Two Appellate Courts Deliver Difficult Interpretations of the No-Fault Statute

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In *Gleason v. Gleason* 26 N.Y.2d 28 (1970), the Court of Appeals heralded the benefits to society from the 1966 Divorce Reform Law, which repealed New York's "ancient divorce laws, which for almost 200 years [] sanctioned divorce solely for adultery." Among the new grounds was the conversion divorce based on living apart for more than one year following a written and acknowledged agreement – New York's closest brush with no fault divorce:

> Implicit in the statutory scheme is the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best interests not only of the parties but of society itself will be furthered by enabling them 'to extricate themselves from a perpetual state of marital limbo.

The 1966 grounds have persisted as the exclusive basis for divorce in New York for 44 years notwithstanding the national no fault trend that swept up the other 49 states. On August 13, 2010, New York ended its distinction as the final frontier to embrace wrongdoing as the exclusive criterion for terminating defunct marriages. Leveraging departure from dead marriages and ex parte foreign divorces may just possibly have become extinct. The Legislature, nevertheless, preserved traditional fault based divorces, perhaps to shield religious or other concerns, such as, immigration.

The gravamen of the no-fault amendment, Domestic Relations Law [DRL] § 170(7), is wholly anchored in the subjective perception and emotional process of the plaintiff:

> 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.

The act took effect "Oct. 12, 2010 and "shall apply to matrimonial actions commenced on or after such effective date." The balance of the statute precludes entry of the judgment of divorce until all ancillary issues, including economic, financial, and custody, have not been resolved either by agreement or judicial determination.

Legislative Intent, Affirmative Defenses

Legislative intent is the ancestral DNA of a statute. Statutes § 92, a canon of statutory construction, states that legislative intent is primary and controlling, and may not be thwarted by the courts:[1]

> Since the intention of the Legislature, embodied in a statute, is the law, in the construction of statutes the basic rule of procedure and the primary consideration of the courts is to ascertain and give effect to the intention of the Legislature.

[1] Niesig v. Team I, 76 N.Y.2d 363 (1990); Ferres v. City of New Rochelle, 68 N.Y.2d 446 (1986).

> [L]egislative intent is said to be the "fundamental rule," "the great principle which is to control," "the cardinal rule" and "the grand central light in which all statutes must be read." ....
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> The intent of the Legislature is controlling and must be given force and effect, regardless of the circumstance that inconvenience, hardship, or injustice may result. Indeed the Legislature's intent must be ... effectuated whatever may be the opinion of the judiciary as to the wisdom, expediency, or policy of the statute, and whatever excesses or omissions may be found in the statute. The courts do not sit in review of the discretion of the Legislature and may not substitute their judgment for that of the lawmaking body.
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> [L]egislative intent is to be ascertained from the words and language used in the statute, and if language thereof is unambiguous and the words plain and clear, there is no occasion to resort to other means of interpretation. What the Legislature intended to be done can only be ascertained from what it has chosen to enact, and it is only when words of the statute are ambiguous or obscure that courts may go outside the statute in an endeavor to ascertain their true meaning....

Generally, it is not necessary to look further than the unambiguous language of the statute to discern its meaning, which looks not only at what the statute requires, but also at what it does not require.[2] Courts cannot, through construction, enact an intent the Legislature totally failed to express,[3] such as, to create affirmative defenses to grounds where the Legislature has not done so.[4] A legislative omission is indicative that the exclusion was intended[5] – had the legislature intended to imbue § 170(7) with a defense it could have expressly done so.[6]

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[2] Morgenthau v. Avion Resources Ltd. 11 N.Y.3d 383 [2008]; Jones v. Bill, 10 N.Y.3d 550 [2008].

[3] Statutes § 92.

[4] Pajak v. Pajak, 56 N.Y.2d 394 (1982).

[5] Valladares v. Valladares 55 N.Y.2d 388 (1982) (It is not the function of this court to discard the clear language adopted by the Legislature and, by a process of judicial legislative revision based on notions of procedural refinements, to substitute for it other words which ... were known to the Legislature but were not employed in the statute as enacted.)

