Domestic Abuse Considerations in Equitable Distribution: Application of the 2020 Amendment to DRL 236B(5)(d)

By Lee Rosenberg, Editor-in-Chief

In the fall 2018 issue of this publication, I explored the issue of egregious conduct as it did (or did not) impact equitable distribution and spousal support. (*See* Marital Fault: Redefining Egregious Conduct in The 21st Century).[1] This standard has been impacted by the 2020 amendment to § 236B(5)(d) of the Domestic Relations Law and two cases out of the New York County Supreme Court—*J.N. v T.N.*[2] and *S.C v R.N.*[3]

Historically, and especially post-passage of no-fault divorce in 2010, courts by and large held that without the existence of "egregious" conduct, equitable distribution and spousal support would not be otherwise affected beyond what the court would normally do under the facts and circumstances of a particular case. Egregious conduct was defined as that which "shocked the conscience" of the court. *See O'Brien v. O'Brien*,[4] citing to *Blickstein v. Blickstein*,[5] and other cases. Further, at least, in the First and Second Departments, no discovery would be permitted on issues of marital fault, barring approval by the court after application—which general prohibition on discovery on "fault" was then extended by the Court of Appeals in 2010's *Howard S. v. Lillian S.*[6]

The *Howard S.* court assessing extreme adulterous conduct referenced egregious conduct as such that "falls well beyond the bounds of the basis for an ordinary divorce—conduct that is truly exceptional, due to outrageous or conscious, shocking conduct on the part of one spouse."[7] *Howard S.* references many other cases, including the oft cited *Havel v. Islam*,[8] and the husband's "shocking the conscience" conduct, which conduct is defined as "so egregious or uncivilized as to speak of a blatant disregard of the marital relationship."

While violence was the hallmark of *Havel*, other cases as cited in the 2018 Family Law Review article provided various other references to conduct in which violence was not so prevalent. The threshold to move the needle on equitable distribution, however, continued to be high. The question was then posed whether past views of egregious conduct were outdated, as lesser "run-of-the-mill" forms of abuse that were tolerated in earlier times should be subject to re-evaluation.

Amendment to DRL § 236(B)(5)(d)

Fast-forward then to 2020's enactment amending DRL § 236B(5)(d) and what is now factor 14 in the court's review of equitable distribution. This amendment requires the court to consider "whether either party has committed an act or acts of domestic violence, as described in subdivision one of § 459–a, of

social services law, against the other party, and the nature extent and duration and impact of such acts or acts."[9]

Social Services Law § 459–a, defines the term "victim of domestic violence" by citing to those provisions of the Penal Law, which would also permit the granting of an order of protection in a family offense proceeding under Family Court Act § 812.[10] Notably, § 459-a is broader than just those enumerated criminal acts; however, as it refers to a violation of the Penal Law "*including, but not limited to* . . . " the specified recitation of the family offense related acts. (emphasis added)

At present, two decisions have issued—both out of Supreme Court, New York County citing to the 2020 amendment. The first of these cases is *J.N. v. T.N.,* issued on September 15, 2022 by Justice Kathleen C. Waterman-Marshall, addressing the history of the egregious conduct standard vis-a-vis the amendment. It rejects the burdensome egregious conduct standard in light of the legislative mandate to consider domestic violence as referenced in the Social Services Law. The second case is *S.C. v. R.N.* from April 5, 2023, from Justice Ariel D. Chesler, and which cites to *J.N. v. T.N.*

J.N. v. T.N.

In *J.N. v. T.N.*, the court, in a matter of first impression, analyzed the legislative change and awarded the wife 85% of the marital assets. Further, that the wife was gainfully employed, did not bar consideration of the husband's "unabated, harassment and verbal abuse," which included conduct during the marriage as well as during the course of the litigation.

The parties were married for under 11 years and had three children. Despite the court characterizing the financial issues as being "uncomplicated," the husband "took every opportunity to delay this matter and harm wife, emotionally and financially. His harassing conduct during the litigation—in and out of the courtroom—was a continuation of his abusive conduct during the marriage. He asserted meritless claims and employed litigation strategies admittedly meant to run up attorneys' fees, and wear wife down. He failed to comply with discovery. He took intentional and calculated actions to damage wife's career and professional reputation in direct violation of court order. He then refused, without excuse, to show up for trial."

