
LAW AND THE FAMILY

ABANDONMENT: WHEN IS SEXUAL REFUSAL JUSTIFIED?

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[New York Law Journal](#)

November 26, 1991

IN THE RECENT decision in *George M. v. Mary Ann M.*, [FN1] the Appellate Division, Second Department reversed "on the law and the facts" a judgment of divorce granted to the husband on the ground of constructive abandonment. In its decision, it found that the wife's refusal to have sexual relations with the husband was justified and that the husband's unconventional sexual demands upon his wife were responsible for her general lack of desire for "conventional" sexual relations. It stated:

Even assuming the truth of all of the husband's evidence, it is uncontroverted that his consistent and repeated demands for anal and oral sex, as well as his demands that his wife retire in erotic nightwear, caused the parties' marriage to sour. The defendant accommodated the plaintiff's demands on occasion, but found that his favored forms of sex were either painful or unpleasant. The defendant's wife's justifiable refusals to indulge the plaintiff and his unwillingness to respect her objections caused repeated arguments which eventually quashed this marriage of 22 years and caused the acrimony which was responsible for the defendant's general lack of desire for conventional sexual relations. Notwithstanding this, the defendant expressed her wishes to continue in a loving marital relationship with the plaintiff, including normal sexual relations. Under these circumstances we are convinced that the defendant's spurning of sexual relations with her husband, in this atmosphere of coercion and lack of consideration, was not unjustified, and, accordingly, does not confer upon the plaintiff a cause of action for a divorce on the ground of constructive abandonment."

A classic illustration of our court's increasing intrusions into marital privacy that are characteristic of the fault grounds for divorce, this case represents a judgment call that should be outside the parameters of our courts.

The Domestic Relations Law provides that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of the abandonment of the plaintiff by the defendant for a period of one or more years. [FN2]

Ground for Divorce

Before this statute was enacted in 1966, abandonment was not a ground for divorce. However, it was and remains a ground for legal separation [FN3] and for dissolution because of presumed death under the "Enoch Arden" law. [FN4]

No time period whatever is set for abandonment where the relief sought is legal separation. [FN5] In addition, abandonment as a ground for legal separation is subject to the defense of "justification," [FN6] which may consist of the "misconduct of the plaintiff" even though such does not amount to grounds for matrimonial relief. Abandonment as a divorce ground is not subject to the traditional divorce defenses, [FN7] nor to the statute of limitations that applies to the grounds of adultery, cruel and inhuman treatment, and imprisonment grounds.

It is generally held that abandonment or desertion requires proof of four elements: (1) a voluntary separation of one spouse from the other; (2) with intent not to resume cohabitation; (3) without the consent of the other spouse; and (4) without justification. [FN8] It is of practical importance, however, that each of these four elements may involve subjective rather than objective criteria. In a confused and conflicting fact pattern of mutual recrimination (where there is that rare phenomenon, the contested case), the clarity and simplicity of the stated requirements becomes elusive. The New York cases construing abandonment as a ground for legal separation refer to some or all of the elements mentioned above. There must be a final departure without sufficient reason and without the consent of the other party and with the intention not to return. [FN9]

The conduct of the defendant as stated previously must be unjustified and without the consent of the plaintiff. [FN10] The action must fall when the conduct of both parties, which forms the basis of the adverse party's cause of action for abandonment, was done with the consent or condonation of the party alleging abandonment. Our law does not yet recognize a mutual abandonment. [FN11] It has been said that for a separation to constitute an abandonment, it "must be obstinate and hardened." [FN12]

Phillips v. Phillips, [FN13] held that the isolated and sporadic acts of a husband in a marriage of 35 years duration did not entitle his wife to a divorce on the ground

of cruel and inhuman treatment. The Appellate Division affirmed Special Term's refusal to grant the wife a divorce on the ground of cruel and inhuman treatment.

