

BABY STEPS TO “GROWN-UP” DIVORCE: THE INTRODUCTION OF THE COLLABORATIVE FAMILY LAW CENTER AND THE CONTINUED NEED FOR TRUE NO-FAULT DIVORCE IN NEW YORK

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INTRODUCTION

As Woody Allen once observed, while the Ten Commandments forbid adultery, New York demands it if you want a divorce.¹ This statement, though an oversimplification of the current grounds for divorce in New York, captures the absurd and frustrating reality of the state’s “archaic” divorce scheme.² New York continues to operate primarily as a fault-based system, a system that was long ago replaced or augmented with no-fault provisions in every other state.³ By 1985, nearly all fifty states allowed couples to dissolve their marriages based on some type of no-fault provision.⁴ In most iterations, no-fault provisions, apart from eliminating blame in divorce, permitted one spouse to pursue a divorce

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¹ See Claude Solnik, *Finding ‘Fault’ with New York State Divorce Laws*, DAILY RECORD NEW YORK, 2007 WLNR 9368107 (citing Woody Allen’s take on his own experiences with the New York divorce system).

² “The systemic and pervasive nature of the problems created by the archaic fault based statute in New York has been corroborated and detailed from every perspective.” (Molinari v. Molinari, 839 N.Y.S.2d 434, Table (2007)) (ordering that determination of the grounds issue in the matter be stayed until legislative determination of Bill A03027).

³ See Rhoda Amon, *Old Law Causes New Struggle*, NEWSDAY, May 3, 2007, at A17 (“‘There is no civilized way to get divorced in New York State.’ New York is the only state that doesn’t have a no-fault divorce procedure.”) (quoting Herbie DiFonzo).

⁴ Generally, “no-fault” refers to “[a] divorce in which the parties are not required to prove fault or grounds beyond a showing of the irretrievable breakdown of the marriage or irreconcilable differences. Any number of reasons can be grounds for divorce, including irretrievable breakdown, irreconcilable differences or incompatibility.” See BLACK’S LAW DICTIONARY 516 (8th ed. 2004); see also Jeremiah A. Ho, *What’s Love Got To Do With It? The Corporations Model of Marriage in the Same-Sex Marriage Debate*, 28 WHITTIER L. REV. 1239, 1275 (2007) (stating that since 1985 nearly all fifty states recognize some type of no-fault basis for divorce); see also *What is a No Fault Divorce?*, LEGAL DEFINITIONS, <http://www.legal-definitions.com/family-law/divorce-law/what-is-a-no-fault-divorce.htm>.

decree without mutual consent.⁵ While the no-fault revolution swept through the United States in the 1970s, New York has remained fixed mostly in the traditional fault-based system, sparingly incorporating no-fault characteristics into its law.⁶ Movements in favor of reforming New York divorce procedures have been part of the state's history from the outset, but have been stalled by "powerful Catholics, moralizing conservatives, paternalistic post-Progressive liberals, and faint-hearted politicians."⁷

The lack of true no-fault provisions has left New York with a system that many find frustrating and unnecessarily adversarial.⁸ Yet, it is in this hostile and stubborn legal landscape that the Chief Judge of the state's highest court has proposed a very modern addition: collaborative law, an alternative dispute resolution method, designed to reduce the adversarial nature of divorce litigation by restraining permissible actions of divorce lawyers.⁹ The Collaborative Family Law Center, currently under construction,¹⁰ is intended to lessen the "financial and emotional" cost of divorce and as Judge Kaye states, is "surely a step in the right direction."¹¹

⁵ ALLEN M. PARKMAN, *GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY* 13 (Rowman and Littlefield Publishers 2000) ("The important characteristic of the new laws was that they permitted one spouse to obtain a divorce even when the other spouse opposed it. Today only four states (Mississippi, New York, Ohio, and Tennessee) require mutual consent for a no-fault divorce.").

⁶ The fault-based system reflects a "public disfavor of divorce except in extreme situations" causing statutes that articulate the grounds for divorce with a certain amount of specificity. See LESLIE JOAN HARRIS, LEE E. TEITELBAUM & JUNE CARBONE, *FAMILY LAW* 293 (3d ed. 2005).

