The Resurrection of Marital Fault

By Joel R. Brandes

The Equitable Distribution Law of 1980 ("EDL") reflected a compromise. At the time a wife who was guilty of grounds for divorce was denied alimony and exclusive occupancy of the marital residence, and property was distributed based upon who had the title to it. All but a few persons were convinced that the then existing law was unjust, and inconsistent with the reasonable expectations of marital partners.

The keystone for equitable distribution was the premise that marriage is an economic as well as a social and private relationship that should be regarded as a joint undertaking or partnership with its own internal assignments of labor. It was the *product* of individual and partnership efforts that would serve as the **"**pot**"** for property distribution purposes upon divorce. [1]

As part of the 1980 compromise, being guilty of fault grounds for divorce was eliminated as a bar to maintenance, and a new definition of **"**maintenance**"**[1] was adopted which authorized the court to limit its duration. Maintenance[2] was designed to supplement property division when there was reasonable need and ability to pay. The amount and duration of maintenance depended upon the courts' consideration of 10 statutory maintenance factors that did not involve marital fault. One factor of the 10 factors in the original statute that the court had to consider was **"**the standard of living established during the marriage where practical and relevant.**"**[3]

The drafters of the Equitable Distribution Law initially insisted that marital fault was irrelevant to property distribution and maintenance. Strong and substantial legislative opposition to that recommended reform resulted in a compromise which rejected any inclusion or exclusion of marital fault in the statutory guidelines or factors. Instead, it was left it up to the courts, in the concluding factor which permits the court to consider "any other factor which the court shall expressly find to be just and proper", to determine what, if any, impact marital fault had on maintenance and the equitable distribution of marital property.[4]

The process of making an equitable distribution contemplated the separation of

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[1] See Foster, Freed & Brandes, Law and the Family New York, 2d Edition, 1986, Volume 1, Section 1:1 and Volume 3, Section 7:1, et seq.

[1] Former DRL **§**236(B) (1)(a)

[2] DRL **§**236(B)(6)(a).

[3] DRL **§**236(B)(6)(a) factor (6).

[4] DRL §236(B)(5) and (B)(6).

marital property and separate property as defined in Domestic Relations Law §236(B)(1), the valuation of the marital property, and then its allocation pursuant to the factors enumerated in Domestic Relations Law §236 (B)(5)(d)(1-10). The original enactment [5] listed 10 economic factors for the court to consider in determining an equitable disposition of property. Among them were the income and property of each party; duration of the marriage; any award of maintenance; contributions to the acquisition of marital property by the party not having title; and contributions and services as a spouse, parent, wage earner and homemaker.

In 1986 [6] the maintenance provisions were substantially modified to add income tax consequences as a factor, and to introduce two economic misconduct factors into the maintenance equation: the wasteful dissipation of assets by either spouse; and any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration.[7] The amendment substituted "standard of living of the parties established during the marriage," in the definition of maintenance, for "reasonable needs" [8] elevating the objective of the maintenance award to the standard of living established during the marriage." This amendment undermined the basic structure of the Equitable Distribution Law and its delicate equilibrium.

The 1984 decision of the Second Department in Blickstein v Blickstein[9] was a key decision shaping policy for the interpretation of the Equitable Distribution Law. Blickstein made ordinary marital fault irrelevant with regard to property distribution. The Appellate Division held that marital fault should not be considered in determining equitable distribution unless it is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship -- misconduct that 'shocks the conscience' of the court thereby compelling it to invoke its equitable power to do justice between the parties". The Court pointed out that conduct is conscience-shocking, evil, or outrageous only when the act in question grievously injures some highly valued social principle, such as human life.

Notably, a year later, the Third Department held that marital fault was relevant in fixing the "amount" of maintenance awards.[10]

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[5] Laws of 1980, Ch. 281, effective July 19, 1980.

[6] Laws of 1986, Ch. 884, effective Aug 2, 1986,

[7] Id.

[8] DRL §236(B)(6)(a)

[9] 99 A.D.2d 287, 472 N.Y.S.2d 110 (2d Dep't 1984).

[10] See Stevens v. Stevens, 107 A.D.2d 987, 484 N.Y.S.2d 708 (3d Dep't 1985) and Nolan v. Nolan, 107 A.D.2d 190, 486 N.Y.S.2d 415 (3d Dep't 1985).

