New York Law of Grounds for Divorce[1]

There are seven grounds for divorce specified in Domestic Relations Law §170, cruel and inhuman treatment, abandonment for one year, adultery, imprisonment for three consecutive years, living apart for a year pursuant to a separation judgment, living apart for a year pursuant to a separation and irretrievable breakdown.

1. Cruel and Inhuman Treatment

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 cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant."[2]

The Domestic Relations Law contains no affirmative defenses to cruel and inhuman treatment. However, the defendant may show that misconduct by the plaintiff (the lure and attraction of another woman is a classic example) was the cause of his leaving the defendant wife rather than the alleged cruel and inhuman treatment of the wife.[3]

Insanity is not a defense to cruel and inhuman treatment.[4]

The Domestic Relations Law provides that no action for divorce may be maintained on a ground which arose more than five years before the date of the commencement of the action, except where abandonment or separation pursuant to agreement or judgment is the ground.[5]

Civil Practice Law and Rules 207, which suspends the running of a statute of

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[2]Domestic Relations Law §170 (1).

[3]Bloom v. Bloom, 52 AD2d 1030 (4th Dept., 1976).See Walden v. Walden, 41 AD2d 664.

[4]Pajak v. Pajak, 56 NY2d 394, 452 NYS2d 381.

[5]Domestic Relations Law §210.

limitations during the absence of the defendant from the state[6] applies to actions for divorce.[7] Therefore, the period of absence of the defendant from the state must be added to the ordinary five-year period for commencing an action for divorce.[8] This is so even though the plaintiff might have brought an action in rem for divorce by service by publication on the defendant.[9]

2. Abandonment

The essence of abandonment is a refusal by one spouse to fulfill "basic obligations springing from the marriage contract".[10]

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.[11]

Abandonment as a divorce ground is not subject to the traditional divorce defenses[12] nor to the statute of limitations which applies to the adultery, cruel and inhuman treatment, and imprisonment grounds.

Abandonment 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. [13] As a practical matter each of these elements may involve subjective rather than objective criteria. The conduct of

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[6]CPLR 207.

[7]Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Gouch v. Gouch, 69 Misc 436, 127 NYS 476 (1910).

[8] Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Hawkins v. Hawkins, 110 App Div 42, 96 NYS 804 (1905); Gouch v. Gouch, 69 Misc 436, 127 NYS 476(1910).

[9]Simonson v. Nafis, 36 App Div 473, 55 NYS 449 (1899).

[10] Mirizio v. Mirizio, 242 N. Y. 74, 81, quoted in Diemer v. Diemer, 8 N Y 2d 206, 210.

[11]Domestic Relations Law §170 (2).

[12] Maryon v. Maryon, 60 App Div 2d 623, 400 NYS2d 160 (2d Dept 1977) .

[13] Phoenix v. Phoenix, 41 App Div 2d 683, 340 NYS2d 977 (3d Dept, 1973), app dismd 33 NY2d 691, 349 NYS2d 672, 304 NE2d 369

the defendant must be unjustified and without the consent of the other spouse. [14] There cannot be a mutual abandonment.[15]

Actual Abandonment

In an action for a divorce on the ground of abandonment, it is sufficient to show that the defendant has left the marital home for the requisite period, has never returned and has on several occasions told his or her spouse that he or she has no intention of returning.[16]

Constructive Abandonment

A "constructive abandonment" occurs when a spouse fails to fulfill a "basic obligation arising from the marital contract."[17] A spouse remaining at home may be guilty of constructive abandonment where the other spouse is justified in departing from the marital home or in terminating the marital relationship by reason of the conduct of the spouse remaining at home . In such cases, for example when the wife locks out the husband[18] or when the husband's abuse drives the wife from the home, the spouse who left the home is not the deserter; the spouse who caused the other to leave is instead the deserter de jure. [19]

"Constructive abandonment" also refers to a cessation of sexual relations as constituting an abandonment even though the parties may continue to live together.

It is sufficient to show that the defendant has failed or refused to have sexual relations with the plaintiff for the requisite period, without justification, and despite repeated requests therefore.[20]

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[14] Schine v. Schine, 31 NY2d 113, 335 NYS2d 58, 286 NE2d 449 (1972). Solomon v. Solomon, 290 N. Y. 337, 340, 342; Matter of Maiden, 284 N. Y. 429, 432-433.

[15] Belandres v. Belandres, 58 App Div 2d 63, 395 NYS2d 458 (1 Dept 1977)

[16] Giella v Giella, 55 Misc 2d 727, 286 NYS2d 621 (1968).

[17] Lyons v. Lyons, 187 AD2d 415, 589 NYS2d 557.

[18] Schine v. Schine (1972) 31 NY2d 113, 335 NYS2d 58, 286 NE2d 449.

[19] Where the wife changes the lock on the entrance door of the marital abode, or where she insists on living alone, thus effectively excluding the husband, this act, unless justified, constitutes abandonment. See Fox v. Fox, 17 Misc 2d 998, 1002, affd. 17 A D 2d 939; Harris v. Harris, 46 Misc 2d 355, 356, 358.

[20] Caprise v. Caprise, 143 A.D.2d 968, 533 NYS2d 622 (2d Dept., 1988).

The Domestic Relations Law contains no affirmative defenses to abandonment.