[6] See E. Scheinberg, No-Fault Divorce, Defenses, Pleadings, Independent Actions, N.Y.L.J., Nov. 30, 2010; Hon. S. Miller, No-Fault, Clear and Simple, N.Y.L.J., Dec. 3, 2010; E. Scheinberg, Hon. S. Miller, Prof. A. Schepard, Jurisdiction, Due Process and No-Fault Divorce, N.Y.L.J., Mar. 14, 2011; Prof. E. Freedman, Further Discussion of No-Fault Divorce and Due Process, N.Y.L.J., Mar. 16, 2011.

While clarity of a statute makes it improper to delve further into legislative intent, nevertheless, bill sponsor memoranda provide another valuable source of legislative intent.[7] The memorandum in support of § 170(7) by State Senator Ruth Hassell-Thompson, states that § 170(7) "amends the DRL in relation to *no-fault* divorce." It recognizes that "many people divorce for valid reasons" unrelated to any statutorily cognizable wrongdoing and can only exit their marriages by "invent[ing] false justifications" and "false accusations" which, pursuant to studies, escalate conflict and hurt children.

Tuper v. Tuper

In *Tuper v. Tuper*,[8] the Supreme Court denied the husband's motion to dismiss the wife's no-fault-divorce action on the grounds that, under CPLR 3211(a)(7), the complaint failed to comply with the specific pleading requirements of CPLR 3016(c): "[i]n an action for separation or divorce, the nature and circumstances of a party's alleged misconduct, if any, and the time and place of each act complained of, if any, shall be specified in the complaint...." The Fourth Department affirmed, holding that § 170(7) does not require a showing of any "misconduct" by either party. In essence, CPLR 3016(c) is inherently inapplicable to § 170(7) because "no fault", precludes misconduct. *Tuper*, however, follows a difficult circuitous reasoning process, below.

Rinzler v. Rinzler

The plaintiff, in *Rinzler v. Rinzler*,[9] commenced an action for divorce grounded on cruel and inhuman treatment and abandonment in 2009. In 2011, plaintiff commenced a new action based on no-fault. Notwithstanding the Legislature's unequivocal proscription that § 170(7) "shall apply to matrimonial actions commenced on or after such effective date [October 12, 2010]," the Third Department, "as a practical matter", allowed, albeit erroneously, the new action to stand, reasoning that the legislative intent was to lessen litigation. The court's language says it all:

> As a practical matter, there is a good reason to allow plaintiff to maintain this action. As the Legislature noted, the intent of no-fault divorce was 'to lessen the disputes that often arise between the parties and to mitigate the potential harm to them ... caused by the current process'...Similarly, the Governor stated, in signing the legislation, that its intent was to 'reduce litigation costs and ease the burden on the parties in what is inevitably a difficult and costly process...Thus, allowing plaintiff to proceed on the cause of action for a no-fault divorce—which was not available to him at the time he commenced the first action—will not 'unreasonably burden ... defendant with a series of suits emanating from a single

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[7] County of Westchester v. Board of Trustees of State University of New York 9 N.Y.3d 833 (2007).

[8] 946 N.Y.S.2d 719 (4th Dept.,2012).

[9] 947 N.Y.S.2d 844 (3rd Dept.,2012).

> wrong merely by basing each suit on a different theory of recovery'...To the contrary, it is more likely to lessen the burden on both parties and promote judicial economy by obviating the necessity of a trial on the issue of fault...
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> Nor are we persuaded by defendant's contention that plaintiff, having previously commenced an action prior to the effective date of DRL§ 170(7), may not avail himself of the benefit of the no-fault provision by commencing a new action because it would contravene the Legislature's intent regarding the statute's effective date. Unlike the equitable distribution statute, which substantially expanded the economic rights of a spouse in a divorce (DRL § 236[B], the change created by DRL§ 170(7) simply provides another ground for obtaining a divorce...Thus, allowing plaintiff to maintain the new action for a no-fault divorce will not circumvent the Legislature's intent.

