NO FAULT DIVORCE, DEFENSES, SUPPLEMENTAL PLEADINGS, INDEPENDENT ACTIONS[1]

Elliott Scheinberg

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26 N.Y.2d 28 (1970), the Court of Appeals heralded the benefits to society from the 1966 Divorce Reform Law, which repealed New York's "ancient divorce laws, which for almost 200 years [] sanctioned divorce solely for adultery."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 ➤➤**[see amendments in article]** 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 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. The act takes effect "on the 60th day after it shall have become a law and shall apply to matrimonial actions commenced on or after such effective date", October 12, 2010.

Important questions swirl about the new law. Is there any defense to the new ground? May a plaintiff's statement under oath be accompanied by a motion for summary judgment for divorce? May pleadings be amended to add § 170[7]?

---

[1] N.Y.L.J., November 30, 2010.: **Cited:** Strack v. Strack, 31 Misc.3d 258, 916 N.Y.S.2d 759 (N.Y.Sup.,2011).

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:[2]

> 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. [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." ....
>
> 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.
>
> [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.[3] Courts cannot, through construction, enact an intent the Legislature totally failed to express,[4] such as, to create affirmative defenses to grounds where the Legislature has not done

---

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

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

[4] Statutes § 92.

so.[5] A legislative omission is indicative that the exclusion was intended[6] – had the legislature intended to imbue § 170[7] with a defense it could have expressly done so.

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], prepared 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. The intent and purpose of the § 170[7] are unquestionable and may not be contaminated by reference to extrinsic sources.

CPLR 3016[c]

The specificity requirement in pleadings [CPLR 3016[c]], "In 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 or counterclaim ... ", is inapplicable to § 170[7] because "no fault", by definition, precludes misconduct. Pleading the irretrievable breakdown for at least six months is sufficient.

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." Section 170[7] is a ground. 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", could 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."[8] The Legislature's requirement of no more than a perceptual statement made under oath eliminates any further exploration as to underlying fact.

---

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

[6] 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.)

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

[8] Scheinkman, Practice Commentaries, DRL § 173.

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.[9] Similarly, the very nature of the word irretrievable screams continuity into perpetuity and requires the same conclusion.

Supplemental Pleadings

By way of background, barring prejudice to the adverse party,[10] statutory [CPLR 3025(b)] and decisional authority [below] permit amendments or supplements. CPLR 3025(b) states: "A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court ... Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." The statute clearly supports "subsequent transactions and occurrences" – matrimonial actions are not excepted.[11] As a point of interest, case law authorizing supplemental post commencement allegations in divorce actions is not of recent vintage, dating back to at least 1834.[12]

---

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

[10] McCaskey, Davies and Assocs., Inc. v. New York City Health & Hosps. Corp., 59 N.Y.2d 755 (1983);

[11] See See Golub v. Ganz 22 A.D.3d 919 (3rd Dept.,2005), affirmed a divorce grounded on post-commencement adultery because the plain language of DRL § 170[4] defines adultery as an event which occurred "after the marriage." Prior to a judgment of divorce parties remain married; Dreier v. Dreier 15 Misc.3d 1131(A) (N.Y.Sup.,2007), granted the husband's motion to amend his answer to assert a counterclaim for a conversion divorce on the grounds that the parties had lived separate and apart pursuant to the terms of the settlement agreement for more than one year (DRL § 170[6]). Citing Golub, Vickers v. Vickers, 131 A.D.2d 565 (2nd Dept.1987), and Getz v. Getz, 130 A.D.2d 710 (2nd Dept.1987), Justice Rosalyn Richter poignantly emphasized that New York does not have "a bright-line rule prohibiting amendments of divorce pleadings to include grounds that did not exist at the commencement of the action." Dreir also found no prejudice [CPLR 3025(b)], such as, the loss of "some special right", some change of position or some significant trouble or expense; cf., Hallingby v. Hallingby, 159 Misc.2d 988 [1993]; Shuffman v. Shuffman 6 A.D.2d 1030 (1st Dept.,1958); Otto v. Otto 220 A.D. 130 (1st Dept.1927) (affirmed an amended complaint alleging adultery committed long after the commencement of the action and previously unknown to the plaintiff. Unlike earlier law, the Legislature, in enacting a liberalized Civil Practice Act showed a "clear intent" "to simplify and liberalize the practice in many respects."

[12] Smith v. Smith, 4 Paige Ch. 432, 3 N.Y. Ch. Ann. 502 (1834); Blanc v. Blanc, 22 N. Y. S. 264, (1893), unanimous opinion; Ames v. Ames, 109 Misc. 161 (N.Y.Sup.,1919), but cf. Faas

Complaints, Post-EDL Cases

The body of law relative to supplemental pleadings which emerged soon after the enactment of the Equitable Distribution Law [EDL], which statute also applied only to matrimonial actions commenced on or after its effective date, is instructive. In those cases, the Court of Appeals denied motions to either discontinue actions [CPLR 3217] only to be commenced anew or amend answers [CPLR 3025(b)] each as a means of accessing the then newly broadened property rights under EDL.

Additionally, supplementing pre October 12, 2010-complaints to include § 170[7] raises the specter of palpable prejudice to the defendant – while the advent of § 170[7] creates no heretofore unknown substantive economic rights, such as, with EDL, it, nevertheless, impacts economic rights. By way of example, a wife who served a fault based complaint for divorce prior to October 12, 2010 who cannot establish her entitlement to a divorce under the pre § 170[7] grounds, is ineligible for equitable distribution.[13] Plainly, a supplemental complaint energized by § 170[7] would result in her automatic entitlement to property distribution – an indubitable economic prejudice to the other spouse.