Defenses - Abandonment - Lack of Justification as an Element of the Cause of Action

The plaintiff must establish that his spouse, who has left the marital home or refused to have sexual relations with him, or who has locked him out of the marital residence lacked justification for doing so.[21]

In order to constitute an abandonment the evidence must establish a "hardening of resolve" by one spouse not to live with the other. A 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." [22] Thus, a wife who leaves the home under the reasonable misapprehension that her husband has been guilty of cruelty or adultery may not be guilty of abandonment. [23]

A wife's refusal to have sexual relations with her husband was found to be justified by his consistent and repeated demands for anal and oral sex, as well as his demands that she wear erotic nightwear. The court found that the husband's unconventional sexual demands were responsible for her general lack of desire for "conventional" sexual relations. She accommodated his demands on occasion, but found that his "favored forms of sex were either painful or unpleasant." Notwithstanding this, she expressed her wishes to continue in a loving marital relationship with him, including, what the court termed "normal sexual relations." The refusal to have sexual relations in "an atmosphere of coercion and lack of consideration," was not unjustified and did not constitute constructive abandonment. [24]

Defenses - Abandonment - Reconciliation

Reconciliation of the parties and resumption of sexual relations may defeat a claim of abandonment. However, "an estranged couple's attempt at a reconciliation, even where it involves the brief and isolated resumption of cohabitation and/or sexual relations, after a matrimonial action has already been commenced, does not, as a

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[21] Phillips v. Phillips, 70 App Div 2d 30, 419 NYS2d 573 (2d Dept 1979).

[22] Phillips v. Phillips, 70 App Div 2d 30, 419 NYS2d 573 (2d Dept 1979).

[23] Fischel v. Fischel, 286 App Div 842, 142 NYS2d 236 (1955).

[24] George M. v. Mary Ann M.,171 AD2d 651, 567 NYS2d 132, (2d Dept.,1991).

matter of law, preclude an entry of judgment in favor of the spouse who originally had an otherwise valid claim for abandonment. Rather, the trial court should examine the totality of the circumstances surrounding the purported reconciliation, before determining its effect, if any, upon the pending marital proceeding. Among the many factors for the trial court to consider are whether the reconciliation and any cohabitation were entered into in good faith, whether it was at all successful, who initiated it and with what motivation."[25]

3. Adultery

The Domestic Relations Law provides that an action may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of the commission of an act of adultery. [26]

It is important to keep in mind that adultery, as distinguished from the other grounds for divorce in New York, is subject to the traditional defenses of recrimination, connivance, and condonation, and also to a five-year statute of limitations.[27]

Definition of Adultery.

The Domestic Relations Law defines adultery as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of the plaintiff and the defendant.[28] Deviate sexual intercourse includes, but is not limited to, sexual conduct as defined in Penal L 130:00, subd 2, and Penal L 130:20, subd 3. [29]

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[25] Haymes v Haymes, 221 A.D.2d 73, 646 N.Y.S.2d 315 (1st Dept.,1996).

[26] Domestic Relations Law §170 (4).

[27] See Domestic Relations Law §171 as to the defenses to a divorce action based upon adultery, and see Domestic Relations Law §200(4), with reference to defenses to a separation action based upon adultery.

[28] Domestic Relations Law §170 (4).

[29] Domestic Relations Law §170 (4).

Penal Law §130.00 provides that "deviate sexual intercourse" "means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." Apparently, bestiality is omitted if the definition is taken literally since the reference is to deviate sexual intercourse with a "person."

Defenses to Adultery - In General

Adultery is distinguished from the other grounds for divorce in New York because it is subject to the statutory defenses of recrimination, connivance, and condonation, and also to a five-year statute of limitations.[30]

Defenses to Adultery - Insanity as a Defense

In an action for divorce based upon adultery, proof that a spouse was mentally incapable at that time the adultery of understanding the nature, quality, effect, and consequences of the adulterous act, is a complete defense.[31]

There is no statute expressly making insanity of the defendant at the time the adultery was committed a defense, but insanity is a defense because the act of adultery implies consent or acquiescence, and an insane person lacks the ability to consent.[32]

Defenses to Adultery - Statute of Limitations

The Domestic Relations Law provides that no action for divorce may be maintained on a ground which arose more than five years before the date of the commencement of the action, except where abandonment, or separation pursuant to agreement or judgment is the ground.[33]

The Domestic Relations Law also provides that a divorce will not be granted although the adultery of the defendant is established, where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action has not been commenced within five years after discovery by the plaintiff of the offense charged.[34]

Where the injured party acquiesces for five years after obtaining knowledge of

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[30] See Domestic Relations Law §171 for the defenses to a divorce action based upon adultery. See Domestic Relations Law §200(4) for the defenses to a separation action based upon adultery.

[31] Laudo v. Laudo, 188 App Div 699, 177 NYS 396 (1919); Horn v Horn, 142 App Div 848, 127 NYS 448 (1911); Rathbun v. Rathbun, 40 How Pr 328.

[32] Laudo v. Laudo, 188 App Div 699, 177 NYS 396 (1919); Cook v. Cook 53 Barb 180.

[33] Domestic Relations Law § 210.

[34] Domestic Relations Law §171 (3).

the adultery, he or she is presumed to have pardoned or forgiven the offense.[35] Moreover, if the plaintiff knew about the existence of the continuous adultery of the defendant for more than five years before the commencement of the action for divorce, it is a bar to the action, even though the plaintiff produces evidence of adultery with the correspondent within the five-year period.[36]

Civil Practice Law and Rules 207, which suspends the running of a statute of limitations during the defendant's absence from the state[37] applies to actions for divorce.[38] Thus, the period of the defendant's absence from the state must be added to the ordinary five-year period for commencing an action for divorce.[39] This is true even though the plaintiff might have brought an action in rem for divorce by service by publication on the defendant.[40]

Defenses to Adultery - Affirmative Defense of Recrimination – (Adultery of the Plaintiff)

The Domestic Relations Law provides that the plaintiff is not entitled to a divorce even though the adultery of the defendant is established, "where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce."[41] This is the defense of recrimination. The adultery of the plaintiff must be established sufficiently to obtain divorce by the defendant.[42]

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[35] Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Gouch v Gouch, 69 Misc 436, 127 NYS 476 (1910).

[36] Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Valleau v. Valleau, 6 Paige 207; Coyne v. Coyne, 271 App Div 895, 67 NYS2d 488 (1946), affd 297 NY 927, 79 NE2d 748; Rosenbaum v. Rosenbaum, 56 Misc 2d 221, 288 NYS2d 285 (1968).

