EQUITABLE DISTRIBUTION OF MARITAL PROPERTY AND POST-DIVORCE INCOME STANDARDS: HAVE WE LOST OUR WAY?

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One of the benefits of practicing family law for many years and getting older is that you see how the law has developed and changed over decades. Those changes are the result of case law at the trial and appellate levels and statutory changes enacted by the Legislature and signed by the Governor; the latter is based on societal changes in outlook and the former is to a certain extent, as well.

When I first started to practice law in 1967, the divorce law of the State of New York was basically the following

- In 1966 we enacted divorce reform on the issue of grounds for divorce and expanded grounds beyond adultery so as to include, *inter alia*, cruel and inhuman treatment and abandonment.

- Custody of children was almost always granted to mothers under the doctrine that children of tender years belong with their mother.

- Alimony was only awarded to wives and it was non-durational, terminating only on death of either party or remarriage of the wife.

- Property was divided based on title solely, and the definition of property was limited. Jointly held property was equally divided, and while exclusive possession of a jointly held home might be granted to a wife with children, when sold its proceeds were equally divided.

- A granting of a fault divorce, *i.e.*, cruel and inhuman treatment, adultery or abandonment against a wife, deprived her of the right to alimony and the possibility of getting exclusive possession of a marital home, even if she had custody of the children.

Over the next twelve to thirteen years, a significant movement developed to encourage the state to become an equitable distribution state rather than a title state when it came to the division of assets and property. The result was the passage of the Equitable Distribution Law, effective July 19, 1980.

The proponents of the law (hereinafter, "ED") sold it on the following concepts and principles:

- Marriage was deemed to be an economic partnership and the partners should each be entitled to the economic fruits of the partnership, regardless of who held title to an asset.

- On the dissolution of the partnership, its economic fruits should be divided between the parties (although the division was not mandated to be equal and was to be based on consideration of a number of factors set forth in the statute).

- While child support was not affected *per se* by ED, the term "alimony" was replaced by the term "maintenance" for the post-divorce support of a dependent spouse.

- Maintenance, which became gender-neutral based on federal case law (Orr v. Orr), was available even to the person against who a fault divorce was granted, but it was no longer non-durational and the courts were given discretion as to the period of time for which it might be awarded.

- Maintenance was intended to be rehabilitative, in an amount and for a period of time to get the dependent partner on his or her way to a post-partnership life.

Once ED was enacted, the biggest issue became the length of time of maintenance. The initial tendency was to award it for a rather limited period of time, the argument being that the fruits of the partnership had been divided and while children needed to be supported, support for a former partner should not be for long.

That theory had significant merit in situations in which a large marital pot of assets existed and was divided, as each partner could look to the assets and the income produced by them. In fact, there were cases which held that if the income to be earned from the assets met one's needs, that party was not entitled to maintenance.

However, the fact is that just as only 3% of the country today have family income over $250,000, most divorces did not then, and still do not today (except for some parts of the country) involve significant assets to be divided. For those people, ED meant that the jointly held house, or the house in which one party had placed title, was in the pot as was the pension of the working spouse or the pensions of both parties. Clearly, this gave dependent spouses an advantage they had not had in the past, but it certainly did not mean that substantial assets existed to be divided and to look to for income. So in the beginning, the ED law which led to short maintenance awards severely disadvantaged dependent spouses and led to various cases and statutory amendments to make it clear that long term maintenance could and perhaps should be awarded in situations in which there were limited assets.

The next significant development in the ED law was the O'Brien case and its progeny. This State in O'Brien held that a professional license and or educational degree, which could not be sold but was personal to its recipient, when acquired during the marriage based on education gained during the marriage, could be valued. The valuation was based upon the stream of income its holder could be expected to earn over his or her lifetime over what he or she would have earned without the license or degree. This value was called enhanced earning capacity (hereinafter, "EEC"). It could be divided and an award made to the other spouse.

