of the offer of reconciliation in desertion cases may well prove significant.²³

The Voluntary Separation Cases

The Maryland Court of Appeals has defined a voluntary separation, entitling the spouses to an *a vinculo* divorce,²⁴ as a "physical separation of the parties, by common consent with a common intent not to resume marital relations."²⁵ Under the voluntary separation statute, the separation must continue for a period of eighteen months.²⁶ If a spouse who initially agreed to a voluntary separation makes an offer to reconcile before the running of the eighteen month period, then obviously the mutual consent not to resume marital relations no longer exists. Thus, prior to the enactment of section 26A, a proper offer to reconcile which was rejected could have been used by the offering party as a *defense* to a divorce on the grounds of voluntary separation.²⁷ Furthermore, as was the law concerning initially innocent separations where a valid offer was subsequently made and rejected, the party whose offer was rejected presumably would have a *ground* for divorce based on desertion from that time on.²⁸ Thus, as in the desertion area, due to the court's underlying policy favoring reconciliation whenever possible, an offer of reconciliation could effectively alter the pre-existing legal positions of the spouses. In effect, an offer could turn a voluntary separation into desertion.

THE SCOPE OF ARTICLE 16, SECTION 26A

Section 26A states that an offer of reconciliation cannot "in and of itself" be a defense to a divorce. Nor can a refusal of such an offer "in and of itself" be a defense to, or a ground for, a divorce.²⁹ On its face the statute seems to be an attempt to take offers of reconciliation completely out of the desertion and voluntary separation scheme

23. See text accompanying notes 36-39 *infra*.

24. MD. ANN. CODE art. 16, § 24 (1966).

25. *France v. Safe Deposit & Trust Co.*, 176 Md. 306, 325, 4 A.2d 717, 725 (1939).

26. MD. ANN. CODE art. 16, § 24 (Supp. 1969).

27. *E.g.*, *Feltgen v. Feltgen*, 237 Md. 32, 205 A.2d 251 (1964); *Chalkley v. Chalkley*, 236 Md. 329, 203 A.2d 877 (1964). In both cases the defense was not sustained because the offers were held not to be in good faith.

28. See notes 17-20 *supra* and accompanying text.

29. MD. ANN. CODE art. 16, § 26A (Supp. 1969).

outlined above. That it is just such an attempt is attested to by the brief history of the prior version of section 26A.

As originally enacted in 1965, section 26A only barred the use of offers of reconciliation as a defense to a divorce.³⁰ The absurdity of this situation is demonstrated by *Jester v. Jester*.³¹ There the spouses were living apart under circumstances which the court characterized as entitling neither party to a divorce. However, during the separation the wife had made offers of reconciliation which the husband had unjustifiably rejected. The court cited the usual rule that "his refusal constituted desertion from the time of refusal,"³² and went on to point out that section 26A did not change this rule: "[S]ection 26A states only that an offer of reconciliation not concurred in by the other spouse shall not of itself be a defense or a bar to a divorce. . . . Refusal of the reconciliation attempt without justification continues to make the spouse refusing guilty of desertion."³³ While the facts in *Jester*, because of the nature of the initial separation, did not necessitate such a conclusion, it is possible to pursue the reading of the statute one step further; that is, that section 26A made it possible for *both* parties to be guilty of desertion simultaneously. Because of the statute, an original deserter could not use his offer to reconcile as a defense to his spouse's suit on the ground of desertion. However, the deserted spouse's rejection of the offer would give the original deserter a claim of desertion of his own. This would lead to the application of the doctrine of recrimination, so that neither party could obtain a divorce.³⁴ Thus, in effect, the refusal of the offer of reconciliation would still amount to a defense to the original desertion and the statute's intended effect would be nullified. Presumably real-

30. MD. ANN. CODE art. 16, § 26A (1966). "In no action for divorce instituted in this State . . . shall an offer of reconciliation or an attempt to reconcile by one spouse without the concurrence of the other spouse be available as a defense to a divorce nor in and of itself be a bar to a divorce."

31. 246 Md. 162, 228 A.2d 829 (1967).

32. *Id.* at 170, 228 A.2d at 834.

