STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

CHRISTINE L. PALERMO,

Plaintiff,

V. **DECISION**

JOSEPH A. PALERMO,

Defendant. **Index No.: 2010/15824**

APPEARANCES:

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Dollinger, J.

In this matter, a husband seeks to dismiss his wife's claim for a divorce based on an irretrievable breakdown of their marriage, even though he has not lived with her for almost a decade. The facts require an examination as to whether a party's sworn allegation of an irretrievable breakdown for a period in excess of six months is a sufficient basis for establishing one of the two indispensable requirements for a divorce under DRL § 170(7).[1]

The couple were married in 1977. In September 2000, the wife moved out of the

[1] The other requirement under DRL § 170(7) is that the parties have resolved their disputes over equitable distribution and support matters. Because this disputes arises in the context of a motion to dismiss, those issues are not before the court.

marital residence. In 2001, the wife commenced a divorce action against the husband on grounds of cruel and inhuman treatment and a jury returned a verdict of no cause for action. In February 2011, the wife again filed a verified complaint, this time on the grounds that the marital relationship had broken down for a period in excess of six months. The husband answered, denying the allegations, and asserting an affirmative defense that the couple had lived separate and apart for a period of at least 10 years. The husband then moved to dismiss the wife's complaint, arguing that the statute of limitations had expired on her claims, that they were barred by *res judicata*, and that the complaint failed to state a cause of action. The wife cross-moved to replead the claim under DRL § 170(7) to include the specific allegation that the marriage was irretrievably broken for a period of greater than six months.[2]

This court needs to decide whether the verified statement of "irretrievable breakdown" of a marriage, in itself, without a trial, provides the necessary predicate to granting a divorce under the Domestic Relations Law.

THE HISTORY OF NEW YORK'S NO FAULT DIVORCE LAWS

Since 1966 when New York repealed its "adultery-only" divorce laws, the state has permitted divorce on the basis of fault (adultery, abandonment, cruel and inhuman treatment, and/or extended incarceration), and no-fault (living apart pursuant to either an agreement or judgment of separation). *Gleason v. Gleason*, 26 NY2d 28 (1970); DRL § 170. By enacting the no-fault provision, the legislature recognized "that it is socially and

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[2] Because amendments to pleadings at the early stages of litigation are widely favored, the motion to amend and serve the complaint is granted. CPLR 3025(b); *Haga v. Pyke*, 19 AD3d 1053 (4th Dep't 2005). The court considers this motion based on the amended complaint.

morally undesirable to compel a couple whose marriage is dead to remain subject to its bond." Gleason at 39. *See also* Covington v. Walker, 3 NY3d 287, 290 (2004) ("dead marriages . . . should be terminated for the mutual protection and well being of the parties and, in most instances, their children;" *quoting* 1966 Report of the Joint Leg. Comm. on Matrimonial and Family Laws); *Christian v. Christian*, 42 NY2d 63, 69 (1977) (the legislature intended the no-fault provisions to allow couples "to extricate themselves from a perpetual state of marital limbo); *Scully v. Haar*, 67 AD3d 1331, 1336 (4th Dep't 2009). The court in *Gleason* noted that the no-fault provisions in the 1966 legislation addressed:

> [T]wo of the chief evils the new divorce law was designed to eliminate – collusive or fraud-ridden divorce actions in this state and the continued pursuit of out-of-state divorces based upon spurious residence and baseless claims.

The court explained that the "larger public purpose by the present legislation requires that there be a legal termination of dead marriages." *Id*. at 43. *See also* Halsey v. Halsey, 296 AD2d 28, 30 (2nd Dep't 2002); *P.B. v. L.B.*, 19 Misc3d 186 (Sup. Ct. Richmond Cty. 2008). By judicially making the 1966 amendments apply to agreements executed prior to its effective date, the court in *Gleason* noted that "it has been well said that "[a] giant step has been taken in the Divorce Reform Law to bring New York into the twentieth century" and added that "the courts should not dilute its effectiveness by denying it the full scope intended for it." *Id*. In *Gleason*, the Court of Appeals recognized that "the real purpose of the no-fault provisions was to sanction on grounds unrelated to conduct."[3]

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[3] The Court of Appeals recently reiterated the evil of trials over fault, noting: "[W]e also observed that fault will usually be difficult to assign and [that] introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues." *Howard S. v. Lillian S.*, 14 NY3d 431 (2010). While *Howard S. v. Lillian S*. dealt with "fault discovery" in New York, its admonition to matrimonial trial practitioners about the implications of fault in resolving divorce disputes is pertinent here. The consequences of fault based discovery are ever present in fault-based trials: "[T]here remains significant potential for abuse and harassment as a result . . . as well

The *Gleason* decision is important to the current question because it recognizes that the state legislature could fashion divorce remedies based on both parties consent to end their marriage without further testimony or evidence as to their private intentions. As the court noted in *Halsey*, if the parties had a "mutual contemporaneous intent" that their marriage was dead and that intention was incorporated into an agreement, then the marriage could be dissolved because both "parties wish to extricate themselves from a perpetual state of marital limbo." *Halsey* at 31. The only requirements under the no-fault grounds enacted in 1966 were that there be a "mutuality of intention" demonstrated separation agreement "as evidence of the authenticity and reality of the separation" and actual separation. *Id*.

In this case, the question is whether the state legislature provided the same relief – divorce – based on the intentions of just one of the two partners to the marriage, without any inquiry into their intent or conduct by enacting DRL § 170(7).