[37] CPLR 207

[38] Ackerman v. Ackerman, 200 NY 72, 93 NE 192 (1910); Gouch v. Gouch, 69 Misc 436, 127 NYS 476 (1910).

[39] Ackerman v. Ackerman (1910) 200 NY 72, 93 NE 192; Hawkins v. Hawkins (1905) 110 App Div 42, 96 NYS 804; Gouch v. Gouch (1910) 69 Misc 436, 127 NYS 476

[40] Simonson v. Nafis, 36 App Div 473, 55 NYS 449 (1899).

[41] Domestic Relations Law §171(4).

[42] Weiger v. Weiger, 270 App Div 770, 59 NYS2d 444 (1946); Kapitola v. Kapitola, 189 App Div 459, 178 NYS 734 (1919); Ryan v Ryan, 132 Misc 339, 229 NYS 511(1928).

However, where the adultery of the plaintiff was committed with the connivance of the defendant, the defendant cannot use the adultery of the plaintiff as a defense to a divorce action brought against him or her,[43] since the defendant could not establish grounds for divorce against the plaintiff because of the defendant's connivance.

Where the adultery of the plaintiff is committed more than five years before the commencement of the action for a divorce, and the defendant knew about the adultery at that time, it does not bar the plaintiff's right to a judgment. Since the defendant could not obtain a divorce against the plaintiff because of the lapse of time, it follows that the plaintiff's misconduct is not a defense to his adultery.[44]

The adultery of the plaintiff is not a defense to the plaintiff's action for a divorce on the grounds of adultery where the defendant has forgiven or condoned the plaintiff's adultery, since the defendant could not maintain an action for a divorce on the basis of a condoned offense.[45] However, the adultery of the plaintiff bars a divorce in his or her favor, even though the defendant could not have maintained an action for divorce, based upon adultery, for failure to comply with the New York residence requirements .[46]

Where the defendant pleads the adultery of the plaintiff as a defense or counterclaim in an action for divorce, that issue must first be determined before the plaintiff is entitled to a divorce, even though the plaintiff establishes that the defendant is guilty of adultery.[47]

Defenses to Adultery - Affirmative Defense of Forgiveness (Condonation)

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[43] Bleck v Bleck, 27 Hun 296 (1882).

[44] Fleischer v Fleischer, 188 Misc 402, 68 NYS2d 6 (1947); Mays v. Mays, 22 NYS2d 702 (Sup 1940), affd 261 App Div 984, 27 NYS2d 436; Ryan v. Ryan, 132 Misc 339, 229 NYS 511(1928).

[45] Ryan v. Ryan, supra.

[46] Leseuer v. Leseuer, 31 Barb 330.

[47] Paul v. Paul, 11 NYS 71 (Sup). See Rect. v. Rect., 36 App Div 2d 939, 321 NYS2d 398 (1 Dept 1971).

The Domestic Relations Law[48] provides that, although the adultery of the defendant is established, a divorce will not be granted where the adultery has been forgiven by the plaintiff.[49]

Defenses to Adultery - Proof of Forgiveness

The forgiveness of adultery may be proven "either affirmatively[50] or by the voluntary cohabitation of the parties with knowledge of the adultery."

Where the defendant in an action for a divorce based on adultery interposes the defense that the adultery has been forgiven by the plaintiff, the forgiveness may be proven by establishing the voluntary cohabitation of the parties,[51] provided it is with knowledge of the adultery. Where the plaintiff has voluntarily cohabited with the defendant with full knowledge that the defendant has committed adultery, it is presumed that the plaintiff has forgiven the injury, and the defense is proven.[52]

Cohabitation, and thus forgiveness, will be inferred from the fact that the parties are living together as husband and wife, where nothing appears to the contrary.[53] However, in the absence of any other evidence tending to establish forgiveness, a single act of intercourse between the husband and wife is not sufficient to prove forgiveness, particularly where the intercourse occurred at a time when the plaintiff was emotionally upset and under the influence of alcohol.[54]

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[48] Domestic Relations Law §171(2).

[49] Forgiveness, thus legally releasing the injury, is called "condonation." Wood v. Wood, 2 Paige 108.

In Uhlmann v. Uhlmann, 17 Abb NC 236, the Court held that "condonation" is a purely technical term of the English ecclesiastical law. The New York statute uses the word "forgiveness."

[50] Domestic Relations Law §171(2).

[51] Domestic Relations Law §171(2).

[52] Wood v. Wood, 2 Paige 108. Brown v. Brown, 21 NYS2d 325 (Dom Rel Ct 1940).

[53] Larger v. Larger, 9 Misc 236, 44 NYS 219 (1897).

[54] Kiley v. Kiley, 115 NYS2d 341 (Sup 1952).

For cohabitation of the husband and wife to constitute forgiveness of the adultery, it must take place with full knowledge of the adultery.[55] This means that the cohabitation must be with the knowledge that the defendant committed adultery.[56] It must appear with reasonable clearness[57] that the plaintiff had obtained knowledge upon which to base a belief in the guilt of the defendant,[58] not only of the particular act of adultery, but of all the then existing charges of adultery.[59] The plaintiff must not only have some indication of the fact of adultery, but must believe the fact to be true.[60]

Where the adultery is denied by the allegedly guilty party, the plaintiff's mere circumstances of a suspicious nature do not constitute sufficient knowledge by the plaintiff of the adultery such that his or her subsequent cohabitation establishes forgiveness. A husband or wife is justified in relying upon the other spouses denial of adultery, so long as he or she is not does not have substantial evidence of guilt.[61]

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[55] Domestic Relations Law §171(2).

[56] Dunnells v Dunnells, 272 App Div 779, 69 NYS2d 651 (1947); Uhlmann v Uhlmann, 17 Abb NC 236.

[57] Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899).

