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LAW AND THE FAMILY

**"Hessen Revisited - The Cruelty Ground For Divorce"**

Joel R. Brandes

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IN *Murphy v. Murphy*, [FN1] decided earlier this year, the parties were married in 1950 and separated in April 1995. In March 1997, plaintiff commenced an action for a divorce upon the grounds of cruel and inhuman treatment. Plaintiff and defendant were the only witnesses who testified at trial. Plaintiff offered evidence of two altercations between the parties, neither of which resulted in physical injury, arrest, an order of protection or other court action, and a claim of a course of conduct involving excessive drinking, name-calling, accusations and recriminations.

Plaintiff testified that defendant's conduct "made [her] feel awful" and that she felt "down all the time" and nervous and that she suffered from high blood pressure and arthritis. The trial court dismissed at the close of the evidence, and the Appellate Division affirmed. It found that plaintiff presented no competent evidence to support a finding that defendant's conduct caused her ailments or created any actual threat to her health or safety. It stated:

Nor was there evidence that plaintiff's nervousness and dismay were so

substantial as to threaten her mental well-being. Particularly in view of the length of the parties' marriage, we conclude that the trial evidence fell far short of establishing a course of conduct by defendant that was harmful to plaintiff's physical or mental health, making cohabitation unsafe or improper.

Domestic Relations Law 170(1), provides that an action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of "the cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant."

#### Hardship Factor

The construction of this statute has been the subject of considerable litigation since its enactment in 1966. In *Hessen v. Hessen*, [FN2] a 1974 decision, the Court of Appeals rejected a restrictive interpretation of the cruel and inhuman treatment ground and accepted the policy behind the "double standard" to the extent that financial hardship on the wife, as a consequence of being barred from an alimony award, and the duration of the marriage, were factors to weigh and balance in determining whether or not a divorce judgment should be granted against a wife. The Court said that the hardship factor was relevant in determining the degree, scope and probable effect of misconduct between spouses. The observation was made that "An appearance of misconduct, which in a matured marriage might fail to justify a finding a substantial

misconduct, but only of transient discord, may in a newer marriage justify or even compel an inference of substantial misconduct."

The Court of Appeals made it clear that a strict construction of DRL 170(1), was unwarranted by statutory language and legislative history. It held that the cruel and inhuman treatment ground does not require that cohabitation be "unsafe" in addition to being "improper" nor does it permit divorce on the basis of mere incompatibility.

The Court noted that prior to the Divorce Reform Law of 1966, when adultery was the sole ground for divorce in New York, cruel and inhuman treatment had been a ground for separation, which was granted only where the petitioner proved both physical or mental injury and that the physical or mental injury made cohabitation unsafe. Judge Breitel made the point that under the Divorce Reform Law, "it was intended that marital misconduct to constitute cruel and inhuman treatment be distinguished from mere incompatibility, and that serious misconduct be distinguished from trivial."

The Court stated that the correct approach would be to permit the court "to exercise a broad discretion in balancing the several factors in each case."

#### Right to Support

Judge Breitel, emphasized that "special weight" must be given DRL 236, which barred the wife from alimony, if a divorce is to be granted for cruel and inhuman treatment. "Needless to say, the loss of support for the wife may be particularly inappropriate in the case of a dependent older woman. Indeed, unless the Legislature sees fit to limit the scope of 236 to bar support only

for grievous forms of misconduct, the effect on the right to support must continue to be an influential factor, as a matter of legislative interpretation, in determining the meaning of section 170."

Brady v. Brady, [FN3] was decided by the Court of Appeals in 1984. In Brady, Supreme Court Term granted the husband a divorce based on cruel and inhuman treatment and awarded the wife support. At the trial, the husband testified that on several occasions during 1976, his wife physically assaulted him. According to the husband, the wife had asked him to leave the marital home in 1977, but for the next two years he returned home at irregular intervals. He left permanently in 1979. He further testified that after 1976 he and his wife only had sexual relations once, despite his repeated advances.

The trial court concluded that this 26-year marriage was a "dead marriage," and even though the assaultive acts that the husband alleged occurred in 1976 were insufficient to support a divorce on cruel and inhuman treatment, the court granted plaintiff a divorce as a matter of discretion. The Appellate Division modified the judgment and dismissed the cause of action for divorce, stating that such discretion cannot be exercised in a manner at variance with the established law in New York.

The Court of Appeals affirmed. [FN4] It held that the principles set forth in Hessen, detailing the necessary showing of cruel and inhuman treatment in a long-term marriage, are still to be followed. Citing Hessen, the Brady court pointed out that the determination of whether conduct constituted cruel and inhuman treatment would depend, in part, on the length of the parties'

marriage, because what might be considered substantial misconduct in the context of a marriage of short duration, might only be "transient discord" in that of a long marriage.

The Court rejected the plaintiff's argument that there was no longer any reason to require a higher showing of misconduct in long-term marriage. As to plaintiff's contention that the rationale for the Hessen rule had been eliminated by the equitable distribution law, the Brady Court stated that the fundamental reason for such a rule was, and remains, the common-sense notion that the conduct that the plaintiff alleged as the basis for a cause of action must be viewed in the context of the entire marriage, including its duration, when deciding whether particular actions can be properly labeled as cruel and inhuman treatment.

