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# **Justice Abandoned: Forty Years of Stalemate in Actions for Divorce on the Ground of Abandonment**

**Dolores Gebhardt  
The Honorable Sondra Miller\***

Abandonment has been a ground for judicial separation in New York since 1813.<sup>1</sup> It became one of the six causes of action for divorce enacted by the Legislature in the Divorce Reform Act of 1966.<sup>2</sup> To obtain a divorce upon this ground, the plaintiff must prove “abandonment . . . by the defendant for a period of one or more years.”<sup>3</sup>

The Divorce Reform Act of 1966 was the result of a “searching investigation of New York State’s matrimonial and divorce laws” conducted by the Joint Legislative Committee on Matrimonial and Family Laws in 1965 and 1966.<sup>4</sup> The Committee recognized that there was “widespread fraud, collusion and perjury in matrimonial actions and proceedings” because the sole cause of action for divorce at the time, adultery, was more often than not a fiction jointly promulgated by parties who had no other means of obtaining a New York divorce. One of the Committee’s stated goals was “revision in the laws, jurisdiction, rules, operations and practices designed to improve the administration of justice and to preserve the marital relationship and the family unit.”<sup>5</sup>

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1. *Erkenbrach v. Erkenbrach*, 96 N.Y. 456 (1884); J. Legis. Comm. on Matrimonial and Family Laws, No. 8, at 87 (N.Y. 1966).

2. L. 1966, c. 254, § 2, codified at N.Y. DOM. REL. LAW § 170(2) (McKinney 2007).

3. N.Y. DOM. REL. LAW § 170(2) (Consol. 1966). Originally, the cause of action did not accrue for two years; this was reduced to one year effective September 1, 1972. *See* L. 1970, c. 835, § 1.

4. J. Legis. Comm. on Matrimonial and Family Laws, No. 8, at 13 (N.Y. 1966).

5. *Id.* at 9.

The Committee heard testimony describing “desertion of the family” by one spouse as “the poor man’s divorce.”<sup>6</sup> The Committee found that “repressive divorce laws contribute to family instability because where the law is unreasonable and unrealistic, self help becomes socially acceptable.”<sup>7</sup> The result was a recommendation “for broadening the grounds for divorce in New York to include abandonment or desertion.”<sup>8</sup>

The courts have lost sight of the ideals and goals of the Joint Legislative Committee in the forty years since the enactment of the Divorce Reform Act of 1966. The courts’ efforts to define and describe abandonment have resulted in a complicated body of case law that confuses the matrimonial bar as well as the very courts that created it. The result is often a denial of justice which, contrary to the Legislature’s intent, relegates the plaintiff to a marriage that is “a mere legal formality which condemns the innocent party to a life of either unwanted celibacy or concubinage.”<sup>9</sup>

This State’s latest effort to reform matrimonial law is the work of the Matrimonial Commission, headed by one of the authors of this article, the Honorable Sondra M. Miller, which was established by Chief Judge Judith Kaye in 2004. The Commission’s 2005 recommendation that New York’s divorce law be amended to provide for no-fault divorce gives the Legislature the opportunity to review and expand upon the Joint Legislative Committee’s groundbreaking work.

This article will critically review the law of abandonment, discuss a recent decision of the Appellate Division, Second Department<sup>10</sup> that demonstrates the courts’ deviation from legislative intent, and urge the enactment of no-fault divorce as recommended by the Matrimonial Commission.

## I. The Law of Abandonment

The Domestic Relations Law does not define “abandonment,” nor are there any defenses in the statute that might

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6. *Id.* at 45.

7. *Id.* at 46.

8. *Id.* at 88.

9. *Cavallo v. Cavallo*, 359 N.Y.S.2d 628, 630 (Sup. Ct. 1974) (quoting J. Legis. Comm. on Matrimonial and Family Laws, No. 8, at 87 (N.Y. 1966)).

10. *McCarthy Fingar, LLP* represented the plaintiff in this case.

serve to illustrate the term. Due to its beginnings as a ground for separation, much of the case law concerning abandonment as a cause of action for divorce developed within the context of separation actions.<sup>11</sup> As will be demonstrated, the courts have since expanded considerably on this old case law.

Abandonment can take one of several forms: physical departure from the marital home, the exclusion from the marital home of one spouse by the other, and constructive abandonment, which itself can take multiple forms.

#### A. *Departure From the Marital Home*

The classic form of abandonment, also called desertion, has been described as: “a voluntary separation of one party from the other without justification, with the intention of not returning.”<sup>12</sup>

##### 1. The Departure Must be Voluntary and Unjustified

The essential elements of the cause of action require that the abandonment be voluntary and unjustified. In other words, the plaintiff must prove that the defendant *intended* to abandon him or her, and that the defendant had no justification for doing so. The latter is also a requirement in an action for separation, and is based on the same legislative concern that the plaintiff wife will wield an abandonment action as “a device to extract high alimony from a spouse who wished to escape the bonds of marriage.”<sup>13</sup> What, then, constitutes justification?

As has long been the law in separation actions, and as the Appellate Division, Second Department first held in 1976 in *Del Galdo v. Del Galdo*, a spouse who leaves out of fear for his or her physical safety is justified in doing so, and thus does not abandon the other spouse.<sup>14</sup> No doubt because it did not want to reward the abusive plaintiff spouse, *Del Galdo* created the

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11. The sole difference between the two causes of action is that the action for a separation contains no statutory waiting period. Compare N.Y. DOM. REL. LAW § 200(2) (McKinney 1999) (requiring no statutory waiting period for abandonment) with N.Y. DOM. REL. LAW § 170(2) (McKinney 1999) (requiring at least one year statutory waiting period for abandonment).