⁷ J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 *PACE L. REV.* 559, 561–62, 564–70 (2007) (New York's single-ground for divorce, adultery, remained "virtually immune to revision until well into the 20th century." Attempts at reform by broadening the grounds for divorce were defeated in 1813, 1827, 1840, 1849, 1850, and 1855. Between 1900 and 1933, fifteen different bills proposing the addition of cruelty and desertion for grounds for divorce were sponsored. Almost all were "buried in committee." Numerous other attempts followed, including the creation of a legislative commission in 1956 to study New York divorce law. It had little effect as its "power was limited and it lacked authority to recommend expansion of divorce grounds." Divorce reform did not really begin to occur until the 1960s.).

⁸ See *Molinari*, 839 N.Y.S.2d 434.

⁹ Chief Judge Kaye has announced her plans for retirement. By early 2009, the state Commission on Judicial Nomination will announce its nomination which will be subject to state Senate approval. See *Selection Process for New York's Chief Judge*, *Newsday.com*, Oct. 12, 2008, <http://www.newsday.com/news/local/wire/newyork/ny-bc-ny—chiefjudge-glance1012oct12,0,1890309.story>.

¹⁰ New York State Unified Court System, <http://www.nycourts.gov/ip/collablaw>.

¹¹ Danny Hakim, *Chief Judge Plans Center to Ease Divorce Process*, *N.Y. TIMES*, Feb. 27, 2007, at B1 ("The new family law center would put the state's imprimatur on an alternative approach to divorce proceedings that started in Minnesota more than a decade ago and has

Collaborative law, a method of lawyering now statutorily recognized in states, such as Texas and North Carolina, allows parties to resolve their divorce both by contract or stipulation and without any court intervention.¹² The process is best described as an "interest-based, cooperative series of negotiations where the parties participate freely with their counsel to arrive at a settlement."¹³

Though collaborative law represents a step toward "civilized" divorce, this Note argues that the New York Legislature's refusal to adopt a true no-fault provision creates an inhospitable environment for the success of collaborative law in New York. The state's largely fault-based system produces behavior, on the part of clients and lawyers, which is at odds with the fundamental goals and principles of collaborative law and will arguably reduce the method's documented benefits, such as cost reduction and participant satisfaction.¹⁴ The Center will have a limited effect on couples as long as unilateral no-fault divorce remains unavailable.

Part I of this Note describes the current state of divorce law in New York by examining the history of divorce culture in New York, the current state statutory scheme, the law's practical effect on New York residents, and the arguments in support of and against the adoption of no-fault provisions. Part II overviews the collaborative law method, illustrates how the method varies from other alternative dispute resolution methods, and discusses various ethical considerations relevant to the method. Part III argues that the introduction of collaborative law will have minimal practical effects unless combined with the adoption of a no-fault provision by the New York Legislature, examines model collaborative law statutes from states such as North Carolina and Texas, and analyzes the Model Uniform Collaborative Law Act. Part IV offers concluding remarks urging continued reform in New York.

migrated around the country since then but that experts say is only sporadically used in New York.").

¹² See TEX. FAM. CODE ANN. §§ 6.603, 153.0072 (Vernon 2001 & Supp. 2005); see also N.C. Gen. Stat. Ann. §§ 50–70 to 50–79 (West 2003).

¹³ Andrew Schouten, *Breaking Up Is No Longer Hard To Do: The Collaborative Family Law Act*, 38 McGEORGE L. REV. 125, 126 (2007).

¹⁴ In an effort to reduce unnecessary animosity, many "soon-to-be-former spouses and their lawyers are embracing collaborative divorce." In addition, the Boston Law Collaborative recently found that the median cost of collaborative divorce to be \$19,723, followed by \$26,830 for a divorce settlement negotiated by counsel, and \$77,723 for a litigated divorce. See Martha Neil, *Kinder, Gentler Collaborative Divorce Also Costs Less*, ABA J., Dec. 18, 2007, available at http://www.abajournal.com/news/kinder_gentler_collaborative_divorce_also_costs_less.

I. STATE OF DIVORCE IN NEW YORK

A. New York: An Anomaly in American Divorce History

The origins of American divorce law can be traced to the English common law,¹⁵ where marriage was regarded as an “indissoluble union” between man and woman that would only terminate upon the death of one of the parties.¹⁶ However, even before England allowed divorce in 1857, some United States territories granted judicial divorces.¹⁷ States began granting divorces upon a showing by an innocent spouse that their wife or husband had committed an enumerated fault.¹⁸ These enumerated faults varied from state to state, but usually included adultery, desertion, and cruelty.¹⁹

Generally, divorce laws were more liberal in the Western states and in 1969 California continued this tradition by enacting the first no-fault divorce law.²⁰ The California Family Law Act of 1969,²¹ which reformed divorce law in California, and across the nation, was able to “free the administration of justice in divorce cases from the hypocrisy and perjury that had resulted from the use of marital fault as a controlling consideration in divorce proceed-

¹⁵ LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 6 (The Free Press 1985).