THE ENACTMENT OF DRL § 170(7)

In 2010, the legislature took the next step and sought to bring New York's divorce laws into the 21st Century by enacting a new no-fault provision which lessened the essential proof necessary to provide the grounds for a divorce. Instead of requiring couples to wait a year after they had expressed their "mutual contemporaneous intent" that their marriage was dead (as required by subdivisions 5 and 6 of Section 170) the

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as the possibility that parties will be induced to enter into disadvantageous settlements rather than litigate these types of intensely personal issues." *Id*.

legislature:

(a) removed the objective waiting period of one year and the need for a writing signed by both parties; and,

(b) permitted one party to be granted the divorce immediately upon a sworn declaration that the marriage was "irretrievably broken for a period in excess of six months." DRL § 170(7).

Read in this fashion, the legislature no longer requires evidence of the "mutual contemporaneous intention" as required by the two previous no-fault grounds. Under DRL § 170(7), one partner alone can declare the marriage is "dead" if sworn to under oath, in accordance with the statutory language.

While a strict reading of the statute suggests that the declaration alone provides the basis for a divorce, the husband in this case argues that something more is required. The husband contends that he is entitled to a trial on this provision. His argument relies on *Strack v. Strack,* 31 Misc2d 258 (Sup. Ct. Essex Cty. 2011). Citing the Domestic Relations Law provision for a right to trial by jury, the court concluded that:

> [T]he legislature failed to include anything in the Domestic Relations Law §170(7) to suggest that the grounds contained therein are exempt from this right to trial. Had it intended to abolish the right to a trial for the grounds contained in the Domestic Relations Law, it would explicitly have done so.

Id. at 263. The court concluded that the question of whether a breakdown is irretrievable is a question of fact to be determined at trial.

In view of the *Strack* decision, there is an apparent collision of the no-fault entitlement under DRL § 170(7), and the trial right under DRL § 173. This court must

resolve the statutory contradiction. In doing so, the primary consideration is to ascertain the history and object of the enactment, in light of the facts which were found by the legislature to prompt its enactment. *Malkin v. Wilkins,* 22 AD2d 497 (4th Dep't 1965). This court must also consider "the mischief sought to be remedied by the new legislation, and...should construe the act in question so as to suppress the evil and advance the remedy." McKinney's Statutes § 95. *See also*, *Lincoln First Bank v. Rupert,* 60 AD2d 193 (4th Dep't 1977*)* (the evils the present act was intended to meet must be considered).[4] The "evil" posed by the lack of a no-fault provision based on one party's sworn declaration was discussed forty years ago by the court of Appeals in *Gleason*: the need for the courts, in a fault-based divorce environment, to probe the inner-life of a marriage to objectively determine its viability.

The legislative history of New York's newest no-fault statute demonstrates the legislature's recognition of this "evil" and the proposed "remedy." It is apparent that the legislature intended to provide estranged couples a simple and incontestable basis for ending their marriage, and avoid the squabbling over issues that flow from the other objective grounds in DRL § 170. The Senate sponsor's memorandum contains the following:

> They [couples] are forced to invent false justifications to legally dissolve their

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[4] The legislative history confirms that the measure is a remedial statute, it should be interpreted broadly and "should be liberally construed to carry out the reform intended and spread its beneficial effects as widely as possible." A court, in construing a statute, should consider the "mischief sought to be remedied and should favor the construction which will suppress the evil and advance the remedy" *Lincoln First Bank v. Rupert*, 60 AD2d 193 (4th Dep't 1977).

> marriages. False accusations and the necessity to hold one partner at fault often result in conflict within the family. The conflict is harmful to the partners and destructive to the emotional well being of children. Prolonging the divorce process adds additional stress to an already difficult situation.
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> This legislation enables parties to legally end a marriage which is, in reality, already over and cannot be salvaged. Its intent is to lessen the disputes that often aries between the parties and to mitigate the potential harm to them and their children caused by the current process. Because a resolution of all the major issues must be reached before a divorce judgment is granted, this legislation safeguards the parties' rights and economic interests.

Sponsor's' Memorandum to S.3980A, enacted into law as Chapter 384 of the Laws of 2010.

In addition, the chief Senate sponsor, Senator Ruth Hassell-Thompson, noted:

> Under New York State's current law, couples in deteriorating relationships are forced to assign blame or fault in order to validly end their marriages. By implementing a policy of no-fault divorce, this prolonged and often destructive process would be eliminated.

Comments of Senator Ruth Hassell-Thompson, Report of Senate Majority Task Force on Domestic Violence, Hearing May 6, 2010

In the materials prepared by the Senate sponsor (derived from a public hearing held on the need for the proposed no-fault changes), leading scholars on the Domestic Relations Law in New York described the consequences of trials where the issue is grounds for a divorce. As one commentator noted:

> New York's divorce process takes too long and costs too much. The typical middle class contested matrimonial action can take well over a year or more to be resolved and the expenses - for attorneys, accountants, appraisers, and experts in children's issues - are counted in the tens of thousands of dollars, not even considering the income lost due to court appearances and preparation for court and child care expenses. Even apart from costs

> measured in dollars, there are significant tangible costs - divorce litigants endure emotional stresses and are impeded from establishing a new life. A physically or emotionally abused spouse, especially an economically dependant spouse, may be deterred from seeking redress because of the high and difficult to control cost of litigation, and the anxiety of an unpredictable result. Children are negatively impacted with uncertainty as to their living and support arrangements... [n]o small part of this is attributable to New York's antiquated fault-based divorce system.

Testimony of Hon. Alan B. Schneickman, Report of Senate Majority Task Force on Domestic Violence, Hearing May 6, 2010.

