ANALYSIS

Exclusive Use and Occupancy—or Sleep Divorce?

When couples decide to divorce, the first task is to separate their living spaces. For some, this means one partner fully moves out. But for others, especially those with children, this means establishing separate sleeping quarters—a “sleep divorce." This article discusses the issues that can arise when establishing the parameters of such an arrangement.

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By Sandra M. Radna

Counsel who practice in the area of litigated divorce acknowledge that one of the early issues to be decided is which party will have *pendente lite* exclusive use and occupancy of the marital residence. If the parties are unable to come to an agreement concerning that issue, a motion and hearing eventuates, leading to the decision on exclusive use and occupancy being made by the court. If the request for exclusive use and occupancy is not granted, both parties may remain in the marital residence, which is likely emotionally difficult. As discussed below, an arrangement known as the *sleep divorce* may provide helpful temporary relief.

The criteria for deciding which party will have exclusive use and occupancy of the marital residence has evolved over time. Monroe County Supreme Court Judge Dollinger, in the case of *L.M.L v. H.T.N*, 57 Misc.3d 1207(A), 68 N.Y.S.3D 379, (Table), 2017 WL 4507541, provided a thorough chronology of the exclusive use and occupancy evolution. Dollinger related that DRL §234, which gives the court discretion in determining exclusive use and occupancy, was derived from §1164-a of the former Civil Practice Act.

Since 1962, when DRL §234 was first enacted, the determination of exclusive use and occupancy of the marital residence has largely been left to judicial discretion. In 1971, the court in *Scampoli v. Scampoli*, 37 A.D.2d 614 (2d Dept. 1971) held that a party must prove that exclusive use and occupancy was necessary to protect the safety of persons and property. In 1978, the court in the *Matter of Minnus v. Minnus*, 63 A.D.2d 966 (2d Dept. 1978), held that sworn factual allegations of prior incidents of violence and abuse, combined with an order of protection, justified exclusive use and occupancy.

In 1986, the court in *Delli Venneri v. Delli Venneri*, 120 A.D.2d 238 (1st Dept. 1986) held that domestic strife was a recognized standard for an award of temporary exclusive possession. Two years later, in 1988, the court in *Kristiansen v. Kristiansen*, 144 A.D.2d 441 (2d Dept. 1988), held that proof of an acrimonious relationship between the parties, the potential of turmoil if the parties resided together, and proof that one spouse had an alternative residence, sufficed to obtain an order for exclusive use and occupancy. The criteria of an available alternative residence and avoidance of domestic strife have been followed by the courts since 1988. See *Amato v. Amato*, 133 AD3d 695 (2d Dept. 2015) where the court awarded defendant wife exclusive use and occupancy of the marital residence after finding that plaintiff husband established another residence, committed the family offense of harassment, and that his return to the marital residence would cause turmoil and domestic strife.

The thoughtful *L.M.L. v. H.T.N.* decision also addressed studies concerning the impact on the children if both parties remain in the home versus one parent being ordered to vacate. Predictably, the acrimonious relationship replete with "domestic strife" is not viewed by the courts as being in the best interests of the children. In accordance with that perspective, the court in the case of *L.M.L. v. H.T.N.* ordered that the father vacate the marital residence citing a hostile home life which was not in the best interests of the children. The court additionally scheduled a hearing to determine the specifics of the exclusive use and occupancy.

While divorcing people may no longer be the happy, loving couple they once were, not every divorce is acrimonious and rises to the level of domestic strife that would warrant an exclusive use and occupancy order. In fact, courts have repeatedly and consistently held that petty harassments are routinely part and parcel of an action for divorce and would not be evidence of domestic strife. See *L.M.L. v. H.T.N.,* supra; *Dachille v. Dachille*, 43 Misc.3d 241, 249 (Sup. Ct. Monroe County 2014); *Taub v. Taub*, 22 A.D.3d 612 (2d Dept. 2006); *Fleming v. Fleming*, 154 A.D.2d 250 (1st Dept. 1989). When exclusive use and occupancy of the marital residence is denied and both parties remain in the marital residence pending the divorce, the *sleep divorce* arrangement provides welcomed breathing room.

