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MATRIMONIAL LAW

Egregious To a Fault

When does bad behavior affect financial determinations?

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THE Appellate Division, Second Department's affirmance last December in *Levi v. Levi*[1] of an equitable distribution award granting the wife 100 percent of the sole marital asset (the marital residence) based on the husband's attempt to bribe the original trial judge was the most recent expansion of the "egregious fault" exception to the general rule that fault should not play a role in the determination of financial issues in a divorce.

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"Fault" is nowhere to be found among the 13 factors a divorce court is to consider pursuant to DRL §236(B)(5)(d) and the 11 factors it is to consider pursuant to §236(B)(6)(a) in determining, respectively, the equitable distribution of marital property and the amount of maintenance to be awarded. New York's courts have interpreted that omission as meaning that fault is not to be considered, unless (1) it is "economic fault" or (2) it is "egregious fault." This article will show that the range of behavior found to constitute "egregious fault" has expanded in the past decade, as the courts—or, more precisely, those in the First and Second Departments—have asserted their equitable powers to take into account a spouse's outrageous behavior when resolving financial issues.

Development of Concept

The "egregious fault" exception was first articulated by the Appellate Division, Second Department, in *Blickstein v. Blickstein*.[2] Citing the "economic partnership" view of marriage, the court held that "[A]s a general rule, the marital fault of a party is not a relevant consideration in distributing marital property," but added that "there will be cases in which marital fault, by virtue of its extraordinary nature, becomes relevant and should be considered."[3]

Those cases, the court explained, "will

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involve situations in which the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that 'shocks the conscience' of the court[,] thereby compelling it to invoke its equitable powers."[4] The only example of such "egregious" conduct offered by the court was that provided by a New Jersey case, *D'Arc v. D'Arc*,[5] in which a husband who had attempted to hire a hit man to kill his wife was punished via a minimal equitable distribution award.

Blickstein's reasoning was quickly embraced by the state's other appellate courts.[6] In *O'Brien v. O'Brien*,[7] the Court of Appeals rejected the husband's contention that the trial court had erred in excluding evidence of the wife's marital fault on the issue of equitable distribution, explaining that

> Arguably, the court may consider marital fault under factor [13], 'any other factor which the court shall expressly find to be just and proper' [DRL §236(B)(5)(d)(13)] [citations omitted].... Except in egregious cases which shock the conscience of the court, however, it is not a 'just and proper' factor for consideration in the equitable distribution of marital property.[8]

To consider fault in other than those egregious cases, the court continued, would be "inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate[.]"[9] The court added that this limitation was also supported by the practical considerations that "fault will usually be difficult to assign and…introduction of the issue may involve the court in time-consuming procedural maneuvers relating to collateral issues."[10]

Expanding Application

For more than a decade after *Blickstein*, the "egregious fault" exception was invoked by New York's courts only rarely, and was treated primarily as applying to conduct involving serious criminal behavior. See *Brancoveanu v. Brancoveanu*[11] (husband attempted to hire a hit man to kill wife), *Thompson v. Thompson*[12] (husband raped wife's 17-year-old daughter), *Venkursawmy v. Venkursawmy*[13] (husband poured gasoline over wife and set her on fire), *Debeny v. Debeny*[14] (long history of domestic violence by husband included slapping wife in the face 50-70 times a year and injuries to wife that included broken foot [twice], broken ankle, broken finger, dislocated shoulder and two cracked teeth) and *Safah v. Safah*[15] (husband removed the parties' children to Lebanon and refused to bring them back to the U.S.)

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Over the past 10 years, however, downstate courts have demonstrated a willingness to find egregious fault and under somewhat more diverse circumstances, with the state's leading matrimonial judge, Justice Jacqueline Silbermann (now the deputy chief administrative judge for matrimonial matters) leading the way.