12. *Williams v. Williams*, 29 N.E. 98, 98 (N.Y. 1891).

13. J. Legis. Comm. on Matrimonial and Family Laws, No. 8, at 93 (N.Y. 1966).

14. *Del Galdo v. Del Galdo*, 379 N.Y.S.2d 479 (App. Div. 1976).

affirmative defense of justification.<sup>15</sup> Although it appears that *lack* of justification is more properly an element of the plaintiff's cause of action,<sup>16</sup> and in fact was considered such in pre-1966 actions for separation,<sup>17</sup> the *Del Galdo* decision has been widely followed. It is now the accepted law of this state that where a plaintiff makes out a *prima facie* cause of action for abandonment, a divorce will be granted unless the defendant pleads and proves that his or her departure was justified.<sup>18</sup>

Interestingly, the *Del Galdo* decision does not describe the acts of the plaintiff husband that justified the wife's departure. Apparently, however, they were insufficient to warrant an award to the wife of exclusive possession of the marital residence.<sup>19</sup>

Inconsistent holdings abound in the area of justification as a defense to abandonment. On the one hand, it has been held that a plaintiff may not obtain a divorce on the ground of abandonment if he or she is guilty of misconduct sufficient to give the defendant grounds for divorce.<sup>20</sup> However, if a spouse departs and then commences a divorce action in the belief that the defendant's conduct constituted cruel and inhuman treatment, but is subsequently unable to obtain a divorce on that ground for failure of proof, the defendant cannot establish an abandonment.<sup>21</sup> In other words, justification can be found even if the departing spouse made a mistake in fearing for his or her safety.

Justification has been found on facts other than fear for one's safety. In one case, the defendant wife's insistence on and admission of a "friendship" with another man constituted justification for the plaintiff husband's departure from the marital

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15. *Id.*

16. J. Legis. Comm. on Matrimonial and Family Laws, No. 8, at 96 (N.Y. 1966); *see also*, N.Y. DOM. REL. LAW § 170(2) (McKinney 1999) (regarding Scheinkman Practice Commentaries).

17. *See, e.g.*, *Silberstein v. Silberstein*, 113 N.E. 495 (N.Y. 1916).

18. *James v. James*, 786 N.Y.S.2d 336 (App. Div. 2004); *Uzo v. Uzo*, 763 N.Y.S.2d 758 (App. Div. 2003); *Carpenter v. Carpenter*, 718 N.Y.S.2d 105 (App. Div. 2000); *Maryon v. Maryon*, 400 N.Y.S.2d 160 (App. Div. 1977).

19. *Del Galdo*, 379 N.Y.S.2d at 481.

20. *McNair v. McNair*, 692 N.Y.S.2d 273 (App. Div. 1999).

21. *Phillips v. Phillips*, 419 N.Y.S.2d 573 (App. Div. 1979).

residence.<sup>22</sup> In another, the wife alleged the husband's involvement with another woman as justification for her refusal to have marital relations with the husband or to share social and familial activities with him.<sup>23</sup>

It has been suggested that departure due to the plaintiff's statement that he intended to pursue a pre-existing homosexual relationship may constitute justification.<sup>24</sup> Incarceration has been found to be justification for abandonment.<sup>25</sup> Where a plaintiff is incarcerated for a period of three or more years, the defendant has his or her own grounds for divorce in any event.<sup>26</sup>

The Appellate Division, Fourth Department found no justification because the wife never confronted her husband with her evidence of his alleged extramarital affair (which the court considered insufficient in any event) or offered any reason for her refusal to have marital relations with the husband. A husband's immature and difficult behavior does not justify the wife's abandonment,<sup>27</sup> nor does mere incompatibility.<sup>28</sup>

At one time, a wife was obligated to relocate with her husband to a location selected by him in good faith.<sup>29</sup> Pursuant to statutory correction of gender bias in 1976, the domicile of married persons is now established without regard to sex.<sup>30</sup> Now, an unjustified refusal by one spouse to accompany the relocating spouse constitutes an abandonment if it can be shown that the relocation was necessary, was not arbitrary, and was made with due consideration of the other spouse's needs.<sup>31</sup>

In her concurring opinion in *James v. James*, the Honorable Sondra Miller concluded that the husband's initial departure from the marital residence due to the wife's obtaining an order

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22. *Abramowicz v. Abramowicz*, 137 N.Y.S.2d 442 (Sup. Ct. 1954); *see also* *Walden v. Walden*, 340 N.Y.S.2d 709 (App. Div. 1973).

23. *Francati v. Francati*, 395 N.Y.S.2d 547 (App. Div. 1977).

24. *H.H. v. S.H.*, 824 N.Y.S.2d 763 (Sup. Ct. 2006).

25. *Johnson v. Johnson*, 561 N.Y.S.2d 1018 (App. Div. 1960).

26. N.Y. DOM. REL. LAW § 170(3) (McKinney 2007).

27. *Schine v. Schine*, 286 N.E.2d 449 (N.Y. 1972).

