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Domestic Relations--Constructive Desertion--Husband's Duty to Provide a Separate home for His Wife

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DOMESTIC RELATIONS — CONSTRUCTIVE DESERTION — HUSBAND'S DUTY TO PROVIDE A SEPARATE HOME FOR HIS WIFE. — W sought a divorce from H on the grounds of constructive desertion. H filed a cross-bill charging actual desertion. H and W lived in H's parental home although H was financially able to furnish a separate home. W left because of a "host of petty annoyances and tyrannies" which she suffered from H's mother. H made no satisfactory effort at reconciliation. *Held*: W was entitled to an *a mensa* decree. H's petition was denied. *Hughes v. Hughes*.¹

In an early case, the West Virginia Court of Appeals interpreted the "wilful desertion" statute as requiring the intentional cessation of cohabitation without reasonable cause.² By this test "reasonable cause" exists only when the offending party's conduct amounts to legal cruelty sufficient to support a decree *a mensa* or *a vinculo*.³ This is the general rule.⁴ West Virginia, however, relaxed this requirement in *Horkheimer v. Horkheimer*,⁵ where the court granted a decree though there was apparently no ground for affirmative relief. The decree was granted solely upon the wife's right to a separate home if the husband was financially

¹ 169 S. E. 403 (W. Va. 1933).

² *Martin v. Martin*, 33 W. Va. 695, 11 S. E. 12 (1890). *Accord*: *Alkire v. Alkire*, 33 W. Va. 517, 11 S. E. 11 (1890); *Reynolds v. Reynolds*, 68 W. Va. 15, 69 S. E. 381 (1909).

³ "Justifiable cause which will excuse a husband or wife from leaving the other, must be such as could be made the foundation of a judicial proceeding for a divorce *a mensa*." *Martin v. Martin*, *supra* n. 2; *Dawkins v. Dawkins*, 72 W. Va. 789, 79 S. E. 822 (1912); *Huff v. Huff*, 73 W. Va. 330, 80 S. E. 846 (1913); *Fisher v. Fisher*, 81 W. Va. 105, 93 S. E. 1041 (1917); *Kittle v. Kittle*, 86 W. Va. 46, 102 S. E. 799 (1920); *Hamilton v. Hamilton*, 87 W. Va. 534, 105 S. E. 771 (1921). Although the statute does not specify "wilfulness" as an element of desertion *a mensa*, the court said in *Hall v. Hall*, 69 W. Va. 175, 71 S. E. 103 (1911) "Though the statute allows a divorce *a mensa et thoro* for abandonment or desertion, in general terms, and does not in express words require willfulness, it must be assumed that the legislators, in drafting and enacting it, intended such abandonment and desertion as is generally recognized and treated as sufficient ground for a limited divorce."

⁴ *Pidge v. Pidge*, 44 Mass. 257 (1841); *Lyster v. Lyster*, 111 Mass. 327 (1873); *Arnaboldi v. Arnaboldi*, 101 N. J. Eq. 126, 138 Atl. 116 (1927); *Searcy v. Searcy*, 196 Mo. App. 311, 193 S. W. 871 (1917); *Towson v. Towson*, 126 Va. 640, 102 S. E. 48 (1920).

⁵ 106 W. Va. 634, 146 S. E. 614 (1929). "The law entitles a wife to a home over which she alone may preside. When there is no serious obstacle in the way of the husband providing such a home, she is not required to live in the home of his parents under their domination." A denial of this "right" amounts to legal cruelty, and there is compliance with the general rule. *Accord*: *Roberts v. Roberts*, 108 W. Va. 71, 150 S. E. 231 (1929); *Davis v. Davis*, 108 W. Va. 157, 150 S. E. 523 (1929); *Walker v. Walker*, 109 W. Va. 662, 155 S. E. 903 (1930).

able to provide it. In *Beuhring v. Beuhring*,⁶ the court suggests that the husband must not only provide a separate home, but a home at a sufficient distance from the home of relatives to protect his wife from their frequent intrusions. *Quaere*, must the husband provide a new home if the wife finds the neighbors (not relatives) annoying? The instant case does not go as far as the *Benking* case but it aids in fixing in West Virginia a qualification upon the general rule that the husband may determine the domicil and the wife must follow him unless the abode endangers her life or health.⁷ Apparently in West Virginia, the wife may assert her right to a separate home and a refusal by the husband, financially competent to provide such a home, will amount to "justifiable cause" for the wife to leave.⁸ Or conversely, the husband's refusal to provide a separate home is "legal" cruelty.⁹ The critics of this conclusion allege that this permits the wife to gain a decree by leaving home that she could not acquire by remaining.¹⁰ Perhaps the distinction is a real one — that the conduct acquiesced in by her husband in the one case is not a real threat upon her life or health, that in the second case her very action demonstrates that the threat is real. The result of the instant case is consonant with a general demand for a re-definition of cruelty to fit a changed social order.

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⁶111 W. Va. 135, 161 S. E. 25 (1931). "While it is the conceded right of the husband to determine primarily the location of the matrimonial domicile, that right must be exercised reasonably, and he may not arbitrarily require his wife to live with or in close proximity to a relative who mistreats her as did the daughter in this instance." "If such a requirement is made, the wife is justified in leaving the husband and may charge him with constructive desertion."

⁷*Davis v. Davis*, *Walker v. Walker*, both *supra* n. 5. And the test of danger is apparently subjective. *Watson v. Watson*, 112 W. Va. 77, 163 S. E. 768 (1932).

⁸*Hughes v. Hughes*, *supra* n. 1. *Horkheimer v. Horkheimer*, *supra* n. 5. The *Horkheimer* case apparently rests upon three closely related cases. (1) *Hoffhines v. Hoffhines*, 146 Md. 350, 126 Atl. 112 (1924). "One of the strong incentives for marriage is the prospect and expectation by the newly married parties of establishing an independent home . . . This instinctive desire of home building should be encouraged and fostered, as upon the foundation of independent and happy homes the stability and prosperity of a nation largely depends." (2) *Marshak v. Marshak*, 115 Ark. 51, 170 S. W. 567 (1914). (3) *Brewer v. Brewer*, 79 Neb. 726, 113 N. W. 161 (1907). "The family is the unit of the social organism, and, while the institution of new families to some extent involves the disintegration of the older household, it is absolutely necessary to continued social existence."

⁹*Supra* n. 5, 7. But see: *State v. Beslin*, 19 Idaho 185, 112 Pac. 1053 (1911); *Coleman v. Coleman*, 164 Ky. 709, 176 S. W. 186 (1915); *Powell v. Powell*, 29 Vt. 148 (1856); *Winkler v. Powell*, 173 Ala. 46, 55 Sq. 536 (1911).

¹⁰(1930) 28 MICH. L. REV. 623.