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WRITTEN TESTIMONY PRESENTED BY
THE NEW YORK COUNTY LAWYERS' ASSOCIATION
MATRIMONIAL LAW SECTION
AT THE PUBLIC HEARING ON NO-FAULT DIVORCE AND MATRIMONIAL REFORM CONVENED BY THE NEW YORK STATE SENATE
May 6, 2010

On behalf of the Matrimonial Law Section of the New York County Lawyers' Association, I want to thank you for opportunity to testify today. I am Jane Bevans, the Legislative Representative of the Matrimonial Law Section of the New York County Lawyers' Association ("NYCLA"). NYCLA is a 10,000 member bar association that, for more than 100 years, has, as part of its fundamental mission, a commitment to access to justice for all New Yorkers without regard to their resources. With me today is Susan Kunstler, former co-chair of the Section and a member of NYCLA's Board of Directors.

As matrimonial practitioners, we represent clients who are going through one of the most difficult and painful life situations imaginable, the dismantling of their families and, often, of their expectations, in a divorce action. We welcome the opportunity to testify on behalf of NYCLA's Matrimonial Law Section. We are grateful to the Senate Standing Committee on Judiciary, to the Senate Standing Committee on Crime Victims, Crime & Correction, to the New York State Senate Majority Task Force on Domestic Violence, and to the Committees' respective chairs, Senator John L. Sampson and Senator Ruth Hassell-Thompson, for their work toward improving matrimonial laws to benefit litigants and their children going through the painful process of divorce. In particular, we applaud all efforts to speed the passage of no fault

as a ground for divorce in New York. The enactment of no fault divorce should not be tied to enactment of any other changes in matrimonial laws, however well intentioned. Rather, it is time for New York to join all other states in the country and allow spouses to obtain a divorce without the recriminations and sometimes lasting damage to families that a "fault" divorce engenders.

No Fault Divorce

The New York County Lawyers' Association supports the enactment of no fault divorce in New York. NYCLA's Executive Committee urged the New York State Legislature to enact such legislation on August 28, 2007, stating: "New York is the only state in the nation that has not enacted a no fault divorce law. 'Fault' trials are expensive and emotionally wrenching for the litigants. They consume scarce judicial resources and compel judges and juries to resolve the often unanswerable and wholly irrelevant question of why a marriage has broken down." Additionally, because grounds trials are often heard by a jury, the litigant wanting a divorce is compelled to open the most intimate details of his or her marriage before a jury of complete strangers.

The Matrimonial Law Section of NYCLA (the "Section") has consistently supported enactment of no fault divorce over the years. The Section's testimony, presented at a hearing of the Matrimonial Commission (the "Miller Commission"), which was held at NYCLA's Home of Law on May 9, 2005, recommended adoption of then pending proposed amendments to Domestic Relations Law ("DRL") Section 170 to add no fault as a ground for divorce in New York. NYCLA itself approved the testimony presented by the Section.

The Section reiterated its support for no fault divorce in a Report issued in May 2007 in which it commented on legislation pending at that time, Assembly Bill 6418 and Senate Bill

2447. Although the Section disapproved the particular bill, it did so not because its support for no fault divorce had wavered in any way but solely because the bill tied enactment of no fault divorce to changes in other areas of matrimonial law. The Section pointed out that the bills were not true no fault statutes because all that was really being changed was reducing the waiting period to obtain a divorce for parties who execute a separation agreement – already a ground for divorce under DRL 170 after the passage of one year – from one year to three months. There were other significant problems with the legislation that presented even greater obstacles to divorce than does the present statute, and the Section recommended disapproval of the bills for that reason as well.

New York is the only state in the nation that has not enacted a no fault divorce law. A judgment of divorce can be granted on "fault" grounds (adultery, cruelty, abandonment, imprisonment, mental illness) or, after the parties live separate and apart pursuant to a written separation agreement for one or more years, either party may sue the other for divorce on a cause of action seeking to "convert" the agreement into a judgment of divorce. While this latter ground might seem to be a kind of no fault divorce, it is not for two primary reasons. First, proof of the cause of action is dependent upon the parties entering into a separation agreement. This prerequisite gives the party opposing the divorce leverage to extract terms to his or her advantage in exchange for ending a dead marriage. Second, even if the parties enter into the agreement, they must wait an entire year before they can "convert" the agreement into a judgment of divorce. In stark contrast, every other state in the union permits married couples to divorce on "no fault" grounds, e.g., irreconcilable differences or incompatibility, without first resolving all of their financial and custodial disputes and without a waiting period.

Moreover, "fault" trials are expensive and emotionally wrenching for the litigants. They

are required to disclose intimate information, often before a jury, that is irrelevant to the resolution of the financial and custodial issues, more important concerns and issues when a marriage has ended. Fault trials consume scarce judicial resources and compel judges and juries to resolve the often unanswerable and wholly irrelevant question of why a marriage has broken down.

As a result of the inability to obtain a divorce on no fault grounds, many New Yorkers go to other states to get divorced, such as our neighboring states of New Jersey, Connecticut and Vermont. Our citizens are forced to flee New York because these other states offer no fault divorce. New York's antiquated law punishes non-monied spouses and parents who live with their children. Individuals with the financial means to move to other states to avoid New York's restrictions can do so; those without financial means cannot. Parents who live with their school-age children – most often women – cannot as a practical matter move to another state without judicial permission and, in any event, they are often reluctant to move because of the disruption it would cause for the children. Legal restrictions also generally prevent a parent from relocating children to another state. Those parents who wish to do so must, in most cases, engage in extremely costly and difficult-to-succeed litigation. Relocation cases, too, consume vast judicial and litigant resources, to say nothing of the emotional effects on the children subjected to the disputes.

