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THE DIVORCE REFORM LAW— A LESSON IN LEGISLATIVE OVERSIGHT

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When, in 1966, divorce reform became a reality in New York, divorce and separation procedures were thought to be greatly simplified as a consequence of the increased attainability of both actions. However, one corresponding aspect of divorce and separation, namely the availability to the defendant of affirmative defenses in separation and divorce actions, became unclear as a result of the legislative revision. This article is aimed at pointing up a perceived inconsistency in New York's separation statute. The situation presented in this article could arise in New York under the Domestic Relations Law. If the matter has been before the courts, the author is unaware of it. If it has not been before the courts, that is the good fortune of attorneys in general. The situation is based on facts created by the author and any resemblance to an actual case is coincidental.

Plaintiff commenced an action for a separation alleging cruel and inhuman treatment.[1] The summons stated that the relief sought included alimony, custody of children, support for the children, possession of the marital residence, and counsel fees. After following the statutory reconciliation procedure,[2] a final report and certificate of no necessity or no further necessity for conciliation procedures was issued.[3] Subsequently, a complaint was served and issue joined.[4] The complaint alleged various and sundry times and events of cruel and inhuman treatment.[5] The answer consisted of a general denial of the

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1. Cruel and inhuman treatment has long been a recognized ground for marital separation agreements in New York. *See* N.Y. DOM. REL. LAW § 200(1) (McKinney Supp. 1971).

2. N.Y. DOM. REL. LAW § 215-c (McKinney Supp. 1971), provides:

> a. Within twenty days after the commencement of a matrimonial action . . . the party plaintiff in such action shall file with the conciliation bureau in the judicial district where the action is pending, a notice of commencement of such action. . . .
>
> b. Upon the filing of such notice, the appropriate supervising justice shall assign the matter to a conciliation commissioner.

3. N.Y. DOM. REL. LAW § 215-c(b)(4)(b) (McKinney Supp. 1971).

4. N.Y. DOM. REL. LAW § 211 (McKinney Supp. 1971).

5. N.Y. CIV. PRAC. LAW § 3016(c) (McKinney 1964). *See also* Mordkowitz v. Mordkowitz, 13 Misc. 2d 495, 177 N.Y.S.2d 328 (Sup. Ct. 1958); Maas v. Maas, 5 Misc. 2d 840, 161 N.Y.S.2d 685 (Sup. Ct. 1957).

allegations. After examinations before trial a note of issue was filed.[6] Some months thereafter, defendant moved to serve a supplemental answer pursuant to section 3025 (b) of the Civil Practice Laws and Rules,[7] which answer sought to allege the misconduct of plaintiff as an affirmative defense to the action for separation and as a basis for asking the court to exercise its discretion in denying the request for alimony. The legal question thus presented is whether misconduct is (or should be) an affirmative defense to an action for separation based on cruel and inhuman treatment.[8]

If plaintiff had sought a divorce, the answer would have been evident under current decisional law. Prior to 1967 the New York divorce law allowed adultery as the only basis for divorce. Section 171 set out defenses to such an action for divorce, as follows:

> In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:
>
> 1. Where the offense was committed by the procurement or with the connivance of the plaintiff.
>
> 2. Where the offense charged has been forgiven by the plaintiff. The forgiveness may be proven, either affirmatively, or by the voluntary cohabitation of the parties with the knowledge of the fact.
>
> 3. Where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action was not commenced within five years after the discovery by the plaintiff of the offense charged.
>
> 4. Where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce.[9]

In 1966 the divorce reform law extended the availability of divorce in New York by creating the so-called "non-fault" grounds.[10] Although section 171 was purportedly repealed in the title of the revising statute, the text was retained.[11] Therefore, the courts were left to decide whether adultery would be a defense in an action for divorce on these newly established grounds.

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6. *See, e.g.*, Augustin v. Augustin, 277 App. Div. 777, 97 N.Y.S.2d 430 (2d Dep't 1950) on the limits of such examinations before trial.

