Report by the Committee on Matrimonial Law
The Association of the Bar of the City of New York

The Case for Amending the New York State

Domestic Relations Law

to Permit No Fault Divorces

Harold A. Mayerson, Chair
Eleanor B. Alter, Chair, Legislation Sub-Committee[1]

November 2004

1 The principal author of this report is Lawrence N. Rothbart.

Historically, New York has led the country in legal reform to ensure that its laws protect the welfare of its citizens. However, New York alone is stuck in the past when it comes to one of the most important components of our social fabric -- marriage. Every other state in the United States permits marriages to end without one spouse casting blame upon the other and rehashing the often harsh, painful and embarrassing reasons for the divorce. The fault requirements of the New York State statutes are more than just a reminder of outdated notions of marriage. They have significant financial and emotional costs. A trial on the issue of grounds often costs the litigants thousands of dollars in legal fees, as well as costing the legal system significant court time hearing the details of a marriage which is obviously dead, but may not be entitled to come to an end under the current law. Most troubling, the inability to get divorced may increase incidents of domestic violence and jeopardize the safety and well-being of the spouses.

Since 1967 some portion of the Family Law Statutes of the State of New York (the Domestic Relations Law or the Family Court Act) has undergone major modifications approximately every ten years. This march of change has permitted the modifications to take hold while giving time for reason to prevail before the next modification. Thus, the Legislative and the Executive Branches have had the benefit of reviewing societal change, court rulings or federal mandates before enacting statutory changes. For some, this move for change has been too slow, for others, too fast. It is now, however, clearly time for the next modification, the inclusion of a ground for divorce based upon the irretrievable breakdown of a marriage.

In enacting a statute to permit "No Fault" divorce , New York would be joining virtually every other jurisdiction of the union that permits marriages to end without casting blame on either party.[2] The proposal under consideration does not eliminate any of the grounds for divorce that presently exist under Section 170 of the Domestic Relations Laws. Rather, the

---

2 A recent survey of divorce statutes for the fifty states, Puerto Rico, the US Virgin Islands and the District of Columbia indicates that 35 jurisdictions recognize some form of Irreconcilable Differences or Irretrievable Breakdown of the marriage as a basis of ending the marital relationship, 6 jurisdictions recognize Incompatibility as a basis of ending marriages and 11 jurisdictions permit living separate and apart without legal proceedings or the finding of fault as a basis for divorce. Only New York requires the finding of fault or the living apart pursuant to a legal document as the basis for a divorce.

proposal would permit parties to end their marriages without the finding of fault on the part of either party while permitting other parties to still avail themselves of the fault grounds if they choose.

There has been much discussion over the years that the institution of marriage is the foundation of civilization and as such everything should be done to foster its continuation. However, there is no indication that the advent of "No Fault" statutes actually undermine the institution of marriage. The varying rates of divorce cannot be tracked to any particular state's "No Fault" statute. It does no damage to the importance of marriage, as an institution, to understand and accept the fact that the ideal of a perfect marriage or relationship, while important, may not always be attainable, or that some marriages should end even when adultery has not been committed or one spouse has not been abandoned or the marriage has not reached such a turmoil that it is unsafe or improper to expect the parties to continue to live together. Through no fault of either party, many couples may just fail to attain the ideal, and to keep them bound in legal relationships which have both social and economic repercussions is both unfair and potentially damaging to all involved. Furthermore, the fact that divorce can only be obtained by a finding of fault does not repair relationships that are not working. Rather, since divorce can only be obtained upon the finding of fault, parties to a failing relationship must enunciate fault grounds to obtain their freedom. This involves the inflaming of emotions as either party or both are forced to develop grounds for divorce and set those grounds into legal documents. It is obvious that after years of trying, neither the courts nor the Legislature can force people to maintain a relationship if they do not want to continue in that vein. It is about time that this fact is recognized in law.

Perhaps the most profound effect of requiring fault grounds for divorce is found in the area of domestic violence. While many believe that requiring fault to be proven before a divorce may be granted protects the victims of domestic violence, the opposite is true. A recent study “Bargaining in the Shadow of the Law: Divorce Laws and Family Distress” (Stevenson and Wolfers [2003]) indicates that No Fault divorce statutes actually have a very real tangible effect on such matters as reducing female suicides and reducing domestic violence while also leading

to a decline in women murdered by their partners. The study indicates that female suicide rates declined approximately 20% in states that have adopted No Fault divorce statutes while domestic violence reports of husbands against wives were reduced by more than one-third. Even domestic violence reports of wives against husbands were reduced significantly when a jurisdiction enacted a No Fault divorce statute. There was also a decline in the rate of women murdered by partners with the advent of No Fault statutes but the correlation was not as strong as the other two indices. Clearly, providing couples with a "neutral" way out of their damaging relationships has tangible benefits to the individuals specifically and society in general.

