Brooklyn Law Review

Volume 57 | Issue 3 Article 6

3-1-1991

Commentary

Christopher J. Mega

COMMENTARY

*Christopher J. Mega**

While I do not participate in or practice matrimonial law, as a legislator and as chairman of the Senate Judiciary Committee, which is charged with reviewing proposed changes in the domestic relations law, I have a responsibility to insure that our matrimonial laws are as fair and effective as possible. To that end, I welcome and appreciate input from law schools, the matrimonial bar, lobbying organizations, the judiciary and the public.

My experience has been that nothing tweaks the interest of women's organizations, men's organizations, religious institutions and bar associations as much as a nice little bill to change the equitable distribution law. I do share the concern that New York's law must be made as fair as possible for women and men who find themselves facing a divorce. I must admit that I did not realize before reading Professor Garrison's report that "[a]lmost half of current American marriages are now expected to end in divorce."[1] The divorce rate seems to be adding validity to the old wisecrack that the number one cause of divorce is marriage.

It seems to me that the number one problem in divorce cases is the scarcity of assets and income to distribute. The typical family simply cannot afford to split up and live separately. Those that do split up find their standard of living substantially diminished. I note that Professor Garrison acknowledged this problem several times in her report and that her research was somewhat hampered by the lack of property distribution information in the case files in the default and consensual divorce samples. According to the report it was "typically impossible to ascertain spousal income or the value of assets owned and trans-

---

* Chairman, New York State Senate Committee on the Judiciary.

[1] Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 625 (1991) (citing Samuel H. Preston, *Estimating the Proportion of American Marriages That End in Divorce*, 3 SOC. METHODS & RES. 435, 457 (1975)).

ferred."[2] Perhaps nothing short of a study that includes interviews with divorced parties and their attorneys will give us a clear picture of the extent to which the scarcity of assets and income affects spouses that receive an equitable property distribution and/or maintenance.

That matrimonial property is scarce is not something we can correct. We are left with only the choice of how the available marital property should be distributed. New York has discarded title as a determining factor. We now have equity as the determinant. Will equal or a presumption of equal be next? It's hard to say.

This controversy has raged for years. The argument over equitable versus equal was the subject of much of the floor debate in the legislature when the equitable distribution law was passed in 1980. It was no easy task to get an equitable distribution bill before the senate in 1980; at that time an amendment calling for equal distribution was defeated handily.[3] In 1980 the equitable distribution bill was considered by some to be a pro-wives bill. It was thought that wives would receive more property under the bill and in return, in the husbands' favor, there would be a diminished obligation to pay permanent alimony. The automatic bar of alimony for a so-called "guilty wife" was eliminated and maintenance was to be awarded to an "innocent" or "guilty" wife on a reasonable need basis.

The obligation to pay maintenance was increased in 1986 when the legislature enacted provisions encouraging awards of permanent maintenance and requiring the court to consider the standard of living of the parties established during the marriage, rather than the parties' reasonable needs.[4] So what was considered by some to be an equally balanced law in 1980 was rebalanced in 1986, supposedly in favor of wives. I have not seen a study of how the 1986 amendments changed the percentage of women receiving adequate maintenance. Without some evidence regarding the effectiveness of the 1986 amendment, it will be difficult to convince the legislature to change the law again.

---

[2] *Id.* at 643.

[3] *See* Isabel Marcus, *Reflections on the Significance of the Sex Gender System - Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55, 70-71 (1987); Jessica C. Brynteson, Note, *Recent Developments: Equitable Distribution in New York*, 45 ALB. L. REV. 483, 488-89 (1981).

[4] N.Y. DOM. REL. LAW § 236B(6)(a)-(c) (McKinney 1986).

I have long advocated that laws should have some symmetry. They should not zigzag. Rules should not change so often as to make the public unsure of the law. Major changes in the law should be enacted after careful study and, in the best of all worlds, only when there is a consensus that changes are necessary.

