

2011

New York and Divorce: Finding Fault in a No-Fault System

Lauren Guidice

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

Recommended Citation

Lauren Guidice, *New York and Divorce: Finding Fault in a No-Fault System*, 19 J. L. & Pol'y (2011).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol19/iss2/6>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

NEW YORK AND DIVORCE: FINDING FAULT IN A NO FAULT SYSTEM

*Lauren Guidice**

INTRODUCTION

As the millions of children of “fault” divorces in New York can attest, the damage involved in declaring fault in order to dissolve a marriage is palpable and enduring. Many are not old enough to understand why the intricate process may take years to complete, or why their mothers assert “cruel and inhuman” treatment when their fathers never seemed like the monster that phrase made him out to be. For over two decades, New York remained stuck in an archaic fault-based system¹—requiring couples to point fingers and air dirty laundry in order to divorce—while the rest of the country progressed and developed unilateral divorce systems.²

The fault requirement of the dissolution of marriage in New York has long been considered to be unnecessary and damaging.³

* J.D. Candidate, Brooklyn Law School 2012; B.A., Fordham University 2008. I would like to thank my family and friends for their constant support, particularly my parents, who taught me that divorce and family are not incompatible. I would also like to thank my editors for their insights throughout the writing and editing of this Note.

¹ See The Editors, *Is New York Ready for No-Fault Divorce?*, N.Y. TIMES ROOM FOR DEBATE BLOG (June 15, 2010), <http://roomfordebate.blogs.nytimes.com/2010/06/15/is-new-york-ready-for-no-fault-divorce/> (stating that “New York was the longtime holdout [on no-fault divorce], since South Dakota passed its law in 1985”).

² South Dakota was the second-to-last state to pass a no-fault divorce law in 1985. SL 1985, ch. 207 § 1; See also, The Editors, *supra* note 1.

³ Hon. Sondra Miller, *The Commission’s Process and Recommendations: Symposium on the Miller Commission on Matrimonial Law*, 27 PACE L. REV.

The looming threat of a fault trial can harm the children of divorce by dragging out proceedings and airing allegations of marital fault, many of which are untrue.⁴ Additionally, scholars and practitioners criticize the fault requirement for adding unnecessary expense to the already financially taxing experience of divorce.⁵ Though fault trials are rare,⁶ they can last from two days to several weeks.⁷ As supervising judge of the matrimonial division in Nassau County, Judge Robert A. Ross, said, “[fault trials] are never pleasant.”⁸

On August 15, 2010, in response to decades of proposals and complaints, Governor Patterson signed a three-bill package that overhauled New York divorce laws.⁹ The package places New York’s divorce laws on equal footing with that of the forty-nine other states that do not require fault in order for a couple to dissolve their marriage.¹⁰ The reform comes twenty-five years after South Dakota, the most recent state to pass a no-fault divorce

551, 551–53 (2007).

⁴ *Id.* “The Commission recognized the need to change the very culture of the system and to make explicit recommendations to reduce trauma, cost and delay.” *Id.*

⁵ *Id.*

⁶ Nassau County Judge Robert A. Ross stated in an interview with Bloomberg News that he presided over eight to twelve “fault” trials per year. Carolyn Kolker & Patricia Hurtado, *Divorce Easier as New York Law Ends Need to Lie*, BLOOMBERG NEWS (Aug. 16, 2010), available at <http://www.bloomberg.com/news/2010-08-16/breaking-up-not-so-hard-to-do-as-new-york-s-divorce-law-ends-need-to-lie.html>. Robert S. Cohen, a divorce lawyer known for representing famous clients, such as model Christie Brinkley and actor James Gandolfini, noted that in his thirty years of practice he only “handled four fault trials.” *Id.*

⁷ *Id.*

⁸ *Id.* (quoting Nassau County Judge Robert A. Ross, who stated, in regards to the “horrible” nature of fault trials: “You may have friends called, girlfriends and boyfriends called, people who are alleged to be girlfriends and boyfriends . . . [h]aving to listen to these things can sometimes be an overwhelming experience”).

⁹ N.Y. DOM. REL. LAW § 170(7) (McKinney 2010); *See also* Denise M. Champagne, *Devil’s in the Details of No-Fault Divorce in New York*, DAILY RECORD, July 14, 2010.

¹⁰ Champagne, *supra* note 9.

New York and Divorce

789

law, did so in 1985.¹¹ The bill encountered significant setbacks during its passage through the State Legislature and prior to gaining the endorsement of Governor Patterson.¹² As Governor Patterson noted at the signing of the three-bill package, the reform brings New York divorce laws “into the twenty-first century.”¹³

Prior to the passage of this law,¹⁴ divorce in New York was a long and contentious process that could not be achieved unilaterally.¹⁵ The closest that parties could get to a “no-fault” option was to mutually agree to a divorce, submit to a “trial” separation, and then convert that separation into a divorce after one year of living apart.¹⁶ If a couple could not mutually agree to a divorce, then they would have to seek a divorce on fault-based grounds.¹⁷ Such “fault” options included adultery, cruel and inhuman treatment, abandonment, and constructive

¹¹ Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1538 (2005) (“In 1985, South Dakota became the last state to adopt a no-fault divorce ground.”).

¹² *Id.* (noting that the current bill’s passage through the Senate in June 2010 marked the best chance “in more than two decades” of passing a no-fault divorce provision).

¹³ Press Release, New York State Office of The Governor, *Governor Patterson Acts on 137 Bills; Vetoes 34 Bills Worth More Than \$22.9 Million in Additional Spending* (Aug. 15, 2010), available at <http://readme.readmedia.com/Governor-Paterson-Acts-on-137-Bills-Vetoes-34-Bills-Worth-More-Than-22-9-Million-in-Additional-Spending/1694112>.

¹⁴ N.Y. DOM. REL. § 170(7) (McKinney 2010) (amending New York’s domestic relations law to add subsection 7 allowing for divorce on the grounds of irretrievable breakdown of marital relationship).

¹⁵ Section 170(5) of New York’s Domestic Relations Law requires a couple to live apart pursuant to a separation judgment or decree for a period of one or more years and show “satisfactory proof” that they have substantially performed the terms and conditions of the judgment or decree before they will be granted a divorce. N.Y. DOM. REL. § 170(5) (McKinney 2010). Similarly, section 170(6) requires a husband and wife to live apart for a period of at least one year pursuant to a written agreement of separation before they will be issued a divorce. *Id.* See also Joel Stashenko, *No Fault Companion Bill on Maintenance Raises New Concerns*, 244 N.Y. L.J. 1 (2010).

¹⁶ N.Y. DOM. REL. §§ 170(5)–(6) (McKinney 2010).

¹⁷ *Id.*

abandonment.¹⁸ This route typically involved extended and costly litigation, at the end of which a divorce was not even guaranteed.¹⁹ At other times, couples and their attorneys would resort to outright perjury in order to establish the requisite “fault” necessary for a divorce.²⁰

Under the new divorce law, divorce can be granted to an unhappy spouse who declares under oath that his or her marriage has been “irretrievably” broken for at least six months.²¹ Other issues related to the divorce, such as child custody and distribution of property, must be resolved by the parties or determined by the court before a divorce will officially be granted.²²

The State Legislature also passed two divorce finance reforms that will affect post-divorce maintenance awards.²³ The amendments to sections 237(a), 237(b), and 238 provide that the spouse with the greater economic worth will pay for attorney’s fees, expert fees, and any additional costs, disbursements, or

¹⁸ *Id.*

¹⁹ Joel Stashenko, *No Fault Divorce Signed Into Law*, 12 N.Y. FAM. L. MONTHLY # (2010) (New York “[j]udges have frequently been forced to reject petitions for divorce”).

²⁰ Champagne, *supra* note 9 (“[I]ndividuals have been known to fabricate allegations in order to establish grounds”); In 1934, the New York Mirror created a sensation with its series, “I Was the Unknown Blonde in 100 New York Divorces!” (discussing the way in which New York lawyers worked around the adultery-only divorce grounds prior to divorce reform in 1960). J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 571–72 (2007).

²¹ 2010 N.Y. Sess. Laws, ch. 384 (McKinney 2010), adding section 170(7) to New York Domestic Relations Law which reads as follows:

The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision 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 expert’s 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.

²² *Id.*

²³ N.Y. DOM. REL. LAW §§ 237(a)–(b), 238 (McKinney 2010).

expenses.²⁴ Further, the amendments to Domestic Relations Law section 236 will govern the provision of temporary maintenance in matrimonial actions.²⁵ The new amendments took effect on October 12, 2010.²⁶

The passage of a no-fault cause of action for divorce and a new maintenance formula raise the specter of a judicial process in which fault does not play a role. However, couples divorce for independent and varied reasons—no two divorces are alike.²⁷ If divorce law is to “do justice,”²⁸ fault should matter in the division of assets, even where it is properly excluded from the reasons for divorce. By allowing fault to be taken into account when determining maintenance awards, New York courts would maintain the requisite authority to provide equitable post-divorce settlements regardless of which party desired the divorce.

Further, divorce cannot be granted under the new law until issues such as equitable distribution, spousal maintenance, child support, counsel and expert fees, child custody, and visitation are either resolved by the parties or determined by the court.²⁹ Thus, in order to protect themselves from the “one-size fits all” divorce that can occur in no-fault jurisdictions, New Yorkers should enter into premarital agreements.³⁰ In an age where divorce proceedings have

²⁴ *Id.*

²⁵ “Temporary maintenance” is the term used for the monetary support provided during the interim of a matrimonial action. N.Y. DOM. REL. LAW § 236 (McKinney 2010).

²⁶ 2010 N.Y. Sess. Laws, ch. 384 (McKinney 2010). In order to study the effects of the new temporary maintenance formula, a Commission was set up and will submit its findings to the state legislature sometime in mid-2011. Stashenko, *supra* note 15 (“The Law Revision Commission will study the setting of maintenance levels statewide to determine if courts are failing to take into account financial factors that could unfairly disadvantage one spouse or another.”).

²⁷ Robin Fretwell Wilson, *Often, There is Fault*, N.Y. TIMES ROOM FOR DEBATE BLOG (June 15, 2010), <http://roomfordebate.blogs.nytimes.com/2010/06/15/is-new-york-ready-for-no-fault-divorce>.

²⁸ *Id.*

²⁹ N.Y. DOM. REL. § 170(7).

³⁰ Or, post-marital agreements, which are entered into by couples that are already married and wish to negotiate the terms of their divorce. 41 AM. JUR. 2D

become more and more streamlined, premarital agreements offer New Yorkers the most equitable solution to an increasingly litigation-less area of the law.