¹⁶ *Id.* (quoting Homer Clark).

It is assumed that marital happiness is best secured by making marriage indissoluble except for very few causes. When the parties know that they are bound together for life, the argument runs, they will resolve their differences and disagreements and make an effort to get along with each other. If they are able to separate legally upon less serious grounds, they will make no such effort, and immorality will result.

Up through the twentieth century marriage was regarded as “a permanent and cherished union which the Church—and then state—had to protect and preserve.” In order to achieve these ends access to divorce was restricted. Two early exceptions to the prohibition were divorce by act of Parliament (solely on the ground of adultery) and the Church permitted divorce *a mensa et thoro* (from bed and board), which allowed the parties to live apart, but left most of the spouses’ marital obligations in force. *See id.*

¹⁷ LAWRENCE M. FRIEDMAN, *LAW IN AMERICA: A SHORT HISTORY* 61 (Random House, Inc. 2002) (referring to a 1844 law in a Florida Territory decreeing a marriage contract dissolved and annulled due to abandonment).

¹⁸ *See id.* at 62–63 (“Divorce was available only to innocent victims of bad husbands or wives. Consensual divorce—divorce by mutual agreement—was legally impossible in every state.”).

¹⁹ *Id.* at 62.

²⁰ Herma Hill Kay, *An Appraisal of California’s No-Fault Divorce Law*, 75 *CAL. L. REV.* 291 (1987).

²¹ Cal. Fam. Code §§ 2310–13 (West 2008).

ings.”²² The Act lists “irreconcilable differences, which have caused the irremediable breakdown of the marriage” as a ground for dissolution or legal separation.²³ By enacting a true no-fault ground, the California legislature furthered the idea that divorce should be granted when a marriage has broken down and that the process should be aimed at reducing guilt and inner-familial conflict, as well as minimizing bitterness resulting from attempts to place blame for an unsuccessful marriage.²⁴ A no-fault ground allows each spouse to be represented as an injured party due to the reality that each party has lost the privilege of enjoying a normal marital relationship.²⁵ Since California’s historic divorce reform, every state has enacted some form of no-fault divorce.²⁶

New York did eventually incorporate a no-fault provision into its divorce law, but the limited scope of the ground has left New Yorkers unable to reap the benefits and freedoms of a unilateral no-fault divorce.²⁷ The state’s opposition to adopting a true no-fault divorce ground is indicative of the state’s historically “strict nature.”²⁸ Until 1966, adultery remained the only recognized ground for divorce.²⁹ But, although the laws remained strict, New Yorkers “contrived to dispose of their spouses” with great frequency.³⁰ Residents achieved these ends through the processes of annulment, migratory divorce, and fraudulent adultery proceedings and by the 1950s New York’s total rate of marital disruption registered above the national average.³¹ New York marital law had be-

²² Donna S. Hershkowitz & Drew R. Liebert, *The Direction of Divorce Reform in California: From Fault to No-Fault . . . And Back Again?*, Counsel Assembly Judiciary Committee, California State Legislature (1997) (quoting Kay, *supra* note 20, at 299).

²³ Cal. Fam. Code § 2310 (West 2008).

²⁴ Hershkowitz & Liebert, *supra* note 22.

²⁵ *Id.*

²⁶ *Id.*; see also RODERICK PHILLIPS, *UNTYING THE KNOT: A SHORT HISTORY OF DIVORCE* 218 (Cambridge University Press 1991). By the late 1970s, most U.S. states had introduced no-fault provisions and by the mid-1980s the principle of no-fault was the model for almost every state. Thirty-six states made “irretrievable breakdown of marriage” a justified ground for divorce, while another six allowed divorce when a couple had lived apart for a specified period, and others recognized mutual consent, incompatibility, or judicial separation. *Id.*

²⁷ See N.Y. DOM. REL. LAW §§ 170(5)–(6) (Consol. 2000).

²⁸ See HERBERT JACOB, *THE SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES*, 30–37 (1988).

