
LAW AND THE FAMILY

LIVING APART - GROUNDS FOR DIVORCE

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DOMESTIC RELATIONS Law s170(6) still remains the only "no-fault" ground for divorce in New York. [FN1] It 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 that:

The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed and acknowledged by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides.

Before its enactment in 1966, as part of the "Divorce Reform Law," the original proposal for a broad separation ground for divorce in New York, which appeared in the "Wilson-Sutton" bill was that a divorce might be granted where "The husband and wife voluntarily live separate and apart for a continuous period of two or more years because of estrangement due to marital difficulties" However, as a result of the 1966 compromise with the "leader's bill," there emerged what became DRL s170(6), which requires that the separation be pursuant to a separation agreement.

The Legislature rejected such a broad provision and instead enacted DRL s 170(6), to vouchsafe the "authenticity and reality of the separation." [FN2] The mere allegation that the parties have been living separate and apart for more than one year after execution of a separation agreement is not sufficient to

automatically entitle a party to a conversion divorce where such party has not substantially complied with the agreement's terms and conditions. [FN3]

Duly Acknowledged Agreement

A separation agreement that has not been acknowledged, cannot form the basis of a divorce pursuant to DRL s170(6). [FN4]

Where parties have lived separate and apart pursuant to a separation agreement for the requisite period, the husband is entitled to a divorce, and the wife's contention that he had not told her he would use the agreement as a basis for a divorce is without merit, since nothing in the statute requires either party to declare his intention to use or not use the agreement as a ground for divorce. [FN5]

It also has been held that a stipulation agreement made in open court and read on the record, to the effect that the parties are to live separate and apart in the future, is tantamount to a separation agreement, so as to provide the basis for an action for divorce under DRL s170(6), after the parties have lived apart for the requisite period. [FN6] However, [FN7] a stipulation made by the parties in open court in the Family Court, wherein the husband agreed to vacate the marital premises, was held not to be tantamount to a separation agreement and, therefore, not a sufficient basis for granting a divorce.

A similar provision authorizing an action for divorce where the parties have lived apart for a year pursuant to a judgment of separation appears in DRL s170 (5), which provides that an action for divorce may be maintained where:

The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfying proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

We assume that a divorce may be obtained based upon unilateral filing with the clerk in the county of residence of an agreement executed in another state if it was executed with the formality required by s170(6). Probably if the agreement is void because of fraud or misrepresentation, it will not satisfy the requirements of the section. The statute is silent as to these and many other problems.

The singular requirement that the separation be attested to by a formal document reflects the experience or cynicism occasioned by the fraudulent and collusive divorces based on adultery that were an unfortunate characteristic of New York divorce law before the 1966 reform. The Legislature merely wanted to provide an added protection against abuses similar to those that occurred under the old law.

'Christian' Decision

In 1977 the Court of Appeals, in *Christian v. Christian*, [FN8] provided an authoritative construction of DRL s170(6). The opinion deals with (1) the effect of total or partial invalidity of the agreement on a s170(6) divorce, and (2) the effect of unconscionability or overreaching on the validity of a separation agreement. On the first point, the Court of Appeals held that a divorce pursuant to s170(6) might be based upon a separation agreement containing a severability clause even if parts of it were void, since the function of the agreement is merely to evidence the authenticity of the parties' separation for the statutory period. The case involved a review of the grant of a judgment of divorce by the Appellate Division, Second Department. [FN9]

The divorce action had been commenced in 1972 by the plaintiff wife on the ground of cruel and inhuman treatment, the husband interposing a counterclaim based on living apart for one year pursuant to a separation agreement. Supreme Court dismissed the wife's cause of action for failure of proof, set aside the separation as void based upon fraud and overreaching on the part of the husband and dismissed his counterclaim for divorce. The husband appealed.

The Appellate Division reversed the determination of Supreme Court. It held that even though one provision of the separation agreement (calling for equal division by the parties of their individually owned securities), was so unconscionable as to be unenforceable, nevertheless, the agreement still furnished a sufficient basis for a divorce under s170 (6).

The Appellate Division found that the wife's claim of fraud had not been sustained by sufficient proof, but it held that one paragraph of the agreement was null and void for a number of reasons, such as the fact that the wife had not been represented by an attorney acting solely in her interests; that her knowledge of financial matters was not equal to that of her husband; and the discrepancy between the value of her securities (about \$900,000) and the value of her husband's (about \$200,000) was so great as to make unconscionable and void the paragraph of the agreement that called for an equal division of the securities of each party.

The court concluded that once there has been a separation for one or more years supported by the prescribed separation agreement, and proof has been established of substantial compliance therewith, "the statute suggests no condition or restriction on the right of either party to commence an action," noting that numerous decisions have upheld divorces granted under DRL s170(6), although individual clauses in the agreements were void.