The contemporaneously enacted temporary maintenance law [DRL § 236B(5-a)], also effective, October 12, 2010, is not a new substantive right – pendente lite spousal maintenance has its own jurisprudence. The new temporary spousal maintenance law is merely a calculus, a methodology by which to enhance predictability and uniformity in spousal maintenance determinations and would, therefore, would not be prejudicial.

Although it is unclear why a plaintiff might omit § 170[7] from the complaint, a fault based action filed after October 12, 2010 should, under the terms of the statute, be eligible for amendment to include § 170[7].

Counterclaims, *Valladares, Motler*

May counterclaims, which are separate causes of action [CPLR 3019(a)], be supplemented to include § 170[7]? Although first blush suggests not because the statute applies to matrimonial actions commenced on or after October 12, 2010, the answer depends upon when the defendant first served the counterclaim.

In *Valladares v. Valladares* 55 N.Y.2d 388 (1982), the husband had amended his pre-EDL complaint with a cause of action predicated on adultery. Following her answer to the amended complaint, but not until after EDL's effective date, the wife moved to amend that answer to assert a counterclaim for divorce on the ground of adultery and to demand equitable distribution of the marital property. Supreme Court allowed the amendment to the answer but denied permission to seek equitable distribution. The Appellate Division and the Court of

---

v. Faas, 57 A.D. 611 (1st Dept., 1901).

[13] DRL § 236(B)(5)(a).

Appeals both affirmed. The Court of Appeals focused on the language in the statute which emphasized, not when the wife's claim had been interposed, but when the action in which it was interposed was commenced.

Valladares preserved an issue that it did not reach because it had not been before the Court: the effect of an independent action, rather than a counterclaim in the husband's pending action, on the wife's right to equitable distribution. Nineteen months later, the Court squarely answered the question, in *Motler v. Motler*, 60 N.Y.2d 244 (1983), also an EDL case, which has a direct bearing on § 170[7].

Motler v. Motler

Framed differently, the unpreserved question in *Valladares* distills into whether a plaintiff can compel the result of shackling a defendant to a soon to expire substantive law, unfavorable to the defendant, by commencing an action prior to the effective date of a new law, which is more favorable to the defendant, simply because the defendant counterclaimed within the plaintiff's action rather than having commenced an independent action? The Court of Appeals answered in the negative.

Two days before the effective date of EDL, plaintiff, in *Motler*, commenced an action for divorce. After EDL's effective date, defendant answered with a counterclaim for divorce and subsequently moved for leave to discontinue her counterclaim for the conceded purpose of commencing a separate action to obtain the benefits of EDL. Supreme Court granted her motion. The Court of Appeals affirmed crediting the Appellate Division's "cogent" observation that plaintiff's commencement of the action only two days prior to the effective date of EDL was "an obvious effort to preclude the defendant from the benefits" of the new law. The Court of Appeals held that, under the permissive nature of CPLR 3019(a), the defendant's substantive rights could not be frustrated by machination of her guaranteed procedural rights, that forfeiture of her rights would depend upon counterclaim or independent action:

> A spouse should not be barred from access to the benefits of the Equitable Distribution Law by being denied procedural remedies to which he or she is unconditionally entitled under the CPLR. Specifically, CPLR 3019 provides that all counterclaims are "permissive" and a party may assert his or her claim against the plaintiff as a counterclaim or may bring a separate suit. (Siegel, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C3019:2, p. 216.) Thus, defendant could have commenced an independent action for divorce after July 19, 1980, rather than interposing a counterclaim in the pending action. Defendant's failure to commence a separate action for divorce at the time the answer and counterclaim were interposed, after the new statute became effective, constituted a tactical error of form, not substance, and should not bar her from access to the benefits of the Equitable Distribution Law.

The Court of Appeals quickly distinguished *Motler* from the its earlier line of EDL-decisions which obviated impermissible equitable distribution where a party either: (a)

commenced an action for divorce prior to EDL's effective date and sought to discontinue it after its effective date;[14] or (b) served an answer prior to EDL's effective date and moved after the effective date to amend the answer or to assert a counterclaim for divorce with a demand for equitable distribution.

Motler underscored that since defendant had neither initiated the original action nor responded to the complaint before the new law took effect, it was, therefore, her determination how to proceed. This thesis holds equally true in post § 170[7] complaints. Furthermore, case law supports the conservation of judicial time and the conservation of the parties "by permitting the service of a supplemental answer and trying all of the issues in one suit rather than compelling a new, independent action."[15]

Conclusion

As with any new statute, the skeletal structure of DRL § 170[7] will assume firm shape as appellate courts answer questions. Restraint must be exercised to avoid enthusiastically overbroad readings beyond the statute's legislative intent, as framed by its plain words.

---

[14] Tucker v. Tucker, 55 N.Y.2d 378 (1982), Zuckerman v. Zuckerman, 56 N.Y.2d 636 (1982), and Pollack v. Pollack, 56 N.Y.2d 968 (1982).

[15] Shuffman v. Shuffman 6 A.D.2d 1030 (1st Dept.,1958); Weiss v. Weiss, 135 Misc. 264 (N.Y.Sup.1929), citing Otto, held: "The fact that the adultery relied on did not occur until after the commencement of the action should not alter the situation and make it necessary for the defendant to commence a separate action."