28. *Phoenix v. Phoenix*, 340 N.Y.S.2d 977 (App. Div. 1973), *appeal dismissed*, 304 N.E.2d 369 (N.Y. 1973).

29. *Fox v. Fox*, 186 N.Y.S.2d 542 (Sup. Ct. 1958), *aff'd*, 233 N.Y.S.2d 1014 (App. Div. 1962); *Cavallo*, 359 N.Y.S.2d 628.

30. N.Y. DOM. REL. LAW § 61 (McKinney 2007).

31. *See, e.g., Bazant v. Bazant*, 439 N.Y.S.2d 521 (App. Div. 1981); *Dornbusch v. Dornbusch*, 449 N.Y.S.2d 539 (App. Div. 1982).

of protection against him was not voluntary, but staying away for the next six years was an abandonment.<sup>32</sup> The husband could have returned after the expiration of the order of protection. Instead, he established a new household and new life. This evidence proved his hardened resolve not to return. The majority holding, citing existing case law, simply reversed the trial court's dismissal of the wife's complaint and granted her divorce, stating that the husband failed to raise the defense of justification.<sup>33</sup>

Where the departure is justified, the law is clear that the spouse left behind has no cause of action based on abandonment. However, neither does the departing spouse. In other words, a spouse who justifiably leaves due to fear for her physical safety cannot obtain a divorce on the ground that she was forced to leave.<sup>34</sup> This result makes no sense. If a spouse leaves out of fear for her safety, but cannot meet the very substantial burden of proof necessary to obtain a divorce on the ground of cruel and inhuman treatment in a long-term marriage, the victimized spouse is fated to remain married to her abuser. Moreover, as previously noted, the spouse left behind has no viable cause of action for abandonment even if the departing spouse was mistaken in her belief that she feared for her safety. Thus, neither party can obtain a divorce under current law. This unfortunate result is hardly in keeping with the legislative intent expressed in the 1966 Joint Legislative Report.

## 2. The Departure Must be Without the Consent of the Deserted Spouse

The abandonment must be against the will and without the consent of the deserted spouse. A cause of action will not lie

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32. *James v. James*, 786 N.Y.S.2d 336, 336 (App. Div. 2004).

33. *Id.* at 336 (citing *Diemer v. Diemer*, 168 N.E.2d 654 (N.Y. 1960); *Pascarella v. Pascarella*, 621 N.Y.S.2d 821 (App. Div. 1994); *Maryon v. Maryon*, 400 N.Y.S.2d 160 (App. Div. 1977); *Del Galdo v. Del Galdo*, 379 N.Y.S.2d 479 (App. Div. 1976)).

34. *Jeffrey v. Jeffrey*, 569 N.Y.S.2d 107 (App. Div. 1991). In this particular case, the events that caused the plaintiff wife to leave could not form the basis for a cause of action based on cruel and inhuman treatment because they were time-barred. *Id.*

where the parties' physical separation was consensual, because by definition, there has been no abandonment.<sup>35</sup>

### 3. The Departure Must be Intended to be Permanent

The plaintiff must also prove that the defendant left with a "hardened resolve" never to return.<sup>36</sup> This is by its nature a fact-sensitive determination. As the Court of Appeals noted in *Bohmert v. Bohmert*, "[w]hat is reasonable will depend on the circumstances of the case and the conduct of the parties."<sup>37</sup> The exclusion of evidence concerning a deserting spouse's intent has been held to be error.<sup>38</sup> As a practical matter, another "defense" appears to have been created—that the defendant intended only a temporary absence.

A significant body of case law concerns the following scenario: the deserting spouse leaves, then attempts to or requests permission to return (i.e., the spouse did not intend to leave permanently), and is rebuffed by the deserted spouse. Unlike the "forced abandonment" scenario presented above in *Jeffrey v. Jeffrey*, the departing spouse *can* turn the tables on the other spouse and establish an abandonment if he or she is rebuffed after asking to return.

The offer must be "timely," i.e., the departure must not have already ripened into an abandonment.<sup>39</sup> In other words, if the departure *looks* permanent, it *is* permanent. If the offer to return is found to have been untimely, the deserted spouse has no obligation to take the deserting spouse back.<sup>40</sup> Although there is no bright-line test for timeliness, the amount of time that has elapsed between the departure and the request is evidence of both intent never to return and good faith.<sup>41</sup> Even a departure followed by commencement of an action for separa-

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35. *Schine v. Schine*, 286 N.E.2d 449 (N.Y. 1972); *Hage v. Hage*, 492 N.Y.S.2d 172 (App. Div. 1985); *Haymes v. Haymes*, 646 N.Y.S.2d 315 (App. Div. 1996).

36. *Mirizio v. Mirizio*, 150 N.E. 605, 607 (N.Y. 1926); *Silberstein v. Silberstein*, 113 N.E. 495 (N.Y. 1916); *James*, 786 N.Y.S.2d at 336; *Sacks v. Sacks*, 307 N.Y.S.2d 177 (App. Div. 1969).

37. 150 N.E. 511, 513 (N.Y. 1926).

38. *Ziegler v. Ziegler*, 198 N.Y.S.2d 875 (App. Div. 1960).

39. *Nicit v. Nicit*, 583 N.Y.S.2d 858 (App. Div. 1992).

