make such a request. This is possible also because according to the Latin
canonical doctrine the priest is not the celebrant of marriage, but only the
official qualified witness of the Church who asks the celebrating parties to
manifest their consent and in the name of the Church receives it (cf. c. 1008
§ 2). In the aforementioned urgent cases the Catholic minister accomplishes
an act of charity in view of the spiritual good and eternal salvation of souls,
preventing the non-Catholic Christian faithful from falling into a state of
sinful life and eternal death.

Conclusion

The recognition of the Churches and ecclesial communities outside
the Catholic Church is the first step towards mutual collaboration between
the various Churches and participation in spiritual resources. Between the
Catholic Church and Eastern Orthodox Churches there exists almost full
doctrinal, ontological and sacramental communion, which renders sacramental
sharing theologically feasible and spiritually beneficial. According
to Catholic theology, the ecclesial communities of Reformation have not
maintained valid sacraments, with the exception of baptism (and marriage),
and hence it is difficult to find a sound theological ground for reciprocal
communication in sacraments. The canonical norms for sacramental sharing
vary according to the grades of communion existing between the Catholic
Church and other Churches and ecclesial communities. The observation of
such norms is necessary to avoid indifferentism, doctrinal errors, scandal
among the Christian faithful and false accusations of proselytism, which
are detrimental to Christian unity and full communion of all the Christian
Churches.

Legal Separation:
A Pastoral Alternative

Phillip J. Brown, S.S.

I. Introduction

Marriage, according to canon 1055 of the 1983 Code of Canon Law is
a covenant, by which a man and a woman establish between themselves a
partnership of the whole of life, ordered by its nature to the well-being of the
spouses and the procreation and upbringing of children. Although the 1917
Code spoke of procreation and the education of children as the primary
end of marriage, with "mutual help and the remedying of concupiscence"
as secondary ends, the 1983 Code (adopting the language of Catechism et
sec., n. 46) no longer speaks of "mutual help" as the primary end of marriage.

CoRed Lexis Canoniceae eurcorietiae foeminiis Pauli II promulgata, Vatican City, Libreria
Editrice Vaticana, 1983. Canon 1055: "Maritim cunctale foedus, quo vir et muller inter se
notioni vitae consortium constituant, indubia est naturalem ad bonum conjunxit et ad
faciendum generationem et educendum foemetum, a Christo Domino ad sacramentum dignatur
et in sacrificio haberi. Est. (Subsequent references to the 1983 Code are taken from this
source relying on the author's English translations; English translations will be referred to
in the text and notes, unless special problems of translation warrant reproduction of the
Latin text.)

Codex Iuris Canonici Papalii X Pontificio Maximi sive digestus Benedictii Papae XV autori-
trum promulgatus, Rome, Typsi Polyclitoris Vaticana, 1917. Canon 1013, § 1: "Matrium
nasprimarius est procreatian et educatio public; secundum quantum salutarium et
introduci concupiscit." (Subsequent references to the 1983 Code are taken from this
source relying on the author's English translations; English translations will be referred to
in the text and notes, unless special problems of translation warrant reproduction of the
Latin text.)
individuals work through such issues, particularly if it appears that separation is indicated and that the separation might have to be permanent. If a decision is not made to separate, a period of assessment can be helpful for determining whether remaining together offers greater hope for preserving the marriage and an intact family. If separation does seem necessary, at least temporarily, an assessment can be made of what will be necessary for cohabitation and family life to be restored. Whether the need for immediate separation is indicated or not, once separation has occurred there is no reason why both the conditions necessary for the assumption of cohabitation or the advisability of going forward to a permanent separation, divorce and the seeking of a decree of nullity should not be explored pastorally. When all is said and done, the point is for ministers to engage in pastoral ministry to this particular person in this particular situation, and to assure that such ministry will continue on an ongoing basis as long as it is needed to guide the individual through this difficult life circumstance within a context of religious faith, the teachings of the Church, and considerate and caring pastoral ministry.

4) Canonical procedures

The procedures for requesting approbation of a legal separation are outlined in canons 1692-1696 of the Code. The procedural canons anticipate that a case of this nature may be able to be relegated to a civil tribunal, and also provide that particular law can incorporate special procedures for dealing with such cases that may be at variance in one way or another with universal law.

