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St. John's Law Review

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Recommended Citation

St. John's Law Review (1975) "DRL 170(5): Family Court Order of Protection Held To Be a Sufficient Predicate for a Nonfault Divorce," *St. John's Law Review*: Vol. 50 : No. 1 , Article 13.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol50/iss1/13>

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disputes is concerned, New York remains in a transitional stage. Perhaps legislative action would be an appropriate solution.¹⁶³

DOMESTIC RELATIONS LAW

DRL 170(5): Family court order of protection held to be a sufficient predicate for a nonfault divorce.

Section 170(5) of the Domestic Relations Law¹⁶⁴ reflects the recent liberalization of divorce law in New York.¹⁶⁵ Under this provision, if a "husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years,"¹⁶⁶ either party to the marriage¹⁶⁷ may, regardless of fault,¹⁶⁸ procure

¹⁶³ See *id.* at n.4, 324 N.E.2d at n.4, 364 N.Y.S.2d at n.4. Professor Sedler urges that the concept of standing be abandoned completely, as it "is of little real significance [*sic*]." Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 511 (1972). On the other hand, Professor Jaffe, in several articles, posits that standing should be not of right but within the discretion of the court. He contends that the developing relaxed standards for standing cause certain risks and dangers for the administrative process. See Jaffe, *Standing Again*, 84 HARV. L. REV. 633, 638 (1971); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 75 *id.* 255, 286-87, 302-05 (1961).

¹⁶⁴ DRL 170(5) provides that a divorce should be granted if:

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 satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

¹⁶⁵ Prior to the enactment of the Divorce Reform Law in 1966, ch. 254, [1966] N.Y. Laws 833, the only ground for divorce in New York was adultery by the spouse against whom the action was brought. Frequently, where such a ground did not legitimately exist, parties seeking to dissolve their marriage would offer perjured testimony to procure a divorce. See Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966). Currently, in New York, there exist six different grounds for a divorce, see DRL 170, two of which are commonly referred to as no-fault grounds. See Atkins, *The Developing Divorce Reform Law*, 45 N.Y. ST. B.J. 545 (1973); Branstein, *No-Fault Divorce, Alimony, and Property Settlement*, *id.* 241 (1973).

¹⁶⁶ DRL 170(5) (emphasis added). The only other requirement of § 170(5) is that the plaintiff submit satisfactory proof that he or she has substantially complied with all the conditions of the separation decree or judgment. *Id.* Courts have been quite liberal in accepting substantial compliance, often to the extent of affording a plaintiff the opportunity to remedy any unsatisfactory performance. See, e.g., Vitale v. Vitale, 37 App. Div. 2d 963, 964, 327 N.Y.S.2d 89, 90 (2d Dep't 1971); Rubin v. Rubin, 35 App. Div. 2d 460, 461, 317 N.Y.S.2d 571, 573 (4th Dep't 1971).

¹⁶⁷ An early and particularly vexing issue encountered in the application of DRL 170(5) was whether that section should be available to the party adjudicated guilty when the prior separation decree was obtained. See, e.g., Church v. Church, 58 Misc. 2d 753, 755, 296 N.Y.S.2d 716, 718 (Sup. Ct. Westchester County 1968) (divorce action pursuant to § 170(5) may not be maintained by a guilty spouse); Frishman v. Frishman, 58 Misc. 2d 208, 210, 295 N.Y.S.2d 70, 72 (Sup. Ct. Kings County 1968) (either guilty or innocent spouse may procure a divorce under § 170(5)). The principal objection to permitting a divorce in favor of a "guilty" spouse was that it would deprive the innocent, and often less financially able, spouse of economic benefits which would otherwise accrue from the marital status, *viz.*, property rights; inheritance rights; social security, medical, and retirement benefits; etc. See Hendel v. Hendel, 59 Misc. 2d 770, 300 N.Y.S.2d 350 (Sup. Ct. N.Y. County 1969), *modified*, 44 App. Div. 2d 532, 353 N.Y.S.2d 454 (1st Dep't 1974) (mem.).

a divorce. Although the statute appears unambiguous on its face, confusion has arisen as to the type of judicial pronouncement which will constitute a "decree or judgment of separation." In *Wechter v. Wechter*,¹⁶⁹ the Supreme Court, Kings County, adopting a liberal interpretation of the statutory language, held that a family court order of protection¹⁷⁰ constitutes a sufficient predicate upon which to grant a DRL 170(5) divorce.

