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Condonation and the New York Separate Roofs Defense

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might profitably make a reconnaisance of other problem areas in the law and astutely complete the campaign.

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CONDONATION AND THE NEW YORK SEPARATE ROOFS DEFENSE

If a wife sues for separation because, *inter alia*, of her husband's undoubted cruelty, and, after gaining a temporary support order which presumably covers shelter costs, continues to live in the same apartment with her husband sharing the same bed, but without intercourse, for ten months, may she get a final judgment? A recent New York supreme court case, *Takagi v. Takagi*,[1] decided this issue in the negative. It was held that in such circumstances the wife had condoned her husband's transgressions so as to bar relief.[2] She did this by sharing the bed and by electing to stay after an opportunity for leaving was supposedly made available.[3]

"special licenses" to licensees who "regularly keep food available." Food is defined as "sandwiches, soups or other foods." There is no requirement that the available food be sold with the liquor.

Section 66 was amended to increase fees for retail licensees.

Section 101-b as amended, retains the definition of the state's policy—"to regulate and control the manufacture, sale, and distribution within the State of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law." It also continues the prohibition against price discriminations in sales to retailers and the requirement that brand owners file price schedules. However, eight new paragraphs were added to § 101-b(3) specifying that a "duly verified affirmation" must be filed with price schedules. The affirmation must declare that the prices set forth are "no higher than the lowest prices" charged by the brand owner or other person to any wholesaler or retailer anywhere in the U.S. during the preceding calendar month. Criminal penalties are made available for false affirmations.

Section 101-bb was added to prohibit sales by retailers at less than cost. Section 101-bbb was added to continue SLA enforcement of minimum consumer prices (filed by the manufacturer or wholesaler) of wine.

The addition of the last named section was necessitated by the repeal of § 101-c, the general price maintenance section. Therefore, minimum consumer resale prices will be enforced for wine but no longer for liquor. In repealing § 101-c, the act declares "it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail . . . , (b) that consumers of alcoholic beverages in this state should not be discriminated against . . . by paying unjustifiably higher prices . . . than are paid by consumers in other states . . . ."

Section 105(4),(4-a) was repealed to eliminate the minimum distance requirement between package stores. But the minimum distance of two hundred feet between liquor stores and churches and schools is retained.

Section 105(19) which previously applied only to sellers of beer was amended to forbid price advertising by licensees selling beer or *liquor* for off-premises consumption.

The effective date for most of the additions noted above is October 31, 1964.

The new law does not contain revisions of the particular sections construed by the courts in the cases examined in this study. However, the repeal of § 101-c can be expected to affect the mail order business; liquor at prices lower than the current fixed scales will be available within the state. The entire price advantage of imported liquors will not be wiped out, because federal and state taxes will apply to domestic purchases. Whether the margin will nonetheless be sufficient to sustain a profitable volume of business for the mail order entrepreneur, and to sustain the allegiance of the price conscious consumer remains to be disclosed.

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1. 38 Misc. 2d 476, 237 N.Y.S.2d 109 (Sup. Ct. 1963) (Lawless, J.).
2. *Id.* at 478, 237 N.Y.S.2d at 111.
3. *Ibid.*

Condonation has been variously defined, but for present purposes it can be called an affirmative defense to a separation or divorce action[4] which requires three elements: an intention to forgive the antecedent acts complained of;[5] an actual forgiveness, express or implied;[6] and a restoration of the offending spouse to full marital rights, so as to clear a reconciliation.[7] This is the better formulation of which several exist.[8]

In the *Takagi* case, the court used the legal principle that the law should not grant judicial separation where the parties have not separated themselves.[9] Plaintiff-wife's failure to leave the apartment ran against this judicially created norm.[10] There were then three reasons for denying relief—failing to leave, sharing the same bed, and long continuance of both conditions. The problems presented, however, are whether such a norm is properly a part of the condonation doctrine, whether it has applicability in the present case, and finally whether it has any value at all as a judicial rule in the law of separation.

The above questions, in substance if not in form, have been the basis of a long standing conflict between the First and Second Departments of the Appellate Division of the New York State Supreme Court. It is held by the First Department that no judicial separation will be granted and an action for temporary alimony will be dismissed unless the parties are physically separated in different domiciles prior to instituting the action.[11] This doctrine was modified by recognizing special circumstances which justify a continued co-residence including a joint-tenancy[12] or tenancy by entirety,[13] economic privation preventing one spouse from finding other housing[14] or problems over the care of children.[15] The inference seems to be that if the parties are not under separate roofs then they really do not desire a separation decree, or at least there has been some kind of forgiveness amounting to a condonation of the alleged wrongs so as to bar the action.

On the other hand, the Second Department believes that although a married couple continue to live under the same roof it is very possible for them to live entirely separate lives.[16] No special circumstances are expressly

