



§ 170. Action for divorce
Currentness

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

- (1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.
- (2) The abandonment of the plaintiff by the defendant for a period of one or more years.
- (3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.
- (4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.
- (5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.
- (6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.
- (7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

Grounds

- 1) The cruel and inhuman treatment
- 2) The abandonment of one or more years
- 3) Imprisonment for three years
- 4) Adultery
- 5) Separation Decree.
- 6) Separation Agreement
- 7) Marriage is broken down irretrievably for a period of at least six months



Example...

- Ralph and Alice have been married for 15 years. Alice is always getting on Ralph's nerves. He is always waving his fist to her face and saying: "One of these days Alice." One day he hits her and she loses a tooth.
- *Can she get a divorce on the ground of cruel and inhuman treatment?*

Statute

- **Domestic Relations Law § 170 (1):**
 - "The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant."

Elements

- 1) A pattern of conduct of defendant endangers the physical or mental well being of plaintiff
- 2) It is unsafe or improper for the plaintiff to cohabit with the defendant.

ELEMENT 1: A pattern of conduct of defendant endangers the physical or mental well being of plaintiff

- What is meant by a pattern of conduct?
 - *Can one act be a pattern?*
- Cruel and inhuman treatment can involve either physical or mental cruelty.

ELEMENT 1: A pattern of conduct of defendant endangers the physical or mental well being of plaintiff

- The treatment of the plaintiff by the defendant must have such a serious effect on the physical or mental health of the plaintiff, that it is not safe or proper for the parties to continue the marriage.
- **Mere incompatibility** between husband and wife is not enough to obtain a divorce under this ground in New York.

Examples

- Some **examples** of acts held to be cruel and inhuman treatment include:
 - continuous physical attacks upon a spouse;
 - constant screaming, profanity or other verbal abuse;
 - gambling away the household funds;
 - staying away from the house too often without an explanation;
 - going out with another man or woman; and
 - wrongfully accusing the other spouse of adulterous relations with another man or woman.

ELEMENT 2: It is unsafe or improper for the plaintiff to cohabit with the defendant

- **Factor: Length of Marriage.**
 - When there is long-term marriage (often fifteen or more years married) the acts of cruelty must be more substantial to justify a divorce.
 - What might be cruel in a short marriage may not be sufficient basis for divorce in a more mature marriage relationship.

For better or for worse...

- The adverse effects of the aging process on the physical and mental disposition of spouses may inevitably create problems in an otherwise long and happy marriage.

For better or for worse...

- Changes in the family situation may create difficulties:
 - the departure of grown children from the household,
 - family tragedies, and
 - economic disasters.

For better or for worse...

- Each case, however, stands on its own facts.
- The court decides whether or not these facts justify a dissolution of the marriage.
- Generally, the acts or conduct on which the divorce is based must have occurred within five years prior to the commencement of the action to be considered by the court.

Example

- After 23 years of marriage, wife contended that her husband was uncommunicative, unsocial, excessively critical, inattentive in social situations, causing her embarrassment. She also claimed that he beat the family dog, upsetting her and the children, and once deliberately drove too close to a tractor, nearly causing an accident. Further, the parties both claimed that they had not engaged in marital relations for some three years, each blaming the other for lack of interest. The wife claimed that, because of the husband's conduct, she suffered from a variety of physical and emotional problems.
- *Is this Cruel and Inhuman Treatment?*

**Sexual Relations and
Cruel and Inhuman Treatment**

- **Refusal.**
 - The mere refusal to engage in sexual intercourse, standing alone, is insufficient to justify a divorce on the ground of cruel and inhuman treatment.

**Sexual Relations and Cruel and Inhuman
Treatment**

- **Sexless Marriage.**
 - Where plaintiff had consented to a sexless marriage for a long period of time, the failure or refusal of the defendant to engage in marital relations does not serve as the basis for a divorce on cruelty grounds.

**Sexual Relations and Cruel and Inhuman
Treatment**

- **Affairs.**
 - The conduct of extramarital relationships may be considered as part of a pattern of cruel and inhuman treatment.
 - Adultery does not have to be pleaded as a ground for divorce

Sexual Relations and Cruel and Inhuman Treatment

- **No affairs.**
 - Charges of infidelity made in the absence of a justifiable belief as to the truth of such charges constitute cruel and inhuman treatment.

Example...

- Ralph and Alice have been married for 15 years. Alice is always getting on Ralph's nerves. He is always waving his fist to her face and saying: "One of these days Alice." One day he hits her and she loses a tooth.
- *Can she get a divorce on the ground of cruel and inhuman treatment?*



Abandonment for One or More Years

- Wilma and Fred are always arguing over Wilma's loudmouth mother. When Wilma asks if her mother can come over and live with them, he refuses. She packs up and walks out the door, telling Fred that she will never come back until Fred lets her mother live with them. He asks for her to come back. She leaves.
- *After a year, can Fred obtain a divorce on the ground of abandonment?*

Statute

- **Domestic Relations Law § 170 (2):**
 - The abandonment of the plaintiff by the defendant for a period of one or more years.

