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Sifre v. Sifre

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Sifre v. Sifre

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A happy divorce, very much like a happy marriage, is not easy to come by. Being forced to fight with your spouse in court over your money, children, home, or anything else either of you can think of hardly encourages a happy ending. While an ending may never be "happy," for those divorcees who retain some respect for their former significant other it can at least be cordial—if they can manage to stay out of court. A provision in the New York Domestic Relations Law (DRL), however, enables spouses to do just that, and terminate a dead marriage "for which there is no hope of reconciliation"[1] by obtaining a divorce pursuant to a separation agreement.[2] If, after entering into a valid separation agreement, the spouses live "separate and apart" for one year pursuant to the terms of that agreement, DRL section 170(6) allows them to "convert" their separation agreement into a final divorce decree without having to battle over the terms of their settlement in court.[3] Of course, this "conversion divorce" is only available for those marriages in which there is no hope of reconciliation, and the separation agreement is evidence that the spouses are, in fact, living separate and apart.[4] Thus, if the parties to a valid separation agreement subsequently reconcile and resume their marital relationship with the intent to abandon the separation agreement, that agreement is deemed void.[5] As the supposedly "dead" marriage has been resurrected, a divorce can no longer be sought based on an agreement meant to evince the separate state of the parties.[6] Because reconciliation is at odds with the existence of the separation agreement, reconciliation is always a question of fact to be determined by the court through consideration of the parties' conduct.[7]

In *Sifre v. Sifre*, the New York Appellate Division, Third Department, refused to allow Mrs. Sifre to introduce evidence of a possible reconciliation as a defense to a divorce action instituted by her husband pursuant to DRL section 170(6).[8] In *Sifre*,

1. Lapidus v. Lapidus, 420 N.Y.S.2d 896, 897 (1st Dep't 1979).

2. *See* N.Y. Dom. Rel. Law § 170(6) (McKinney 2003).

3. *See* Christian v. Christian, 42 N.Y.2d 63, 69 (1977).

4. *See id.* at 69 ("[T]he function of the [separation agreement] is 'merely to authenticate the fact of separation.'" (quoting Gleason v. Gleason, 26 N.Y.2d 28, 37 (1970))).

5. *See, e.g.*, *In re* Estate of Wilson, 50 N.Y.2d 59, 66 (1980) ("[B]ecause the spouses have effected a reconciliation . . . [t]he conduct of the spouses may be understood to manifest an intention to void the agreement in its entirety."); *In re* Estate of Whiteford, 314 N.Y.S.2d 811, 813 (3d Dep't 1970); *In re* Estate of Granchelli, 393 N.Y.S.2d 894, 896 (Sup. Ct. Monroe County 1977).

6. *See Christian*, 42 N.Y.2d at 69.

7. *See In re* Estate of Whiteford, 314 N.Y.S.2d at 813 ("The existence of such intent [to abandon a separation agreement] is primarily a factual question, to be decided in the first instance by the trier of fact . . . ."); *Wilson*, 50 N.Y.2d at 66.

8. *See* Sifre v. Sifre (*Sifre II*), 878 N.Y.S.2d 798, 800 (3d Dep't 2009). The New York DRL provides, in pertinent part:

> 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 . . . (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

the issue on appeal was whether the language contained in the parties' separation agreement ("Agreement") prohibited her from demonstrating—by means other than a writing—that she and her husband had reconciled with the intent to resume their marital relationship.[9] The Agreement stated that none of its provisions "shall be changed or modified, nor shall this Agreement be discharged or terminated in whole or in part, except by an instrument in writing."[10] The Third Department concluded that the requirement that any *termination* of the Agreement be in writing meant that any *abandonment* of the Agreement must also be in writing.[11] In the absence of any such writing, the court deemed the issue of reconciliation to be "irrelevant."[12] This case comment contends that the Third Department, in granting Mr. Sifre a divorce, erred in three ways. First, it improperly relied on the Agreement as the sole basis for granting the divorce instead of the actual separation between the parties.[13] Second, it justified doing so by ignoring established principles of contract interpretation.[14] Third, the court's interpretation of the Agreement allowed Mr. Sifre to procure a divorce in a manner contrary to public policy, thereby effectively rendering the Agreement itself void.[15]

Mr. Sifre and Mrs. Sifre were married on October 4, 1981.[16] In November 2000, they separated;[17] the Agreement was signed on November 27, 2000.[18] In February

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> 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.

