

DIVORCE AND MATRIMONIAL CAUSES AMENDMENT BILL

EXPLANATORY NOTE

THIS Bill amends the Divorce and Matrimonial Causes Act 1928.

Clause 2 contains a new provision enabling the Supreme Court to make a decree of presumption of death and dissolution of marriage, on a petition by one party to the marriage alleging that reasonable grounds exist for supposing that the other party to the marriage is dead.

Clause 3 makes comprehensive provision as to nullity of marriage, replacing the common law as well as incorporating sections 8 and 9 of the Matrimonial Causes Act 1950 of the United Kingdom Parliament. *Subclause (1)* prescribes the cases in which a petition for nullity may be presented—namely, where either party is domiciled in New Zealand, or where either party is resident in New Zealand (otherwise than as a traveller or for the purposes of the suit), or where the marriage was celebrated in New Zealand. *Subclause (2)* sets out the cases in which a marriage is void from the beginning, while *subclause (3)* prescribes the grounds on which a marriage is voidable and may be decreed to be void from the time of the decree for nullity. *Subclause (4)* preserves the legitimacy of the children of a voidable marriage, as if the marriage had been dissolved, and not annulled, at the date of the decree for nullity.

Clause 4 provides that the desertion of one party to a marriage by the other party shall not be terminated by the mental deficiency of the deserting party if it appears to the Court that the desertion would probably have continued if the deserting party had not become mentally deficient.

Clause 5 amends the grounds for divorce to include—

- (a) Conviction of the attempted murder of the petitioner or any child of the petitioner or respondent, or of wounding of or doing bodily harm to the petitioner or any such child, irrespective of the sentence imposed on the conviction (in place of the existing requirement of a sentence of at least seven years' imprisonment); and
- (b) The murder of any person, whether a child of the respondent or petitioner or not.

Clause 6 makes it a ground for divorce that the respondent is a person of unsound mind and is unlikely to recover, and has been confined as such (not as a voluntary boarder) in a mental hospital in New Zealand or any other country of the Commonwealth for the period of five years immediately preceding the filing of the petition. This is in addition to the existing grounds of confinement for periods aggregating seven years during the last ten years, and unsoundness of mind for the last seven years coupled with confinement for the final three years.

Subclause (2) of clause 6 substitutes the term "Commonwealth" for the expression "British dominions" in paragraphs (f) and (g) of section 10 of the principal Act.

Clause 7 amends section 12 (3) of the principal Act so as to enable a wife separated from her husband to petition for divorce after three years' residence in New Zealand, without having also to have lived apart from her husband for three years. Paragraph (b) makes section 12 (3) general, so that it will extend to a decree for presumption of death and dissolution of marriage as well as to a decree for divorce.

Clause 8 enables the Court, by a special order in any particular case, to reduce the period that must elapse before a decree *nisi* is made absolute from three months to any shorter time, but not less than six weeks.

Clause 9 enables an order for the maintenance of a wife by her husband to be made binding on the husband's estate after his death during the lifetime of the wife, instead of being limited to the joint lives of the husband and wife.

Clause 10 extends the powers of the Court to vary or modify orders for the payment of maintenance, so as to apply to orders relating to security or settlements, and to enable orders to be extended to bind the husband's estate after his death if application is made before the date of death or within one year thereafter.

Clause 11 enacts three new sections (similar to sections 3, 4, and 5 of the Destitute Persons Amendment Act 1951) as follows:

Section 41A authorizes the Court, in its discretion, where a decree for divorce or nullity of marriage or judicial separation or restitution of conjugal rights has been made, to vest in the husband or wife the tenancy of any dwellinghouse that is held by the other spouse and in which either of the parties resides. Except for the change of tenant, the landlord's rights are not to be affected. Provision is made for a re-vesting of the tenancy in the original tenant on a change of circumstances or on the death of the party in whom the tenancy has been so vested. The clause binds the Crown (where the Crown is the landlord).

Section 41B provides that the landlord of a dwellinghouse which is the subject matter of a vesting order under section 41A may apply to the Court, within fourteen days after service of the order upon him, for the cancellation or variation of the order.