The circumstances in which the parties may be given permission to approach a civil court are: 1) Where it is foreseen that the ecclesiastical decision will not result in civil effects, and 2) if it is foreseen that a civil judgment is the matter will not contravene divine law. The competent authority for giving this permission is the Bishop of the diocese where the parties are living. The canon does not specifically address the question of parties who have already separated on their own authority and are living in different ecclesiastical jurisdictions, but presumably it is referring to the Bishop of the place where the common household was being maintained prior to separation. However, in cases of longstanding separation it may be presumed that the Bishop of the place where the party seeking official recognition of the separation is living would be the appropriate ecclesiastical authority whose permission is required. In fact, the language of the canon (perennis peculiaribus adiutorum) may anticipate precisely this kind of situation. Furthermore, if the case will necessarily concern the merely civil effects of the marriage (most often one may presume that this means the distribution of the property of the parties and spousal and child financial support), the competent authority is directed to attempt to have the case brought before a competent civil court from the very beginning, provided the stipulations of §2 of the canon against any judicial judgment that would contravene divine law are complied with. Thus, a primary concern of canon law is that the case not be relegated to a civil court. The civil court judgment might result in declaring the dissolution of a valid marriage bond or some other effect contrary to divine law.

A canonical determination regarding separation can be made either by a decree of the competent diocesan Bishop or through a judicial sentence. If there is a question regarding the competence of a tribunal to which the case has been referred, it is to be resolved in accordance with the provisions of canon 1673 pertaining to marriage nullity cases. Thus, unless the case is reserved to the Apostolic See for some reason, cases regarding the legal separation of spouses can be decided by the tribunal of the place where the marriage was celebrated, the tribunal of the place where the respondents have a domicile or quasi-domicile, the tribunal of the place where the plaintiff has a domicile provided both parties live in the territory of the same Bishop’s Conference and the Judicial Vicar of the respondent’s domicile consents after being consulted, or the tribunal of the place where most of the proofs are to be collected if the Judicial Vicar of the respondent’s place of domicile consents after asking the respondent if he or she has any objection.

Cases for the separation of spouses are to be determined according to the oral contentious process, unless either party or the promoter of justice requests that the ordinary contentious process be used. Therefore the matter can be heard by a single judge (c. 1657) according to the norm of canon 1624 (that is, the judge may utilize two assessors as advisors, who can be either clerics or laypersons, if he so chooses). The petitioner must submit a petition that complies with canon 1504 (identifying the judge before whom
the case is brought, what is being requested and from whom, the legal basis of the petitioner's claim and at least in general the facts and proofs in support thereof; it must be signed by the plaintiff or her or his procurator indicating the day, month and year and the address of the plaintiff or procurator; and it must indicate the respondent's domicile or quasi-domicile). Furthermore, the petition must summarize the facts involved and identify any proofs that cannot be submitted with the petition itself in a way that will permit them to be gathered immediately by the judge.49 Furthermore, any relevant documents (or at least authentic copies) must be attached to the petition.50

Canon 1695 requires the judge to use pastoral means to attempt to bring about a reconciliation of the parties and persuade them to restore conjugal living before the case is accepted whenever there is hope a favorable result. Similarly, canon 1659 §1 implicitly requires the judge to attempt mediation according to the norm of canon 1456 before notifying the respondent of the petition and calling forth a response.51 Thus, the judge is to exhort the parties to seek an equitable solution to their differences by discussing the matter with them, even employing reputable persons to mediate between the parties.52 If such efforts are pointless or are attempted but prove fruitless, the judge is then to notify the respondent of the petition allowing for a written reply within fifteen days, which has the effect of a judicial summons in accordance with canon 1512. The canons are careful to preserve the respondent's right of defense, and require the judge to set a time limit for the petitioner to reply to any exception raised by the respondent within the allowed time for responding to the petition.53 After the time limit for the pleadings has expired the judge is to examine the acts and determine the point in issue, and then summon the parties and any others whose attendance may be required to be present for a hearing within thirty days, identifying for the parties the point in issue.54 The parties are to be notified in the summons that they may submit a short written statement in support of their positions at least three days before the hearing,55 and at the hearing the judge is to consider first all of the matters referred to in canons 1459-1464 (exceptions based on defects that might render the judgment invalid, requests for delay, objections to the competence of the tribunal or the judge, assertions that the matter is res judicata, other peremptory exceptions, counterclaims and questions regarding the allocation of judicial expenses or the grant of free legal aid).