Special Term had granted the defendant's motion made just prior to trial to amend his answer to allege a counterclaim for abandonment, even though at the time the wife had instituted her action, she had only been gone from the marital home for four months. At the trial, proof of abandonment by the wife was received over objection of plaintiff wife's counsel. Special Term dismissed the plaintiff's complaint and directed judgment for the husband on the ground of abandonment.

A Year's Absence

Reversing the judgment in the husband's favor, the Appellate Division, Second Department noted that the statute requires a year's absence before an action for divorce on the ground of abandonment may be brought and that this is a jurisdictional prerequisite. [FN14]

More important, however, were the comments of the Second Department to the effect that "It is clear that her [the wife's] departure was the result of what she deemed to be the misconduct of the defendant. In this belief she was mistaken. Nevertheless, her departure and absence should not form the basis of a finding of abandonment under these circumstances."

The court continued, "We think a term of separation may not be said to constitute as a matter of law a definitive abandonment when it is bounded by a lawsuit, maintained upon reasonable grounds and with sincerity of conviction for the very purpose of determining whether the separation shall continue. Thus, in our view the evidence does not show that hardening of resolve, that irrevocable decision by the plaintiff not to live with the defendant, whether she was right or wrong in her claim that the defendant had been guilty of cruelty to her."

A wife who leaves the home under the reasonable misapprehension that her husband has been guilty of adultery, may not be guilty of abandonment. [FN15] However, to serve as justification, the mistake must be a reasonable one. Where a wife abandoned her husband because he had normal intercourse with her, and because, as she believed, he had caused her to become pregnant, he was entitled to a separation on the ground of her abandonment. [FN16]

The spouse remaining at home may be guilty of abandonment sufficient to form a basis for a divorce. In some cases a spouse is justified in departing from the marital home or in terminating the marital relationship by the conduct of the former. Such abandonment being termed "constructive abandonment." [FN17]

The element of justification has the same effect as proof of consent to the separation insofar as abandonment is concerned. One authority points out, "In fact justification for leaving the home has a double effect. It causes the desertion not

to be desertion, and, in those states which accept the doctrine of constructive desertion, it labels as desertion the conduct which justifies the departure. For example, when a husband by his cruelty forces his wife to leave their home, she is not a deserter, but he is a constructive deserter." [FN18]

In *Del Gado v. Del Gado* [FN19] the Appellate Division, Second Department, held that where a wife leaves the marital home because she fears for her safety due to her husband's conduct, she has justification for leaving the home. The husband is barred from suing for divorce on the ground of her abandonment.

In such cases, the wife who locks out the husband, or the husband whose abuse drives the wife from the home, is the deserter rather than the spouse who is absent from the home. The other meaning of "constructive desertion" refers to a cessation of sexual relations as constituting an abandonment or desertion even though the parties may continue to live under the same roof.

Legend has it that the doctrine originally arose during the housing shortage. At least for the purposes of legal separation, New York has recognized the doctrine of constructive desertion (or abandonment) in both senses. For a time, however, there was disagreement as to whether or not cessation of sexual relations could constitute constructive abandonment. [FN20]

In the well-known case of *Diemer v. Diemer*, [FN21] the Court of Appeals held that the wife's religious scruples did not justify her in refusing to have sexual relations with the husband when they had been married by a civil ceremony but not according to the rules of her church. Her refusal was deemed to constitute abandonment. Other New York cases have held that a denial of marital relations may constitute an abandonment, although not where both parties have agreed not to have marital relations. [FN22]

In *Hammer v. Hammer* [FN23] the husband filed suit for divorce on the ground of constructive abandonment, alleging that his wife had refused to have sexual intercourse with him for over four years. The Appellate Division, Second Department, reversing the trial court's judgment of divorce in favor of the husband, reviewed the evidence, and found that even crediting all the husband's testimony and rejecting the wife's allegations in refutation, "it is clear that plaintiff for 10 years did nothing by way of legal process to assert his marital rights but was apparently content to permit the situation to continue....It seems clear to us that under the circumstances it can be said that plaintiff consented to a sexless relationship. Before he can predicate a separation or divorce action on the ground of defendant's refusal to have sexual relations with him, he must demand in good faith a renewal both of the marital relation and its obligations and, if the other refuses, such refusal will [then] furnish the basis of an action.