Definition

- Abandonment means that defendant-spouse has intentionally left plaintiff-spouse without plaintiff's consent, and of his or her own accord and without justification.
- The essence of abandonment is a refusal on the part of one spouse to fulfil basic obligations springing from the marriage contract.

Types of Abandonment

- Abandonments recognized in law can be divided into three categories.
 - 1) Departure from the marital residence.
 - 2) Exclusion from the marital residence.
 - 3) Exclusion from marital relations (constructive abandonment).

Elements of Abandonment

- A cause of action for divorce on grounds of abandonment (Domestic Relations § 170 [2]) requires proof of:
 - 1) departure or exclusion from the marriage;
 - 2) lasting for a period of over 1 year prior to commencement of the action;
 - 3) departure or exclusion is unjustified and;
 - 4) Departure or exclusion against the will of and without the consent of the complaining spouse.

Ground will be defeated if...

- 1) Defendant spouse had good reason for leaving (such as plaintiff's ill treatment or consent), **OR**
- 2) Defendant offered in good faith to return.

Example

- Barney and Betty have been married for a few years. Barney has a very high sex drive while Betty's sex drive has been decreasing these past few years. For the past few years, Barney has asked her to have sex and she keeps telling him that she is no longer interested in having sex with him.
- Can Barney obtain a divorce on the ground of abandonment?

Sex

- "Sexual relations between man and woman are given a socially and legally sanctioned status only when they take place in marriage and, in turn, marriage is itself distinguished from all other social relationships by the role sexual intercourse between the parties plays in it" (*Diemer v Diemer*, 8 NY2d 206, 210 [1960]).

Constructive Abandonment

- Unjustified refusal by a spouse to have sexual relations is also considered a "constructive abandonment."
 - The fact that the parties did not have sexual relations for more than one year does not by itself establish constructive abandonment (see *Hammer v Hammer*, 34 NY2d 545, 546 [1974]).

Constructive Abandonment

- Plaintiff must establish that defendant refused to engage in sexual relations and that such refusal was unjustified, willful, and continued, despite repeated requests for resumption of cohabitation.

Notes

- There is **no statute of limitations** on abandonment.
- A separation agreement eliminates the ground of abandonment, since both parties when they sign an agreement, consent to living apart.



Statute

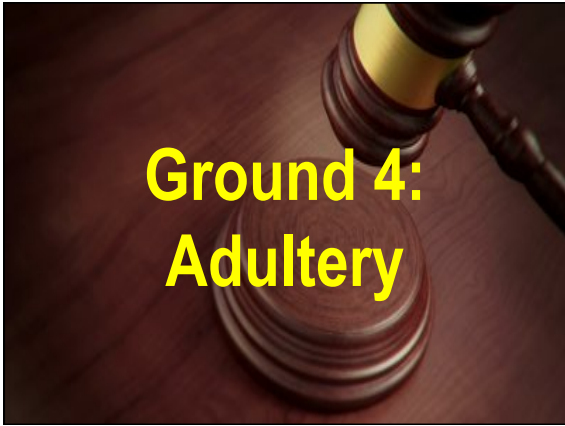
- **Domestic Relations Law § 170 (3):**
 - The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

Imprisonment for three or more years

- Divorce on the grounds of imprisonment for three or more years means that the defendant actually must have served three years or more in prison before an action can be brought; even if the conviction is later revoked.

Imprisonment for three or more years

- The purpose of the requirement that the defendant be incarcerated for three years prior to the commencement of an action for divorce is to give the convicted party an opportunity to obtain release from prison and to prevent the “natural but sometimes too rash inclination to dissolve a marriage” upon a spouse’s conviction.



Example....

- Fred and Ginger are married. Fred runs a strip-club where women dance topless. One day Ginger comes to the club where she sees Fred kissing and fondling the breasts of one of his dancers.
- *Can she obtain a divorce on the ground of adultery?*

Statutes

- **Domestic Relations Law § 170 (4):**
 - The commission of an act of adultery, provided that adultery ... is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.

Statutes

- **Domestic Relations Law § 170 (4):**
 - The commission of an act of adultery where adultery is defined as the **sexual intercourse, oral sexual conduct or anal sexual conduct**, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant.

Statutes

- **Domestic Relations Law § 170 (4):**
 - **Oral sexual conduct and anal sexual conduct include**, but are not limited to, **sexual conduct** as defined in **Penal Law §§ 130.00 (2) and 130.20 (3)**.