On the subject of whether New York should have an equal distribution law, I have found no consensus for change. In the past much of the matrimonial bar has generally opposed adopting an equal or presumption of equal distribution law. A joint position paper of the New York State Bar Association, Family Law Section, and the American Academy of Matrimonial Lawyers, New York chapter, stated in 1990 that an "[e]xamination of recent decisional law clearly reveals that the courts have warmly embraced the concept of equitable distribution and that most property divisions are equal."[5] The position paper advocated that continuing the equitable principles on which the present laws are predicated and the individualized treatment of divorce litigants is better than changing to a system of prefabricated solutions. The paper goes on to point out that the establishment of a presumption of equal will, in the minds of many litigants, amount to an automatic entitlement to fifty percent of the marital estate, irrespective of the individual's circumstances in the case.[6] It stated that this is likely to harden negotiating positions and make settlement more difficult in those cases where equity requires a disposition other than equal division.[7] I know that Assemblyman Koppell has expressed the contrary view that if there is a clear understanding that an equal distribution will be awarded by a court, it will be easier to convince each party to settle. It seems likely to me that both positions may be correct. Some cases would be easier to settle and some would be more difficult if New York enacts a presumption of equal law.

Getting back to the subject of maintenance and the question of whether the equitable distribution law should be changed

---

[5] Timothy M. Tippins, The Koppell Bill (A.7433—D): An Assault on the Fabric of Family Law 8 (Position Paper of The New York State Bar Association Family Law Section and The American Academy of Matrimonial Lawyers, New York Chapter) (undated).

[6] *Id.* at 10.

[7] *Id.*

to create a presumption of entitlement to maintenance in certain cases, I don't have a ready answer. I want to point out again, however that, since 1984, the latest date from which Professor Garrison's case samples are taken, a major change in maintenance law has been enacted. The intent of the legislature in passing the 1986 amendment was to correct the courts' interpretation of the maintenance provisions of the equitable distribution law that had denied indefinite maintenance to divorced women who came away from long-term marriages or from short-term marriages where there were children to be cared for.

I think we have to be careful in changing the rules for awarding maintenance. The payor of maintenance also has a right to a future. A maintenance burden that is too large will be counterproductive, causing the payor, usually the husband, to skip out of the reach of the court and out of his financial obligation to the family. My office frequently receives complaints from men who feel they're required to pay too much maintenance and/or child support and from women who complain about receiving too little. Another frequent complaint comes from women who feel their husbands are paying too much to their ex-wife and thus do not have enough left over to support their second family.

Prior to the 1986 amendment many lawyers were of the opinion that the courts had absolute discretion to fix maintenance indefinitely and that courts did so in appropriate cases. Women's groups were convinced that the law gave too much discretion to judges, which they said often resulted in short-term maintenance awards that left homemaker spouses in marriages of long duration, or younger dependent spouses with young children, without adequate financial support. In response, the legislature enacted provisions encouraging awards of permanent maintenance and requiring the court to consider the standard of living that the parties established during the marriage as well as the parties' reasonable needs.[8] The 1986 law also required the court to consider the present and future earning capacity of both parties, the ability of the party seeking maintenance to become self-supporting and the reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone

[8] N.Y. DOM. REL. LAW § 236B(6)(a)-(c) (McKinney 1986).

or delayed education, training, employment or career opportunities during the marriage.[9] The question now is whether the legislature should further strip the judiciary of discretion in the realm of domestic relations law.

I for one am not ready to do so without evidence that the 1986 amendments are not producing the intended results. We must also examine the results that have been produced by the New York Child Support Guidelines adopted in 1988.[10] As Professor Garrison's report points out, the child support guidelines "may significantly improve the consistency and predictability of child support awards."[11] If we find that the child support guidelines are not adequate to correct the disparities in the standard of living of children and their noncustodial parent, then new legislation would certainly be warranted.

Another of Professor Garrison's proposals is of interest to me. She has stated that new rules are needed to govern spousal property entitlements during marriage so that there is protection for a spouse, who wants to remain married, whose partner is dissipating marital assets.[12] The dissipation of assets is a factor for the court to consider in the distribution of marital property and in the awarding of maintenance in a divorce action. But entitlement at the time of divorce may be of no protection in a case where other property is not available to offset the squandered property. I have not thought out how rules for property entitlement during marriage could be enforced without a court intervention similar to a divorce action, but I would like to explore this further with Professor Garrison to see if we can find the legislative solution.

I share the desire to make New York's divorce laws as fair and as efficient as possible. I also recognize that change will not come about until we have a firm foundation for change. Professor Garrison's report is an important building block in that foundation. I look forward to hearing from others interested in this subject and especially from the matrimonial bar of New York. If it takes legislative hearings to produce the needed

---

[9] *Id.* § 236B(6)(a)(3)-(5).
[10] *Id.* § 240.1-b (McKinney Supp. 1991).
[11] Garrison, *supra* note 1, at 736.
[12] *Id.* at 733.

input, I will be happy to schedule the same and ask the assembly judiciary committee to participate.