Determining Whether 'No-Fault' Law Allows Trials When Parties Disagree

By Allan E. Mayefsky

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The new no-fault divorce statute (Domestic Relations Law §170(7)) that was put into effect on Oct. 12, 2010, and gives parties the option of obtaining a divorce without alleging fault, has been hailed by litigants, commentators, and matrimonial judges as marking the end of pointless and expensive trials over divorce grounds. Today, to establish grounds, a married person commencing an action for divorce in New York need allege under oath only that the marital relationship "has broken down irretrievably for a period of at least six months."1 On the surface, DRL §170(7) eliminates the need for trials and presents a simple way for an unhappy spouse to end a marriage without having to present evidence of, inter alia, adultery, cruelty, or abandonment.

It seems, however, that grounds litigation may still be necessary at least according to Justice Robert J. Muller of the Supreme Court of New York, Essex County. In Strack v. Strack,2 Justice Muller ordered an immediate trial on the issue of whether or not a couple's relationship had "broken down irretrievably for a period of at least six months" notwithstanding the fact that the wife had made the necessary sworn statements pursuant to DRL §170(7).3

In Strack, the wife brought an action for divorce based on the new no-fault ground, alleging in her complaint that, inter alia, her relationship with her husband had "broken down such that it [was] irretrievable," there was "no emotion in their marriage," she had "kept largely separate social schedules and vacation schedules" from her husband, and the couple "have not lived as husband and wife." The husband moved to dismiss the complaint.

Although rejecting the husband's arguments that the wife had not pled with enough specificity or that her claim was barred by the statute of limitations, the court carefully examined the substantive issue presented, namely "whether [the wife's] unilateral statement under oath is irrefutable, as [the wife] suggests, or if [the husband] is to be afforded the same procedural and substantive due process as is available for any other cause of action in our jurisprudence."

In addressing the issue, the court examined the legislative history of DRL §170(7), noting that the new no-fault legislation was established in part to lessen "time consuming and expensive" litigation with the expectation that the allegation of an "irretrievable breakdown" would be irrefutable. However, Justice Muller then went on to state that the new no-fault ground "is not a panacea for those hoping to avoid a trial" but rather "a new

cause of action subject to the same rules of practice governing the subdivisions which have preceded it."

In support of this statement, the court pointed out that in enacting DRL §170(7), the Legislature failed to say anything about DRL §173 which provides that "[i]n an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce." Thus, the court concluded that the husband had the right to a trial on the issue of whether his relationship with his wife had broken down irretrievably for a period of at least six months.

Right to Trial?

Strack raises two interesting questions: First, does a litigant who opposes a DRL §170(7) divorce always have the right to trial? This question was explored in a recent New York Law Journal article by Timothy Tippins.4 Mr. Tippins contends that Justice Muller's holding was proper and DRL §170(7) "does not express any intent to strip litigants of the opportunity to be heard." As opposed to being a "no-ground statute" or a "no-trial statute," DRL §170(7) is a "no-fault statute." Even if the statute did expressly prohibit trials, Mr. Tippins argues it would not pass constitutional muster. He asserts that due process is not a "legislative gift" but rather a "fundamental right protected by the U.S. Constitution." Thus, following this line of argument, Mr. Strack should have the right to be heard with respect to his wife's allegations and to provide evidence to the contrary.

A subsequent Nassau County decision, however, challenges the interpretation set forth in Strack and supported by Mr. Tippins. In A.C. v. D.R.,5 decided on March 28, 2011, the wife moved for summary judgment on the ground that her relationship with her husband had irretrievably broken down. Her husband opposed the motion. Although refusing to grant a judgment of divorce until the other issues had been resolved, Justice Anthony J. Falanga stated that there is no defense to DRL §170(7) and that a plaintiff's self-serving declaration about his or her state of mind is all that is required for dissolution of the marriage on the ground that it is irretrievably broken. He noted: "Suggestions that the party wishing to stay married has a constitutional right that is being infringed upon in violation of due process is unavailing. Staying married, against the wishes of the other adult who states under oath that the marriage is irretrievably broken, is not a vested right."

Ultimately the appellate courts may need to weigh in on the dispute between Strack and A.C. as each decision makes compelling arguments. On the one hand, if it was the Legislature's intent to do away with trials entirely, why is there no mention of DRL §173? Why require a sworn statement that the "marriage has broken down irretrievably for a period of six months" when a statement such as "I want a divorce" would accomplish the same goal? On the other hand, it is difficult to pinpoint exactly what due process principle is at risk the right to force your spouse to stay in a marriage? And if it was the Legislature's intent to make DRL §170(7) objectionable, wouldn't the statute explicitly state that the moving spouse needs to prove an irretrievable breakdown instead of merely requiring a sworn statement?

