LETTER TO THE EDITOR

Repealing Fault Grounds for Divorce Would Have Little Effect on NY Matrimonial Law

Joel R. Brandes responds to two recent columns that discuss repealing the fault grounds for divorce, arguing that removing them would have little effect on the practice of matrimonial law in New York.

May 16, 2024 at 10:32 AM

By Joel R. Brandes | May 16, 2024 at 10:32 AM

[Editor's note: This letter was submitted in response to the columns "Abolishing the 'Crime' of Adultery: Should Related Civil Fault Statutes Also Be Discarded?", which the New York Law Journal published on April 23, 2024, and "Adultery, Fault Divorce, and Morals: A Complex Cocktail", which the New York Law Journal published on May 1, 2024.]

In an article titled "Abolishing the 'Crime' of Adultery: Should Related Civil Fault Statutes Also Be Discarded?", which the New York Law Journal published on April 23, 2024, the authors wrote that "…fault divorce is as dead as the crime of adultery and it is time for the Legislature to do away with the fault grounds for divorce and wipe them out of the statutory scheme."

An article titled "Adultery, Fault Divorce, and Morals: A Complex Cocktail", which the New York Law Journal published on May 1, 2024, also advocated for abolishing the fault grounds because the "…system that allows for even the remote possibility of a fault-based divorce claim being used as a weapon that can, in turn, wreak havoc on a family, not to mention unnecessarily escalate legal fees. "

Notably, neither author advocates for the repeal of the fault grounds for separation and annulment.

It appears to this commentator that repealing the fault grounds for divorce (cruel and inhuman treatment, abandonment for one year; three years imprisonment, and adultery) will have very little, if any, effect upon the practice of matrimonial law in New York. Egregious misconduct could still be considered by the court in making an equitable distribution of marital property under factor (o) for property distribution.

In *Howard S. v. Lillian S.*, 14 NY3d 431, 902 N.Y.S.2d 17 (Apr. 29, 2010) the Court of Appeals observed that marital fault is not a "just and proper" factor for consideration under factor (o), "[e]xcept in egregious cases which shock the conscience of the court." It held that it should be only a truly exceptional situation, due to outrageous or conscience-shocking conduct on the part of one spouse, that will require the court to consider whether to adjust the equitable distribution of the assets (citing, inter alia, *Havell v. Islam*, 301 AD2d 339 [1st Dept 2002] [vicious assault of spouse in presence of children]). It noted that courts have agreed that adultery, on its own, does not ordinarily suffice as egregious misconduct.

Under our present system, Domestic Relations Law §170 (7) provides that a no-fault judgment of divorce may be obtained where one spouse states under oath that the relationship between husband and wife is irretrievably broken. All four Appellate Divisions have held that the opposing spouse in a no-fault divorce action is not entitled to litigate the other spouse's sworn statement that the relationship has broken down irretrievably for a period of at least six months (see *Trbovich v. Trbovich*, 122 A.D.3d 1381, 997 N.Y.S.2d 855 (4th Dept,2014); *Johnston v. Johnston*, 156 A.D.3d 1181, 68 N.Y.S.3d 178 (3d Dept.,2017); *Motta v. Motta*,145 A.D.3d 561, 43 N.Y.S.3d 336 (1st Dept.,2016); *Hoffer–Adou v. Adou*, 121 A.D.3d 618 997 N.Y.S.2d 7 (1st Dept.,2014); *D'Ambra v D'Ambra*, 2024 N.Y. Slip Op. 01291, 2024 WL 1081237, at *1 (2 Dept., 2024)).

No matter what ground is the basis for the divorce (fault grounds or no-fault grounds), no judgment of divorce may be granted upon a finding of irretrievable breakdown unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce. Abolishing the fault grounds will not eliminate the requirement that all of the custody and economic issues between the parties must be resolved (by trial or settlement) before a divorce can be granted.

Assuming, for purposes of argument, that the fault grounds for divorce were repealed, fault such as domestic violence would still be a factor for the court to consider under factor (o) for property distribution and in determining the amount and duration of maintenance under factor (g) for maintenance.

On Aug. 13, 2010, after the decision in *Howard S. v Lillian S*, supra, Domestic Relations Law §236 (B)(6)(a)(7) was amended to add, as factor (g) for determining the amount and duration of maintenance, "acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in Section 459-a of the social services law" (Laws of 2010, Ch. 371, effective 60 days after it shall become a law). This factor defines the "acts" by reference to Social Services Law §459-a and makes domestic violence and what would be considered acts of cruel and inhuman treatment a relevant consideration for maintenance awards.

In addition, the court may, but is not required to determine the duration of post-divorce maintenance in accordance with an advisory schedule. In determining the duration of post-divorce maintenance, whether or not the court utilizes the advisory schedule, it must consider the factors listed in Domestic Relations Law §236(B)(6)(e)(1) and must set forth, in a written decision or on the record, the factors it considered. (Domestic Relations Law §236(B)(6)(f)(2)).

The factors in Domestic Relations Law §236(B)(6)(e)(1) include:"(g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social Services law."

To ascertain the acts of domestic violence referred to in factor (g), counsel must refer to Social Services Law &s;§459-a, which does not specifically define an "act or acts of domestic violence." Instead, subdivision 1 defines a victim of domestic violence" as "a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, or strangulation; which act or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person's child."

