Divorce Law Reform in New York

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IN NEW YORK

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ON THE EFFECTIVE date of the new divorce law,¹ September 1, 1967, there will be five new grounds for divorce in New York and one for judicial separation. In addition, adultery, which is a ground for either, will include homosexual as well as heterosexual intercourse.

The new grounds for divorce are cruelty, abandonment of one’s spouse for two years, confinement to prison for three years, living apart for two years following a judicial separation, and living apart for two years following the execution of a written separation agreement.

The new ground for judicial separation is confinement to prison for three years. The former grounds remain. They are cruelty, an abandonment of no specified duration, non-support and, of course, adultery.

The grounds are a compromise between the traditional fault theory of divorce and separation, and the contemporary, so-called dead marriage theory. The former views divorce and separation as radical remedies for a marital wrong committed by the defendant. It derives from an attitude toward marriage which emphasizes the social function performed by the family. In order that this function be performed, it holds that persons do, in fact, marry for better or for worse, and that, consequently, a husband and wife have a duty to see their marriage through, whatever the difficulty. This view would, therefore, permit dissolutions and separations only where one of the spouses has committed a wrong which strikes at the foundation of the marital relationship. Adultery, cruelty, abandonment, separation of the spouses because of imprisonment for crime, and non-support of the wife by the husband are examples of such a wrong.

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The dead marriage theory of divorce and separation assumes that marriage, like other contracts, is primarily for the personal fulfillment and satisfaction of the spouses. It would, therefore, permit a marriage to be dissolved or the spouses to be separated whenever it clearly appears that the marriage has failed this objective. Under this theory, it makes no difference where the fault, if any, lies. The only material question is whether the spouses are, in fact, hopelessly estranged. The legislative problem is that of establishing objective criteria by which to judge whether a marriage is, in fact, dead. The new divorce law adopts living apart for two years after either a judicial separation or separation agreement as the criterion.

**Adultery and Homosexual Activity**

Adultery, as usually understood, continues to be a ground for either divorce or separation under the new law. But the law enlarges the concept to include "deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff." This is broad enough to include perverted acts between a man and a woman. However, the importance of the provision doesn't lie here. Adultery, as previously understood, already included such acts. The deviate intercourse referred to is a homosexual act voluntarily performed by a married man or woman with another person. Although the legislature presumably had the practicing homosexual in mind when it wrote this provision, one homosexual act is as sufficient for divorce or separation as is a single heterosexual adultery.

Homosexual activity is made a ground for divorce and separation because such unfaithfulness breaches the marital contract in essentially the same way as a heterosexual adultery. If one accepts the latter as a ground, it is reasonable enough to accept the former.

The new law does not permit dissolutions and separations because of sexual perversion as such, but only for acts of perversion with another person. Hence, habitual, solitary masturbation, transvestism, exhibitionism, voyeurism and the like are not adultery because they involve no physical contact with another person. For the same reason bestiality is not a ground. However, were the guilty spouse to flaunt his perversion in front of the other, he could well be guilty of mental cruelty which is, of course, another ground for divorce or separation.

**Cruel and Inhuman Treatment**

Cruelty, previously only a ground for separation, is made a ground for divorce by the new law. However, the concept of cruelty appears to remain unchanged. The provisions concerning cruelty found in the old law have been consolidated, reworded and enacted as a ground for both separation and divorce. There is now an express reference to mental cruelty in the divorce and separation statutes, but the courts have accepted this as a form of cruel and inhuman treatment for years.

The justification for matrimonial actions based upon cruelty is the necessity of removing the plaintiff from a situation in which his physical or mental well-being is endangered by the defendant's torments. Hence, cruelty consists of malicious conduct which makes it "unsafe" for the injured spouse to live with the guilty party. Cohabitation is unsafe only when the conduct of the guilty spouse poses a
danger to the plaintiff's physical health or to his reason. Absent a threat to the plaintiff's physical or mental health, there is no ground for divorce or separation because the danger which would justify a dissolution or separation is missing. Mental cruelty, then, is a malicious course of conduct by one spouse which causes the other psychic suffering which, in turn, has impaired or which threatens to impair either the physical or mental well-being of the injured spouse.

The new law provides that a matrimonial action may be based upon such cruel and inhuman treatment as renders it "unsafe or improper" for the plaintiff to cohabit with the defendant. Where one spouse is maliciously persecuting the other by repeated humiliation and contempt, continued cohabitation is, no doubt, "improper" even though the plaintiff's health and reason are not endangered. Thus, it is thought by some that a divorce or separation can be procured in such a case on the ground of mental cruelty. But the law speaks not only of conduct which renders it improper for the parties to cohabit; it also requires conduct which "endangers the physical or mental well-being of the plaintiff." Therefore, it seems that in order to make out mental cruelty it is still necessary to prove that the defendant's conduct endangers the plaintiff's health, whether physical or mental.