N.Y. Dom. Rel. Law § 170(6) (McKinney 2003).

9. *See Sifre II*, 878 N.Y.S.2d at 800. In addition to the issue of whether the Agreement permitted extrinsic evidence to be introduced, Mrs. Sifre also alleged that the Agreement was unconscionable in its terms and that Mr. Sifre had not substantially complied with its terms. Brief for Defendant-Respondent at 5, Sifre v. Sifre, 878 N.Y.S.2d 798 (3d Dep't 2009) (No. 08-568). The Third Department also found those arguments to be without merit. *See Sifre II*, 878 N.Y.S.2d at 800.

10. *Sifre II*, 878 N.Y.S.2d at 799.

11. *Id.*

12. *Id.* at 800.

13. *See* Dom. Rel. § 170(6); *see also* Christian v. Christian, 42 N.Y.2d 63, 70 (1970) ("[I]t is the physical separation, rather than the writing, which constitutes the actual basis of the cause . . . ." (citing Littlejohns v. Littlejohns, 349 N.Y.S.2d 462, 468 (Sup. Ct. N.Y. County 1972))); Buckley v. Buckley, 537 N.Y.S.2d 943, 943 (Sup. Ct. Saratoga County 1989) ("It is . . . the physical separation which constitutes the grounds for divorce under [DRL] § 170(6), not the agreement."); *infra* text accompanying notes 46–57.

14. *See infra* text accompanying notes 58–82.

15. *See infra* text accompanying notes 85–93; Restatement (Second) of Contracts: Promise Detrimental to Marital Relationship § 190(2) (1981) ("A promise that tends unreasonably to encourage divorce or separation is unenforceable on grounds of public policy.").

16. Brief for Defendant-Respondent, *supra* note 9, at 7.

17. *Id.*

18. *Id.*

2008, more than seven years after the execution of the Agreement, Mr. Sifre commenced divorce proceedings.[19] At that time, the parties had been married for twenty-six years.[20] Mrs. Sifre contested the divorce action, arguing, among other things, that "the parties cohabitated together with the intent to reconcile subsequent to execution of the [A]greement."[21] Specifically, she asserted that she and Mr. Sifre cohabitated and reconciled after having been apart for only six months and thus, as a matter of law, the entire Agreement should be deemed abandoned and void.[22] Although it was undisputed that the parties spent time together after the execution of the Agreement,[23] Mr. Sifre denied her allegations.[24] He cross-moved for summary judgment, asking the court to grant him a conversion divorce pursuant to DRL section 170(6).[25] Presented with conflicting affidavits from the parties regarding their alleged reconciliation, the trial court properly noted that a question of fact existed and the issue could not be resolved without a trial.[26] Mr. Sifre's motion for summary judgment to grant him a divorce was denied.[27]

Mr. Sifre appealed the trial court's decision denying his motion for summary judgment. He contended that, because he had substantially complied with the terms of the Agreement, any consideration by the court regarding reconciliation was barred.[28] Consequently, he claimed that dismissal of Mrs. Sifre's reconciliation defense was mandated.[29] The Third Department granted his motion for summary judgment, thereby awarding him a conversion divorce.[30] The court reasoned that the introduction of evidence other than "an instrument in writing" to demonstrate a possible reconciliation of the parties was prohibited because the language contained in the parties' Agreement stated that none of its provisions "shall be changed or modified, nor shall this Agreement be discharged or terminated in whole or in part,

19. *Id.*

20. Sifre v. Sifre (*Sifre I*), No. 08-0568, slip op. at 2 (N.Y. Sup. Ct. Ulster County Oct. 7, 2008) (on file with the author), *rev'd*, 878 N.Y.S.2d 798 (3d Dep't 2009).

21. *Id.*

22. *See* Brief for Defendant-Respondent, *supra* note 9, at 8; *Sifre I*, No. 08-0568 at 3. Mrs. Sifre alleged that she and Mr. Sifre resumed a sexual relationship, spent several nights a week together, attended social events together, vacationed together, and went out to dinner regularly. *Id.* at 8.

23. *See Sifre I*, No. 08-0568 at 6; *see also* Brief for Defendant-Respondent, *supra* note 9, at 7.