7. N.Y. CIV. PRAC. LAW § 3025(b) (McKinney 1964).

8. Under the old separation law, see Rosenberg v. Rosenberg, 28 Misc. 2d 922, 216 N.Y.S.2d 330 (Sup. Ct. 1961); Feix v. Feix, 100 N.Y.S.2d 627 (Sup. Ct. 1950).

9. N.Y. DOM. REL. LAW § 171 (McKinney 1964).

10. N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1971). *See* the text of section 170 at note 21 *infra*.

11. N.Y. Sess. Laws 1966, ch. 254.

In *Mante v. Mante*,[12] a wife brought an action for a divorce, alleging cruel and inhuman treatment. The lower court dismissed the action for failure of proof, and the Appellate Division affirmed. In commenting on several findings of the trial term, the Appellate Division noted:

> Under the statute in effect prior to September 1, 1967, an action for a divorce could be resisted by proof of adultery on the part of the complainant; misconduct in general was not a defense . . . . That statute remains unchanged by the revision. The present statute providing for cruel and inhuman treatment as a ground for a divorce therefore does not include the defense of recrimination based on misconduct.[13]

Continuing, the court added:

> In the light of this background, we think that adultery remains the only misconduct which is a recriminatory defense to an action for divorce; and then only if the plaintiff is proceeding in the action on the theory of the defendant's adultery. No longer is fault an essential component for divorce . . . .[14]

Noting that the divorce reform law did not provide defenses to the new grounds, the court concluded that the legislature intended to abandon the traditional fault approach in divorces and to permit termination of a marriage where both parties were at fault, except in cases where both were guilty of adultery. In support of this position, the court cited *Gleason v. Gleason*.[15]

The same result has been reached in other cases. In *Bishop v. Bishop*,[16] a wife sought a divorce based on the ground of cruelty. Her husband's answer denied the cruelty and included a counterclaim and affirmative defenses. The court stated:

> There are no statutory defenses to an action for divorce based on the defendant's cruel and inhuman treatment. Defense must consist of a denial of the complaints made. The sole statutory provision relating to affirmative defenses for divorce actions is expressly limited to actions based on adultery.[17]

In *Garner v. Garner*,[18] the same result was found when an action

12. 34 App. Div. 2d 134, 309 N.Y.S.2d 944 (2d Dep't 1970).
13. *Id.* at 139, 309 N.Y.S.2d at 949.
14. *Id.* at 140, 309 N.Y.S.2d at 950.
15. 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).
16. 62 Misc. 2d 436, 308 N.Y.S.2d 998 (Sup. Ct. 1970).
17. *Id.* at 437, 308 N.Y.S.2d at 999.
18. 59 Misc. 2d 29, 297 N.Y.S.2d 463 (Sup. Ct. 1969).

based on the husband's confinement in prison for three consecutive years after the marriage was defended on the basis of adultery.

The *Mante* case contains a good discussion of the limited defenses available in actions for divorce.[19] The defense of recrimination has been widely criticized and invariably limited to actions based on adultery. The consistent view of courts in states where recrimination is permitted as a defense has been that it is permissible only in an action based on adultery.[20]

Thus it is clear that the sole affirmative defense to actions for divorce is adultery and then only if the action is based on adultery. Since fault is no longer an "essential component for divorce," the lesser forms of recriminatory misconduct cannot frustrate an action for divorce based on the other grounds such as cruel and inhuman treatment.

Section 170 of the Domestic Relations Law, which sets forth the grounds for divorce,[21] contains no defenses in its text. The legislature

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19. *See* Mante v. Mante, 34 App. Div. 2d 134, 139-41, 309 N.Y.S.2d 944, 949-51 (2d Dep't 1970).

20. *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS 375 (1968).

21. N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1971) states:

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) 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 abandonment of the plaintiff by the defendant for a period of one or more years.