Naturally, adopting this theory led to the concept of double dipping, when one sought to both treat the excess stream of income as an asset and also to look to it as a source of maintenance. Ultimately, this concept was rejected and the concept of capturing income and thus having it no longer available for maintenance was accepted.

The next significant change in our law, at least regarding economics, was the enactment of the CSSA in about 1989, which created a formula for the award of child support.

Prior to 2010, New York was in the unique position of being the only state in the union without true no-fault divorce and which evaluated and made an award of EEC.

A number of years ago a movement developed to get this state to adopt true no-fault divorce, which it did in 2010. We now can get a divorce as of October 12, 2010 based on the irretrievable break down of the marriage.

However, since nothing ever happens in a vacuum in this state, and because there were pressures from many groups, the no-fault law was tied to two other laws. One of these laws should make it easier for dependent spouses to obtain counsel fees during the pendency of an action for divorce and is a welcome change.

The other law relates to maintenance guidelines and a formula to be utilized. The bill actually passed and signed into law only deals with using a formula as to amounts for temporary maintenance – money to be paid during the pendency of the action for divorce. The bill also assigns to the Law Revision Commission of this State "the review of the economic consequences of divorce, the review of the maintenance laws of the state with a focus on the way in which they are administered to determine the impact of these laws on the post marital economic disparities....in achieving the state's policy goals of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple."

While the Law Revision Commission is working on the mandate and we do not know exactly what they are considering, based on their preliminary report it is fair to conclude that one of the concepts they may consider is a formula to be applied to income to fix an amount of support. They may also consider a formula to be applied to the length of the marriage to fix the length of the support award. We also suspect that the Commission may be reexamining our treatment of EEC and perhaps determining that it should not be treated as an asset.

Clearly, there is some support in the legislature for a formula approach, both as to amount and as to duration of maintenance, and, frankly, we all know that the temporary maintenance formula bill is a bad rewrite of one of those bills.

This brings me to the title of this piece.

If we continue with ED, assuming we clean up the issue of EEC and we adopt a formula approach to amount and duration of maintenance, we will, in effect, become a state which says marriage is an economic partnership during the marriage and its fruits should be divided on the termination of the partnership. In addition however, there will continue to be an economic partnership of ex-partners pursuant to a formula based on income and the length of the partnership. If someone disagrees with this position, then please explain how else to interpret the words in the law which sends the issue to the Law Revision Commission "ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple."

To suggest that a formula approach to maintenance and duration of maintenance would be a breach of the very basic tenets of the enactment of ED – we divide the fruits of the partnership and then go on our separate ways with perhaps some assistance as necessary – is an understatement. Such a law would be an absolute contradiction of the theory of ED and partnership.

Now I know that there will be people who say: "But we need the formula and duration for those cases in which there are little or no assets, and only one party works," which is to say, in a partnership which has had no economic fruits, perhaps there is no other way to deal with economics. If that is the theory, then any law should so state and perhaps have reference to a quantum of marital assets over which it does not apply or have an income cap over which it does not apply.

One of the problems we have in dealing with divorce reform, be it grounds or economics, is that those of us who are active in the field tend to represent people of economic means and when we divide the partnership we divide real money, and support should not be formulaic since there is no need for it.

I suspect that if we get a formulaic approach to maintenance (both as to amount and duration) we will begin to have significantly more litigation and trials on the percentage division of assets in cases in which the wage earner argues based on factors, including that maintenance will be a formulaic mandate, that there not be an equal division of assets. In addition, I suspect that there will be significant litigation in these cases seeking to have a court reject the formula and use a needs test. Certainly, even the poorly drafted temporary maintenance bill allows a court to do this.

While I recognize that there are societal issues involved which may transcend any individual case, and that we do need to protect dependent spouses, unless we are prepared to say

we have no confidence in our courts and thus need a statutory formula for everything, the adoption of formulas is not the solution.

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