Section 41C gives the landlord a right of appeal against a vesting order made under section 41A, if he has first applied for the cancellation or variation of the order under section 41B and his application has been refused. He may also appeal against the refusal of his application. The time allowed for appeals is not to run against any party to the proceedings until the landlord's application has been disposed of, or, if the landlord does not so apply, until the expiration of twenty-one days after the making of the vesting order.

Clause 12 reduces the time for appeals to the Court of Appeal from decisions of the Supreme Court under the principal Act from three months to six weeks.

Hon. Mr Webb

DIVORCE AND MATRIMONIAL CAUSES
AMENDMENT

ANALYSIS

Title.	8. Interval between decree <i>nisi</i> and decree absolute.
1. Short Title.	9. Maintenance of wife after husband's death.
2. Decree of presumption of death and dissolution of marriage.	10. Variation of orders by Court.
3. Nullity of marriage.	11. New sections inserted:
4. Effect of mental deficiency on desertion.	41A. Power of Court to vest tenancy of dwellinghouse in petitioner.
5. Divorce on ground of conviction of attempted murder, etc., of petitioner or child, or conviction of murder.	41B. Right of landlord to apply for cancellation or variation of vesting order.
6. Divorce on ground of unsoundness of mind.	41C. Appeals in respect of orders under <i>last two</i> sections.
7. Domicile of separated wife.	12. Time allowed for appeal to Court of Appeal.

A BILL INTITULED

AN ACT to amend the Divorce and Matrimonial Causes Act 1928. Title.

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Divorce and Matrimonial Causes Amendment Act 1953, and shall be read together with and deemed part of the Divorce and Matrimonial Causes Act 1928 (hereinafter referred to as the principal Act). Short Title.
See Reprint of Statutes, Vol. III, p. 865

Decree of
presumption of
death and
dissolution of
marriage.
Cf. Matrimonial
Causes Act,
1950 (14 Geo.
VI, ch. 25),
s. 16 (U.K.)

2. The principal Act is hereby amended by inserting, after section ten, the following new section:
 “10A. (1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may, if he is domiciled in New Zealand and at the time of the filing of the petition has been domiciled there for two years at least, present a petition to the Court praying to have it presumed that the other party is dead and to have the marriage dissolved, and the Court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage. 5 10

“(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead in the absence of proof to the contrary. 15

“(3) Unless the context otherwise requires, the provisions of this Act and of any other enactment, so far as they are applicable and with any necessary modifications, shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree for divorce respectively. 20 25

“(4) In determining for the purposes of this section whether a woman is domiciled in New Zealand in any case in which she is not deemed to be domiciled there by virtue of section twelve of this Act, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living.” 30

Nullity of
marriage.
Cf. 14 Geo. VI,
ch. 25, ss. 8, 9
(U.K.)

3. The principal Act is hereby amended by inserting, after section ten^A (as inserted by the *last preceding* section), the following new section: 35

“10B. (1) A petition for nullity of marriage on any of the grounds specified in subsections *two* and *three* of this section may be presented to the Court—

“(a) Where the petitioner or the respondent is domiciled in New Zealand at the time of the filing of the petition; or 40

- 5 “(b) Where the petitioner or the respondent is resident in New Zealand at the time of the filing of the petition and is not resident in New Zealand only as a traveller or for the purposes of the suit; or
- “ (c) Where the marriage was celebrated in New Zealand.
- 10 “(2) A marriage shall be void *ab initio*, whether or not a decree for nullity has been granted, where any of the following grounds exist:
- “ (a) That at the time of the ceremony of marriage either party to the marriage was already married:
- 15 “ (b) That the marriage was induced by duress or mistake:
- “ (c) That the marriage is declared to be void by section nine of the Marriage Amendment Act 1946 (which relates to marriages between persons within the prohibited degrees of relationship): 1946, No. 8
- 20 “ (d) That the marriage was not solemnized in due form.
- “ (3) A marriage shall be voidable on any of the following grounds:
- 25 “ (a) That the marriage has not been consummated owing to the incapacity or wilful refusal of the respondent to consummate the marriage:
- “ (b) That either party to the marriage was at the time of the marriage a mentally defective person within the meaning of the Mental Defectives Act 1911: See Reprint of Statutes, Vol. V, p. 743
- 30 “ (c) That the respondent was at the time of the marriage suffering from venereal disease in a communicable form:
- 35 “ (d) That the respondent was at the time of the marriage pregnant by some person other than the petitioner:
- “ Provided that, in the cases specified in paragraphs (b), (c), and (d) of this subsection, the Court shall not
- 40 grant a decree unless it is satisfied—
- “ (i) That the petitioner was at the time of the marriage ignorant of the facts alleged;