Void From Start

Five years later, in *Angeloff v. Angeloff*, [FN10] the Fourth Department held that "the established rule is that, if a separation agreement conforms to s170 of the DRL, but substantial provisions are held to be void and unenforceable it may still be accepted for the sole purpose of evidencing the parties' agreement to live separate and apart, thus satisfying the statutory requirement in respect to a separation agreement." This holding was subsequently modified by Court of Appeals, [FN11] which, limiting *Christian*, held that because the separation agreement was void ab initio it could not be the basis for a conversion divorce.

In *Fisher v. Fisher*, [FN12] the Appellate Division held that the 1984 Amendment to CPLR 3212(e), which prohibits granting summary judgment in matrimonial actions in favor of the non-moving party, does not prohibit granting of summary judgment to the defendant in action for conversion divorce under DRL s170(6) where the plaintiff seeks a conversion divorce and also seeks to invalidate certain financial provisions of the agreement.

Plaintiff failed to submit an affidavit in opposition, and her verified complaint acknowledged living apart for a period in excess of one year pursuant to the agreement. The court held that even though certain of the provisions of the agreement may be ultimately declared void it retains its validity to support an action for conversion divorce.

In contrast is the *Weinstock* decision. In *Weinstock v. Weinstock*, [FN13] the Appellate Division affirmed an Order of the Supreme Court that denied the husband's application for a conversion divorce and set aside the parties' separation agreement. The court held that the parties' separation agreement entered into in 1988 was patently unconscionable because the wife, having been married for 22 years, waived all rights with respect to equitable distribution, thereby relinquishing any share in the husband's assets, which were estimated to her to be in excess of \$2 million.

Pursuant to the agreement, the wife's receipt of maintenance was conditioned on her being employed and simultaneously taking at least six college credits and further limited the husband's obligations by providing that, even if those stringent requirements were met, he would only have to pay the difference between the wife's other income and the sum of \$15,000 per year. Further evidence of the agreement's unconscionability was the requirement that the wife must transfer her share of the jointly held marital home to the husband and grant to him an irrevocable power of attorney, allowing him to sign her name to any documents, checks, deeds, leases, etc. After the agreement was signed, the husband induced the wife to sign a loan agreement for a mortgage of \$85,000 on a second home purchased by him. Thereafter, he kept for himself the entire proceeds from this transaction.

The wife's psychiatrist, who testified at the hearing, characterized the wife as being very trusting of the husband and emotionally depended on him. The

husband's direct testimony indicated a fatal lack of disclosure concerning his financial affairs.

The record was also replete with evidence of the wife's diminished capacity because of her periods of dependence upon valium and alcohol. The Appellate Division held that the agreement was so manifestly unfair and the apparent product of coercion and overreaching on the part of the husband that it was properly set aside. The court concluded the agreement was void, ab inito, and that it could not serve as the predicate for a conversion divorce.

Filing Agreement

DRL 170 (6) provides that for a separation agreement to serve as a ground for a divorce, it must first be filed in the office of the county clerk of the county where either party resides. The statute provides that:

In lieu of filing such the agreement, either party to the agreement may file a memorandum of such agreement, which memorandum be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation, and (d) the date of the subscription and acknowledgment or proof of such agreement of separation.

The purpose of the filing provision is to evidence the fact that the agreement was made before the commencement of the divorce action. [FN14] The agreement may be filed nunc pro tunc. [FN15]

Performance

One bringing an action for divorce under DRL s170(6) must submit proof that he or she has substantially performed all the terms and conditions of such agreement. However, just what is "substantial" performance depends upon the particular facts of each case.

A review of the decisions under both DRL 170(5) and (6) offer some insight into the answers to this question.

In *Wilkins v. Wilkins* [FN16] the Supreme Court held that where the parties were separated by a decree of judicial separation in 1967, since that time resided in different abodes and the husband made all the required alimony payments, he was entitled to a divorce pursuant to DRL 170(5), notwithstanding the wife's allegations that they had sexual intercourse on a fairly regular basis during the eight-year period.

The court rejected the wife's contention that the husband had not specifically performed all terms and conditions of the separation judgment because of the alleged acts of sexual intercourse. In New York a judgment of separation can only be revoked by the court upon an application by both parties; reconciliation and cohabitation are ineffective to revoke the judgment.

In *Buckley v. Buckley* [FN17] the Supreme Court held that no grounds for divorce exist pursuant to DRL 170(6) where the parties resume marital relations and have not lived separate and apart for one year pursuant to a written agreement. The court held that the parties cannot provide in an agreement, for purposes of obtaining a divorce, that in "the event of reconciliation and resumption of the marital relationship between the parties, the provisions of this agreement shall nevertheless continue in full force and effect, except as otherwise provided by written agreement."