4. Annot., 32 A.L.R.2d 107, § 3, at 117 (1953). See generally Gordon, *Condonation in Connecticut*, 37 Conn. B.J. 544 (1963).
5. Betz v. Betz, 2 Robt. 694 (N.Y. Super. Ct. 1864).
6. Annot., 32 A.L.R.2d 107, 121 (1953).
7. *Id.* at 125.
8. Annot., 32 A.L.R.2d 107, 113 (1953). See, *e.g.*, Maughan v. Maughan, 184 N.E.2d 628, 630 (Ct. of Com. Pleas, Tuscarawas County, Ohio 1961); Annot., 32 A.L.R.2d 107, § 17 (1953) (statutory definitions and requirements). See generally Schouler, Divorce Manual § 154 (1944).
9. Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950) (per curiam); Takagi v. Takagi, 38 Misc. 2d 476, 478, 237 N.Y.S.2d 109, 110 (Sup. Ct. 1963).
10. Takagi v. Takagi, *supra* note 9, at 477, 237 N.Y.S.2d at 110.
11. Somer v. Somer, 285 App. Div. 809, 137 N.Y.S.2d 1 (1st Dep't 1955) (per curiam).
12. Lampert v. Lampert, 268 App. Div. 920, 51 N.Y.S.2d 343 (2d Dep't 1944).
13. Brous v. Brous, 283 App. Div. 1050, 131 N.Y.S.2d 565 (1st Dep't 1954).
14. Lindley v. Lindley, 162 N.Y.S.2d 217 (Sup. Ct. 1957).
15. Baker v. Baker, 16 A.D.2d 409, 228 N.Y.S.2d 470 (1st Dep't 1962) (dictum).
16. See Lowenfish v. Lowenfish, 278 App. Div. 716, 103 N.Y.S.2d 357 (2d Dep't 1951) (memorandum decision).

required. The court therefore should not impose as a sine qua non of a separation action that the parties first be physically apart in separate housing.[17] In this view the Second Department appears to weigh more heavily the problems of the wife in finding dwelling space prior to her motion for temporary alimony and support[18] and the possible creation of a counterclaim for abandonment by the remaining spouse.[19] The only criterion set by this department appears to be that the parties have so isolated and segregated their lives that they no longer live as man and wife.[20]

The Third Department has not made a decision on this issue. In the Fourth Department at least one case, *Schultz v. Schultz*,[21] has been decided without opinion. On its face it appears to reject the First Department rule. The Court of Appeals has not made any pronouncement.[22]

But an apparent end to the controversy has been made by section 236 of the New York Domestic Relations law. This new provision says that a court *may* in its discretion give temporary support in a final decree according to the circumstances of the parties and justice of the case even though the parties continue to reside in the same abode. But certain questions remain. Does the statutory language mean the court can grant a separation order and direct support and yet allow the parties to then continue to live in the same apartment? Does the language now preclude a court from finding condonation before the final decree? In order to attempt to answer these issues some idea of the purpose of the statute must be formulated as well as an idea of the problems it was most probably meant to correct. To do this a review of the relevant cases which bear upon the statute is required.

The separate-roofs doctrine of the First Department, relied on in part by the opinion in the *Takagi* case, was created in *Berman v. Berman*.[23] A separation decree based on cruel and inhuman treatment by the husband was reversed, because the parties had continued to live in the same apartment regardless of the court's recognition that the parties were not living together as husband and wife and had led their lives as separately as two people could within a small apartment.

17. List v. List, 186 Misc. 261, 61 N.Y.S.2d 809 (Sup. Ct. 1946), *modified and aff'd mem.*, 276 App. Div. 998, 95 N.Y.S.2d 604 (1st Dep't 1950).

18. Berman v. Berman, 277 App. Div. 560, 561, 101 N.Y.S.2d 206, 207 (1st Dep't 1950) (Van Voorhis, J., dissenting).

19. See Ziegler v. Ziegler, 10 A.D.2d 270, 198 N.Y.S.2d 875 (1st Dep't 1960) (per curiam), *criticized in* 35 N.Y.U.L. Rev. 1552, 1553 (1960); Kronenberg v. Kronenberg, 203 N.Y.S.2d 218 (Sup. Ct. 1960); List v. List, 189 Misc. 261, 61 N.Y.S.2d 809 (Sup. Ct. 1946) (dicta), *modified & aff'd mem.*, 276 App. Div. 998, 95 N.Y.S.2d 604 (1st Dep't 1950).

20. List v. List, *supra* note 19, *approved in* Lowenfish v. Lowenfish, 278 App. Div. 716, 103 N.Y.S.2d 357 (2d Dep't 1951) (memorandum decision); *accord*, Lutz v. Lutz, 166 A.2d 490 (D.C. Munic. Ct. App. 1960); Downing v. Downing, 279 S.W.2d 538 (Kansas City Ct. App. 1955).

21. 1 A.D.2d 930, 150 N.Y.S.2d 568 (4th Dep't 1956) (memorandum decision). *Contra*, Ross v. Ross, 4 Misc. 2d 399, 149 N.Y.S.2d 585 (Sup. Ct. 1956), *appeal dismissed by stipulation*, 4 A.D.2d 1001, 170 N.Y.S.2d 1006 (4th Dep't 1957).

22. Takagi v. Takagi, 38 Misc. 2d 476, 478, 237 N.Y.S.2d 109, 111 (Sup. Ct. 1963).

23. 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950) (per curiam).

> We think it is contrary to the policy of the law and incongruous to separate parties judicially who have not separated themselves. Perhaps good reason exists why the parties should separate by mutual agreement or why plaintiff should leave their common place of abode and sue for a separation.[24]

But the court said no judgment should be rendered where it seemed the judgment contemplated the parties would continue to occupy the same apartment even under the separation decree.[25] A strong dissent pointed out the harshness of the ruling especially as applied to a middle-aged woman with no relatives or income in New York City where housing is difficult to find.[26] A later supreme court case within that department found difficulty with the rule and even suggested that it be limited to cases where after judgment the spouses would continue in the same domicile.[27] An order for temporary alimony and counsel fees was reversed in *Friedman v. Friedman*[28] because the complaint did not show any special reason for the plaintiff-wife to remain at the matrimonial domicile while bringing the action. Moreover, it was held to be immaterial that the wife, after starting the action, had removed herself from the domicile.[29] This holding was clarified by *Somer v. Somer*[30] where the court announced that a complaint alleging the fact of common abode did not render it legally insufficient but that in this case it must allege additional facts which would justify a departure from the *Berman* rule.[31] The strictness of the rule was indicated by *Ramos v. Ramos*[32] which held flatly that no support order or counsel fees would be given to a wife who at the time of commencing the action was living together with her husband in the same apartment.