In *Murtha v. Murtha*,[16] the wife was awarded 60 percent of the parties' assets, based in part on the court's finding of egregious fault. The conduct that resulted in that finding was the husband's long history of physical abuse of the wife, which included "slapping, pushing and striking," as well as severe verbal abuse. The court found it appropriate to tilt the equitable distribution of marital property in the wife's favor because the abuse "contributed to the [wife's] psychological impairment[,] which prevents her from being self-supporting[.]"

In emphasizing the impact of the husband's conduct on the wife's ability to be self-supporting, the court echoed the reasoning of the court in *Thompson v. Thompson*,[17] which emphasized the disabling psychological impact on the wife of the husband's rape of her daughter. The 60 percent award to the wife represented a relatively modest sanction for the husband's misconduct, however, as the court noted that "even without a factor for fault," it would have awarded the wife more than 50 percent based on the parties' future financial prospects.

In *S.B. v. R.B.*,[18] Justice Silbermann, after finding that the four-year-long estrangement of the parties' son from the husband was the "result of [the wife's] vindictive and relentless decision to alienate [the son] from his father," penalized the wife by awarding her as maintenance "only those amounts [the wife] reasonably needs to meet her daily living expenses and so as not to negatively impact on [the son's] lifestyle," rather than what the wife would need to "maintain her prior standard of living." The decision did not invoke the term, "egregious fault," but characterized the wife's conduct as "reprehensible" and cited DRL §236(B)(6)(11), the "catch-all" factor allowing a court to consider "any other factor which the court shall expressly find just and proper" when setting maintenance. The decision specified that the maintenance awarded was "contingent upon [the wife] ensuring that the visitation schedule established by the court at the conclusion of the trial is adhered to."

On appeal, the First Department held

that "when determining the maintenance award, the IAS court properly considered defendant's relationship with his son[.]"[19] In a subsequent decision in the same litigation, Justice Silbermann cited "the wife's egregious conduct in destroying the husband's relationship with [the son]" and the wife's "conduct in attempting to harm the husband's professional life" in awarding the husband 70 percent of the marital assets.[20]

In *Havell v. Havell*,[21] the husband, whose murderous assault on the wife had precipitated the divorce action, sought to exclude all evidence of misconduct prior to that assault as not rising to the level of "egregious" misconduct that could be taken into consideration in determining equitable distribution.

The misconduct alleged included beating the children on numerous occasions; repeated use of violence and vulgar language with the wife, the children, housekeepers and visitors; calling the wife an "old hag" whose skin was hanging off and remarking that he should discard her for a younger woman; telling the children that the wife was a "whore," because she had had a previous marriage; routinely walking around the house, while the children and friends of theirs were present, in pajamas so loose that his genitals were exposed; spanking one of the children, then six months of age, for crying; belittling the parties' learning-disabled son, calling him "stupid" and "an idiot"; refusing to believe the "bipolar" diagnosis of the parties' oldest child, stating that what he needed was a "good kick" and a beating.[22]

Noting that the wife had alleged "conduct resulting in lasting emotional harm to herself and the parties' children," Justice Silbermann held that "such conduct, if proven, is so egregious and shocking that the court must invoke its equitable power so that justice may be done between the parties."[23]

Observing that "the 'egregious conduct' standard, as it appears to operate in practice, traditionally has allowed consideration of fault only in cases in which the alleged misconduct amounted to a serious violent felony,"[24] Justice Silbermann rejected that de facto standard, concluding that

> [A] pattern of domestic violence, properly proven by competent testimony and evidence, is a "just and proper" factor to be considered by the court in connection with the equitable distribution of marital property pursuant to Domestic Relations Law §236(B)(5)(D)(13).[25]

In her decision after trial,[26] Justice Silbermann focused on the husband's murderous, premeditated April 22, 1999, assault on the wife, in which he beat her savagely with a barbell, knocking out teeth, smashing her jaw and breaking her nose, and leaving her with permanent injuries and disabilities and a titanium plate in her head. Based on that assault and its devastating impact on the wife, as well as the husband's disregard for the likely emotional impact on three of the parties' younger children—who witnessed much of the attack and intervened as best they could—the court awarded the wife 100 percent of all remaining marital assets (approximately $13 million).[27] Because of the extreme nature of that attack, the court noted that it "did not reach the issue of whether the acts of domestic violence committed by the husband prior to April 22, 1999, should further reduce the husband's award."

