

# FAIR\$HARE

## THE MATRIMONIAL LAW MONTHLY

Prentice Hall Law & Business—Vol. 11, No. 1, January 1991 Monthly

### CONTENTS

<b>NEW AND NOTEWORTHY</b>	
Case highlights. ....	2
<b>INSIGHT</b>	
<b>Comparable Company Method Of Valuing a Closely-held Business</b>	
by Martin P. Randisi, CPA, ASA The problems, illustrated by analogy to an acquisition. ....	3
<b>Use of a QDRO</b>	
by Richard J. Levinson, CPA and Nicolas J. Crocetti, CPA Understanding the basics. ....	5
<b>Equitable Remedies Available To Cohabitants</b>	
by Frank A. Louis A checklist of theories. ....	7
<b>PRACTICE POINTERS</b>	
<b>Effective Drafting of Premarital Agreements</b>	
by Theda C. Snyder Duration, business protection. ....	11
<b>Resolving Alternate Weekend Visitation Disputes</b>	
by Lawrence Schorr Suggested agreement clause. ....	12
<b>COMMENTARY</b>	
<b>The Fault with No-Fault in New York</b>	
by Barbara Bevando Sobel and Sandra Katz Protecting family units. ....	13
<b>New York's New Child Support Ideology Strikes Out</b>	
by Timothy M. Tippins The Kal Daniels case. ....	15
<b>LITIGATION CASE TIPS</b>	
Valuing a lawyer's tax shelters (opposing arguments, hybrid award). ....	20
<b>CASE DEVELOPMENTS</b>	
<b>Property Distribution:</b> professions (capitalization of future medical income, education loans); businesses (pharmacy/FMV, minority discount); stock exchange seat (valuation date); pensions (cash-out tax consequences); marital home (post-divorce revaluation, usury); personal injury awards (analytic approach); waste (investment losses); separate property (royalty income). <b>Alimony/Maintenance:</b> percentage of future bonuses, temporary receiver. <b>Child Support:</b> income over guideline cap, emancipation date (learning disabilities, drug addiction). <b>Litigation:</b> hearsay (sex abuse statements). <b>Domestic Torts:</b> custodial interference, venereal disease transmission. <b>Divorce quiz:</b> guardian <i>ad litem</i> malpractice immunity? ....	21
<b>JUDGE'S CORNER</b>	
Property distribution based on judge's divorce.	
<b>You Be the Judge:</b> attorney's exchange of letters or alimony contract? ....	27
<b>WRITTEN ELSEWHERE</b>	
Recent articles. ....	28
<b>INDEX</b>	
Table of Cases, State Index, Subject Index. ....	29

# COMMENTARY

## The Fault with No-Fault In New York

by *Barbara Bevando Sobel and  
Sandra C. Katz\**

Are we ready to abandon the established philosophy of marriage and divorce in New York state? Apparently not yet. In June 1990, the New York State Assembly failed to pass a no-fault divorce bill which would have: created a new ground for divorce in New York based upon irreconcilable differences; created a presumption that all marital assets would be divided "equally" for marriages that last more than five years (assets from marriages of less than five years would be divided "equitably"); created permanent maintenance awards that are subject to judicial discretion; and created counsel fee and expert fee awards that are subject to judicial discretion.

The no-fault bill failed in the assembly notwithstanding the fact that last year a bill which included all of the above provisions, except permanent maintenance, passed in the Senate 33 to 26. However, do not be seduced into a false sense of security. A no-fault bill, like an *incubus* (demon), can come back to haunt us if it is re-introduced in January 1991. In our view the no-fault bill provides nothing new under the sun that could benefit our society and, more particularly, nothing that could benefit women and children. To fully comprehend the ramifications of the proposed no-fault legislation in the State of New York, it is necessary to understand the concept of divorce and marriage as it exists at present.

### *Grounds for Divorce*

In New York, pursuant to Domestic Relations Law §170, a divorce may be granted on the following *fault* grounds: *cruel and inhuman treatment*; *abandonment*; *adultery*; and *confinement in prison* (for a period of three or more consecutive years).

Alternatively, a divorce may be granted if the parties have lived apart for one year or more pursuant to a written separation agreement. However, the spouse requesting the divorce must show that he/she

\*The authors practice with the law firm of Sandra C. Katz, New York City and Staten Island. Ms. Sobel is matrimonial chairperson, Staten Island Women's Bar Association and a member of the Matrimonial Committee, Women's Bar Association of New York State. Ms. Katz is co-chairperson, Matrimonial Committee, Women's Bar Association of New York State.

has substantially complied with all of the terms and conditions of the agreement.

After all is said and done, whether we like it or not, what the current law boils down to is a *balance* between the spouse at fault and the innocent spouse. The innocent spouse at least has the option of divorcing the spouse at fault.

### *Proposed No-Fault Bill*

The Matrimonial Committee of the Women's Bar Association of the State of New York, in 1990, submitted a legislative memorandum in opposition to the proposed no-fault bill. Below is the gist of this memorandum.

**Irreconcilable differences.** The no-fault bill would have created a new ground for divorce in New York based upon irreconcilable differences. Irreconcilable differences would be established by showing that the parties have lived in separate habitations for 12 consecutive months or more and that there was no reasonable prospect of reconciliation. After 18 consecutive months of separate habitation, the court could presume that "no reasonable prospect of reconciliation exists" and the divorce could be granted based upon the application of one spouse.

