

Further on Voluntary Separation as a Ground for Absolute Divorce - Benson v. Benson

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Family Law Commons](#)

Recommended Citation

Further on Voluntary Separation as a Ground for Absolute Divorce - Benson v. Benson, 15 Md. L. Rev. 261 (1955)

Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol15/iss3/7>

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**FURTHER ON VOLUNTARY SEPARATION AS
A GROUND FOR ABSOLUTE DIVORCE**

*Benson v. Benson*¹

By LEONARD BLOOM*

This case is significant in that it departs from a previous viewpoint of the Maryland Court of Appeals, and it does so by the narrowest of margins, 3 to 2. In an action for divorce *a vinculo matrimonii*, where the plaintiff relies upon the statutory grounds of 3 years voluntary separation between the parties, the question is here presented as to whether the separated parties must have had a mutual intent at the time of their separation *not* to resume marital relations thereafter, in order that an absolute divorce decree will issue. Secondly, and collateral to this, can the parties at the time of their separation recognize or acknowledge the possibility of a future reconciliation, or will such an acknowledgment defeat the "voluntary" aspects of their separation?

* Second Year Evening Student, University of Maryland School of Law.
¹ 204 Md. 601, 105 A. 2d 733 (1954). For earlier notes on this subject, see *Five Years Voluntary Separation As New Ground For Absolute Divorce*, 2 Md. L. Rev. 357 (1938), and supplementary note thereto in 7 Md. L. Rev. 146 (1943).

In this particular case,² the wife filed suit for an absolute divorce, alleging as grounds at least 3 years voluntary separation between the parties. The parties were married in 1944 and thereafter lived with the husband's parents on the parental farm. Marital difficulties arose, the wife not being content to live with her in-laws; and in July of 1949, the wife asked her husband to take her to her sister's house, which was 5 miles away. The husband consented. He drove his wife to her sister's house, and the wife took certain belongings with her. She commented that she was sorry "it worked out this way". Her husband asked her if she could see any other way out, and she commented that "right now I don't". The wife testified that she and her husband couldn't figure any other way out, and that they decided to try it "this way". There was further evidence that the husband believed a separation "to be the only solution for now".

Later, the wife moved to Baltimore, and in 1951 her husband went to see her to inform her that should she return to the farm, his parents would forgive her. Since the friction created from living with her in-laws originally precipitated her marital difficulties, the wife was not at all anxious to accept an offer to reconcile which would impose substantially the same intolerable conditions. She refused to return. On January 2, 1953, a written agreement was prepared and was signed and sworn to by the husband only. The agreement recited that "the parties hereto are now and have been for some time past living separate and apart"; and it provided that the parties would thereafter live separate and apart, and that neither would seek restitution or enforcement of conjugal rights. The agreement also contained a property settlement. The agreement was executed by the husband only and not by the wife. It also stated that the wife was to file suit for a divorce, but the grounds were not stated.

Thereafter, the wife filed suit for a divorce *a vinculo matrimonii*. She had a copy of the separation agreement executed by her husband; but it was not admitted in evidence, and the divorce decree was denied. On appeal, the Court of Appeals reversed and ruled that the separation agreement was a sworn recognition or admission by the husband of the state of affairs between the parties at the time, and for that limited purpose it was relevant and should have been admitted.

² *Ibid.*

However, even if the agreement is admitted in evidence it was at the most, merely a recognition of the state of affairs between the parties as of the time of its execution; since the term "have been for some time past living separate and apart" is too nebulous to sustain the wife's cause of action. Therefore, it was essential to the wife's suit to comply fully with the statute³ and to prove that the separation was "voluntary" at its inception. Hence, the case turns upon the interpretation given to the particular Maryland statute⁴ which sets out as grounds for an absolute divorce, 3 years of voluntary separation between the parties.

The Maryland statute in question is Article 16, Section 33 (Code of 1951), and the applicable portion included by an amendment in 1937, reads as follows:

" . . . the Court may decree a divorce a vinculo matrimonii . . . when the husband and wife shall have voluntarily lived separate and apart, without any cohabitation, for three consecutive years prior to the filing of the bill of complaint, and such separation is beyond any reasonable expectation of reconciliation; . . . "

The first case dealing with this statute was *Campbell v. Campbell*.⁵ That case did not undertake to clearly define the meaning of the term "voluntary separation" because the main issue dealt with the constitutionality of the statute where the separation period occurred before the statute was passed. Not only did the Court of Appeals construe the statute to apply, but considered that the wife's tacit recognition and compliance with a formal separation agreement negated her contention that she was coerced into executing that agreement.