Part I of this Note will explore the historical development of divorce law by examining the traditional fault based divorce law and the subsequent movement away from the law in other jurisdictions. Part II will discuss the fault-based system under New York's former Domestic Relations Law and address the inadequacies of the fault based divorce system. Part III will examine the subsequent changes that will occur as a result of New York's divorce reform bill, including no-fault divorce and divorce finance changes. This section will explore the implications of no-fault divorce laws on maintenance,³¹ including how the new formula provides for calculating temporary maintenance awards under New York's new no-fault divorce reform package, and how that will affect the parties to divorce.³² Additionally, this section will address the possible financial effect New York's divorce laws will have on couples seeking to divorce. Part IV will address potential inadequacies in the new divorce law, and recommend both judicial prescriptions and precautionary measures that should be taken by spouses prior to entering into marriage. Ultimately, this Note maintains that fault should play a role in maintenance proceedings and the distribution of marital property. Following the example of many other states,³³ New York should allow marital misconduct to be taken into account in determining maintenance awards and the division of property.

I. HISTORICAL DEVELOPMENT OF DIVORCE LAW

Divorce law developed rapidly throughout the late nineteenth and early twentieth centuries. Viewed in much the same light as

Husband and Wife § 107.

³¹ N.Y. DOM. REL. LAW § 236 (b)(1) (McKinney 2010).

³² N.Y. DOM. REL. LAW § 236 (McKinney 2010) (Amendments to section 236 of New York Domestic Relations Law were enacted, governing the provision of temporary maintenance in matrimonial actions).

³³ See generally A.B.A., *Alimony/Spousal Support Factors*, 42 FAM. L.Q. 757 (2009).

New York and Divorce

793

tort actions, divorce was seen as a remedy for those spouses who had been wronged by their partner.³⁴ Thus, the fault-based divorce system was the dominant scheme in most jurisdictions until the mid-twentieth century.³⁵ However, as social values and mores changed, strict fault-based divorce regimes were replaced by unilateral, no-fault systems.³⁶ By 1985, almost every jurisdiction in the United States had a unilateral divorce system in place. The singular exception to this overwhelming support for unilateral divorce was New York.

A. Traditional Fault Based Divorce

Divorce was not recognized under English common law until the mid-nineteenth century, when divorce jurisdiction was removed from the ecclesiastical courts to the civil court system.³⁷ At that time, divorces were only granted in cases of adultery.³⁸ By the late nineteenth century, the laws regulating marriage and divorce in the United States varied drastically among the states.³⁹ Though the laws differed, each jurisdiction recognized divorce or judicial separation on limited grounds—all of which involved some degree of fault.⁴⁰ Although the most frequently used grounds for divorce were “[a]dultery, extreme cruelty, or desertion,” many states permitted “insanity, conviction of a crime, habitual drunkenness and drug addiction” to be used as grounds for divorce.⁴¹

³⁴ Michelle L. Evans, *Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt*, 66 WASH. & LEE L. REV. 465, 473–73 (2009).

³⁵ JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 237 (3d ed. 2005).

³⁶ See generally NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES (Greenwood Press 1977) (1962).

³⁷ See LYNN CAROL HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES 12–17 (1980).

³⁸ Evans, *supra* note 34, at 472.

³⁹ BLAKE, *supra* note 36, 116–29.

⁴⁰ *Id.* (noting the differences in approaches to divorce that were adopted).

⁴¹ GREGORY ET AL., *supra* note 35, at 237.

Under the fault-based system, the primary concern was “the strong public interest in preserving marriage.”⁴² The system was founded on the belief that requiring proof of fault would limit access to divorce and further the state’s interest in preserving marriages.⁴³ Divorce was “conceived as a remedy for the innocent against the guilty.”⁴⁴ This strict notion of “wrong-versus-right” led many courts to refuse to grant divorce in cases where both parties were guilty of marital misconduct.⁴⁵

The limited availability of divorce began to wane in the second half of the twentieth century as jurisdictions across the country began to authorize divorce without regard to fault.⁴⁶

Nevertheless, New York’s general divorce law, which solely allowed for divorce on the ground of adultery, remained “immune to revision.”⁴⁷ Attempts to reform New York laws by broadening the grounds for divorce were continuously defeated.⁴⁸ However, by 1930 the New York Legislature had successfully defined five grounds for annulment: infancy,⁴⁹ bigamy, lunacy and idiocy, force or fraud, and physical incapacity (impotence).⁵⁰

B. The Emergence of No-Fault Divorce

The limited availability of divorce left many couples trapped in

⁴² Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1442, 1471 (1992).

⁴³ Evans, *supra* note 34, at 473.

⁴⁴ *Brewies v. Brewies*, 178 S.W.2d 84, 85 (Tenn. Ct. App. 1944) (holding that a divorce ordinarily will not be granted where both parties are equally at fault).

⁴⁵ The result that occurs is ironic: when both parties have a ground for a divorce, neither has a right to divorce. *Id.* See generally J.W. Bunkley, *The Doctrine of Recrimination in Divorce Law*, 20 MISS. L.J. 327 (1948). This was known as the doctrine of recrimination. *Id.*

⁴⁶ GREGORY ET AL., *supra* note 35, at 237 (discussing the collapse of conventional divorce law and the development of no-fault divorce laws).

⁴⁷ DiFonzo & Stern, *supra* note 20, at 564.

⁴⁸ BLAKE, *supra* note 36, at 201–04. Between 1900 and 1933, over fifteen bills were sponsored and rejected. *Id.* at 201.

⁴⁹ Being under the age of consent.

⁵⁰ BLAKE, *supra* note 36, at 66–67.

New York and Divorce

795

irretrievably broken marriages.⁵¹ Over time, the fault-based divorce system led to the widespread corruption of the family law system, which legislatures and judges across the nation had come to ignore.⁵² Unhappy couples resorted to collusion—fabricating evidence of marital misconduct in order to establish the requisite ground upon which divorce could be granted.⁵³ In a notorious example, Dorothy Jarvis was hired in over one-hundred divorce cases to play the role of “the other woman.”⁵⁴ Jarvis staged adulterous hotel rendezvous with New York husbands.⁵⁵ A photographer would catch the “adulterous couple,” thus providing the necessary evidence for the unhappily married New Yorkers to obtain a divorce.⁵⁶

Eventually, the widespread practice of “collusion and perjury”⁵⁷ by couples wishing to divorce challenged the legitimacy of the family law system.⁵⁸ In response, California enacted the country’s first no-fault divorce law.⁵⁹ Signed by Governor Ronald Reagan in 1969,⁶⁰ this revolutionary legislation inspired similar

⁵¹ *Sullivan v. Sullivan*, 689 N.Y.S.2d 378, 382 (Sup. Ct. Suffolk Cnty. 1999) (stating that a divorce will not be granted on the grounds that the marital relationship is irretrievably broken and lost).

⁵² See GREGORY ET AL., *supra* note 35, at 236–38.

⁵³ Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1512–13 (2000) (explaining the concept of collusion and its widespread use in the practice of divorce law prior to the introduction of no-fault rules).

⁵⁴ BLAKE, *supra* note 36, at 193.

⁵⁵ *Id.*

⁵⁶ Friedman, *supra* note 53, at 1512–13.

⁵⁷ *Id.* at 1506–07. In the early twentieth century a Massachusetts judge claimed, “[t]here [was] probably no tribunal in the country in which perjury was more rife than in the Divorce Court.” HENRY EDWIN FENN, THIRTY-FIVE YEARS IN THE DIVORCE COURT 139 (1911).

⁵⁸ Ira Mark Ellman, *Divorce in the United States*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND 341, 341 (Sanford N. Katz, et al. eds., 2000) (“The entire package of [fault-based divorce] rules encouraged the very sham that the collusion doctrine ineffectually sought to suppress.”).

⁵⁹ See Family Law Act of 1969, ch. 1608, § 4506, 1969 Cal. Stat. 3314, 3324 (current version at Cal. Fam. Code § 2310 (West 2011)).

⁶⁰ See generally ASSEMB. COMM. ON JUDICIARY, DIVORCE REFORM IN CALIFORNIA: FROM FAULT TO NO-FAULT...AND BACK AGAIN? (Nov. 6, 1997),

changes across the country as the no-fault approach grew in popularity.⁶¹

By the mid-1980s, all states had some form of a no-fault provision integrated into their divorce law.⁶² Most states enacted no-fault divorce laws that cited “irreconcilable differences” or “irretrievable breakdown” as the basis for marital dissolution.⁶³ Neutral grounds for dissolving marriage reduced the moral stigma associated with divorce.⁶⁴ In addition, a large majority of no-fault regimes began to permit unilateral divorce.⁶⁵

Social scientists studying family relationships in the middle of the twentieth century suggested that “marriages broke up in [the] context of conflicts in attitude, personality, or other difficulty on both sides, rather than as a result of fault by one spouse and innocence by the other.”⁶⁶ Advocates of no-fault divorce relied on this proposition to bolster the argument that traditional grounds for divorce (i.e., adultery, desertion, etc.) were *symptoms* of a deteriorating marriage rather than the *causes*.⁶⁷ It was argued that

available at <http://www.library.co.gov/crb/98/04/currentstate.pdf>. The 1969 statute read: “A Court may decree a dissolution of the marriage or legal separation on either of the following grounds, which shall be pleaded generally: (1) [i]rreconcilable differences, which have caused the irremediable breakdown of marriage[;] (2) [i]ncurable insanity.” 1969 Cal. Stat. 1608 (current version at Cal. Fam. Code § 2310 (West 2011)).

⁶¹ GREGORY ET AL., *supra* note 35, at 237 (describing California’s divorce reform law as the forefront of the “divorce revolution”).

⁶² Either as the sole basis for divorce or as an alternative to the traditional fault based system. *See* Evans, *supra* note 34, at 474. *See also* Scheu v. Vargas, 778 N.Y.S.2d 663, 663 (Sup. Ct. 2004) (stating that, in New York, no-fault divorce applies only where there is a previous decree of separation or a written separation agreement, as required by the Domestic Relations Law provision listing grounds for divorce; otherwise, a divorce may be granted only if fault is established pursuant to one or more of the grounds set forth in the provision).

⁶³ Evans, *supra* note 34, at 474.

⁶⁴ *Id.*

⁶⁵ This meant that one spouse could terminate the marriage without the consent of the other. Michael Grossberg, *How to Give the Present a Past? Family Law in the United States 1950-2000*, in CROSS CURRENTS, *supra* note 58, at 3, 7.

⁶⁶ *Id.* at 18.