The legislative history highlights the legislature's intent in enacting DRL § 170(7). Equally compelling is what *wasn't* said during the entire deliberations on Chapter 384 of the Laws of 2010. Based on the best legislative research available to this court, no member of the legislature (or the Governor) ever said anything indicating that "a sworn statement by one party that the marriage was irretrievably broken for a period in excess of six months" is subject to the jury trial right under DRL § 173. In this court's view, the deafening legislative silence is evidence of the overwhelming legislative design: that the new no-fault statute is a "no trial on fault" edict. Under the charge to this court to determine the "legislative intent," silence must be accounted for.

There is little question that New York courts have, on repeated occasions, expressed their frustration with trials involving fault grounds. In *Molinari v. Molinari*, 15 Misc3d 120A (Sup. Ct. Nassau Cty. 2007), the court, after noting that New York was the only state that requires the finding of fault or living apart pursuant to a separation agreement as the basis for a divorce, added:

> A cursory determination of the grounds issue here would only deflect a recurring dilemma to the public at large. In an all-too-frequent occurrence,

> matrimonial courts are faced with innumerable instances where efficacious resolution of economic issues and custody determinations are backseated and delayed by fault [grounds] trials. The party without resources to afford such litigation, or, the party who chooses not to aggressively allege the faults of his/her spouse, is often at a tactical disadvantage - simply because an opposing party seeks to impose financial leverage or exacting personal animus, due to the current statutory scheme to establish grounds for divorce in New York State.

Id. at 3. To address this seeming statutory dilemma, the New York State Matrimonial Commission, chaired by Hon. Sondra Miller, in a report to the Chief Judge, made the following observation:

> Substantial evidence, derived from the public hearings held by the Commission and the professional experience of the Commission members, leads us to conclude that fault allegations and *fault trials* add significantly to the cost, delay, and trauma of matrimonial litigation and are, in many cases, used by litigants to achieve a tactical advantage.

Miller Commission Report to the Chief Judge of the State of New York, April 2006, p. 18 (emphasis added). *See also* *Andrew T. v. Yana T*, 26 Misc3d 1039 (New York Cty. 2009), *rev'd on other grounds* 74 AD3d 687 (1st Dep't 2010); *Davis v. Davis*, 71 AD3d 13 (2nd Dep't 2009) (denying divorce for "social abandonment," but voicing the frustration of the New York matrimonial bar that New York is the only state requiring a finding of fault for divorce); *X.J. v. F.J.*, 234 NYLJ 78 (Queens Cty. 2005) (denying constructive abandonment as a ground for divorce but questioning "whether or not fault remains relevant in the context of divorce litigation" and reiterating a call for legislative action).

It seems apparent that the legislature was reacting to the call of the judiciary regarding their frustration with fault finding in matrimonial cases. As the court in *Andre T.*

v. Yana T. notes:

> This is yet another case that shows how New York's inexcusable failure to allow no-fault divorce is destructive both to individual litigants and to our legal system as a whole. Much has been written before about the toll that is taken on the parties, the parties' children and on the court itself in contested divorce proceedings where "grounds contests" can rage on for months or even years. But even in the context of uncontested divorce proceedings - where both spouses want to end their marriage on agreed upon terms - the lack of a true no-fault basis for granting a divorce poses significant problems. Not only does it often force the person obtaining the divorce to swear to things that everybody knows are untrue, but it forces judges and special referees who preside over these cases to in effect turn a blind eye - or at least a myopic one - to what is technically perjury.

Andrew T. v. Yana T., 26 Misc3d 1039 (New York Cty. 2009). Trial judges recognize that the problem posed by New York's divorce laws are the required trials/hearings on the issue of fault. The "evil" was the need for a trial, with all of its concomitant requirements that the parties describe their intensely personal lives in public, before their families, and the courts.

In this court's view, there is little doubt that the legislative intent in enacting DRL § 170(7) was to eliminate trials on fault. The statute states that when one party has stated under oath that their marriage has been irretrievably broken for a period of six months, the mere statement under oath is sufficient to provide the basis for a divorce if the parties conclude an agreement on all other issues.[5]

In view of this intent, this court declines to follow the logic or holding of *Strack*. DRL § 173 states that there is a right to trial by jury "of the grounds for granting the divorce." *See Mandel v. Mandel,* 109 Misc2d 1 (Sup. Ct. Queens Cty. 1981). Under DRL § 170(7),

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[5] Even the court in *Strack v. Strack* acknowledged that the legislative history strongly suggested that the allegation of "irretrievable breakdown" would not be subjected to "the rigors of any defense, any motions, the requirement of testimony and certainly not the scrutiny of any fact finder." *Strack* at 262. Yet, they declined to follow that intention.

the grounds cannot be disputed. Either a party swears the marriage is irretrievably broken or they do not. The grounds are established by the oath; there is no legislative requirement of a judicial finding on the reliability or veracity of the oath. While the right to trial set forth in DRL § 173 could be read to require a trial solely on the question of whether the party has properly sworn to the irretrievable breakdown of their marriage, it leads to a counterproductive, if not absurd, result: a jury trial on the question of whether the party has properly sworn to the irretrievable breakdown, a fact which is readily apparent to the court upon a review of the face of the pleadings. This court declines to interpret these two statutes in such a fashion when to do so creates the exact problem that DRL § 170(7) was designed to avoid.

