

Discovery and 'Non-Egregious' Marital Fault

Even as no-fault divorce legislation in the State of New York has been signed into law, matrimonial practitioners continue to deal with the vestiges of fault-based litigation.

BY THOMAS A. ELLIOT

AUGUST 2010

Even as no-fault divorce legislation in the State of New York has been signed into law, matrimonial practitioners continue to deal with the vestiges of fault-based litigation. Some of these include the relevance of marital fault in relation to equitable distribution, and discovery with respect to marital fault. In the recent case of *Howard S. v. Lillian S.*, 14 N.Y.3d , 902 N.Y.S.2d 17, 2010 N.Y. Slip Op. 03474 (2010), handed down on April 29, the Court of Appeals addressed the issue of egregious marital fault as a factor in equitable distribution. Specifically, the court held that the wife's alleged extramarital affairs ' one of which purportedly resulted in the birth of an out-of wedlock child whom her husband thought was his ' did not, as a matter of law, rise to the level of "egregious marital conduct."

Egregious marital conduct, in the legal sense, is that conduct which falls well outside the bounds of the basis for an ordinary divorce action. The wife's actions in *Howard S.*, being less than unheard-of, therefore could not properly be considered as a factor to be taken into consideration in the equitable distribution of marital property. Accordingly, the court ruled, with one judge dissenting, that the husband was not entitled to liberal disclosure regarding the wife's alleged misconduct. Implicit in this decision is the adoption by the Court of Appeals of the rule that, in general, discovery relating to the issue of grounds is not permissible in a matrimonial action. Although the First and Second Appellate Departments had long held this view, the Third and Fourth had not.

The Case

In *Howard S. v. Lillian S.*, the husband commenced an action asserting two causes for a divorce; he claimed both cruel and inhuman treatment and adultery. The husband also asserted a cause of action for fraud based on the wife's failure to disclose her adultery. In addition to the divorce, the husband sought damages under the fraud claim based on, among other things, the sums he expended in supporting their youngest child, who allegedly was the product of one of the wife's adulterous affairs. Finally, he ask the court to award him monies he had expended for fees in the collaborative law process the parties had engaged in prior to the commencement of the divorce action. In his request that the court equitably distribute the marital property, he claimed that he should be awarded most of the parties' marital property because of his wife's alleged egregious marital fault in having a child with another man while married, and failing to reveal to her husband that he was not the father of the child.

The wife moved to dismiss or sever the fraud cause of action. The husband cross-moved for liberal discovery relating to his fraud claim and the issue of the wife's egregious marital fault for purposes of equitable distribution. The Supreme Court denied the wife's motion to dismiss the fraud claim, finding that the husband's complaint stated a viable cause of action. It limited his available damages to his pecuniary loss in the form of collaborative law process fees, however. The Supreme Court also denied the husband's cross-motion for liberal discovery, determining that the wife's conduct did not rise to the level of egregious fault such that it could be considered for purposes of equitable distribution. This holding was affirmed by the Appellate Division, First Department, with one justice dissenting. *Howard S. v. Lillian S.*, 67 AD3d 187 (1st Dept. 2009).

The Appeal

The Appellate Division granted the husband leave to appeal to the Court of Appeals, and the high court affirmed. In its decision the court, citing *O'Brien v. O'Brien*, 66 NY2d 576 (1985), noted that it had previously rejected the notion that marital fault was a just and proper factor for consideration with respect to equitable distribution, except in egregious cases that shocked the

conscience of the court. The court also noted that although it had not had occasion to further define “egregious misconduct,” the lower courts had generally rejected the notion that adultery, on its own, constituted such conduct, as adultery is a ground for divorce; it is a basis for ending the marital relationship, not for altering the nature of the economic partnership. The Court of Appeals concluded that in order to have any significance at all with respect to the issue of equitable distribution, non-economic misconduct must consist of behavior that falls well outside of the basis for an ordinary divorce action. The court noted examples of such “outrageous or conscience-shocking conduct,” such as the attempted bribery of a trial judge (*see Levi v. Levi*, 46 AD3d 520 (2d Dept. 2002)) and the vicious assault of a spouse in the presence of children (*see Havell v. Islam*, 301 AD2d 339 (1st Dept. 2002)).

Applying the foregoing principles to the facts before it, the Court of Appeals held that the husband’s allegations that the wife had committed adultery, had conceived a child she knew or should have known was fathered by another man, and that she kept this information from the husband did not constitute egregious marital conduct. Therefore, the court held that the husband was not entitled to liberal discovery with respect to this issue.