The court in considering equitable distribution specifically held,

> As of 2020, when the New York State Legislature amended DRL §236(B)(5)(d)(14), the court now may consider domestic violence, as that term is defined in the Social Services Law, in formulating a distributive award. This case implicates this new provision. Indeed, this court cannot reach the correct equitable result on the parties' financial matters without considering Husband's domestic violence during the marriage, abuse throughout this litigation, and its effects.
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> . . . Husband committed acts of domestic violence as that terms is defined Social Services Law §549(a), against Wife throughout the entire marriage . . . Indeed his harassment continues to date, has impacted her emotionally, financially, and reputationally, and warrants the distributive award and its implementation herein.
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> . . . The man in the marriage is the same exact man in this litigation. He has continued his campaign of abuse for the past four years: having lost the power to curse and degrade her to her face at will, Husband has engaged in extreme and harassing litigation tactics for the stated purpose of wearing Wife down financially and emotionally. Indeed, he has said it himself—he is on a kamikaze mission. He has engaged in "clear, intentional, and relentless conduct in attempting to harm Wife in her professional life" by discussing her employment and the details of this litigation with third parties, including reporters, in direct violation of the Confidentiality Order. He asserted manufactured and wholly meritless claims of domestic violence against Wife. He has actively sought to disparage and defame her to the Board of Directors of [a not-for-profit organization on which she sits] and undermine her employment. He caused articles to be written about her, her relationship to [the investment bank], and this divorce, despite knowing that she could lose assets and her job for any reason including reputational and financial harm to her employer.
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> In this Court's considered view, Husband's domestic violence during the marriage and this litigation, which threatens Wife's professional reputation, fits squarely within what this Court is now authorized to consider under DRL § 236 B (5)(d)(14), as amended, and resembles the type of conduct previously recognized by courts in denying maintenance to an abusive spouse.

The court also referenced testimony and documents in the custody trial conducted by Hon. Lori S. Sattler, which included a domestic violence finding.

In looking at the husband's conduct, the court considered the wife's testimony as to his mental and emotional abuse, which the court found to be clear, consistent, and credible. This conduct also included being controlling, verbally abusive, and threaten-

ing. His conduct as well included use of verbal epithets, financial dissipation, failure to engage in discovery, false claims regarding the mother's parenting, last-minute cancellations of his parenting time, and his refusal to respond to the wife's emails or texts regarding the children.

In analyzing past vs. present views on "fault," the court, looking at the 2020 amendment, found that the husband's conduct was such that could be considered "harassment, aggravated, harassment" among other available prohibited behaviors, and that such behavior resulted in emotional injury or harm. The court looked as well to the legislative history to ascertain the "spirit and purpose" of the enactment to guide the court in its interpretation of the statutory amendment.

Ultimately, the court found "by all accounts, this is an insidious case of domestic violence, the end of which has yet to be reached. Consequently, this court is empowered to, and must on this record, find that the husband's acts resulted in 'actual ... *emotional injury*' and has 'created a substantial risk of . . . *emotional harm*' to Wife, and has negatively impacted her professional reputation and career and threatened her ability to make a living" (emphasis in original).

With regard to the issue of spousal support, given that the wife was the financially superior income earner and that the husband had received pendente lite tax-free maintenance of $480,000 over a 24-month period, the husband's domestic violence and harassing conduct undermined his ability to obtain any further post-divorce maintenance award.

S.C. v. R.N.

In *S.C. v. R.N.*—a child abduction case—Justice Chesler found that the wife had in fact engaged in "egregious conduct" in its more traditional sense, which undermined the husband's ability "to earn income, and saddled him with severe trauma, depression, and anxiety." The court found the wife's conduct also detrimentally impacted the parties' child and awarded her no equitable distribution.

In this matter involving a 10-year marriage, the wife abducted the child to India—a non-Hague signatory country—during the midst of the New York custody and divorce litigation. The child, who was approximately eight years old at the time of commencement of the action, was autistic, and had special needs, which were being met by services in New York. The wife fled to India with the child within several weeks of the forensic report having been provided to the court in New York. The wife, in abstentia, advised the court by email that she had commenced proceedings in India, and that she considered the New York matter to have been "withdrawn" without basis. The court, with regard to issues of custody, determined that the husband should have sole legal and physical custody of the child, with no parental access awarded to the wife until such time as she participated in proceedings in New York.