[58] Digs v. Digs, 187 App Div 859, 175 NYS 791 (1919); Harris v. Harris, 83 App Div 123, 82 NYS 568 (1903); Deisler v. Deisler, 59 App Div 207, 69 NYS 326 (1901); Abbott v Abbott, 132 Misc 11, 228 NYS 611 (1928).

[59] Uhlmann v. Uhlmann, 17 Abb NC 236.

[60] In Abbott v Abbott, 132 Misc 11, 228 NYS 611 (1928) evidence that while his wife was living apart from him, the husband received a letter from her landlord, complaining of her conduct, but he apparently did not believe the charges, as he threatened to prosecute the landlord for sending such a letter, was held to be insufficient to show condonation by subsequent cohabitation.

In Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899) an action by a wife for divorce on the ground of adultery, evidence that the husband of the correspondent came to defendant's house and, in the presence of the plaintiff, accused defendant of the adultery with his wife was held insufficient to sustain a finding of condonation, in view of the evidence that when he was accused the defendant protested his innocence, and convinced both the plaintiff and the accuser that some other man was the guilty party and volunteered his help in discovering the man's identity.

[61] Harris v. Harris, 83 App Div 123, 82 NYS 568 (1903); Deisler v. Deisler, 59 App Div 207, 69 NYS 326 (1901); Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899); Uhlmann v. Uhlmann, 17 Abb NC 236.

A court may not find that a plaintiff condoned the defendant's adultery where his or her knowledge of the adultery is based entirely in the other's spouse's confession of adultery.[62] It must appear that the plaintiff has some proof, in addition to the confession of adultery. This is a practical rule, since the confession alone is not sufficient as proof of adultery.[63]

Revival of Condoned Offense

Forgiveness of the adultery which constitutes a defense to an action for divorce based upon adultery is not absolute, but is conditioned upon the defendant's future good conduct.[64] Where a spouse commits adultery subsequent to the forgiveness, the forgiven adultery is revived so that a divorce may be granted.[65] The condonation is nullified and the original offense of adultery is revived by subsequent cruelty, abuse, or indignities amounting to marital misconduct or conjugal unkindness.[66]

Defenses to Adultery - Affirmative Defense of Connivance and Procurement

In an action for a divorce even though the adultery of the defendant is established it is a statutory defense if it is established that the adultery was committed by the procurement or with the connivance of the plaintiff.[67]

"Connivance" has been defined to be the 'corrupt consenting of a married party to that offense of the spouse for which that party afterward seeks a divorce".[68] It may

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[62] Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899). Uhlmann v. Uhlmann, 17 Abb NC 236.

[63] Merrill v. Merrill, 41 App Div 347, 58 NYS 503 (1899).

[64] Ohms v. Ohms, 285 App Div 839, 137 NYS2d 397 (1955); Kreighbaum v. Kreighbaum, 118 Misc 100, 192 NYS 516 (1922).

[65] Smith v Smith, 4 Paige 432. Clark v. Clark (1867) 30 NY Super Ct 276.

[66] Johnson v Johnson, 14 Wend 637; Ohms v. Ohms, 285 App Div 839, 137 NYS2d 397 (1955); Timerson v. Timerson, 2 How Pr NS 526. Hoffmire v Hoffmire, 3 Edw Ch 173, affd 7 Page 60. Kreighbaum v Kreighbaum, 118 Misc 100, 192 NYS 516 (1922).

[67] Domestic Relations Law §171(1).

[68] Santoro v. Santoro, 55 NYS2d 294 (Sup 1945), affd 269 App Div 859, 56 NYS2d 539.

be established by declarations of the plaintiff and by evidence of his or her conduct and the surrounding circumstances.[69]

Where a spouse has conspired with another person to have that person commit adultery with her spouse, she connives at the adultery.[70] However, a spouse is not guilty of connivance merely because he or she fails to prevent or discourage the adultery by his or her spouse.[71]

Where a spouse suspects that his or her spouse is about to commit adultery, he or she may spy on his spouse or obtain evidence of the adultery from other persons, without being guilty of connivance.[72] However, where a spouse employs detectives or agents for the express purpose of committing adultery with his or her spouse, there is a corrupt consent and a connivance at the adultery.[73]

An act of adultery is deemed to have been procured by the plaintiff where it appears that it was committed by the defendant with an agent of the plaintiff employed by the plaintiff to procure evidence of the defendant's adultery, since the plaintiff is charged with responsibility for the act of the agent, although the agent was not hired for the purpose of committing adultery.[74]

Defenses to Adultery - Collusion

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[69] Santoro v. Santoro, 55 NYS2d 294 (Sup 1945), affd 269 App Div 859, 56 NYS2d 539; Myers v. Myers, 41 Barb 114.

[70] Fisher v. Fisher, 220 NY 710, 116 NE 1044 (1917). Armstrong v. Armstrong, 45 Misc 260, 92 NYS 165 (1904).

[71] Reiersen v. Reiersen, 32 App Div 62, 52 NYS 509 (1898) (where a husband believes that his wife has committed adultery and intends to continue to do whenever she has the opportunity, and he does not actively interfere to prevent the adultery, in order to obtain evidence of it, although if he wanted to he could prevent it, he is not guilty of connivance.); Pettee v Pettee, 77 Hun 595, 28 NYS 1067 (1894), affd 148 NY 735, 42 NE 725.

[72] Reiersen v. Reiersen, 32 App Div 62, 52 NYS 509 (1898). Pettee v. Pettee, 77 Hun 595, 28 NYS 1067 (1894), affd 148 NY 735, 42 NE 725.

[73] Helmes v. Helmes, 24 Misc 125, 52 NYS 734 (1898).

[74] McAllister v. McAllister, 137 NYS 833 (Sup 1912).