40. *Id.*

41. *Mirizio v. Mirizio*, 161 N.E. 461, 462 (N.Y. 1928); *Campbell v. Campbell*, 118 N.Y.S.2d 17 (App. Div. 1952); *aff'd*, 115 N.E.2d 685 (N.Y. 1953).



tion, without more, has been held not to constitute abandonment by the departing spouse.<sup>42</sup>

The attempt or request to return must also be made in "good faith."<sup>43</sup> If the good faith of the *deserting* spouse is determined, the *deserted* spouse has the duty to take the deserting spouse back. An unjustified failure to do so switches the parties' roles, and constitutes abandonment of the *deserting* spouse by the *deserted* spouse.<sup>44</sup>

"Good faith return" cases are also complicated because it is sometimes difficult to determine which spouse abandoned the other. In *Gleckman v. Kaplan*,<sup>45</sup> the plaintiff husband alleged that his wife had locked him out of the marital home.<sup>46</sup> Actually, the wife changed the locks on the marital residence because the husband had left the wife seven months earlier and established his own residence.<sup>47</sup> Thus, the husband was the true abandoning spouse, not the wife.<sup>48</sup> The husband tried to turn the wife's action into an abandonment by introducing "evidence" of a good faith offer to return to the wife, but the trial court found that said offer was not an offer to resume the spousal relationship, but merely to return on his own terms, and thus was not made in good faith.<sup>49</sup> The court noted: "[t]he law is clear that the plaintiff cannot maintain an action against the defendant on abandonment grounds unless the plaintiff can demonstrate that *following his own departure from the conjugal residence*, he made a 'good faith' offer to resume the marriage which was rejected by the defendant."<sup>50</sup>

Indeed, numerous other decisions concerning the validity of a plaintiff spouse's offer to resume cohabitation after the dismissal of his or her action for divorce or separation are similar:

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42. *Mirizio*, 161 N.E. at 462-63.

43. *Bohmert v. Bohmert*, 150 N.E. 511, 513 (N.Y. 1926).

44. *Aghnides v. Aghnides*, 127 N.E.2d 323 (N.Y. 1955); *Solomon v. Solomon*, 49 N.E.2d 470 (N.Y. 1943); *Campbell*, 118 N.Y.S.2d at 17; *Harlow v. Harlow*, 204 N.Y.S. 128 (Sup. Ct. 1924).

45. 626 N.Y.S.2d 549 (App. Div. 1995).

46. *Id.* at 550.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* (emphasis added).

the plaintiff making the offer to return had been the abandoning party in the first instance.<sup>51</sup>

What constitutes good faith in one case may not do so in another. An unconditional offer to return has been held to be in good faith,<sup>52</sup> an offer to return merely to manage the parties' jointly owned property has not.<sup>53</sup> Letters requesting to return have sometimes constituted good faith,<sup>54</sup> other times, they have been considered a mere litigation tactic and are "entitled to little weight as evidence of an honest desire to live" with the deserted spouse.<sup>55</sup> A return made without a demonstration of a willingness to reassume the obligations of marriage does not evidence good faith.<sup>56</sup>

The Appellate Division, Third Department appears to require a spouse to make *repeated* requests to return. These cases confuse a good faith offer to return with an action for constructive abandonment, which will be discussed below. For example, in *Relyea v. Relyea*,<sup>57</sup> the plaintiff husband pleaded abandonment and constructive abandonment as a cause of action for divorce. The basis was the wife's insistence that he vacate the parties' farm. He moved in with another woman but periodically returned to the farm to do work there. The husband testified that he made one request to resume marital relations with the wife. His failure to make multiple requests was held to be insufficient to prove a claim of constructive abandonment, i.e., an unjustified refusal by one spouse to engage in marital relations with the other. In so finding, however, the court blurred the separate concepts of a good faith offer to return (abandonment) and spurned requests to resume marital relations (constructive abandonment).

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51. See, e.g., *Aghnides*, 127 N.E.2d 323; *Bohmert v. Bohmert*, 150 N.E. 511, 513 (N.Y. 1926); *Campbell v. Campbell*, 118 N.Y.S.2d 17 (App. Div. 1952) *aff'd*, 115 N.E.2d 685 (N.Y. 1953); *Kenneson v. Kenneson*, 36 N.Y.S.2d 676 (Fam. Ct.1942).

52. *Williams v. Williams*, 29 N.E. 98 (N.Y. 1891).

53. *Gleckman*, 626 N.Y.S.2d 549.

54. *Campbell*, 118 N.Y.S.2d at 17; *Harlow v. Harlow*, 204 N.Y.S. 128 (Sup. Ct. 1924).

55. *Bohmert*, 150 N.E. at 513; *Erlich v. Erlich*, 104 N.Y.S.2d 531 (App. Div. 1951).

56. *Gleckman*, 626 N.Y.S.2d at 549; *Gruen v. Gruen*, N.Y.L.J., Jan. 15, 1993, at 21.

57. 768 N.Y.S.2d 712 (App. Div. 2004).

One year later, in *Schubert v. Schubert*, the blurring became the law.<sup>58</sup> The Third Department affirmed the dismissal of the plaintiff wife's abandonment case. According to the court: "[t]o establish this cause of action, plaintiff must demonstrate that defendant unjustifiably and without plaintiff's consent abandoned plaintiff for a period of one or more years and refused repeated requests to resume cohabitation or conjugal relations."<sup>59</sup>

This melding of principles from abandonment and constructive abandonment has further complicated and confused the law.