33. *Id.*

34. "Recrimination is generally defined as a rule or doctrine which precludes one spouse from obtaining a divorce from the other, where the spouse seeking a divorce has himself or herself been guilty of conduct which would entitle the opposite (*sic*) spouse to a divorce." *Courson v. Courson*, 208 Md. 171, 174, 117 A.2d 850, 851 (1955). Moreover, recrimination requires that the offsetting offenses be of equal magnitude; that is, both a *mensa* or both a *vinculo* grounds. See *Courson v. Courson*, 208 Md. 171, 175-76, 117 A.2d 850, 852 (1955). The ground for divorce created by the rejection would be recriminatory in almost all instances, *i.e.*, usually both grounds would be of sufficient duration only for an *a mensa* divorce. A deviation from this norm would occur where the original desertion was of a *vinculo* duration at the time the offer was rejected. In this case, the original desertion is a *vinculo* while the desertion based on the rejection of the offer is only a *mensa*, and thus recrimination would not apply. However, this situation could also become recriminatory if the action was not instituted until eighteen months after the offer was rejected, since both grounds would then be of a *vinculo* duration.

izing this problem, the Maryland General Assembly rewrote section 26A into its present form.³⁵

In plugging the gap left by the prior version of section 26A, the Maryland legislature effectively barred almost all uses of offers of reconciliation. The extent to which offers are still of legal importance depends on an as yet non-existent interpretation of the phrase "in and of itself" in section 26A.³⁶ Under the present version of the statute, an offer cannot be used which "in and of itself" is a defense to, or a ground for, a divorce.³⁷ One possible interpretation is that it means that offers are still admissible when there is other evidence offered which tends to show that the offering party actually desired reconciliation. If an offer remains usable in the same manner as before the enactment of section 26A in a case where other evidence is introduced, then section 26A has little or no effect. Seemingly such evidence could always be produced, and if a reasonable alternative interpretation is available which gives effect to the statute, it should be adopted. A more likely interpretation is that offers of reconciliation are still usable in cases where the offer only supports other evidence, but not where the offer constitutes the basis of a legal position. Thus, of the four situations discussed earlier in which offers have been given legal effect under the prior law, the offer would still be usable only in the one in which the deserted spouse utilizes the rejection of his offer as evidence of a continuing intent to desert by the deserter.³⁸ Section 26A would be no bar here since the offer is not advanced as a ground *in and of itself*. The rejection of the offer merely adds evidentiary support to the pre-existing fact of desertion. However, in instances where the offer is used to affect a change in the parties' legal positions,³⁹ section 26A would seem to bar use of the offer. In these cases, the offer *itself* is the essential element in the ground or the defense.

Assuming this interpretation to be correct, the rewriting of section 26A has reduced to a minimum the effect of offers of reconciliation in divorce litigation. It is arguable that the results of such a reduction on the substantive law of desertion and voluntary separation are as undesirable as was the simultaneous desertion result arising out of the prior version of section 26A.⁴⁰

35. MD. ANN. CODE art. 16, § 26A (Supp. 1969), quoted *supra* at note 4.

36. *Id.*

37. *Id.*

38. See notes 21-22 *supra* and accompanying text.

39. See notes 12-20 and 24-28 *supra* and accompanying text.

40. See notes 30-35 *supra* and accompanying text.

THE FAR-REACHING CONSEQUENCES OF SECTION 26A

Section 26A effectively works a radical alteration in the elements of desertion in Maryland as they existed prior to its enactment. As discussed above, the basic requirements of desertion are a separation and an intent to end the marriage relationship on the part of the deserter which must continue throughout the separation.⁴¹ However, as a result of section 26A, one can now be guilty of desertion even though the requisite intent to end the marriage relation does not exist for the required amount of time. For example, in *Hornstein v. Hornstein*⁴² a husband's bill for desertion was denied and a divorce was granted to the wife for desertion on the basis of her husband's rejection of her offer of reconciliation. The wife was originally guilty of desertion, but her offers to reconcile had effected a reversal in the parties' legal positions. Were the case decided today, a different result would be reached. Under section 26A, the wife would not be able to use her offer as a defense to the husband's bill or the husband's rejection of the offer as a ground for her own bill. The result is that the husband will get a divorce for desertion although his wife, as evidenced by her offer, did not have the intent to end the marriage relation for the entire period of the alleged desertion. In effect, section 26A institutes a "once a deserter, always a deserter" policy. Unless an actual reconciliation takes place, any eighteen month separation which began as desertion gives a valid ground for divorce regardless of subsequent events.