Collusion between the parties to a divorce action will bar the granting of a judgment of divorce even though the adultery of the defendant is established. Collusion is a statutory defense.[75]

The term "collusion" as applied to a divorce action has been broadly defined to be an agreement between a husband and wife to procure a judgment dissolving the marriage, which, if the facts were known, the court would not grant.[76] The term "collusion" in matrimonial law also has been more narrowly defined as “an agreement between husband and wife for one of them to commit, or to appear to commit, or to be represented in court as having committed, a breach of matrimonial duty, for the purpose of enabling the other to obtain the legal remedy of divorce, as for a real injury. Where the act complained of as a ground for the divorce has in truth not been done, collusion is a real or attempted fraud upon the court”.[77]

The General Obligation Law provides that an agreement made between a husband and wife shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of the grounds for a divorce.[78]

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[75] Hanks v. Hanks, 3 Edw Ch 469; Dodge v. Dodge, 98 App Div 85, 90 NYS 438 (1904); Galloway v. Galloway, 92 App Div 300, 86 NYS 1078 (1904); Goldner v. Goldner, 49 App Div 395, 63 NYS 431 (1900); Bowe v. Bowe, 55 Misc 403, 106 NYS 608 (1907); Cowan v. Cowan, 23 Misc 754, 53 NYS 93 (1898); Huntley v. Huntley, 73 Hun 261, 26 NYS 266 (1893).

[76] Doeme v. Doeme, 96 App Div 284, 89 NYS 215 (1904).

[77] Fuchs v. Fuchs, 64 NYS2d 487 (Sup 1946); See also McIntyre v. McIntyre, 9 Misc 252, 30 NYS 200 (1894)

[78] Gen Oblig L 5-311., as amended in 1966. Conduct that previously was regarded as "collusive" is not regarded as collusive. See Taft v Taft, 156 AD2d 444, 548 NYS2d 726 (2d Dept.,1989). Gen Oblig L 5-311 provides that a contract between a husband and wife to “alter or dissolve the marriage” is void.

In Charap v Willett, --- N.Y.S.2d ----, 2011 WL 1902605 (N.Y.A.D. 2 Dept.), the Appellate Division held that the parties written stipulation was void as against public policy, since it expressly required the former wife to seek dissolution of the marriage and "provides for the procurement of grounds of divorce" (General Obligations Law 5-311). As the offending provision represented the only consideration provided by the former wife for the agreement, which did not contain a severability provision, the stipulation was void in its entirety (cf. Taft v. Taft, 156 A.D.2d 444).

The courts have not always been careful to distinguish between connivance and collusion. While connivance and collusion are closely related, the distinction between them is that connivance is a corrupt consenting, whereas collusion is a corrupt agreement. To constitute collusion there must be an agreement between husband and wife to procure a divorce.[79]

The readiness of one of the parties to a divorce action to assist the other in the legal proceedings is not of itself collusive, although it invites scrutiny into the facts to ascertain whether they are false, or, if true, whether there was an agreement to procure a divorce.[80] The mere act of the defendant furnishing information to the plaintiff of his past acts of adultery does not constitute collusion barring the plaintiff from a divorce; it is only a circumstance to be considered by the court in determining whether there actually has been collusion.[81] The law contemplates collusion in the act of adultery, not in the furnishing of evidence of the adultery.[82] The failure of the defendant to appear and defend an action for a divorce on the grounds of adultery is not collusion, although it may, in connection with other circumstances, be evidence of it.[83]

Committing an act of adultery, or creating the appearance of having committed adultery, with the consent or privity of the other spouse, or under an arrangement between the spouses, has been held to be collusion.[84]

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[79] Doeme v. Doeme, 96 App Div 284, 89 NYS 215 (1904); Bowe v. Bowe, 55 Misc 403, 106 NYS 608 (1907); McIntyre v. McIntyre, 9 Misc 252, 30 NYS 200 (1894).

[80] Dodge v. Dodge, 98 App Div 85, 90 NYS 438 (1904).

[81] Rosenzweig v. Rosenzweig, 231 App Div 13, 246 NYS 231 (1931); Lake v. Lake, 60 NYS2d 105 (Sup 1946).

[82] Rosenzweig v. Rosenzweig, 231 App Div 13, 246 NYS 231 (1931).

[83] In Galloway v. Galloway, 92 App Div 300, 86 NYS 1078 (1904), the defendant interposed an unverified answer denying the allegations of adultery in the complaint. At the trial the the defendant's attorney did not cross-examine witnesses except with regard to particulars which tended to strengthen the plaintiff's case rather than to establish a defense. The defendant offered no testimony. The court held that the circumstances were sufficiently strong to show collusion and to justify the denial of a divorce.

[84] Dodge v. Dodge, 98 App Div 85, 90 NYS 438 (1904); Goldner v. Goldner, 49 App Div 395, 63 NYS 431 (1900); Huntley v. Huntley, 73 Hun 261, 26 NYS 266 (1893).

In Cowan v. Cowan, 23 Misc 754, 53 NYS 93 (1898) the wife was denied a divorce where it appeared that the husband committed adultery for the purpose of

Defenses to Adultery - Distinction Between Collusion and Settlement

There is an exceedingly fine line drawn between collusion and proper settlement of differences prior to divorce. If the term is given a broad definition, many, if not most, uncontested divorces accompanied by settlement agreements may be labeled "collusive." The proper definition of the term, however, should depend upon the legal and social consequences entailed. Since today our public policy encourages parties to amicably settle differences, and permits the parties to obtain a “no-fault” divorce, only a blatant conspiracy to fabricate facts and to work a serious fraud on the court, should be deemed "collusion."

4. Imprisonment for Three Years

The Domestic Relations Law provides that an action may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of the confinement of the defendant in prison for a period of three or more consecutive years after the marriage of the plaintiff and the defendant.[85]

There must be at least three years of confinement but it is not clear whether the action may be brought after the felon's release. If the "protective" purpose of this law is accepted, then it should make no difference that the divorce action is filed after the prisoner's release except that the general statute of limitations of five years applies.[86]

Proof of Confinement in Prison

In an action for divorce based upon the confinement of the defendant in prison for a period of three or more consecutive years after the marriage of the plaintiff and the defendant, it is necessary to show that the defendant has been in prison for three or more years.[87]

Proof of being sentenced to prison for a period not to exceed three years is not sufficient.[88] The person against whom an action is brought must be physically

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providing her with grounds for a divorce, and in collusion with her son, who told her what he had done.

