

## Sexual Relations and Abandonment

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[New York Law Journal](#)

November 24, 1998

**D**OMESTIC RELATIONS LAW (DRL) §170(2) 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 one or more years.

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.<sup>1</sup> As a practical matter each of these elements may involve subjective rather than objective criteria.

The conduct of the defendant must be unjustified and without the consent of the plaintiff.<sup>2</sup> As a consequence there cannot be a mutual abandonment.<sup>3</sup>

In *Phillips v. Phillips*,<sup>4</sup> the Appellate Division held that 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." 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.<sup>5</sup> The mistake, however, to serve as justification, must be a reasonable one.

### Constructive Abandonment

A "constructive abandonment" occurs when a spouse fails to fulfill a "basic obligation arising from the marital contract."<sup>6</sup> 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 former. In such cases, for example when the wife locks out the husband 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.

"Constructive abandonment" also refers to a cessation of sexual relations as constituting an abandonment even though the parties may continue to live together. In *Diemer v. Diemer*,<sup>7</sup> the Court of Appeals held that a wife's religious scruples did not justify her in refusing to have sexual relations with her husband when they had been married in a civil ceremony, but not according to the rules of her church. Her refusal to have sex with him was deemed to constitute abandonment.

However, in *George M. v. Mary Ann M.*,<sup>8</sup> the 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." It held that the wife's refusal to have sexual relations with her husband, in "an atmosphere of coercion and lack of consideration," was not unjustified and did not constitute constructive abandonment.

In *Hammer v. Hammer* <sup>9</sup> the husband alleged that his wife had refused to have sexual relations with him for more than four years. The Appellate Division found that even crediting all the husband's testimony, "he did nothing for 10 years by way of legal process to assert his marital rights, but was apparently content to permit the situation to continue ...." Under the circumstances the court found that he consented to a sexless relationship, and it held that before he could predicate a divorce action on the ground of defendant's refusal to have sexual relations with him, "he must demand in good faith a renewal both of the marital relation and its obligations and, if the other *refuses*, such refusal will [then] furnish the basis of an action."

*Hammer* was affirmed<sup>10</sup> in a memorandum decision by the Court of Appeals, which found that the Appellate Division acted within its discretion in determining that the wife was not chargeable with constructive abandonment.

*Hammer* firmly established the rule that there must be a demand for sexual relations before there can be an abandonment. Appellate courts have strictly construed *Hammer* to require "repeated demands" and have denied a divorce where the husband's proof did not permit a finding that for at least one year he, at least periodically, requested a resumption of marital sexual relations. "A refusal or failure to engage in marital relations, to rise to the level of constructive abandonment, must be unjustified, willful and continued, despite *repeated requests* from the other spouse for resumption of cohabitation."<sup>11</sup> Unfortunately, standards such as "repeatedly" and "periodically" are vague and make it difficult to counsel a client.

## **Attempt to Reconcile**

Recently, in *Haymes v. Haymes*,<sup>12</sup> the First Department gave a more liberal reading to DRL §170 (2). The factual allegations in the complaint stated a prima facie cause of action for constructive abandonment. Just before opening statements, the trial court granted an oral motion by defendant for partial summary judgment. It held that the parties' failed six-week attempt at reconciliation, during which they had sexual relations once, which occurred after the maturation of plaintiff's claims, and after the action for divorce had been commenced, barred plaintiff from succeeding on her abandonment claims as a matter of law.

The parties were married in 1965 and lived together until 1987. According to plaintiff's allegations, beginning in December 1984 defendant refused to have sexual relations with her, rejecting her repeated overtures. In September 1987 defendant moved out of the couple's home, an act that plaintiff maintained was without her consent and without justification. The plaintiff claimed that defendant engaged in several adulterous relationships with women identified in the complaint. The action for divorce was commenced in September 1988, after defendant had remained out of the marital home for more than one year.

The couple attempted a reconciliation from Nov. 18, 1988, to Jan. 4, 1989, during which time they resumed residing unhappily together. Unable to resolve their problems, they returned to living apart and pursuing their respective marital claims.

The First Department noted that there was a dearth of current appellate authority in this state directly addressing the legal question of whether a relatively brief attempt at a reconciliation, after otherwise valid claims of abandonment have matured and been alleged in an action, should require plaintiff to forfeit these facially valid causes of action for divorce.