A recent review of the policy behind the *Berman* rule, and the articulation of an additional standard to be applied in dismissing separation actions, is found in *Baker v. Baker*.[33] Plaintiff-wife had received temporary alimony and counsel fees on a cruel treatment and adultery complaint. But co-residence caused a reversal on appeal. The new criterion is the presence of the wife's independent financial means thereby giving her a choice to stay in the apartment or to leave. As the court said:

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24. Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206, 207 (1st Dep't 1950) (per curiam). *Contra*, Spletzer v. Spletzer, 200 Misc. 614, 110 N.Y.S.2d 235 (Sup. Ct. 1951).

25. Berman v. Berman, 277 App. Div. 560, 101 N.Y.S.2d 206 (1st Dep't 1950) (per curiam).

26. *Id.* at 561, 101 N.Y.S.2d at 207.

27. Latteri v. Latteri, 147 N.Y.S.2d 360 (Sup. Ct. 1951) (dictum).

28. 285 App. Div. 938, 137 N.Y.S.2d 1 (1st Dep't 1955) (per curiam).

29. *Ibid. Contra*, Skolnick v. Skolnick, 24 Misc. 2d 1077, 204 N.Y.S.2d 63 (Sup. Ct. 1960).

30. 285 App. Div. 809, 137 N.Y.S.2d 1 (1st Dep't 1955) (per curiam). See Renaud v. Renaud, 147 N.Y.S.2d 359 (Sup. Ct. 1955) (wife failed to allege necessity to stay at husband's residence—complaint dismissed with leave to amend).

31. *Accord*, Rothenberg v. Rothenberg, 8 A.D.2d 703, 185 N.Y.S.2d 594 (1st Dep't 1959).

32. 13 A.D.2d 726, 214 N.Y.S.2d 71 (1st Dep't 1961) (co-residence required a denial of temporary alimony on law, fact and discretion).

33. 16 A.D.2d 409, 228 N.Y.S.2d 470 (1st Dep't 1962), 29 Brooklyn L. Rev. 157 (1962).

> . . . so long as the wife has demonstrated that she can live with her husband, despite his failings *and she has any choice at all*, she has not made out a proper case for a judicial separation. The court should not encourage a separation by granting temporary support in which event the wife would move from the marital residence, if otherwise she might not.[34]

That some of this reasoning was and is speculative when applied to specific cases is shown by both the outcome of the *Baker*[35] case and the *Takagi* case where despite the temporary support granted, including shelter, the wife remained in the apartment; it was held against her as a factor indicating condonation.

Contrary to the First Department's *Berman* rule is the doctrine of *List v. List*, as adopted by the Second Department.[36] Separation was granted by Judge Walters on the grounds of cruel and inhuman treatment, abandonment and non-support. Although the parties resided in the same apartment they occupied different bedrooms, took no meals together, never went out together and had not even talked to each other. Defendant's payment of bills, rent and utilities but with inadequate expenses for plaintiff was called "callous niggardliness" in relation to husband's "means" and "station in life."[37] The court's analysis of the social policy behind a separation decree in the case was as follows:

> . . . for when there arises between two people the irreconcilable conflict which exists between these parties and all vestige of the reality of marriage has disappeared, it is a vain, and to my mind a far from sacred thing, to attempt to hold them together by a mere name and a meaningless and hateful bond.[38]

As to the separate-roofs argument of the defendant, the court said that the earlier cases[39] which denied relief did so because no alimony was necessary, not because the parties lived together.[40] Judge Walter's critique of the yet inchoate separate-roofs rule is worth reiterating in full.

There is a look of logic in the assertion that courts should not by

34. *Id.* at 411, 228 N.Y.S.2d at 472.

35. After the reversal of the first separation decree, the wife moved out, sued again, this time gaining the desired separation. Baker v. Baker, 17 A.D.2d 924, 233 N.Y.S.2d 741 (1st Dep't 1962). In *Takagi*, the parties subsequently acquired an Alabama divorce, September 25, 1963.

36. 186 Misc. 261, 61 N.Y.S.2d 809 (Sup. Ct. 1946), *approved in* Lowenfish v. Lowenfish, 278 App. Div. 716, 103 N.Y.S.2d 357 (2d Dep't 1951) (memorandum decision).

37. List v. List, 186 Misc. 261, 264, 61 N.Y.S.2d 809, 812 (Sup. Ct. 1946).

38. *Ibid.*

39. *E.g.*, Bruggeman v. Bruggeman, 191 App. Div. 689, 182 N.Y. Supp. 87 (2d Dep't 1920).

40. List v. List, 186 Misc. 261, 61 N.Y.S.2d 809 (Sup. Ct. 1946). See Maurer v. Maurer, 263 App. Div. 290, 32 N.Y.S.2d 522 (1st Dep't 1942); Skolnick v. Skolnick, 24 Misc. 2d 1077, 204 N.Y.S.2d 63 (Sup. Ct. 1960); Liebowitz v. Liebowitz, 162 N.Y.S.2d 224 (Sup. Ct. 1957); Foley v. Foley, 184 A.2d 853 (D.C. Munic. Ct. App. 1962) (spouses lived together, shared household expenses. *Held*: wife's financial condition is a relevant consideration and may limit award of maintenance or defeat it altogether). See generally Annot., 10 A.L.R.2d 529 (1950).