Statutes

- **Penal Law § 130.00 (2):**
 - a) **“Oral sexual conduct”** means conduct between persons consisting of contact between the mouth and
 - 1) the penis,
 - 2) the anus, or
 - 3) the vulva or vagina.

Statutes

- **Penal Law § 130.00 (2):**
 - b) **“Anal sexual conduct”** means conduct between persons consisting of contact between
 - 1) the penis and anus.

Statutes

- **Penal Law § 130.20 (3):**
 - He or she engages in **sexual conduct** with
 - an animal or
 - a dead human body.

Statutes

- **Penal Law § 130.00 (10).**
 - **“Sexual conduct”** means sexual intercourse, oral sexual conduct, anal sexual conduct, aggravated sexual contact, or **sexual contact**.

Statutes

- **Penal Law § 130.00 (10).**
 - **Penal Law § 130.00 (3):**
 - **“Sexual contact”** means any touching of the sexual or other intimate parts of a person ...for the purpose of gratifying sexual desire of either party.
 - It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.

Proof

- The proof of adultery is **difficult**.
- **CPLR 4502 (a)**. One spouse is statutorily disqualified from testifying against the other in an action founded on adultery, except:
 - to prove the marriage,
 - disprove the adultery, or
 - disprove a defense after evidence has been introduced tending to prove such defense.

Establishing Adultery

- **Confessions to Spouse.**
 - Not admissible in evidence, unless proved through the testimony of third persons or of the admitting spouse.
 - Divorce may not be granted on the basis of adultery solely on a confession;
 - there must be corroborating evidence.

Establishing Adultery

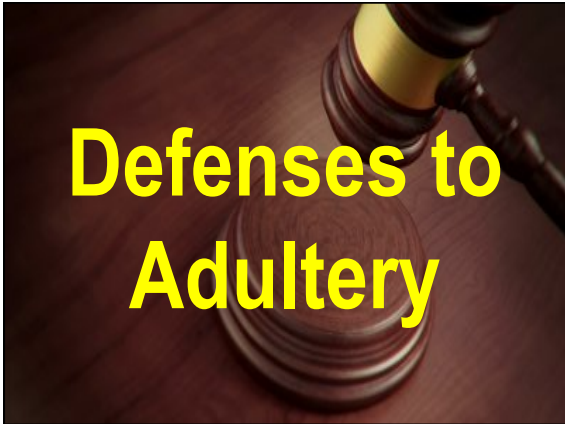
- **Eyewitnesses.**
 - Adultery may established through the testimony of eyewitnesses; even the testimony of one witness, if credited by the trier of fact, may be enough to prove adultery.

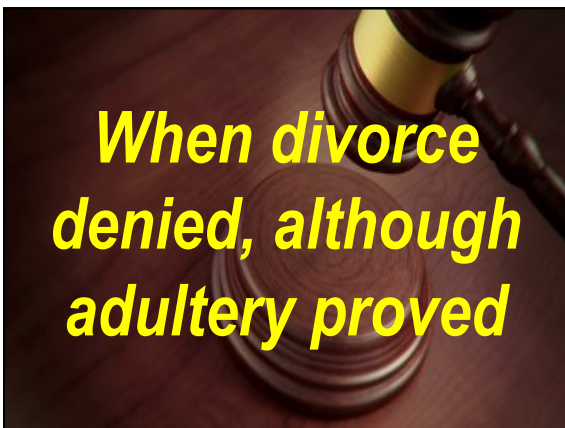
Establishing Adultery

- **Circumstantial Evidence.** Adultery can be proven circumstantially by establishing three elements:
 1. Opportunity,
 2. Inclination, and
 3. Intent.
- Proof of all three elements is required to establish adultery by circumstantial evidence.

Example...

- Betty and Barney are married. Betty decides to give Barney for his 50th birthday a prostitute. He takes advantage of the gift and has sexual intercourse with the prostitute. When he thanks Betty, Betty tells him that she got him and now she is going for a divorce on the ground of adultery.





Example...

- Happy Birthday! Betty gives Barney for his 50th birthday an 18 year old prostitute. Barney has sex with her and does things with her he would never do with Betty. Betty is hurt and now wants a divorce on the ground of adultery.

§ 171. When divorce denied, although adultery proved

Currentness

In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

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

- In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

1. Where the offense was committed by the procurement or with the connivance of the plaintiff.
2. Where the offense charged has been forgiven by the plaintiff: voluntary cohabitation of the parties with the knowledge of the fact.
3. Action was not commenced within five years after the discovery by the plaintiff of the offense charged.
4. Where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce.

1. "Procurement" or "connivance."

- Procurement means that one spouse actively encouraged the other to commit adultery.
- Connivance is similar to "collusion" or "consent" by a spouse to the adultery.

Example...