**Abandonment**

The new law, just as the old, provides that an abandonment of no specified duration is a ground for judicial separation. The law concerning abandonment as a basis for separation is, therefore, unchanged. A divorce may be obtained for the abandonment of the plaintiff by the defendant for a period of two or more years. The use of the word abandonment in the divorce statute indicates that the cases concerning this as a ground for separation are precedent in divorce actions based upon this ground.

Abandonment as a ground for separation is a voluntary cessation of cohabitation by one spouse without the other's consent, without justification and with the persistent and obstinate intention of never resuming cohabitation.

An abandonment does not occur as soon as the spouses are separated; an indeterminate period of time, which can be as long as four years, must elapse before a refusal to cohabit ripens into abandonment. It is said that a refusal to cohabit does not become abandonment until the refusal is persisted in, obstinately.

The time at which an unjustified refusal to cohabit becomes obstinate and, hence, abandonment is dependent upon the guilty party's apparent justification. Where it is or should be clear to the guilty spouse that he has no justification, the refusal to cohabit becomes abandonment within a short time. But even in this case the deserter is given a month or two or more to reconsider and return to his spouse before he is guilty of abandoning the spouse. Where the guilty party has arguable justification and believes in good faith that he is justified, as where his right to refuse cohabitation depends upon an uncertain question of law, a refusal of many years is not obstinate until persisted in after a court has resolved the question.

In the first case, a separation can be obtained against the guilty party within a few months or a year after his initial refusal to cohabit. To obtain a separa-
tion the innocent spouse need not wait two years. In the second case, it may be impossible to procure a separation even though the parties have lived apart for three or four years.

When the legislature specified a time period in the provision for divorce for abandonment, it presumably wanted to obviate the sometimes difficult problem of determining when a refusal to cohabit was obstinate. It was presumably intended that a divorce could be obtained for an unjustified desertion as soon as, but not before, it continued for two years without regard to whether the defendant's refusal to cohabit is obstinate. If the new law is construed so as to effectuate this intent, abandonment, as a ground for divorce, will be defined as a voluntary cessation of cohabitation by one spouse without the other's consent, without justification, and with the intention of never resuming cohabitation, which is persisted in for at least two years.

The Living Apart Grounds for Divorce

The new divorce law authorizes the conversion into a divorce of either a judicial separation or a written contract of separation executed by the husband and wife. While there are questions of detail and technical requirements, the intent of the law is clear. A divorce may be obtained by either spouse when the parties have lived separate and apart for at least two consecutive years following either a judicial separation or the execution of a written separation agreement, provided that the one seeking the dissolution has in the interim complied with all the terms and conditions of the separation decree or agreement.

These two are the grounds which reflect the dead marriage theory of divorce. They were enacted in the belief that there is no better evidence that a union is unviable than the fact that the spouses have led, for an extended time, independent lives after marital difficulties which had previously resulted in a judicial separation or the execution of a separation agreement.

While condonation is not a defense to a divorce action based upon either of these grounds, the plaintiff must show affirmatively that the spouses have "lived separate and apart." Presumably, this means the husband and wife must dwell apart in separate abodes without sexual intercourse for at least two consecutive years immediately preceding the divorce action so as to unequivocally evidence the death of the marriage. Where the spouses have cohabited or had intercourse during the two years preceding the divorce action, it seems that they have not been apart long enough to clearly establish their irreconcilability at the time the divorce is sought. Thus, when the parties, attempting a reconciliation, resume cohabitation after a judicial separation or separation agreement, there can be no dissolution until two years after the attempt fails and the cohabitation ceases. But two years after the cohabitation is terminated, either party could procure a dissolution, the cohabitation following the separation decree or agreement notwithstanding.

In order to convert a separation decree or agreement into a divorce, the one seeking the divorce must show that he has complied with "all" the terms of the decree or agreement up to the time of the divorce proceeding. This means,
principally, that the husband can procure a divorce only if he has faithfully made the support payments required by the separation decree or agreement. But a breach of other terms, such as child visitation provisions, could also prevent either the husband or wife from obtaining a divorce.

An action for divorce alleging one of the living apart grounds cannot be initiated until September 1, 1967. However, living apart for two years after September 1, 1966 will suffice. But living apart prior to September 1, 1966 is not to be counted in computing the time the parties have been apart. Apparently any separation decree or agreement can be converted into a divorce no matter when the decree was granted or the agreement executed. Thus, any separation decree or agreement is a ground for divorce when the parties have lived apart for two years after September 1, 1966. Consequently, a divorce could be granted on these grounds as early as September 1, 1968, but not before.

Defenses

Except for the present statutes of limitations, it was intended that the new law leave intact the defenses to divorce and separation actions based upon an heretofore existing ground, whether the defenses were available by virtue of statute or case law. Therefore, the defenses of collusion, connivance, condonation and recrimination are still available to defeat either a divorce or separation action based upon the defendant's adultery. Furthermore, recrimination, by virtue of a statute, and condonation, as a result of case decisions, are defenses to separation actions based upon the defendant's cruelty, abandonment or non-support. As regards a separation action alleging the new ground, confinement to prison, it is clear that recrimination will, and that condonation should, defeat the action.