Section 26A works an even stranger result where the initial separation does not afford either party a ground for divorce. In this case, instead of making a deserter out of the one who lacks the requisite intent, the statute prevents a divorce for desertion being obtained against a spouse who has satisfied all the desertion requirements. The rejection of the offer, it would seem, should be evidence of the intent necessary to constitute desertion. Under the prior law, once one party in this situation made a valid offer of reconciliation, the other party would have to accept or run the risk of becoming a deserter.⁴³ Under section 26A, there is a legal standoff. The rejection of an offer of reconciliation under these circumstances, which under the prior definition of desertion would constitute the necessary element of intent to desert by one party, is no longer usable in court. Thus a "deserter" may avoid an adverse court decision simply because the initial separation was less than desertion.

*Lynch v. Lynch*⁴⁴ is a striking example of the radical change wrought by section 26A. In that case, the wife had left her husband's home to care for her sick father. After her father's death, her attempts to return home were rejected by the husband. The wife, without means of her own support, was forced to sue for separate alimony, an action in which the wife must prove grounds entitling her to either an

41. See notes 5-11 *supra* and accompanying text.

42. 195 Md. 627, 75 A.2d 103 (1950).

43. See notes 17-20 *supra* and accompanying text.

44. 166 Md. 300, 170 A. 764 (1934).

a *vinculo* or an *a mensa* divorce.⁴⁵ She was able to sustain this burden on the basis that the husband had deserted her by failing to accept her offers to renew cohabitation. Under section 26A, the wife would be unable to use her offers to return as proof of desertion in order to gain the alimony she needed. Barring other grounds for divorce or actual reconciliation, the offeror would be left to voluntary separation or the new five-year separation statute⁴⁶ as a ground for obtaining a divorce and alimony from one who had separated from her and who has the intent to end the marriage relationship.

It might be pointed out that it is a somewhat strained interpretation to call the situation presented in *Lynch* an "offer of reconciliation." However, prior to enactment of section 26A, the court of appeals, as evidenced by *Lynch*, does not seem to have required that there be any prior estrangement beyond the simple fact of living apart in order to present a situation giving rise to an offer of reconciliation.⁴⁷ It is assumed that section 26A uses the term in the same sense, although there is the possibility of reinterpretation so that section 26A would not apply to this situation at all.

An equally drastic change in the traditional Maryland notions of voluntary separation is effected by section 26A. As indicated earlier, a voluntary separation under the Maryland statute requires two basic elements: an eighteen month separation and a *mutual intent* by the spouses to terminate the marriage.⁴⁸ Under the prior law, a spouse could end the mutual intent by offering in good faith to reconcile at any time during the period.⁴⁹ Section 26A now prevents such a use of an offer of reconciliation with the result that, as long as the separation began as a voluntary separation, the passage of eighteen months will produce a perfectly valid *a vinculo* divorce, even though the *mutual intent* to end the marriage has terminated. Under the earlier law, not only was there no mutual intent to end the marriage, but the party who rejected the offer would be guilty of desertion from the time of the rejection.⁵⁰ Thus, in some cases section 26A will now cause the court to grant a divorce for voluntary separation where the state of mind of the parties more closely resembles that required for desertion than for a "voluntary" separation.

A LEGISLATIVE MISTAKE?

In view of the fact that the Maryland law of desertion and voluntary separation has been drastically altered by a statute dealing with the narrow subject of offers of reconciliation, one is tempted to ask whether the legislature meant to do what it did. To answer this question, it is necessary to know why the statute was enacted. Due

45. MD. ANN. CODE art. 16, § 2 (1966); see *Courson v. Courson*, 213 Md. 183, 129 A.2d 917 (1957); *Zukerberg v. Zukerberg*, 188 Md. 428, 53 A.2d 20 (1947).

46. MD. ANN. CODE art. 16, § 24 (Supp. 1969).

47. See cases cited note 19 *supra*.

48. *France v. Safe Deposit & Trust Co.*, 176 Md. 306, 4 A.2d 717 (1939). See notes 24-28 *supra* and accompanying text.

49. See notes 27-28 *supra* and accompanying text.

50. See text accompanying note 28 *supra*.

to the absence of published committee reports or other legislative history in Maryland, it is impossible to answer this question with any certainty. The purpose of section 26A can only be surmised. It is probably correct to say that section 26A was intended to prevent spouses from effectively bettering their legal positions as to divorce litigation by tricking the courts into thinking that they had truly attempted reconciliation. The legislature must have had in mind a deserter who was able to turn the tables through an offer of reconciliation whose purpose was litigation rather than reconciliation.