In analyzing the facts, the court looked to prior cases which "shocked the conscience" of the court, but also *considered the effect of the statutory amendment as was analyzed in J.N. v. T.N.* In addition to the abduction, the wife filed at least seven groundless criminal and ACS investigations against the husband and had the husband arrested twice based upon false claims of abuse. Due to her false allegations, the husband's access to the child had been subject to supervision. The wife had also destroyed or disposed of documents, computers, and hard drives, took the husband's passport and visa—limiting his ability to travel to India and limiting his employment options, and hindered his ability to establish the value of certain assets.

The court ultimately found that under the circumstances of the wife's conduct, "it would be inequitable to award her even 10% of the marital assets." Accordingly, "in light of her egregious marital fault, the plaintiff has forfeited her right to a share of the marital assets."

While certainly the wife's conduct in *S.C. v. R.N.* would fall into the historic "egregious conduct" level even before the amendment to the domestic relations law, it is also significant in that the court has taken note of the amendment to DRL § 236B(5)(d) as was analyzed in *J.N. v. T.N.*, finding that court's analysis to be "a helpful review of the consideration of marital fault in equitable distribution."

As of the date of this writing, there does not appear to be any other cases that have addressed the statutory change, and so there is, of course, no appellate authority to guide us and no other counties beyond New York County have presented a reported decision. There is also no guidance regarding how the courts would view discovery in this particular equitable distribution factor. Given the pre-amendment decision in *Howard S.* and the previous longstanding discrepancy between the First and Second Departments, and the Third and Fourth Departments on the issue of such discovery, how, if at all, does the amendment—which requires the court to consider domestic violence—impact this issue? Having no appellate authority to clarify, it would seem that best practice requires the matter be addressed directly with the court prior to asserting a right to discovery, and the result may now again depend upon which judicial department the matter is pending.

No doubt, given the historical prohibition on such "fault-based" discovery in the "downstate" departments and the restrictions posed by *Howard S.*, an attempt to inquire at deposition or otherwise, into issues relating to domestic violence would be met with an objection and a directive for the witness not to answer. Given precedent, such a directive would not be frivolous per se. The trial court must then be inquired of to determine to what extent, if it all, issues related to domestic violence may be subject to pre-trial discovery.

As we await further guidance from our trial and appellate courts, it does seem clear that at least in New York County, the days of looking to limited prior notions of egregious conduct in affecting equitable distribution may be a thing of the past.

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Endnotes

1. L. Rosenberg NYSBA Family Law Review, Vol 50, No. 2 (2018).
2. 77 Misc.3d 894 (Sup. Ct. N.Y. Co. 2022).
3. 79 Misc.3d 383 (Sup. Ct. N.Y. Co. 2023).
4. 66 N.Y.2d 576 (1985).
5. 99 A.D.2d 287 (2d Dep't 1984).
6. 14 N.Y.3d 431 (2010). Note the dissent by Judge Eugene F. Pigott, Jr., asserting that discovery as was historically permitted in the Third and Fourth Departments should be the rule.
7. *Id.* The Court of Appeals did not find adulterous conduct, even as alleged, to be "egregious."
8. 301 A.D.2d 339 (1st Dep't 2002).
9. ". . . disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, or strangulation." Soc Ser Law § 459-a.
10. FCA § 812 references

    disorderly conduct, harassment in the first degree, harassment in the second degree, aggravated harassment in the second degree, sexual misconduct, forcible touching, sexual abuse in the third degree, sexual abuse in the second degree as set forth in subdivision one of § 130.60 of the penal law, stalking in the first degree, stalking in the second degree, stalking in the third degree, stalking in the fourth degree, criminal mischief, menacing in the second degree, menacing in the third degree, reckless endangerment, criminal obstruction of breathing or blood circulation, strangulation in the second degree, strangulation in the first degree, assault in the second degree, assault in the third degree, an attempted assault, identity theft in the first degree, identity theft in the second degree, identity theft in the third degree, grand larceny in the fourth degree, grand larceny in the third degree, coercion in the second degree or coercion in the third degree as set forth in subdivisions one, two and three of § 135.60 of the penal law.

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