The court also rejected the husband's contention that "egregious fault" could be considered in determining equitable distribution only where the victim spouse could show that the misconduct at issue had adversely affected his/her economic circumstances, for which the husband cited, inter alia, *Thompson*[28] and *Murtha*.[29] Ruling narrowly, Justice Silbermann held that "[I]n cases where one spouse attempts to murder the other spouse, there need be no showing of an adverse economic impact on the victim spouse in order to reduce the offending spouse's equitable distribution." Finally, despite the wife's substantially superior financial position, the court held that, under the circumstances, "it would be inequitable to require the wife to pay any portion of the husband's counsel fees[.]"

Definition and Standards

In the fullest explication of "egregious fault" by an appellate court in nearly two decades, the First Department affirmed on all points.[30] While emphasizing that "The general rule in New York is that marital fault should not be considered in determining equitable distribution,"[31] the court adopted as its own the definition of "egregious fault" offered in *McCann v. McCann*.[32] In *McCann*, Justice David B. Saxe, finding that the *Blickstein* "shocks the conscience" formulation lacked "a standard beyond the purely subjective with which to determine whether a given act is 'conscience-shocking,' and thus egregious,"[33] held that "egregious" conduct is conduct that "grievously injures some highly valued social principle…so fundamental that the court is compelled to punish the offending spouse by affecting equitable distribution of the marital assets."[34] Whether courts will find "grievously injures some highly valued social principle" a less subjective, easier-to-apply standard than "shocks the conscience" remains to be seen.

After observing in passing that "Marital fidelity…apparently falls into the realm of…'lesser' values, so adultery is non-egregious,"[35] Justice Saxe concluded, in *McCann*, that the husband's misrepresentations to the wife as to his intention and ability to have children with her likewise did not qualify as "egregious."

> I cannot hold that such a misrepresentation, even though it goes to the heart of the relationship, is more socially deleterious than alcoholism, adultery, abandonment and verbal or physical abuse, all of which have already been rejected as "egregious marital fault."[36]

In *Havell*, the First Department, like the trial court, expressly rejected the husband's contention that egregious conduct may not be considered with respect to equitable distribution unless that conduct has adversely affected the innocent spouse's ability to be self-supporting. The First Department found that the trial-court decisions cited by the husband were "unsupported by any other authority, do not accord with higher, controlling authorities, are not binding on this Court, and are unpersuasive."[37] The "higher, controlling authorities" cited by the court were *O'Brien* and *Blickstein*.[38] The court did not limit its holding, as the court below had, to cases where one spouse has attempted to murder the other.

Although the First Department also upheld the trial court's refusal to award the husband any counsel fees, its decision did not license trial courts to disregard the policy of DRL §237(a) in cases where egregious fault is found. Rather, the court, after stating that "It would hardly be just to require plaintiff to pay defendant's fees after his murderous attack on plaintiff,"[39] noted that the husband "received awards totaling $377,500 during the course of this litigation, most of which he used for attorneys' fees [including those incurred in the criminal case arising from his attack on the wife] and that "it appears from his filings on this appeal that he has been capably represented throughout this litigation[.]"[40] Accordingly, the court concluded, the husband's "contention that the court ignored the public policy of litigation parity here is unsubstantiated."[41]

In *DeSilva v. DeSilva*,[42] Justice Silbermann definitively abandoned the de facto "serious violent felony" standard she had described in *Havell*. Finding that "there has been a pattern of conduct involving both physical and verbal abuse which rises to the level of egregious fault," she awarded the wife 100 percent of the marital assets and assigned the husband responsibility for all of the parties' debts, with the exception of a loan on a car that was one of the assets awarded to the wife.