The *Strack* court, obviously looking ahead to the proof problems that such a trial might encompass, acknowledges the substantial uncertainty that its ruling creates. The court states that "whether a marriage is irretrievable need not necessarily be viewed by both parties." *Strack* at 263. The court asserts that the marriage may still be broken down, "even though one of the parties continues to believe that the breakdown is not irretrievable and/or that there is still some possibility of reconciliation." *Id*. The recitation of the purpose of the hearing underscores the uncertainty. The reference "viewed by both parties" clearly suggests that both parties can, at the required trial, testify on their subjective "views" of whether the marriage is so broken as to be irretrievable. This raises a myriad of questions. How far "broken" does the marriage have to be to be irretrievable? What proof is necessary? Is the court empowered to decide that a marriage can be repaired even if one party states, under oath, that it is their "view" that the marriage can not be repaired? Does the court, in deciding whether a marriage is irretrievable, decide the sincerity – or veracity

– of a spouse who states, under oath, that he or she no longer wants to be married? Is any court prepared to state: "the court finds that even though one party says that they want to be divorced, I find that the marriage is not broken?" How will the court determine whether a spouse's belief that marriage is broken is justified? What facts are necessary to establish that a spouse has a good faith belief that the marriage is broken? Is reconciliation a factor? What proof is required to show some possibility of reconciliation? How significant does the "possibility of reconciliation" have to be for the court to conclude that it is significant enough to decline to grant the divorce? Is the court required to find that one spouse is telling the truth about the "possibility of reconciliation" while making the corollary decision that the other is not being truthful when he or she says that reconciliation is not possible?

If this litany of evidentiary complications is allowed to arise, one conclusion is readily apparent: the evil that this legislation was designed to eliminate - public trials on fault - will continue into future divorce cases. By merely permitting one party in a divorce to inquire about a spouse's "belief" about their marriage or their "views" of "the possibility of reconciliation," the New York courts will be plunged into an endless evaluation of people's beliefs and inner most perceptions of their marriages because, as the court in *Strack* even admitted, there are no objective specific standards for evaluating the "possibility of reconciliation." If the *Strack* decision governs future divorce litigation, the courts will be invading, in an incalculable manner, the inner privacy of married couples. These issues surely were not within the scope of the legislature's intentions when the professed target of this new law was to reduce inner family turmoil, and the gut-wrenching pain of trials

under the fault provisions of DRL § 170. The legislature never intended to have these personal issues probed by judges or juries and this court declines to read the trial right under DRL § 173 to negate the legislature's design. Having observed a contortion of litigants testify, and often exaggerate the facts underlying the grievances against their spouses, this court will not unleash a new waive of inquiry by opposing litigants, their attorneys, and judges, against the privacy of couples seeking to end their marriage without acrimony and discord. This court will not read the new law in such a fashion to let a jury decide whether a spouse is being truthful when asked about reconciling a marriage that they have already sworn under oath is irretrievably broken.

The court concurs with *A.C. v. D.R.*, 32 Misc3d 293 (Sup. Cty. Nassau Cty. 2011), which notes that the legislature's power to resolve divorce questions may not be challenged - the legislature can permit dissolution of a marriage even on the "self-serving declaration about a spouse's state of mind that the marriage is irretrievably broken." *Id*. at 306. The court concludes that the legislature recognizes that "parties to a marriage should be able to make personal and unavoidably subjective decisions about the continuation of their marriage partnership." *Id*. As the court properly held, there is "no defense to the no-fault grounds." *Id*. *A.C. v. D.R.* did not encounter the argument that DRL § 173 grafts a trial right and the need for a fact finding hearing on the subjective standard in DRL § 170(7), but it highlights the public policy objectives that would be thwarted by subjecting couples to trials on their inner most beliefs and views. Seen in this fashion, DRL § 170(7) envisions that courts are bound by the subjective views of married couples on their marriage.

The doctrine articulated in *Strack,* based on the seeming conflict between DRL §§ 170(7) and 173, directs that courts must objectively look at marriages and find facts regarding whether irretrievable differences exist. However, if the jury trial right overwhelms the subjective determination, the courts will re-open a door that the legislature intended to shut. Couples, seeking to end their marriages in a civil matter without a trial, will find themselves entangled in pointless litigation. This result could never have been the legislature's intention, and this court, with its fealty to the legislative process and its declared intentions, declines to derail that plan. The pleadings in this case reinforces that conclusion. The defendant, in his affidavit, invites the court to explore the nature of their continuing marriage. The defendant swears that despite the fact that he has not lived with his wife for a decade, "they have established a marriage that works for both of us." The defendant invites this court to decide whether the marriage works for *both of them*, an intensely subjective inquiry that would require the court to define the contours of their marriage. This court is not competent to define "marriages that work for both of us" and leaves that determination to the participants and their sworn declarations, just as the legislature, in enacting DRL § 170(7) intended.

This court has also considered the opinion in *Schiffer v. Schiffer*, 2011 WL 4790060 (Sup. Ct. Duchess Cty. 2011), which follows the logic of *Strack*, holding that the no-fault assertion under DRL § 170(7) is subject to the trial requirement. This court finds little in *Schiffer* that differs from the analysis in *Strack* and declines to follow it. The *Schiffer* court suggests that what is required, as a matter of fact finding under DRL § 170(7), is that the relationship be irretrievably broken *and* a statement under oath by

the party seeking the divorce. However, there is no "and" connecting the sworn statement provision and the "irretrievable breakdown for six months" assertion. The legislature used another connector: "provided." The use of this word –"provided" – rather than "and" means that the "irretrievable breakdown for six months" must be accepted as true "provided" one party swears that it is true. The word "provided," is defined as: "on condition that" or "with the understanding" or "if."[6] Therefore, the "irretrievable breakdown for six months" exists "provided" (read "if") one party swears to it. This court will not change the language of the statute or read it inconsistent with its express provisions, especially when the strict reading advanced by this court achieves the goal that the legislature wanted to avoid: courts prying into the private lives of married couples through trials over the lesser fault of "irretrievable breakdown."