This bill would have created a method by which one spouse could obtain a divorce against a spouse who was not at fault and who did not consent to the divorce, simply by leaving. Concisely stated, the bill created a cause of action for abandonment in favor of the abandoning spouse. More importantly, this bill rewarded the abandoning spouse who refused to bargain in good faith with regard to reaching a reasonable and equitable financial and custodial settlement.

The no-fault bill contradicted the concept of divorce that has existed for the past decade in New York state. Under the no-fault bill disproportion rather than balance would exist. The innocent spouse would become a victim of the capricious whims of the spouse at fault. For example, the spouse at fault would be able to obtain a divorce even though he/she abandoned and deserted an innocent spouse who may have invested one, five, 10, 20, 30 years or more into a marriage. Even if the spouse at fault deserted the innocent spouse and refused to pay any support to him/her, or to the children, the spouse at fault could be rewarded by having grounds for divorce. After an 18-month separation, the spouse at fault would merely have to tell the judge that he/she despised the innocent spouse and did not want to live with her/him to demonstrate that there was no "reasonable prospect of reconciliation."

In short, no-fault, as proposed in this legislation, would have rewarded the guilty spouse (with grounds or divorce) for leaving the marital home whether or not that spouse paid support. This approach defies logic and would revert the concept of marriage and divorce into the dark ages.

Proponents of no-fault contend that the bill would release parties from a dead marriage. However, spouses already have the option of an uncontested divorce. In New York, if the party seeking a divorce can come to terms with her/his spouse, they have the option of signing a separation agreement and waiting one year for a divorce. Therefore, the non-passage of a no-fault bill does not eradicate the availability of uncontested divorce. Rather, the non-passage of the no-fault bill denies a divorce to the spouse at fault who refuses to agree on support, property distribution, etc.

**Property distribution.** The presumption that marital assets in marriages of more than five years should be divided "equally" whereas assets in marriages of less than five years should be divided "equitably," is arbitrary at best. This presumption is a repetition of case law as it exists today. This legislation would not have changed the fact that although some assets are divided equally, other assets will never be divided on an equal basis. For example, the marital residence and pensions are often divided equally. On the other hand, a business or a professional degree or license is rarely divided in the same fashion, and the status quo would continue notwithstanding this proposed legislation.

Why should marriage of less than five years be discriminated against? In many cases, the first five years of marriage is the time when the wife devotes the greatest part of her time supporting her husband's education and/or career and raising the children.

**Maintenance.** Spousal maintenance may be permanently awarded under current statutory and case law. Therefore, the no-fault bill simply provided an "illusion" of adding more rights, but fell flat when it comes to substance. The New York Court of Appeals, in *Braiman v Braiman*, 44 N.Y.2d 584, 591, 407 N.Y.S.2d 449, 452 (1978), aptly observed that "divorce dissolves the family as well as the marriage, a reality that may not be ignored." [Emphasis supplied]. Women and children with no frame of reference for poverty have become the new "middle class poor."

Studies in states such as California,<sup>1</sup> Ohio,<sup>2</sup> Vermont,<sup>3</sup> Alaska,<sup>4</sup> Michigan,<sup>5</sup> Connecticut,<sup>6</sup> and Maryland<sup>7</sup> have determined that women and children suffer financially after the enactment of no-fault grounds in three significant ways: (1) maintenance is less likely to be awarded; (2) when maintenance is awarded it is lower in amount and for shorter periods of time; and (3) property awards are decreased.

**Counsel/expert fees.** The no-fault bill offered nothing more than what is already provided for pursuant to Domestic Relations Law §237. DRL §237 authorizes interim fee awards where it is shown that such an award is needed to enable the non-monied spouse to proceed properly. The no-fault bill merely would have guided the court as to how to determine a reasonable fee, if an award was to be made at all.

### Conclusion

Do not be fooled and do not be misled. *There is no "free lunch."* The provisions for a distributive award, maintenance, and counsel/expert fees are merely a sweetener to disguise the decay and the rancor imposed upon the innocent, victimized spouse who, in reality, is being discarded as yesterday's trash.

Does this society still revere the sanctity of the family unit? Will this society continue to compensate the innocent victim and not the party at fault? These are the moral questions at the heart of the no-fault divorce issue.

### NOTES

1. Lenore Weitzman, *The Divorce Revolution*.
2. McGraw, Sterin and Davis, "A Case Study in Divorce Law Reform and Its Aftermath," 20 *J. Pen. L.* 443 (1982-82).
3. Wishik, "Economics of Divorce: An Exploratory Study," 20 *Fam. L.Q.* 79 (1986).
4. Alaska Women's Commission, *Family Equity at Issue*.
5. As reported in Hoffman and Holmes, *Husbands, Wives and Divorce in Five Thousand American Families—Patterns of Economic Progress* (1976) Tables 2.1 and 2.2.
6. McLindon, "Separate but Unequal: The Economic Disaster of Divorce for Women and Children," 21 *Fam. L.Q.* 351 (1987).
7. Bell, "Alimony and the Financially Dependent Spouse in Montgomery County, Maryland," 22 *Fam. L.Q.* 325 (1988). For a study using national figures, see Hoffman, "Divorce and Economic Well Being. The Effects on Men, Women and Children," *Del. Law* 18 (Spring, 1987).