For at least two reasons, it is doubtful that the legislature realized that its efforts to put a stop to such legal maneuvering created radical changes in the law of desertion and voluntary separation. First, it could be argued simplistically that if the legislature had intended to change the definitions of these divorce grounds they would have amended article 16, section 24 rather than enacting an entirely new section. Admittedly, such a direct amendment is not a precondition of legal effectiveness. However, it does shed light on what the legislature thought it was doing. Secondly, and more significantly, the Maryland legislature last year enacted a statute making a five year separation a ground for divorce regardless of the circumstances of the separation or the existence of other grounds for divorce.⁵¹ In providing that recrimination should not be a defense to a divorce on this ground,⁵² the legislature clearly showed an intent to make a divorceable situation out of a separation which could not qualify under the pre-existing divorce grounds. In light of this, it hardly seems likely that the legislature realized that, by virtue of section 26A, most previously non-divorceable separations were now divorceable on only eighteen months of separation rather than five years.⁵³

In any event, section 26A is in force and its language is clear. In addition to the earlier discussion, the statute raises other problems. On a theoretical level, it could be asked whether the statute was necessary, assuming its purpose was to prevent the kind of legal maneuvering possible under the prior law. A look at the prior cases evinces a set of limitations upon the use of offers of reconciliation

51. MD. ANN. CODE art. 16, § 24 (Supp. 1969). It should be noted that part of this enactment, which deals with distributions of property under this new divorce ground, has been held unconstitutional by a Maryland circuit court because of failure to comply with the requirements of titling bills set by § 29 of art. III of the Maryland Constitution. *Buckheit v. Buckheit*, No. _____ 70 (Circuit Ct., Baltimore Co., Jan. 6, 1970) in the Daily Record (Baltimore), Jan. 17, 1970, at 3, col. 1. The part of the bill creating the new ground for divorce remains undisturbed.

52. MD. ANN. CODE art. 16, § 24 (Supp. 1969).

53. See notes 42-43 *supra* and accompanying text. This point is accentuated by the fact that the amendment to art. 16, § 24, which made a five-year separation grounds for divorce was first offered for passage on the basis of a three year separation. By increasing the duration to five years, the General Assembly seems to have indicated a reluctance to allow a divorce for a separation which was not divorceable under the prior law of desertion or voluntary separation except where the separation was quite long lasting. As indicated, § 26A, allows such a result on only eighteen months of separation, in all cases in which the separation began either as desertion or voluntary separation. The only cases left for the five year statute to cover are those where the initial separation was "innocent" where a spouse with grounds for divorce chooses not to seek one.

which functioned well in preventing spouses from abusing their use. The general rule, applicable to both desertion and voluntary separation cases, was that the offer, in order to be of legal effect, must have been made in good faith and must have been free from unreasonable conditions.⁵⁴ The policy behind this rule is identical to that supposed to be the basis of section 26A: that is, an offer deserves no recognition where it "was merely designed to improve his legal position with reference to his duty of support, without any sincere desire or intention that it be accepted."⁵⁵ Thus, offers made through intermediaries,⁵⁶ offers made on the witness stand at the hearing,⁵⁷ and offers which show no sufficient promise that the cause of the separation will be removed⁵⁸ have all been held inadequate. Section 26A attempts to accomplish the same result as the old rule by simply forbidding all use of offers. While the result to be achieved is desirable, in light of the side effects of section 26A, it could certainly be argued that the prior case law provided adequate safeguards to prevent the abuse of such offers.

A much more practical problem which section 26A raises concerns the determination of alimony in divorce cases. In all cases where a divorce is decreed in Maryland, alimony may be awarded;⁵⁹ this includes voluntary separation cases.⁶⁰ The general rule as to the factors to be considered in deciding whether alimony is proper in a given case was stated in *Waters v. Waters*:⁶¹

In determining an award of alimony and whether "the wife's income is insufficient to care for her needs," the court should consider the husband's wealth and earning capacity, the station in life of the parties, age, physical condition, the ability to work, the length of time the parties have lived together, the circumstances leading up to the divorce, and *the fault which destroyed the home*.⁶²

If then, fault is a factor in determining alimony, section 26A raises a serious question. Consider the case in which a husband deserts for a short time and then offers in good faith to be reconciled, only to be unjustifiably rejected by the wife. Because of section 26A, the husband is still guilty of desertion. But what about the alimony problem? Since fault is an element, could the husband tender proof of the wife's refusal of his offer in order to deny her alimony on the basis of fault? Section 26A only prevents the use of offers as a defense to, or a ground for, a divorce; it says nothing about determining alimony. Yet if such proof

54. *E.g.*, *Feltgen v. Feltgen*, 237 Md. 32, 205 A.2d 251 (1964) (voluntary separation); *Kirkwood v. Kirkwood*, 165 Md. 547, 170 A. 180 (1934) (desertion).