[85] Domestic Relations Law §170 (3).

[86] Domestic Relations Law §210.

[87] Short v. Short, 57 Misc 2d 762, 293 NYS2d 590 (1968).

[88] Short v. Short, 57 Misc.2d 762, 293 NYS2d 590 (1968).

imprisoned. Where the defendant has not been confined in prison for a period of three years at the time suit is instituted, the action may not be maintained.[89]

The fact that after serving three or more years the conviction was reversed and a new trial granted does not preclude the granting of a divorce on the imprisonment ground.[90]

Defenses - Imprisonment for Three Years - Statute of Limitations

The Domestic Relations Law provides that no action for divorce may be maintained on a ground which arose more than five years before the date of the commencement of the action except where abandonment or separation pursuant to agreement or judgment is the ground. Therefore, the statute of limitations is a defense

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[89] Short v. Short, 57 Misc.2d 762, 293 NYS2d 590 (1968).

In Cerami v. Cerami, (1978) 95 Misc.2d 840, 408 NYS2d 591, the defendant shot and killed his former supervisor. Before defendant was ordered committed to the Rochester Psychiatric Center in 1974, he was confined in local jails and in facilities operated by the State Dept. of Correctional Services between March 23, 1970 and August 1, 1974, for more than four consecutive years. The Court held that the period of the husband's confinement between arrest and sentencing constituted confinement "in prison" for purposes of the statute, even though parts of this confinement were served in a state hospital after the determination that he was not competent to stand trial. It also held that the time during which he was incarcerated in the state prison and in the county jail (after the original judgment of conviction had been vacated by the Court of Appeals, and before he had been found not guilty by reason of insanity), constituted confinement "in prison" for purposes of the statute. It concluded that the husband's more than four years of physical confinement between March 23, 1970 and August 1, 1974, included more than three consecutive years of confinement "in prison" and that the terms of the statute were satisfied.

Colascione v. Colascione,57 Misc.2d 199, 291 NYS2d 559 (1968) , held that "actual physical incarceration for the statutory period of three consecutive years gives rise to the right to a divorce," without more and is unaffected by a reversal of the conviction.

In Pergolizzi v. Pergolizzi, 59 Misc.2d 1027, 301 NYS2d 366 (1969) the court held that a spouse's post sentencing incarceration in a Department of Correction facility is to be counted as part of the requisite three year period entitling the other spouse to a divorce.

[90] Colascione v. Colascione, 57 Misc.2d 199, 291 NYS2d 559 (1968).

to an action for a divorce on the grounds of confinement in prison for a period of three years. [91]

5. Living Apart Pursuant to a Separation Judgment

The Domestic Relations Law provides that an action may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage where the parties have lived separate and 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.[92]

The ground is subject to two limitations: (1) the separation pursuant to the decree of legal separation must have been for the designated period (two or more years before Sept. 1, 1972, one or more years thereafter); and (2) the plaintiff seeking the conversion must submit satisfactory proof that he or she has "substantially" performed the terms and conditions of the separation decree.[93]

The traditional divorce defenses, such as recrimination, condonation, and connivance, do not apply to this ground.

6. Living Apart Pursuant to Separation Agreement

The Domestic Relations Law provides[94] 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

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[91] Domestic Relations Law §210.

[92] Domestic Relations Law §170 (5).

[93] The original period of time provided in Domestic Relations Law §§170(5) and (6) was two years. However, Laws 1970, Ch. 335, effective September 1, 1972, reduced the period to one or more years.

[94] Domestic Relations Law §170(6)

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.[95]

The word "substantially" as used in Domestic Relations Law §170(6) was intended to avoid the need to prove literal compliance, but did not eliminate the need to prove compliance with the essentials of the agreement's provisions as a predicate to conversion divorce. The mere allegation and proof that parties have been living separate and apart for more than one year after entering into a separation agreement does not automatically entitle one party, who has not otherwise substantially complied with the terms and conditions of the agreement, to a conversion divorce. Substantial compliance means that the major mandatory decretal duties imposed upon the parties by the agreement as conditions of the separation must be complied with. It is with these major provisions, such as alimony and child support, that the statute requires substantial compliance for at least one year.[96]

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.[97]

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, and provides the basis for an action for divorce under Domestic Relations Law §170(6), after the parties have lived apart for the requisite period. A stipulation made in open court partakes of the nature of a contract, and therefore is tantamount to a separation agreement and a sufficient basis for granting a divorce.[98]

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[95] A separation agreement which has not been acknowledged, cannot form the basis of a divorce pursuant to Domestic Relations Law § 170(6). Cicerale v. Cicerale, 85 Misc.2d 1071, 382 NYS2d 430 (1976), affd (2d Dept.) 54 App Div 2d 921, 387 NYS2d 1022.

[96] Berman v. Berman, 52 NY2d 723, 436 NYS2d 274, 417 NE2d 568 (1980), affirmed for reasons stated in opinion by Justice Arnold at the Appellate Division (72 AD2d 425, 424 NYS2d 899.

[97] Trachtenberg v. Trachtenberg, 66 Misc 2d 140, 320 NYS2d 412 (1970).

[98] Martin v. Martin , 63 Misc 2d 530, 312 NYS2d 520.