24. *Sifre I*, No. 08-0568 at 2.

25. *Id.*; N.Y. Dom. Rel. § 170(6) (McKinney 2003).

26. *See Sifre I*, No. 08-0568 at 6, 7; *Sifre II*, 878 N.Y.S.2d at 799.

27. *Sifre I*, No. 08-0568 at 7. "Pre-trial discovery was never found with respect to the asserted facts [that the parties reconciled, and the agreed upon and disputed details of this almost eight year post-separation relationship accordingly have not yet been developed on the record." Brief for Defendant-Respondent, *supra* note 9, at 8.

28. Brief for Defendant-Respondent, *supra* note 9, at 6; *See* Dom. Rel. § 170(6).

29. Brief for Defendant-Respondent, *supra* note 9, at 6.

30. *See Sifre II*, 878 N.Y.S.2d at 800.

except by an instrument in writing."[31] As there was no such writing, the court deemed the issue of reconciliation "irrelevant."[32]

There is no clear standard in New York for determining whether spouses have reconciled and resumed their marital relationship. As the Court of Appeals has made clear, "cohabitation with the intent to reconcile" has no definite meaning and thus the factual context of the supposed reconciliation must always be considered.[33] Courts have gone so far as to find an issue of fact even when explicit language in a separation agreement required that "reconciliation" of the parties be documented in a written statement. For example, in *Katz v. Beckman*, Mr. Katz filed for divorce from his wife pursuant to DRL section 170(6).[34] The separation agreement provided, in part, that "[t]his Agreement shall not be invalidated or otherwise affected by a reconciliation between the parties hereto . . . unless said reconciliation . . . be documented in a written statement executed and acknowledged by the parties . . . ."[35] Despite this clear language in the parties' separation agreement, the Second Department still found that once the wife produced evidence that the parties did reconcile, an issue of fact was raised as to whether or not the parties intended to abandon the agreement altogether.[36]

The lack of a clear standard has made these agreements subject to great controversy between spouses when it comes to their enforcement.[37] Because a separation agreement will be deemed void when there has been cohabitation with the intent to reconcile between husband and wife indicating that the agreement has been abandoned, it cannot serve as a basis for a conversion divorce.[38] Indeed, the Third

31. *See id.* at 799–800.

32. *Id.* at 800.

33. *See* Graev v. Graev, 11 N.Y.3d 262, 274 (2008). In *Graev*, the spousal agreement between Mr. and Mrs. Graev contained a provision for the termination of spousal support payments on the event that Mrs. Graev "cohabits" with another man for a period of sixty consecutive days; however, the agreement did not define the word "cohabitation." The Court of Appeals found that the word "cohabitation" was ambiguous and had no plain meaning adequately established in existing law. The Court held that, absent evidence as to the parties' intent, there was no way to determine what acts "cohabitation" was meant to embrace. *Id.* at 266–74.

34. 756 N.Y.S.2d 258, 259 (2d Dep't 2003).

35. *Id.*

36. *Id.* at 260; *see also Buckley*, 537 N.Y.S.2d 943, 943 (Sup. Ct. Saratoga County 1989).

37. *See, e.g.*, Lippman v. Lippman, 596 N.Y.S.2d 241 (4th Dep't 1993); Rosenhaus v. Rosenhaus, 503 N.Y.S.2d 892 (2d Dep't 1986); *In re* Estate of Whiteford, 314 N.Y.S.2d 811 (3d Dep't 1970).

38. *See Rosenhaus*, 503 N.Y.S.2d at 892 (noting that a resumption of the marital relationship sufficient to indicate an abandonment of that agreement will "vitiate the separation agreement" (citing Brody v. Brody, 180 N.Y.S. 364, 365 (1st Dep't 1920))); *Whiteford*, 314 N.Y.S.2d at 813 ("[A] reconciliation, resumption of the cohabitation and marital relations, accompanied by an intent to abandon a separation agreement renders that agreement void." (citing Zimmer v. Settle, 124 N.Y. 37 (1891))); Zimtbaum v. Zimtbaum, 284 N.Y.S. 101 (2d Dep't 1935); *Buckley*, 537 N.Y.S.2d at 943 (finding that, although the separation agreement at issue stated that it would still continue in "full force and effect" despite any reconciliation between the parties "except as otherwise provided by [a] written agreement," in the face of a reconciliation the separation agreement could not stand even without such a writing).