Almost all of the abusive behavior by the husband described by the court in its decision as published, however, was verbal, albeit in particularly vulgar language and in front of the parties' children. The only physical acts by the husband described in the published decision were from one occasion on which he spat in the wife's face and threw a packed duffel bag at the wife's pregnant belly; one occasion on which he threw the wife to the ground once (not while she was pregnant); and one occasion on which, while engaged in one of his foul-mouthed verbal tirades at the wife, the husband drove extremely fast and recklessly, with the children in the car. *DeSilva*, decided by Justice Silbermann, the state's chief matrimonial judge, would appear to portend a far greater role for fault in the determination of equitable distribution than at any time since equitable distribution became the law in 1980.

1. 46 AD3d 520 (2d Dept. 2007).
2. 99 AD2d 287 (2d Dept. 1984).
3. Id. at 291-292.
4. Id. at 292.
5. 164 N.J. Super. 226 (Superior Ct. 1978), mod. on other grounds, 175 N.J. Super. 598, (App. Div. 1980).
6. See *O'Brien v. O'Brien*, 66 NY2d 576, 589-590 (1985); *Stevens v. Stevens*, 107 AD2d 987, 988 (3d Dept. 1985) (applying *Blickstein* formulation to maintenance); *McMahan v. McMahan*, 100 AD2d 826, 826-827 (1st Dept. 1984); *Pacifico v. Pacifico*, 101 AD2d 709, 710 (4th Dept. 1984).
7. See note 6, supra.
8. Id. at 589-590 (citing *Blickstein*, supra, note 1); *Stevens*, supra, note 6; *McMahan*, supra, note 6; and *Pacifico*, supra, note 6.
9. *O'Brien*, supra, note 6, at 590.
10. Id.
11. 145 AD2d 395 (2d Dept. 1988).
12. NYLJ, 1/5/90 (Sup. Ct. Nassau Co.).
13. NYLJ, 3/16/90 (Sup. Ct. N.Y. Co.).
14. NYLJ, 1/24/91 (Sup. Ct. Nassau Co.).
15. NYLJ, 1/8/92 (Sup. Ct. Suffolk Co.).
16. NYLJ, 5/15/98 (Sup. Ct. N.Y. Co.).
17. See note 12, supra.
18. NYLJ, 3/31/99 (Sup. Ct. N.Y. Co. 1999).
19. *Bragar v. Bragar*, 277 AD2d 136, 137 (1st Dept. 2000).
20. *Bragar v. Bragar*, NYLJ, 6/21/02 (Sup. Ct. N.Y. Co.).
21. 186 Misc.2d 726 (Sup. Ct. N.Y. Co. 2000).
22. Id. at 728-729.
23. Id.
24. But see *Gordon v. Gordon*, NYLJ, 3/10/92 (Sup. Ct. N.Y. Co.) (Saxe, J.), aff'd, 205 AD2d 446, 614 NYS2d 904 (1st Dept. 1994).
25. Id. at 732.
26. NYLJ, 7/30/01 (Sup. Ct. N.Y. Co. 2001).
27. Earlier in the case, the husband had received distributions totaling $377,500. See *Havell v. Islam*, 301 AD2d 339, 342 (1st Dept. 2002).
28. Supra, note 12.
29. Supra, note 16.
30. *Havell v. Islam*, 301 AD2d 339 (1st Dept. 2002).
31. Id. at 344 (citations omitted).
32. Id. at 345 (quoting from *McCann v. McCann*, 156 Misc.2d 540 [Sup. Ct. N.Y. Co. 1993].
33. *McCann*, supra, note 32, at 544.
34. Id. at 545-546.
35. Id. at 547 (citing *Rosenberg v. Rosenberg*, 126 AD2d 537 [2d Dept. 1987] and *Wilbur v. Wilbur*, 116 AD2d 953 [3d Dept. 1986]).
36. Id. at 548-549.
37. 301 AD2d at 345.
38. Id.
39. Id. at 347.
40. Id. at 348.
41. Id.
42. NYLJ, 9/6/06 (Sup. Ct. N.Y. Co.).

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