⁶⁷ *Id.* at 17–18.

parties should not be required to assert such symptoms in order to finalize a divorce when the causes of the breakdown were often multifarious and equally distributed between the parties.⁶⁸

In the wake of California's "legal and cultural transformation,"⁶⁹ no-fault divorce reform quickly became a prevalent topic in family law discourse throughout the country.⁷⁰ In 1969, the same year as California's groundbreaking divorce reform, the Federal Uniform Marriage and Divorce Act ("UMDA") was approved,⁷¹ which called for irretrievable breakdown of the marriage to be the sole ground of divorce.⁷² Federal encouragement of no-fault divorce practices along with the independent adoption of no-fault divorce regimes among the states highlights the (almost) universal belief that the fault requirement to the dissolution of marriage was outdated and unnecessary. However, despite the fact that every jurisdiction in the country would adopt unilateral divorce systems throughout the 1970s and 1980s, it would take New York nearly a half-century to follow suit.⁷³

C. Why Change Took So Long In New York

In the years leading up to the present overhaul of its divorce laws, New York remained unable to advance past legislative wrangling into legislative action.⁷⁴ New York's inaction can be attributed in part to the influence of the Catholic Church and to the

⁶⁸ *Id.*

⁶⁹ James Herbie DiFonzo, *Customized Marriages*, 75 IND. L.J. 875, 907 (2000).

⁷⁰ See ASSEMB. COMM. ON JUDICIARY, *supra* note 60, at 132 (1997) (describing California's passage of a no-fault option as the launch of a "legal revolution").

⁷¹ UNIF. MARRIAGE & DIVORCE ACT § 302 (1970). Although only eight states have adopted the UMDA—Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington, "the act has greatly influenced the terms of divorce reform for many states." DiFonzo & Stern, *supra* note 20, at n.223.

⁷² UNIF. MARRIAGE & DIVORCE ACT § 302 (1970).

⁷³ THE EDITORS, *supra* note 1.

⁷⁴ DiFonzo & Stern, *supra* note 20, at 567.

many dedicated women's organizations in the legislature.⁷⁵ Such forces underlie the main reason for New York's delayed progress in divorce reform, which was simply that it was decades behind the rest of the country.⁷⁶

New York deferred divorce reform legislation several times between 1900 and 1960.⁷⁷ Scholars have suggested that the "stubborn adhesion" of New York's lawmakers to a single ground for divorce reflected "not so much a stern sense of duty as an inability to give the problem of marital law more than fitful attention."⁷⁸ Distracted by social and religious forces, decades of World Wars, and economic depression, New York legislators stood stagnant on the issue of divorce reform.⁷⁹

By the 1950s, New York had the "lowest recorded divorce rate in the country."⁸⁰ However, the frequency of annulments,⁸¹ migratory divorce,⁸² separations, and desertions combined to increase the state's total marital disruption far beyond the national average.⁸³ In the 1960s, "this dichotomy between 'law-as-statute

⁷⁵ See generally *id.*

⁷⁶ See generally *id.*

⁷⁷ BLAKE, *supra* note 36, at 64–79.

⁷⁸ *Id.* at 64.

⁷⁹ DiFonzo & Stern, *supra* note 20, at 567. Between the years 1900 and 1933, fifteen different legislators sponsored bills to modernize New York's divorce law by adding grounds such as cruelty and desertion. BLAKE, *supra* note 36, at 201. However, each bill was "buried in committee." *Id.*

⁸⁰ DiFonzo & Stern, *supra* note 20, at 576.

⁸¹ New York had the nation's highest annulment rate, comprising approximately one-third of all annulments in the United States. HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 35 (1988).

⁸² The practice of leaving one's state or country in order to take advantage of more lenient divorce laws and secure a divorce. BLAKE, *supra* note 36, at 1–4, 152–59.

⁸³ Unhappy New Yorkers were willing, in significant numbers, to leave home to get divorced. DiFonzo & Stern, *supra* note 20, at 576. By 1922, scholars noted that nearly one-third of all New York divorces had been obtained out of state. *Id.* Because of Constitutional full-faith and credit requirements, New York Courts accepted these out of state divorces so long as both parties were present. *Id.* at 573. And, for those New Yorkers who could not afford to leave the state in order to end their marriages, annulments provided another

New York and Divorce

799

and law-in-action”⁸⁴ eventually proved to be too much for the New York Legislature.⁸⁵

New York’s first major divorce reform occurred as a result of a 1961 report by the Joint Legislative Committee on Matrimonial and Family Laws.⁸⁶ Known as the “Wilson Committee,”⁸⁷ the group discovered what Family Law judges and practitioners had long known; the State’s formal divorce law had “spawned a set of practices inconsistent with any notions of sound public policy.”⁸⁸ The Committee realized that by framing the need for divorce reform in such a way as to stress the “public policy need for consistency between the law in practice and the law as written,” it could successfully evade the moral debate of divorce itself.⁸⁹

The subsequent divorce reforms—New York’s first—occurred in 1966.⁹⁰ The new law provided for divorce on the grounds of adultery, cruel and inhuman treatment, abandonment for two or more years, confinement in prison for three or more years, or living apart for a period of two years or more pursuant to an

route to dissolving their unions. In New York, annulments accounted for 25% of marital dissolutions during World War II and nearly 50% after 1950. *Id.* at 574. In addition to traveling in order to get a divorce, or resorting to annulments, other couples who wanted to dissolve their marriages simply resorted to deserting their partners. *Id.* at 575. In 1940, the percentage of white married women (excluding widows) who did not live with their husbands was approximately 30% greater in New York than the rest of the country. *Id.*

⁸⁴ DiFonzo & Stern, *supra* note 20, at 576.

⁸⁵ *Id.*

⁸⁶ JACOB, *supra* note 81, at 37.

⁸⁷ *Id.* at 35–37.

⁸⁸ DiFonzo & Stern, *supra* note 20, at 578.

⁸⁹ Again and again, the Committee was made aware of how ‘the formal law had spawned a set of practices inconsistent with any notions of sound public policy.’ Viewed in this way, divorce became something other than grist for the conservative-liberal debate. Because the issue was framed as ‘disjunction between law-on-the-books and law in action,’ divorce reform could be presented as a much-needed ‘procedural’ change.

Id. See also, BLAKE, *supra* note 36, at 212.

⁹⁰ *Id.* at 577.

agreement or a judicial separation decree.⁹¹ Although limited in reach, New York had passed its first no-fault divorce law.

Further, when the New York Court of Appeals upheld the legality and retroactivity of conversion divorce in *Gleason v. Gleason* in 1970, it became clear that New York was moving in a positive direction insofar as its divorce laws were concerned.⁹² Notably, the Court's reasoning explicitly rejected any state interest in compelling couples to remain together in marriages that were clearly non-operational.⁹³ The Court concluded that the purpose of the "no-fault provision" allowing for conversion divorce was to remove issues of misconduct from the Court's consideration.⁹⁴ Arguably, the *Gleason* Court extended support to no-fault divorce based on "moral and social grounds."⁹⁵ No-fault divorce in New York was on its way.

II. NEW YORK'S FAULT BASED DIVORCE SYSTEM

New York's fault-based divorce system was rife with issues that often led to bitter and divisive battles between couples wishing to end their marriages.⁹⁶ Often, a couple's reasons for divorcing did not neatly fall into one of the statute's specific grounds for divorce. Additionally, judicially prescribed conditions for each ground of divorce often made the process more complex and

⁹¹ HALEM, *supra* note 37, at 258–59. Judicial separation decrees require a showing of marital fault. *Id.* Alternatively, parties may separate pursuant to a written agreement, filed with the Clerk of the Court, without a finding of fault. *Id.* In judicial separations, either the innocent party or the party against whom a judgment has been made may apply for conversion. *Id.*

⁹² See *Gleason v. Gleason*, 256 N.E.2d 513, 516 (N.Y. 1970) (holding that the action for a conversion divorce could be maintained even by the person who was found at fault in the original separation action). "Conversion divorce" occurs when two parties separate pursuant to a separation agreement or decree by the court. The terms of the agreement or decree must be abided by and the parties must live separately for a designated period of time—at which time the separation may be "converted" into a divorce by the Supreme Court. See *id.*

⁹³ See *id.*

⁹⁴ *Id.*

⁹⁵ HALEM, *supra* note 37, at 266.

⁹⁶ See *Miller*, *supra* note 3, at 551.

New York and Divorce

801

resulted in uncertain outcomes. Further, while the financial stability of the divorcing parties was often a motivating factor behind courts' refusals to grant divorce petitions, such considerations frequently resulted in inequitable decisions. Ultimately, New York's defunct divorce finance laws were a major catalyst for the current overhaul of the state's domestic relations laws.

A. Marital Fault

The fault-based divorce system subsisted in New York until the amendment of subsection seven to Domestic Relations Law section 170 in October of 2010. Under the prior New York Domestic Relations Law section 170, an action for divorce could only be granted if the couple could establish one of the six grounds for divorce established in 1966.⁹⁷ While only 23 percent of divorces in 2009 were contested in New York, there was still a possibility of a contested divorce and the ensuing fault trial, with long, drawn out witness testimonies on the alleged wrongdoing of the parties and painful attacks on each party's credibility.⁹⁸

The following cases illustrate the difficulty of requiring fault in order to divorce and demonstrate how courts often refused to grant divorces. While it appeared that New York courts strictly enforced fault criteria, the underlying financial concerns at play in divorce proceedings were often the central consideration in courts'

⁹⁷ Cruel and inhuman treatment, abandonment (also constructive abandonment), imprisonment of one of the parties for a period of three or more years, adultery, and living separate and apart pursuant to a separation judgment or agreement. N.Y. DOM. REL. § 170 (McKinney 2010). According to the New York State Department of Health, the most frequently cited grounds for divorce in 2008 (the most recent year for which statistics are available) were abandonment and cruel and inhuman treatment, respectively. DEP'T. OF HEALTH, INFO. FOR A HEALTHY N.Y.: TABLE 50: DIVORCES BY COUNTY OF DECREE AND LEGAL GROUNDS FOR NEW YORK STATE - 2008, *available at* http://www.health.state.ny.us/nysdoh/vital_statistics/2008/table50.htm. Out of 52,619 divorces filed for in 2008, abandonment accounted for over 36,000 of the grounds with cruelty a distant second at just over 10,000. *Id.*

⁹⁸ Kolker & Hurtado, *supra* note 6.

reasoning.⁹⁹ In *Hessen v. Hessen*—the first case to highlight the various considerations evaluated by courts when determining whether conduct constitutes cruel and inhuman treatment sufficient to grant a divorce—the court held that physical or mental abuse warrants a divorce *only if* the conduct makes cohabitation improper or unsafe.¹⁰⁰ In *Hessen*, the Court of Appeals noted that the “cruel and inhuman treatment” ground for divorce could not be satisfied by the mere breakdown of the marital relationship, but would require evidentiary proof of cruelty.¹⁰¹ What is particularly noteworthy in *Hessen* is the Court’s focus on the respective ages of the husband and wife seeking divorce, and on the duration of the marriage.¹⁰² The Court denied the Hessens a divorce,¹⁰³ stating that the appearance of misconduct, “which in a matured marriage might fail to justify a finding of substantial misconduct, may justify or even compel an inference of substantial misconduct in a newer marriage.”¹⁰⁴ The case law that follows *Hessen* further demonstrates the absurdity of New York’s divorce laws.

