Appraising Change and Progress a Decade After the Report of the New York Task Force on Women in the Courts

EQUAL *Justice* **EQUAL** *Treatment* **EQUAL** *Opportunity*

A Report by the New York Judicial Committee on Women in the Courts
May 1996

The bill extended the protections of New York's "rape shield law" by confining defense inquiries to evidence that judges found relevant after an offer of proof or a hearing outside the presence of a jury. The legislature recognized that, although prior sexual history is rarely relevant to any offense, sexual or otherwise, it often adds an inflammatory and prejudicial element to a trial as well as an opportunity to humiliate and intimidate complaining witnesses.

An entirely different kind of initiative on sexual assault has come from the Chief Judge's Family Violence Task Force, which, in July, 1995, began a series of seven, one-day seminars on child sexual abuse. Intended to bring the latest research and thinking to judges, the seminars have relied on multidisciplinary panels of experts and practitioners that have included the criminal defense bar as well as matrimonial lawyers, mental health experts, prosecutors, law enforcement officials, law guardians, and forensics experts. Five of these seminars used an interactive format addressing matrimonial, criminal, and family law issues.

Matrimonial Litigants

The Task Force, reporting relatively soon after New York's Equitable Distribution Law went into effect, as judges, lawyers, and litigants were grappling with its implications, found troublesome applications of the law that put at risk the economic stability of matrimonial litigants.[34] Most in jeopardy were partners in marriages, usually wives, with few assets in their names and little income of their own yet often responsible for dependent children. The decade since the Task Force Report has seen measured progress towards more fair outcomes and a more level playing field for New York women whose marriages end in divorce.

Economic Consequences of Divorce

Distribution of Marital Property

When the Task Force reported, New York's Equitable Distribution was still new, and the legal system was still adjusting to the law's changes in the process for assigning post-divorce economic rights. In the past decade, many of the gains envisioned by the law's architects have been consolidated through judicial decisions and legislation. Yet the application of these laws continues in some ways to leave women, particularly financially dependent spouses, at a disadvantage.

The Court of Appeals has taken an expansive view of the law's reach and, in conformance with the Legislature's intentions, interpreted it with an appreciation of the needs of economically weaker spouses. When the Task Force reported, the Court had recently decided the landmark case of *O'Brien v. O'Brien*,[35] adopting the theory that marriage is an economic partnership and encouraging courts to recognize the nonfinancial contributions of homemakers. The Court has held fast to the course set in *O'Brien*. In 1993, for example, the Court described the Equitable Distribution Law as a "revolutionary enactment," recognizing that a spouse acquires an independent ownership interest in marital property.[36] In the last year alone, the Court has ratified

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[34] *Task Force Report* at 64-80.

[35] 66 N.Y. 2d 576 (1985).

[36] *Kaplan v. Kaplan*, 82 N.Y. 2d 300, 305-306 (1993).

O'Brien twice, paying tribute in one case to *O'Brien's* "pragmatic and theoretical worth,"[37] and referring in another to "the generous reading which the Legislature intended to be accorded the term marital property,"[38] a key concept in equitable distribution law. Court of Appeals rulings have made available for distribution as assets of the marriage partnership not only the professional licenses that were the subject of *O'Brien*, but also pensions, nonvested as well as vested;[39] the appreciated value of separately held assets;[40] disability payments;[41] and investments in business partnerships.[42]

Experience with the Equitable Distribution Law also has changed judicial attitudes, and judges now are more inclined to split marital property equally between husband and wife. The Equitable Distribution Law asked judges, lawyers, and the public to rethink radically their ideas about the division of labor within a marriage, the value of contributions to a household, and equity in divorce. These new notions required time to take hold. According to a comprehensive study of reported decisions during the first ten years of New York's experience with the Equitable Distribution Law, in the years from 1980 to 1983 judges awarded spouses half of the marital estates in only 33% of the cases. In later years, from 1983 to 1990, over 50% of judicial awards gave husband and wife equal shares in marital assets.[43]