Jury Trials, Grounds

DRL § 173 provides: "In an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce." It seems that the Legislature's failure to amend this statute, like its failure to amend DRL § 210, below, was inadvertent. Juries, as fact finders, are charged with the duty of allotting responsibility attributable to wrongdoing. It is contradictory and violative of the legislative intent that a ground based on no wrongdoing, "no-fault", can become the subject of fault finding. Justice Allan Scheinkman states that the right to a jury trial on divorce grounds "assumes that there are genuine fact issues to be tried."[10] The Legislature's requirement of no more than a perceptual statement made under oath eliminates any further exploration as to underlying fact.

The above statement, in *Tuper*, regarding CPLR 3016(c) notwithstanding, the Fourth Department veered in a surprisingly different direction noting that during the debate over no-fault divorce in the State Assembly over the bill that became the no-fault statute, the Assembly sponsor stated at various times that "the allegation of an irretrievable breakdown in the marital relationship can be 'contested'...[the Sponsor's] representations appear consistent with the fact that the Legislature, upon enacting the no-fault statute, did not amend DRL § 173." Notably absent from *Tuper* is State Senator Hassell-Thompson's statement, above.

Statute of Limitations

In another likely inadvertent oversight, the Legislature did not amend DRL § 210, the Statute of Limitations on grounds for divorce, to include § 170(7). Under § 210, abandonment [§ 170[2]] is exempted from the five year limitations period. Abandonment is fundamentally a continuing event.[11] Similarly, the very nature of the word irretrievable screams continuity into

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[10] Scheinkman, Practice Commentaries, DRL § 173; cf. Tuper, n1.

[11] Giella v. Giella, 55 Misc.2d 727 (N.Y.Sup. Jan 17, 1968); Smith v. Smith, 55 Misc.2d 172 (N.Y.Sup., 1967).

perpetuity and requires the same conclusion.

The Supreme Court, in *Tuper*, also denied the husband's motion to dismiss the wife's no-fault-divorce action on the grounds that the action was time barred under CPLR 3211(a)(5). The Appellate Division surprisingly held that § 170(7) is subject to the five-year limitations period in § 210. The decision erroneously analogized the nature of § 170(7) to the ground of imprisonment rather than abandonment:

> [A] cause of action for divorce under the no-fault statute should be treated similarly to a cause of action for divorce based upon imprisonment of a spouse (§ 170[3]), which is also governed by the five-year statute of limitations set forth in section 210. In Covington v. Walker (3 N.Y.3d 287, 291, 786 N.Y.S.2d 409, cert. denied 545 U.S. 1131, 125 S.Ct. 2938), the Court of Appeals held that a cause of action for divorce based on imprisonment "continues to arise anew for statute of limitations purposes on each day the defendant spouse remains in prison for 'three or more consecutive years' until the defendant is released." Like a spouse serving a life sentence, an irretrievable breakdown in a married couple's relationship is a continuing state of affairs that, by definition, will not change. After all, the breakdown is "irretrievable." It thus stands to reason that a cause of action under the no-fault statute may be commenced at any time after the marriage has been "broken down irretrievably for a period of at least six months" (cites omitted).
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> [A] contrary ruling would force a spouse such as plaintiff "to unwillingly remain in a dead marriage" (Covington, 3 N.Y.3d at 291, 786 N.Y.S.2d 409, 819 N.E.2d 1025). Indeed, if the accrual date of a no-fault cause of action were to be determined as defendant suggests so as to arise only on the day that the relationship initially became irretrievably broken, assuming that an exact date could even be pinpointed, the only couples who could get divorced under the no-fault statute would be those whose relationships irretrievably broke down within the past five years but not within the last six months. Couples whose relationships irretrievably broke down more than five years ago would have to remain married. That is inconsistent with the general intent of the Legislature in enacting the no-fault statute, which was to "enable[ ] parties to legally end a marriage which is, in reality, already over and cannot be salvaged" (Senate Introducer Mem. in Support, Bill Jacket, L. 2010, ch. 384, at 13).

Conclusion

Restraint must be exercised to avoid albeit benevolent yet overbroad readings beyond the statute's legislative intent, as framed by its plain words.