The court in *Schiffer* also raises a "due process" argument, claiming that the courts should not deprive a spouse of the right to trial on irretrievable breakdown and that to hold otherwise reduces the court to a "rubber stamp" when presented with a claim under DRL § 170(7). This suggestion ignores the Court of Appeals directive in *Gleason*:

> [R]ights growing out of the [marriage] relationship may be modified or abolished by the Legislature without violating the provisions of the Federal or State Constitution which forbid the taking of life, liberty or property without due process of law.

Gleason v. Gleason, 26 NY2d 28 (1970); *see also* *A.C. v. D.R.*, 32 Misc3d 293, 306 (Sup. Cty. Nassau Cty. 2011) (reasserting compelling conclusion of *Gleason* that there

[6] Merriam Webster OnLine Dictionary, 2011.

is no due process right to any defense in matters involving the dissolution of marriages).[7] For these reasons, this court declines to follow *Schiffer*.

The wisdom of the state legislature's determination to permit divorce on the subjective sworn testimony of one of the marriages partners is demonstrated by an examination of our sister states who have experimented with no-fault based on objective facts adduced at a hearing. These decisions indicate that while other state legislatures have attempted to permit couples to leave their personal lives behind when seeking a divorce, the need for an objective standard – presented during hearings and trials – ushers the courts into the inner most privacy of couples, whose lives are many times already marred by conflict and turmoil. In Massachusetts, for example, the legislature permits divorce upon "irretrievable breakdown of the marriage," but added two restrictions, neither of which are found in New York's statute. First, unlike New York, the "irretrievable breakdown" must exist for six months from the filing of the complaint seeking divorce. (This "six month" objective period is dated from the complaint. In New York, the six months can precede the filing of the complaint and one party can attest to the existence of the six month period.) Second, the Massachusetts statute requires that a court hold a hearing to determine if there has been a continuous

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[7] In *A.C. v. D.R.*, the court added:

> Suggestions that the party wishing to stay married has a constitutional right that is being infringed upon in violation of due process is unavailing. Staying married, against the wishes of the other adult who states under oath that the marriage is irretrievably broken, is not a vested right.

Id. at 306.

"irretrievable breakdown" of the marriage for the six months since the date of the filing of the complaint. Massachusetts courts have grappled with the amount of proof necessary to establish an "irretrievable breakdown" and have sought to avoid probing into the private of couples whose marriages have, at least in one partner's eyes, failed. In *Caffyn v. Caffyn*, 806 NE2d 415 (Ma. 2004), the state's highest court, held that its no-fault statute did not "contain a requirement that a spouse plead or enumerate any objective factors that would lead a court to the conclusion that a marriage is irretrievably broken." *Id*. at 421. The court added that:

> [T]he legislature implicitly recognized that the parties to a marriage should be able to make personal and unavoidably subjective decisions about marriage and divorce free from the overwhelming state control.

Id. at 422. Thus, in Massachusetts, even though the state legislature required a hearing on the existence of irretrievable breakdown, the courts have acknowledged that "subjective declarations" of the breakdown are sufficient to establish grounds and those subjective marital decisions need not be "objectively documented, tested and proven." *Id*. The court in *Caffyn* cited a California court's determination that "the prima facie case for dissolution should be satisfied by the declaration of petitioner that he or she sincerely believes that the marriage is irreparably broken down." *Id*.[8]

[8] The Massachusetts court referred to an analysis of the California no-fault divorce statute which like DRL § 170(7) does not explicitly state whether a petitioner's testimony about his or her subjective perception of the marital state is sufficient evidence to establish an irretrievable breakdown. The analysis concluded that "demonstrative evidence is not required to corroborate state-of-mind testimony and the prima facie case for dissolution should be satisfied by the declaration of petitioner that he or she sincerely believes that the marriage has irreparably broken down." *Caffyn v. Caffyn*, 806 NE2d 415, 422, n.16

The Massachusetts example is echoed in other states. Even though states claim to be "no-fault" jurisdictions, the legislatures have, in almost all cases, like Massachusetts, added requirements that the courts make findings that irreconcilable differences exist or an irretrievable breakdown has occurred before a divorce can be granted. Under these mandatory trial statutes, the state courts are caught in an convoluted conundrum – they must find either a subjective or objective basis that these predicates occur, but with little statutory definition or guidance, they tend to shy away from invading intimate marriage issues. California's legislature requires a finding of "irreconcilable differences" but the courts have acknowledged that a "subjective" judgment by either partner can be sufficient to support the finding. *See, In re Marriage of Walton,* 28 Cal.App.3d 108, 117 (1972), *quoting In re Marriage of McKim*, 6 Cal.3d 673 (1971) (in deciding whether evidence supports findings "that irreconcilable differences do exist and that the marriage has broken down irremediably and should be dissolved," the court must necessarily "depend to a considerable extent upon the subjective state of mind of the parties").[9] Connecticut also requires a "finding" by the court that the marriage has

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(Ma. 2004), *quoting* Comment, The End of Innocence: Elimination of Fault in California Divorce Law, 17 UCLA L. Rev. 1306, 1319, 1322-23 (1970).