On April 3, 2020, Domestic Relations Law §236 (B)(5)(d) factor 14 was added to the property distribution factors (Laws of 2020, Ch 55, §1). This factor is: "whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and

the nature, extent, duration, and impact of such act or acts." To ascertain the acts of domestic violence referred to in factor (14) counsel must again refer to Social Services Law &s;§459-a referred to above.

Social Services Law &s;§459-a includes, but is not limited to, conduct that would constitute the cruel and inhuman treatment ground for divorce in Domestic Relations Law § 170(1).

If the fault grounds for divorce were repealed, marital fault (as opposed to economic fault) would still be a factor for consideration in other dissolution actions too—not just divorce actions. Domestic Relations Law §236 (B)(5), the property distribution section, provides that (except where there is an agreement under Domestic Relations Law § 236 (B)(3)) where all or part of the relief granted *is divorce, or the dissolution, annulment or declaration of the nullity of a marriage*, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, the court must determine the respective rights of the parties in their separate or marital property, and provide for its disposition in the final judgment.

Domestic Relations Law § 236 (B)(6)(a), the maintenance provisions, apply (except where there is an agreement providing for maintenance), in any matrimonial action. Matrimonial actions are defined in Domestic Relations Law § 236 (B) (2) as *actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage,* for a declaration of the validity or nullity of a foreign judgment of divorce, for a declaration of the validity or nullity of a marriage, and to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce (emphasis added).

The April 23, 2024, article states that the fault grounds were left in the Domestic Relations Law §170 at the time that the irretrievable breakdown ground was added in 2010 because of concern that "certain religious groups" would oppose no-fault divorce. The Bill Jacket indicates that the New York State Catholic Conference opposed the legislation. (New York Bill Jacket, 2010 S.B. 3890, Ch. 384). I am not aware of any evidence to suggest that those religious groups and spouses, whose beliefs do not permit divorce, have changed their position since then.

Moreover, it is significant that since the decision in *Howard S. v Lillian S.*, supra, the Legislature added the new "fault" factors for consideration in determining property distribution and maintenance.

In *Agulnick v. Agulnick*, 191 A.D.3d 12, 18 (2d Dept., 2020), where the cause of action based on adultery was dismissed on motion, the Appellate Division observed that many grounds for divorce, including adultery, have assumed less practical significance to matrimonial litigants, who now place greater focus on matters of equitable distribution, child custody, and parental access, child support, child-related add-on expenses and durational or lifetime maintenance.

In *D'Ambra v. D'Ambra*, supra, decided a few months ago, the Appellate Division recognized that the "…ease and availability of no-fault divorce…has had the practical effect of displacing other grounds that may otherwise have been asserted and litigated in many actions…"

As best as I can tell, the last reported decision after trial involving the adultery ground was *Johnston v. Johnston*, 156 A.D.3d 1181, 68 N.Y.S.3d 178 (3d Dept., 2017) discussed above. The last reported decision involving cruel and inhuman treatment was *Bruzzese v. Bruzzese*, 152 A.D.3d 563, 61 N.Y.S.3d 18 (2d Dept., 2017), where prior to trial, the parties stipulated to a divorce on the ground of an irretrievable breakdown. After a nonjury trial, the Supreme Court, inter alia, awarded the defendant a divorce on the grounds of cruel and inhuman treatment. The Appellate Division reversed holding that the court should have awarded the defendant a divorce on the irretrievable breakdown ground.

A spouse can head off fault divorce litigation by interposing a counterclaim for a divorce on irretrievable breakdown grounds. This is exactly what happened in *Johnson v. Johnson*, 156 A.D.3d 118, 168 N.Y.S.3d 178 *(3d Dept., 2017). There, the* wife commenced an action seeking, among other things, a judgment of separation from the husband. The husband answered and asserted a counterclaim for divorce on the ground of irretrievable breakdown or abandonment, and, in reply, the wife asserted a counterclaim for divorce on the ground of adultery or constructive abandonment.

Following the trial, the Supreme Court granted the husband a judgment of divorce against the wife on the ground that their marriage had broken down irretrievably for a period of at least six months. The Appellate Division affirmed, holding that having determined that the husband established irretrievable breakdown pursuant to Domestic Relations Law §170(7), the Supreme Court was under no obligation to grant the wife a judgment of divorce on the ground of adultery or constructive abandonment.

Repealing the fault grounds for divorce will not lessen the antagonism between spouses who litigate all of the other issues, nor make it easier to obtain a divorce where there are economic and custody issues that have not been resolved. It will not reduce or eliminate domestic violence, which has been added to Domestic Relations Law §236, as factors for consideration in the determination of property distribution and maintenance, since the decision in Howard S. v Lillian S., supra.

While the repeal of the fault grounds might eliminate fault causes of action interposed by the few spouses who want their “pound of flesh,” it would do little to reduce the number of contested divorce cases where the economic and custody issues are not resolved by settlement.

Joel R. Brandes *practices matrimonial law in New York City concentrating on appeals. He is the author of the twelve-volume treatise, Law and the Family New York, 2022- 2023 Edition, and Law and the Family New York Forms, 2022 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He has been recognized by the New York Appellate Division as a “noted authority and expert on New York family law and divorce.” He can be reached at joel@nysdivorce.com or his website at www.nysdivorce.com.*