“(ii) That proceedings were instituted within a year from the date of the marriage; and
“(iii) That marital intercourse with the consent of the petitioner has not taken place since the discovery of the existence of the grounds for a decree. 5

“(4) Where a decree for nullity is granted in respect of a voidable marriage as defined in subsection *three* of this section, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment. 10

“(5) Unless the context otherwise requires, the provisions of this Act and of any other enactment, so far as they are applicable and with any necessary modifications, shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree for divorce respectively.” 15

Effect of mental deficiency on desertion.

4. The principal Act is hereby amended by inserting, after section thirteen, the following new section: 20

“13A. Where a party to a marriage has been deserted by the other party, the desertion shall not be deemed to be terminated by reason only of the mental deficiency of the deserting party if it appears to the Court that the desertion would probably have continued if the deserting party had not become mentally defective.” 25

Divorce on ground of conviction of attempted murder, etc., of petitioner or child, or conviction of murder.

5. Section ten of the principal Act is hereby amended by repealing paragraphs (*d*) and (*e*), and substituting the following paragraphs: 30

“(d) That since the celebration of the marriage the respondent has been convicted of attempting to commit the murder of the petitioner or any child (of any age) of the petitioner or respondent, or has been convicted of any offence under section one hundred and ninety-seven of the Crimes Act 1908 against the petitioner or any such child: 35

See Reprint of Statutes, Vol. II, p. 238

“(e) That the respondent has since the celebration of the marriage been convicted of murder: ”. 40

6. (1) Section ten of the principal Act is hereby amended by inserting, after paragraph (g), the following paragraph:

Divorce on ground of unsoundness of mind.

5 “(gg) That the respondent is a person of unsound mind and is unlikely to recover, and has been confined as such in New Zealand in an institution within the meaning of the Mental Defectives Act 1911, or in a like institution in any other country of the Commonwealth, for the period of five years immediately preceding the filing of the petition:”

See Reprint of Statutes, Vol. V, p. 743

10 (2) Section ten of the principal Act is hereby further amended as follows:

15 (a) By omitting from paragraph (f) the words “British dominions”, and substituting the word “Commonwealth”:

(b) By omitting from paragraph (g) the words “British dominions”, and substituting the word “Commonwealth”.

20 7. Section twelve of the principal Act is hereby amended as follows:

Domicile of separated wife.

25 (a) By omitting from subsection three (as added by section three of the Divorce and Matrimonial Causes Amendment Act 1930) the words “and has been living apart from her husband for a period exceeding three years”:

See Reprint of Statutes, Vol. III, p. 872

(b) By omitting from the said subsection three the words “of section ten”.

30 8. Section twenty-four of the principal Act is hereby amended by omitting from subsection one the words “such time, not less than three months from the pronouncing thereof, as the Court by general or special order from time to time directs”, and substituting the words “three months from the date of the pronouncing thereof or such shorter time, not less than six weeks, as the Court directs by special order in any particular case”.

Interval between decree nisi and decree absolute.

35 9. (1) Section thirty-three of the principal Act is hereby amended by inserting in subsection one, after the words “order that the husband”, the words “or his personal representatives”.

Maintenance of wife after husband's death.

6 *Divorce and Matrimonial Causes Amendment*

(2) Subsection two of section thirty-three of the principal Act is hereby amended as follows:

- (a) By omitting the words "direct the husband to pay to the wife during the joint lives of the husband and wife", and substituting the words "order that the husband or his personal representatives shall pay to the wife for any term not exceeding her life": 5
- (b) By inserting, after the word "reasonable", the words "and every such order made against the husband shall be enforceable against his personal representatives after his death": 10
- (c) By inserting in paragraph (a) of the proviso, after the word "husband", the words "or his estate, as the case may be,": 15
- (d) By inserting in paragraph (b) of the proviso, after the word "husband", the words "or of his estate, as the case may be,":

Variation of orders by Court.