#### B. *Exclusion from the Marital Home of One Spouse by the Other*

Sometimes called "abandonment by lockout," the cause of action accrues when one spouse unjustifiably denies the other access to the marital residence for a period of one or more years. As the name suggests, abandonment by lockout occurs when one spouse unjustifiably changes the locks on the marital residence or otherwise deprives the other spouse of access thereto.<sup>60</sup>

#### C. *Constructive Abandonment*

In its 1926 decision in *Mirizio v. Mirizio*<sup>61</sup> and its 1960 decision in *Diemer v. Diemer*,<sup>62</sup> the Court of Appeals expanded the concept of abandonment from a literal physical desertion to a figurative one: the refusal by one spouse to engage in sexual relations with the other. In identifying and describing the so-called "constructive abandonment," the Court of Appeals found that "the essence of desertion or abandonment . . . is a refusal on the part of one spouse to fulfill 'basic obligations springing from the marriage contract.'"<sup>63</sup> Not every refusal constitutes an abandonment. The litmus test is: "[h]ow fundamentally the denial strikes at the civil institution of marriage. Where primary

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58. 823 N.Y.S.2d 282 (App. Div. 2006).

59. *Id.* at 283.

60. *Schine*, 286 N.E.2d 449; *Soldinger v. Soldinger*, 799 N.Y.S.2d 815 (App. Div. 2005).

61. 150 N.E. 605 (N.Y. 1928).

62. 168 N.E.2d 654 (N.Y. 1960).

63. *Id.* at 657 (quoting *Mirizio*, 150 N.E. at 607).

rights and duties are involved, where the denial goes to one of the foundations of marriage, it is the policy of our law to allow a separation from bed and board.”<sup>64</sup> Because sexual relations between spouses are an integral part of marriage, refusal to engage in them is logically a breach of the marital contract.

A mere allegation that the parties did not have sexual relations is insufficient; it is the *unjustified refusal* to do so that gives rise to grounds for divorce based on constructive abandonment.<sup>65</sup> Moreover, the plaintiff must prove that he or she made *repeated* requests; a single rejected request will not sustain a cause of action.<sup>66</sup> As previously noted, the “repeated requests” requirement appears to have been applied in the Third Department to the “good faith request to return” requirement in desertion cases.

As in the desertion cases discussed above, what constitutes justification is a fact-sensitive determination. Refusal to engage in marital relations due to a medical condition has been held to be justified. In *Sullivan v. Sullivan*,<sup>67</sup> the court held that plaintiff husband failed to prove constructive abandonment because the defendant wife’s refusal to have sexual relations was due to her recent hospitalization for a heart attack, and therefore was justified.

Refusal to engage in acts of sodomy or other objectionable sexual conduct has also been held to be a justified refusal.<sup>68</sup>

The spouse who claims to have been constructively abandoned must prove that the unjustified refusal to have sexual relations continued for at least one year prior to the commencement date.<sup>69</sup> If the alleged unjustified refusal is for less than one year, the complaint will be dismissed.<sup>70</sup>

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64. *Diemer*, 168 N.E.2d at 657.

65. *Edward W.R. v. Barbara A.R.*, 670 N.Y.S.2d 162 (App. Div. 1998); *Rossiter v. Rossiter*, 399 N.Y.S.2d 596 (Sup. Ct. 1977).

66. *Silver v. Silver*, 677 N.Y.S.2d 593 (App. Div. 1998).

67. 689 N.Y.S.2d 378 (Sup. Ct. 1999).

68. *George M. v. Mary Ann M.*, 567 N.Y.S.2d 132 (App. Div. 1991).

69. *Id.* at 132.

70. *Caprise v. Caprise*, 533 N.Y.S.2d 622 (App. Div. 1988).

#### D. "Social Abandonment"

Two recent trial court decisions have expanded on the constructive abandonment theory of *Diemer* and *Mirizio*, and held that a refusal by one spouse to engage in "social intercourse" with the other spouse constitutes constructive abandonment. In *C.P. v. G.P.*,<sup>71</sup> the plaintiff wife alleged that the husband refused to eat a meal with her, or one that she prepared; refused to celebrate holidays and family functions with her; refused to sleep in the same room with her; and refused to speak to her other than sporadically. The court found that "the very core of a marriage is the concept of a 'relationship,'" and held that the husband's conduct was a refusal to fulfill the basic obligations of the marriage contract, and denied the husband's motion to dismiss the complaint.<sup>72</sup>

In *Michaelessi v. Michaelessi*,<sup>73</sup> the plaintiff wife testified to an extended period of physical separation, never celebrating anniversaries together or attending social functions, and a refusal by her husband to communicate with her even if they were in the same place. The trial court found that "the plaintiff has been abandoned by the defendant under any reasonable construction of the term," and denied the husband's motion to dismiss the complaint.<sup>74</sup>

It should be noted that to date, no appellate court has opined as to the viability of a cause of action based on "social abandonment."

## II. The Law is Abandoned

As the foregoing discussion demonstrates, the law of abandonment has evolved into a convoluted quagmire that has strayed far from the legislative mandate of 1966. The following case is an example of what can happen to a plaintiff seeking a divorce on the ground of abandonment in this State.

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71. CP v. GP, 800 N.Y.S.2d 343 (Sup. Ct. 2005).

72. *Id.*

73. 814 N.Y.S.2d 562 (Sup. Ct. 2005).