Department here did concede that reconciliation is, in fact, a defense to an action for conversion divorce,[39] and whether Mr. and Mrs. Sifre cohabited with the intent to reconcile subsequent to execution of the Agreement is undeniably a question of fact. To make that determination, the court was required to look for unequivocal acts that demonstrated the parties intended to reconcile and abandon the Agreement.[40] Because the court determined that the issue of reconciliation was "irrelevant"[41] and did not conduct the requisite fact finding, it is impossible to conclude with absolute certainty that Mr. and Mrs. Sifre did not cohabit with the intent to reconcile.

In wrongly granting summary judgment to Mr. Sifre, the Third Department erred in three ways. First, it improperly relied on the Agreement to serve as the sole basis for granting the divorce, rather than considering any actual separation or reconciliation as required by law.[42] Second, the court's reasoning was borne from an impermissible construction of the parties' Agreement; the Third Department ignored established principles of contract interpretation and construction by distorting the plain meaning of the terms used in the Agreement.[43] Third, by construing the Agreement to prohibit evidence of reconciliation, the court granted the divorce in a manner contrary to public policy, thereby rendering the Agreement void.[44]

It is well established in New York domestic relations case law that, unless the parties actually separate, a divorce based on a separation agreement cannot be granted.[45] In New York, divorce is "a creature" designed solely by the legislature.[46] As such, the only available grounds for divorce that are to be recognized by the courts in New York are those clearly stipulated by statute in DRL section 170: cruel and inhumane treatment, abandonment, confinement in prison, adultery, living apart pursuant to a decree of separation for more than one year, living apart pursuant to a written agreement of separation for more than one year, and irretrievable breakdown

39. *See Sifre II*, 878 N.Y.S.2d 798, 799 (3d Dep't 2009).

40. *See Lippman*, 596 N.Y.S.2d at 242 ("Abandonment may be shown circumstantially, by proof of the parties' resumption of the marital relationship by unequivocal acts." (citing Zambito v. Zambito, 566 N.Y.S.2d 789 (3d Dep't 1991))).

41. *See Sifre II*, 878 N.Y.S.2d at 800.

42. *See* N.Y. Dom. Rel. Law § 170(6) (McKinney 2003); *see also* Christian v. Christian, 42 N.Y.2d 63, 70 (1970) ("[I]t is the physical separation, rather than the writing, which constitutes the actual basis of the cause . . . ."); Buckley v. Buckley, 537 N.Y.S.2d 943 (Sup. Ct. Saratoga County 1989) ("It is . . . the physical separation which constitutes the grounds for divorce under [DRL] § 170(6), not the agreement."); *supra* text accompanying notes 46–57.

43. *See infra* text accompanying notes 58–82.

44. *See infra* text accompanying notes 85–93; Restatement (Second) of Contracts: Promise Detrimental to Marital Relationship § 190(2) (1981) ("A promise that tends unreasonably to encourage divorce or separation is unenforceable on grounds of public policy.").

45. *Buckley*, 537 N.Y.S.2d at 943–44; *see also* Dom. Rel. § 170(6).

46. *Buckley*, 537 N.Y.S.2d at 943 ("Divorce in [New York] is a creature of the legislature, and the grounds upon which it may be granted are purely statutory."); *see also* N.Y Const. art. II; N.Y. Stat. Law § 1 (McKinney 2010) ("A statute is an act of the legislature . . . .").

of the marriage for a period of at least six months.[47] The operative element in DRL section 170(6), the ground on which Mr. Sifre was granted a divorce, is the *actual living apart* of the parties.[48] As stated by the Court of Appeals in *Christian v. Christian*, it is the actual and physical separation of the parties, not the separation agreement, which provides the grounds for a conversion divorce under DRL section 170(6).[49] The separation agreement primarily serves an evidentiary function; it authenticates the separate state of the parties.[50] Thus, proof separate and independent of the agreement is admissible to determine whether the statutory requirement of DRL section 170(6), that the parties actually lived separate and apart, was fulfilled.[51] Without an actual separation, there is no ground for a conversion divorce under the statute.[52]