(3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of adultery, provided that adultery for the purpose of articles ten, eleven, and eleven-A of this chapter, is hereby defined 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 plaintiff and defendant. Deviate sexual intercourse includes, but not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.

(5) 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.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation subscribed 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 agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed

enacted a separate section, section 171, to enumerate the defenses to an action for divorce—defenses available only in an action based on adultery.[22] Emulating section 170, section 200 of the Domestic Relations Law outlines the statutory grounds for *separation*.[23] Subsection 4 of section 200 provides:

> The commission of an act of adultery by the defendant; except where such offense is committed by *the procurement or with the connivance of the plaintiff or where there is voluntary cohabitation of the parties with the knowledge of the offense or where action was not commenced within five years after the discovery by the plantiff of the offense charged or where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce,* provided that adultery for the purposes of this subdivision is hereby defined 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 plaintiff and defendant.[24]

As indicated by the italicization, this subsection embraces all of the defenses contained in section 171. The remaining portions of section 200 make no mention of defenses to the grounds for separation other than adultery. In other words, it is apparent that one section, section 200, is intended to provide both grounds and defenses for separation actions in the same way that two sections, sections 170 and 171, do for divorce actions. There being no defenses to an action for divorce based on the non-fault grounds, it logically follows that there exist no defenses in an action for separation based on non-fault grounds. Such a conclusion is seemingly consistent with the drafting of section 200, especially in light of section 200 (4). However, one must consider the effect of section 202, which states:

> The defendant in an action for separation from bed and board may set up, in justification, *the misconduct of the plaintiff;* and if that

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all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

22. *See* N.Y. DOM. REL. LAW § 171 (McKinney 1964).

23. *See* N.Y. DOM. REL. LAW § 200 (McKinney Supp. 1971).

24. *Id.*

> defense is established to the satisfaction of the court, the defendant is entitled to judgment.[25]

Prior to 1967, adultery was the only ground for divorce, while several bases were available for separation. Accordingly, section 171 permitted one defense, adultery, to an action for divorce, while section 202 permitted the broader defense of misconduct to an action for separation. The number of defenses may have been the *quid pro quo* to the number of grounds. The divorce reform law increased the number of grounds for divorce, but did not increase the number of defenses. If section 202 is literally applied despite the revision of section 200, there will be be no *quid pro quo;* that is, a defense will be available for each ground in a separation action while the same defense is unavailable for the corresponding ground in a divorce action. Although section 202 of the Domestic Relations Law states that misconduct of the plaintiff will be a defense in an action for separation, it is difficult to conceive that in the revision of section 200 the legislature intended all defenses to apply to actions for separations on each ground when it limited the defenses in actions for divorce to that of adultery in an action based on adultery. If section 202 serves to bar plaintiff's action for a separation on defenses which would not be available in an action for divorce, the result might depend solely on the relief sought. Such a result would be inconsistent with the interpretation given in actions for divorce. If a marriage can be terminated in a divorce action based on non-fault grounds even though the plaintiff may be guilty of misconduct, what sense can there be in preserving the marriage by denying a separation on the basis of misconduct which would not be permitted in a divorce action?

The absurdity of permitting misconduct as a defense in an action for separation on the grounds of cruel and inhuman treatment is aptly discussed in *Woicik v. Woicik.*[26] In *Woicik,* the husband sued for a divorce or separation charging cruel and inhuman treatment. Defendant counterclaimed for separation, charging cruel and inhuman treatment and abandonment. At the close of the case, plaintiff moved to withdraw so much of his prayer for relief as sought a separation. The court found that the proof amply demonstrated the substance of the charges of cruel and inhuman treatment made by each of the parties. Since plaintiff had demonstrated the cruel and inhuman conduct

25. N.Y. DOM. REL. LAW § 202 (McKinney 1964) (emphasis added).
26. 66 Misc. 2d 357, 321 N.Y.S.2d 5 (Sup. Ct. 1971).

of the defendant, he was entitled to a divorce. The court went on to discuss the anomalies of the Domestic Relations Law in the area of defenses. It correctly stated the law in actions for divorce discussed previously and noted the difference in an action for separation because of section 202. Although the court did not decide the applicability of section 202 in light of the revision of section 200 under the divorce reform law, it struggled with the problem in the context of alimony.