Since Brady, our courts have denied divorces in long-term marriages when the proof did not meet the high standards enunciated by the Court of Appeals. Thus, in *Miller v. Miller*, [FN5] the court reversed a judgment of divorce, based on cruelty, in a 26-year marriage, because the allegations of frequent absence from the marital residence and assault on two occasions did not constitute evidence of conduct that would so endanger the physical or mental well-being of the plaintiff spouse as to render it unsafe or improper to continue to cohabit with the defendant.

#### High Degree of Proof

In a lengthy marriage a party seeking a divorce on the grounds of cruel and inhuman treatment must show serious misconduct and not mere incompatibility.

[FN6] A high degree of proof is required. [FN7] There must be a showing of a course of conduct by the defendant that is harmful to the physical or mental health of the plaintiff and makes cohabitation unsafe or improper. [FN8] Where the evidence demonstrates that the parties only have irremedial or irreconcilable differences, a divorce on the grounds of cruel and inhuman treatment will be denied. In *Green v. Green*,<sup>9</sup> the Appellate Division held that trial court erred in granting the wife a divorce on cruel and inhuman treatment in a marriage of long duration, where she offered no medical proof to establish that her health was adversely affected by defendant's alleged conduct. Plaintiff testified that the marriage lacked communication and sexual intimacy, that defendant pushed her a few times causing minor bruises and that as a result of such conduct she gained excessive weight. In *Marciano v. Marciano*, [FN10] Plaintiff testified there were six occasions from 1982 to 1985 when the parties argued and defendant used obscene and vulgar language. On one occasion defendant pounded plaintiff's chest and grabbed his genitals. Plaintiff testified that as a result of such conduct he was upset and embarrassed, his ulcer was irritated and his work performance adversely affected. The Appellate Division reversed the judgment of divorce, as the marriage was of long duration and no medical proof was presented. However, a divorce will be granted where there is substantial evidence of cruel and inhuman treatment. For example, in *McKilligan v. McKilligan* [FN11], a marriage of more than 25 years, the Appellate Division affirmed the judgment

that granted the wife a divorce on the ground of cruelty. It found that over the prior five years, defendant

(1) absented himself from plaintiff and children, and completely removed himself from social intercourse with the family;

(2) did not converse with plaintiff and directed her to write notes to him;

(3) permitted the household heating and plumbing system to fall into disrepair, creating health hazards for household members;

(4) refused to talk about family finances or defendant's corporation;

(5) showed no affection or caring toward plaintiff and had ended sexual contact with plaintiff;

(6) was cold and uncaring, causing the children to suffer emotionally and one child to develop severe migraine headaches;

(7) made it impossible and unsafe for plaintiff to continue to cohabit with defendant in the marital home.

Plaintiff's claims of long-term cruelty and her testimony that she so feared defendant that she became physically and mentally debilitated were corroborated by testimony of other family members, outsiders and medical experts.

In *Wilbourne v. Wilbourne*, [FN12] the Appellate Division affirmed a judgment of divorce granted to the husband, on the grounds of cruel and inhuman treatment. The husband's testimony at trial revealed a pattern of quarrelling initiated by the wife, which led to physical altercations, including the throwing of plates, fruit and other objects, scratching and hair-pulling. These disputes escalated to a point where they were occurring on a nightly basis,

causing the husband to become depressed. The wife also repeatedly accused the husband of infidelity, without justification. These accusations were repeated to the parties' daughter and to a partner in the architectural firm with which the husband was associated.

The court held that based on the wife's repeated accusations of infidelity, which in this case so undermined the marital relationship as to make continued cohabitation improper, and in light of the constant fighting between the parties, which went well beyond any mere incompatibility or strained relations, the trial court did not abuse its discretion.

The significance of the Brady decision was its perpetuation of the Hessen policy in a new form after the justification for that policy had been removed by the enactment of the Equitable Distribution Law. The automatic bar to alimony for a wife guilty of misconduct has been eliminated, and since July 19, 1980, wives are assured of an equitable share of marital property acquired during the marriage. As a consequence there is no economic justification for Brady.

FN(1) 683 NYS2d 650 (3d Dept.,1999).

FN(2) 33 NY2d 406 (1974).

FN(3) 101 AD2d 797 (2d Dept., 1984), aff'd 64 NY2d 339 (1985).

FN(4) 64 NY2d 339 (1985).

FN(5) 104 AD2d 1032 (2d Dept., 1984).

FN(6) Hessen v. Hessen, 33 NY2d 406; Brady v. Brady, 64 NY2d 339.

FN(7) Green v. Green, 127 AD2d 983 (4th Dept., 1987).



FN(8) Kleindust v. Kleindust, 116 AD2d 988 (4th Dept., 1986).

FN(9) 4th Dept., 1987, 127 AppDiv2d 983.

FN(10) 4th Dept., 1990, 161 AppDiv2d 1163.

FN(11) 3d Dept., 1989, 156 AppDiv2d 904.

FN(12) 1ST DEPT., 1991, 173 APPDIV2D 289.

Joel R. Brandes has law offices in Garden City and New York City. He co-authored Law and the Family New York and The Family New York Forms (both, Westgroup). Bari B. Brandes is a member of the firm and co-author of the Annual Supplements to Law and the Family New York 2d. She assisted in the preparation of this article.