The Third Department, in granting Mr. Sifre a divorce without a finding that the parties in fact lived separate and apart for the requisite year, fabricated its own ground for divorce in New York State—divorce based solely upon the existence of a separation agreement. The Third Department deemed the issue of whether the parties actually lived separate and apart pursuant to their separation agreement to be "irrelevant" in the face of the language of the Agreement.[53] However, the statute makes clear that three factors must be proved: (1) there is a formal document containing the terms of the separation, (2) that the parties have substantially complied with those terms, and (3) "that the parties have lived apart . . . for the statutorily required period."[54] Only once all of these requirements are met does "the right to a divorce become[] absolute."[55] Here, by preventing Mrs. Sifre from introducing evidence of a possible reconciliation, the Third Department granted Mr. Sifre a divorce based solely upon the existence of the separation agreement—a ground for divorce not permitted by statute.[56] Consequently, the divorce should not have been granted.

Secondly, the Third Department created its own ground for divorce by misinterpreting the Sifres' Agreement. The Agreement at issue stated that none of its provisions "shall be changed or modified, nor shall this Agreement be discharged

47. Dom. Rel. § 170; No Fault Divorce Act, ch. 384, 2010 N.Y. Laws 3890 (codified as amended at N.Y. Dom. Rel. Law § 170(7) (2010)).

48. Christian v. Christian, 42 N.Y.2d 63, 70 (1970).

49. *See id.* ("[I]t is the physical separation, rather than the writing, which constitutes the actual basis of the cause . . . .") (citations omitted)*; see also Buckley*, 537 N.Y.S.2d at 943–44.

50. *Christian*, 42 N.Y.2d at 69, 70; *Buckley*, 537 N.Y.S.2d at 943–44.

51. *See Christia*n, 42 N.Y.2d at 70.

52. *See* Dom. Rel. § 170(6); *Buckley*, 537 N.Y.S.2d at 944.

53. *See Sifre II*, 878 N.Y.S.2d 798, 800 (3d Dep't 2009).

54. P.B. *v. L.B.*, 855 N.Y.S.2d 836, 842 (Sup. Ct. Richmond County 2008) (citing Gleason v. Gleason, 26 N.Y.2d 28, 35 (1970)). *See also* Dom. Rel. § 170(6).

55. *P.B.*, 855 N.Y.S.2d at 842 ("Once there has been a separation for one or more years following the execution and acknowledgement of the prescribed separation agreement . . . the right to a divorce becomes absolute." (citing Tanleff v. Tanleff, N.Y.S.2d 433 (Sup. Ct. N.Y. County (1969))).

56. *See* Dom. Rel. § 170(6).

or *terminated* in whole or in part, except by an instrument in writing."[57] When interpreting the clear, unambiguous language of the Agreement that required a "termination" to be in writing, the Third Department ignored established principles of contract interpretation[58] and inappropriately found that the word "termination" was intended by the Sifres' to be a stand-in for "abandon." As a result, the court concluded that there could be no abandonment of the Agreement unless evinced by a writing.[59]

"A separation agreement is a contract subject to the principles of contract construction and interpretation."[60] Parties to such an agreement, like parties to any other contract, will be conclusively bound by its terms unless it is set aside.[61] If such an agreement is complete and unambiguous, it must be enforced according to the "plain meaning of its terms."[62] Most importantly, a court may not re-write the agreement by distorting or changing the meaning of the terms used, as this would effectively create a new contract for the parties "under the guise of interpreting the writing."[63] For example, a court may not substitute the word "abandon" in contractual agreements between spouses when, in fact, "termination" was the word chosen and used by the parties in the Agreement.

To terminate is "to end."[64] When a contract is terminated, the respective duties of the parties under it are discharged, meaning the parties are no longer required to fulfill their obligations under the agreement, such as the payment of child support or maintenance. Termination of an agreement can only be achieved by the express mutual assent of the parties.[65] When a contract contains a provision that states it may not be terminated unless the cancellation is in writing, the assent to termination by the parties must be contained in writing.[66]

However, the law in New York regarding the effect of reconciliation on separation agreements is clear; the agreement will be *abandoned* and rendered void upon a

57. *See Sifre II*, 878 N.Y.S.2d at 799 (emphasis added).

58. *See infra* text accompanying notes 61–69.

59. *See Sifre II*, 878 N.Y.S.2d at 799 ("The parties therefore required that a termination of the separation agreement—i.e., an abandonment of it—must be in writing.").