## **Good Faith**

The court agreed with plaintiff that there was more than an implication in several New York appellate cases that an effort to reconcile is meaningless without a showing that it was made in good faith. It noted that by granting the motion for summary judgment the trial court prevented plaintiff from endeavoring to prove that defendant did not make a good faith effort to reconcile. It viewed the record as ambiguous as to the frequency of those relations and whether they were entered into in good faith by the defendant. It concluded that the prevailing legal authority seemed to hold that cohabitation by itself is insufficient to invalidate an accrued claim for divorce.

The First Department held:

that 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 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.

The Appellate Division reversed the order, on the law, reinstated the cause of action and remanded the matter for trial.

Upon remand the Supreme Court dismissed the abandonment claim on the pleadings and, following a trial, dismissed the constructive abandonment claim. It credited plaintiff's testimony that, for the four years preceding the commencement of the action, defendant had refused to have sexual relations with her despite her repeated requests, and discredited defendant's account of the marriage.

The court found that during a "good faith attempt at reconciliation" several months after the commencement of the action, the husband had "reestablished his presence in the marital home" and the parties had engaged in sexual relations. The court concluded that plaintiff could not base constructive abandonment on the "parties' lack of sex in the marriage ... given the resumption of an active married life after commencement of this proceeding." The previous lack of sex between the parties was canceled out by the resumption of sexual relations during the abortive reconciliation attempt.

In keeping with the analysis it set forth on the prior appeal, the Appellate Division reversed and remanded for the entry of a judgment of divorce on the ground of constructive abandonment,<sup>13</sup> finding that, "upon consideration of the totality of the circumstances, the brief interlude of cohabitation and sexual relations between the parties during an unsuccessful attempt to reconcile does not result in plaintiff's forfeiture of an otherwise valid claim of constructive abandonment."

### **Context of Conduct**

The court noted its prior analysis<sup>14</sup> and stated that it was clear from that analysis that "the dispositive issue is not whether the parties cohabited and engaged in sexual relations; rather, it is all of the circumstances surrounding such conduct, that will determine what *effect, if any* it will have upon the pending proceeding" [emphasis added].

The court concluded that the trial court erred in finding that the resumption of sexual relations was an impediment to a finding of constructive abandonment. Upon consideration of the totality of the circumstances, and particularly in view of the unsuccessful nature of the attempt at reconciliation, it concluded that the resumption of those relations did not deprive plaintiff of her constructive abandonment claim.

The attempted reconciliation lasted about six weeks. Defendant's picture of marital bliss during this period, however, was denied by plaintiff and belied by his own account of

plaintiff's violent behavior toward him on various occasions during this time, consisting of several physical and verbal attacks, including, according to him, a "wild and uncontrollable rampage" at his office. In addition, plaintiff had reason to believe that defendant was still seeing other women, and there was conflicting evidence as to whether defendant spent every night at the marital residence during the period.

When all the circumstances surrounding the purported reconciliation were considered, it was clear that the brief attempt to reconcile was unsuccessful. Thus, to the extent that there was any cohabitation and/or sexual relations between the parties during that time, it did not defeat plaintiff's cause of action for divorce on the ground of constructive abandonment.

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(1) *Phoenix v. Phoenix* (3d Dept. 1973) 41 AD2d 683, app dismd 33 NY2d 691; *Kaplan v. Kaplan* (2d Dept. 1969) 31 AD2d 247.

(2) *Schine v. Schine* (1972) 31 NY2d 113.

(3) *Belandres v. Belandres* 58 AD2d 63 (1st Dept. 1977).

(4) 70 AD2d 30 (2d Dept. 1979).

(5) *Fischel v. Fischel*, 286 A.D. 842 (1955).

(6) *Lyons v. Lyons*, 187 AD2d 415.

(7) *Diemer v. Diemer*, 8 NY2d 206 (1960).

(8) 171 AD2d 651.

(9) 2d Dept. 1973, 41 AD2d 831.

(10) 34 NY2d 545 (1974).

(11) *Caprise v. Caprise*, 143 AD2d 968 (2d Dept., 1988); See also *Biegeleisen v. Biegeleisen*, 676 NYS2d 684 (2d Dept., 1998).

(12) 221 AD2d 73 (1st Dept., 1996).

(13) *Haymes v. Haymes*, 675 NYS2d 593 (1st Dept., 1998).

(14) *Haymes v. Haymes*, 221 AD2d 73, 80.

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