> their judgments separate couples who elect to live together; . . . I think . . . that that is a very unrealistic view of the situation, and that we shall make a closer approach to truth and justice if we realize that when not merely love and harmony, but, also, the rudiments of companionship and civilized social intercourse have passed out of married life, each spouse is apt to seek a tactical advantage over the other, and if the law says to two spouses so situated that one or the other must move out before either can obtain legal relief, either one of two things almost inevitably will happen. The more daring character of the two spouses, or, more likely, merely the one having the greater financial resources, will resolve to risk a charge of abandonment by the other and move out, or one or the other, or both, will settle down to a course of conduct designed and calculated to force the other to move out so that a charge of abandonment can be made against that one. The rule urged by defendant thus seems to me to be the most provocative of separations and unmarital conduct and the one least consonant with sound public policy.
>
> Instead of adopting a mere rule of thumb by saying that in every case moving out is a sine qua non of legal relief, I think the circumstances of each case should be weighed on their own merits in an effort to make a common sense appraisal of their weight and gravity in their own setting.[41]

Thus the Second Department has held that the wife need not move out of the domicile prior to her action for separation.[42] It is the standard of whether the parties have lived separate and apart even though residing in the same domicile that governs the issuance of a decree for separation and support in the Second Department.[43]

The difficulty with the First Department's separate-roofs rule against co-residence is that it does not seem to serve any useful purpose since there are indications that failing in a first action because of co-residence one party may simply move out, allege new acts of cruelty, and sue again, this time gaining the desired decree.[44] Thus, the deterrent value mentioned in the first *Baker* decision[45] is open to question.

One of the difficulties which the *Berman* court said should mandate a reversal was swept aside by a supreme court opinion in *Spletzer v. Spletzer*.[46] Under similar circumstances the court said that for purposes of defendant's motion to dismiss it could not assume that the judgment of separation would be granted, or if granted that the parties would be living together at the time of judgment. "There is no policy in the law which requires the parties to be separated before such a motion [for temporary alimony] can be granted."[47]

41. List v. List, *supra* note 40, at 263-64, 61 N.Y.S.2d at 811.
42. See Lowenfish v. Lowenfish, 278 App. Div. 716, 103 N.Y.S.2d 357 (2d Dep't 1951) (memorandum decision); Donnelly v. Donnelly, 272 App. Div. 779, 69 N.Y.S.2d 651 (2d Dep't 1947) (memorandum decision).
43. Bergman v. Bergman, 280 App. Div. 820, 113 N.Y.S.2d 914 (2d Dep't 1952) (memorandum decision); Lowenfish v. Lowenfish, *supra* note 42.
44. See note 35 *supra*.
45. Baker v. Baker, 16 A.D.2d 409, 228 N.Y.S.2d 470 (1st Dep't 1962).
46. 200 Misc. 614, 110 N.Y.S.2d 235 (Sup. Ct. 1951).
47. *Id.* at 617, 110 N.Y.S.2d at 237.

Likewise questionable is the relation of the rule to the defense of condonation. Condonation requires a finding of intent to forgive or an implied forgiveness. The First Department had equated condonation and the separate-roofs doctrine and in doing so failed to take account of other essential aspects of condonation. Furthermore, as a defense it should be raised by the defendant and not by the court sua sponte. Admittedly by express language in the New York statute the court may do so where the grounds for separation are alleged adultery,[48] but how except by pleading could it be raised otherwise?[49] If the *Berman* rule is at base a rule of per se condonation then it is a radical departure from the historic common law declarations of that doctrine.[50] And even if it is not so based it may be further asked that if the law favors condonation then why force the estranged spouses to be physically separate before instituting a separation action thus foreclosing one important opportunity for condonation to result even during the pendency of the action. As explained above, the confusion between the rules was properly the subject of legislative clarification as one judge had suggested.[51]

Moreover the First Department rule put the burden of leaving upon the allegedly innocent plaintiff. The Second Department is more flexible. The court will see to it that the wife has an option to stay if the husband moves out and continues to pay rent, or leave, if the husband refuses to vacate, and compel him to maintain her separate living quarters or resume rent payments.[52] Before the *Berman* rule, one First Department court utilized this more liberal view in order to give a wife some relief while not unduly burdening a husband who posed no danger to the wife and who could not support her and his children in separate quarters.[53]

It is therefore suggested that the new statute was designed to establish as state law the reasoning and the advantages of flexibility of the doctrines relating to separation actions adopted and developed primarily by the Second Department. The purpose of the new provision appears to be to allow a complaining spouse, usually the wife, to get the total matter litigated to a final decree without being forced to leave the family abode if she is constrained by her personal finances or judgment not to.

Thus the statute should not be interpreted to allow two parties to remain in the same abode after a final decree containing a support order has been granted. This would be a fair interpretation if for no other reason but that equity power should not try to regulate a delicate close personal relationship where its decree would be impracticable to enforce.

48. N.Y. Dom. Rel. Law §§ 200-03.

49. See McGaughy v. McGaughy, 410 Ill. 596, 102 N.E.2d 806 (1951). *Contra*, Maughan v. Maughan, 184 N.E.2d 628 (Ct. of Comm. Pleas, Tuscarawas County, Ohio 1961).

50. See Betz v. Betz, 2 Robt. 694 (N.Y. Super. Ct. 1864).

51. Spletzer v. Spletzer, 200 Misc. 614, 617, 110 N.Y.S.2d 235, 237 (Sup. Ct. 1951).

52. Donnelly v. Donnelly, 272 App. Div. 779, 69 N.Y.S.2d 651 (2d Dep't 1947); Applebaum v. Applebaum, 81 N.Y.S.2d 580 (Sup. Ct. 1948).