Maintenance

Since few of the approximately 60,000 couples ending their marriages in New York each year have property besides their marital home subject to equitable distribution, fair awards of maintenance are just as critical to the financial stability of economically weaker spouses as appropriate divisions of marital assets. The Task Force Report criticized judges for awarding maintenance that too often left even unemployed women who had been married for many years without adequate support.[44] The Equitable Distribution Law, in theory, provided for maintenance both to help divorcing spouses capable of achieving independence and to provide financial stability for spouses who realistically could never be expected to earn enough to support a standard of living comparable to that enjoyed during the marriage. A study comparing divorces before and after the Equitable Distribution Law was enacted found a precipitous drop in awards of maintenance after the law went into effect, and particularly hard hit, according to the study, were women who were most vulnerable by virtue of long years spent as homemakers without significant participation in the labor market.[45]

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[37] *McSparron v. McSparron, NYLJ*, Dec. 8, 1995, p. 27, col. 3.

[38] *Hartog v. Hartog*, 85 N.Y. 2d 36, 49 (1995).

[39] *See, e.g., Burns v. Burns*, 84 N.Y. 2d 369, 376 (1994). *See also Kaplan v. Kaplan*, 82 N.Y. 2d 300 (1993), holding that the Equitable Distribution Law prevailed over the statutory anti-assignment provisions of the Teachers Retirement System.

[40] *See, e.g., Hartog v. Hartog*, 85 N.Y. 2d 36, 45-46 (1995); *Price v. Price*, 69 N.Y. 2d 8, 17-18 (1986).

[41] *See, e.g., Dolan v. Dolan*, 78 N.Y. 2d 463 (1991).

[42] *See, e.g., Burns v. Burns*, 84 N.Y. 2d 369, 375 (1994).

[43] Marsha Garrison, "How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making," 74 *North Carolina L. Rev.* 401, 454-55 (1996).

[44] *Task Force Report* at 75.

[45] Marsha Garrison, "Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes," 57 *Brooklyn L. Rev.* 621, 697-705 (1991).

Attempts have been made to counteract the apparent judicial reluctance to award fair maintenance. In 1986, the summer after the Task Force reported, the Legislature passed amendments to the Equitable Distribution Law intended to encourage judges to make more substantial awards of maintenance. The amendments directed judges ruling on requests for maintenance to consider the standard of living couples had enjoyed before they separated and added language to erase any doubts about the authority of judges to make awards permanent.[46] The statute, however, seems to have had little immediate effect on judicial decision making.[47]

The Court of Appeals, taking up the problem of maintenance, has continued to remind judges that considering pre-divorce standards of living is obligatory, not optional. In *Hartog v. Hartog*,[48] and again in *Summer v. Summer*,[49] both decided in 1995, the Court of Appeals reversed appellate court rulings precisely because they had given insufficient consideration to pre-divorce standards of living. In both cases the Court of Appeals reinstated lifetime awards of maintenance made by trial courts.

Data on Economic Consequences of Divorce

Responding in part to a suggestion of the Women's Bar Association of New York State, the New York Judicial Committee on Women in the Courts has worked with the court system to create a mechanism for collecting consistent data on the post-divorce economic prospects of families. A form was drafted soliciting basic demographic information and financial data on New York divorces, and, in 1994, court rules were amended to require parties, in both contested and uncontested matters, to complete the form and file it with their proposed judgments of divorce.[50] The first full year's data is being recorded electronically and will be ready for analysis by the summer of 1996.

