

Published in *The Nassau Lawyer*, February 2006

THE ECONOMICS OF MARITAL FAULT: PART II

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Part I of this article which appeared in the October, 2005 issue of the Nassau Lawyer discussed the status of the law and the role of marital fault in obtaining a judgment of divorce in New York, a “fault” state, which unlike the other forty-nine states, does not recognize some form of “No Fault” divorce. Proposed legislation to reform New York’s Domestic Relations Law to include as grounds for divorce a “no fault” provision died in the respective judiciary committees of the 2005 legislature.

Even were marital fault eliminated as grounds for divorce as was set forth in the proposed legislation, an errant spouse must be cognizant of the less burdensome hurdles posited by New York Domestic Relations Law section 236(B) (5) and (6). These particular provisions of the statute pertain to the disposition of marital assets and the award of spousal support once the prerequisite grounds for divorce have been established. Therein are set forth various factors to be considered by a court when making an award of support or property distribution including a catchall factor encompassing marital fault.

Interestingly enough, even in the forty-nine “No Fault” states where the role of marital fault has been diminished and/or eliminated as grounds for divorce, the courts retain discretion in considering marital fault when awarding alimony, spousal support, property division, child custody, child support, attorneys’ fees and costs unless such consideration is specifically prohibited by statute.¹ In some of those states that have enacted “No Fault” divorce statutes where grounds for divorce are predicated upon the

¹ See 86 A.L.R.3rd 1116 section 2(a)

“irreconcilable differences of the parties” or the “irretrievable breakdown of the marriage,” courts are engaged in a two-step analysis of:

- 1) statutory construction; and
- 2) the consideration of marital fault as a factor, similar to New York Courts.

This occurs when the legislature, although creating a “no fault” provision for grounds, fails to enact a corresponding provision as to fault in awarding spousal support or property division. Jurisdictions vary in their statutory interpretation; some interpret silence as judicial discretion to consider marital fault and others as a judicial prohibition to permit marital fault a role in support and/or property distribution awards.

The enactment of the New York “Equitable Distribution Laws” in June 1980 heralded the recognition of marriage as an economic partnership and secularized what historically had been viewed as a religious and/or social institution. Early drafts of the equitable distribution legislation explicitly ruled out marital fault as a factor for the court’s consideration in property distribution; however, the final draft and the law as it currently exists today resolved a legislative dispute over complete extrication of marital fault from judicial consideration by creating a catchall factor in both the maintenance and property distribution provisions of the statute that could encompass marital fault, leaving it to the discretion of each Department in this state to decide the applicability of marital fault in a particular action.

EQUITABLE DISTRIBUTION

Domestic Relations Law Section 236(B) 5(d) sets forth thirteen factors that the court shall consider in determining an equitable distribution of property in a matrimonial action where there is no agreement of the parties regarding the disposition of their property. It is the thirteenth factor that is “any other factor which the court shall find to be

just and proper” whereby the court is given discretion to consider marital fault in its findings. In discussing marital fault in the context of a matrimonial action wherein property distribution is at issue, the courts have shifted their focus from the moral/ethical misconduct of the parties to misconduct effectuating economic hardship and a wasting of marital assets.

The case setting forth the standard for consideration of marital fault in establishing an equitable distribution award is the Court of Appeals decision in the infamous O’Brien case decided in 1985.² Citing the decision of the Appellate Division, Second Department in *Blickstein v Blickstein*, 99A.D.2d 287, 472 N.Y.S.2d 110 (2nd Dept. 1984), the Court noted that “Except in egregious cases which shock the conscience of the court, . . . it (marital fault) is not a ‘just and proper’ factor for consideration in the equitable distribution of marital property . . .”.

A review of the case law demonstrates that the type of conduct that may shock the conscience of matrimonial litigants, fails to rise to the legal level sufficient to shock the conscience of the court, conduct such as:

- adultery,
- an extramarital homosexual act,
- excessive drinking,
- verbal harassment and physical abuse, and
- threatening to kill a spouse.³

The theory is that marriage is an economic partnership and upon its dissolution, like any partnership, each of the partners is entitled to a fair share of the partnership

² *O’Brien v O’Brien*, 66 N.Y.2d 576, 498 N.Y.S.2d 743, (1985) , infamous not for the proposition set forth in this article but for the Court’s declaration that a license (to practice medicine) separate and apart from a professional practice is a marital asset subject to equitable distribution .

