

DRL § 211: Cooling-Off Period Does Not Apply to Counterclaim for Separation in an Annulment Action

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DOMESTIC RELATIONS LAW

DRL § 211: Cooling-off period does not apply to counterclaim for separation in an annulment action.

Under the new Section 211 of the DRL,¹⁵³ a complaint in any action for a divorce or separation cannot be served until the expiration of a 120 day "cooling-off" period or, in the case of a divorce action, at the expiration of conciliation proceedings, whichever period is less.¹⁵⁴ In *Botti v. Botti*,¹⁵⁵ the husband brought an action for an annulment and the wife counterclaimed for a separation. The court rejected the husband's contention that the counterclaim was a violation of section 211 and allowed the wife's counterclaim without requiring the statutory cooling-off period. The court reasoned that section 211, by its language, applied only to divorce and separation actions and had no application in a suit for annulment. It was concluded that since the new section contained no prohibition against entering a counterclaim, it should be allowed under CPLR 3011 and 3019(a) and under "the liberal and expanding practice in claims between litigants to avoid multiplicity and circuity of actions."¹⁵⁶ The court directed that the husband's action for annulment be tried first and upon an unfavorable determination of that action, that the wife's claim be adjudicated.

It may be argued that the court's decision is inconsistent with the intent of the legislature in providing for the cooling-off period. However, it can be fairly said that in a situation such as this, there is little hope of saving the marriage and a cooling-off period or conciliation proceedings would be futile. In any event, the language of the statute appears to justify the conclusion of the court, and if the legislature did not intend such a result, an amendment would seem to be in order.

DRL § 211: Amendment of complaint for separation to include action for divorce allowed.

In another case involving an interpretation of Section 211 of the DRL¹⁵⁷ the husband moved to amend his complaint in a separation action so as to demand a divorce upon the same factual allegations.¹⁵⁸ The question arose as to whether such an amend-

¹⁵³ N.Y. Sess. Laws 1966, ch. 254, § 7.

¹⁵⁴ For the law on conciliation proceedings see N.Y. Sess. Laws 1966, ch. 254, § 8.

¹⁵⁵ 55 Misc. 2d 269, 284 N.Y.S.2d 748 (Sup. Ct. Kings County 1967).

¹⁵⁶ *Id.* at 271, 284 N.Y.S.2d at 750.

¹⁵⁷ *Taplinger v. Taplinger*, 55 Misc. 2d 103, 284 N.Y.S.2d 794 (Sup. Ct. N.Y. County 1967).

¹⁵⁸ The plaintiff was motivated by the recently amended DRL § 170. See N.Y. Sess. Laws 1966, ch. 254, § 2.