60. Graev v. Graev, 11 N.Y.3d 262, 276 (2008) (quoting Matter of Meccico v. Meccico, 76 N.Y.2d 822, 823–24 (1990)); *see also* Clark v. Clark, 827 N.Y.S.2d 159, 160–61 (2d Dep't 2006).

61. *See* Christian v. Christian, 42 N.Y.2d 63, 71 (1970).

62. *Graev*, 11 N.Y.3d at 276 (quoting Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 570 (2002)).

63. Smith v. Smith, 874 N.Y.S.2d 300, 302 (3d Dep't 2009) (citing Vermont Teddy Bear Co. v. 538 Madison Realty Co., 1 N.Y.3d 470, 475 (2004)).

64. Black's Law Dictionary 1609 (9th ed. 2009) ("[T]ermination, *n*. 1. The act of ending something . . . .[T]erminate, *vb*. 1. To put an end to; to bring to an end. 2. To end; to conclude.").

65. *See* M.J. Posner Constr. Co. v. Valley View Dev. Corp., 499 N.Y.S.2d 997, 999 (3d Dep't 1986).

66. *See id.*; *see also* N.Y Gen. Oblig. Law § 15-301(4) (McKinney 2003) ("If a written agreement or other written instrument contains a provision for termination . . . on written notice . . . the requirement that such notice be in writing cannot be waived except by a writing signed by the party . . . .").

showing of evidence of the reconciliation.[67] This is because a reconciliation of the parties does not simply end the agreement and relieve a party of their obligations under it as a termination would; when an agreement is abandoned, it is as if it had never been.[68] An abandoned agreement is rendered invalid, nullified, revoked, vitiated, and voided in its entirety[69]—undoubtedly a much harsher effect than simply bringing any one or all of its provisions to an end. Proof of abandonment is not limited to any one form; it is instead shown circumstantially by inferring from the parties' conduct and the surrounding circumstances.[70] Additionally, abandonment need not be expressed in words, and a contract will generally be considered abandoned when the acts of the parties are inconsistent with the continued existence of the contract.[71] In the case of a separation agreement, a reconciliation of the parties is inconsistent with the continued existence of the agreement, which is intended to evince their separate state; accordingly, reconciliation renders the agreement abandoned.[72]

Further, when reconciliation occurs and the separation of the parties fails, the consideration for the separation agreement also fails.[73] Without valid consideration,

67. *See In re* Estate of Whiteford, 314 N.Y.S.2d 811, 813 (3d Dep't 1970) ("[A] reconciliation . . . renders that agreement void."); *see also* Rosenhaus v. Rosenhaus, 503 N.Y.S.2d 892, 893 (2d Dep't 1986) ("In order to vitiate the separation agreement, there must be 'such a resumption of the marital relation as to indicate an intention to abandon the agreement of separation.'" (quoting Brody v. Brody, 180 N.Y.S. 364 (1st Dep't 1920))).

68. *See In re* Estate of Granchelli, 393 N.Y.S.2d 894, 896–97 (Sup. Ct. Monroe County 1977) ("The legal effect of a reconciliation between a husband and wife after executing a Separation Agreement is to return the parties to the position they were in . . . prior to executing the agreement.").

69. *See* Thompson v. Thompson, 741 N.Y.S.2d 641, 642 (4th Dep't 2002) ("[A] resumption of the marital relationship . . . will invalidate the agreement."); *see also* Sepenoski v. Sepenoski, 591 N.Y.S.2d 63 (2d Dep't 1992); Freeman v. Freeman, 562 N.Y.S.2d 269 (4th Dep't 1990); *Whiteford*, 314 N.Y.S.2d at 813.

70. *In re* Estate of Schanzer, 182 N.Y.S.2d 475 (1st Dep't 1959), *aff'd*, 8 N.Y.2d 972, 972 (1960); *see also* General Motors Accept. Corp. v. Clifton-Fine Cent. Sch. Dist., 85 N.Y.2d 232, 236 (1995); Lippman v. Lippman, 596 N.Y.S.2d 241, 242 (4th Dep't 1993) ("Abandonment may be shown circumstantially . . . [and is] to be resolved by proof of the acts and expressions of the parties . . . ."); *In re* Estate of Wilson, 50 N.Y.2d 59, 66 (1980) ("[C]onduct of the spouses may be understood to manifest an intention to void the agreement in its entirety.").