The strict evidentiary standard required to end a marriage of long duration is illustrated by *Palin v. Palin*.¹⁰⁵ Although the wife in *Palin* proved that she had been verbally abused, threatened, and physically attacked by her husband, the court held that this abuse was insufficient for a finding of cruel and inhuman treatment.¹⁰⁶ The court noted that the treatment did not suggest anything more than “unpleasantness.”¹⁰⁷ In fact, New York courts have held that

⁹⁹ See, e.g., *Hessen v. Hessen*, 308 N.E.2d 891 (N.Y. 1974).

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ *Id.*

¹⁰² *Id.* at 895 (stating that for marriages of long duration it is proper to apply the admonition “for better or worse”).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 893–95. The Court took into account that an older couple may experience the “deleterious effects of old age on the physical and mental disposition,” which may create problems within a marriage, and that changes in family situations like the departures of grown children from the household or family tragedy, may create difficulties. *Id.*

¹⁰⁵ *Palin v. Palin*, 624 N.Y.S.2d 630 (N.Y. App. Div. 1995).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (granting the wife a divorce based on adultery but rejecting the divorce on grounds of cruel and inhuman treatment).

isolated acts of violence are not sufficient for a divorce based on cruel and inhuman treatment.¹⁰⁸

In a well-publicized case that occurred in 2010,¹⁰⁹ a Nassau County court denied a husband's divorce request on the grounds of cruel and inhuman treatment despite the fact that his wife had threatened him with a samurai sword.¹¹⁰ Evidence during the lengthy fault trial showed that the wife had abused the husband for years.¹¹¹ The constant abuse resulted in the husband's sleep deprivation because he feared "sneak attacks" from his wife.¹¹² The wife once brought the sharp tip of a samurai sword "within inches" of her husband's face; this extreme event precipitated the husband's request for a divorce.¹¹³ However, noting that the marriage was one of long duration, the court denied the husband a divorce.¹¹⁴ The court's opinion also noted that the husband failed to testify that the alleged incidents "so endangered his physical or mental well-being as to render it unsafe or improper for him to cohabit with his wife."¹¹⁵

¹⁰⁸ See, e.g., *Wenderlich v. Wenderlich*, 311 N.Y.S.2d 797 (N.Y. App. Div. 1970) (finding "proof . . . that defendant struck the plaintiff the morning of September 1, 1967 . . . insufficient to establish the cause of action"); *Concetto v. Concetto*, 377 N.Y.S.2d 164 (N.Y. App. Div. 1975) (holding that "[t]he proof, however, failed to establish that the name-calling and the two isolated acts of alleged violence, to which the husband testified, so endangered his physical or mental well-being as to render it unsafe or improper for him to cohabit with his wife"); *Rabinowitz v. Rabinowitz*, 321 N.Y.S.2d 934 (N.Y. App. Div. 1971) (explaining that "[e]vidence showing that marriage was marked by lack of harmony, frequent quarrels and occasional strife, all adding up to degree of incompatibility, still fell far short of statutory requirements").

¹⁰⁹ Vesselin Mitev, *Sword Attack Claim Does Not Cut It; 'Abandonment' Wins Divorce*, LAW.COM (April 8, 2010), <http://www.law.com/jsp/article.jsp?id=1202447747480&slreturn=1&hbxlogin=1>.

¹¹⁰ *S.K. v. I.K.*, No. 203247-2008, 2010 WL 1371943, at *9 (N.Y. Sup. Ct. Mar. 29, 2010).

¹¹¹ *Id.* at *5–6.

¹¹² *Id.* at *3.

¹¹³ *Id.* at *5. During the lengthy "fault" trial, the couple's daughter testified that the tip of the sword was "extremely sharp" and, had she not intervened, her mother could have seriously injured or killed her father. *Id.*

¹¹⁴ *Id.* at *9.

¹¹⁵ *Id.* (citing *Hessen v. Hessen*, 308 N.E.2d 891 (N.Y. 1974)).

These cases illustrate the difficulty of proving cruel and inhuman treatment as grounds for a divorce in New York. Although the average divorce case lacks the drama of a samurai sword, many spouses suffered physical or emotional abuse that did not rise to the court-defined level of cruel and inhuman treatment under New York law.¹¹⁶ Asserting other grounds for divorce was often just as complicated and ineffective.

New York courts made equally outrageous holdings under the awning of constructive abandonment grounds for divorce. In order for a spouse to assert constructive abandonment,¹¹⁷ the refusal to engage in marital relations must have persisted for at least one year prior to the commencement of the action.¹¹⁸ However, in *Hammer v. Hammer*, the Court asserted that the failure to file for a divorce on the grounds of constructive abandonment after an extended period of time could bar a spouse from claiming constructive

¹¹⁶ See, e.g., *Gross v. Gross*, 836 N.Y.S.2d 166, 168–69 (N.Y. App. Ct. 2007) (holding that reprehensible and highly offensive behavior does not necessarily establish cruel and inhuman treatment ground for divorce where wife testified that her husband had forced himself on her sexually, trapped her inside the marital bedroom on occasion, and threw her against the walls of their home); *E.D. v. M.D.*, 801 N.Y.S.2d 233, 234 (N.Y. Sup. Ct. 2005) (holding that the evidence of physical contact between the parties was isolated and minimal and not grounds for cruel and inhuman treatment where husband was frequently argumentative and struck the wife on occasion but where the wife had not sought medical treatment for any injuries); *S.C. v. A.C.*, 798 N.Y.S.2d 348, 352 (N.Y. Sup. Ct. 2004) (holding that, with regard to the incidents of physical contact between the parties, none were more than minor and incidental to the behavior complained of and were insufficient for grounds of cruel and inhuman treatment).

¹¹⁷ Constructive abandonment is one of the most popular grounds for divorce. See DEP'T. OF HEALTH, *supra* note 97 (listing the number of divorces in New York in 2008). A refusal or failure to engage in marital relations, to rise to the level of constructive abandonment, must be unjustified, willful, and continued, despite repeated requests from the other spouse for resumption of cohabitation. See *Silver v. Silver*, 677 N.Y.S.2d 593, 594 (N.Y. App. Ct. 1998).

¹¹⁸ See, e.g., *Levy v. Levy*, 385 N.Y.S.2d 314 (N.Y. App. Div. 1976) (finding the husband's charge of constructive abandonment insufficient based on timeliness); *DeAngelis v. DeAngelis*, 388 N.Y.S.2d 744 (N.Y. App. Div. 1976) (rejecting claim "[w]here wife's refusal to have sexual relations with husband existed for much less than one year prior to institution of divorce action").

abandonment altogether.¹¹⁹ The *Hammer* Court held that where a husband had not threatened to terminate his sexless marriage, but allowed it to continue for ten years, he impliedly consented to the status of the relationship and could not claim constructive abandonment as grounds for divorce.¹²⁰

Although *Hammer* involved a case where the couple had not engaged in intimate relations for ten years, New York courts have rejected constructive abandonment claims involving much shorter periods.¹²¹ In *Breckinridge*, the couple mutually declared that their marriage had been sexless for three years,¹²² and each asserted that the lack of marital relations was due to the other's lack of interest.¹²³ The court held that because both parties implicitly agreed to eliminate marital intimacy, neither could be at fault and no divorce could be granted.¹²⁴

By ignoring any multitude of reasonable causes for a couple to remain together despite their lack of marital relations, New York courts arguably encouraged couples to surrender their marriages early. Couples with legitimate reasons for staying together such as raising children or financial inability to separate could lose the ability to divorce on the grounds of constructive abandonment at a later date. These cases are merely a small sample of New York divorce cases. The inconsistent, unpredictable nature of the decisions clearly illustrates the necessity of a unilateral and "faultless" ground for divorce.

B. Alimony

The effect that New York's alimony laws had on individuals in

¹¹⁹ *Hammer v. Hammer*, 342 N.Y.S.2d 9, 10 (N.Y. App. Div. 1973), *aff'd*, 34 N.Y.2d 545 (1974).

¹²⁰ *Id.*; *see* *Bunce v. Bunce*, 426 N.Y.S.2d 105 (N.Y. App. Div. 1980) (constructive abandonment claim based on refusal to engage in marital relations for fifteen years).

¹²¹ *See, e.g.*, *Breckinridge v. Breckinridge*, 478 N.Y.S.2d 136, 138 (N.Y. App. Div. 1984).

¹²² *Id.* at 137.

¹²³ *Id.*

¹²⁴ *Id.* at 138.

the wake of divorce—particularly women—was a significant factor behind the Court of Appeals' holding in *Hessen* and other cases like it.¹²⁵ The old Domestic Relations Law deprived alimony and occupancy of the marital home to a spouse against whom a divorce had been granted.¹²⁶ With this in mind, New York courts decided that special thought should be given to the deprivation of support rights that would follow a fault determination against dependent spouses.¹²⁷ For example, because the husband in *Hessen* was the one who filed for divorce and the one who asserted cruelty against his wife, the Court felt that it would be inappropriate to deprive her—a dependent older woman—of support by granting the husband a divorce absent truly grievous misconduct.¹²⁸ The consideration for the financial welfare of spouses post-divorce sheds a more reasonable light on the Court's holding. In fact, the concern for the financial effect of divorce on spouses was common for most of the grounds for divorce in New York, as the judiciary did not want individuals to become wards of the state.¹²⁹

Over time, it became clear that dependent wives seeking divorce on the grounds of cruel and inhuman treatment were held to a lower standard of proof because of the inapplicability of the alimony preclusion.¹³⁰ Although this inequity made sense given the

¹²⁵ *Hessen v. Hessen*, 308 N.E.2d 891, 895 (N.Y. 1974). At the time *Hessen* was decided, alimony was only awarded to wives. Brooke Grossman, Note, *The Evolution of Equitable Distribution in New York*, 62 N.Y.U. ANN. SURV. AM. L. 607, 611 (2007).

¹²⁶ *Hessen*, 308 N.E. 2d at 410.