74. *Id.*

In *M v. M*,<sup>75</sup> the plaintiff husband's third attempt to obtain a judgment of divorce in this State failed. The parties had been married for forty-five years. In 1995, Mrs. M, in accordance with the parties' earlier consensual agreement, vacated the marital residence and took up residence in the parties' vacation home. In 1996, the parties jointly purchased a cooperative apartment in Westchester County, with the intention of residing there together once the marital residence was sold. Mrs. M occupied the apartment, and, by mutual agreement, Mr. M stayed on in the marital residence pending its sale. However, when the marital residence was sold in 1998, Mrs. M refused to allow Mr. M to move into the jointly-owned apartment. Mr. M had no choice but to reside in the parties' vacation home. After selling the vacation home, Mr. M purchased a cooperative apartment a few blocks from the jointly-owned apartment where Mrs. M resided due to his wife's continued refusal to allow him to live with her.

For the next three years, the parties lived apart, but shared in family events with their children and grandchildren, vacationed together, and engaged in consensual sexual relations. Mrs. M, however, remained steadfast in her refusal to allow Mr. M to live with her.

In June 1999, after they had returned from a vacation together, Mr. M told his wife that he was dissatisfied with their skewed living arrangements. When his wife continued to refuse to permit Mr. M to move in with her, Mr. M then refused to continue their more intimate relationship. Thereafter, Mrs. M cut off all communication with her husband.

Feeling that he had no choice but to end this bizarre marriage, Mr. M filed his first action for divorce in 2001, alleging cruel and unusual treatment and abandonment among other grounds. A fault trial before a Judicial Hearing Officer resulted in the dismissal of Mr. M's complaint. With regard to the allegations of abandonment, the Judicial Hearing Officer specifically found that Mr. M failed to meet his burden of proof because he at first acquiesced in the parties' unconventional arrangement, and then was the party who effectively ended the

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75. 823 N.Y.S.2d 209 (App. Div. 2006). The names of the parties have been omitted herein to protect their privacy.

relationship. *The Judicial Hearing Officer ignored the fact that Mr. M ended the relationship because his wife refused to live with him.*

Mr. M brought his second divorce action in 2002, again alleging that his wife had abandoned him. After one year of discovery and negotiations failed to result in a settlement satisfactory to Mrs. M, she moved to dismiss the complaint. In April 2003, the trial court granted the motion, finding that Mr. M's second proceeding was no different from his first and was therefore *res judicata*. On the record, however, the trial judge pointed out that the parties were still married, and that based on the Judicial Hearing Officer's decision, Mrs. M had no justification for refusing to live with her husband, and could therefore reestablish his residence with her.

At this juncture Mrs. M, through her counsel, threatened to call the police if Mr. M attempted to move in with her. The trial judge warned Mrs. M from the bench that her refusal to allow her husband to resume cohabitation would constitute her abandonment of Mr. M. Mr. M's attorney requested that Mr. M be permitted to make an offer to return to Mrs. M. The trial judge demurred, and issued an order estopping Mrs. M from asserting a defense to any divorce action filed by Mr. M on the ground of abandonment after one year's time (hereinafter referred to as the "estoppel order"). The estoppel order was served upon Mrs. M with notice of entry. She failed to appeal, or to move to renew or reargue.

One year later, Mr. M filed his third action for divorce, alleging abandonment as grounds. Relying on Mrs. M's refusal to cohabit with him in the jointly owned apartment, her threats to call the police should he attempt to do so, and upon the estoppel order, Mr. M moved for partial summary judgment on the issue of fault.

Mrs. M cross-moved to dismiss the complaint, arguing, *inter alia*, that (i) the dismissals of the first two divorce actions were *res judicata* in the instant case; (ii) the estoppel order was not legally binding because it was based on dicta; and (iii) Mr. M's April 2003 offer to resume cohabitation was not made in good faith, but was merely a litigation strategy.

Mr. M's third action survived the motion to dismiss because his evidence related to incidents that occurred subsequent to

the events upon which his first two divorce actions has been based. The first two actions thus were not *res judicata* on the third.

The Supreme Court acknowledged that Mr. M had made out a *prima facie* cause of action for abandonment. As we have seen, according to established precedent, unless Mrs. M pleaded and proved justification, Mr. M was entitled to a divorce. Pursuant to the estoppel order, Mrs. M was precluded from doing so. In fact, she had not even pleaded justification in her answer.

The Supreme Court refused to enforce the estoppel order and grant summary judgment. Instead, it focused upon the offer to return that was made on Mr. M's behalf in open court. Ignoring the fact that Mr. M was the abandoned spouse by virtue of Mrs. M's unequivocal refusal to reside with him, the Supreme Court found that a question of fact existed as to whether Mr. M's offer to return had been in good faith, apparently based on its erroneous determination that Mr. M was the abandoning spouse.

The Supreme Court's decision denying summary judgment contained two irreconcilable findings: (i) that Mr. M had made out a *prima facie* case of abandonment; and (ii) that Mr. M had to make a good faith offer to return. As we have seen, an abandoned spouse has no obligation to request the return of the spouse who failed to fulfill a basic obligation of marriage.

A second fault trial ensued. The sole issue before the trial judge was whether the offer to resume cohabitation had been made in good faith. Mr. M testified that he still loved his wife, and wanted to resume their former happy life surrounded by their children and grandchildren. He described how attempts to save the marriage through counseling failed when Mrs. M refused to attend. Mr. M made clear that he wanted a whole marriage or no marriage, and that Mrs. M's insistence on marriage without cohabitation was what ultimately spurred him to seek a divorce.

