

Published in *The Nassau Lawyer*, October 2005

THE ECONOMICS OF MARITAL FAULT: PART I

By Nancy E. Gianakos

“No Fault” Divorce renewed with vigor this year as proposed legislation was presented to New York legislators to amend Section 170 of the New York Domestic Relations Law (DRL §170). For those practitioners unfamiliar with this statute, it sets New York apart from the other 49 states who recognize some form of “No Fault” divorce; California being the first of our sister states to enact no fault divorce legislation when then Governor Ronald Reagan signed the Family Law Act of 1969.

As a condition precedent to the division of assets of married parties, a spouse must first prove grounds. The initial hurdle of a grounds trial is costly and time consuming, win or lose. As noted by Justice Jeffrey D. Lebowitz in a recent decision, according to the New York State Bar Association’s Family Law Section survey of matrimonial practitioners across the state, a party incurs additional counsel fees of \$2,000 to \$15,000 to resolve fault as a component of the matrimonial action.¹

New York Courts will grant a divorce based upon one of six statutory grounds set forth in DRL §170, the first four of which are fault based:

- Adultery;
- Cruel and inhuman treatment;
- Abandonment for more than one year;
- Prison confinement for a period of three or more consecutive years;
- Living separate and apart pursuant to a decree or judgment of separation for more than one year; or
- Living separate and apart pursuant to a written agreement, properly acknowledged, for a period of at least one year.

¹See *S.C v A.C.*, 4 Misc3d 1014(A) 2004, N.Y.Slip Op.50884(U), June 17, 2004 (Queens County) Justice Lebowitz denies wife of 30 years a divorce on grounds of cruel and inhuman treatment.; also, *See Ozkan v Ozkan*, Suffolk County Supreme Court, August 2004, after several days of trial, Justice Kent denied plaintiff’s divorce based upon grounds of cruel and inhuman treatment and adultery by the defendant during the course of their 18 year marriage.

Last year, two proposed alternate versions of “No Fault Divorce” legislation amending Domestic Relations Law Section 170 circulated the legislature for a sponsor:

Version 1

1. *The husband and wife have lived separate and apart for a period of twelve or more consecutive months immediately prior to the commencement of the action;*
2. *The husband and wife have consented under oath to the granting of a judgment of divorce;*
3. *The marriage has broken down irretrievably, provided that both parties have so stated under oath or one of the parties has so stated and the other has not denied it.”*

and

Alternate Version 1

Repeating Items 1-3 of Version 1 and the following:

“If one of the parties has denied under oath that the marriage is irretrievably broken, the Court shall consider all relevant factors, and shall make a finding as to whether the marriage is irretrievably broken.”

The provisions of the alternate versions evolved into a final text contained in two identical bills for consideration by the New York State Senate and Assembly this year. In April 2005, both the Senate and the Assembly referred the following identical bill to their respective Judiciary Committee:

Section 1. Section 170 of the Domestic Relations Law is amended by adding a new subdivision 7 to read as follows:

(7)(A) Irreconcilable differences which have caused the irremediable breakdown of the marriage, irrespective of the fault of either party, and further attempts at reconciliation are impractical or futile and not in the best interest of the parties or family. Irrespective of this subdivision, allegations or evidence of specific acts or misconduct shall be proper and admissible as a factor when determining maintenance and property division.

(B) *If both of the parties by petition or otherwise state under oath or affirmation irreconcilable differences within the marriage or if one of the parties so states and the other does not deny such statement, the court shall make a finding as to whether or not the marriage is irremediably broken. Irreconcilable differences are those grounds which are determined by the court which have caused the irremediable breakdown of the marriage and further attempts at reconciliation are impractical or futile and not in the best interest of the parties or family.*

1. *If one of the parties has denied under oath or affirmation that the marriage is irremediably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall: (I) make a finding whether the marriage is irremediably broken; or (II) continue the matter for further hearing and may suggest to the parties that they seek counseling, the court shall then make a finding whether the marriage is irremediably broken.*
2. *If one of the parties states that the marriage is irremediably broken and the other has not denied such statement, there is a presumption that the marriage is irremediably broken, unless controverted by the evidence, the court shall, after a hearing, make a finding that the marriage is irremediably broken. The court, in its discretion, may waive a hearing on an uncontested divorce complaint and admit proof by affidavit.*

No legislation was adopted by the Senate or the Assembly with regard to these bills.

If these bills are approved in the future, as proposed, then by legislative deference, the Court will establish on a case-by-case basis the “relevant factors” to determine whether the marriage is “irremediably broken” and the matrimonial practitioner will embark anew in uncharted waters. *Query:* Does the proposed legislation simply replace the necessity of fault grounds to obtain a divorce with the politically correct “irreconcilable differences” grounds in order to obtain a divorce?

Unlike the present law, many courts will order parties to an immediate trial if grounds are not resolved before the economic issues of the marital relationship are addressed. This is the bargaining chip that no-fault advocates want eliminated, arguably

to the disadvantage of the “non-errant, non-moneyed” spouse. The defendant spouse, by contesting grounds under the present statutory scheme, and the plaintiff spouse, under the threat of an impending grounds trial (the loss of which results in no division of assets), drives settlement in many instances in the defendant’s favor. The impact of removing fault at the initial phase of a matrimonial action overcomes a monumental barrier to obtaining a divorce in New York for the errant spouse.

However, like both versions of last year’s amendment to DRL §170, the recent bills do not make eradication of marital fault a *fait accompli*. No Fault advocates were unsuccessful in their efforts to unconditionally bifurcate the termination of the marriage, i.e., severing the marital bond (and thereby permitting a party to remarry) and dividing the marital assets.

Compare the language of the prior proposed legislation with the language of the present bills:

Prior Version

“Unless the parties shall agree or upon good cause shown, the Court shall not enter a judgment of divorce under this Section 170 unless and until the economic issues of the parties’ marriage, including but not limited to the equitable distribution of marital property, the payment or waiver of spousal and child support and counsel fees and expenses as otherwise defined in this article have been resolved and incorporated in the final judgment of divorce.”

2005 Proposed Senate and Assembly Bills

3. Appeal from the decree of dissolution that does not challenge the finding that the marriage is irremediably broken does not delay the finality of that provision of the decree which dissolved the marriage. A party may remarry before the time for appeal has run if it is not contested that the marriage is irremediably broken or if a stipulation that the marriage is irremediably broken is incorporated in the decree for dissolution.

By permitting a party to appeal the trial court's determination that an "irremediable breakdown" of the marriage has occurred, the decree provisions regarding equitable distribution are held in abeyance. The bond of economics and marital fault remain joined. In effect, a disgruntled spouse is invited to a second bite of the marital apple with an implicit *de novo* review of the factual finding of the trial court of an "irremediable breakdown" of the marriage.

Even were marital fault eliminated as grounds for divorce, an errant spouse must be cognizant of the less burdensome hurdles posited by New York Domestic Relations Law Section 236B (5) and (6). These particular provisions of the statute pertain to the disposition of the marital assets and award of spousal support. Therein lie catchall factors that permit marital fault to be of some significance in the Court's determination of the allocation of assets and award of maintenance, albeit it in a limited role as interpreted by the Appellate Division of the Second Department and to be addressed in Part II of this article.

The law in response to social mores has evolved from a morality driven approach to divorce into an economic balancing act of "how to," proverbially, like Solomon, "divide" the marital assets.

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