

The End of Social Abandonment As a Ground for Divorce?

The Appellate Division, Second Department, recently issued a decision in which the fairly new concept of social abandonment was rejected as a ground for divorce.¹

While this decision appears to sound the death knell for social abandonment in the Second Department, at least until the Court of Appeals renders a decision in this regard, this article will discuss why we think social abandonment should be a viable cause of action, even if it is considered as a ground for divorce outside the realm of abandonment.² Thus, even if social abandonment is not recognized in and of itself as a ground for divorce, there is no reason why the same exact allegations that are set forth as a social abandonment cannot be considered grounds for divorce as cruel and inhuman treatment.³

The New York State Domestic Relations Law defines abandonment which is one of six statutory grounds for divorce as "the abandonment of the plaintiff by the defendant for a period of one or more years."⁴

Courts have expanded the concept of abandonment as a divorce ground to include constructive abandonment, defined as the refusal by a spouse to engage in sexual relations with the other spouse for a period of one or more years prior to the commencement of the action, when such refusal is unjustified, willful and continual, and despite repeated requests for the resumption of sexual relations.⁵

Abandonment has also been expanded by the courts to include when one spouse locks the other spouse out of the marital home without justification or consent.⁶

The concept of abandonment as a divorce ground was expanded even further recently to include incidents of social abandonment.⁷ Thus, one trial court has recog-



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nized the refusal of one spouse to eat a meal with the other or to eat a meal cooked by the other spouse, the refusal to celebrate holidays with the other spouse, to participate in relatives' birthdays including the other spouse's and their children's, the refusal to attend the funeral for the other spouse's father, mother and nephew, the refusal of one spouse to

As constructive abandonment is a creature of the judiciary, there is absolutely no reason why the judiciary cannot similarly expand the definition of abandonment to also include social abandonment.

attend a wedding with their spouse or graduation parties for the parties' children as well as the refusal to speak with the other spouse other than sporadically to constitute grounds for divorce on the basis of social abandonment.⁸

However, the expansion of abandonment to include social abandonment was recently repudiated by the Appellate Division, Second Department when it determined that "the Plaintiff's allegations of social abandonment may appropriately be viewed as merely another way of claiming irreconcilable differences between spouses, that do not constitute a cognizable ground for a divorce."⁹

The court went on to further state that a judicial recognition of social abandonment where none is supported in the statute [DRL §170] would constitute a judicial

usurpation of legislative authority and that it is the role of the legislature, not the courts to make law.¹⁰ The court also determined that a social abandonment of one spouse by the other is not as legally recognized as a refusal to engage in sexual relations and that it therefore is not entitled to a similar high level of protection.¹¹

Finally, the court declined to extend the definition of abandonment to include social abandonment due to its opinion that there would be frequent overlap between constructive abandonment and social abandonment, that the practical application of social abandonment would not be so simple and based on its belief that social abandonment eludes clear or easy definition.¹²

Thus, the Appellate Court predicted that the recognition of a social abandonment cause of action, no matter what Herculean efforts could be undertaken to establish its precise definition, would open a judicial quagmire of varied factual claims, defenses, and permutations that would be to the everlasting consternation of the matrimonial bench and bar.¹³

However, we think that the Second Department missed the boat here in refusing to recognize social abandonment as the basis for the granting of a divorce.

Even if the courts do not wish to extend the definition of abandonment to include social abandonment, there still remains the option of determining that when applicable, one spouse's unjustified refusal to socialize with the other would constitute a ground for divorce as cruel and inhuman treatment.¹⁴

Cruel and Inhuman Treatment

Even prior to the court's recognition of social abandonment as a viable ground for divorce as an expansion of the abandonment ground, our firm always included one spouse's failure to socialize with the other, the refusal to attend parties with the other spouse and the refusal to spend time with the other's friends as inci-

1. *Davis v. Davis*, 2009 NY Slip Op 8579 (2d Dept. 2009.)

2. Pursuant to DRL §170 (2.)

3. DRL §170 (1)

4. DRL §170 (2.)

5. *Davis v. Davis*, 2009 NY Slip Op 8579 (2d Dept. 2009); *Warman v. Warman*, 52 A.D.3d 596, 860 N.Y.S.2d 151, (2d Dept. 2008); *BM v. MM*, 24 Misc. 3d 1133, 880 N.Y.S.2d 850 (Sup. Ct. Nassau Cty. 2009.)

6. *Schine v. Schine*, 31 N.Y.2d 113, 335 N.Y.S.2d 58 (Ct. App. 1972.)

7. *C.P. v. G.P.*, 6 Misc.3d 1034A, 800 N.Y.S.2d 343, (Sup. Ct. Nassau Cty. 2005.)