²⁹ See PHILLIPS, *supra* note 26; see also JACOB, *supra* note 28 (noting that the Roman Catholic Church played a large role in the limitation of divorce in New York to cases of adultery until 1967 in the face of many efforts to liberalize the law).

³⁰ DiFonzo & Stern, *supra* note 7, at 559.

³¹ *Id.* (highlighting that although by statute New York was the “anti-divorce state” statistics showed that the incidence of annulments, migratory divorce, separations and desertions placed the state’s average well above the national average).

come a “dual system” in which “[t]he divorce laws in practice had almost nothing in common with the divorce laws on the books.”³² After 1870, most divorces were collusive; the parties either pretended to have grounds for divorce where none existed or chose not to be forthcoming about grounds that were present.³³ In New York, these charades had a re-occurring plot and cast of characters: a husband, a woman (generally blonde), and a photographer. The scene would be set-up in preparation for a “maid” or “bellboy” to knock on the door and enter followed by a photographer who would capture the scantily clad husband and woman in the hotel room. These photos would then be introduced as evidence of adultery and, based upon “the same big blonde attired in the same black silk pajamas,” thousands of divorces were granted annually.³⁴ As one New York judge stated, “a certain amount of naiveté . . . was an essential adjunct to the judicial office.”³⁵

Another method frequently employed by New Yorkers was the migratory divorce. Residents would leave the state in order to secure a divorce in a neighboring state, popularly referred to as divorce havens or divorce mills.³⁶ This method especially appealed to the wealthy,³⁷ but, more importantly, methods such as these highlighted the fact that with or without no-fault divorce, New York residents were willing to lie, pay, or relocate their way into a divorce.³⁸ This inconvenient reality is still a current issue in the state; twenty-first century New Yorkers are to this day being forced

³² Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1504 (2000).

³³ *Id.* at 1511–12 (“New York, the state with the strictest divorce laws, witnessed what were perhaps the most cleverly orchestrated, and fraudulently obtained, divorces in the country.”).

³⁴ New York notoriously had the most flouted divorce law in the country; the same kind of fraudulent adultery that was long the stuff of English novels and life was regularly confected in New York. *See id.* at 1515; *see also* Carl E. Schneider, *Legislatures and Legal Change: The Reform of Divorce Law*, 86 MICH. L. REV. 1121, 1122 (1988).

³⁵ Judges and lawyers did not approve of the system, but were left with little choice. Lawyers “had to act ‘like blind monkeys’ to help their clients in New York or ‘help them engage in the sophistry of an out-of-state divorce.’” *See* Friedman, *supra* note 32, at 1515; *see also* Schneider, *supra* note 34 (“The gap between the law on the books and the law in action distressed many who knew about it and particularly distressed the lawyers and judges who collaborated in or countenanced the hypocrisy and perjury which made the system work.”).

³⁶ Before 1840, Pennsylvania and Vermont fulfilled the role of “divorce haven.” After that point western states became a popular choice. By 1870 an estimated one quarter of all divorce decrees issued in Illinois and one-sixth of those in Connecticut were arranged through New York law offices. *See* DiFonzo & Stern, *supra* note 7, at 572.

³⁷ *See* Schneider, *supra* note 34, at 1122 (The result was “[t]he delicate-minded (and well-to-do) New Yorker went to Reno” to benefit from the short residency requirement and liberal divorce statute).

³⁸ *Id.*

to jump through hoops to secure a divorce that would otherwise be readily available in every other state.

B. New York's "Modern" System

The current grounds for divorce in New York have remained largely unchanged from those passed during the reforms of the 1960s. Today, under New York's Domestic Relations Law (DRL), an action for divorce may be maintained based upon one of six grounds.³⁹ The first four grounds require a showing of either (1) cruel and inhuman treatment, (2) abandonment, (3) adultery, or (4) imprisonment of three or more years by the other spouse.⁴⁰ These are the traditional fault-based grounds. Two additional grounds were later added in the Divorce Reform Act of 1966.⁴¹ The fifth ground allows for a divorce to be maintained if husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years.⁴² This ground may also be characterized as fault-based in light of the fact that in order to obtain a judicial decree or judgment of separation a showing of fault is required.⁴³

³⁹ N.Y. DOM. REL. LAW § 170.

- (1) 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.
- (2) The abandonment of the plaintiff by the defendant for a period of one or more years.
- (3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.
- (4) The commission of an act of adultery. . . .
- (5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one more years after the granting of such decree
- (6) The husband and wife have lived separate and apart pursuant to a written agreement of separation. . . .

