Publisher page limitations in the second edition restricted the amount of material and number of problems that we could share with student readers. However, the web provides us with the opportunity to provide more expansive explanations of the law to in the chapters and to add more problems for review and reflection. We believe that the additional explanatory material and problems will further enhance a student’s ability to master family law and provide an added intellectual boost when preparing for final family law examinations.

Note: This material is available only to a student who has purchased the first or second edition of the Family Law Examples and Explanations book or a member of the faculty. It may not be copied or reproduced in any form without the express written consent of authors. Students who have purchased the second edition may, of course, download and print out this supplemental material for their individual use.

Chapter 4: Section 4.16(a) Constructive Desertion

Constructive desertion is a doctrine fashioned by the courts to provide relief for a party who justifiably separates from his or her spouse. The essential elements of constructive desertion are that one spouse bring about a separation from the other spouse because of the latter's misconduct. The misconduct that will support a finding of constructive desertion consists of inter alia, 'cruelty arising from physical abuse or other acts which affect and impair the health and make life together intolerable. Edwards v. Edwards, 356 A.2d 633 (D.C. 1976). Justification for leaving a spouse is a traditional defense to the charge of desertion. See, e. g., Underwood v. Underwood, 50 App.D.C. 323, 271 F. 553 (1921). Under the doctrine of constructive desertion, the conduct which justified the separation is labeled as desertion, thus enabling the innocent party to sue for divorce.

EXAMPLE: Assume that P (wife) and D (husband) were married for ten years and had three children. The husband, who previously had physically abused the wife on several occasions, was arrested after having threatened her and the children with a loaded shotgun. As a result of this and a prior similar incident, the wife brought charges against him. He entered a plea of guilty to two counts of assault and battery, and received a 60-day suspended sentence on each count and was placed on probation for one year on the condition that he avoid contact with his wife concerning marital problems. Since that time, the parties have lived apart with the wife and children having remained in the family home. P commenced a divorce action stating as her only ground constructive desertion by the husband. The husband denied that he had deserted the wife directly or indirectly. The trial court ruled that the
elements of constructive desertion were not present because the wife had never left the marital abode. Wife has appealed. Most likely, how will an appellate court rule on the wife’s appeal?

EXPLANATION: The appellate court will most likely rule that the wife’s divorce action may proceed based on constructive desertion. It is true that desertion contemplates a voluntary separation of one party from the other, without justification, an intention not to return, and the absence of consent or connivance of the other party. For the desertion to be ‘constructive’ in character, one spouse must usually show misconduct by the other spouse forcing the former to abandon the marital abode. If such misconduct is shown the spouse remaining in the marital abode is treated, in the eyes of the law, as the deserter.

But this is an unusual situation. Here, the court will most likely rule that the trial court erred when determining that departure from the marital abode is an essential element of constructive desertion. It should reason that the “leaving the marital abode” language is an attempt to illustrate the degree of misconduct necessary to support constructive desertion.

Here, the husband engaged in misconduct which forced the wife to terminate the marital relationship. Because of his acts of cruelty and physical abuse, she had two practical alternatives: she could either leave the family home with the children or enlist the aid of the police and the courts in protecting herself and the children from his assaults. Had she terminated the marriage by leaving the marital abode, there is no question but that she would have been entitled to a divorce on the ground of constructive desertion. However, there is no reason why she should be denied a divorce on that ground simply because she did not flee, but instead chose to file charges with the police with the intent of having the husband arrested and permanently restrained from living with her. Edwards v. Edwards, 356 A.2d 633 (D.C. 1976); Lynch v. Lynch, 63 So.2d 657 (Miss. 1953) (There is a constructive desertion, entitling the innocent party to a divorce for desertion, where an existing cohabitation is brought to an end by the misconduct of one of the spouses. Where one spouse compels the other to leave the marital home, or refuses to permit the other to return to it, the other spouse is entitled at the expiration of the statutory period to a divorce upon the ground of desertion. The spouse who by his or her act intentionally brings the cohabitation to an end is guilty of desertion, regardless of which party leaves the home).