The acts of the case are to be assembled during the hearing (without prejudice to the judge's right to call upon other tribunals for assistance in instructing the case or communicating the acts as noted in canon 1418), and the parties may be allowed to assist in the examination of the other party or witnesses or any expert.56 A record of the pleadings, acts and testimony to the extent they bear on the substance of the matter is to be kept by a notary and signed by the persons testifying, and proofs not previously submitted or requested may only be admitted in accordance with canon 1452 (although the judge does have considerable leeway in admitting new proofs in accordance with both canon 1452 and canon 1600, specifically mentioned in canon 1665).57 Nevertheless, if all of the proofs cannot be collected during the hearing, the matter is to be delayed and a further hearing scheduled (canon 1666, which is clearly designed to safeguard the right of the parties to have adequate notice of proofs and an opportunity to respond to all relevant matters brought before the tribunal). After the proofs have been collected the judge is to conduct an oral discussion of the case and proceed to make a decision privately, the dispositive portions of which are to be immediately announced in the presence of the parties.58 Judgment can be deferred for up to five "useful" days in particularly difficult matters, but the full text of the judgment, including the reasons for it, is to be notified to the parties as soon as possible, normally within fifteen days.59

49Canon 1658.
46Ibid.
49Canon 1659.
50Canon 1446 §2.
51Canon 1660.
52Canon 1661 §1.
53Canon 1661 §2.
54Canon 1665 §1.
55Canon 1663 §2, 1561, 1670.
56Canon 1654.
57Canon 1665.
58Canon 1668 §1.
59Canon 1668 §§2 & 3.
Given the nature of any request for legal separation, it is hard to imagine cases in which one of the parties would prefer an ordinary contentious process, and it can be presumed that if and when someone would actually request formal ecclesiastical approval of a legal separation the oral contentious process will ordinarily suffice. Nevertheless, it must be born in mind that the canons do provide for the possibility of an action for legal separation being litigated according to the ordinary contentious process. Given the unlikelihood of this actually occurring, however, no effort will be made to summarize the provisions of that process in connection with actions for legal separation. If the ordinary contentious process were utilized, however, canon 1693 §2 provides that in the event of an appeal the tribunal of second instance is to proceed in accordance with canon 1692 §2 (that is, following the same procedures outline above for cases in the first instance), observing whatever the court determines to be necessary or appropriate.

Finally, canon 1696 provides that since cases regarding the separation of spouses concern the public good no less than cases involving the validity of the marriage itself, the promoter of justice must always intervene in accordance with the norm of canon 1433, which requires his or her presence, and also that the acts are invalid if he or she was not summoned. However, the canon goes on to stipulate that the acts will not be considered invalid if the promoter was actually present or was at least able to fulfill his or her role after studying the acts.

IV. Conclusion

In giving his charge to the Commission entrusted with the revision of the Code of Canon Law in 1965, Pope Paul VI spoke of the necessity of adapting canon law to the "new way of thinking" (novus habitus mentis) so evident in the work of the Second Vatican Council, a way of thinking that gives particular importance to pastoral care and the necessities of the People of God. In a certain sense, Pope Paul VI seems to have been calling upon the Church to engage the reality of the human condition more realistically.

Christian faith, however hope-filled and comforting it may be, exists for real human beings, in the real world, as it is. In fact, the power of Christian faith has something to do with the hope and consolation it offers believers in a terribly flawed world, where human beings must often contend with almost unimaginable challenges and suffering.

No one likes to imagine that family members, especially married persons with joint responsibility for raising children, would harm one another physically or psychologically. However, it is not necessary to imagine that this might occur: it does. Pastoral ministers are called upon to offer assistance to believers and in fact to unbelievers as well in the actual trials of their lives; as well as in the celebratory moments. One of the greatest challenges anyone can face in life is that of finding himself or herself in a situation where a beloved and trusted or perhaps a merely tolerated spouse is doing physical and psychological harm to them or their children. And yet, scientifically dependable studies establish that there is far more harm done through physical violence and psychological abuse in the home than anyone would like to admit. Beyond physical and psychological abuse, other circumstances often make married and family life extremely difficult if not intolerable as well. It is the duty of pastoral ministers to be attentive, sensitive and helpful to those they serve in such difficult life circumstances, which evidence demonstrates are plentiful. It is perhaps equally unimaginable how much good ministers of the Gospel can accomplish when they do engage the most difficult circumstances people face and grapple with all of the complexities that such circumstances present.

As Paul VI and John Paul II pointed out time and again, when all is said and done canon law exists to serve the pastoral ministry of the Church. This article has attempted to demonstrate how the new law of the Church provides pastors and other pastoral ministers with meaningful alternatives for assisting those subject to the law in some of the most difficult circumstances of their lives. The end-results of pastoral ministry are often not ideal, frequently failing to achieve preferred results. This is bound to be the case, however in so imperfect a world, and sometimes the lesser of evils is the greatest good that can be achieved.

Separate living by married couples, and the separation of children from a fully integrated home life in a Christian family, is not desirable. Sometimes, regrettable it is necessary, at least if one is willing to engage the truth of the human condition realistically. However, separation may also offer the most realistic, and therefore the best, means of nurturing a married couple and their family toward wholeness. Marriages do fail, however; a good number of them. And it must be conceded that many are declared to have been null from the outset when subjected to adequate canonical scrutiny.