10. Section forty-one of the principal Act is hereby amended by adding the following subsections as subsections two and three thereof: 20

"(2) The Court may from time to time vary or modify or extend any order made under section thirty-three or section thirty-six or section thirty-seven of this Act in such manner as the Court thinks fit, whether as to the term of the order, or as to the nature of any security or settlement, or by increasing or diminishing the amount or extent of any security or the gross sum or annual sum secured, or otherwise. 25

"(3) An application for an order under this section or under the proviso to subsection two of section thirty-three of this Act may be made by the person entitled to the benefit of the order, or by the person liable under the order or (after his or her death) by his or her personal representatives or by any creditor or other person interested in the distribution of his or her estate or entitled to apply for an order under Part II of the Family Protection Act 1908 in respect thereof: 35

See Reprint of Statutes, Vol. III, p. 298

"Provided that, where an order is for a term not exceeding the life of the person liable, an application for the extension of the term beyond his or her lifetime shall not be made except during his or her lifetime or within one year after his or her death." 40

11. The principal Act is hereby amended by adding to Part IV the following new sections:

New sections inserted.

“41A. (1) Where the Court makes a decree for divorce or nullity of marriage or judicial separation or restitution of conjugal rights, the Court may at the same or any subsequent time, in its discretion, having regard to all the circumstances of the case, make an order vesting in the petitioner the tenancy of any dwelling-house, being a dwellinghouse within the meaning of the Tenancy Act 1948,—

Power of Court to vest tenancy of dwellinghouse in petitioner.

1948, No. 76

“(a) Of which at the time of the making of the decree the respondent is or was either the sole tenant or a tenant holding jointly or in common with the petitioner; and

“(b) Of which at the time of the making of the order under this subsection the respondent is a tenant as aforesaid; and

“(c) In which the petitioner or the respondent resides at the time of the order under this subsection.

“(2) On and after the taking effect of an order made under subsection *one* of this section, unless the tenancy is sooner lawfully determined, the petitioner shall be deemed to be the tenant of the dwellinghouse upon and subject to the terms and conditions of the tenancy in force at the time of the making of the order.

“(3) On the taking effect of an order made under subsection *one* of this section, unless the tenancy is sooner lawfully determined, the respondent shall be deemed to have ceased to be the tenant of the dwellinghouse.

“(4) The jurisdiction conferred on the Court by subsection *one* of this section may be exercised in any case where a decree as aforesaid has been made before the commencement of this section.

“(5) Nothing in this section or in any order made thereunder shall be construed to limit or affect the operation of any enactment or rule of law for the time being applicable to any tenancy to which this section applies or to the dwellinghouse held under the tenancy, or to authorize the Court to vary, except by vesting or re-vesting the tenancy pursuant to this section, any express or implied term or condition of the tenancy.

“(6) On the application of the respondent in any case in which an order is made under subsection *one* of this section, the Court may, if in its opinion the circumstances have so changed since the making of the order that the tenancy should be revested in the person or any of the persons in whom it was vested before the making of that order, make an order cancelling the first-mentioned order and revesting the tenancy accordingly. 5

“(7) At any time after the death of any petitioner in whom any tenancy is vested by any order made under subsection *one* of this section, the respondent may, unless the tenancy has been determined by reason of the death of the petitioner, apply to the Court for an order revesting the tenancy in the respondent, and the Court may make an order accordingly. 10 15

“(8) On the taking effect of any revesting order under subsection *six* or subsection *seven* of this section, unless the tenancy is sooner lawfully determined, the person in whose favour it is made shall be deemed to be the tenant of the dwellinghouse upon and subject to the terms and conditions of the tenancy in force at the time of the making of the revesting order. 20

“(9) Any order under this section may be made upon and subject to such terms and conditions, not inconsistent with this Act, as the Court thinks fit. 25

“(10) Every order under this section shall take effect on such date as may be specified in that behalf in the order, being a date not earlier than two months after the date of the making of the order;

“Provided that it shall not in any case take effect— 30

“(a) If it is made subject to the performance of any condition or the occurrence of any event specified in the order, until the condition is performed or the event occurs:

“(b) If any application is made by the landlord under section *forty-one* B of this Act for the cancellation or variation of the order, and the order is confirmed with or without variation, until the order of confirmation is made or until such date as may be specified in that behalf in the confirming order: 35 40

“(c) If there is an appeal to the Court of Appeal against the order, or an appeal by the landlord against the refusal of the Supreme Court to cancel or to vary the order, until the appeal has been determined.

