Jurisdiction, Due Process and No-Fault Divorce[1]

The recently enacted no-fault divorce law, Domestic Relations Law § 170[7] provides a new ground for divorce: "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."

In an article, (No-Fault, Divorce and Due Process, 3/3/2011 NYLJ 3), Tim Tippins, Esq., differed on the position held by Hon. Sondra Miller (ret. Justice, Appellate Division, Second Department), (No-Fault–Clear and Simple, 12/3/2010 NYLJ 6), and me (No-Fault Divorce, Defenses, Pleadings, Independent Actions, 11/30/2010 NYLJ 4), that, pursuant to the plain language of the statute, compliance with the new no-fault divorce law requires no more than the statutory assertion by one party under oath; no further judicial inquiry or fact finding is required, irrespective of the other spouse's protests regarding the happy state of the marriage. Justice Miller, the driving force behind the no-fault law, briefly reviewed the legislative history behind the new ground and framed the poignantly disarming question in opposition to the contention that the no-fault divorce law requires a fact finding trial if demanded by the defendant: "Is it possible that experienced attorneys discern that the legislative intent was to substitute trials on 'irretrievable breakdown' for trials on fault?"

Mr. Tippins posits: "... the statute does not express any intent to strip litigants of the opportunity to be heard...Even if the Legislature had expressly proclaimed that there were to be no trials, such a provision would be constitutionally infirm" because of "due process" infringement.

This issue requires an understanding of the Legislature's role in divorce. Parties have no due process right to a divorce. Therefore they have no due process rights to determine divorce criteria. The Legislature has the exclusive right to determine when and how couples marry and divorce so long as it does not act irrationally or in a discriminatory manner. As the United States Supreme Court has held:

> "The State [through legislation] has the absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved," *Sosna v. Iowa*, 419 U.S. 714, 734-35 (1974) *quoting Pennoyer v. Neff*, 95 U.S. 714, 734-3 (1878).

The courts of this State have no common-law jurisdiction over divorce or its incidents. *Northrup v. Northrup*, 43 N.Y.2d 566 (1978). Prior to 1787 the courts of this State had no jurisdiction of the subject of divorce, and the only remedy of aggrieved individuals in matrimonial cases was by application to the Colonial governor and his council or to the legislature for relief. *Erkenbrach v. Erkenbrach* 96 N.Y. 456 (1884); see *Elizabeth Burtis, v. John Burtis*., Hopk. Ch. 557 (N.Y.Ch. 1825), *Langerman v. Langerman* 303 N.Y. 465 (1952), and *Trustees of Village of Saratoga Springs v. Saratoga Gas, Electric Light & Power Co*. 191 N.Y. 123 (1908) re historical development of divorce in New York.

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The jurisdiction of the courts to grant a divorce exists only by virtue of statute. *Pajak v. Pajak*, 56 N.Y.2d 394 (1982). Courts have jurisdiction over the marriage relation, its incidents and its ultimate consequences only as such jurisdiction is conferred by statute. *Waddey v. Waddey*, 290 N.Y. 251 (1943). When [a] statute [] provides the procedure by which and the court and proceeding in which the remedy of one who has a grievance must be pursued, where such a remedy did not formerly exist, all other procedure and remedies are thereby excluded for the settlement of such a grievance. *Hoops v. Hoops*, 292 N.Y. 428 (1944). It thus rests exclusively within the Legislature's authority to establish the predicates for exiting the marriage, even if it be on demand or at will. Courts may not, under the canons of statutory construction, infuse defenses or deny relief where the Legislature declined to do so. McKinney's Statutes § 92; *Pajak*, id.

California law is instructive. California Family Code § 2310, "Grounds for dissolution or legal separation", provides: "Dissolution of the marriage or legal separation of the parties may be based on either of the following grounds, *which shall be pleaded generally*: (a) Irreconcilable differences, which have caused the irremediable breakdown of the marriage"; and (b) insanity. California counsel advised me that no pleadings for divorce are filed in that State. A form, available on the State's website, requires only that litigants check the applicable box. California counsel could not sufficiently emphasize that protests by the party opposed to the divorce are of absolutely no avail. The court must grant the divorce. The statute has never been held constitutionally infirm.

Early in the history of no fault divorce in California, some courts took the position that they could deny a no fault divorce after a contested hearing. *McKim v. McKim*, 6 Cal. 3d 673, 677, 493 P.2d 868 (1972). "But it soon became clear that courts would not probe into the facts of the parties relationship" and California soon granted divorces based on the statement of one party that the couple had irreconcilable differences, a statement that could not be contested. IRA ELLMAN ET. AL. FAMILY LAW 220-221 (4th ed. 2004).

Based on experience elsewhere, the New York Legislature rationally concluded that hearings would serve no useful purpose. Even if New York courts were to go through the charade of allowing the defendant to take the stand in order to mollify an unnecessary due process concern, the court would, nevertheless, be constrained to grant the divorce, as directed by the Legislature, once the plaintiff satisfied the single statutory criterion: the formulaic recitation of the statutory language. This is a *haec verba* ground.

Additionally, our Legislature acted perfectly rationally-and in the best interests of New Yorkers-in not allowing contested hearings when one spouse alleges "irreconcilable differences." Experience in other states long ago demonstrated the utter futility, waste of time and resources of both courts and litigants, on contested hearings about whether irreconcilable differences exist. "Studies in California, Iowa, and Nebraska revealed that the opponents of no fault divorce were correct in forecasting that these reforms would ultimately permit unilateral divorce … In the Nebraska study a 'survey of 10,000 dissolution cases failed to reveal a single instance in which it could be said with certainty that a divorce which was desired by even one of the parties was ultimately refused.' As the Nebraska investigator observed:

It is difficult to imagine what evidence a respondent spouse could introduce to counter the impressive demonstration of martial breakdown which is exhibited when one of the parties to a marriage steadfastly insists that the relationship has come to an end. The strained and hostile atmosphere and the ugly courtroom confrontation that would attend a contest over whether marital breakdown has occurred would only further evidence the fact that it had." Id. at 221 quoting Alan H. Frank et. al. *No Fault Divorce and the Divorce Rate: The Nebraska Experience- An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 66-67 (1978).

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