In *Wechter*, an action for divorce, the defendant wife had, in a prior support proceeding in the family court,¹⁷¹ obtained an order of support and an order of protection requiring the parties to remain apart for one year. Having lived apart from the defendant in compliance with the order of protection for approximately seven years, plaintiff husband filed for divorce. In opposition, defendant

Nevertheless, the Court of Appeals, in *Gleason v. Gleason*, 26 N.Y.2d 28, 35, 256 N.E.2d 513, 516, 308 N.Y.S.2d 347, 351 (1970), established that the guilt or innocence of the party seeking to convert the separation decree into a divorce is irrelevant. The Court further noted that if the loss of important rights by the innocent party "is thought to occasion economic inequity, . . . redress or alleviation must be left to the Legislature." *Id.* at 43, 256 N.E.2d at 521, 308 N.Y.S.2d at 357. Indeed, by a recent amendment to DRL 170, ch. 1047, § 170(7), [1974] N.Y. Laws 2692 (codified at DRL 170-a), the legislature has attempted to remedy this problem. Under this new provision a spouse may institute a proceeding to recover the value of certain rights lost as the result of a divorce decree. Absent intervening circumstances which render such an award inequitable, the interest of the plaintiff in this action is to be calculated "as if the death of the defendant had immediately antedated the divorce." DRL 170-a(b). Hopefully, with the aid of this provision, courts will be able to grant a divorce pursuant to § 170(5) with less fear of an inequitable distribution of the marital assets.

¹⁶⁹ Four of the six grounds for divorce in New York are predicated upon a finding of marital fault. *See* DRL 170(1)-(4). An action for divorce may be instituted against a spouse who is guilty of cruel and inhuman treatment, abandonment for one or more years, imprisonment for three or more consecutive years, or adultery. Section 170(5), although commonly referred to as one of the two nonfault grounds for divorce in New York, also requires a finding of fault in the first instance since a judicial decree or judgment of separation, the apparent prerequisite for a § 170(5) divorce, may only be granted upon evidence of cruel and inhuman treatment, abandonment, neglect of wife, adultery, or confinement in prison for three or more consecutive years. DRL 200. The only true nonfault ground for divorce, therefore, is contained in subdivision six of § 170. This provision permits parties who have lived apart for at least one year pursuant to either a written separation agreement or a memorandum executed according to certain formal requirements to maintain an action for divorce.

¹⁶⁹ 81 Misc. 2d 821, 366 N.Y.S.2d 996 (Sup. Ct. Kings County 1975) (mem.) (Heller, J.).

¹⁷⁰ N.Y. FAMILY CT. ACT § 842 (McKinney Supp. 1974). Authority to grant an order of protection is vested in the family court. *Id.* § 841(d). The order typically prescribes conditions of behavior to be observed by the petitioner or respondent spouse and can extend for as long as a year. *Id.* § 842. For example, the court may order one spouse "to stay away from the home, the other spouse or the child." *Id.* § 842(a). As a general matter, a protection order is granted to stabilize a dangerous condition and to protect the safety of persons and property. *See* *Capelli v. Capelli*, 73 Misc. 2d 431, 433, 341 N.Y.S.2d 798, 800 (Family Ct. Rockland County), *rev'd*, 42 App. Div. 2d 905, 347 N.Y.S.2d 601 (2d Dep't 1973). Failure to comply with an order of protection may result in that spouse's commitment to jail for a term not in excess of six months. N.Y. FAMILY CT. ACT § 846 (McKinney Supp. 1974).

¹⁷¹ Support proceedings are under the exclusive original jurisdiction of the family court. *See* N.Y. FAMILY CT. ACT §§ 411 *et seq.* (McKinney 1963).

moved to dismiss the complaint for failure to state a cause of action.¹⁷² The *Wechter* court, however, found that the order of protection fully satisfied the requirements for a conversion divorce pursuant to DRL 170(5) and thereupon denied defendant's motion to dismiss.¹⁷³

The court considered the legislative intent behind the enactment of section 170(5) especially relevant to its determination. As particularly helpful in this regard, *Wechter* cited the "keystone" Court of Appeals decision, *Gleason v. Gleason*.¹⁷⁴ In passing upon the retroactive application of section 170(5) specifically at issue in that case,¹⁷⁵ the *Gleason* Court discussed in depth the purpose and operation of this new nonfault ground for divorce. According to the Court of Appeals

[t]he vital and operative fact is that the parties have actually lived apart The real purpose of this nonfault provision was, as noted, to sanction divorce on grounds unrelated to misconduct. The decree is simply intended as evidence of the authenticity and reality of the separation.¹⁷⁶

Relying upon *Gleason*, the *Wechter* court concluded that the legislature's purpose in requiring a "decree or judgment of separation" was merely to insure that there be documentary evidence of the fact of separation.¹⁷⁷ To infer that the legislature further intended

¹⁷² In support of her motion, the defendant argued, *inter alia*, that an order of the family court had no effect upon the marital status of the parties and therefore could not serve as a basis for divorce under DRL 170(5). 81 Misc. 2d at 822, 366 N.Y.S.2d at 996.