⁴⁰ *Id.*

⁴¹ *See id.*; *see also* Gleason v. Gleason, 26 N.Y.2d 28 (1970) (allowing for retroactive application of subdivision 5 of § 170 to grant a divorce after the parties had lived apart for two years).

⁴² N.Y. DOM. REL. LAW § 170(5).

⁴³ N.Y. DOM. REL. LAW §§ 170, 200. A judgment separating the parties from bed and board may be procured for:

- (1) cruel and inhuman treatment
- (2) abandonment
- (3) neglect or refusal of the defendant-spouse to provide for the support of the plaintiff-spouse
- (4) adultery

The sixth ground is the one that most resembles a no-fault ground. It permits divorce based on a written and filed separation agreement that the parties have lived pursuant for at least one year.⁴⁴ This avenue, however differs substantially from most other states' no-fault provisions, imposing harsher restrictions upon the couple.⁴⁵ The Domestic Relations Law requires that husband and wife live pursuant to a written agreement of separation filed either with the county clerk or with the court for at least one year.⁴⁶ After such time, one party must "sue for no-fault divorce, based on a showing that the terms of the decree or agreement were, indeed, carried out for the full period."⁴⁷ The practical effect of this type of no-fault ground is it creates a burden for separating and divorcing couples.⁴⁸ The agreement requires detailed resolution of issues such as custody, property distributions, and alimony which many couples find difficult to work out.⁴⁹ Further, it is possible for one party in the marriage to refuse to sign the separation agreement, foreclosing the option of a no-fault divorce.⁵⁰ As a result, no-fault divorce, "while it technically exists, is nonetheless stricter than in most other states."⁵¹

C. Effect on New York Couples

So much like their historic counterparts, New Yorkers continue to face substantial obstacles in obtaining a divorce. Today, in

(5) confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff to defendant.

⁴⁴ N.Y. DOM. REL. LAW § 170.

(6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement. . . .

This is often referred to as a "conversion divorce" whereby the separation agreement converts to a divorce after one year. See Rhona Bork, *Taking Fault With New York's Fault-Based Divorce: Is the Law Constitutional?*, 16 ST. JOHN'S J. LEGAL COMMENT 165, 189 (2002) (discussing the liberalization of New York divorce law through the addition of conversion divorce).

⁴⁵ N.Y. DOM. REL. LAW §170(6).

⁴⁶ *Id.*

⁴⁷ See Joanna Grossman, *Will New York Finally Adopt True No-Fault Divorce? Recent Proposals to Amend the State's Archaic Divorce Law*, FINDLAW, Oct. 20, 2004, available at <http://writ.new.findlaw.com/grossman/20041020.html>.

⁴⁸ See *id.* (stating that reaching a separation agreement with such detail can be tedious even for couples in which both parties desire a separation).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

the absence of true no-fault divorce, New York residents must allege one of the above mentioned fault grounds, unless the parties can amicably resolve all the issues relating to the divorce.⁵² The current trend for couples who (1) both want out of the marriage, but (2) are unwilling to wait the required one-year separation term, and (3) have no recognized grounds under which to file, is to allege constructive abandonment based on a failure to engage in sexual relations.⁵³ Known as the “gentlemen’s grounds” for divorce, a lack of sex is a common accusation in a non-contentious case, in which “neither side wants to allege, or admit to, other less seemly grounds, such as cruelty or adultery.”⁵⁴ But, the absence of no-fault is felt most in situations where one spouse does not want a divorce. In situations such as these, one party may refuse to sign a separation agreement, and this refusal may in effect force the couple to live apart indefinitely without the prospect of a divorce.⁵⁵ To illustrate this scenario, take the case of *Scheu v. Vargas* in which a wife sought a judgment of divorce based upon her husband’s confinement in prison for a period of three or more consecutive years.⁵⁶ The parties were married on April 26, 2000, approximately eight months after the commencement of her husband’s jail term.⁵⁷ The court denied the wife’s motion because at the time of the parties’ marriage, Plaintiff (wife) was aware of the Defendant’s (husband) incarceration.⁵⁸ With no other grounds for divorce, the mere

⁵² Residents must still prove a traditional fault ground such as adultery, abandonment, or cruel and inhuman treatment, unless they are able to live separately pursuant to a mutually agreed upon separation agreement for one year. See Janet A. Johnson, *Symposium on the Miller Commission on Matrimonial Law*, 27 Pace L. Rev. 539, 541 (2007); see also *The Long Divorce*, N.Y. TIMES, Mar. 26, 2006, Section 14 (“Under present law, a marriage cannot merely die . . . [i]t must be killed by one spouse or the other. . .”).