53. Letts v. Letts, 84 N.Y.S.2d 236 (Sup. Ct. 1948), *modified & aff'd*, 273 App. Div. 958, 78 N.Y.S.2d 753 (1st Dep't 1948).

The next problem is to determine what effect the new provision has upon the defense of condonation. Living in the same abode pending final judgment should no longer be a factor in itself in finding condonation. Additional facts must be present. Some of the difficulty in deciding what more is required can be removed by an understanding of the term condonation as it has developed in New York. In *Betz v. Betz*[54] it was said:

> The term condonation necessarily includes that operation of the mind, evinced by words or acts, known as forgiveness; the free, voluntary and full forgiveness and remission of a matrimonial offense. Unless accompanied by that operation of the mind, even cohabitation[55] without fraud or force, is insufficient to establish a condonation.[56]

In this case the court found that there was no intention to forgive but only an intention to gain support for herself and her child. A modern application of this definition to facts somewhat analogous to the *Takagi* case is found in an Illinois decision, *McGaughy v. McGaughy*.[57] After being allegedly beaten by her husband, plaintiff-wife decided to divorce him but slept in the same bed with defendant for two weeks after misconduct. Defendant argued on appeal that the acts were condoned (without using that term or having affirmatively pleaded it). But the Illinois supreme court said plaintiff's attitude for the two weeks did not possess all the necessary ingredients of condonation. Citing the *Betz* formulation, it stated that "her's was anything but a warm heart and forgiving soul but on the contrary was cold and uncommunicative."[58] The wife was said to have slept in the bed because there was no place else to sleep until she left to live with her daughter. An earlier court opinion than *Betz* said it was not satisfactorily shown that there was a reconciliation and co-habitation after cruel and inhuman treatment even though she remained in the house for several weeks after the wrongs. Upon the wife's brief return "the high words that passed between the parties repel any presumption of a reconciliation."[59] Judge Parker said:

> If condonation may be inferred from cohabitation, the presumption may be rebutted by the accompanying circumstances. Even where there is a condonation, it is always subject to the implied condition that the husband shall afterwards treat the wife with conjugal kindness; and condoned cruelty will be revived by subsequent acts of cruel treatment, which of themselves would not have been sufficient to justify a separation.[60]

54. 2 Robt. 694 (N.Y. Sup. Ct. 1864).

55. Cohabitation was not defined. Its meaning in some cases is unclear. It should be used only to denote a living together as man and wife with sexual relations. See, *e.g.*, Bracksmayer v. Bracksmayer, 22 N.Y.S.2d 110, 112 (Sup. Ct. 1940) (cohabit in legal terms means more than occupying the same bed; it means to live and copulate as man and wife). *Accord*, Jacobsen v. Jacobsen, 205 Misc. 2d 584, 198 N.Y.S.2d 762 (Sup. Ct. 1954).

56. Betz v. Betz, 2 Robt. 694, 696 (N.Y. Super. Ct. 1864).

57. 410 Ill. 596, 102 N.E.2d 806 (1951).

58. McGaughy v. McGaughy, 410 Ill. 596, 102 N.E.2d 806 (1951).

59. Whispell v. Whispell, 4 Barb. 217 (N.Y. Sup. Ct. 1848).

60. *Ibid.*; *accord*, Pellegrino v. Pellegrino, 66 N.Y.S.2d 297 (Sup. Ct. 1946); Ryan v.

In *Reynolds v. Reynolds*[61] where there was evidence that after the last act of cruelty plaintiff-wife continued to cohabit with defendant about seven months from October 1857 to April 1858, the referee nevertheless found there was no forgiveness. The Court of Appeals affirmed holding that "[s]uch continuance [i.e., of sexual relations] is not in this case, as it would have been in an action for divorce on the ground of adultery, conclusive of the fact of condonation."[62] In *Cox v. Cox*[63] a referee again refused to find condonation of acts of cruelty, inhuman misconduct and abuse by virtue of continuous acts of intercourse even on the night before the wife's voluntary separation. There was testimony to the effect that she never "in fact or intentionally forgave the defendant's acts of cruelty and inhumanity."[64] On the *Reynolds* authority the Appellate Division said that although sexual intercourse was some evidence upon the subject of forgiveness or condonation, it was not conclusive.[65] More recently Surrogate Wingate had occasion to summarize these formulations:

> Condonation is favored in the law (Galusha v. Galusha, 116 N.Y. 635, 643, 22 N.E. 1114, [1116] [dictum] . . . and whereas cohabitation subsequent to the commission of acts which would warrant a judgment of separation does not, as in the case with known adultery, constitute condonation as a matter of law, it raises an inference thereof . . . which, when not neutralized, is adequate for a determination that it has occurred.[66]

As previously indicated, sexual intercourse will not be condonation of cruelty as a matter of law. In addition, it is more desirable to have a rule which allows the court to look at all facts before deciding whether a condonation has been shown by resumption of marital relations as well a forgiveness.

The problem remaining then is to determine when condonation exists. To answer this the distinction between condonation of adultery and condonation of cruel and inhuman treatment must be noted. Sexual intercourse creates a greater presumption of condonation of adultery than it does of acts of cruelty.[67] As one court explained the reason for the difference:

Ryan, 132 Misc. 339, 229 N.Y. Supp. 511 (Sup. Ct. 1928). *Cf.* Maggio v. Maggio, 145 N.Y.S.2d 662 (Sup. Ct. 1955) (endurance of cruel treatment in the hope of overcoming its practice does not condone the original practice which induced the commencement of the separation suit), *citing*, Fisher v. Fisher, 223 App. Div. 19, 227 N.Y. Supp. 345 (1st Dep't 1928), *aff'd on other grounds*, 250 N.Y. 313, 165 N.E. 460 (1929).