71. *See* Sub10k, Inc. v. Nat'l Mktg. Servs., Ltd., 819 N.Y.S.2d 775 (2d Dep't 2006).

72. *See In re* Estate of Wilson, 50 N.Y.2d at 66, 67. The court stated:

> Once the partners to a union renounce their incipient state of separation in favor of maintaining their coupled status, absent any indication to the contrary, it is to be assumed that, writing on a clean slate, they intended all vestiges of the agreement that was to serve to memorialize their separation also fall.

Id. at 66.

> The principle that a reconciliation or failure to actually separate constitutes an implied revocation of the agreement in its entirety . . . is founded upon the judicial sensitivity to the reasonable and legal expectations of contracting parties that a separation agreement will continue in effect only while they are actually separated.

Id. at 67 (Gabrielli, J., concurring).

73. *Granchelli*, 393 N.Y.S.2d at 896.

the entire agreement is unenforceable,[74] including any provisions that required its termination, or abandonment, to be in writing. Therefore, whether there has been an abandonment of the agreement is always a question of fact.[75] Even a provision in the Agreement that explicitly stated that no abandonment shall take effect unless agreed to by the Sifres' in writing would not be wholly effective because abandonment is a question of fact and the fact-finder must still determine if the parties intended by their conduct to abandon the agreement.[76] As stated in *In re Estate of Wilson*, reconciliation "constitutes an implied revocation of the agreement in its entirety."[77] To hold as a matter of law, as the Third Department did, that Mr. and Mrs. Sifre could not abandon the Agreement without conforming to the writing requirement of the termination provision was an impermissible construction of the Agreement wholly at odds with existing law.[78]

The Third Department did more than just fabricate a new ground for divorce in New York and over-reach in its interpretation of the Agreement. By interpreting the termination clause at issue in the Agreement to mean that evidence of abandonment in the form of reconciliation between the parties is inadmissible, the court also interpreted the Agreement in a manner that rendered it contrary to public policy.[79] Therefore, the agreement itself is also void.[80]

Perpetuation of the home is essential to modern society and to the welfare of the community.[81] It has thus long been established under New York law that any agreement between husband and wife that seeks to break up the home by promoting the procurement of a divorce is contrary to public policy and is void.[82] Separation agreements are generally an exception to this principle. The law's "tolerant attitude"

74. *See* Thomas D. Crandall & Douglas J. Whaley, Cases, Problems, and Materials on Contracts 132 (4th ed. 2004) ("A contract is defined as a promise the law will enforce . . . . That [promise] is what the law calls *consideration*.").

75. *See* Estate of Rothko v. Reis, 43 N.Y.2d 305, 324 (1977); *see also* Green v. Doniger, 84 N.Y.S.2d 587 (1st Dep't 1948); *Wilson*, 50 N.Y.2d at 66; *In re* Estate of Whiteford, 314 N.Y.S.2d 811, 813 (3d Dep't 1970) ("The existence of such intent [to abandon the separation agreement] is primarily a factual question, to be decided . . . by the trier of fact . . . .").

76. *See* Katz v. Beckman, 756 N.Y.S.2d 258, 259 (2d Dep't 2003).

77. 50 N.Y.2d at 67 (Gabrielli, J., concurring).

78. *See supra* text accompanying notes 62–77.

79. *See infra* text accompanying notes 84–93.

80. *See infra* note 84.

81. *See* Stahl v. Stahl, 221 N.Y.S.2d 931, 939 (Sup. Ct. N.Y. County 1961).

82. 7 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 16:19 (4th ed. 2010); *see also* Reid v. McLeary, 706 N.Y.S.2d 179, 180 (2d Dep't 2000) ("No cause of action exists to enforce an agreement the main objective of which is to dissolve a marriage and to facilitate a divorce."); Niman v. Niman, 181 N.Y.S.2d 260, 263 (Sup. Ct. N.Y. County 1958); P.B. v. L.B., 855 N.Y.S.2d 836, 843 (Sup. Ct. Richmond County 2008) ("The parties to a separation agreement are not entirely free to contract as they choose; their agreement must conform to the laws of New York State."); Restatement (Second) of Contracts § 190(2) (1981) ("A promise that tends unreasonably to encourage divorce or separation is unenforceable on grounds of public policy.").