- Betty and Barney are married. They have a great relationship, except that Barney is constantly having oral sex outside of the marriage (something Betty would never do). She knew about it, but always continued to live with him. After having sex with Betty, Barney tells Betty that he would stop if only she would have oral sex with him. Now she wants a divorce on the ground of adultery.

2. "Condonation" or forgiveness:

- Plaintiff having sexual intercourse with defendant spouse after discovery of his or her adultery is an absolute defense to a divorce action based on the adultery.

Example...

- Betty and Barney are married. Betty tells her best friend of an affair she had with Fred. The best friend tells Barney, but her never confronts Betty. Since they were not already having sex, Barney continued to not have sex. After 8 years, Barney can take it no more and wants a divorce on the ground of adultery.

3. "Statute of Limitations":

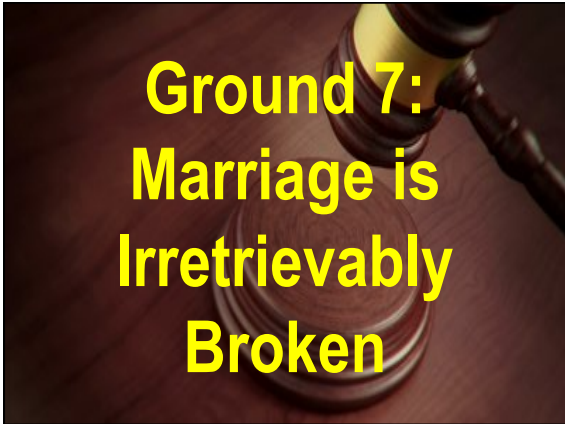
- Plaintiff has **five years from your discovery** of the first unforgiven act of adultery to commence the divorce action.

Example...

- Betty and Barney are married. Barney finds out that Betty had an affair (that included sexual intercourse) and he decides that he too will have an affair, which he does. However, after having oral sex with another woman, he is too angry and decides that he can't have sexual intercourse. Instead he leaves the other woman and now seeks a divorce.

4. Recrimination

- Both parties are guilty of adultery.
 - If each spouse proves the adultery of the other, neither can obtain a divorce against the other on that ground.



Example...

- John and Betty were married in 1976. After their last child got married, they became empty-nesters. One day, John woke up and realized he was no longer in love, that they were arguing all the time over money and that it would be best to end the marriage to see if there was something better out there for John. Betty is just fine with the marriage and believes that "til death do us part" means that.
- *John wants a divorce.*

Statute

- **Domestic Relation Law § 170 (7):**
 - The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath....

Broken Down Irretrievably

- This ground was added in 2010.
- It is basically known as irreconcilable differences.
 - *New York was the last state to add this type of ground.*
- It only requires one party to state that the marriage has broken down irretrievably for a period of at least six months



Living Apart...

- Living apart, without a formal written agreement of separation or a court judgment of separation, is not recognized as a ground for a New York State divorce, no matter how long you continue to live separately.

Living Apart...

- Legal Separations:
 - There are only two valid ways to dissolve a marriage.
 - Each requires separation of one or more years

Living Apart...

- The law requires that plaintiff and defendant spouses
 - live apart either under
 - a written contract of separation or
 - a court judgment of separation and
 - the plaintiff spouse must have substantially complied with the terms of the agreement or judgment.

Separation Agreement

- A separation agreement is a detailed contract usually prepared by attorneys, where the parties agree to live separate for the rest of their lives.

Separation Agreement

- It should set forth the respective rights and duties of each spouse with respect to
 - the custody and access to children,
 - support payments,
 - distribution of property, and
 - all other matters pertaining to the marital relationship.

Ethics

- The same attorney is absolutely prohibited from representing both spouses no matter how "friendly" the matter may appear on the surface.

Agreement

- Certain vital formalities must be carefully followed, or the written agreement will not qualify as a ground for divorce.
- The agreement or a memorandum of the agreement is filed (with complete confidentiality) with the clerk of the county where either spouse lives.

Agreement

- At the end of one year from the date of the agreement, either spouse may sue the other for a “no-fault divorce.”

Proof

- All that must be proven to the court is:
 - 1) agreement was duly executed and acknowledged and was properly filed;
 - 2) Spouses have in fact lived apart during the period of the agreement up to the time of the divorce action; and
 - 3) Plaintiff has substantially complied with the terms of the separation agreement. The court will grant a divorce based on that proof.

Separation Decree

- Another form of separation is through a judgment of separation granted by the Supreme Court.
- This judgment is based on the same four “fault” grounds as for divorce.
- However, the abandonment may be for less than a year.
- In addition, “non-support” is a ground for a decree of separation, although not for a decree of divorce.

Separation Decree

- One year after the filing of the court's judgment of separation, either party may sue for a "no-fault" divorce, based upon one year of living apart.
- A divorce does not occur automatically after a year. Court action must be taken.