61. 34 How. Pr. 346 (N.Y. 1867).

62. Reynolds v. Reynolds, 34 How. Pr. 346, 347 (N.Y. 1867).

63. 52 Hun. 613, 5 N.Y. Supp. 367 (4th Dep't 1889); *accord*, Fusaro v. Fusaro, 236 N.Y.S.2d 525 (Sup. Ct. 1962) (for five weeks after the abandonment wife's admitted intercourse with husband in hopes of effecting a reconciliation is not in itself sufficient proof of reconciliation).

64. Cox v. Cox, 5 N.Y. Supp. 367, 369 (4th Dep't 1889).

65. *Ibid.*

66. In the Matter of Estate of Chandler, 175 Misc. 1029, 1031, 26 N.Y.S.2d 280, 284 (Surr. Ct. 1941); *accord*, Brown v. Brown, 51 R.I. 132, 152 Atl. 423 (1930).

67. Brown v. Brown, 171 Kan. 249, 232 P.2d 603 (1951); Cox v. Cox, 5 N.Y. Supp. 367 (4th Dep't 1889).

> The effort to endure unkind treatment as long as possible is commendable; and it is obviously a just rule that the patient endurance by one spouse of the continuing ill-treatment of the other should never be allowed to weaken his or her right to relief.[68]

The possible rule to be derived from these New York cases would be that only where there is convincing evidence of actual forgiveness should a court of equity, after considering all inferences from all the evidence, refuse to grant a separation for otherwise established grounds for a separation decree. One principle which has been developed and underlined by the cases is that spouses should not be separated where livable conditions are established by forgiveness of the alleged marital offences. Basically, the cases appear to recognize that there may be sex without love and affection but only conjugal endearment is sufficient to heal the wounds of inflicted marital cruelty.[69]

It is in regard to this matter of resumption of full marital rights that the New York decisions are deficient for failing to include it as an element of condonation. The difference between restoration of full marital rights and the resumption of marital relations was made clear by a California court in discussing the meaning of the former term in its statute defining condonation:[70]

> There is a clear distinction between the ordinary construction of the term "marital relations" and the statutory term of "all marital rights." The conjugal rights of married persons include the enjoyment of association, sympathy, confidence, domestic happiness, the comforts of dwelling together in the same habitation, eating meals at the same table, and profiting by the joint property rights as well as the intimacies of domestic relations.[71]

Unlike New York, most jurisdictions do require a restoration to all marital rights.[72] On the other hand, New York[73] agrees with the majority rule that a single act of intercourse during separation does not necessarily prove that there has been a condonation of prior cruelty or indignities, but is only evidence of it and requires other circumstances for the ultimate finding.[74] It is clear that intercourse because of fear does not work a condonation.[75] In fact a denial

68. Brown v. Brown, *supra* note 67, at 252, 232 P.2d at 606; *accord,* Rothman v. Rothman, 67 N.Y.S.2d 96 (Sup. Ct. 1946).

69. If intercourse were required, impotency could prevent condonation. *Cf.* Wright v. Wright, 153 Neb. 18, 43 N.W.2d 424 (1950) (there may be condonation without intercourse).

70. Cal. Civ. Code § 116. Hawkins v. Hawkins, 104 Cal. App. 608, 286 Pac. 747 (1930); *accord,* Wolf v. Wolf, 102 Cal. 433, 36 Pac. 767 (1894). *But see* Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185 (1922).

71. Hawkins v. Hawkins, *supra* note 70, at 612, 286 Pac. at 748. See generally Annot., 32 A.L.R.2d 107, § 6 (1953).

72. See generally Annot., 32 A.L.R.2d 107, § 6 (1953).

73. Reynolds v. Reynolds, 34 How. Pr. 346 (N.Y. 1867); Cox v. Cox, 5 N.Y. Supp. 367 (4th Dep't 1889).

74. Annot., 32 A.L.R.2d 107, 142 (1953). *But see* Collins v. Collins, 194 La. 446, 193 So. 702 (1940); Davidson v. Davidson, 11 Vt. 68, 10 A.2d 197 (1940); Winnard v. Winnard, 62 Ohio App. 351, 23 N.E.2d 977 (1939); Phinizy v. Phinizy, 154 Ga. 199, 114 S.E. 185 (1922).

75. Belville v. Belville, 114 Vt. 404, 45 A.2d 571 (1946). See generally Annot., 32 A.L.R.2d 107, § 12 (1953).

of sexual relations to the offender has been held to show that there is no condonation.[76] Refraining from having intercourse for a long time gives evidence that there has been no forgiveness.[77]

Where the problem of separate lives under the same roof exists, courts have generally found that if the parties occupied the same house or apartment, but did not have sexual intercourse, there was no condonation.[78] And sleeping in the same bed creates a rebuttable presumption that they have had intercourse and condoned prior offenses.[79] That the separate-roofs doctrine of the *Berman* case followed in the First Department is not favored for lack of flexibility is indicated by the following typical comment:

> The courts have said that the parties must live "separate and apart" during the pendency of the action, but . . . it has not been said that they cannot do that within the family home. It was the experience of the writer when a trial judge that where there were several children it was sometimes an economic necessity for their support that the home shelter both parents.[80]