¹²⁷ Such as the wife in *Hessen. Id.* at 412 (noting that because of the effect that fault finding has on the opportunity to obtain support and other post-divorce relief, courts should use broad discretion in considering the grant of a divorce based on cruel and inhuman treatment).

¹²⁸ *Id.* (holding that the economic consequences of granting of the divorce must be treated as an influential factor in determining whether to grant divorce).

¹²⁹ See *Lord v. Lord*, 409 N.Y.S.2d 46, 49 (N.Y. 1978) (noting that the division of assets and alimony would be considered differently if the wife and children were in danger of becoming wards of the state).

¹³⁰ See, e.g., *Filippi v. Filippi*, 384 N.Y.S.2d 1010, 1011 (N.Y. App. Div. 1976) (taking note of the fact that most courts applied a lesser standard of proof for women seeking divorce on the ground of cruel and inhuman treatment, but that in the case at bar, the court would strictly apply the *Hessen* standard where

financial issues dependent women faced in the event that their financially secure husbands should decide to divorce them, the extreme domestic situations some husbands were incapable of escaping highlighted the need for reform of New York's divorce finance laws.¹³¹

C. Equitable Distribution

One of the primary reasons for arbitrary and inconsistent divorce holdings was New York's failure to update divorce finance law when the state updated its divorce law in 1966.¹³² At the time, New York retained the traditional common law view that legal title to property was determinative of its ownership upon divorce.¹³³ Under such a system, the husband, who was typically the homeowner and breadwinner, left the marriage with a majority of the property.¹³⁴ This inequality in post-divorce assets was typically remedied by awarding the wife permanent or long-term alimony.¹³⁵

the marriage was long in duration).

¹³¹ In *Johnson v. Johnson*, the court rejected a husband's petition for divorce on grounds of cruel and inhuman treatment despite the fact that his wife had been absent from the family home for extended periods and had assaulted him on at least two occasions. *Johnson v. Johnson*, 478 N.Y.S.2d 54 (N.Y. App. Div. 1984) (holding that the wife's actions did not affect the husband in any deleterious way). In *Denny v. Denny*, the court of appeals denied the plaintiff husband his application for divorce on the grounds of cruel and inhuman treatment despite his wife's refusal to move with him to another city when transferred by his employer, that he felt dominated by her to the point that his self-confidence was shaken, and that she deprived him of reasonable intimacy. *Denny v. Denny*, 409 N.Y.S.2d 443 (N.Y. App. Div. 1978). In its consideration of the husband's request for a divorce, the court of appeals took note of the fact that the wife would be unable to obtain alimony if it granted her husband a divorce. *Id.*

¹³² DiFonzo & Stern, *supra* note 20, at 588.

¹³³ BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* 7 (3d ed. 2005).

¹³⁴ See Bea A. Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 697 n.47 (1990) (citing JACOB, *supra* note 81, at 5).

¹³⁵ JACOB, *supra* note 81, at 5. In contrast to "title" states, such as New York, a smaller number of states adhere to the "community property" method

Thus, in divorce proceedings where fault was asserted against the wife, courts were wary of granting the husband a divorce for fear of leaving the wife with no property or earning potential and without the relief of alimony.¹³⁶

New York struggled with the effects of its divorce finance laws throughout the 1970s, while nearly all other states adopted equitable distribution laws.¹³⁷ Equitable distribution deemed marriage an economic partnership¹³⁸ and aimed to “credit the unpaid work that the typical non-employed homemaker put into the partnership.”¹³⁹ However, women’s groups and state legislators in New York feared the excessive discretion granted to judges under the equitable distribution system, and were concerned that distributing property equally would only encourage divorce.¹⁴⁰ Proponents of the equitable system eventually prevailed, and New York adopted an equitable distribution system in 1980.¹⁴¹

Further, New York’s Domestic Relations Law section 236 was

where all income earned by either spouse or property purchased with those earnings is collectively termed “marital property. DiFonzo & Stern, *supra* note 20, at 585. Eight states—Arizona, California, Idaho, Louisiana, New Mexico, Nevada, Texas, and Washington—follow this “community property” principle. See Jens-Uwe Franck, ‘*So Hedge Therefore, Who Join Forever: Understanding the Interrelation of No-Fault Divorce and Premarital Contracts*, 23 INT’L J. L., POL. & FAM. 235, 243 (2009). Under this system, no matter how title is held, each spouse owns half of the marital property. TURNER, *supra* note 133, at 6–7.

¹³⁶ See, e.g., *Hessen v. Hessen*, 33 N.Y.2d 406, 410 (N.Y. 1975) (taking note of the fact that, under section 236 of the Domestic Relations Law, “a divorce granted on the basis of the wife’s ‘misconduct’ will deprive the wife of both her rights to alimony and the exclusive occupation of the marital residence”).

¹³⁷ DiFonzo & Stern, *supra* note 20, at 587.

¹³⁸ UNIF. MARRIAGE & DIVORCE ACT § 160, 9A U.L.A. XX (1970). Using definitions typical of community property systems, the Uniform Marriage & Divorce Act became a prototype for widely adopted equitable distribution statutes, in which courts are directed to make a just division of marital property based on a series of factors.

¹³⁹ NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 206 (2000).

¹⁴⁰ DiFonzo & Stern, *supra* note 20, at 587.

¹⁴¹ 1980 N.Y. Laws 434 (codified as amended at N.Y. DOM. REL. LAW § 236 (McKinney 2010)).

New York and Divorce

809

amended following the 1979 Supreme Court case *Orr v. Orr*.¹⁴² The Supreme Court fundamentally altered New York's divorce finance law by determining that gender based divorce statutes, such as the one that governed alimony awards, were unconstitutional due to their disparate treatment of male and female parties.¹⁴³ The Court held that spousal support might be awarded to either deserving spouse regardless of gender.¹⁴⁴ The ruling was ultimately incorporated into the Equitable Distribution Law, and courts now award maintenance to the less monied party in order to maintain that spouse's standard of living in the aftermath of divorce.

D. Maintenance

Property division was tied to alimony, and New York's change to equitable distribution altered the law of alimony in a fundamental way.¹⁴⁵ As in the Equitable Distribution Law, the legislature replaced alimony with "maintenance" payments.¹⁴⁶ While the practice of alimony was rooted in the concept that the husband was the primary source of financial support, and was thus his wife's caretaker, maintenance is based on the idea that marriage is an economic partnership. Thus, under the alimony system a husband was charged with financially supporting his ex-wife because she lacked the means to do so herself.¹⁴⁷ Conversely, maintenance payments represented compensation for loss of

¹⁴² *Orr v. Orr*, 440 U.S. 268 (1979) (holding that an Alabama statute authorizing the imposition of alimony obligations on husbands in favor of wives, but not in favor of husbands, was unconstitutional).

¹⁴³ *Id.* at 283. The percentage of male alimony recipients rose to 3.6% in the five-year period ending in 2006. Anita Raghavan, *Men Receiving Alimony Want a Little Respect*, WALL ST. J., Apr. 1, 2008, <http://online.wsj.com/article/SB120700651883978623.html>.

¹⁴⁴ *Orr*, 440 U.S. at 280–82.

¹⁴⁵ DiFonzo & Stern, *supra* note 20, at 588.

¹⁴⁶ *Id.*

¹⁴⁷ Which is the reason that alimony payments ceased once the ex-wife remarried, since she would then be "taken care of" by her new husband.

earning from the marital partnership.¹⁴⁸ Maintenance payments were calculated in order to preserve the parties' standard of living during the marriage and to provide for the non-monied spouse's "reasonable needs."¹⁴⁹ Courts were encouraged to limit the duration of maintenance payments as a result of the legislation, pushing for recipients to become self-sufficient as quickly as possible.¹⁵⁰ Effectively, New York ended permanent spousal support.¹⁵¹

Despite the equitable change intended by the legislation, the Equitable Distribution Law and subsequent shift away from permanent alimony did not have the effect of alleviating post-divorce economic inequality,¹⁵² since most divorcing couples have few assets to divide.¹⁵³ In most divorces, the equitable distribution of assets does not offer each spouse enough of a solid economic foundation in the aftermath of divorce.¹⁵⁴

It is much more costly to maintain two households than a single marital home. However, the standard of living for men generally increases in the aftermath of divorce while for women, it significantly decreases.¹⁵⁵ This is because a high earning spouse—traditionally the husband—can recoup his or her old lifestyle over time whereas a low-earning or non-working spouse cannot do so as

¹⁴⁸ Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 640 (1991).

¹⁴⁹ 1980 N.Y. LAWS 434 (codified as amended at N.Y. DOM. REL. LAW. § 236 (B)(6) (McKinney 2009)). Maintenance ceased, under this system, when the wife remarried. N.Y. DOM. REL. LAW. § 236 (B)(6)(c) (West 2010). However, maintenance could continue even if the wife was in a relationship with another man, but not technically married. *Id.* at § 6(d).

¹⁵⁰ Garrison, *supra* note 148, at 640.

¹⁵¹ In 1986, however, the New York legislature amended the Equitable Distribution Law to permit indefinite maintenance payments in situations that involved older and disabled women with no job skills other than homemaking and child rearing. N.Y. DOM. REL. LAW § 236(B)(6) (McKinney 1986) (amended 2010); *See also*, N.Y. JUR. DOM. REL. § 2206 (McKinney 2010).

¹⁵² DiFonzo & Stern, *supra* note 20 at 589, 598–99.

¹⁵³ Garrison, *supra* note 148, at 662–64.

¹⁵⁴ *Id.* at 658.

¹⁵⁵ DiFonzo & Stern, *supra* note 20, at 595–96.

easily or quickly, if at all. Thus, the post-divorce economic needs of most non-working or low-earning spouses simply cannot be achieved by equitable distribution of the marital assets.¹⁵⁶ The income of high earning spouses is inevitably a much more valuable “asset” than marital property.¹⁵⁷ It follows that the non-earning spouse, who, with the passage of the Equitable Distribution Law, traded an award of temporary maintenance for permanent alimony, underwent a substantial economic deterioration in the wake of divorce.¹⁵⁸

III. THE NEW LAW: CRITICISM, PRAISE, AND POTENTIAL PROBLEMS

The adoption of a no-fault divorce option has engendered both excitement and outrage among the various parties involved in this debate. Women’s groups in particular, who blame no-fault divorce systems for the decreased occurrence of domestic violence, are praising the ability of spouses to unilaterally divorce one another as a major step forward. However, opponents point to the United States’ high divorce rate—connecting no-fault divorce to the ease with which couples can dissolve their marriages. Further, confusion over the new law’s maintenance provisions has scholars and practitioners concerned, and will undoubtedly be the cause of future debate.