In *Meyn v. Meyn*, [FN18] the Appellate Division affirmed a judgment of divorce under DRL 170(6). The parties executed a separation agreement on Sept. 8, 1981, and ratified and amended it on Nov. 14, 1983, by an amendment executed while the parties were still living in the same residence. Thereafter, the parties agreed that the wife would continue to reside in the marital residence with the husband until she was able to procure a job and an apartment. On Jan. 5, 1984, the wife moved out. On Feb. 4, 1985, the husband commenced his action.

A separation agreement executed when the parties are living together will be found valid when an immediate separation is contemplated and in fact occurs, as in this case. The actual separation, about 6 1/2 weeks after the execution of the amended agreement, was sufficiently immediate to support a conversion divorce. Moreover, the wife did not object to or reject the agreement during the 14 1/2 months following and accepted all the benefits during that time.

Support Arrearages

In *Roth v. Roth*, [FN19] the husband contended that he had substantially performed all the terms and conditions of the separation decree, since he had lived apart from his wife for the statutory period. The record revealed, however, that the husband had been brought into court on repeated occasions because of arrearages in alimony and child support payments. It is only now, said the court, "When plaintiff perceives compliance to be to his advantage as an avenue to secure divorce relief, that past arrearages have been eliminated."

The Supreme Court distinguished *Rubin v. Rubin*, [FN20] where a prior delinquency in alimony was eliminated, and the husband had been in compliance with the separation decree for eight years, and *Van Vort v. Van Vort*, [FN21] where after initial defaults in the husband's support payments, a four-year period of compliance followed immediately preceding the divorce action and was found to constitute substantial compliance. In ruling that the husband had not

substantially complied with the terms of the separation decree, the court held that "there has been no period of any real duration where compliance, rather than intransigent [sic] refusal, has characterized plaintiff's actions."

The court stated further that after "some period of time (in this Court's view at least a full year) passes during which the husband has substantially performed the directives imposed upon him by the separation decree, he can submit satisfactory proof of substantial performance. This decision in no way adjudicates his ineligibility to ever demonstrate such grounds for divorce only that at this time the record is overwhelming that plaintiff has not 'substantially performed all the terms and conditions' of the separation decree."

In *Failla v. Failla*, [FN22] the husband was denied a conversion divorce pursuant to DRL s170(5). The evidence showed the husband to be in arrears in his alimony payments pursuant to the separation judgment in a large amount over a long period and that he had failed to comply with and satisfy other orders of the court. Holding that this was substantial non-compliance and non-performance of the major decretal duties of the separation judgment, the court dismissed the husband's complaint for divorce.

In *King v. King*, [FN23] an action under DRL 170(5) for divorce based upon 1984 separation judgment, the court dismissed the complaint based upon husband's failure to substantially comply. He was in arrears \$900 in child support payments under a judgment that directed he pay \$100 a week. He also failed to pay for a new roof, resulting in a repair cost to the wife for more than \$2,000. The court held that his failure to comply was substantial, since case law as to the required compliance is the equivalent for a separation agreement as for a separation judgment.

In *Gray v. Gray* [FN24] the Appellate Division held that, even though the payments were late, the plaintiff husband's payments for his wife's bills constituted substantial compliance with the terms of a separation agreement so as to entitle him to a divorce pursuant to DRL s170(6).

In *Rubin v. Rubin*, [FN25] reversing the dismissal by Special Term of the husband's action for divorce pursuant to DRL 170(5), the Appellate Division found substantial compliance by plaintiff with the terms of the separation judgment. The court stated that even though "appellant had been delinquent in making the required alimony payments for several years, he had been in compliance for a period of years prior to the commencement of this action." The court, noting that the parties had been separated for 12 years, said that there was no possibility of reconciliation and that to deny a divorce to the husband because of his "failure to make timely alimony payments years ago, especially where such failures have been cured, or, at least substantially cured," would be contrary to the purpose of the law.

In *Timmins v. Timmins* [FN26] the Appellate Division found substantial compliance by a husband with the terms of a separation agreement, justifying a divorce pursuant to DRL s170(6), despite his being in arrears in his payments on several occasions and despite his having sought court approval of a reduction in payments due under the agreement during periods of financial difficulty.

In *Vitale v. Vitale*, [FN27] the Appellate Division stated that the husband's payments over a period of several years of \$40 a month instead of \$10 a week as directed in the judgment, was substantial compliance with the judgment, in view of the husband's tender in his action for divorce of all arrearages accrued by reason of his paying monthly instead of weekly. Affirming the trial court's judgment granting the husband a divorce, the Appellate Division stated that "It would serve no useful purpose to say that his manner of payment precluded him from obtaining a divorce under Subdivision 5 of s170 of the Domestic Relations Law."