In a leading federal case, *Pedersen v. Pedersen*,[81] it was held to be essential for a separation decree that the parties live separate lives with the intention of permanently abandoning the relations of husband and wife.[82] Occupancy of the same house is but one fact to be considered with others in deciding whether the parties live as man and wife.[83] It is a "segregation" of the parties so as to avoid condonation that is required.[84] In another recent District of Columbia case it was said that living in the same home will not block an award of maintenance to a wife who was in fact living a separate life but that such a case requires special scrutiny by the court to discourage litigation between husbands and wives who are actually living together.[85]

Two lower New York court cases in the First Department illustrate how the courts can arrive at just results by using the suggested flexible approach

76. Taylor v. Taylor, 224 S.W.2d 412 (Mo. App. 1949). See generally Annot., 32 A.L.R.2d 107, § 12 (1953).

77. See McGaughy v. McGaughy, 410 Ill. 596, 102 N.E.2d 806 (1951); Glass v. Glass, 175 Md. 693, 2 A.2d 443 (1938); Mackrell v. Mackrell, [1948] 2 All E. R. 858 (1948 C.A.).

78. See generally Annot., 32 A.L.R.2d 107, § 12, at 137 (1953).

79. See Karger v. Karger, 19 Misc. 236, 44 N.Y. Supp. 219 (Sup. Ct. 1897). *Compare* Biltgen v. Biltgen, 121 Kan. 716, 250 Pac. 265 (1926) (spouses slept together twice—no intercourse—no condonation), *and* Dennis v. Dennis, 289 S.W. 16 (Mo. App. 1926) (spouses slept together twelve days after divorce suit—no condonation), *with* Williams v. Williams, 188 Va. 543, 50 S.E.2d 277 (1948) (spouses shared same bed for ten days—intercourse denied—condonation). *Cf.* Miller v. Miller, 237 N.Y.S.2d 95 (Sup. Ct. 1962) (after divorce suit started spouses shared same bedroom for fifteen months—no condonation).

80. Cousino v. Cousino, 90 Ohio App. 449, 452, 107 N.E.2d 213, 214 (Lucas County 1951). See also Rasgatis v. Rasgatis, 347 Ill. App. 477, 107 N.E.2d 273 (1952) (indicating other factors weighing against finding condonation from continued cohabitation); Hansen v. Hansen, 86 Cal. App. 744, 261 Pac. 503 (1927).

81. 107 F.2d 227 (D.C. Cir. 1939).

82. Pedersen v. Pedersen, 107 F.2d 227 (D.C. Cir. 1939).

83. *Id.* at 232.

84. *Ibid.*

85. Clements v. Clements, 184 A.2d 195, 196 (D.C. Munic. Ct. of App. 1962) (special circumstances are required to allow separate maintenance of wife while living under the same roof with husband).

where the parties reside together. In *Lindley v. Lindley*[86] the court said the "significance of the parties' continuing to live under the same roof may yield to the probative force of other countervailing evidence."[87]

> It would require blindness to the realities of the situation to hold that the wife was required "in order to avoid condoning her husband's offense or submitting absolutely to his hostile will in the matter of her maintenance to leave the only shelter she has," particularly in the circumstances of this case.[88]

Under the new section 236 of the New York Domestic Relations law such overwhelming "countervailing evidence" is no longer required before separation and support may be granted notwithstanding co-residence. An example of how the application of the elements of condonation and the other factors mentioned as probative of the need for a decree can yield proper results is *Duffy v. Duffy*.[89] Apart from residence the court denied separation because: (1) there were no children to support; (2) the wife was gainfully employed; and (3) commencement of the action was not a full cessation of conjugal affection—"the parties . . . have not had a sufficient degree of separation or living apart so as to warrant judicial recognition of separation."[90]

Because of the alleged element of choice, the *Takagi* case might have been decided the same way by either the First or Second Departments. Temporary support could have been granted because of the wife's lack of financial independence. The length of time in sharing the same bed could have been probative in either department of a forgiveness. Under the *Berman* rule, living in the same abode would have raised a rebuttable presumption of forgiveness and reconciliation. Living in the same domicile raises a similar presumption as to restoration of full marital rights.[91]

Although the new statute speaks in terms of directing support notwithstanding a continued living in the same abode, it is not clear that it means to eliminate the fact of co-residence from the court's view in finding condonation. Moreover the language of the statute—"may," "circumstances of the case and parties," etc.—appears to give the court wide discretion in refusing either temporary support or a final order where other strong factors begin to create a situation which looks like condonation.

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86. 162 N.Y.S.2d 217 (Sup. Ct. 1957).
87. Lindley v. Lindley, 162 N.Y.S.2d 217, 221 (Sup. Ct. 1957) (occasionally wife sold her blood as a donor to help maintain herself).
88. *Ibid.*
89. 23 Misc. 2d 266, 200 N.Y.S.2d 150 (Sup. Ct. 1960), *approved in* 35 N.Y.U.L. Rev. 1552, 1553 (1960).
90. Duffy v. Duffy, 23 Misc. 2d 266, 267-68, 200 N.Y.S.2d 150, 151-52 (Sup. Ct. 1960) (wife "strangely manifested her estrangement to the extent of wanting her back scrubbed in the bath tub.")
91. *But see* Tolstoy, The Law and Practice of Matrimonial Causes 73-74 (5th ed. 1963) (the offending spouse need only be restored to the same position he or she occupied before the offense was committed—restoration may occur without cohabitation under the same roof).