This court will not sanction plaintiff's unilateral termination of a marital relationship predicated on a refusal to have sexual relations when he himself, in effect consented to such a relationship for the long period here involved."

Hammer v. Hammer [FN24] was affirmed in a memorandum decision by the Court of Appeals, handed down simultaneously with its decision in Hessen v. Hessen. [FN25] The Court of Appeals said, "In the light of these facts of consent and condonation, and also in view of the age of the parties and the duration of the marriage, the Appellate Division acted within its discretion in determining that the wife was not chargeable with 'constructive abandonment' under the Domestic Relations Law." We note that the reference to "condonation" is unfortunate because that defense applies only to the adultery ground. Presumably, what the Court meant was implied consent to the cessation of marital relations.

In Zagarow v. Zagarow [FN26] the Supreme Court, Suffolk County, granted a divorce to the wife for her husband's cruel and inhuman treatment, and denied the husband's counterclaim for a dual divorce on the ground of her constructive abandonment because she refused to have sexual intercourse unless he used contraceptives. The Court held that defendant "did not refuse to have intercourse because his wife insisted on his use of a contraceptive. His consent, however reluctant, negates the theory of abandonment."

In Caprise v. Caprise, [FN27] the Appellate Division reversed the trial court's finding that there had been a constructive abandonment of the plaintiff husband because his proof did not permit a finding that for at least one year he, at least periodically, requested a resumption of marital sexual relations. In order to warrant a divorce, the abandonment must be proved to have continued for at least one year. To be considered constructive abandonment, a refusal or failure to engage in marital relations, must be unjustified, wilful and continued, despite repeated requests from the other spouse for resumption of cohabitation.

The New York decisions on "constructive abandonment" all involve intrusions into marital privacy and the washing of dirty linen in public that are characteristic of the fault grounds for divorce. The rules are artificial and otherworldly. True no-fault divorce, based upon the breakdown of the particular marriage, would dispense with the need for such unrealistic hair-splitting and unwarranted intrusions into the marital bedroom.

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FN1 ---AD2d---, 567 NYS2d 132, NYLJ 3-8-91, P. 27, Col.2, (2d Dept., 1991

FN2 Dom Rel Law 170, subd 2.

FN3 Dom Rel Law 200, subd. 2

FN4 Dom Rel Law, 220

FN5 See Dom Rel Law 200, subdiv. 2

FN6 See Dom Rel Law, 202

FN7 Where a husband sues for a divorce on the ground of abandonment in an uncontested action, and makes out a prima facie case, he is entitled to a judgment of divorce if defendant wife fails to plead and prove justification for her leaving him. *Maryon v. Maryon* (1977, 2d Dept) 60 App Div 2d 623, 400 NYS2d 160. Although the Appellate Division, Second Dept., speaks of defendant wife's failure "to plead or prove the defense of justification" it must be noted that there are no defenses under Dom Rel Law 170 to any other ground for divorce except adultery. When abandonment is alleged, if the defendant can show justification for the alleged abandonment then the plaintiff's case has not been made out, since a justified leaving by a spouse does not constitute abandonment. In an uncontested matrimonial action based on abandonment plaintiff need not raise and rebut any inference of justification.

FN8 *Phoenix v. Phoenix* (1973, 3d Dept) 41 App Div 2d 683, 340 NYS2d 977, app dismd 33 NY2d 691, 349 NYS2d 672, 304 NE2d 369, the Appellate Division held that the evidence established that defendant wife had abandoned her husband without justification for a period of one year so as to entitle him to a divorce pursuant to Dom Rel Law 170, subd 2. (Citing *Kaplan v. Kaplan* (1969, 2d Dept.) 31 AppDiv 2d 247, 297 NYS2d 881).