The case of *France v. Safe Deposit & Trust Co.*⁶ warrants a much closer examination, however. There, the Court of Appeals undertook to define "voluntary" when they said:

" . . . a voluntary separation is a physical separation of the parties, by common consent with a common intent not to resume marital relations. It does not mean a mere physical separation⁷ . . . "

³ Md. Code (1951), Art. 16, Sec. 33.

⁴ *Ibid.*

⁵ 174 Md. 229, 198 A. 414 (1938), noted, 2 Md. L. Rev. 357 (1938).

⁶ 176 Md. 306, 4 A. 2d 717 (1939).

⁷ *Ibid.*, 325.

The Court went on to say that the word "voluntary" connotes an agreement, and that unless the parties agree to live apart the separation cannot be voluntary.

In the *France* case,⁸ the facts were these: The husband advised his wife to accompany her mother to Italy for a rest and to visit her ailing sister. The husband secured all the accommodations for his wife and saw her off at the dock. The wife testified that the husband never mentioned that he desired her to stay in Europe permanently, and that she had every reason to believe that the separation would be a temporary one and that eventually the parties would be reunited. He testified that he told her the separation would be final. Once the wife arrived in Europe, the parties exchanged frequent letters. The husband repeatedly professed his love for his wife, his regret at their separation, and his desire to have his wife return; but he did nothing whatsoever to hasten her return. In fact, he prolonged it. Although he supported his wife adequately while she was in Europe, he declined to send her sufficient money for her home passage. His wife was in poor health, of a nervous temperament, and somewhat unstable mentally. Her husband was a doctor and well aware of her condition. By virtue of his professional knowledge and his own personal experience, he realized that it would be inadvisable for his wife to travel alone. She continually expressed her desire to return to the United States, but her husband did not arrange for her safe travel. Instead, he waited until the necessary statutory period was over, and shortly thereafter filed suit for an absolute divorce alleging as grounds, voluntary separation between the parties.

The Court of Appeals, in refusing the absolute divorce, commented that the parties must have at the time of their separation, a common intent not to resume marital relations thereafter.

The later Maryland cases⁹ all pay homage to *France v. Safe Deposit and Trust Co.* and reiterate in whole or in part the doctrine that a mutual intent at the time of separation (or sometime thereafter) not to resume marital relations in the future is a necessary condition precedent that must be fulfilled in order to obtain an absolute divorce for volun-

⁸ *Supra*, n. 6.

⁹ *Miller v. Miller*, 178 Md. 12, 11 A. 2d 630 (1940); *Kline v. Kline*, 179 Md. 10, 16 A. 2d 924 (1940); *Beck v. Beck*, 180 Md. 321, 24 A. 2d 295 (1942), noted 7 Md. L. Rev. 146 (1943); *Nichols v. Nichols*, 181 Md. 392, 30 A. 2d 446 (1943), noted 7 Md. L. Rev. 146 (1943); *Kruse v. Kruse*, 183 Md. 369, 37 A. 2d 898 (1944); *Foote v. Foote*, 190 Md. 171, 57 A. 2d 804 (1948); *Hahn v. Hahn*, 192 Md. 561, 64 A. 2d 739 (1949).

tary separation, that in the absence of such a mutual or common intent an absolute divorce decree will not issue, and that the present three year statutory period of voluntary separation starts from the time such a mutual intent is manifested between the parties.

These later cases¹⁰ all contain a strong element of desertion, in which one of the parties files suit for an absolute divorce on grounds of desertion or abandonment,¹¹ and the other party counters with a suit for an absolute divorce on grounds of voluntary separation, or vice-versa. In either event, the suit on the ground of voluntary separation is used as a defensive measure to negate the allegations of desertion presented by the other party. Each suit tends to counter-act the other, because desertion by its very nature presupposes that the separation was involuntary as to the plaintiff.

The *Beck* case,¹² is particularly interesting and in many respects closely akin to the principal case of *Benson v. Benson*,¹³ noted herein. In the *Beck* case¹⁴ the husband continued to live in the same house, but deserted the bed of his wife. This is recognized in Maryland as a form of constructive desertion such that after the statutory period of 18 months has elapsed, an absolute divorce decree may issue.¹⁵ Six months after the husband's act of constructive desertion had occurred, the wife left the home. Then, after a period of about 9 years, the wife brought suit for an absolute divorce decree, alleging as grounds, *voluntary* separation. The decree was denied, and properly so. The theory of a voluntary separation is entirely opposed to desertion, where the separation is considered involuntary as to the party deserted.