[9] In *Walton*, the California court notes that to determine irretrievable differences a court may consider evidence of misconduct by either party:

> Where necessary to its determination, the court is given discretion to receive evidence of specific acts of misconduct, but in exercising this discretion, the court should bear in mind that one of the principal purposes for the change from dissolution on a fault basis to a marital breakdown basis was the desire to eliminate acrimony and devisiveness and to provide "a conciliatory and uncharged atmosphere which will facilitate resolution of the other issues and perhaps effect a reconciliation."

"broken down irretrievably" but the legislature never defined "irretrievably" and the courts have considered subjective evidence from a single party effective. As one Connecticut court noted, there need not be objective guidelines for determining that a marriage is irretrievably broken:

> We decline . . . to circumscribe this delicate process of fact-finding by imposing the constraint of guidelines on an inquiry that is necessarily individualized and particularized . . .

Joy v. Joy, 423 A.2d 895 (App. Ct. Conn. 1979), *quoted in Eversman v. Eversman*, 496 A2d 210, 212 (App. Ct. Conn. 1985).[10] *See also Mattson v. Mattson*, 376 A2d 473, 475 (Me. 1977) (The term "irreconcilable marital differences" is one that necessarily lacks precision and should not be circumscribed by a strict definition); Matter of the Marriage

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Walton at 478, n.2. This inquiry, permitted in California, drags the court into the innermost privacy of the couple's married life – an investigation, which to this Court's mind – is inconsistent with the entire notion of "no-fault divorce." *See also Bernie v. Bernie*, 207 Cal. App. Unpub. LEXIS 7035 (Ct. App. Cal. 2007) (testimony of gambling addiction, attempt by daughters of another marriage to sabotage the marriage, all factors in finding irreconcilable differences).

[10] In *Eversman v. Eversman*, the Connecticut court described the testimony used to justify a determination of irretrievably broken as follows:

> [T]he plaintiff testified to numerous extramarital affairs and to his belief that the marriage had been deteriorating for approximately fifteen years. He further testified that, at the time of trial, he was living with another woman whom he wished to marry. Finally, the evidence disclosed that while some attempts were made at joint and individual counseling in 1981, those efforts proved unsuccessful.

Eversman at 212. Based on this court's experience, this proof - with its discussion of affairs and the "belief" that the marriage had been deteriorating - is strikingly similar to the testimony in New York's fault grounds trials.

of Dunn, 511 P2d 427 (1973) (irreconcilable within Oregon law need not necessarily be so viewed by both parties, it may, under certain circumstances, be unilaterally viewed as well).

In this court's view, New York's statute, permits the divorce solely on the basis of the sworn statement without the need for a "finding," extending no-fault beyond that permitted in other states, even though these states have invoked the "irretrievable breakdown" standard. In most cases, these other states require the courts to find, as an objective fact, that the marriage is "irretrievably broken down." Pennsylvania, for example, permits a divorce upon the grounds of "irretrievably broken," but the legislature permits the opposing party to obtain a hearing if they deny that allegation and allege that counseling may repair the marriage. *Wetzel v. Heiney*, 17 A3d 405 (Superior Ct. Pa. 2011), *citing* 23 Pa. C.S. § 3301(d); *see also* 23 Pa. Con. Stat. § 3103 (2011) (definition of irretrievable breakdown as "estrangement due to marital difficulties with no reasonable prospect of reconciliation"). Other state legislatures have imposed, by express statutory language, this same requirement that the court find, as a matter of law and fact, that a marriage is irretrievably broken before a judgment of divorce can be granted. *Szramkowski v. Szramkowski,* 2010 Mo. App. LEXIS 784 (Ct. App. Mo. 2010) (Missouri statute requires court to find that a marriage is irretrievably broken before divorce is granted), *citing* Mo. Rev. Stat. § 452.305.1(2); *Bodine v. Bodine*, 2010 Ariz. App. Unpub. LEXIS 896 (Ct. App. Ar. 2010) (divorce for irretrievable breakdown goes

forward if one party swears to it under oath and the other does not deny, but, if denied, then a hearing and specific finding required, *citing* A.R.S. § 25-316.A); *Robins v. Robins*, 2010 Wash. App. LEXIS 2567 (Ct. App. Wa. 2010) (if the parties agree that marriage is irretrievably broken, then divorce goes forward, but if no agreement, then court must find irretrievable breakdown to grant divorce, *citing* RCW 26.09.30(3)(a)©; *Wagner v. Wagner*, 749 NW2d 137 (Neb. 2008) (Nebraska statute requires the court, after a hearing, to make a finding that the marriage is irretrievably broken), *citing* Neb. Rev. Stat. § 42-361(1); *see also Butler v. Butler*, 642 NW2d 646 (Ct. App. Wisc. 2002) (court required to find irretrievable breakdown and "no prospect for reconciliation" to justify divorce under Wisc. Stat. § 767.12[2][b]); *Cowsert v. Cowsert, 259 NW2d 393* (Mich. App. Ct. 1977) because the legislature called for evidence to be tried in open court, no-fault divorce in Michigan is not automatic and requires a hearing).

