

## GUEST COLUMN

# Can I get a divorce if I'm still living with my spouse?

In these economically challenging times, many clients who want a divorce don't have the financial wherewithal to move out of the marital home. Their first question is "Do I have to move out in order to get a divorce?"

**By Carol G. Cooper, Esq.**

As always, the answer depends on the specific facts of the case.

The grounds for absolute divorce, set forth in Fam. Law §7-103, are as follows:

- 1) adultery,
- 2) desertion (including constructive desertion),
- 3) voluntary separation,
- 4) conviction of a felony or misdemeanor (incarceration),
- 5) a two-year separation,
- 6) insanity (institutionalization),
- 7) cruelty of treatment, and
- 8) excessively vicious conduct.

Four of those grounds do not require the parties to live separate and apart: adultery, desertion, cruelty of treatment and excessively vicious conduct.

With regard to conviction of a felony, one of the elements is that the defendant has served 12 months of a sentence of at least three years in a penal institution. Thus, the incarceration has forced the separation. Similarly, insanity is a ground for divorce only if the insane spouse has been institutionalized for not less than three years.

## Condonation

There is no statutory or case law basis for denial of a divorce on the grounds of

adultery where the parties have continued to reside in the same household. Nevertheless, judges frown on this and may interpret the continued sharing of a residence as evidence of condonation.

Under §7-103(d), condonation is not an absolute bar to a decree of an absolute divorce; however, it is considered by the court in determining whether the divorce should be decreed.

As to the two domestic violence grounds for divorce, cruelty of treatment and excessively vicious conduct, one would hope that the abused spouse either would have left the home for protection, or obtained a protective order to remove the abusive spouse from the home.

Yet, there are cases where this does not happen and the parties remain living together while the divorce case is pending. Again, a judge could view the continued sharing of the residence as condonation of the defendant's behavior; or, as evidence that the conduct of the defendant is not sufficiently cruel.

## Desertion and abandonment

Desertion (including constructive desertion) also does not require that the parties live separate and apart. In *Kelsey v. Kelsey*, 186 Md. 324, 326, 46 A.2d 627, 628 (1946), the Court of Appeals stated that "a desertion may exist although the husband and wife still live under the same roof."

The requirement of abandonment refers to a cessation of the marital relation, not necessarily living separate and apart. In *Kelsey*, the wife testified that for a period of 18 months her husband had refused to have marital relations with her despite her repeated requests to resume those relations.

The *Kelsey* issue on appeal was not whether the allegations were sufficient to obtain an absolute divorce; rather, the issue was the sufficiency of the corroboration. Certainly these allegations are difficult to corroborate. The Court of Appeals found that the corroboration in the *Kelsey* case was sufficient to justify the granting of a divorce.

The more recent case of *Ricketts v. Ricketts*, 393 Md. 479, 903 A.2d 857

(2006) which dealt with a complaint for limited divorce, not absolute divorce, confirms that desertion or abandonment, at least in the limited divorce context, does not require a party to move out of the marital home.

I see no reason why this holding should not also apply to a complaint for absolute divorce on the same grounds. In *Ricketts*, the husband had been forced out of the marital bedroom and sexual relations thereafter had been denied by the wife. See also *Scheinin v. Scheinin*, 200 Md. 282, 89 A.2d 609 (1952).

## Beyond separate bedrooms

The remaining two grounds, voluntary separation and two-year separation, both require that the parties live separate and apart. Yet, it may be possible to live "under the same roof" and still be considered under the law as living separate and apart.

In *Jackson v. Jackson*, 13 Md. App. 725, 284 A. 2d 654 (1971), the Court of Special Appeals defined "living separate and apart" as the parties living "in such a way that those in the neighborhood may see that the husband and wife are not living together." *Id.* at 730.

Parties living in the same house where there is a separate basement, attic or garage apartment with a separate entrance could potentially qualify as "living separate and apart" under *Jackson*.

Otherwise, under the current statutory and case law, living in separate bedrooms does not meet the requirement of "living separate and apart." *Id.* at 732-733.

## Summary

While clients may think it costs too much for one person to move out of the home, living together could prove costly if failure to separate caused the divorce proceedings to be delayed.

It is always advisable for the parties to separate prior to the absolute divorce hearing if possible. Continuing to live together only complicates things, even if the grounds for divorce don't specifically require a separation.

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