8. *Id.*

9. *Davis v. Davis*, 2009 NY Slip Op 8579 (2d Dept. 2009.)

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. DRL §170 (1.)

15. *Id.*

16. *Brady v. Brady*, 64 N.Y.2d 339, 486 N.Y.S.2d 891 (Ct. App. 1985.)

17. *Id.*

18. *Bulger v. Bulger*, 88 A.D.2d 895, 450 N.Y.S.2d 601 (2d Dept. 1982); *Vainav. Vaina*, 272 A.D.2d 916, 706 N.Y.S.2d 812 (4th Dept. 2000.)

19. *Anglin v. Anglin*, 80 N.Y.2d 553, 592 N.Y.S.2d 630 (Ct. App. 1992); *O'Brien v. O'Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743 (Ct. App. 1985); *Smith v. Smith*, 8 A.D.3d 728, 778 N.Y.S.2d 188 (3d Dept. 2004.)

20. *Davis v. Davis*, 2009 NY Slip Op 8579 (2d Dept. 2009); *Warman v. Warman*, 52 A.D.3d 596, 860 N.Y.S.2d 151, (2d Dept. 2008); *BM v. MM*, 24 Misc. 3d 1133, 880 N.Y.S.2d 850 (Sup. Ct. Nassau Cty. 2009.)

21. *Id.*

22. *Davis v. Davis*, 2009 NY Slip Op 8579 (2d Dept. 2009.)

23. *Id.*

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Abandonment

Continued from page 4
denials of cruelty, especially if such refusal was upsetting to the other spouse and caused them to suffer from stress, strife or undue unhappiness.

The Domestic Relations Law defines cruel and inhuman treatment as such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.¹⁵

The Court of Appeals has defined cruel and inhuman treatment as a course of conduct by the defendant that is harmful to the physical or mental health of the plaintiff and makes cohabitation unsafe or improper.¹⁶

Thus, as stated by the Court of Appeals, cruel and inhuman treatment may take the form of mental abuse, and will be found where cohabitation between hus-

band and wife is improper.¹⁷ There is therefore no need for physical abuse and/or a determination that cohabitation be unsafe in order to constitute cruel and inhuman treatment.¹⁸

In our opinion, a failure of one spouse to socialize with the other on a continuous basis, in certain circumstances, depending on the length of the marriage and on the severity, may render it improper for the innocent spouse to continue to cohabit with the guilty spouse.

Basic Tenets of Marriage

Marriage is considered to be an economic partnership in the state of New York.¹⁹ In addition, based on the court's expansion of abandonment to include the unjustified lack of sexual relations for a period of one or more years, sexual relations has been determined by the courts to also constitute a basic tenet of a marriage.²⁰ However, that said, in addition to economics

and sexual relations being basic tenets of a marriage, there is also a social component to a marriage based upon love, devotion, companionship and the enjoyment of spending time together as a couple and possibly ultimately as a family.

This social component, which we believe to be another basic tenet of a marriage, is completely violated and eradicated when one of the spouses refuses to socialize with the other, despite the innocent spouse's desire to socialize with the guilty spouse.

A dead marriage, which does not constitute a divorce ground, is one in which both spouses have accepted the fact that what was once there has disappeared. In a dead marriage, the spouses still talk and communicate, they just don't love each other anymore. It is therefore akin to irreconcilable differences. This scenario, on the other hand, is different in that unlike a dead marriage,

one of the spouses desires the friendship, love and companionship of the other who refuses to satisfy their spouse's need for companionship and feelings of affection.

So, even if you don't call it social abandonment, the failure and outright refusal of one spouse to spend time with the other going to movies, on vacation, to parties, family functions, out to eat, to weddings, funerals and Bar Mitzvahs should warrant the granting of a divorce on the basis that the continuation of such a marriage would be improper, so long as the innocent spouse suffered emotionally as a result of this mistreatment by their partner.

As constructive abandonment is a creature of the judiciary, there is absolutely no reason why the judiciary cannot similarly expand the definition of abandonment to also include social abandonment as was done with respect to constructive abandonment.²¹ While opponents of this expansion

point to evidentiary issues and an alleged difficulty in trying to prove that a social abandonment has in fact occurred,²² we see no reason why proving social abandonment would be any more difficult than meeting one's burden of proof with respect to constructive abandonment.

Thus, contrary to the Appellate Division, Second Department's recent ruling, we see no reason why "the recognition of a social abandonment cause of action, no matter what herculean efforts could be undertaken to establish its precise definition, would open a judicial quagmire of varied factual claims, defenses, and permutations that would be to the everlasting consternation of the matrimonial bench and bar."²³