⁵³ See Mark Fass, *Proof of Viagra Use Rebuts Wife’s Claim of Abandonment*, 235 N.Y.L.J. 1 (2006); see also John Celock, *Advocates on All Sides See Faults in No-Fault Divorce Debate: 49 States Have Loosened Divorce Requirements, But New York Unlikely to Follow Soon*, CTRY HALL, Aug. 14, 2007, <http://www.cityhallnews.com/news/128/ARTICLE/1238/2007-08-14.html> (quoting New York State Supreme Court Justice Jacqueline Silverman, “‘There are very few honest cases of abandonment,’ . . . referring to the most frequent cause cited by agreeing couples.”).

⁵⁴ *Id.* at 2. In one case, a husband who did not want to get divorced, due to religious beliefs and “other things that keep them together,” contested his wife’s allegation of “constructive abandonment” by offering as proof his 10-pill prescription for the erectile-dysfunction medication (Viagra), of which only eight pills were left, and by introducing testimony of a conversation he had with his physician regarding his responsiveness to the 100 mg. dose. See Fass, *supra* note 53.

⁵⁵ Solnik, *supra* note 1.

⁵⁶ *Scheu v. Vargas*, 778 N.Y.S.2d 663 (2004).

⁵⁷ *Id.*

⁵⁸ *Id.*

fact that Defendant continued to be incarcerated for a period of three or more years after the marriage was insufficient to establish fault on his part.⁵⁹ Unable to allege any of the enumerated fault grounds discussed above, the court was unable to grant a divorce.⁶⁰ The wife's remaining option was to hope her husband would agree to work out a written separation agreement.⁶¹

Another example is Jeffrey and Paula Molinari, a New York couple who have been entrenched in a divorce battle for over two years.⁶² Mr. Molinari moved out on June 22, 2005 and filed for divorce, but to date the couple is still legally married.⁶³ Mr. Molinari sued for divorce on the ground of constructive abandonment, alleging that his wife has not had sex with him for more than one year.⁶⁴ Ms. Molinari opposed the divorce, a decision Mr. Molinari's attorney characterized as a last attempt to get more money from her husband.⁶⁵ The Molinari's situation, though not unique in light of New York's resistance to unilateral, no-fault divorce, does possess a twist. The presiding Judge, Justice Ross, is holding his decision, as to grounds in abeyance, pending the legislature's action on the pending no-fault legislation.⁶⁶ In the opinion, Justice Ross described his current frustration with the system, stating that "[i]n 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."⁶⁷ In response to his frustration, Justice Ross has chosen to defer his decision in the case until such

⁵⁹ *Id.* at 664.

⁶⁰ *Id.*

⁶¹ *Id.* at 663 (noting that "no-fault divorce applies only where there is a previous decree of separation or a written separation agreement. . . . Otherwise, a divorce may be granted 'only if fault is established pursuant to one or more of the grounds set forth in *Domestic Relations Law* §170.>").

⁶² See *Molinari*, 839 N.Y.S.2d 434.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *New York Divorce Ruling Unusually Delayed for Proposed No-Fault Divorce Law!*, TOTAL DIVORCE, Apr. 24, 2007, available at http://www.totaldivorce.com/divorce_articles_new_york_no_fault_law.asp.

⁶⁶ In his opinion Judge Ross wrote that "[n]otwithstanding the controverted issue of the circumstances surrounding the departure of the plaintiff from the marital home, and even acknowledging that there is no written separation agreement between the parties, Mr. Molinari would be entitled to be granted a judgment of divorce, on these limited facts alone, in 49 states—with New York being the only exception." See *Molinari*, 839 N.Y.S.2d 434; see also Marc A. Rapaport, *New York's Antiquated Fault-Based Divorce System: A Judge's Call for Action*, <http://www.divorcesource.com/NY/ARTICLES/rapaport1.html> (last visited Sept. 4, 2008).

⁶⁷ *Molinari*, 839 N.Y.S.2d at 434.

time as the New York legislature votes on the proposed no-fault bill. Until that time, the Molinaris will stay legally married.