FN9 *Uhlmann v. Uhlmann*, 17 Abb NC 236

FN10 *Schine v. Schine* (1972) 31 NY2d 113, 335 NYS2d 58, 286 NE2d 449

FN11 *Henderson v. Henderson* (1978, 4th Dept) 63 App Div 2d 853, 405 NYS2d 857; *Belandres v. Belandres* (1977, 1st Dept) 58 App Div 2d 63, 395 NYS2d 458; *Butts v. Butts* (1975, 2d Dept) 50 App Div 2d 584, 375 NYS2d 31).

FN12 *Morris v. Morris*, (1943) 267 App Div 147, 44 NYS2d 724, revd on other ground 293 NY 709, 56 NE2d 589 FN13 (1979, 2d Dept.) 70 App Div 2d 30, 419 NYS2d 573

FN14 Citing Cavallo v. Cavallo (1974) 79 Misc 2d 195, 359 NYS2d 628; Dudzick v. Dudzick (1975) 84 Misc 2d 731, 378 NYS2d 234; Rossiter v. Rossiter (1977) 92 Misc 2d 342, 399 NYS2d 596

FN15 Fischel v. Fischel (1955) 286 App Div 842, 142 NYS2d 236

FN16 Saminos v. Saminos (1955) 285 App Div 1020, 139 NYS2d 454

FN17 On constructive desertion, see Annotation: 19 ALR 2d 1428, Cavallo v. Cavallo (1974) 79 Misc 2d 195, 359 NYS2d 628; Francati v. Francati (1977, 4th Dept.) 57 App Div 2d 694, 395 NYS2d 547

FN18 Clark, Law of Domestic Relations 337 (1968)

FN19 (1976, 2d Dept) 51 App Div 2d 741, 379 NYS2d 479; See also Casale v. Casale 111 AD2d 737, 489 NYS2d 775

FN20 At one time the various departments were in disagreement as to whether or not an action for judicial separation for abandonment could be brought when the parties were living under the same roof but not as husband and wife. Compare Berman v. Berman (1950) 277 App Div 560, 101 NYS2d 206; Lowenfish v. Lowenfish (1951) 278 App Div 716, 103 NYS2d 357; and List v. List (1946) 186 Misc 261, 61 NYS2d 809, mod 276 App Div 998, 95 NYS2d 604.

FN21 Diemer v. Diemer (1960) 8 NY2d 206, 203 NYS2d 829, 168 NE2d 654. See also Mirizio v. Mirizio (1926) 242 NY 74, 150 NE 605, 44 ALR 714; 35 Yale LJ 758 (1926).

FN22 Devon v. Devon (1961, Sup) 214 NYS2d 109. Wood v. Wood (1963) 41 Misc 2d 95, 41 Misc 2d 112, 245 NYS2d 800, mod on other grounds (1st Dept) 22 App Div 2d 660, 253 NYS2d 204, affd 16 NY2d 64, 262 NYS2d 86, 209 NE2d 709, 13 ALR3d 1401, cert den 383 US 943, 17 L Ed 2d 206, 86 S Ct. 1197.

FN23 (1973, 2d Dept) 41 App Div 2d 831, 342 NYS2d 9, affd 34 NY2d 545, 354 NYS2d 105, 309 NE2d 874 FN24 (1974) 34 NY2d 545, 354 NYS2d 105, 309 NE2d 874

FN25 (1974) 33 NY2d 406, 353 NYS2d 421, 308 NE2d 891

FN26 (1980) 105 Misc 2d 1054, 430 NYS2d 247

FN27 ---AD2d---, 533 NYS2d 622 (2d Dept., 1988)