Now, the principal case noted is closely parallel to the *Beck* case, in that the failure of the husband to provide a domicile separate from his parents' is regarded in Maryland as a form of constructive desertion.¹⁶ But whereas the wife in the *Beck* case¹⁷ walked out on her husband after he had constructively deserted her, the departure of the wife in the principal case was consented to and aided by the husband. The separation therefore acquires the character of

¹⁰ *Ibid.*

¹¹ Md. Code (1951), Art. 33, Sec. 16.

¹² *Supra*, n. 9.

¹³ *Supra*, n. 1.

¹⁴ *Supra*, ns. 9, 12.

¹⁵ *Fleegle v. Fleegle*, 136 Md. 630, 110 A. 889 (1920); *Hoffhines v. Hoffhines*, 146 Md. 350, 126 A. 112, 38 A. L. R. 332 (1924).

¹⁶ *Ewing v. Ewing*, 154 Md. 84, 140 A. 37 (1928).

¹⁷ *Supra*, ns. 9, 12.

a voluntary one; and it is in this regard that the principal case may be distinguished from the *Beck* case,¹⁸ where the final separation was unilateral as far as the wife was concerned.

The interpretation of Article 16, Section 33, concerning voluntary separation as a ground for an absolute divorce as laid down in the *France* case,¹⁹ and as quoted in the succeeding cases, requires that the parties manifest a common intent not to resume marital relations in the future in order that the statute shall apply. The principal case removes the necessity for such a rigid intent element and in a sense qualifies it by requiring that the parties have merely a common intent to separate and not necessarily an intent to remain forever separated. Under the majority view in the principal case,²⁰ the mere acknowledgment of a possible reconciliation in the future, actually the possible occurrence of a condition subsequent sometime after the physical separation of the parties, does not preclude the statutory period from commencing as of the separation; and likewise, does not defeat the voluntary aspects of the separation.

The Chief Judge and one associate judge dissented on the grounds that as the *France*²¹ case had previously interpreted the statute,²² any modification of that interpretation should be dictated by public policy considerations, and that expressions of public policy are more properly voiced by the legislature.

However, a rule of law extracted from a particular factual situation may not necessarily be valid where a critical fact is either included or deleted. Boiled down to its bare essentials, the leading *France* case²³ involves a physical separation of the parties where at least the wife fully intended to return at a future date, coupled with the future acts of her husband in prolonging the separation by refusing to secure adequate passage. Now too, in the principal case,²⁴ the husband prolonged the separation by his failure to provide a separate domicile; also, whereas in the *France* case²⁵ one of the parties definitely expected to return in the future, neither of the parties in the principal case had any more than a hazy hope of reconciling in the future. Yet, because they "left the door open" so to speak,

¹⁸ *Supra*, ns. 9, 12.

¹⁹ 176 Md. 306, 4 A. 2d 717 (1939).

²⁰ *Supra*, n. 1.

²¹ *Supra*, ns. 6, 19.

²² Md. Code (1951), Art. 16, Sec. 33.

²³ *Supra*, ns. 6, 19.

²⁴ *Supra*, n. 1.

²⁵ *Supra*, ns. 6, 19.

for a future reconciliation, the dissenting opinion holds that their voluntary separation was of a character insufficient to qualify the parties for an absolute divorce.

It is respectfully submitted, however, that the *France* case,²⁶ although correct under its particular factual situation, actually went too far and laid down a broad rule of law not applicable to the principal case. Moreover, it appears that the principal case is just the type of case the legislature had in mind when the statute²⁷ was passed. The statute provides for an 18 month "cooling-off" period during which time the parties may reconsider that their marriage of long standing should not be dissolved by a hasty, ill-advised divorce. The very purpose of the statute is to encourage the separated parties to make amends and attempt to reconcile their differences; if the parties at the time of separating recognize the possibility of such a future reconciliation, they should not thereafter be penalized for their failure to reconcile. The reasoning of the dissenting opinion will tend to obviate the very purpose of the statute, and it is respectfully submitted that the majority of the Court of Appeals, adopted a more realistic approach in the principal case, by eliminating the requirement of "a common intent not to resume marital relations", which was engrafted on the statute by the *France* case.

²⁶ *Ibid.*

²⁷ *Supra*, n. 22.