A. Unilateral Divorce

The key component to New York’s divorce law reform is the addition of Domestic Relations Law Section 170(7), which allows parties to divorce if the marital relationship has irretrievably broken down for at least six months, and one party has so stated under oath.¹⁵⁹ This judgment can be granted only after the issues of equitable distribution, spousal maintenance, child support, counsel

¹⁵⁶ DiFonzo & Stern, *supra* note 20, at 597.

¹⁵⁷ Garrison, *supra* note 148, at 664.

¹⁵⁸ See DiFonzo & Stern, *supra* note 20, at 597.

¹⁵⁹ N.Y. DOM. REL. LAW § 170(7) (McKinney 2010).

and expert fees, child custody and visitation are resolved.¹⁶⁰

One of the chief advantages of section 170(7) is the ability of one spouse to dissolve the marriage without the consent of the other.¹⁶¹ This provision has received a great deal of criticism. Women's groups such as the National Organization of Women fear that this "divorce on demand" will lead to increased divorce rates and will negatively impact the financial security of women who will be left destitute once their husbands unilaterally divorce them.¹⁶² Other opponents of the law cite children as the "voiceless third parties in divorce," and argue that making divorce "easy" gives couples the opportunity to split up despite the fact that repairing their marriage for the sake of their children may be possible.¹⁶³ Others argue that, because women seek divorce more frequently than men,¹⁶⁴ no-fault divorce disproportionately harms

¹⁶⁰ *Id.* These issues may be resolved by either the parties or determined by the Court. *Id.*

¹⁶¹ *See id.*

¹⁶² *See* Marcia Pappas, *Reject Divorce on Demand*, Comment to *Is New York Ready for No-Fault Divorce?*, N.Y. TIMES BLOG (Jun. 15, 2010), <http://roomfordebate.blogs.nytimes.com/2010/06/15/is-new-york-ready-for-no-fault-divorce/#marcia>. *See also* Andrew J. Cherlin, *Not Your Mother's Divorce*, N.Y. TIMES, June 15, 2010.

¹⁶³ Barbara Dafoe Whitehead, *The Voiceless Third Parties*, N.Y. TIMES BLOG (Jun. 15, 2010), <http://roomfordebate.blogs.nytimes.com/2010/06/15/is-new-york-ready-for-no-fault-divorce#barbara>.

On this score, a consensus among social scientists has emerged. It distinguishes between children in families where parents are engaged in unremittingly high levels of conflict and children in families where parents are unhappy but have low conflict. In high conflict families, children are better off if their parents divorce. In low-conflict families, however, children are better off if their parents stay together and repair the marriage. Sadly . . . the majority of parental divorces today occur in low-conflict situations.

Id.

¹⁶⁴ Research shows that the spouse who "wants out" of the marriage most is "more often the wife." Betsey Stevenson, *Divorce Reform Hits New York*, FREAKONOMICS (Jun. 16, 2010), <http://www.freakonomics.com/2010/06/16/divorce-form-hits-new-york/>. Women in the United States currently file slightly more than two-thirds of divorces. Vicki Larson, *Why Women Walk Out More Than Men*, THE HUFFINGTON POST (Jan. 24, 2011, 2:58 AM), <http://www>.

New York and Divorce

813

men since men are unlikely to secure custody of children in the aftermath of divorce and are often ordered to make child support payments.¹⁶⁵

Conversely, family law scholars and practitioners point out that one of the most surprising aspects of the no-fault divorce system is that it seems to have little, if any, effect on divorce rates.¹⁶⁶ At the time most states across the country began adopting no-fault divorce systems, the divorce rate doubled.¹⁶⁷ However, this increase in divorce rates occurred “in equal measure in those states adopting unilateral divorce” as in states where fault-based divorce systems remained in place.¹⁶⁸ Additionally, proponents of the new law point out that the state with the lowest divorce rate in the country, Massachusetts, has permitted no-fault divorce since 1975.¹⁶⁹ Although divorce rates may increase in the aftermath of

huffingtonpost.com/Vicki-larson/why-women-want-out-more-t_b_792133.html (discussing a study done by the National Marriage Project of the University of Virginia, which found that two-thirds of all divorces are initiated by women); *See also* Margaret F. Brinig, *Penalty Defaults in Family Law: The Case of Child Custody*, 33 FLA. ST. U. L. REV. 779, 792 (2006).

¹⁶⁵ *See generally* JEFFERY M. LEVING WITH KENNETH A. DACHMAN, FATHERS’ RIGHTS: HARD-HITTING & FAIR ADVICE FOR EVERY FATHER INVOLVED IN CUSTODY DISPUTE 1–3 (1997). *See also* Judith Seltzer, *Consequences of Marital Disruption for Children*, 20 ANN. REV. SOC. 235, 240–41 (1994) (noting that mothers often obtain custody of children after divorce). *Rights of a Non-Custodial Parent Paying Child Support*, LIVESTRONG.COM (June 3, 2010), <http://www.livestrong.com/article/138803-rights-non-custodial-parent-paying-child-support/> (“Most payers of child support are men. . .”).

¹⁶⁶ *See, e.g.*, Betsey Stevenson, *Divorce and Domestic Violence*, N.Y. TIMES BLOG (Jun. 15, 2010), <http://roomfordebate.blogs.nytimes.com/2010/06/15/is-new-york-ready-for-no-fault-divorce#betsey>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Cherlin, *supra* note 162. “[Massachusetts’] divorce rate is low for at least two . . . reasons: [f]irst, its population is highly-educated, and educated people avoid marrying young, which is a risk factor for divorce. Second, it has a large Catholic population, and Catholics are still somewhat less likely to divorce.” Cherlin notes that New York has an equally educated populous with a great deal of Catholics. *Id.* Therefore, he expects the rate of divorce in New York (which is currently tied for the fifth lowest rate of divorce in the country) to remain low despite no-fault divorce. *Id.*

New York's adoption of no-fault divorce, studies of other states show that this increase will likely be temporary.¹⁷⁰

Further, advocates of no-fault divorce herald it as one of the best means of combating domestic abuse.¹⁷¹ Reports of domestic violence tend to decrease in states that adopt no-fault divorce.¹⁷² Studies show that the decrease in domestic violence is not simply due to the fact that spouses being abused can unilaterally leave their abusive partners, but because "abusive spouses understand that they will be left."¹⁷³ Additional praise of no-fault divorce systems attribute decreased rates of female suicide to the ability of abused or unhappy women to unilaterally leave their partners.¹⁷⁴ Therefore, it appears that no-fault divorce systems tend to provide an important benefit to particularly defenseless members of society.

B. Maintenance

The enactment of Domestic Relations Law section 170(7) is only a small portion of the New York divorce reform package.¹⁷⁵ The accompanying bills that amend Domestic Relations Law sections 236, 237, and 238 contain provisions to protect the less monied spouse.¹⁷⁶ The new laws require the court to provide for temporary support during a divorce proceeding when the parties have unequal financial resources.¹⁷⁷ The revision of *pendente lite*

¹⁷⁰ *Id.* New Yorkers waiting to file for divorce, who did not have grounds to do so, will file immediately, which will likely result in a short swell in divorce rates. *Id.*

¹⁷¹ *See, e.g.,* Stevenson, *supra* note 166.

¹⁷² Studies show a marked decrease in domestic violence among states that adopted no-fault divorce systems relative to states (such as New York) that did not. *Id.*

¹⁷³ The studies show a thirty-percent decline in domestic violence, which indicates that violence in lasting marriages decreased. *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *See* N.Y. DOM. REL. LAW §§ 236–38 (McKinney 2010).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

New York and Divorce

815

awards,¹⁷⁸ which order the monied spouse¹⁷⁹ to pay interim counsel fees for the non-monied spouse during the course of the case so as to enable her or him to carry on or defend it, were designed to better reflect the circumstances couples face during divorce proceedings.¹⁸⁰ The new laws create a presumption that the less monied spouse will be entitled to the payment of these fees, which will be set by a new formula.¹⁸¹ Further, the new law revises the way that temporary maintenance awards are calculated by granting justices a mathematical formula to determine presumptive awards.¹⁸² Lastly, the method for determining post-divorce maintenance awards received an overhaul with the addition of extra factors that the court may consider when deviating from the presumptive award.¹⁸³

The new statutory guidelines established for determining temporary maintenance are intended to provide greater consistency and fairness.¹⁸⁴ However, the mathematical formula for awarding presumptive temporary maintenance, and the factors to be considered by courts when deviating from this presumptive award, may be a cause of some confusion for justices. The temporary maintenance formula for presumptive awards requires Supreme Court justices to take two sets of calculations into account.¹⁸⁵ The new mathematical formula for determining temporary maintenance is meant to provide uniformity and predictability. However, the

¹⁷⁸ *Pendente lite* awards are the interim support payments provided to the lower income spouse while divorce litigation is pending. 65 AM. JUR. 2D *Receivers* § 3 (West 2010).

¹⁷⁹ The spouse with larger financial net worth.

¹⁸⁰ N.Y. DOM. REL. LAW § 236(B)(5) (McKinney 2010).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Stashenko, *supra* note 15.

¹⁸⁵ First, the formula requires subtracting twenty-percent of the lower earning spouse's income from 30% of the higher spouse's income. ($M=0.30(H)-0.20(L)$). N.Y. DOM. REL. LAW § 236(B) (McKinney 2010). The second formula calls for the court to subtract the lower earning spouse's income from 40% of the combined income of both spouses. ($M=0.40(H+L)-L$). *Id.* The Court will use the lower of the two figures to set the guideline amount of temporary maintenance. *Id.* at 5-a(c)(1).

determination of temporary maintenance awards is ultimately at the discretion of the courts, as justices are free to deviate from the presumptive award if he or she “finds that the presumptive award is unjust or inappropriate.”¹⁸⁶ Thus, a method that was intended to take the uncertainty and confusion out of determinations of temporary maintenance, by providing parties with a mathematical formula, is not much changed from that of the old method of calculating temporary maintenance. Additionally, the statute’s vague guidance for justices on how to determine whether a presumptive award is “unjust or inappropriate” will undoubtedly confound justices.¹⁸⁷ What is worse, however, is that the lack of guidance will ultimately create windfalls for some lucky parties while others will be required to make do with the scant terms of the presumptive award.

Additionally, the presumptive temporary maintenance formula only applies to the first \$500,000 of income.¹⁸⁸ Any income above this point may not be calculated into the abovementioned mathematical formula but must be considered separately by the court in determining temporary maintenance.¹⁸⁹ This will inevitably be an added source of confusion and possible tension for divorcing New Yorkers. Because New York is one of the wealthiest states in the country, with six of its sixty-two counties among the wealthiest per capita in the nation,¹⁹⁰ it is likely that many justices will have to determine additional guideline amounts of temporary maintenance through the consideration of a variety of imprecise factors presented by the statute.¹⁹¹ Thus, the new divorce finance laws largely leave wealthy parties to litigate the details of

¹⁸⁶ *Id.* at 5-a(e).

