

# A Look Back and Forward: From 40 Years of the Equitable Distribution Law to the Path Ahead

By Lee Rosenberg, Editor-in-Chief

Come July 2020, the Equitable Distribution Law<sup>1</sup> will be 40 years old. Since its enactment effective July 19, 1980, New York matrimonial practice has seen extraordinary developments. In its prior incarnation, the law was literally “inequitable”—New York being a state that distributed assets based upon title, restricted spousal support—then officially called “alimony”—to women only, but only if they were free from marital fault. The enactment of the Equitable Distribution Law recognized that the previously existing statutory framework failed to meet the standards of a modern society and the changing relationships and responsibilities between spouses. The recognition of marriage as an “economic partnership” remains the cornerstone of our current law.<sup>2</sup>

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Since that time, we have seen the creation<sup>3</sup> and elimination<sup>4</sup> of enhanced earning capacity as a distributable asset; the enactment of the Child Support Standards Act<sup>5</sup>—eliminating the needs-based test in favor of an income-based determination;<sup>6</sup> the establishment of a statutory presumption for an award of counsel fees in favor of the non-monied spouse;<sup>7</sup> a formula for temporary and final spousal support;<sup>8</sup> the consideration of domestic violence in custody and support awards;<sup>9</sup> conceptual gender neutrality in the application of the domestic relations law;<sup>10</sup> the enactment of no fault divorce;<sup>11</sup> codifying “automatic orders”;<sup>12</sup> and same-sex marriage,<sup>13</sup> among the developments in the last 40 years.

Our trial and appellate courts have been overwhelmed with issues not initially contemplated when the Equitable Distribution Law was enacted. They have weighed in over the years to try and find equity and implement practical as well as legislative change. Our Court of Appeals has issued many seminal decisions that have shaped the landscape of the law from *O’Brien*<sup>14</sup> to *El-Dehdan*<sup>15</sup> to *McSparron*<sup>16</sup> to *Cassano*<sup>17</sup> to *Price*<sup>18</sup> to *Majauskas*<sup>19</sup> to *Brooke S.B.*<sup>20</sup> to *Howard S.*<sup>21</sup> to *Mahoney-Buntzman*<sup>22</sup> to *Keane*<sup>23</sup> to *Graev*,<sup>24</sup> and more. Much has been done and much remains to be accomplished.

As society continues to change and evolve or—in some cases, devolve—we will continue to address parenting rights, support issues, valuation issues, gender inequality, children’s issues, and the need for access to justice in an increasingly beleaguered system. In the enactment of the Equitable Distribution Law and its immediate aftermath, New York looked not only to legislators and administrators to craft and correct that which would profoundly affect the married and unmarried population of the State—it looked as well to the expertise of many of our own practitioners and judges for advice and input.



Much has been recently made of the most recent foray into “court consolidation,” which initially failed to pass by resort to a constitutional amendment and which is now being promulgated through legislative channels.<sup>25</sup> It is proffered, *inter alia*, that as part of such consolidation, the Family Court will be rolled into the Supreme Court and that the *merged* Supreme Court will consist of six “divisions”: family, probate, criminal, state claims, commercial, and general. To be approved and to take effect, the proposal must be passed by the legislature during its 2020 session, passed again during its 2021 session, and then approved by state voters at the November 2021 general election. Justices will be available under the proposal to be shifted between divisions. Many groups and organizations are fully in favor of the proposal such as our own New York State Bar Association and many are opposed or skeptical. Certainly, the consolidation of the statutorily created Family Court—with its specialized functions and its availability for more immediate access to justice to those who need it—into a Supreme Court “Family

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Division” with historic equitable powers and complex equitable distribution issues among others—raises many concerns with many nuances. Without delving deep into these issues and debating all of same in this column, what seems clear, is that the Matrimonial and Family Law Bar and Bench should be invited to serve as active participants in the discussion, creation and evolution of this proposal.

Those families and their children who are served by the family and matrimonial courts all have a vested interest in a system which truly serves justice. They are not just faceless corporations in a commercial part nor parties arguing over the details of contractual obligations—they are the very human faces of parents and children enduring some of the most traumatic and stressful events one can go through. Further, those professionals who toil for these families and their children, have deep expertise and insight into what works and what does not, what changes are beneficial and which are not; they have their own individual specialized knowledge of abuse and neglect matters, Hague Convention issues, high net worth dissolutions, forensic custody evaluations, juvenile/PINS cases, stock option and pension distributions, and may often act in the capacity of therapist, accountant, economist, and psychologist, in addition to attorney or judge. Moreover, they care deeply, even sometimes seemingly more than the parties themselves.

While it is said that many do not like change, certainly there are changes needed in our courts. It is a rare lawyer, jurist, or litigant who would say that all is completely well in our matrimonial and family law system—I am not sure I know any. That being said, we should be intricately included to be part of the proverbial solution, with fair representation, participation, and input to be provided and considered in crafting the result. Much has been accomplished since July 19, 1980. The path has been long, sometimes arduous, to get to a better place. We can still go forward to find greater fairness, equity, and justice—together.

## Endnotes

1. DRL § 236B.
2. *Fields v. Fields*, 15 N.Y.3d 158 (2010) citing to Governor’s Approval Mem., L. 1980, ch. 281, reprinted in 1980 McKinney’s Session Laws of N.Y., at 1863).
3. *O’Brien v. O’Brien*, 66 N.Y.2d 576 (1985).
4. DRL § 236B(5)(d)(7).
5. DRL § 240(1-b).
6. Except in High income@ cases. See, e.g. *Brim v. Combs*, 25 A.D.3d 691 (2nd Dep’t 2006); *Anonymous v. Anonymous*, 286 A.D.2d 585 (1st Dep’t 2001).
7. DRL § 237, 238.
8. DRL § 236B(5-a),(6).
9. DRL § 236B(5-a), (6); DRL § 240.

10. DRL § 10-a(2).
11. DRL § 170(7).
12. DRL § 236B(2)(b).
13. DRL § 10-a(1).
14. *O’Brien, supra* at endnote 3. (creation of enhanced earning capacity).
15. *ElDehdan v. ElDehdan*, 26 N.Y.3d 19 (2015) (elements necessary to support a finding of civil vs. criminal contempt).
16. *McSparron v. McSparron*, 87 N.Y.2d 275 (1995) (valuation date guideposts for active and passive assets).
17. *Cassano v. Cassano*, 85 N.Y.2d 649 (1995) (statutory process for determining child support under the CSSA).
18. *Price v. Price*, 69 N.Y.2d 8 (1986) (test for appreciation of separate property).
19. *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984) (formula for distribution of pensions).
20. *Brooke S.B. v. Elizabeth A.C.C.*, 28 N.Y.3d 1 (2016) (addresses rights of non-married couples without a biological or adoptive relation to a child as to standing to seek custody or parenting rights).
21. *Howard S. v. Lillian S.*, 14 N.Y.3d 431 (2010) (addressing egregious conduct and discovery).
22. *Mahoney-Buntzman v. Buntzman*, 12 N.Y.3d 415 (2009) (second-guessing of economic decisions during intact marriage and binding nature of tax returns).
23. *Keane v. Keane*, 8 N.Y.3d 115 (2006) (double-counting in computing maintenance awards on tangible assets).
24. *Graev v. Graev*, 11 N.Y.3d 262 (2008) (defining Acohabitation@ in contractual spousal support obligations).
25. <http://ww2.nycourts.gov/sites/default/files/document/files/201909/CourtMergerSummaryandProposal.pdf>.

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