

8. *Insanity*

Unsoundness of mind was first introduced as a ground for divorce by the *Herbert Act* of 1937. By that Act the respondent had to be of incurably unsound mind and to have been under care and treatment continuously for a five year period immediately prior to the presentation of the petition. However, if the conduct of the petitioner has been conducive to the insanity either through neglect or otherwise, the decree may be refused. It is required that the respondent be under treatment in a mental hospital and the continuity of the care and treatment and the statutory requirement regarding the detention of persons of unsound mind must have been strictly adhered to. Non-compliance may have the effect of breaking the continuity and thus lead to a rejection of the petition. An Act of 1959, the *Divorce (Insanity and Desertion) Act*, permits a break in continuity of detention for less than 28 days to be disregarded.

Finally, the degree of insanity is of no concern to the court. The position that has been taken in defining "incurably unsoundness of mind" is that the phrase describes a mental state, which, despite five years treatment, makes it impossible for the spouses to live a normal married life, and there being no prospect of improvement which would make it possible in the future.

9. *Provision Regarding Children*

Following the recommendations of a Royal Commission, the Morton Commission, which reported in 1956, greater attention is now paid to the interests of the children of the marriage in any matrimonial proceedings. (Cmnd. 9678, paras 373-394). The *Matrimonial Causes Act* of 1965, section 33, provides that the court may not grant a decree absolute unless it is satisfied with the arrangements made for the care and upbringing of all "relevant" children, if it is practicable to do so and that the arrangements are satisfactory, or are at least the best that can be made in the circumstances. The services of court welfare officers can be drawn upon to assure the court of the suitability of the arrangements and the court can order that the children be separately represented. Despite the introduction of these provisions, there is still dissatisfaction in England not only with the way these provisions are working, but also with their scope as well. The Law Commission has expressed its intention to undertake a thorough investigation of this subject as soon as possible. (Cmnd. 3123, p. 24).

III SCOTS DIVORCE LAW

Although similar to English divorce law, the law of divorce in Scotland is quite distinctive and based upon its own traditions. Currently, the grounds for the dissolution of marriage in Scotland are: cruelty, adultery, desertion, incurable insanity and sodomy or bestiality. A marriage may also be dissolved on the presumption of death of one of the partners. Adultery is a ground derived from the common law while the other grounds have a statutory basis in the *Divorce (Scotland) Act* of 1938. Desertion, however, has been a ground for divorce in Scotland since the sixteenth century when it was introduced by an Act of 1573. Cruelty, insanity, bestiality or sodomy and presumption of death were introduced by the 1938 statute. (T. B. Smith, *A Short Commentary on the Law of Scotland* [Edinburgh, 1962]).