On the other hand, it was intended that there be no defenses to a divorce action based upon one of the new grounds other than those provided by the provisions of the new law. But except for a statute of limitations, the new law only provides that a resumption of cohabitation will bar a divorce action based upon abandonment. Thus, except for condonation of abandonment, it seems that condonation and recrimination will not defeat a divorce action based upon cruelty, abandonment, confinement to prison or one of the living apart grounds.

The abolition of defenses is a corollary of the dead marriage theory of divorce. It is, therefore, logical to provide for no defense insofar as the living apart grounds are concerned. It would be ridiculous to deny a divorce because the parties had "colluded" or "connived" at the execution of a separation agreement. Since no fault is involved in these grounds, condonation and recrimination likewise have no part to play.

But the failure to provide for defenses where the fault grounds of cruelty, abandonment and confinement to prison are involved makes no sense either. Consider some of the consequences.

Consider the case where at one time the husband has been confined to prison for three years. Upon his release he and his wife resume cohabitation. Later she becomes angry for a trivial reason such as a slighting remark about her mother. She leaves the husband and seeks a
divorce on the ground of confinement to prison. It seems she will get it unless the statute of limitations bars the action. In any event, the condonation of the husband’s fault will not defeat the action; and she will obtain a divorce because of, in effect, the husband’s remark about his mother-in-law.

The failure to provide for condonation as a defense in the case above is even worse than it at first seems. When she leaves her husband, the wife might be as satisfied with a judicial separation as a dissolution of the marriage. But, if she is to bring a matrimonial action, it must be a divorce action because it seems that the resumption of cohabitation will bar a separation on the ground of confinement to prison.

There is yet another anomaly. Where the husband is guilty of adultery, condonation of the offense will subsequently bar a divorce on that ground. It is inconsistent to bar a divorce in the case of a condoned adultery, but to permit one for a condoned confinement, cruelty or abandonment.

The period of limitations on a divorce or separation action brought because of adultery is five years from the time the offense was discovered by the plaintiff. Divorce and separation actions brought upon another ground must be commenced within five years after the ground arose; except that there is no period of limitation on actions based upon abandonment or one of the living apart grounds.

**Jurisdiction of New York Courts in Matrimonial Actions**

The new law confers jurisdiction upon the New York courts to entertain divorce and separation actions only when at least one of the spouses is domiciled in the state at the time the action is initiated. Consequently, all New York divorce and separation decrees will be founded upon the traditional jurisdicctional basis of domicile and there will be no question of their validity. In the past, the courts could assume jurisdiction when neither party was a resident of the state if the marriage had been contracted here or if both spouses had resided here when the adultery occurred. It is doubtful whether, in the first case, there is sufficient contact between the marriage and the state of New York to justify an assertion of jurisdiction over the marriage by the courts of this state. That doubt is obviated by the new jurisdictional provisions.

**Foreign Divorces**

The new provision dealing with migratory out-of-state divorces obtained by New York citizens effects nothing new. It provides that in two cases the procurer of a foreign divorce is presumed to have been domiciled in New York at the time he instituted the divorce action. This is, first, when the procurer was domiciled here within twelve months prior to the commencement of the divorce action and resumed his residence here within eighteen months after departing from New York; and, second, when he maintained a house or apartment here from the time he left New York until the time he returned after procuring the divorce.

The constitutionality of the statute has been doubted for several reasons. It has been said it is unconstitutional because it permits collateral attack on bilateral foreign divorces protected from such at-

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tack by the full faith and credit clause of the United States Constitution. The statute does not authorize such attack. It merely lays down a rule of evidence relative to the proof of the domicile of the procurer of a foreign divorce. Where the Constitution precludes any litigation concerning the procurer’s domicile, the statute has no application.

Full faith and credit permits collateral attack on a foreign ex parte divorce so the statute is applicable in this case. Although an ex parte divorce obtained within the United States may be subjected to collateral attack, there is a constitutional presumption of its validity. It has been argued that the statute is unconstitutional because it creates a presumption of invalidity in lieu of the presumption of validity required by full faith and credit.

The constitutional presumption of validity is a rebuttable one. It is the writer’s belief that the statute merely provides that, as a matter of law, proof of certain facts rebuts the presumption of validity and that this is permissible. But even were the statute unconstitutional, it would not make much difference. The cases hold that, even without such a statute as the one in question, proof of facts similar to those specified by the statute is sufficient to rebut the presumption of validity. Hence, ex parte United States divorces are as vulnerable to attack without, as with the statute.

Nor does the statute overrule the decision of Rosenstiel v. Rosenstiel. The point of that case is that New York recognizes a bilateral Mexican divorce obtained in a proceeding at which the plaintiff was physically present regardless of the domicile of the spouses. Proof that the procurer of such a divorce was domiciled in New York when he commenced the divorce action is immaterial; such a divorce is valid anyway.

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