> Had the defendent sued for divorce, she would have been entitled to a decree granting her the relief sought, regardless of whether the doctrine of comparative rectitude or dual divorce were applied, albeit the plaintiff would have been entitled to the same relief. If this were the situation, there would have been no refusal "to grant the relief requested by the wife." Thus, despite the implication in Foster and Freed to the contrary (The Divorce Reform Law, 1970, p. 13), the condition mandating the refusal to grant alimony would not exist. Indeed, authority supports the conclusion that alimony would be justified, dependent on the need therefor (*DeBurgh v. DeBurgh* . . . .).That case holds . . . that "when a divorce is granted to both, alimony may be awarded to either, for the basis of liability for alimony is the granting of a divorce against the person required to pay it." . . .
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> While there is no authority in this State which is directly in point, *Sacks v. Sacks* . . . is persuasive that the question of alimony must be viewed as a unitary part of the question presented for determination. There, the husband sued for separation. The wife counterclaimed for like relief. Both claims were dismissed, the wife's for failure of proof, and the husband's even though he established the wife had abandoned him, because his conduct was such as to bar the relief sought. In affirming the substantial award of alimony the court said . . . : "As a wife may obtain support from her husband when both are free of misconduct, she may also obtain support when both are guilty of misconduct which bars both from obtaining a separation."
>
> Thus far we have discussed defendant's right to alimony in the context of the hypothesis of a prayer seeking divorce. The fact is that she has not sought a divorce; and the relief requested, in the form of a separation, is denied on two grounds—recrimination and a termination of the marital relationship by the granting of a divorce to her husband. However, rights are contingent upon the facts as they have been developed upon the trial. It is difficult to believe that the Legislature intended that a right so substantively vital as the right to alimony be dependent upon a matter so substantively irrelevant as the prayer for relief.[27]

No doubt the court was correct in its conclusion. Paraphrasing the

27. *Id.* at 360-61, 321 N.Y.S.2d at 9-10.

last sentence requires the same conclusion in regard to the defense of misconduct. It is difficult to believe that the legislature intended that the defense of misconduct to an action should be "dependent upon a matter so substantively irrelevant as the prayer for relief."

The defense of misconduct under section 202 should not be permitted in a separation action when it is unavailable in a divorce action. To allow such a defense would defeat the purpose of the reforms and make it more difficult to obtain a separation than a divorce.

The situation need not arise in the context presented. The reader can undoubtedly conceive of several others with little difficulty. One example would be when the plaintiff seeks to amend the prayer for relief from a separation to a divorce. Formerly, such motions were granted because the rules of pleading were liberal, because there was no prejudice to defendant, and the burden of proof for plaintiff was equal or greater after the change in relief. Now, however, the granting of such a right to amend precludes all defenses (except in an action based on adultery) and, therefore, may prejudice a defendant who wishes to defend. The alternative is for the plaintiff to discontinue the action for separation and commence a new one for divorce, all of which is an unnecessary technical procedure requiring the expenditure of time and effort for lawyers, clients and the courts. Does it make sense to preserve the marital status of the parties in a separation action because of the misconduct of the plaintiff when the same plaintiff could terminate that status if the action were for divorce? I think the answer to both questions is clearly "no." As Judge Fuld put it so aptly in *Gleason v. Gleason*,[28]

> In a word, if there is no longer a viable marriage the question of fault, of "guilt," or "innocence," is irrelevant.[29]

28. 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970).
29. *Id.* at 35, 256 N.E.2d at 516, 308 N.Y.S.2d at 351.