¹⁷³ *Id.* at 825-26, 366 N.Y.S.2d at 999-1000. The sole issue in *Wechter* was whether the order of protection constituted a sufficient predicate for a § 170(5) divorce. The court never reached the question of whether a divorce should be granted because a factual determination on the issue of plaintiff's compliance with the order of the family court was necessary. *Id.* at 825, 366 N.Y.S.2d at 1000.

¹⁷⁴ 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).

¹⁷⁵ Prior to *Gleason*, the retroactive application of § 170(5) and the attendant due process implications had been a major source of litigation. Since a party who requested a separation decree prior to the enactment of DRL 170(5) had no reason to contemplate its possible use as grounds for divorce, it was argued that such a use would deprive that party of valuable property rights without the requisite notice. *Id.* at 40, 256 N.E.2d at 519, 308 N.Y.S.2d at 355. In rejecting this argument, the *Gleason* Court reasoned that marital rights are merely contingent rights which may be taken away by the legislature before they vest. *Id.*

¹⁷⁶ *Id.* at 35, 256 N.E.2d at 516, 308 N.Y.S.2d at 351. The *Gleason* Court further remarked:

Reasonably and sensibly read, the statute, as a whole, points the construction that all that has to be proved is that there is some kind of formal document of separation The function of the decree, as we already noted, is merely to authenticate the fact of separation.

Id. at 37, 256 N.E.2d at 517, 308 N.Y.S.2d at 353.

¹⁷⁷ 81 Misc. 2d at 825, 366 N.Y.S.2d at 999. A number of courts have relied upon *Gleason's* liberal construction of legislative intent to sustain actions for divorce under DRL 170(6), *i.e.* conversion divorces based upon separation agreements, where all the formal statutory requirements had not been observed. *See, e.g.*, *Markowitz v. Markowitz*, 77 Misc. 2d 586, 587-88, 353 N.Y.S.2d 872, 874-75 (Sup. Ct. Kings County 1974); *Littlejohns v.*

to require a specific type of proof would, in the court's opinion, "emphasize form over substance and place undue stress upon the instrument."¹⁷⁸ Having found no significant distinctions between the operative provisions of a separation decree and a protection order,¹⁷⁹ the court determined that use of either as proof of separation would further the legislative objective of preventing fraud and collusion.¹⁸⁰

The social undesirability of compelling couples to remain together under the guise of a conjugal relationship which is in fact meaningless has generally been conceded.¹⁸¹ In this regard, the result achieved in *Wechter* is an equitable one.¹⁸² Nevertheless, the court appears to have adopted a broader construction of the statute than its language warrants.¹⁸³ The provisions of DRL 170(5) are

Littlejohns, 76 Misc. 2d 82, 87, 349 N.Y.S.2d 462, 468 (Sup. Ct. N.Y. County 1972), *aff'd*, 42 App. Div. 2d 957, 348 N.Y.S.2d 959 (1st Dep't 1973); *Martin v. Martin*, 63 Misc. 2d 530, 533, 312 N.Y.S.2d 520, 523 (Sup. Ct. Queens County 1970). Emphasizing the fact of physical separation rather than the form of proof, these courts have been remarkably broad in their interpretation of § 170(6).

¹⁷⁸ 81 Misc. 2d at 825, 366 N.Y.S.2d at 999.

¹⁷⁹ The family court order at issue in *Wechter* required that the husband live apart from his wife and support his family. A further provision granted him limited child visitation rights. Justice Heller noted that these are the essential features of a separation decree. *Id.*

¹⁸⁰ *Id.* at 825, 366 N.Y.S.2d at 999-1000. Indeed, the committee rewriting New York's matrimonial laws expressly stated that one of its objectives was to prevent fraudulently procured divorces. REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS, 1966 N.Y. LEG. DOC. NO. 8, at 21-23.

¹⁸¹ See, e.g., Finlay, *Reluctant, But Inevitable: The Retreat of Matrimonial Fault*, 38 MODERN L. REV. 153 (1975); Foster & Freed, *Living Apart as a Ground for Divorce*, 153 N.Y.L.J. 94, May 17, 1965, at 1, col. 4; Comment, *No-Fault Divorce: A Proposal for Mississippi*, 45 MISS. L.J. 179 (1974); Note, *The Case for No-Fault Divorce*, 10 TULSA L. REV. 427 (1975); Note, *Domestic Relations: Incompatibility Divorce in Kansas — A Movement Toward No-Fault Divorce*, 14 WASHBURN L.J. 349 (1975). See also notes 192-93 and accompanying text *infra*.