¹⁸⁷ Stashenko, *supra* note 15.

¹⁸⁸ N.Y. DOM. REL. LAW § 236(B)5-a(b)(5) (McKinney 2010).

¹⁸⁹ *Id.*

¹⁹⁰ Francesca Levy, *America’s 25 Richest Counties*, FORBES.COM (Mar. 4, 2010), http://www.forbes.com/2010/03/04/america-richest-counties-lifestyle-real-estate-wealthy-suburbs_2.html.

¹⁹¹ N.Y. DOM. REL. LAW § 236 Part B, 5-a(c)(2)(i)-(xix) (McKinney 2010). These factors include the marriage’s length, the substantial differences in the parties’ incomes, and the parties’ standard of living established during the marriage. *Id.*

their pre- and post-divorce maintenance, and this will likely affect many New York couples.

Another foreseeable concern with the law's new divorce finance provisions lies in the determination of post-divorce maintenance awards. In calculating maintenance, justices are charged to consider an array of factors such as the length of the couple's marriage, the standard of living of the parties, the earning capacity of the parties and their prospects of employment, and other factors.¹⁹² These factors are often subjective and can be difficult to measure, which may allow justices to vary dramatically in their maintenance awards. An "outspoken supporter"¹⁹³ of New York's implementation of no-fault divorce, former Appellate Division Justice Sondra M. Miller, noted that "if [I] were still hearing divorce cases, [I] would be confused by how to set maintenance."¹⁹⁴ While the new law set up a Law Revision Commission to study the effect of the new maintenance provisions on the setting of maintenance levels around the state, in the interim, there may be significant differences in maintenance awards that will unduly disadvantage some spouses throughout the state.¹⁹⁵

The new maintenance formulas are the new law's most striking weakness and will likely be the source of much confusion. The reform of New York's divorce laws was intended to make divorce more equitable and less time consuming and costly. However, the new temporary and post-divorce maintenance provisions offer confusing and potentially time consuming solutions to an already uncertain and drawn out process.

IV. RECOMMENDATIONS AND PROPOSED SOLUTIONS

The enactment of a no-fault option for the dissolution of marriage in New York is a positive development in the domestic

¹⁹² N.Y. DOM. REL. LAW § 236 Part B, 5-a(e)(1)(a)-(q) (McKinney 2010).

¹⁹³ Stashenko, *supra* note 15.

¹⁹⁴ *Id.* Miller noted: "If I were a judge, does it mean that I consider child support? The law is not clear. It is a very troublesome piece of legislation"
Id.

¹⁹⁵ *Id.*

relations laws of the state. However, while fault based divorce laws have their evils, they also encourage (or at times force) spouses to negotiate with one another in order to secure adequate post-divorce settlements. The default rules provided by no-fault divorce systems ignore the fact that each divorce is as unique as the circumstances that brought the couple to desire an end to their marriage. Often times, one party *is* at “fault,” and if post-divorce settlements are to be properly calculated, all of the facts should be considered, including the blameworthy conduct of the parties. Further, in the likely event that New York courts continue to consider fault in the distribution of property and maintenance awards only in the most egregious cases, New Yorkers contemplating marriage should enter into premarital or post marital agreements so that they have the requisite control over their post-divorce lives.

A. WHY A LITTLE FAULT IS A GOOD THING

While “fault allegations and fault trials add significantly to the cost, delay and trauma of matrimonial litigation,” in many cases litigants use fault as a tactical advantage in securing a more equitable post marital settlement.¹⁹⁶ This “tactical advantage” relates to the fact that many courts do not adequately provide post-divorce financial protection for the non-monied spouse.¹⁹⁷ For true post-divorce equitable distribution, New York’s divorce finance laws should take fault into account in situations where fault is relevant.

The reasons for divorcing and the financial position of the parties are unique in each divorce. Often some form of fault does exist, and in order for courts to adequately address the dissolution of the marriage before them, they should be able to consider all of the events that led the parties to seek divorce. In keeping with the Court of Appeals’ holding in *O’Brien*, New York courts only allow fault to be a consideration in maintenance awards and property division in “egregious cases which shock the conscience of the

¹⁹⁶ Miller, *supra* note 3, at 553; *See also* Kolker & Hurtado, *supra* note 6.

¹⁹⁷ Peter Nash Swisher, *The ALI Principles: A Farewell to Fault-But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?* 8 DUKE J. GENDER L. & POL’Y. 213, 214 (2001).

court.”¹⁹⁸ In *O’Brien*, the husband sought consideration of the wife’s fault in respect to the equitable distribution of the couples’ marital property.¹⁹⁹ However, the court held that there was no suggestion that the wife was guilty of fault sufficient to shock the conscience of the court, as was required for fault to be taken into account in the equitable distribution of property.²⁰⁰

New York courts should reconsider the *O’Brien* standard and allow for the consideration of fault. Of course, this infusion of fault would have no bearing on the actual granting of divorce but would be considered solely for the purposes of maintenance and property distribution. According to the American Bar Association, marital fault is a “factor” in awarding maintenance and dividing property in twenty-five states and the District of Columbia.²⁰¹ If no-fault divorce is to “do justice,”²⁰² New Yorkers should have the same opportunity.²⁰³

By removing the need for fault, New York’s Domestic Relations Law also takes away the strategic position that fault often plays in divorce settlements.

The threat of a fault divorce trial has often been used as a negotiating tool between warring spouses . . . [W]hen a spouse didn’t want to divorce for religious or other reasons, the threat of a trial airing marital disputes or proving the allegations of fault, might be used as a negotiating tactic paving the way for better settlement terms . . . No-fault

¹⁹⁸ See, e.g., *O’Brien v. O’Brien*, 66 N.Y.2d 576 (N.Y. 1985). Although the *O’Brien* Court failed to define “egregious misconduct,” lower courts have concluded that in order for conduct to affect equitable distribution, non-economic misconduct must “consist of behavior that falls well outside of the basis for an ordinary divorce action.” Thomas A. Elliot, *Discovery and ‘Non-Egregious’ Marital Fault*, 12 NO. 1 N.Y. FAM. L. MONTHLY 3, 4 (Sept. 2010).

¹⁹⁹ *O’Brien*, 66 N.Y.2d at 576.

²⁰⁰ *Id.*

²⁰¹ A.B.A., ALIMONY/SPOUSAL SUPPORT FACTORS, available at http://www.abanet.org/family/familylaw/flqwinter07_alimony.pdf (last visited Mar. 23, 2011).

²⁰² Wilson, *supra* note 27.

²⁰³ *Id.*

divorce [] takes this card out of the mix.²⁰⁴

The positive effects of no-fault divorce in New York should not preclude courts from considering the harmful symptoms of real marital fault when structuring the couple's post-divorce property settlement or maintenance allocation.²⁰⁵

Many courts in jurisdictions where the legislature enacted no-fault divorce laws have held that fault may be considered.²⁰⁶ As is evidenced by the decisions of courts in other jurisdictions, the fault of one or both parties may properly be considered in respect to alimony, spousal support, or property division pursuant to a divorce based on no-fault grounds. Because New York's current policy of not considering fault during maintenance determinations is similarly non-statutory, its courts should note the reasoning behind the decisions of other jurisdictions and make a common-law based change by allowing the consideration of fault in appropriate circumstances.

Other no-fault states have considered fault in maintenance determinations. In *Huggins v. Huggins*, the court rejected the husband's assertion that Alabama's no-fault divorce statute precluded the consideration of fault in the court's grant of alimony.²⁰⁷ The court wisely indicated that marital misconduct was a natural aspect of deciding alimony payments if there was fault to be taken into consideration.²⁰⁸ The court held that a trial court might consider fault when making a property division, even if it

²⁰⁴ Kolker & Hurtado, *supra* note 6.

²⁰⁵ Evans, *supra* note 34, at 475.

²⁰⁶ See, e.g., *Edwards v. Edwards*, 26 So.2d 1254, 1260 (Ala. Civ. App. 2009); *Cooper v. Cooper*, 382 So.2d 569, 571 (Ala. Ct. App. 1980); *Miller v. Miller*, 361 So.2d 577, 579 (Ala. Ct. App. 1978); *Huggins v. Huggins*, 331 So.2d 704, 707-08 (Ala.Ct. App. 1976); *Sides v. Sides*, So.2d 677, 679 (Ala. Ct. App. 1969). Occurring in jurisdictions where the no-fault provision did not include the role of fault in maintenance determinations or property division pursuant to a divorce based on no-fault grounds in the legislation itself.

²⁰⁷ *Huggins*, 331 So.2d at 707-08.

²⁰⁸ *Id.*; see *Sides*, So.2d at 679 (allowing fault to be considered); *Miller*, 361 So.2d at 579 (the Court considered the fault of a husband in committing adultery); *Cooper*, 382 So.2d at 571 (the Court considered the fault of a spouse in committing adultery).

New York and Divorce

821

does not grant a fault-based divorce.²⁰⁹ The *Edwards* court went a step further adding that, “the facts and circumstances of each divorce case are different,” and thus trial courts should consider each of the particular facts and circumstances surrounding the case at bar in dividing property.²¹⁰ In *Edwards*, the wife had abused drugs and alcohol throughout the couple’s marriage and was thus entitled to less than equitable distribution in light of the fault she played in the marital dissolution.²¹¹

A Connecticut court likewise considered a husband’s fault in connection with an award of maintenance and division of marital property in *Sweet v. Sweet*.²¹² The *Sweet* court noted that, although fault was not a consideration under the state’s divorce statute, the trial court could properly consider reasons for the dissolution of the marriage in making financial awards.²¹³ This supports the aforementioned proposition that no two divorces are alike and that courts have a duty to review each case before them in its entirety.

Further, in *Givens v. Givens*, the court noted that “[t]he trial court has discretion in the division of marital property, and a just division does not have to be equal, particularly where one party has engaged in misconduct.”²¹⁴ The court went on to explain that the conduct of parties during the marriage is a factor to be considered when allocating marital property.²¹⁵ However, it is important to note the *Givens* court’s caution: although marital fault should be taken into account in dividing marital property, “it should not serve as a basis for ordering excessive maintenance against, or inadequate marital property to, the offending spouse.”²¹⁶ The

²⁰⁹ *Edwards*, 26 So.3d at 1260.

²¹⁰ *Id.* at 1259.

²¹¹ *Id.* at 1260.

