ANALYSIS

# Abolishing the 'Crime' of Adultery: Should Related Civil Fault Statutes Also Be Discarded?

In 1907, the state of New York made it a crime to commit adultery. That Class B misdemeanor was carried over from prior law when the Penal Law was revised in 1965. Now, New York State Assembly Bill No. 4714 calls for the repeal of that provision.

By Alton L. Abramowitz and Leigh Baseheart Kahn | April 23, 2024 at 09:26 AM

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In the book of Exodus of the Hebrew Bible (the Old Testament in Christianity), at Chapter 20, it recites the Ten Commandments given to Moses to bring to his people. The Seventh Commandment's list of sins contains the strict instruction—in no uncertain terms and without equivocation or ambiguity—that "thou shalt not commit adultery."

Throughout both human and religious history, adultery has had many consequences, oftentimes resulting in an extraordinary level of violence against the adulterer such as murder by stoning, bodily mutilation, flogging, etc. Even in today's so-called "modern World" honor killings occur in some cultures (*see, Wikipedia, Adultery.*)

In 1907, the state of New York made it a crime to commit adultery. That Class B misdemeanor was carried over from prior law when the Penal Law was revised in 1965 and is found at Section 255.17, which defines adultery as follows: "A person is guilty of adultery when he engages in sexual intercourse

with another person at a time when he has a living spouse, or the other person has a living spouse."

New York State Assembly Bill No. 4714 calls for the repeal of that provision. Notably, the bill passed the State Assembly by a vote of 137 to 10 and it passed the State Senate by a margin of 57 to 4. It was sent to the governor's desk on or about April 3, 2024, where it awaits executive action.

The justification for this bill is set out in the Legislative Memo that accompanies it, which recites as follows: "This outdated statute criminalizes sexual behavior between consenting adults as a Class B misdemeanor, punishable by up to three months in prison and a fine of up to $500. The state has no business regulating consensual sexual behavior between adults. It is long-past time for us to remove this statute from the penal law." *See* "Attention New York Adulterers: Your Sin May Soon No Longer Be a Crime", The New York Times (April 1, 2024); "Cheating on your spouse is a crime in New York. That may change", Brooklyn Daily Eagle (March 22, 2024)).

Some members of the Bar have speculated that the defendant former president, among others, might have to invoke their Fifth Amendment right against self-incrimination in the "hush money" trial that commenced April 15, 2024, to avoid admitting to the "crime of adultery", without prompt executive action on this pending bill, rendering the issue it addresses very timely. However, that topic is not going to be addressed by this column other than to say that adultery remains a "sin" in many religions regardless of whether one of the alleged adulterers is a purveyor of Bibles seeking commercial gain. Instead, the reader's focus is directed to New York Domestic Relations Law (DRL) §170, which specifies the seven grounds for divorce in New York state.

Adultery was the only ground for divorce in New York state until Aug. 31, 1967. The Divorce Reform Act of 1966, which became effective Sept. 1, 1967, changed that singular basis by adding five additional grounds: "the cruel and inhuman treatment of the plaintiff by the defendant"; "the abandonment of the plaintiff by the defendant for a period of at least one or more years" (originally two years and amended to one year effective as of Sept. 1, 1972); "the confinement of the defendant in prison for a period of at least three consecutive years"; "the husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all of the terms and conditions of such decree or judgment"; and, "the husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all of the terms and conditions of such agreement."

Although the financial issues arising out of a fault divorce, along with issues concerning the custody of the parties' children, were always tried before and decided by a judge, the question of whether a spouse was guilty of fault could be and oftentimes was tried in front of a jury. Of utmost significance was the fact that a spouse found guilty of fault would be denied alimony and, at a time when there was no law providing for the equitable distribution of marital assets, the non-moneyed spouse (usually a non-working wife) who did not hold title to any of the parties' major assets was left impoverished if found guilty of fault.

Making fault trials on the issue of adultery arduously time-consuming for juries and the judges presiding over them was the requirement that the adultery be proved by third-party corroborating evidence; the parties themselves and the co-respondent were by law not competent to prove the adultery with their own testimony, thereby breeding a genre of private investigators whose primary business was to catch cheating spouses committing adultery. That was done by either catching the adultery committing spouse in the act itself, or more commonly by proving "opportunity and inclination."

"Opportunity" was proved by the testimony of a third person who saw the purported adulterers entering a place such as a hotel room and who observed them at a later time exiting that place after having spent sufficient time there to have engaged in sexual relations. In general, "inclination" was demonstrated by the testimony of a third person often accompanied by photographs of the alleged adulterers exhibiting "public displays of affection," such as holding hands, kissing, fondling, etc.

Cruel and inhuman treatment was significantly easier to prove because fault on this ground could be based on the testimony of one of the parties without the need for corroborating testimony from a third person. However, the degree of cruelty necessary to demonstrate one's entitlement to a divorce increased as the length of the marriage increased, making it sometimes difficult to obtain a divorce in long marriages when the allegations might be "mere bickering" between spouses as opposed to those cases where there were demonstrable physical injuries (i.e., what some lawyers indelicately referred to as "blood on the floor").

As time wore on, there also developed a theory of "constructive abandonment," which was mostly predicated on testimony that, although the parties had not physically separated (i.e., established separate residences), one of them had unreasonably and without cause refused to engage in sexual relations for a period of one or more years although both parties were fully capable of such relations.