³ *Nolan v Nolan*, 107 A.D. 2d 190, 486 N.Y.S.2d 415(3rd Dept.1985); *Pacifico v Pacifico* 101 A.D.2d 709, 475 N.Y.S.2d 952 (4th Dept.1984). *M.V.R. v T.M.T.*, 115 Misc.2d, 454 N.Y.S.2d 779, N.Y. sup., (1982)

assets and in apportioning partnership assets, the cause of the dissolution generally would not be relevant. Accordingly, the Courts have reasoned that marital fault is inconsistent with this view. In addition, as the Court stated in the O'Brien decision,"... fault will usually be difficult to assign and ... introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues," and so marital fault in determining equitable distribution awards should be the exception and not the rule.⁴ Prior to the decision in the Blickstein case, *supra*, a Suffolk County Court found marital fault to be a just and proper consideration in fashioning its equitable distribution award where the husband was convicted of attempted murder for attacking his wife with a knife.⁵ Contrast this with *Pagan v Pagan*, 138 A.D.2d 685, 526 N.Y.S.2d 498, (1988), a post-Blickstein decision, where an unintentional shooting of one's spouse did not rise to the level of a conscience shocking marital fault.

The New York courts have not completely abandoned the arena of marital fault as the foregoing might suggest but has turned its analysis to findings of economic misconduct which fall under the purview of a more specific statutory factor, factor number nine, "the wasteful dissipation of marital property by either party." Under that analysis, marital fault may be considered in the evaluation of economic misconduct such as in the case where the marital estate was apportioned by the Court to compensate wife for husband's secreting of assets and squandering marital monies on luxuries in an adulterous relationship.⁶ The Court has also considered a party's lack of candor and veracity in setting forth finances, as well as the manipulation of the marital lifestyle to

⁴ See O'Brien, *supra*.

⁵ *Wenzel v Wenzel*, 122 Misc.2d 1001, 472 N.Y.S.2d 830 (Sup.Ct. Suffolk County 1984)

⁶ *Maharan v Maharan*, 245 A.D.2d 94, 666 N.Y.S.2d 129 (1st Dept. 1997)

frustrate the court's efforts to make a fair determination as marital misconduct sufficient to effect its equitable distribution award.⁷

In these instances, the Courts have adjusted the percentages for distribution of the marital property between the parties so as not only to do equity in the particular case, but also for public policy purposes to make the percentage significant so as to deter this type of conduct in litigants or those contemplating divorce.

MAINTENANCE

Until 1967, adultery was the only grounds for divorce in New York. A spouse found to be an adulteress would lose her right to alimony; and in those days, since most of the other property would be titled to her husband (until 1980, property rights followed legal title), she would exit the marriage without any award – support or assets. With the enactment of Domestic Relations Law Section 236, the “Equitable Distribution Laws,” came the recognition of the marriage as an economic partnership and spousal support (maintenance) as gender neutral.

Generally, the courts will only recognize marital fault which occurs prior to the commencement of an action; and so, post-commencement sexual relations by a spouse with a third party although adulterous have been found, at least in the Second Department, not to warrant consideration under the catchall eleventh factor .⁸

There is no consistency among the departments regarding marital fault when awarding maintenance. Although the Court of Appeals in the O'Brien case (*supra*) laid the groundwork for the various departments to consider marital fault as a factor when

⁷ *Griffin v Griffin*, 115 A.D.2d 587, 496 N.Y.S.2d 247 (2nd Dept. 1985); *Barnes v Barnes*, 106 A.D.2d 535, 483 N.Y.S.2d 358 (2nd Dept. 1984)

⁸ See *Melnick v Melnick*, 118 A.D. 32d 628, 496 N.Y.S.2d 287 (2nd Dept. 1985)

awarding property distributions, the decision is silent on the role of marital fault in determining the amount and duration of maintenance. Like the courts in “No Fault” jurisdictions that due to statutory silence use a two-prong test to determine the role of fault, some courts in this state, relying on the silence of O’Brien, have rejected marital fault as a factor in maintenance determinations. As a result, the First Department has held that marital fault *is not* a consideration for a maintenance award whereas the Second Department gives it consideration.⁹ However, where evidence of need for spousal support is established, the marital fault of the spouse though a factor for consideration in the Second Department, will supersede marital fault as a factor for consideration and not deter the Court from an award of maintenance to the errant spouse.¹⁰

CHILD SUPPORT

Though legislative vacillation pervaded the consideration of marital fault in maintenance and property distribution awards, the legislature was unequivocal regarding child support awards.

Domestic Relations Law section 236 (B)(7)(a) clearly states....

“The court shall not consider the misconduct of either party but shall make its award for child support pursuant to section two hundred forty of this article.” (the Child Support Standards Act)

THE FUTURE

Presumably, “no fault” advocates will renew their efforts in 2006 to secure a grounds provision for divorce that is not predicated upon the fault of either party. However, in considering such legislation, the New York legislature should avoid the piecemeal approach in reformation of the Domestic Relations Law and spare the bench,

⁹ *Wilson v Wilson*, 101 A.D.2d 536, 476 N.Y.S.2d 120 (1st Dept, 1986)

¹⁰ *Maloney v Maloney*, 114 A.D.2d 440, 494 N.Y.S.2d 356(2d Dept,1985)

the bar and litigants onerous litigation as in our sister states whose legislatures failed to address marital fault and its role in all contexts: grounds, support and property distribution.

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