¹⁸² The *Wechter* court was obviously influenced by the overwhelming evidence that a viable marriage no longer existed. In 1967, after 15 years of marital difficulties, the husband in *Wechter* procured a unilateral Mexican divorce. Shortly thereafter, he remarried and at the time of this action was living with his new "spouse." In addition, before his wife obtained a support order from the family court, he refused to provide his family with any financial support whatsoever. 81 Misc. 2d at 822, 366 N.Y.S.2d at 997. Nevertheless, the defendant wife argued that public policy would not be served by permitting the use of an order of protection as grounds for a § 170(5) conversion divorce. She feared that this would encourage a husband, desirous of obtaining a divorce, to breach his obligation of support, hoping that his wife would seek an order of support and an order of protection, and discourage a wife, who might not want that divorce, from seeking judicial protection. *Id.* at 823, 366 N.Y.S.2d at 997. The *Wechter* court disposed of this argument by noting that "[t]here is no provision in the law that requires wives . . . to seek orders of protection in the Family Court when seeking an order of support." *Id.* at 825-26, 366 N.Y.S.2d at 1000.

¹⁸³ In *Peck v. Peck*, 78 Misc. 2d 207, 209, 356 N.Y.S.2d 517, 519 (Sup. Ct. Monroe County 1974), the Supreme Court, Monroe County, refused to give the statute more than a literal interpretation, stating that "[n]either the Court of Appeals [in *Gleason*] nor the legislature intended that a no-fault divorce could be based upon any kind of formal document of separation." *Id.* at 209, 356 N.Y.S.2d at 519 (emphasis in original). Consequently, the court refused to grant a divorce predicated upon an order and judgment — that the husband make mortgage payments and pay taxes on the couple's residence — issued in a previous unsuccessful divorce action.

clear and specific. The statute requires a "decree or judgment of separation." Had the legislature intended that any kind of judicial order requiring the parties to live separate and apart satisfy the requirements of the statute, it could have easily so stated. Absent any authorization in the legislative history it should not be assumed that the failure to include family court orders or other types of judicial orders was the result of legislative oversight.

Prior case law seems to reflect a preference for a narrow reading of the statute. In *Becker v. Becker*,¹⁸⁴ for example, the Appellate Division, Second Department, held that an existing judgment resembling a separation decree¹⁸⁵ was insufficient to satisfy the requirements of 170(5),¹⁸⁶ emphasizing that "nothing less than a judicial decree of separation [may] be the antecedent of a divorce decree under that subdivision."¹⁸⁷ It can certainly be argued that an order of the family court, which is not binding on the supreme court and has no effect on the marital status of the parties,¹⁸⁸ is something less than a judgment or decree of separation. The Supreme Court, Nassau County, in *Liebling v. Liebling*,¹⁸⁹ similarly refused to permit a judgment awarding the defendant exclusive possession of the marital home to serve as a basis for divorce under section 170(5). To grant the divorce in this instance would, in the court's opinion,

do violence to the limitations imposed by the Legislature and [in effect] provide a seventh ground for divorce which might include, if the analogy be permitted, an order of protection by the Family Court.¹⁹⁰

¹⁸⁴ 44 App. Div. 2d 676, 353 N.Y.S.2d 796 (2d Dep't 1974) (mem.), *modifying* 72 Misc. 2d 64, 338 N.Y.S.2d 376 (Sup. Ct. Queens County 1972).

¹⁸⁵ The wife was awarded exclusive possession of the marital home, child custody, and support, while the husband was granted visitation rights. A separation decree, however, was specifically denied. *Id.* at 676, 353 N.Y.S.2d at 797.

¹⁸⁶ In modifying the position of the lower court, which granted a divorce under both DRL 170(5) and DRL 170(1), the appellate court in *Becker* took issue with the trial court's position that the fact of separation is of ultimate importance. The appellate court insisted that the language of DRL 170(5) be strictly construed:

[W]e cannot agree with Special Term's finding that the underlying 1965 judgment, which specifically denied a separation decree while awarding custody, support and visitation, can be construed to satisfy the clear requirements of subdivision (5) of section 170 of the Domestic Relations Law that nothing less than a judicial decree of separation be the antecedent of a divorce decree under that subdivision.