55. *Hokemeyer v. Hokemeyer*, 194 Md. 223, 227, 71 A.2d 15, 17 (1950).

56. *E.g.*, *Hokemeyer v. Hokemeyer*, 194 Md. 223, 71 A.2d 15 (1950).

57. *E.g.*, *Kirkwood v. Kirkwood*, 165 Md. 547, 170 A. 180 (1934).

58. *E.g.*, *Kruse v. Kruse*, 179 Md. 657, 22 A.2d 475 (1941).

59. Md. ANN. CODE art. 16, § 3 (1966).

60. *E.g.*, *Hughes v. Hughes*, 216 Md. 374, 140 A.2d 649 (1958); *Foote v. Foote*, 190 Md. 171, 57 A.2d 804 (1948).

61. 191 Md. 436, 62 A.2d 250 (1948).

62. *Id.* at 440-41, 62 A.2d at 252 (emphasis added).

is allowed, the court is technically contradicting itself by giving a wife a divorce on the basis that the separation was the husband's fault while denying the wife alimony on the basis that the separation was her fault. The simple answer to the problem may be that fault is not the only criterion for alimony, and that section 26A operates to minimize the fault connotation attached to a refusal of reconciliation where the question of alimony is concerned. However, it is clear that section 26A on its face does not prevent use of the offer in determining alimony.

IN DEFENSE OF SECTION 26A: SOME POLICY CONSIDERATIONS

Despite the substantial, and possibly unforeseen, effects of section 26A in the areas of desertion and voluntary separation, one can find much to commend the statute in its overall application to divorce litigation in Maryland. Limited to considerations of voluntary separation, several beneficial aspects are apparent. By insuring that once a voluntary separation agreement is entered it will be binding unless the spouses mutually rescind it, section 26A has merely placed these agreements on a par with other contracts. It is a fundamental principle of contract law that a contract validly entered cannot be disregarded with impunity by unilateral action.⁶³ This is exactly what was permitted by prior case law when it was held that an offer of reconciliation ended the requisite mutual intent to terminate the marriage, thus ending the voluntary separation.⁶⁴ In putting an end to this situation, section 26A is in accordance with the modern trend toward giving separation agreements more importance in the domestic relations area.⁶⁵ Such a trend is of obvious value to the administration of divorce litigation in that it allows the parties to settle out of court many of the serious problems inherent in a divorce. Section 26A, by making the agreement binding once entered, will tend to aid in this by insuring that parties will not make such agreements without considerable thought and consideration. A carefully drafted separation agreement can go a long way toward easing the work and time load of a judicial system.

In its general application, section 26A does much to liberalize divorce law in Maryland. Although it has always been a policy that divorce was to be discouraged whenever possible,⁶⁶ the more modern view recognizes that more harm than good is done by making it difficult for estranged spouses to become legally divorced.⁶⁷ Insofar as offers of reconciliation were used as defenses, this was precisely their effect

63. See S. WILLISTON, *CONTRACTS* § 1288 (Rev. ed. 1937).

64. *E.g.*, *Feltgen v. Feltgen*, 237 Md. 32, 205 A.2d 251 (1964).

65. A 1968 amendment to the Maryland Annotated Code provides that the introduction into evidence of a valid separation agreement in an action for voluntary separation shall serve as full corroboration of the plaintiff's case. MD. ANN. CODE art. 35, § 4 (Supp. 1969). Avoiding the usual corroboration rule, the plaintiff need offer no other proof than the agreement as to the mutual and voluntary nature of the separation.

66. "The law will not countenance the living apart of a husband and wife in Maryland except for grave and weighty causes." *Kline v. Kline*, 179 Md. 10, 15, 16 A.2d 924, 926 (1940). See note 1 *supra* and accompanying text.

67. See, *e.g.*, Comment, *A Divorce Reform Act*, 5 HARV. J. LEGIS. 563 (1968). In presenting a model divorce reform act, this comment discusses the myriad of reasons why liberalization of divorce laws is desirable.

under the prior law.⁶⁸ As has been shown, section 26A permits a divorce for an eighteen month separation which began as a desertion regardless of subsequent events.⁶⁹ In essence, with the exception of the case where the initial separation is "innocent," the statute provides that an irreconcilable separation of eighteen months is grounds for divorce.⁷⁰ In an indirect manner, Maryland has joined with an increasing number of other states which are providing for a divorce under such circumstances.⁷¹ As one writer observed, "when the marriage has irreparably deteriorated, the state should not attempt by legal controls to preserve what by social controls can no longer be preserved."⁷² In light of this modern view of divorce, section 26A may well produce a beneficial result. After all, when spouses cannot get together after eighteen months, one is hard pressed to justify preventing a legal finalization of the separation. It seems quite obvious that society is better served by a good divorce than a bad marriage.