Further evidence of the wisdom of New York's legislative purpose is found in Georgia, where its legislature simply permitted divorce upon "irretrievable differences." The legislature did not define that term. The state's highest court then judicially defined "irretrievably broken" as a marriage "where either or both parties are unable or refuse to cohabit and there are no prospects for a reconciliation." *McCoy v. McCoy*, 642 SE2d 18 (Ga. 2007), citing *Harwell v. Harwell*, 209 SE2d 625 (1974) and OGCA § 19-5-3(13). The court in *Harwell* added the "no prospects for reconciliation" verbiage, even though it was not included in the statute. OGCA § 19-5-3(13). Later, in *McCoy* the court moved

away from the decision in *Harwell*. In *McCoy*, the court held that the mere "prospects for reconciliation" are not sufficient to deny a divorce and added that if the legislature wanted to make "irretrievable breakdown" consensual, the legislature would have required that the parties agree the marriage was irretrievable broken. In essence, under current Georgia law (post *McCoy*), the allegation of "irretrievable breakdown" – without both parties admitting that reconciliation is unlikely – is sufficient for granting a divorce. The Georgia history of interpreting its "irretrievable breakdown" statute illustrates the wisdom of the New York legislature and a cautions New York courts considering a requirement that the subjective declaration of irretrievable breakdown should be subject to the trial requirements of DRL § 173. Any judicial finding of irretrievable breakdown requires judicial inquiry into a myriad of personal and private issues regarding the intimacy of a married couple. These determinations are inherently subjective and intensely personal. As Georgia's judiciary found, the courts are not equipped to venture into the depths of married life and objectify what is intensely personal.

In each of these examples, a central observation emerges: even though other state legislatures permit divorces on the grounds of "irreconcilable differences" or "irretrievable breakdown," those legislatures included (in the actual text of their legislative amendments) a requirement that the courts either accept proof from both parties or take other steps (like the Maine requirement for mandatory counseling)

before a court finding could be adjudicated.[11] As the histories of these "mandatory finding" jurisdictions indicate, the courts' attempts to make findings on "irreconcilable differences" or "irretrievable breakdown" puts them on the same path engendered by "fault based" grounds. In these cases, the courts must inquire into the deepest depths of a marital relationship, put the parties under oath subject to cross-examination, and review the privacy of their married life. As the opinions from these jurisdictions demonstrate, "no-fault" grounds – if accompanied by a requirement for a trial on the motives or sincerity of one partner – are not, in law or fact, no-fault decisions. The court

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[11] Maine permits divorces upon "irreconcilable marital differences" but requires a court finding to that effect. 19-A.M.R.S § 902 (2011). In *Pelletier v. Pellitier*, 597 A2d 60 (Me. 1991), the grounds asserted for the divorce were irreconcilable marital differences and the court considered the following:

> Mrs. Pelletier testified that their marriage had gone downward, that there was so much anger and hate that I just can't live that way anymore, that she and Mr. Pelletier could not talk to each other, that Mr. Pelletier was always angry and that he dictates to me, that Mr. Pelletier excluded her from his will in favor of a person he hardly knew, that he had attempted to have her committed shortly before she left the marital home, and that she could definitely not continue to live with Mr. Pelletier.

*Id.*at 61. The court concluded:

> That evidence demonstrates more than trivial or minor differences between the Pelletiers and a greater degree of disparity between husband and wife than mere unhappiness, for which a divorce cannot be granted. *Mattson v. Mattson*, 376 A2d 473, 476 (Me. 1977). Because the court could find that cohabitation had become intolerable for Mrs. Pelletier, its granting of the divorce on the grounds of irreconcilable marital differences cannot be disturbed.

Id. If the decision in *Strack v. Strack* controls this issue in New York, these are the types of trials – with their intensely subjective and prying testimony – that will continue in New York, despite our legislature's efforts, to the contrary.

must look for *some* inappropriate conduct by the parties to justify findings of irreconcilable differences or irretrievable breakdown. When required to conduct a hearing on whether irretrievable breakdown has occurred, New York courts will confront the same evidence of marital misconduct or inappropriate behavior that is currently used to justify a fault-based decision. While the quantum of proof to justify irreconcilable differences irretrievable breakdown may be less than that necessary to establish other grounds, the courts will be presented with the same confrontational testimony of a married couple that now characterizes fault trials in New York. The better approach is what the New York legislature recognized in Chapter 394 of the Laws of 2011: the consent of both partners is as necessary *to continue* a marriage just as the same simple declaration "I do" from both partners starts it. If either partner swears that it is over, the state should not require a hearing – or any judicial inquiry – before agreeing with that partner.

In this court's view, our sister states have enacted "some fault" statutes which require judicial inquiry into the lives of married couples to find "some" factual basis that their married life should be dissolved. To find "some fault" the courts in those states, directed by their legislatures, hold trials, which bring with them the "evils" of judicial delving into the private lives of the couple. New York's legislature has enacted in DRL § 170(7) a true "no-fault" divorce law which does not require proof of any fault, and which does not require or permit the government, through its courts, to put people seeking a divorce on trial regarding their marriage. By making the sworn statement the operative – and objective – fact as the grounds for the divorce, New York's legislature allows one

partner to end a marriage and permits that partner to do so without having to justify their decision by alleging intolerable conduct – or misconduct or any conduct – by the other party. If this court holds otherwise, the same evils that the legislature identified and sought to remedy – trials over marital conduct – will haunt New York's supposed "no-fault statute" forever, and directly contravene the intent of the legislature, and the purpose of DRL § 170(7). If the New York legislature intended to have hearings and trials regarding the veracity of a sworn statement indicating that a marriage is irretrievably broken, it would have followed the countless examples of other states and included the hearing requirement in its legislative mandate. It chose not to do so, and this court will not, under the guise of statutory construction, amend or overrule the legislature's efforts. To do so would thwart DRL § 170(7)'s purpose.