Mrs. M did not refute any of her husband's testimony. She admitted that she never intended to invite Mr. M home and would not allow him to move back in with her.

Despite this testimony, the trial judge ruled from the bench that Mr. M's offer to return had not been made in good faith and



dismissed his third action for divorce. His rationale was that because Mr. M failed to telephone his wife or send her flowers subsequent to his April 2003 offer to return—i.e., that he failed to make repeated requests to return—he could not have sincerely wanted to reside with his wife.

The trial judge ignored Mrs. M's admitted refusal to live with Mr. M and her threats to call the police. He failed to acknowledge that Mr. M was the abandoned spouse.

On appeal before the Appellate Division, Second Department, Mr. M's counsel contended that Mr. M was the abandoned spouse because Mrs. M refused to cohabit with him, and threatened to call the police if he tried to move into their jointly owned apartment. Mr. M, therefore, had no obligation to make an offer to return to Mrs. M. Even if he had such an obligation, Mrs. M's admission at trial that she would not take him back rendered such an offer a fruitless waste of time, and that Mrs. M's refusal to reside with her husband constituted a refusal on her part to fulfill a "basic obligation springing from the marriage contract," citing *Mirizio* and *Diemer*.

Unpersuaded, the Appellate Division affirmed the trial court and found that Mr. M's third complaint had properly been dismissed.

Mr. M's sad plight is due in part to the confusing state of the law on abandonment, but more clearly on the courts' erroneous view of the uncontroverted essential facts of this case. Had Mr. M been the abandoning spouse, he would have the burden of establishing a good faith effort to return to the marriage and the marital residence. However, if he established that he was the abandoned spouse, and sought a divorce on those grounds, he had no such burden; the burden would then be on Mrs. M—the abandoning spouse—to both plead and prove justification in abandoning him.

The essential facts in this case regarding the critical issue of who is the abandoning and who is the abandoned spouse are uncontroverted. The parties' initial separation, some ten years ago, was consensual—an arrangement effected for practical reasons, i.e. the sale of their primary residence and joint purchase of a new residence. Also uncontroverted was the fact that for three years, they continued their marital relationship, except for residing together. It was when Mr. M, tired of the ambiguo-

ous lifestyle he had accepted, sought to reside with his wife and reestablish a conventional marriage that the marital wars began. Inexplicably, neither the trial courts nor the appellate court recognized the most significant uncontroverted fact: that *on the record* through her counsel, Mrs. M *refused to permit his return on threat of calling the police should he arrive at her doorstep*. Can this statement have been anything but an abandonment by Mrs. M? Since she never pleaded nor proved justification, at least at that juncture the parties' respective roles, as well as the legal outcome, were clear.

On what legal theory was Mr. M required, as the abandoned spouse, to make repeated "good faith" efforts to return? The law requires such efforts by an abandoning spouse, not an abandoned one.

It is on this basic issue, finding that Mr. M was the abandoning spouse, that the authors of this article believe the courts erred, and as a result relegated Mr. M to a marriage in name only. His sole recourse, at age 73, is to relocate and pursue a divorce in a jurisdiction where he is not required to prove fault. The injustice to Mr. M is irreparable, but is only one example of the incalculable harm being done to families by the state of the law in New York. In no other state in the union is it necessary to run the gauntlet through a confusing morass of law in order to prove fault. Only here, in New York, must one spouse have to prove the other was wrong simply to legally terminate a marriage that had effectively terminated long ago. Only here, in New York, can parties be denied the right to end their marriage and consigned to either a lifetime of empty misery or a move to another state.

### III. A Call for No-Fault Divorce

In 1966, the Joint Legislative Committee found that: "[t]he [divorce] law is criticized for many reasons – that it makes a mockery of justice in the courts; that it causes thousands of New Yorkers to flee their own state courts in matrimonial actions; that the law rather than promoting family stability actually contributes toward weakening the family unit."<sup>76</sup>

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76. J. Legis. Comm. on Matrimonial and Family Laws, No. 8, at 13 (N.Y. 1966).

Sadly, this is still the case today. Cases such as *M v. M* demonstrate that obtaining a divorce in New York remains an expensive, emotionally draining and uncertain proposition. Each year, hundreds of people are compelled to remain in dead or even unsafe marriages because they cannot meet strict, arcane and tortured standards of proof.

In 2005, the Matrimonial Commission Report recommended that no-fault divorce be enacted to curb the social ills and injustice inherent in fault-based divorce. Specifically, the Commission found:

Substantial evidence, derived from the public hearings held by the Commission and the professional experience of the Commission members, leads us to conclude that fault allegations and fault trials add significantly to the cost, delay and trauma of matrimonial litigation and are, in many cases, used by litigants to achieve a tactical advantage in matrimonial litigation.<sup>77</sup>

Recently, the Honorable Robert A. Ross of the Supreme Court, Nassau County quoted an excerpt from the Miller Commission Report in a controversial decision that highlights the growing frustration of the bench, the bar and the litigants with this State's antiquated system of fault-based divorce. In *Molinari v. Molinari*<sup>78</sup> the parties had been physically separated for nearly two years at the time of their fault trial. The plaintiff husband had moved out, and thus was the abandoning party. His ground for divorce was constructive abandonment; specifically, that his wife had unjustifiably refused his repeated requests for marital relations.