By requiring more for condonation than simply sharing the same abode, Judge Lawless's opinion in the *Takagi* case recognized that the *Berman* rule was not a rule of condonation per se. In this way the decision avoids conflict with any inferences from the Fourth Department interpretation in the *Schultz* case.[92]

The only remaining question about the *Takagi* case is with the accuracy of the finding of condonation. Conceding the persuasiveness of the ten month duration, may it not be argued that a wife may attempt to seek reconciliation but failing to gain the expected cooperation of the husband decide to see the separation action through? In other words is the fact of sharing the same bed for ten months, even presuming plaintiff could have left, sufficient in itself to establish that degree of forgiveness and reconciliation necessary for condonation? If the test of restoration to full marital rights is applied, it clearly does not since there had not been a resumption of intercourse in the *Takagi* case. From the cases outlined above, facts of a lack of social intercourse, conjugal affection, and other normal incidents of married life would be relevant and if present should point toward an opposite conclusion.

Two other problems stand out. The original temporary support order in *Takagi* gave the wife twenty dollars per week for personal needs and said further that the order did not relieve the husband from supplying the wife with food, clothing and shelter. A reasonable interpretation of this language is that the husband could comply by simply continuing to support the wife in their present dwelling. Secondly, the most perplexing fact about *Takagi*, as well as some of the other cases discussed, is the wife's presence in court asking for a final decree of separation after living in a way which the court then says showed she had forgiven the husband. Certainly the realities of the wife's continued request for separation, notwithstanding acts alleged to create inferences of condonation, should be an additional fact to be considered by the court before it finds any condonation. Under the new section 236 of the Domestic Relations Law the fact of remaining in the same abode with a temporary support order pending trial would no longer be a valid reason for a court to deny a final decree. However, because of the discretionary word "may," requests for temporary support might still be denied where condonation is clearly shown or where the defendant has continued to adequately maintain the wife.[93] Where the request is for a final separation decree any finding of condonation should also include a restoration of full marital rights, since otherwise an attempt at reconciliation less than sexual intercourse may eliminate the wife's cause of action by being labelled condonation.[94]

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92. Schultz v. Schultz, 1 A.D.2d 930, 150 N.Y.S.2d 568 (4th Dep't 1956) (memorandum decision).

93. See Scheidler v. Scheidler, 10 A.D.2d 991, 203 N.Y.S.2d 109 (2d Dep't 1960); Kronenberg v. Kronenberg, 10 A.D.2d 987, 203 N.Y.S.2d 217 (2d Dep't 1960); Weiss v. Weiss, 1 A.D.2d 769, 148 N.Y.S.2d 80 (1st Dep't 1956); Lampert v. Lampert, 268 App. Div. 920, 51 N.Y.S.2d 343 (2d Dep't 1944) (memorandum decision); Bruggeman v. Bruggeman, 191 App. Div. 689, 182 N.Y. Supp. 89 (2d Dep't 1920); Deal v. Deal, 259 N.C. 489, 131 S.E.2d 24 (1963).

94. See Oughterson, *Family Court Jurisdiction*, 12 Buffalo L. Rev. 467, 494 n.43 (1963).

With the new statute condonation could not be found from the single fact of continued residence in the same abode. As suggested before, other facts must be present. Some of the circumstances which a court will look to in deciding whether condonation has occurred are the frequency, if any, of sexual intercourse (without fear or force), the presence of other expressions of conjugal kindness, love and affection, the amount of social intercourse and the observance of other marital amenities, *i.e.*, eating together, shopping together, etc. Factors that weigh against such a finding are continuing acts of physical aggression, sex by fear, continued expressions of a desire to leave regardless of social intercourse and the purpose of staying or cohabitating but without sexual intercourse *i.e.*, not to seek reconciliation but to see to welfare of children or repair of house[95] or to avoid social embarrassment,[96] all of which indicate a high degree of segregated life.

The object of this decisional process should be to conclude from all the facts, including the plaintiff's presence in court and the realities of married life, that such a reconciliation of the parties has occurred or that there have been sufficient manifestations of conjugal affection to warrant a conclusion that the plaintiff has forgiven the other spouse, making any judicial action unnecessary and undesirable. If a state of mind judicially labelled as forgiveness is to be found, then all of the plaintiff's conduct must be considered if an accurate finding of condonation is to be made. Such caution would be helpful to insure that the laudable policy of preserving relatively stable family life will not be used to force parties to remain in a "meaningless and hateful bond."[97]

LESLIE G. FOSCHIO

THE EVOLUTION OF THE DURHAM RULE IN THE DISTRICT OF COLUMBIA (1954-1963)

When a convicted defendant appeals the denial of a *pro se* motion seeking mental examination, and the appellate court affirms the denial in a per curiam decision,[1] one does not generally expect two of the three judges to write concurring opinions. When these concurring opinions deal not at all with the issue on appeal, but rather treat and interpret a case which one of the judges admits "is not here involved,"[2] one begins to wonder. But, when the Judges involved are Chief Judge Bazelon and Judge Burger of the U.S. Court of Appeals, Dis-

Cf. Stahl v. Stahl, 221 N.Y.S.2d 931, 945, *modified on other grounds*, 16 A.D.2d 467, 228 N.Y.S.2d 724 (1st Dep't 1962) (restoration of marital rights no consideration for separation agreement); Tolstoy, *op. cit. supra* note 91, at 73-74.

95. Kahnovsky v. Kahnovsky, 67 R.I. 63, 20 A.2d 679 (1941).

96. McCallum v. McCallum, 153 Wash. 1, 279 Pac. 88 (1929) (avoid "scene" at parent's home).

97. List v. List, 189 Misc. 261, 264, 61 N.Y.S.2d 809, 812 (Sup. Ct. 1946).

1. Gray v. United States, 319 F.2d 725 (D.C. Cir. 1963).

2. *Id.* at 726.