In *Nahl v. Nahl*, [FN28] the Appellate Division affirmed an order of the Supreme Court that granted plaintiff summary judgment pursuant to DRL s170(6). It found substantial compliance with the provisions of the agreement, where plaintiff consistently attempted to comply with certain crucial paragraphs of the agreement and was "for the most part thwarted by the actions of the defendant herself." Literal compliance with the terms of the separation agreement is not necessary if the essentials of the agreement are met.

FN1. Although a "no-fault" divorce is available under DRL s170 (5) on the grounds of living apart for one or more years after the granting of a judgment of separation and substantially performing all of its terms and conditions, we do not consider this a true "no-fault" ground because fault must be established to obtain a judgment of separation.

FN2. *Gleason v. Gleason* (1970). 26 NY2d 28, 308 NYS2d 347, 256 NE2d 513.

FN3. *Berman v. Berman* (1980), 52 NY2d 723, 436 NYS2d 274, 417 NE2d 568, affg (1st Dept) 72 AD2d 425, 424 NYS2d 899.

FN4. *Cicerale v. Cicerale* (1976), 85 Misc2d 1071, 382 NYS2d 430, affd (2d Dept. 54 AD2d 921, 387 NYS2d 1022. Real Property Law s292 provides: "Except as otherwise provided by this article, such acknowledgement can be made only by the person who executed the conveyance, and such proof can be made only by some other person, who was a witness of its execution, and at the same time subscribed his name to the conveyance as a witness." A defectively acknowledged separation agreement may nevertheless be the grounds for divorce if the agreement can be proved in another form that would entitle a deed to be recorded. The affidavit of the subscribing witness to the execution of the agreement would be sufficient proof to conform to the requirements of recording a deed (Real

Property Law, 292, 304) and is, therefore, adequate to cure a defective acknowledgement. *Londin v. Londin* (1979) 100 Misc2d 965, 420 NYS2d 326.

FN5. *Trachtenberg v. Trachtenberg* (1970), 66 Misc2d 140, 320 NYS2d 412.

FN6. *Martin v. Martin* (1970), 63 Misc2d 530, 312 NYS2d 520.

FN7. *Stone v. Stone* (1974, 2d Dept.) 45 AD2d 967, 359 NYS2d 351.

FN8. (1977) 42 NY2d 63, 396 NYS2d 817, 365 NE2d 849.

FN9. (1975) 2d Dept. 47 AD2d 917, 367 NYS2d 40, app dismd 37 NY2d 796, 375 NYS2d 107, 337 NE2d 613 and revd 42 NY2d 63, 396 NYS2d 817, 365 NE2d 849.

FN10. (1982, 4th Dept.) 86 AD2d 974, 488 NYS2d 335, mod 56 NY2d 982, 453 NYS2d 630, 439 NE2d 346.

FN11. (1982) 56 NY2d 982, 453 NYS2d 630, 439 NE2d 343.

FN12. (1987, 4th Dept.) 132 AD2d 1005, 518 NYS2d 290.

FN13. (1990, AD2d Dept.) 561 NYS2d 807, later proceeding (2d Dept.) 167 AD2d 394 and app dismd without op 77 NY2d 874, 568 NYS2d 916, 571 86, reconsideration den 77 NY2d 940, 569 NYS2d 614, 572 NE2d 55.

FN14. *Martin v. Martin* (1970) 63 Misc. 2d 530, 312 NYS2d 520.

FN15. *Barr v. Barr* (1990 3d Dept.) 168 AD2d 886, 564 NYS2d 562.

FN16. Both statutes require living apart for a year and substantial performance of the agreement or judgment.

FN17. (1976) 85 Misc2d 985, 382 NYS2d 240.

FN18. (1989) 142 Misc2d 560.

FN19. (1987, 2d Dept.) 135 AD2d 689, 522 NYS2d 588.

FN20. (1973) 74 Misc2d 135, 344 NYS2d 739.

FN21. (1971, 4th Dept.) 35 AD2d 460, 317 NYS2d 571.

FN22. (1970) 62 Misc2d 981, 310 NYS2d 641.

FN23. (1975) 81 Misc2d 959, 367 NYS2d 935.

FN24. (1986) 134 Misc2d, 509 NYS2d 751.

FN25. (1980, 1st Dept.) 74 AD2d 524, 4253 NYS2d 805.

FN26. (1971, 4th Dept.) 35 AD2d 460, 317 NYS2d 571.

FN27. (1975, 4th Dept.) 50 AD2d 720, 375 NYS2d 71.

FN28. (1989, 3d Dept.) 148 AD2d 898, 539 NYS2d 526.

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