Section 26A will also aid the administration of divorce litigation in general by keeping offers of reconciliation out of the courts. Under the prior law, by definition, the only offers which ever came before a court were unsuccessful ones. It could be argued that, apart from indicating fault as a basis for determining alimony or custody, society has no interest in having courts consider offers of reconciliation which were not successful in reuniting the spouses. The prior law led to spouses making offers simply to better their respective legal positions. Although there were rules which attempted to separate these offers from the ones made in good faith,⁷³ the process was difficult, unpleasant, and far from exact. The value of considering such offers does not justify the cost paid in terms of the courts' time and trouble.

In addition to alleviating a messy administrative problem, the new statute will help the image of the judiciary as a whole. It cannot be doubted that a serious problem in this vein exists today in the area of domestic relations.

The present discrepancy between the law on the books and the law in action has developed into a serious threat to the morals of the bar and the respect for law among the public. Law cannot

68. It should be noted that offers of reconciliation under the prior law did not always prevent divorce. Often they simply determined who would get the divorce.

69. See notes 42-43 *supra* and accompanying text.

70. It should be remembered that this result of § 26A is in apparent conflict with the new five year separation statute. See notes 52-54 *supra* and accompanying text.

71. New Mexico and Oklahoma have had on the books for quite some time provisions allowing a divorce on the ground of incompatibility. N.M. STAT. ANN. § 22:7-1 (1953); OKLA. STAT. tit. 12, § 1271 (1961). In a more drastic step, California has recently amended its law to provide for only two grounds for dissolution of the marriage; "incurable insanity" and "irreconcilable differences, which have caused the irremediable breakdown of the marriage." CAL. CIV. CODE § 4506 (West Supp. 1969). In order to avoid any resemblance to the traditional contested divorce proceeding in which fault played so large a part, the act further provides that "In any pleadings or proceedings for legal separation or dissolution of marriage under this part . . . evidence of specific acts of misconduct shall be improper and inadmissible, except where child custody is an issue. . . ." CAL. CIV. CODE § 4509 (West Supp. 1969). The apparent view is to allow a divorce where one or both parties feel the situation is hopeless, and can prove it, without resorting to the traditional "bloody" battle.

72. Comment, *A Divorce Reform Act*, 5 HARV. J. LEGIS. 563, 567 (1968).

73. See notes 55-59 *supra* and accompanying text.

remain workable or maintain dignity when, like the American experience under alcoholic prohibition, a substantial part of the country believes that prohibited conduct is in fact right and another part does not care about strict enforcement. Such is the case with divorce law, an area where many have their only litigious experience. People are faced not only with a fault oriented basis which they try to circumvent, but also with the spectacle of ritualistic name calling at a public trial.⁷⁴

Although the statute has certain seemingly unintended effects on the substantive law of divorce, by eliminating a practice whose only value was fixing the blame for a hopeless situation, section 26A will ultimately take a step toward spanning the credibility gap between the law and the people.

Probably the most important benefit which can be seen to flow from section 26A is not readily apparent at first glance. The law concerning offers of reconciliation arose because society felt that reconciliation was preferable to divorce.⁷⁵ Now section 26A has effectively eliminated all the rules which grew up under this policy. And yet, section 26A probably will do more to encourage actual reconciliation than did the prior rules. Previously, in order to encourage reconciliation, it was felt advisable to penalize a spouse who refused it. Such a rule probably prevented actual reconciliation in many cases because a spouse would avoid an offer which he thought was merely a legal ploy in order that he not be held to have refused it. By providing that an offer of reconciliation can no longer produce a change in the parties' pre-existing legal positions, section 26A has opened the way for spouses to discuss reconciliation freely and without fear of adverse consequences in the event the attempt at reconciliation fails. Section 26A is a step toward shifting the focus of the law away from problems of dispensing rewards and penalties for acts which failed of reconciliation toward society's real concern — actual reconciliation.

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74. Comment, *A Divorce Reform Act*, 5 HARV. J. LEGIS. 563, 569 (1968).

75. See notes 1-3 *supra* and accompanying text.