Two other arguments deserve attention, although not acceptance. First, the defendant suggests that the even if the subjective declaration of "irretrievable breakdown" is not the subject of a right to a trial, the second portion of the declaration - whether the breakdown has persisted for six months - is an objective standard subject to the trial requirement. The language of the statute rebuts this suggestion. The statue makes the six month period part of the subjective declaration. If a married partner swears that the breakdown has persisted for six months, then there is no suggestion in the statute that the court should delve into the declarant's state of mind during the six month period. If the court accepted this suggested interpretation, then the courts would again be required to ask probing questions regarding the couple's marriage. Has the breakdown persisted for perhaps only four months? Is the marriage more broken down

now than it was six months ago, is it less? If “less broken down,” may the court still grant the divorce? What happens if the court concludes that the marriage has only been broken down for three months, but by the time the motion to dismiss the cause of action is heard by the court, the six month period has now been reached? Can the declarant reaffirm the breakdown at that point, rescuing the cause of action?

This court can not conceive that the legislature intended this back-door maneuver around the no trial requirement in its no-fault statute. There is no evidence that the legislature intended to avoid trials on the “irretrievable breakdown,” but continue trials on whether that condition existed for more than six months. A trial on either basis opens the door the that legislature wanted closed and locked: the need for a trial probing into the innermost life of married couples. This court declines to countenance such an investigation in the absence of express legislative direction.

The second argument is equally unavailing. The defendant claims that the no-fault language renders the remaining grounds in DRL § 170 irrelevant. The defendant argues that the legislature did not intend to repeal all the remaining fault grounds or, swallow up those grounds in the broad sweep of the self-declaration no fault provision of subdivision 7.

This court acknowledges that the "divorce by declaration" provision of subdivision 7 may have the practical effect of virtually eliminating the need for the remaining "fault based" grounds, but the simple answer here is the most persuasive. In deciding the grounds for divorce and predicates for a court to grant a divorce, the legislature can do what it wishes, especially in the area of marriage and divorce. The legislature can

proceed at its own speed and this court will not erect any limits or police its actions under the guise of interpretation:

> This type of determination is a central legislative function and lawmakers are afforded leeway in fulfilling this function, especially with respect to economic and social legislation where issues are often addressed incrementally.

Hernandez v. Robles, 7 NY3d 338, 378 (2006). There is no requirement that the legislature repeal other fault grounds when implementing a new no-fault ground. The legislature, vested with the power to decide the basis for divorce, can add a new ground and repeal others or, as it did here, add a new ground and leave the fault-based grounds in place, permitting people to decide which ground or cause of action best suits them. This court, having determined the legislative intention, will not further inquire about its motivation or method.

New York's legislature, faced with a choice between "some fault" and no-fault as the grounds for granting a divorce, chose no-fault and forever eliminated the prospects that a partner to a marriage would be required to point a finger at the other during a trial and say "you are at fault for our marriage's demise."

For these reasons, the defendant's motion to dismiss the complaint, because it fails to state a cause of action, is denied. The complaint states a cause of action. Because the cause of action (a sworn statement by one partner that the marriage has been irretrievably broken for a period in excess of six months) is set forth on the face of the amended pleadings, and hence complies with the language of the statute, it is not subject to the trial right under DRL § 173. The court also denies the motion to dismiss

for violation of the statute of limitations. There is no statute of limitations under DRL §170(7) because the cause of action only arises at the time the party swears that the marriage has been irretrievably broken for a period in excess of six months. A cause does not accrue until there is "a legal right" to be enforced. *Hahn Automotive v. Amer. Zurish Ins. Co.*, 81 AD3d 1331 (4th Dep't 2011). The cause of action for divorce on the basis of irretrievable breakdown accrues at the time of the attestation by one partner and not sooner. The statute of limitations has no pertinence to a cause of action that arises at the time of the filing of the complaint.

Finally, the court denies the defendant's motion to dismiss based on *res judicata*. The doctrine of *res judicata* serves to preclude a party from re-litigating issues of fact and law decided in a prior proceeding. *Matter of Hunter*, 4 NY3d 260 (2005); *Gramatan Home Investors Corp. v. Lopez*, 46 NY2d 481 (1979); *Luscher v. Arrua*, 21 AD3d 1005 (2nd Dept. 2005); *Koether v. Generalow*, 213 AD2d 379 (2nd Dept. 1995); *New York Site Development Corporation v. New York State Department of Environmental Conservation*, 217 AD2d 699, 630 (2nd Dept. 1995). It also precludes litigation of claims for different relief which arise from the same facts or transaction, which should or could have been resolved in the prior proceeding even if they weren't. *Id*. According to the motion papers before the court, *res judicata* is invoked here because the plaintiff, a decade ago, served a complaint alleging a divorce on the grounds of cruel and inhuman treatment under DRL § 170(1). The case was taken to a jury which ruled no cause for action. *Res judicata* does not preclude the claim under DRL § 170(7) because it is

based on a different theory and cause of action. The jury finding that no cause of action for cruel and inhuman treatment existed a decade ago only applies to the facts before the jury at that time. It does not preclude this claim for a divorce on the grounds that one party has sworn that the marriage has been irretrievably broken for a period of excess six months.

In this case, the court of Appeals has the final word. The simple fact is that the larger public interest demonstrated by the present legislation requires that there be a legal termination of dead marriages. *Gleason v. Gleason*, 26 NY2d 28 (1970). This court finds that the legislature transformed the Court of Appeals's logic in *Gleason* into the public policy and law of this state in enacting DRL § 170(7).

This opinion constitutes the decision of the court and the parties will submit an order on consent and attach this decision to it.

Dated: October 20, 2011

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Richard A. Dollinger