In Stone v. Stone, 45 App Div 2d 967, 359 NYS2d 351 (2d Dept 1974) the court held that a stipulation made by the parties in open court in the Family Court, in which the husband agreed to vacate the marital premises, was not a separation agreement

The agreement or a memorandum of it must be filed with the county clerk before a divorce may be granted.[99]

Proof of Living Separate

In an action for a divorce based upon the ground that the plaintiff and the defendant have lived separate and apart for the requisite period either pursuant to a judgment of separation or a written separation agreement, substantial compliance by the plaintiff with the terms and conditions of the judgment or agreement must be shown, as well as the fact that the living apart has been uninterrupted for the requisite statutory period.[100]

7. Irretrievable Breakdown for a Period of At Least 6 Months

The Domestic Relations Law provides that a husband or wife may be granted a judgment or divorce on the ground that: "The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce." [101]

This provision became effective on October 12, 2010, and the legislation enacting it specifically provides that it shall apply to matrimonial actions commenced on or after its effective date. [102]

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and not sufficient to warrant a divorce.

[99] Domestic Relations Law §170(6).

[100] Seldin v. Seldin, 55 Misc.2d 187, 284 NYS2d 679 (1967).

[101] Domestic Relations Law §170 (7), effective October 12, 2010. Laws of 2010, Ch 384, (August 13, 2010) (§ 2. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to matrimonial actions commenced on or after such effective date.)

[102] Id. In G.C v G.C., 2012 WL 1292729 (N.Y.Sup.), 2012 N.Y. Slip Op. 50653(U) Supreme Court, inter alia, permitted an amendment to a divorce complaint to add a cause of action under Domestic Relations Law § 170(7) which arose after the filing of the complaint, even though the plaintiff brought a divorce action prior to October 10, 2010, the effective date of the statute and the statutory amendment states that the "act

In order to establish a cause of action and obtain a divorce under Domestic Relations Law §170 (7) the party seeking the divorce on irretrievable breakdown grounds, must, in addition to satisfying the residence requirements of Domestic Relations Law § 230, establish that: (1) the relationship between husband and wife is irretrievably broken; (2) for a period of at least six months; and (3) the plaintiff or defendant must state under oath that the relationship between husband and wife is irretrievably broken. [103]

However, no judgment of divorce may be granted upon a finding of irretrievable breakdown unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce. [104]

Where the parties to a contested action for a divorce have agreed that the divorce will be uncontested it has been the practice of New York courts to permit them to submit the matter to the court for determination upon affidavits and the required papers, or to hold an inquest on a fault ground. Where the papers were submitted, the court would reserve decision until the resolution of the ancillary issues. Where the court held an inquest, the court would grant a judgment of divorce, but hold the entry of the judgment in abeyance pending the resolution of the ancillary issues. The practice of granting the judgment and holding its entry into abeyance pending the resolution of the ancillary issues is not permitted under this section which prohibits the granting of a judgment of divorce until all of the ancillary issues are resolved by the parties, or determined by the court and incorporated into the judgment of divorce. However, the court can still hear the testimony and reserve decision.[105]

Irretrievable Breakdown - Defined

The term “irretrievably broken” is not defined in the Domestic Relations Law, nor has in been defined yet by case law.

Irretrievable Breakdown - Sufficiency of Proof and Defenses

... shall apply to matrimonial actions commenced after the effective date."It was undisputed that the effective date was October 12, 2010.

[103] Domestic Relations Law §170 (7) as added by Laws of 2010, Ch 384

[104] Domestic Relations Law §170 (7) as added by Laws of 2010, Ch 384

[105] Domestic Relations Law §170 (7) as added by Laws of 2010, Ch 384

The court must find that the marriage is irretrievably broken as a predicate to the granting of a divorce. Domestic Relations Law § 170(7) appears to allow the court to grant a judgment of divorce where one spouse states under oath that the relationship between husband and wife is irretrievably broken.[106]

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[106] Domestic Relations Law §170 (7) as added by Laws of 2010, Ch 384.

In AC v DR, --- N.Y.S.2d ----, 2011 WL 1137739 (N.Y.Sup.) the Supreme Court concluded that the decision that a marriage is irretrievably broken need not be based on any objectifiable fact. It is sufficient that one or both of the parties subjectively decide that their marriage is over and there is no hope for reconciliation. It concluded that a plaintiff's self-serving declaration about his or her state of mind is all that is required for a divorce on the grounds that it is irretrievably broken. In the court's view, the Legislature did not intend nor is there a defense to Domestic Relations Law § 170(7).

In Vahey v Vahey, --- N.Y.S.2d ----, 2012 WL 832350 (N.Y.Sup.) Supreme Court held that all that is required under Domestic Relations Law § 170(7) is the sworn statement of the irretrievable breakdown by the plaintiff. The Court agreed with the analysis set forth by Justice Falanga in A.C. v. D.R., 32 Misc.3d 293 (Sup Ct 2011). that the section 170(7) ground is inherently subjective in nature, and "a plaintiff's self-serving declaration about his or her state of mind is all that is required for the dissolution of a marriage on the ground that it is irretrievably broken." The Court disagreed with the views expressed in Schiffer v. Schiffer, 33 Misc.3d 795 (Sup Ct Dutchess County, 2011) and Strack v. Strack, 31 Misc.3d 258 (Sup Ct Essex County 2011).

In Townes v Coker, --- N.Y.S.2d ----, 2012 WL 444054 (N.Y.Sup.) in opposition to Wife's application for summary judgment as to grounds, the Husband categorically denied his Wife's claims that the marriage had broken down irretrievably. The Supreme Court found that the Legislature did not enact a defense to this cause of action and courts cannot employ statutory construction to enact an intent that the Legislature did not express. Since the Wife stated "under oath" that the marriage is irretrievably broken, there was no basis for directing a trial with regard to this cause of action for divorce. Once a party has stated under oath that the marriage has been irretrievably broken for a period of at least six months, the cause of action for divorce has been established as a matter of law. The Court declined to follow Strack v.. Strack, 31 Misc.3d 258, 916 N.Y.S.2d 759 (Sup.Ct., Essex Cty., 2011) and Schiffer v. Schiffer, 33 Misc.3d 795 (Sup.Ct. Dutchess Co., 2011). Supreme Court held that pursuant to DRL §170(7), once either party states under oath that the marriage has been irretrievably broken for at least six months, the grounds are no longer at issue and there is no right to a trial, by jury or otherwise. The entire purpose of the statute was to permit the Court to grant a divorce without requiring a trial. It noted that in AC v. DR, 32 Misc.3d 293, 305, 927 N.Y.S.2d 496 (Sup.Ct. Nassau Co., 2011), Justice Falanga stated the

The Domestic Relations Law provides that no action for divorce may be maintained on a ground which arose more than five years before the date of the commencement of the action except where abandonment or separation pursuant to agreement or decree is the ground.[107] Therefore, it would appear that the five year statute of limitations may be a defense to this ground that the marriage is not irretrievably broken. [108] The

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plaintiff's self-serving declaration about his or her state of mind is all that is required for the dissolution of a marriage on grounds that it is irretrievably broken.