During a marriage, a *sleep divorce* is the choice to sleep in a separate bed or separate room from a spouse or romantic partner. Interestingly, 25% of American couples already sleep in separate beds or rooms. Reasons for sleep divorces during a marriage include snoring, body temperature, restless legs, room temperature, chaotic work schedules and being on "baby duty." Some studies even claim that sleep divorces improve relationships because people who are well rested are generally happier. As recently as April 14, 2021, Lambeth Hochwald wrote an article about *sleep divorce* in the *New York Post* which featured couples who credited *sleep divorce* with saving their respective marriages. However, *sleep divorce* not only helps marriages, it is a useful tool in divorce.

In the acrimonious divorce where an application for exclusive use and occupancy of the marital residence is denied by the court, *sleep divorce* provides respite and privacy. If necessary, a court order can specify the logistics and terms for how the parties will share parenting time with the children as well as share the marital residence, including sleeping arrangements. In situations where the divorce is not acrimonious, sleep divorce, pending the legal divorce, is an option for some of the reasons indicated below:

Children: When one parent vacates the marital residence, without the children, it may be viewed negatively in terms of which parent will ultimately have residential custody of the children. See *T.D.F v. T.F.,* 32 Misc.3d 1205 (A), 2011 WL 2571225, 2011 N.Y. Slip Op. 51188. See also *Matter of Moran v. Cortez,* 85 A.D.3d 795 (2d Dept. 2011) (court reversed Family Court to preserve status quo in best interests of the children). If there is no court order or agreement between the parties concerning custody and parenting time, both parties may opt to stay in the marital residence until they reach an agreement, or a court order is issued. The *sleep divorce* arrangement maintains an appearance of the status-quo for the children with the benefit of both parents in the home. Sleeping apart, if planned and implemented thoughtfully, may be discrete and unremarkable to the children, fostering the reduction of tension between the parties.

Finances: Staying in the marital residence for a period of time, or even until the divorce is final, allows the parties to conserve resources. The financial circumstances of the parties were cited in the matter of *T.D.F. v. T.F.*, 32 Misc.3d 1205(A), 2011 WL 2571225; 2011 N.Y. Slip Op. 51199, when he denied the husband's request for exclusive use and occupancy. Remaining in the marital residence pending the divorce provides the party who is vacating more time to shore up finances for their post-divorce life as well as time to secure a new residence. A gradual transition may also be easier on the children who can be involved in choosing the new home where the vacating parent will live. *Sleep divorce* allows the parents to remain in the same residence for financial purposes while having their own separate space, preferably a separate room with a lock on the door.

Sabotage: There are instances where neither spouse is willing to vacate the marital residence during the pendency of the divorce due to concerns that one spouse will frustrate the sale of the marital residence. Even when there is a court order or agreement between the parties to sell the house, one spouse may be concerned that the other will not fully cooperate in facilitating the sale, may purposely cause the house not to be shown, or have it shown to potential purchasers in poor condition. In the circumstance where one spouse is buying the other out of their equitable share of the marital residence, the vacating spouse may insist on receiving buyout monies prior to vacating to ensure that it is actually paid. There also may be concerns that the marital property contained within the marital residence will be destroyed, sold, or given away. Remaining in the marital residence until its sale or transfer while implementing the *sleep divorce* is a practical solution to these issues.

While the term *sleep divorce* is not commonly used in the courts, it has been implemented by couples going through divorce, at times by court order and other times by agreement, for as long as we can remember. It will likely continue to be utilized as a practical solution, as long as the safety of the parties is not at risk.

Sandra M. Radna *is the owner of Law Offices of Sandra M. Radna, PC., an all woman firm with offices on Long Island and in New York City. She is also the author of the book, "You're Getting Divorced … Now What?" (Ultimate World Publishing, August, 2020).*

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