In the era preceding the enactment of New York's version of no-fault divorce, constructive abandonment became the ground for divorce most often chosen by parties to an uncontested divorce wishing to expeditiously obtain a dissolution of their marriage on innocuous grounds that might not offend the other party, while avoiding the necessity of waiting one year or more after having signed a separation or settlement agreement. Pleadings, affidavits and testimony as to the basis for a constructive abandonment divorce were seen by a multitude of jurists, attorneys and litigants as perjurious. This fact resulted in many judges "holding their noses" to avoid the stench of that perjury while nevertheless granting a judgment of divorce in the face of the personal and societal need for the parties to be able move on with their lives, while overcoming the obstacles presented where the fault grounds for divorce were weak or non-existent.

Of course, many parties also pled constructive abandonment in their pleadings in contested divorce cases as well, causing similar incredulity among numerous judges and juries called upon to determine the validity and truthfulness of such claims.

The foregoing history provided the backdrop and impetus for the movement to adopt no-fault divorce in New York state, which began to gain traction in the early 2000s. The justifications for the adoption of no-fault divorce put

forth by its proponents included, among other things, that: it provided a means of obtaining a divorce that did not require either party to cast aspersions of wrongdoing on the other party; it enabled victims of domestic violence and abuse to obtain a divorce without infuriating the abuser spouse by exposing that abuser's misdeeds to in court public scrutiny; it saved the courts and juries from having to countenance possibly perjurious testimony; it saved precious courtroom and judicial time by avoiding contested grounds trials; it enabled jurists to focus their energies and time on issues of significance that would impact the post-divorce futures of divorcing parties and their families, such as financial and child custody related matters; it would reduce the monetary costs of divorce by allowing attorneys to also focus their time on those significant issues instead of spending it on gathering detailed facts of the opposing party's fault and the strategic presentation of those claims to the trier of fact; etc.

In essence, the goal of the supporters was to achieve an outcome which would lead all the stakeholders towards a "bottom line" approach to the termination of marriages.

Ultimately, a coalition of bar associations that included the New York Chapter of the American Academy of Matrimonial Lawyers, the Family Law Section of the New York State Bar Association, the New York County Lawyers Association, the New York City Bar Association, the Nassau County Bar Association, the Women's Bar Association of the State of New York and others promoted a draft no-fault divorce statute. This was followed by the formation of an ad hoc committee of various matrimonial and family law bar leaders from around the State that was led by Hon. Sondra Miller, Retired Associate Justice of the Appellate Division, Second Judicial Department.

As lobbying for the proposed legislation intensified, the New York Office of Court Administration under the leadership of the late Chief Judge Judith Kaye adopted passage of the law as part of its own package of legislative priorities, providing the impetus for the state's Legislature and the governor to enact the current no-fault divorce law, which became effective in 2010, roughly 40 years after California had adopted its version of no-fault divorce (the first in the nation).

Because of concerns among the various bar leaders that certain religious groups might have opposed the no-fault legislation, it was agreed at the time of the statute's enactment that the fault grounds for divorce would continue to remain in effect and would not be deleted from the statute.

(For an exhaustive discussion and review of the case law regarding the grounds for divorce in New York, see McKinney's Practice Commentaries and Supplemental Practice Commentaries to DRL §170 authored by Hon. Alan D. Scheinkman (ret.), the former Presiding Justice of the Appellate Division Second Judicial Department).

At the outset of the no-fault divorce era our courts experienced some litigation over the question of whether there were any defenses to a cause of action for no-fault divorce. Ultimately, that issue was put to rest with the courts holding that "the opposing spouse in a no-fault divorce action pursuant to Domestic Relations Law §170(7) is not entitled to litigate the other spouse's sworn statement that the relationship has broken down for a period of at least six months." *See, D'Ambra v. D'Ambra,* __AD3d__, 2024 WL 1081237 (Second Dept. March 13, 2024), *and the cases cited therein.*

Having reached the 14th year of no-fault divorce, fewer lawyers plead fault grounds when drafting a complaint for a divorce, trials on fault grounds are

virtually unheard of and judges discourage parties from taking fault cases to trial, deeming it a "waste of the court's time." In point of fact, the only time that fault is called into play in any significant way is when a party seeks to demonstrate that the opposing spouse is guilty of egregious fault of such a high degree that it would shock the conscience of the court and is a factor that ought to be considered in determining the equitable distribution of marital assets or in fixing an award of spousal maintenance (i.e., "alimony").

Thus, the conclusion is virtually inescapable that fault divorce is as dead as the crime of adultery, and it is time for the Legislature to do away with the fault grounds for divorce and wipe them out of the statutory scheme (*see, however, Agulnick v. Agulnick,* 191 AD3d 12 (Second Dept. 2020), where the wife counterclaimed with allegations of the husband's adultery because their 2006 post-nuptial agreement provided her with significant financial enhancements if the husband engaged in future adulterous conduct).

Having said that the fault grounds for divorce should be abolished, there is left open for future discussion and consideration the question of whether the equitable distribution and spousal maintenance provisions of the DRL should be amended to include fault as a factor for courts to consider in determining those issues. Doing so would require a legislative determination that a spouse found "blameworthy" in a matrimonial action must pay a financial cost as a consequence of their conduct and misbehavior, a debate that must await another time.

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