44 App. Div. 2d at 676-77, 353 N.Y.S.2d at 797. The grant of the divorce under section 170(1), however, was affirmed. *Id.*

¹⁸⁷ 44 App. Div. 2d at 676, 353 N.Y.S.2d at 797.

¹⁸⁸ See *Loomis v. Loomis*, 288 N.Y. 222, 224, 42 N.E.2d 495, 496 (1942); *accord*, *Shulsky v. Shulsky*, 63 Misc. 2d 642, 644-45, 312 N.Y.S.2d 944, 946-47 (Sup. Ct. Kings County 1970); *Small v. Small*, 77 Misc. 2d 1032, 1035, 355 N.Y.S.2d 545, 547 (Family Ct. Queens County 1974).

¹⁸⁹ 76 Misc. 2d 465, 352 N.Y.S.2d 758 (Sup. Ct. Nassau County 1973).

¹⁹⁰ *Id.* at 468, 352 N.Y.S.2d at 761.

Both *Becker* and *Liebling* were conspicuously absent from Justice Heller's opinion in *Wechter*.¹⁹¹

Unquestionably, the *Wechter* decision is in accord with both the liberal attitude expressed by the Court of Appeals in *Gleason*¹⁹² and societal views recognizing divorce as a necessary and desirable social institution.¹⁹³ Its apparent inconsistency with a literal reading of the statute in issue and precedent such as *Becker* and *Liebling*, however, serves only to make future determinations of what constitutes a valid predicate for divorce under DRL 170(5) unpredictable. Since it appears that the divorce laws in New York require further liberalization in order to adequately reflect social attitudes, it is hoped that the legislature¹⁹⁴ will act quickly in this regard and clarify the confusion generated by conflicting judicial decisions.

Editor's Note. As *The Survey* goes to print, *Wechter* has been reversed on appeal. 174 N.Y.L.J. 112, Dec. 11, 1975, at 11, col. 2 (App. Div. 2d Dep't). Adhering to a literal interpretation of the statutory language, the Appellate Division, Second Department, held that "[n]othing less than a judicial judgment of sporation [*sic*] can be the basis for a divorce under the clear requirements of subdivision (5) of section 170 of the Domestic Relations Law"

¹⁹¹ Another relevant decision not cited by the *Wechter* court is *Harris v. Harris*, 36 App. Div. 2d 594, 318 N.Y.S.2d 361 (1st Dep't 1971), *rev'g mem.* 164 N.Y.L.J. 10, July 15, 1970, at 10, col. 1 (Sup. Ct. N.Y. County). The plaintiff in that case sought a divorce based on a New Jersey "judgment of separate maintenance." Ruling that the New Jersey judgment was similar to a family court order of support in New York and that such judgment had no effect on the marital status of the parties, the trial court dismissed the action. *See* 36 App. Div. 2d at 594, 318 N.Y.S.2d at 362. Although it reversed the decision below, the Appellate Division, First Department, did not take issue with the trial court's conclusion that an order of the family court would not be a sufficient ground for a divorce under DRL 170(5). Instead, the appellate court held that the New Jersey judgment was the equivalent of a separation decree in New York. *Id.* at 595, 318 N.Y.S.2d at 363.

¹⁹² The *Gleason* Court found

[i]mplicit in the statutory scheme . . . the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them "to extricate themselves from a state of marital limbo."

26 N.Y.2d at 35, 256 N.E.2d at 516, 308 N.Y.S.2d at 351, *quoting* *Adelman v. Adelman*, 58 Misc. 2d 803, 805, 296 N.Y.S.2d 999, 1003 (Sup. Ct. Queens County 1969).

¹⁹³ *See* Sassower, *No-Fault Divorce and Women's Property Rights: A Rebuttal*, 45 N.Y. St. B.J. 485, 487-88 (1973). The author contends that the acceptance of no-fault divorce would lead to better marriages because dead marriages could be easily dissolved and the parties free to start anew in a wiser marriage.

In his opinion in *Wechter*, Justice Heller strongly urged that New York adopt a more liberal and absolute form of no-fault divorce. Given society's widespread acceptance of divorce, the justice observed that "[d]issolution of a marriage should not involve a war between the parties in the courtroom." 81 Misc. 2d at 827, 366 N.Y.S.2d at 1001.

¹⁹⁴ As noted in *Nitschke v. Nitschke*, 66 Misc. 2d 435, 438, 321 N.Y.S.2d 246, 249 (Sup. Ct. Queens County 1971) (wife's open court request that the husband vacate the marital premises insufficient predicate for § 170(5) divorce), "the courts have gone as far as they may go and it is now up to the legislature to remedy the problems."