Proof of Marital Breakdown

Should the reasoning in Strack be accepted, a second fundamental question is raised: How does a plaintiff prove that a marriage has broken down irretrievably? Justice Muller helped answer this by stating 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."

Courts from other states with similar no-fault statutes support Justice Muller's interpretation of the standard. In Connecticut, for example, it is the plaintiff's burden to prove that the marriage has irretrievably broken down.6 Such evidence need not be corroborated and there need be no showing of fault.7 The fact that a defendant maintains hope for reconciliation is not enough to support a finding that there has not been an irretrievable breakdown of the marriage.8

Beyond the standard of proof, however, courts in other states with similar no-fault statutes have been hesitant to set forth specific circumstances that trial courts could utilize as permissible indices of an irretrievable breakdown of the marriage. Rather, courts examine each case individually and avoid any formulaic recitations of objective factors. As the Supreme Judicial Court of Maine points out: "The term irreconcilable marital differences is one that necessarily lacks precision and should not be circumscribed by a strict definition."9 Nonetheless, from a survey of various decisions, it is possible to glean some recurring indicators of an irretrievable breakdown.

One indicia is a cessation of a sexual relationship.10 Unlike proving constructive abandonment, however, it is not necessary to show that it is one party's fault that the physical intimacy in the relationship has ended. As one Delaware court pointed out, although "courts have held that isolated acts of sexual intercourse will not defeat an action for divorce, nevertheless a continuing sexual relationship between marital partners may be generally viewed as antithetical to the concept of separation, to the incompatibility of the parties, and to the 'irretrievable breakdown' of the marriage□"11 Another indicia is whether or not the couple is cohabiting.12 Certainly not living together as husband and wife (as Mrs. Strack alleged) indicates estrangement. Other factors are more amorphous separate social schedules, a lack of emotion or affection, or little communication.13

Despite the existence of these objective factors, however, courts still leave the door open to grant a divorce based on purely subjective evidence. In the words of Justice Falanga: "Marriage is the state's recognition and approval of a man and woman's voluntary choice to live with each other, to remain committed to one another and to form a household based upon their own feelings about one another."14 To proscribe that a couple cannot divorce just because they continue to engage in activities together like cohabitating, sleeping together, or socializing fails to take into account the nuanced and emotional aspect of a marriage. It also invites the type of perjury that DRL §170(7) sought to prevent by forcing the plaintiff to testify to such objective factors when perhaps there were none.

The answer, it seems, if Strack is correct, is to give defendants the right to be heard to make room for the rare case when a defendant does have evidence to rebut a finding of the irretrievable breakdown, but to set the standard of proof at a level low enough that most trials will be relatively quick, inexpensive and drama-free. And this is precisely what Strack has advocated doing.

Conclusion

Thus, although an acceptance of the reasoning in Strack may mean the continuation of grounds trials in New York State, the good news is that DRL §170(7) trials, in the unlikely event they do occur, will be less contrived than the trials of yesterday involving who refused to sleep with whom, lies, betrayal, and adultery. And this, at the end of the day, will make the most practical difference to courts, litigants, and attorneys alike.

Endnotes:

1. DRL §170(7).
2. 2011 NY Slip Op 21033 (Sup. Ct. Essex Cty. Feb. 3, 2011).
3. Id. at *10.
4. See Timothy M. Tippins, "No-Fault Divorce and Due Process," New York Law Journal (March 3, 2011).
5. 2011 NY Slip Op 21113 (Sup. Ct. Nassau Cty. March 28, 2011).
6. See Eversman v. Eversman, 496 A.2d 210, 211 (Conn. App. Ct. 1985).
7. Riley v. Riley, 271 So.2d 181 (Fl. App. 1972).
8. See Eversman, 496 A.2d at 212.
9. See Mattson v. Mattson, 376 A.2d 473 (Me. 1977).
10. See e.g., In re the Matter of Howard W.B. v. Janice H.B., 1995 Del. Fam. Ct. Lexis 2, **5-6 (Del. Fam. Ct. 1995).
11. In re the Matter of Howard W.B., 1995 Del. Fam. Ct. at *6.
12. Id.; see also Abunaw v. Abunaw, 2006 Conn. Super LEXIS 2348 (Super. Ct. 2006).
13. See e.g. Riley, 271 So.2d.
14. A.C., 2011 NY Slip Op. at *24.