In Palermo v Palermo, 2011 WL 7711557 (N.Y.Sup.), 2011 N.Y. Slip Op. 52506(U), the wife again filed a verified complaint on the grounds that the marital relationship had broken down for a period in excess of six months. The husband answered, denying the allegations, and asserting an affirmative defense that the couple had lived separate and apart for a period of at least 10 years. The husband moved to dismiss the wife's complaint, arguing that the statute of limitations had expired on her claims, that they were barred by res judicata, and that the complaint failed to state a cause of action. The wife cross-moved to replead the claim under DRL § 170(7) to include the specific allegation that the marriage was irretrievably broken for a period of greater than six months. The motion to amend and serve the complaint was granted. CPLR 3025(b). The Court held that the verified statement of "irretrievable breakdown" of a marriage, in itself, without a trial, provided the necessary predicate to granting a divorce under the Domestic Relations Law. Under DRL § 170(7), one partner alone can declare the marriage is "dead" if sworn to under oath, in accordance with the statutory language. While a strict reading of the statute suggests that the declaration alone provides the basis for a divorce, the husband contended that he was entitled to a trial on this provision relying on Strack v. Strack, 31 Misc.2d 258 (Sup.Ct. Essex Cty.2011). The court concluded that the question of whether a breakdown is irretrievable is a question of fact to be determined at trial. The court concurred with A.C. v. D.R., 32 Misc.3d 293 (Sup. Cty. 2011) that there is "no defense to the no-fault grounds." The court also considered the opinion in Schiffer v. Schiffer, 33 Misc.3d 795 (Sup.Ct. 2011), which followed the logic of Strack, holding that the no-fault assertion under DRL § 170(7) was subject to the trial requirement. This court found little in Schiffer that differed from the analysis in Strack and declined to follow it. The Court also held that there is no statute of limitations under DRL 170(7) because the cause of action only arises at the time the party swears that the marriage has been irretrievably broken for a period in excess of six months. A cause does not accrue until there is "a legal right" to be enforced.

[107] Domestic Relations Law § 210

[108] In Strack v Strack, 31 Misc.3d 258, 916 N.Y.S.2d 759 (Sup. Ct 2011) the allegations in the complaint were as follows: "The relationship between husband and wife has broken down such that it is irretrievable and has been for a period of at least

Domestic Relations Law also provides that there is a right to a jury trial on the grounds for a divorce.[109]

Several lower courts have found that there is no defense to the irretrievable breakdown ground and no right to a trial by jury on the issue of irretrievable breakdown despite the provisions of Domestic Relations Law.[110] Other lower courts have held that

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six months. For a period of time greater than six months, Defendant and Plaintiff have had no emotion in their marriage, and have kept largely separate social schedules and vacation schedules. Each year Plaintiff and Defendant live separately throughout most of the winter months. Though they share the residence for several months out of the year, Plaintiff and Defendant have not lived as husband and wife for a period of time greater than six months. Plaintiff believes the relationship between she and Defendant has broken down such that it is irretrievable and that the relationship has been this way for a period of time greater than six months." The Court found that the grounds set forth in Domestic Relations Law § 170(7) were subject to the five-year statute of limitations; that the parties were entitled to a jury trial of the grounds for divorce under Domestic Relations Law § 173; and that the determination of whether a breakdown of a marriage is irretrievable is a question to be determined by the finder of fact. The Court held however, that whether a marriage is so broken that it is irretrievable need not necessarily be so viewed by both parties. Accordingly, the fact finder may conclude that a marriage is broken down irretrievably even though one of the parties continues to believe that the breakdown is not irretrievable and/or that there is still some possibility of reconciliation. The Court ordered that there be an immediate trial on the issue raised in defendant's motion, namely whether "[t]he relationship between husband and wife has broken down irretrievably for a period of at least six months."

In Schiffer v Schiffer, 33 Misc.3d 795 (Sup.Ct. 2011) the court found that Mr. Schiffer had raised a triable issue of fact that the marriage was irretrievably broken for at least six months. The proof bared by the parties on the wife's motion for summary judgment dismissing the complainti sufficed to establish a true issue of fact as to whether the marriage was irretrievably broken. It held that after the parties are afforded the accouterments of due process, the finder of fact will undoubtedly resolve the question as to whether this marriage is irretrievably broken for at least six months.

[109] Domestic Relations Law § 173.

[110] See AC v DR, --- N.Y.S.2d ----, 2011 WL 1137739 (N.Y.Sup.); Vahey v Vahey, --- N.Y.S.2d ----, 2012 WL 832350 (N.Y.Sup.); Townes v Coker, --- N.Y.S.2d ----, 2012 WL 444054 (N.Y.Sup.); and Palermo v Palermo, 2011 WL 7711557 (N.Y.Sup.), 2011 N.Y. Slip Op. 52506(U).

the parties are entitled to a trial on the issue of irretrievable breakdown.[111] Resolution of this issue will have to wait the eventual determination of the Court of Appeals.

[111] See Strack v Strack, 31 Misc.3d 258, 916 N.Y.S.2d 759 (Sup. Ct 2011); Schiffer v Schiffer, 33 Misc.3d 795 (Sup.Ct. 2011)