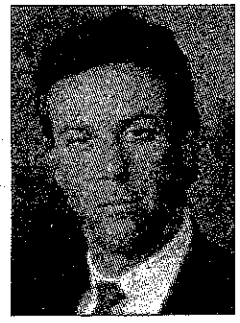
Matrimonial & Family Law

Issues Arising From Passage of the 'No Fault' Divorce Law

New York's "No Fault" divorce law became effective on October 12, 2010 and it is applicable to all actions commenced on or after that date.[1]



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Pursuant to this newly enacted provision from the Domestic Relations Law, an action may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

"... (7) 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. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce."[2]

The passage of this long-awaited legislation has led to numerous issues, some of which have already begun to be addressed by the Courts of this state. For example, ancillary issues surrounding the passage of this addition to D.R.L. Section 170 include, but are not limited to, the following:

1. Can a spouse commence his or her own action for divorce pursuant to D.R.L. Section 170 (7) even though there is already an action for divorce pending which was commenced prior to the effectiveness of the no fault provisions? The obvious purpose of this is to take advantage of the newly enacted no fault provision, as well as the new provisions pertaining to temporary maintenance and temporary counsel fee awards.[3]

2. Is a spouse permitted to oppose a divorce commenced on the basis of the newly

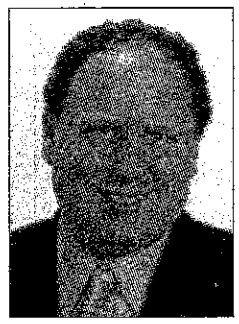
enacted no fault law, such as by claiming that the marriage has not irretrievably broken down? For example, if one spouse claims that there has been an irretrievable breakdown of the marriage, may the other spouse oppose this by claiming that the parties are truly happily married, they recently took a romantic vacation together and/or that they continue to engage in sexual relations?

3. Does the 5 year statute of limitations imposed by D.R.L. Section 210 (a) apply to

D.R.L. Section 170 (7) as well?

Commencing a Second Divorce Action Pursuant to D.R.L. Section 170 (7)

In the case of *Heinz v. Heinz*, which was decided by the Nassau County Supreme Court in February, 2011, Justice Daniel Palmieri determined that one spouse may commence a divorce action pursuant to D.R.L. Section 170 (7) even though a divorce action commenced by the other spouse is pending before the Court and was started prior to the enactment of the no fault divorce law.[4] In *Heinz*, the wife commenced a divorce action via a Summons with Notice prior to the enactment of the no fault divorce law. The grounds for divorce alleged by the wife were cruel and inhuman treatment and constructive abandonment.[5]



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The husband appeared in the wife's divorce action pursuant to a Notice of Appearance, and then commenced his own, separate divorce action against the wife pursuant to D.R.L. Section 170 (7). He did so subsequent to the effectiveness of the new no fault laws and while the wife's divorce action was still pending.[6] The wife ultimately moved to have the husband's divorce action dismissed on the ground that another action was pending between the parties.

The Court ruled in favor of the husband, determining that his second divorce action pursuant to the newly enacted no fault laws was properly commenced.[7] In so ruling, Justice Palmieri stated that the pendency of an action by one spouse does not, by itself, bar an action by the other spouse on a different ground or grounds.[8]

The Court based its ruling on the legal precedent surrounding the enactment of New York's Equitable Distribution statute in 1980. Justice Palmieri initially cited the Court of Appeals case of *Valladares v. Valladares*, which denied a spouse's attempt to discontinue a divorce action commenced prior to the enactment of the Equitable Distribution law in order to subsequently commence a new divorce action as a means of taking advantage of the new statute.[9] Justice Palmieri compared *Valladares* with *Motler v. Motler*, which was another Court of Appeals case in which a defendant was permitted to commence their own action to take advantage of the equitable distribution laws despite the fact that there was already an action pending for divorce which had been commenced by the spouse prior to the enactment of the statute.[10]

NO FAULT ...

Continued From Page 13

The difference in these two prior Court of Appeals cases, according to Justice Palmieri, was that the party seeking to commence the new action was not the plaintiff in the earlier suit, and thus was not attempting to circumvent the Legislature's determination by undoing what she herself had begun.[11] Therefore, in holding that the husband could proceed on his divorce action commenced subsequent to the enactment of the no fault statute even though his wife's divorce action was still pending, Justice Palmieri concluded that

> "[t]his Court can find no reason in law or logic to depart from the teachings of the foregoing authority. The language regarding the applicability of part B, and the new subsection (7) of Domestic Relations Law Section 170, to actions commenced on or after such effective date is the same, and the law of permissive counterclaims has not changed. Moreover, in the present case the wife acknowledges that the husband was served with the Summons with Notice on November 22, 2010. This means that no jurisdiction over his person had been acquired, and no appearance in her action could even occur, before the new statute came into effect. This makes the husband's position that there was no impediment to the commencement of his action all the stronger. In any event, the result here would be the same even if a counterclaim in the pending action had been asserted and discontinued, as in Motler."[12]