The Blickstein rule was adopted by the Court of Appeals in O'Brien v O'Brien,[11] where the Court explained that "marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate…"

In Havell v. Islam,[12] the Appellate Division, First Department held that only egregious misconduct should be considered by the court in making an equitable distribution. The parties were married for 21 years and had six children. Seven days after plaintiff told defendant that she would seek a divorce he entered her bedroom at 5 a.m. and when she awoke, he pinned her to the bed and began beating her viciously on the head, face, neck and hands with a barbell. Plaintiff suffered, among other things, multiple contusions, a broken nose and jaw, broken teeth, multiple lacerations, and neurological damage. Defendant was indicted for attempted murder, pleaded guilty to assault in the first degree and was sentenced subsequently to 8-1/4 years in prison. The Court affirmed a judgment of divorce which limited the husband's equitable distribution to 4.5**%** of the parties $13 million of marital assets and denied him an award of counsel fees

In Howard *S.* v. Lillian S.,[13] the Court of Appeals reiterated that that marital fault is not a "just and proper" factor for consideration under the catch-all factor, "[e]xcept in egregious cases which shock the conscience of the court." At a minimum, in order to have any significance at all, egregious conduct must consist of behavior that falls well outside the bounds of the basis for an ordinary divorce action. This is not to say that there can never be a situation where grounds for divorce and egregious conduct will overlap. However, 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. The Court cited, as examples, a case involving the attempted bribery of trial judge[14] and the Havel case.[15]

The property distribution provisions of Domestic Relations Law **§**236(B)(5)(d) were amended in 2009 when "loss of health insurance benefits upon dissolution of the marriage" was added as factor.[16] Shortly after that irretrievable breakdown was added to Domestic Relations Law §170(7) as a ground for divorce.[17]

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[11] 66 N.Y.2d 576, 590, 498 N.Y.S.2d 743 (1985).

[12] 288 A.D.2d 160, 734 N.Y.S.2d 841 (1st Dep't 2001).

[13] 14 N.Y.3d 431, 902 N.Y.S.2d 17 (2010).

[14] Levi v Levi, 46 AD3d 520 [2d Dept 2007]

[15] Havell v Islam, 301 AD2d 339 [1st Dept 2002].

[16] Laws of 2009, Ch. 229, effective Sept. 15, 2009.

[17] Laws of 2010, Ch 383, effective October 13, 2010.

In August 2015 the EDL was amended again. According to the Sponsors' Memorandum, in developing the amendments "Justice Jeffrey Sunshine, chair of the Advisory Committee, informally brought together lawyers belonging to different interest groups in an attempt to achieve a compromise on maintenance guidelines that addresse[d] their sometimes conflicting concerns."[18] The definition of maintenance in Domestic Relations Law **§**236(B)(6)(a) was eliminated. It now recites that the court make its award for post-divorce maintenance pursuant to the provisions of **§**236 (B)(6). Mandatory guidelines with formulas for the calculation of maintenance awards were adopted. The definition of income was expanded to include income from income-producing property that is being equitably distributed. Additional factors[19] for determining if the formula amount of post-divorce maintenance is unjust or improper included the termination of child support, income or imputed income on assets being equitably distributed, and "acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment.[20] An "advisory" formula for determining the duration of postdivorce maintenance awards was included. In determining the duration of maintenance, the court is required to consider anticipated retirement assets, benefits and retirement eligibility age. [21] The amendment specifies that it does not prevent the court from awarding nondurational, post-divorce maintenance in an appropriate case.

The 2015 amendment eliminated "enhanced earning capacity as a marital asset"[22] but did not eliminate as a factor for purposes of property distribution the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse.

As a result of the addition of the no-fault, irretrievable breakdown, ground for divorce, the cruel and inhuman treatment ground has almost become a relic of the divorce process. However, that may not be the case. Hidden in a budget bill that was signed on April 3, 2020, the legislature added a new factor to the property distribution factors.[23] Domestic Relations Law §236 [B]5] [d] factor 14 was added: "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."

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[18] See Sponsors Memorandum, 2015 A.B. 7645 (NS)

[19] DRL **§**236(B)(6)(a)(7)

[20] Laws of 2015, Ch. 369, § 3, eff. Jan 23, 2016 enacting DRL **§**236(B)(6)(e)(1)(g).

[21] Id.

[22] Domestic Relations Law §236 [B] [5] [d] [7]

[23] Laws of 2020, Ch 55, §1, enacted April 3, 2020.

To ascertain the acts of domestic violence referred to in factor (14) counsel must refer to Social Services Law §459-a which does not specifically define an "act or acts of domestic violence. "Instead, subdivision 1 defines 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.

It appears to us that a spouse who fits within this definition would probably be held to have committed acts which constitute the cruel and inhuman treatment ground for divorce in DRL § 170(1).

New factor (14) for property distribution is almost identical to factor (g) for maintenance that was added in 2015. Both factors define the "acts" by reference to Social Services Law § 459-a and both make domestic violence a factor for maintenance and property distribution.

These amendments appear to legislatively overrule the "egregious misconduct" rule of Howard *S.* v. Lillian S., as a factor for consideration in property distribution and maintenance and replace them with domestic violence, a lesser standard than egregious misconduct. The amendments, which allow a court to penalize a spouse for marital misconduct which constitutes the cruel and inhuman treatment ground for divorce when making a maintenance and property distribution determination, encourage the parties to litigate issues of physical and mental abuse.

Conclusion

It would be fair to say that the legislation referred to as the Equitable Distribution Law of 1980, and the public policy that engendered it, as expressed in O'Brien v. O'Brien, no longer exists. Today, the statute represents a political compromise between "conflicting concerns."

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