There are many problems with the current system that requires the finding of fault before a divorce is granted. First, a spouse who lacks economic resources may be forced to remain in a marriage that is not working for them. Meanwhile, a spouse who has economic resources has the option of moving to a neighboring state to obtain a divorce under that state's "No Fault" statute.[3] This disparity in options is magnified when children are involved. The spouse who is the primary caretaker of the children is often not in the outside work world or is underemployed so as to permit that parent to care for the children, and thus lacks the resources to move to a "No Fault" state. In addition, since these spouses care for the children, a move to another state is not an easy task, socially (i.e., removing a child from their home and school) or even legally (the courts can enjoin a parent from removing a child from the state). Thus, this spouse is given the untenable choice of leaving their children or going out to an uncertain economic future in return for obtaining a divorce in another state. Clearly, this is not the intention of the enactors and supporters of the current law.[4]

Another problem with the current law is that the courts of New York are spending significant amounts of time addressing and litigating the issue of whether a marriage should be allowed to end. This costs the taxpayers money and the litigants money as well.

---

3 All the states surrounding New York have some type of no fault divorce statute.

4 The recent Court of Appeals decision in O'Connell v. Corcoran, 1 N.Y.3d 179, 770 N.Y.S. 673 (2003) has raised another concern for those who have left the jurisdiction solely for the purpose of obtaining a No Fault divorce. The Court of Appeals has held that if such an action is taken, the courts of New York must review what issues could have been raised in the foreign court proceeding and if issues (such as equitable distribution) could have been raised and were not, then res judicata will prevent the New York courts from acting on the issue. In O'Connell v. Corcoran, the former wife lost out on equitable distribution because she sought what she and her husband thought was a simple No Fault divorce in Vermont.

A recent survey of matrimonial lawyers in New York State indicates that while the majority of time in litigation is not spent addressing the issue of fault, it is not an insignificant amount of time.[5] Furthermore, while virtually all cases are resolved by a settlement of the ancillary issues, often the issue of who is to be granted the divorce presents an impediment to final resolution. It is an anomaly that parties are asked to reach a settlement and compromise their positions and in essence continue to trust each other but then the laws of New York State require that one of them accept the fact that they were the reason that the marriage should be dissolved. The courts and attorneys should not be placed in the position of convincing the parties to accept the fact that one of them is the "bad person" and that the other must testify as to the “bad actions” of the other. This charade only further erodes the public’s confidence and respect for the legal system and is demeaning to the courts, the attorneys and the parties. Parties should be permitted to end a marriage with dignity and without being forced to call each other names. In fact, an argument can be made that by permitting parties to end their marriages in a non-confrontational manner society is actually supporting marriages and healthy relationships, in that people can end marital relationships without destroying all the feelings that still might exist between the parties. Furthermore, the distaste for the matrimonial proceedings will be reduced, thus encouraging people to remarry without the risk of having to face the repugnant fault divorce procedure again.

The need to maintain relations in the future is especially important if children are involved in the matter. When children are concerned, the requirement for fault grounds becomes even crueler to all those involved. It is axiomatic that for children to cope with the divorce process, it is best for the parents to work with each other and have as amicable a relationship as possible. As noted previously, by requiring fault, the statute encourages the parties to call each other names and further, to rehash every possible imperfection that the other may possess. One party is thus seen as the good spouse and the other as the bad spouse. This is not a productive framework in which to encourage the parties to cooperate in raising the children. In fact, by

---

5 New York State Bar Association Family Law Section Attorney's Questionnaire, Reform of the Statutory Grounds for Divorce in NY Preliminary Report. Three thousand surveys were mailed with a response rate of 24%. Respondents were equally divided between Upstate, NYC and the suburban counties of Long Island and Westchester.

forcing the parties to accept or create grounds for divorce the statute is actually denigrating the parties and destroying opportunities to develop cooperation between the parents. Clearly, this is not beneficial to the parties or their children.

Critics to the enactment of a "No Fault" divorce provision in New York State may argue that parties may currently obtain a divorce in this state without fault by merely waiting a year after they have signed a separation agreement or there has been a judgment of separation. The response to these critics is twofold. First, why should people who have resolved their differences without resort to the courts be forced to live in limbo for another year after they have decided that their marital relationship should end? Should the state be forcing people to live in a legal relationship that the parties themselves have already decided should change? Clearly, the answer to this second question is no. An adjunct to this point occurs when the parties to a divorce have children; by making the parents wait for the end of the marriage, the state is requiring the children to live in limbo as well. This is clearly not in the best interests of the children or the state. Children need finality to move forward with their lives and the new beginnings that their parents are striving for by coming to agreement to end the marriage. Forcing the parents to wait a year for the finalization of a divorce is not beneficial to the children.

Second, there is the reality factor of matrimonial law. The parties to a divorce action want finality themselves if they have been able to resolve their differences at the courthouse steps. In the reality of the courthouse, once parties reach an agreement as to how to settle the ancillary issues (custody, visitation and the economics) they want to end the actual legal relationship as soon as possible. Unless there is a reason to wait for the divorce to be finalized (i.e., social security eligibility, pension reasons, health insurance coverage) the divorce will be desired immediately. Accordingly, the court, the attorneys and the parties are forced into the charade of placing grounds on the record so that a divorce may be obtained immediately. As noted previously, this makes a mockery of the concept of law and justice and is demeaning to the court, the attorneys and the parties. Thus, the statute as currently enacted, requiring a waiting period of a year, is not working and is not being widely used. It is time that the laws of New York reflect the reality of the lives of the people of the state.

Based upon the reasoning set forth, it is urged that the next modification of the New York State's matrimonial laws take place and that true "No Fault" divorce be enacted.