Matrimonial Litigation

Not only the outcomes of divorce cases but the litigation process itself has come under fire. A particularly devastating critique by the New York City Commissioner of Consumer Affairs[51] prompted the appointment of the Committee to Examine Lawyer Conduct in Matrimonial Actions under Hon. E. Leo Milonas, then Justice of the Appellate Division, First Department, and, later, Chief Administrative Judge. In 1993, after an intensive, nine-month long investigation that culminated in three days of public hearings, this committee, "impressed with the scope and urgency of the problems it encountered," urged the "prompt implementation" of a series of recommendations.[52]

Many recommendations were directed at the behavior of lawyers. The committee suggested instituting court rules compelling lawyers in matrimonial cases to provide written fee retainers

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[46] Laws of 1986, Ch. 884.

[47] Marsha Garrison, "How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making," 74 *North Carolina L. Rev.* 401, 472 (1996).

[48] 85 N.Y. 2d 36, 50-51 (1995).

[49] 85 N.Y. 2d 1014 (1995).

[50] For a copy of the form collecting information on New York divorces, *see Appendix C.*

[51] NYC Department of Consumer Affairs, *Women in Divorce: Lawyers, Ethics, Fees and Fairness* (1992).

[52] Office of Court Administration, *Report of the Committee to Examine Lawyer Conduct in Matrimonial Actions*, May 4, 1993.

and to give prospective clients a bill of rights. Also recommended were the establishment of a system for arbitrating disputed attorneys fees and limitations on the charging liens and security interests often used to compel payment of fees. But the court system itself also came under attack for tolerating the abusive tactics of lawyers and allowing divorce actions to become wars of attrition. Chief among the recommendations addressed to the courts was a proposal for preliminary conferences with both parties present, to be held soon after cases were filed, for the purpose of discussing possible settlements, defining and narrowing contested issues, and setting discovery schedules. The committee also advocated measures to encourage prompt decisions on requests for *pendente lite* relief so that dependent spouses were not left destitute while litigation progressed, routine awards of interim counsel fees, and the imposition of sanctions stiff enough to secure compliance with discovery rules and court orders.

Within months the bulk of these recommendations was adopted in amendments to court rules.[53] Not content, however, with changing rules, but determined to see that they had their intended effect of making the process of divorce less arduous and more fair, Chief Judge Judith S. Kaye appointed the Committee to Track the New Matrimonial Rules and named as the committee's chair Hon. Jacqueline Silbermann, Administrative Judge of the New York City Civil Court. This committee has documented instances in which compliance with the rules has met expectations as well as places where it has fallen short of the mark.[54] Consulting with bench and bar, through meetings and an attorney survey, the committee found notable success in achieving one of the primary goals of the rules: early and effective judicial intervention through mandatory preliminary conferences. Fee arbitration has gone forward in over 150 cases, and, even though, according to one study, lawyers have prevailed in the majority of cases, the process has been applauded by a number of clients and their advocates.[55]

Yet one critical problem stubbornly defies solutions: the reluctance of judges to award interim attorneys fees to economically dependent spouses. The committee tracking the rules reported that the "common practice of routinely denying or deferring such applications [for interim fees] ... does not seem to have improved in any significant degree."[56] In yet another attempt to change this practice, the Office of Court Administration included in its 1996 legislative program a bill to create a rebuttable presumption in favor of interim attorneys fees.

Child Support

Reporting "compelling evidence of human suffering" caused by the failure of courts to impose and enforce child support obligations, the Task Force documented the need for dramatic reforms in the legal mechanisms for securing financial resources from noncustodial parents for the support of their children.[57] The Task Force reported soon after the New York State

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53 The new rules created 22 NYCRR Part 1400 and amended 22 NYCRR Part 136, Part 1200, and 22 NYCRR § 202.16.

54 Office of Court Administration, *Status Report of the Committee to Track the New Matrimonial Rules to the Chief Judge and the Chief Administrative Judge*, June 1995 [*Status Report*].

55 "Divorce Lawyers Win Most Fee Disputes," *New York Law Journal*, Dec. 14, 1995, p. 1, col. 3.

56 *Status Report* at 62.

57 *Task Force Report* at 85-100.