The temptation by a client to offer false testimony to obtain a divorce on a "fault" ground thrusts the attorney and the client into an untenable situation fraught with all of the risks and the problems associated with an attorney facing the possibility of dealing with false testimony. This is not conducive to constructive attorney-client relationships and, indeed, is reminiscent of the circumstances that obtained in the divorce field when adultery was the only ground upon which a

divorce could be obtained in New York. Equally unfortunate are the instances when testimony is provided to the court that engenders a level of skepticism about its truthfulness.

Perhaps the most profound effect of requiring fault grounds for divorce can be found in the area of domestic violence. While some believe that requiring fault to be proven before a divorce may be granted protects victims of domestic violence, the opposite is true. "Bargaining in the Shadow of the Law: Divorce Laws and Family Distress" (Stevenson and Wolfers [2003]) indicates that no fault divorce statutes have a significant effect on issues that should not be ignored, such as reducing female suicides and reducing domestic violence and a decline in the number of women murdered by their partners. The study indicates that female suicide rates declined approximately 20 percent in states that have adopted no fault divorce statutes, while domestic violence reports of husbands against wives were reduced by more than one third. Domestic violence reports of wives against husbands were also reduced significantly when a state enacted no fault divorce.

Treatment of Marital Assets; Post-Marital Income Guidelines

We do not take a position at this time on the overhaul of matrimonial laws that could encompass the manner in which marital assets are treated and distributed and whether or not enactment of post-marital income guidelines (for maintenance, not child support, as the latter is already dealt with in the Child Support Standards Act) is appropriate. We note, however, that there appears to have been a judicial trend over the last five or more years to reduce the percentage of marital assets held in the name of the titled spouse, often the monied spouse, which are awarded to the non-titled spouse, who is often the non-monied spouse. We question whether this increasing reduction of awards to the non-titled and non-monied spouse is the judicial response to the seminal case of O'Brien v. O'Brien, in which the New York Court of

Appeals established the principle that **intangible** assets, such as licenses and degrees – there a medical license – were marital property subject to distribution upon divorce. We note further that New York is the only state in the country that recognizes such intangible assets as marital property.

We do believe that examination of these important and complex issues is necessary and appropriate and welcome the opportunity to participate in further study of such issues.

Counsel Fee Awards; Interim Counsel Fees

The New York County Lawyers' Association has long been in the forefront of making certain that the indigent and less monied portion of the population receives essential legal services and that attorneys representing them are paid for their work. While we take no position at this time on whether legislative change is the appropriate vehicle to guarantee that counsel fee awards, including interim counsel fee awards, are sufficient to enable non-monied spouses to be adequately represented in divorce actions, we raise the question as to whether the real, as well as the perceived, problems in awards of counsel fees are the result of insufficient legislation or judicial reluctance to award fees.

This, too, is an area that warrants further study and we welcome the opportunity to participate in such study. We do not believe that examining counsel fee awards and interim counsel fee awards in a vacuum addresses the entire problem of the expense of obtaining a divorce in New York. The Section addressed the larger problem in its testimony before the Matrimonial Commission in 2005. Our remarks and testimony at that time are reprinted below.

Counsel fee awards *pendente lite* are usually advanced as the means of securing equal and adequate representation for both parties. Where there is truly a monied and non-monied spouse, the *pendente lite* counsel fee award can, and should, be used to resolve economic

inequality and level the litigation playing field. In that situation, it is not sufficient to look at the retainer paid by the monied spouse and award that amount as the total *pendente lite* award. Conversely, often there is no monied spouse, only two non-monied parties without enough funds to go around. As court fees and other expenses related to litigation mount, and litigation becomes ever more costly, a two-tier system of justice must be avoided, and new ways found to provide legal services to litigants of moderate means, those with too much income to qualify for Legal Aid or Legal Services, but not enough income to retain private counsel. Counsel fee awards, *pendente lite* and otherwise, are an easy answer, but not an answer that deals with the problem for the many families in this economic category.

Domestic Violence

We do not take a position at this time on whether and what additional systems should be implemented to protect or better protect victims of domestic violence who seek divorces from abusive spouses. As set forth earlier in this testimony, the enactment of no fault divorce has been shown to significantly reduce domestic violence committed by both men and women and suicides by women. Accordingly, we reiterate our strong and unwavering support of the enactment of no fault divorce in New York. In this area, too, we welcome the opportunity to participate in further study of what other measures may be appropriate to protect victims of domestic violence and to further reduce the incidence of domestic violence.

Conclusion

We urge the keeping of statistics for any pilot, trial or experimental program and reforms implemented as a result of these hearings and the Committees' ongoing work. Without such data, we may have the same discussions and arguments years from now without being able to review the efficacy of well-intentioned and quite possibly highly successful programs. We stressed this in our testimony before the Matrimonial Commission in 2005 and reiterate its importance today. Thank you for the opportunity to participate in these hearings and in the critically important area of divorce reform.

Respectfully Submitted,

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Co-Chairs
Matrimonial Law Section