toward these agreements recognizes that in such cases "public policy is not offended" because the parties have already separated and the agreements are made while they are living apart.[83] However, a provision in a separation agreement that frustrates the potential reconciliation of married persons who are separated is against the state's clearly articulated public policy because it helps them procure such a divorce.[84] Here, the Third Department interpreted the termination clause to prohibit Mrs. Sifre from introducing evidence of reconciliation.[85] By prohibiting the introduction of evidence demonstrating a possible reconciliation, the court made it impossible for the Agreement to be abandoned.[86] Without any apparent avenue for abandoning the Agreement, it will remain valid despite any extrinsic acts or circumstances and will serve as the basis for a conversion divorce regardless of whether the Sifres reconciled. This is not to say that if evidence of reconciliation were introduced, the agreement would automatically be abandoned; a fact-finding must still occur. But if the parties did reconcile and resume marital relations, then any agreement which deems that reconciliation "irrelevant" must be void on public policy grounds because it allows for a divorce where the parties have resumed marital relations.[87] It follows that a clause in a separation agreement interpreted to have the effect of prohibiting evidence of reconciliation is contrary to public policy. As clearly articulated in *In re Estate of Britcher*, "[a] provision in [a] separation agreement providing that the agreement shall not be invalidated without a subsequent writing is itself void" and renders the entire agreement unenforceable.[88]

It is clear that the Third Department erred in granting Mr. Sifre's motion for summary judgment, thereby granting him a conversion divorce from Mrs. Sifre despite her allegations that the parties had reconciled. Reconciliation is a question of fact that must be decided by the fact-finder.[89] By prohibiting the introduction of such evidence, the court in effect fabricated a ground for divorce that is not permitted by New York

83. *Stahl*, 221 N.Y.S.2d at 939. ("The more tolerant attitude extended toward separation agreements made while the parties are living apart, or in prospect of immediate separation, is conditioned upon a recognition that in such cases public policy is not offended because the contract does not bring about the separation nor promote the marital discord.").

84. *See* Christian v. Christian, 42 N.Y.2d 63, 67 (1977). There are cases that have found a clause in the agreement expressly requiring the reconciliation to be in writing not void because the clause does not prevent the introduction of evidence regarding reconciliation, but simply *shifts the burden of proof* onto the non-moving party. *See, e.g.,* Katz v. Beckman, 756 N.Y.S.2d 258 (2d Dep't 2003).

85. *See Sifre II*, 878 N.Y.S.2d 798, 800 (3d Dep't 2009).

86. *See In re* Estate of Schanzer, 182 N.Y.S.2d 475 (1st Dep't 1959), *aff'd*, 8 N.Y.2d 972 (1960); General Motors Accept. Corp. v. Clifton-Fine Cent. Sch. Dist., 85 N.Y.2d 232, 236 (1995); Lippman v. Lippman, 596 N.Y.S.2d 241, 242 (4th Dep't 1993) ("Abandonment may be shown circumstantially . . . [and is] to be resolved by proof of the acts and expressions of the parties . . . ."); *In re* Estate of Wilson, 50 N.Y.2d 59, 66 (1980) ("[C]onduct of the spouses may be understood to manifest an intention to void the agreement in its entirety.").

87. *See supra* notes 84–85.

88. 833 N.Y.S.2d 332, 333 (4th Dep't 2007).

89. *See supra* text accompanying notes 34–37.

statute.[90] The court's reason for prohibiting such evidence to be introduced was the result of an impermissible construction of Mr. and Mrs. Sifre's separation agreement; specifically, interjecting the word and meaning of "abandon" where the parties had deliberately chosen "terminate."[91] The overall effect of these impermissible acts rendered the entire Agreement void, as the court's interpretation allowed Mr. Sifre to procure a divorce from Mrs. Sifre even though she claimed the parties had reconciled and were no longer separated—an act clearly offensive to public policy.[92] Granting Mr. Sifre a divorce under such circumstances was improper.

90. *See supra* text accompanying notes 46–57.

91. *See Sifre II*, 878 N.Y.S.2d at 799, 800*; see also supra* text accompanying notes 58–82.

92. *See supra* text accompanying notes 85–93.