The Implications

The decision in *Howard S. v. Lillian S.* is noteworthy in several respects. First, the decision makes it clear that most types of garden-variety marital misconduct will not be relevant in determining issues of equitable distribution of marital assets. Although it is difficult to imagine many situations more shocking and egregious than discovering that one’s spouse has failed to disclose a child whom a party thought was his own was fathered by another man, according to the Court of Appeals such conduct should have no bearing whatsoever on the distribution of marital property, despite the likely negative economic and emotional consequences of such conduct. Indeed, it appears from the examples given by the Court of Appeals (*i.e.*, attempted bribery of a trial judge and assault of a spouse in the presence of children) that in order for spousal misconduct to be considered in the equitable distribution of marital property, such conduct must be criminal in nature. In these situations, an unequal distribution of marital assets

to the “innocent” spouse becomes the penalty for engaging in such criminality. Apparently, in all other situations “courts are not in the business of regulating how spouses treat one another,” as stated by the majority in *Howard S. v. Lillian S.*

Another notable aspect of the decision in *Howard S. v. Lillian S.* is the fact, as noted by Judge Pigott in his dissent in the case, that the majority has implicitly adopted the First and Second Judicial Departments’ longstanding prohibition against discovery with respect to the issue of marital fault. It is well established in the First and Second Departments that discovery with respect to marital fault is not permitted absent a court order granting permission to conduct such discovery. *See, e.g., Ginsberg v. Ginsberg*, 104 AD2d 482 (2d Dept. 1984) (enactment of the financial disclosure provisions of the equitable distribution law, which evinced a legislative intent that both parties to a matrimonial action provide full financial disclosure, did not alter the long-standing prohibition against pretrial discovery of information concerning the merits of a matrimonial action.); *see also McMahan v. McMahan*, 100 AD2d 826 (1st Dept. 1984).

Apparently, one of the primary rationales for this prohibition, as stated by the Second Department in *Hunter v. Hunter*, 10 AD2 91 (2d Dept. 1960), was that such disclosure “may unduly prevent the reconciliation of the parties or, even if reconciliation is not likely, make future relationships, which must persist despite separation, unnecessarily bad.”

Pretrial Discovery and Marital Fault

In contrast to the First and Second Departments, the Third and Fourth Judicial Departments have not had a general prohibition against pretrial discovery with respect to marital fault. *See Semon v. Saridis* 125 AD2d 882 (3d Dept. 1984); *Lemke v. Lemke* 100 AD2d 735 (4th Dept. 1984).

Remarkably, the Court of Appeals has apparently never addressed head-on the aforesaid conflict between the Appellate Division departments regarding discovery and marital fault. Although in *Howard S. V. Lillian S.* the issue of discovery with respect to the actual grounds for divorce was not before the court (the decision, in a footnote, reflects that the parties had stipulated to a divorce on the ground of constructive abandonment), implicit in the decision is that discovery

with respect to ordinary, run-of-the-mill marital misconduct is not permissible absent a court order. Indeed, the Court of Appeals, in discussing the husband's application for discovery with respect to the wife's adultery and concealment of the fact that her child was fathered by another man, stated as follows: "Even taking these allegations as true, plaintiff has essentially stated a cause of action for adultery. While adultery, and many of its unintended consequences, will undoubtedly cause a great deal of anguish and distress for the other spouse, it does not fit within the legal concept of egregious conduct. Moreover, plaintiff's cause of action for fraud, is based entirely upon defendant's alleged adultery and on plaintiff's reliance upon the denial of that behavior. *Plaintiff cannot obtain discovery for what is essentially an allegation of marital fault.*" (Emphasis supplied.)

Thus, it appears from the foregoing language of the decision that the Court of Appeals has determined that discovery with respect to marital fault is not permissible except in cases of egregious conduct. Therefore, practitioners in the Third and Fourth judicial Departments would now appear to be on firm footing in resisting discovery demands with respect to the issue of marital fault. In this regard, the decision *Howard S. v. Lillian S.* appears to reflect an ongoing shift away from marital fault as a relevant factor in matrimonial litigation.

Thomas A. Elliot, a member of this newsletter's Board of Editors, is a partner in Joseph Law Group, P.C.

Reprinted with permission from the August 2010 edition of the "Law Journal Newsletters" © 202X ALM Global Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-256-2472 or reprints@alm.com.

Original Link: <https://www.lawjournalnewsletters.com/2010/08/27/discovery-and-non-egregious-marital-fault/>