²¹² *Sweet v. Sweet*, 462 A.2d 1031 (Conn. 1983).

²¹³ *Id.*

²¹⁴ *Givens v. Givens*, 599 S.W.2d 204, 205–06 (Mo. Ct. App. 1980) (trial court has discretion in division of marital property and a just division does not have to be equal, particularly where one party has engaged in misconduct).

²¹⁵ *Id.*

²¹⁶ *Id.*; see *Hogan v. Hogan*, 651 S.W.2d 585, 587 (Mo. Ct. App. 1983) (the conduct of the parties is among the factors to be considered in the division of marital property).

purpose of considering fault in the distribution of property should not be to punish the party at fault, but to allow for all relevant facts to be considered in establishing an equitable post-divorce settlement.

In an apt holding by the Nevada Court of Appeals in *Heim v. Heim*, the Court noted that the concept of fault is consistent with the statutory requirement that property division and alimony awards be just and equitable, and have regard to the respective merits of the parties.²¹⁷ Similarly, in *Woodside v. Woodside*, a South Carolina court noted that the marital conduct factor becomes important in equitable distribution when the conduct of one party to the marriage throws a burden on the other party that falls beyond the norms to be expected in a marital relationship.²¹⁸ In such a situation, the court stated, marital misconduct should affect property distribution.²¹⁹

As Professor Robin Fretwell Wilson wrote, “Americans care why marriages break apart. Infidelity, violence [and] abandonment matter. This does not mean that we must uncritically embrace the old fault-based divorce laws . . . [but] [i]t does suggest [that] we need a prudent and realistic search for new approaches to enacting our shared moral understanding of marriage.”²²⁰ In response to its new no-fault divorce provision, New York courts should take heed of the manner in which other jurisdictions examine fault in the distribution of marital property and maintenance awards. Because fault includes more than “extremely outrageous behavior.”²²¹ New

²¹⁷ *Heim v. Heim*, 763 P.2d 678, 680 (Nev. 1988) (statutory requirement that awards be “just and equitable” applies to awards of alimony as well as to property disposition).

²¹⁸ *Woodside v. Woodside*, 350 S.E.2d 407, 412 (S.C. Ct. App. 1986) (in making an alimony award, court should consider the conduct of the parties).

²¹⁹ *Id.*

²²⁰ Robin Fretwell Wilson, *Don't Let Divorce Off the Hook*, N.Y. TIMES BLOG (Oct. 1, 2006), <http://roomfordebate.blogs.nytimes.com/2010/06/15/is-new-york-ready-for-no-fault-divorce/#robin>.; see also Lynn D. Wardle, *Beyond Fault and No-Fault in the Reform of Marital Dissolution Law*, in RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 16–17 (Robin Fretwell Wilson, ed., Cambridge University Press 2006).

²²¹ *O'Brien v. O'Brien*, 66 N.Y.2d 576, 590 (N.Y. 1985).

York courts must reconsider the standard set forth in *O'Brien* and work toward a more equitable system of marital dissolution.

B. The Argument for Premarital Agreements in No-Fault Divorce Jurisdictions

Marriage, at its core, is a contract. Because individuals do not enter into contracts without negotiating the terms, entering into the most important contract of one's life should not be treated any differently or with less care. Couples can choose to write this important marriage contract themselves via premarital agreements, or they can accept the default contracts written by the State Legislature.²²² Accordingly, New Yorkers considering marriage in the increasingly streamlined divorce system that no-fault divorce encourages, should write the terms of their own marriage and divorce by entering into premarital or post marital contracts.

Couples planning to marry have the option of entering into premarital agreements.²²³ Premarital agreements are recognized by all fifty states and are becoming more and more popular among couples contemplating marriage.²²⁴ Under early common law, prenuptial agreements were only applicable to the division of

²²² Steven E. Landsburg, *The Marriage Contract: Divorce is Just a Breakdown in Negotiations*, SLATE.COM (Sept. 12, 1997), <http://www.slate.com>.

²²³ Additionally, post-marital agreements are designed for couples that are already married and wish to negotiate the terms of a potential future divorce. ROBERT E. OLIPHANT & NANCY VER STEEGH, *WORK OF THE FAMILY LAWYER* 445–47 (2d ed., Aspen Publishers 2008).

²²⁴ Only approximately 5–10% of couples enter into premarital agreements in the United States. Beth Potier, *For Many, Prenups Seem to Predict Doom*, HARV. GAZETTE (2003), <http://news.harvard.edu/gazette/2003/10.16/01prenup.html>. The article interviews Heather Mahar, a fellow at the John M. Olin Center for Law, Economics, and Business at Harvard Law School who surveyed students on Harvard's campus on premarital agreements and divorce opinions. Mahar found that although respondents to her survey were able to correctly identify the national divorce rate (approximately 50%), the percent that thought they would eventually divorce was a mere 11.7%. *Id.* These inconsistencies underlie the reasoning for why the actual rate of couples that sign premarital agreements is only 5–10%. *Id.*

property upon one spouse's death.²²⁵ However, due to the increase in divorce rates, courts were forced to expand their acceptance of premarital contracts to govern property distribution in the event of divorce.²²⁶

The 1970 Florida Supreme Court case *Posner v. Posner* marked a shift in widespread judicial acceptance of premarital agreements.²²⁷ Although the *Posner* Court recognized an interest in keeping marriages together, it took note of the rising divorce rate and reasoned that "prospective marriage partners . . . may want to consider and discuss . . . the disposition of their property and the alimony rights of [a spouse] in the event their marriage should fail."²²⁸

Premarital agreements are particularly beneficial in no-fault jurisdictions because of the divorce system's ability to trap couples in disadvantageous financial situations during marriage. For example, a spouse who gives up or postpones his or her professional career to stay home with children or concentrate on caring for the marital home makes personal investments that have little value outside of the marriage.²²⁹ In no-fault divorce systems, where default rules are not totally equitable with regard to post marital maintenance or property division, dependent spouses are at the mercy of their financially secure partner.²³⁰ If that partner unilaterally decides to leave the marriage, these marital investments are devalued because they are economically worthless outside the home.²³¹ Conversely, the partner who makes such

²²⁵ OLIPHANT & VER STEEGH, *supra* note 223, at 445.

²²⁶ *Id.*

²²⁷ *Posner v. Posner*, 233 So.2d 381, 385 (Fla. 1970) (holding that antenuptial agreements, settling alimony and property rights of the parties upon divorce, if conforming to stringent rules prescribed for ante- and post-nuptial agreements settling property rights of spouses and made in good faith and on proper grounds, cannot be said to facilitate or promote procurement of a divorce and are valid as to conditions existing at the time the agreement was made).

²²⁸ *Id.*

²²⁹ Franck, *supra* note 135, at 254.

²³⁰ *Id.*

²³¹ See D. KELLY WEISBERG, FAMILY LAW 147-49 (1999). See also Garrison, *supra* note 148, at 632.

New York and Divorce

825

investments in the marital home and/or childcare cannot simply walk away from the marriage without suffering economic destitution.²³² Thus, spouses who foresee devoting their time to childcare or domestic management should negotiate the post-divorce rules on permanent maintenance or property division by entering into pre or post marital agreement.²³³

Interestingly, courts have come to regard the enforceability of premarital contracts as a natural consequence of the introduction of no-fault divorce.²³⁴ Prior to the widespread availability of no-fault divorce, courts feared that premarital agreements might provide incentive for a spouse to commit fault and exit his or her marriage without consequence. Because the terms of divorce were already provided for in a pre-nuptial contract, courts believed that the couple had little to fear from divorce and thus little reason to behave. However, in the wake of no-fault divorce regimes and *Posner*, courts have instead come to view premarital agreements as a straightforward way of resolving the financial issues of divorce.²³⁵ Therefore, premarital agreements should be interpreted as a corrective measure for the disadvantages inflicted by the decline of marriage through the already widespread availability of no-fault divorce.²³⁶

By entering into premarital agreements prior to marriage, parties may insist on stronger rights to alimony or a larger share of marital property than is provided by the default rules.²³⁷ The fewer the rights to maintenance payments or to a share of the property

²³² Franck, *supra* note 135, at 254.

²³³ *Id.* at 260–61.

²³⁴ *Frey v. Frey*, 41 A.2d 705, 709–10 (Md. 1984) (explaining that antenuptial agreements settling alimony or property rights of parties upon divorce are not *per se* against public policy and may be specifically enforced). “The old view’s fear that spouses could induce a divorce through fault, without consequences, because the terms of divorce were settled in a [premarital contract], is no longer persuasive because that spouse [can now] seek a no-fault divorce.” *Id.*; see also LAURA W. MORGAN & BRETT R. TURNER, *ATTACKING AND DEFENDING MARITAL AGREEMENTS* 33–34 (2001).

²³⁵ Jana B. Singer, *The Privatization of Family Law*, *WIS. L. REV.* 1443, 1475 (1992).

²³⁶ Franck, *supra* note 135, at 238.

²³⁷ MORGAN & TURNER, *supra* note 234, at 35–36.

provided by the no-fault default rules, the more contractual protection seems appropriate.²³⁸ Therefore, with the advent of no-fault divorce and the failure of New York courts to consider marital fault in the division of property and determination of maintenance awards, couples considering marriage should enter into premarital agreements. Negotiating the terms of a potential divorce may be the best route to a secure and equitable marriage.

CONCLUSION

The enactment of a no-fault divorce system is a positive development for New York's Domestic Relations Laws. By eliminating the strict fault requirements for divorcing spouses, the law ensures that New Yorkers who wish to dissolve their marriage can do so without added time, expense, or perjury. Additionally, studies of no-fault jurisdictions illustrate other advantages to adopting unilateral divorce such as the decrease in incidents of domestic violence and lower rates of female suicide.²³⁹

However, the passage of a no-fault divorce system in New York eliminates any bargaining leverage economically disadvantaged spouses have in the wake of divorce. Despite the fact that in some divorce cases there is assignable fault, New York courts fail to take this into account in awarding maintenance and dividing property.²⁴⁰ In light of the state's adoption of unilateral divorce, New York courts must reevaluate the *O'Brien* standard that allows marital fault to be considered only in egregious cases that "shock the conscience."²⁴¹ Further, with the loss of fault as a negotiating tool, New Yorkers looking to protect themselves and their assets in the wake of divorce should seek alternative solutions such as premarital agreements.

²³⁸ Franck, *supra* note 135, at 262.

²³⁹ See, e.g., The Editors, *supra* note 1 (discussing various pros and cons of no-fault divorce).

²⁴⁰ Pappas, *supra* note 162.

²⁴¹ *O'Brien v. O'Brien*, 66 N.Y.2d 576, 589 (N.Y. 1985).