In a similar case entitled *A.C. v. D.R.; D.R.C. v. A.C*, Justice Anthony Falanga of the Nassau County Supreme Court allowed a wife to bring an action for a no fault divorce, even though there was already a pending action for divorce which was commenced by her spouse prior to the enactment of the no fault divorce legislation.[13] In reaching his decision, Justice Falanga, like Justice Palmieri, also cited to the *Motler* case, discussed above.[14]

Statute of Limitations

The Essex County Supreme Court in *Strack* was also faced with the question of what the Statute of Limitations is with respect to actions for divorce under Domestic Relations Law Section 170 (7).[22] The Court determined that the five year statute of limitations imposed pursuant to Domestic Relations Law Section 210 (a) was also applicable to actions pursuant to Domestic Relations Law Section 170 (7).[23]

Opposing a Divorce Commenced Under the No Fault Law

Both the Essex County Supreme Court and the Kings County Supreme Court[15] have recently ruled that a spouse may oppose the granting of a divorce being sought under the newly enacted no fault law.[16] Thus, according to the rulings from these two cases, a trial will be required if a party disputes the factual allegations asserted by their spouse that the marriage has broken down irretrievably.[17]

In the Essex County case, entitled *Strack v. Strack*, the wife sought a divorce based upon the newly enacted no fault grounds.[18] The husband opposed the divorce, claiming that the Complaint failed to state a cause of action.

In ruling that there should be an immediate trial on the issue of whether the relationship between the parties had irretrievably broken down for a period of at least six months, the Court stated, "Domestic Relations Law Section 170 (7) is not a panacea for those hoping to avoid a trial. Rather, it is simply a new cause of action subject to the same rules of practice governing the subdivisions which have preceded it."[19] In concluding that the husband was entitled to a trial on this issue, the Court considered that "Domestic Relations Law Section 173 provides that in an action for divorce, there is a right to trial by jury of the issues of the grounds for granting the divorce, and here, the Legislature failed to include anything in Domestic Relations Law Section 170 (7) to suggest that the grounds contained therein are exempt from this right to trial. Had it intended to abolish the right to trial for grounds contained within Domestic Relations Law Section 170 (7), it would have explicitly done so."[20] The Court also took into consideration the fact that "insofar as the phrase broken down such that it is irretrievable is nowhere defined in the statute, the determination of whether a breakdown of a marriage is irretrievable is a question to be determined by the finder of fact. The Court does hold, however, that whether a marriage is so broken that it is irretrievable need not necessarily be so viewed by both parties. Accordingly, the fact finder may conclude that a marriage is broken down irretrievably even though one of the parties continues to believe that the breakdown is not irretrievable and/or that there is still some possibility of reconciliation."[21]

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1. D.R.L. Section 170 (7)
2. *Id.*
3. D.R.L. Section 236 B (5-a) and D.R.L. Section 237.
4. *Heinz v. Heinz*, 2011 N.Y. Slip Op 21049, N.Y. Misc. LEXIS 359 (Sup. Ct. Nassau Cty. 2011.)
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Valladares v. Valladares*, 55 N.Y.2d 388, 449 N.Y.S.2d 687 (1982).
10. *Motler v. Motler*, 60 N.Y.2d 244, 469 N.Y.S.2d 586 (1983).
11. *Heinz v. Heinz*, 2011 N.Y. Slip Op 21049, N.Y. Misc. LEXIS 359 (Sup. Ct. Nassau Cty. 2011).
12. *Id.*
13. *A.C. v. D.R.; D.R.C. v. A.C.*; NYLJ, January 25, 2011.
14. *Id.*
15. The Kings County Supreme Court case of *Stroffolino v. Stroffolino*, NYLJ, February 7, 2011 has been appealed to the Appellate Division, Second Department.
16. *Strack v. Strack*, 2011 NY Slip Op 21033, 2011 N.Y. Misc. LEXIS 169 (Sup. Ct. Essex Cty. 2011); *Stroffolino v. Stroffolino*, NYLJ, February 7, 2011.
17. *Id.*
18. *Strack v. Strack*, 2011 NY Slip Op 21033, 2011 N.Y. Misc. LEXIS 169 (Sup. Ct. Essex Cty. 2011.)
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. Domestic Relations Law Section 210 (a); *Strack v. Strack*, 2011 NY Slip Op 21033, 2011 N.Y. Misc. LEXIS 169 (Sup. Ct. Essex Cty. 2011.)