Judge Ross noted that over a period of over two years: "[w]hile litigating the issue of grounds, these parties were relegated to motion practice, amendment of pleadings, contemplation of withdrawal of the action and seeking a divorce in another jurisdiction, filing jury demand, conferences, and ultimately trial of the matter."<sup>79</sup>

It is clear from the decision that Judge Ross considered the husband's evidence to have been insufficient to support a find-

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77. MATRIMONIAL COMMISSION, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 18 (February 2006), available at <http://www.courts.state.ny.us/reports/matrimonialcommissionreport.pdf>, available here as Appendix A.

78. 15 Misc.3d 1120A (N.Y. Sup. Ct. Apr. 16, 2007).

79. *Id.* at \*3.

ing of constructive abandonment. In an effort to find a means to grant the divorce, Judge Ross noted that in every other state in the union, the husband would have been granted a divorce simply by virtue of the parties' physical separation. He continued that a bill is pending in the State Assembly, Bill AO3027, by which "irreconcilable differences" would be added as a ground for divorce, and expressed his firm belief that no-fault divorce must come to New York via "legislative determination, and not judicial fiat."<sup>80</sup>

Interestingly, Judge Ross noted that the judiciary is charged with the responsibility of protecting the constitutional rights of the citizens of New York State, and strongly hinted that the current fault-based statute could come under constitutional scrutiny in a proper case. The *Molinari* matter was not such a case, as the husband failed to give the required notice of a challenge to the constitutionality of the statute to the Attorney General. Judge Ross concluded that "[t]he constitutional issues are, at this point, premature, but nonetheless are weighty."<sup>81</sup>

Finding it to be a "fulfillment of a constitutional responsibility," Judge Ross held his decision in abeyance and retained jurisdiction in order to give the Legislature the opportunity to act on Bill AO3027.<sup>82</sup> He directed that financial discovery in the case continue in order to avail prejudice to either party by the stay. A copy of the April 16, 2007, decision was served upon Governor Elliot Spitzer; Attorney General Andrew Cuomo; author of Bill AO2027, Helen Weinstein; John DeFrancisco, the Chair of the State Senate Judiciary Committee; Assembly Speaker Sheldon Silver; and State Senate Speaker Joseph Bruno.

Justice Ross's unprecedented decision was front-page news in the New York Law Journal.<sup>83</sup>

Two weeks later, on April 30, 2007, Justice Ross issued his second decision in *Molinari v. Molinari*. This time, he noted that the Civil Practice Law and Rules (CPLR) require that a

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80. *Id.* at \*10.

81. *Id.* at \*7-\*8.

82. *Id.* at \*15.

83. Joel Stashenko, *Divorce Ruling Awaits Action in Legislature*, N.Y.L.J. at 1, col. 1 (April 19, 2007).

court's decision be rendered within sixty days after the cause is fully submitted.<sup>84</sup> There was insufficient time for the legislature to consider and act upon Bill AO3027 before a final decision had to be rendered to avoid running afoul of the CPLR.

Judge Ross then granted the wife's motion to dismiss the husband's complaint for failure to prove constructive abandonment. There was no evidence that the husband's requests for marital relations were repeated, or that these requests were unjustifiably rejected by his wife. In particular, Judge Ross found that the fact that the husband had vacated the parties' home and abandoned the wife "renders the purported repeated requests by the [husband] to resume relations incredulous."<sup>85</sup>

At the time of this writing, no-fault divorce has yet to become a reality despite the efforts of the Honorable Sondra Miller and various bar associations to urge legislative enactment of no-fault divorce via the Post-Miller Commission Committee for Change. As to the fate of erstwhile plaintiff Mr. Molinari, according to his attorney, he is likely to seek a divorce in New Jersey, a no-fault state to which he relocated over one year ago.<sup>86</sup>

Unbelievably, the sole recourse for both Mr. Molinari and Mr. M – relocation to a more hospitable state in order to terminate a dead marriage – was the same fate of thousands of New Yorkers forty years ago. In fact, the practice of seeking divorces in other states was condemned as "encourag[ing] the commercialization of divorce," and was one of the reasons for the findings of the Joint Legislative Committee, which led to the enactment of the Divorce Reform Act of 1966.<sup>87</sup> We have come full circle. The groundbreaking work of the Joint Legislative Committee, as well as justice for New York families, has been abandoned.

No-fault divorce is the logical extension of the New York Legislature's intent, expressed forty years ago, to broaden the grounds for divorce in order to provide justice for the families of

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84. CPLR § 4213(C).

85. *With Long Wait Ahead for No-Fault, Judge Denies Divorce*, N.Y.L.J. at 1, col. 1 (May 3, 2007).

86. *Id.*

87. J. Legis. Comm. On Matrimonial and Family Laws, No. 8, at 21, 37-39 (N.Y. 1966).

this state. Its enactment would inure to the benefit of litigants such as Mr. M, whom this State has condemned to be forever bound to a woman who does not want to live with him. After an auspicious start forty years ago, the law of abandonment has returned to the pre-1966 days, when desertion of families and out-of-state divorce actions offered the only possibility of a modicum of freedom. This Legislature has the opportunity to significantly reduce expense and trauma in matrimonial actions. We urge the Legislature to act.