5 “(11) Where any dwellinghouse to which any order made under this section relates is held under any registered lease, the Registrar of the Court in which the order is made shall, on the taking effect of the order,
10 send a copy of the order, sealed with the seal of the Court, to the District Land Registrar or, as the case may require, to the Registrar of Deeds, who shall, upon payment of the prescribed registration fee, register it in the prescribed manner. The said registration fee shall
15 be payable by the person in whose favour the order is made.

“(12) For the purposes of this section, the term ‘tenant’, in relation to any dwellinghouse, includes any person whose tenancy has expired or been determined,
20 and who is for the time being deemed under or by virtue of any enactment or rule of law to continue to be the tenant of the dwellinghouse; and the term ‘tenancy’ has a corresponding meaning.

“(13) This section shall bind the Crown.

25 “41B. (1) Where any order vesting or re-vesting any tenancy is made under section *forty-one A* of this Act, the Registrar of the Court in which the order is made shall forthwith cause to be served on the landlord of the dwellinghouse a copy of the order together with a notice
30 in the prescribed form, signed by the Registrar, informing the landlord of his right to apply to the Court to have the order cancelled or varied under this section.

Right of landlord to apply for cancellation or variation of vesting order.

“(2) The following provisions shall apply with respect to the service of the copy of the order and the
35 notice:

“(a) They may be served by delivering them to the landlord personally or by posting them by registered letter addressed to him at his last known place of abode or business in New
40 Zealand:

“(b) If they are so posted as aforesaid they shall be deemed to have been served at the time when the registered letter would in the ordinary course of post be delivered:

“(c) If the landlord is absent from New Zealand, they may be served as aforesaid on his agent in New Zealand. 5

“(3) Within fourteen days after service of the notice, the landlord may apply to the Court for the cancellation or variation of the order. 10

“(4) Notice of any such application shall be given, in such manner as the Court or a Judge thereof directs, to all parties to the proceedings in which the order was made, and every such party shall be entitled to be heard on the application. 15

“(5) After hearing the application the Court may, in its discretion, cancel the order, or confirm it either unconditionally or subject to such variations or conditions as the Court thinks fit.

“(6) Any application under this section may be disposed of in Chambers. 20

“(7) Where any order is made under this section, the Registrar shall forthwith cause a copy of the order to be served, in the manner prescribed by subsection *two* of this section, on every party who was entitled to be heard on the application under this section, and the provisions of that subsection shall accordingly apply with the necessary modifications. 25

“41c. (1) Subject to the provisions of this section, the landlord of any dwellinghouse to which any order under section *forty-one A* of this Act relates shall be deemed for the purposes of section fifty-eight of the principal Act (which relates to appeals) to be a party prejudicially affected by the order, and shall accordingly be entitled to appeal under that section to the Court of Appeal— 30 35

“(a) Against the order:

“(b) Against the refusal of the Court to cancel the order on any application under section *forty-one B* of this Act: 40

“(c) Against the refusal of the Court to make any variation for which any such application as aforesaid is made.

Appeals in respect of orders under last two sections.

“(2) The landlord shall not, without the leave of the Court of Appeal, be entitled to appeal against the order unless he has first applied to the Supreme Court for the cancellation or variation of the order as aforesaid
5 and the Court has refused to cancel the order or has refused to make the variation so applied for.

“(3) The time allowed for an appeal against the order shall not begin to run against the petitioner or respondent, or against any person affected or deemed
10 to be affected by the order, and no such appeal may be commenced by any person, until the expiration of twenty-one days after the date of the making of the order, or, in any case where an application is made by the landlord for the cancellation or variation of the order, until
15 the landlord’s application is disposed of.”

12. Section fifty-eight of the principal Act is hereby amended by omitting the words “ three months ”, and substituting the words “ six weeks ”.

Time allowed
for appeal to
Court of
Appeal.