D. Matrimonial Commission's Recommendations and the Pending Legislation Now Under Review in New York

Judge Ross is not alone in expressing his frustrations with the current New York divorce procedures. Influential state leaders, such as Judge Kaye (Chief Judge of New York) and associations, such as the New York State Bar and the Women's Bar Association of New York, all support the adoption of true no-fault divorce.⁶⁸ In addition, the New York State Matrimonial Commission voiced its support in its 2006 reports.⁶⁹ The Commission, chaired by Associate Judge Miller, is charged with examining all aspects of the divorce process in New York and is also expected to make recommendations for reform.⁷⁰ Thus far, the Commission has called "for an overhaul of divorce and child custody rules, including the authorization of no-fault divorces."⁷¹ The Commission found substantial evidence that New York's fault-based divorce system adds significantly to the cost, delay and trauma of matrimonial litigation.⁷² In addition to supporting no-fault divorce, the Commission called for an emphasis on mediation and more streamlined procedures.⁷³

In the face of these proposed reforms, leaders in the Republican-led Senate suggested that the focus will more probably be on "incremental changes."⁷⁴ As the chairman of the State Senate's Judiciary Committee stated, "[t]here's been no real talk about having a true no-fault divorce'. . . . [we have] been focused, as a first step, on cutting down the amount of time it takes to get divorced once a separation agreement is reached."⁷⁵ The bill, referred to as S2447/A6418, would reduce to three months, rather than one year,

⁶⁸ See Hakim, *supra* note 11.

⁶⁹ See Danny Hakim, *Panel Asks New York to Join the Era of No-Fault Divorce*, N.Y. TIMES, Feb. 7, 2006, at A1.

⁷⁰ New York State Unified Court System, *Matrimonial Commission*, <http://www.nycourts.gov/ip/matrimonial-commission/index.shtml> (last visited Oct. 23, 2007).

⁷¹ Hakim, *supra* note 69.

⁷² Matrimonial Commission Report to the Chief Judge of the State of New York, 18 NEW YORK STATE UNIFIED COURT SYSTEM (Feb. 2006), available at <http://www.nycourts.gov/ip/matrimonial-commission/index.shtml#report>.

⁷³ See Hakim, *supra* note 69.

⁷⁴ *Id.*

⁷⁵ *Id.*

the time couples must be separated before divorce can be granted under the Domestic Relations Law.⁷⁶ However, it is important to note that the shortened waiting period will only benefit those couples who are able to agree upon all the settlement terms.⁷⁷ This legislation will do nothing to ease the divorce process for couples in which one party does not want a divorce or is holding up the proceedings in order to secure a better settlement.⁷⁸

In addition, there is a legislative initiative, Assembly Bill A03027, sponsored by Assemblywoman Helene Weinstein, proposing enactment of “The Divorce Reform Act of 2007.”⁷⁹ The Act has a stated purpose of adding irreconcilable differences as a ground for divorce.⁸⁰ The proposed divorce reform would not eliminate fault grounds; rather, it provides the option of securing a divorce without alleging fault.⁸¹ As a similar pending New York bill, A06978, states, “[t]he purpose of enactment of a no-fault divorce statute in addition to traditional fault categories is to provide for dissolution of marriage in a manner which would keep pace with contemporary social realities, and not to advance vindication of private rights or punishment of matrimonial wrongs.”⁸² Chief Judge Kaye, the New York State Bar Association, and the Women’s Bar Association of New York all support the pending “no-fault” legislation.⁸³ To date, none of the proposed legislation has been passed.

E. New York’s Aversion to No-Fault Divorce

There are various possible theories to help understand the New York Legislature’s refusal to adopt true no-fault provisions in the past. One explanation may be the Roman Catholic Church, an influential entity that has historically opposed divorce reform in

⁷⁶ N.Y. Assem. B. A06418, 2007–2008 Assem., Reg. Sess. (illustrating the “legislative recognition that it is socially and morally undesirable to compel a couple whose marriage is dead to remain subject to its bonds.”); see also Janice G. Iman, *Judge Delays Ruling: Elects to Await Passage of No-Fault Grounds Legislation*, 8 NO. 10 N.Y. FAM. L. MONTHLY 3 (2007).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ N.Y. Assem. B. A03027, 2007–2008 Assem., Reg. Sess.; see also *Molinari*, 839 N.Y.S.2d 434.

⁸⁰ N.Y. Assem. B. A03027.

⁸¹ *Id.*

⁸² N.Y. Assem. B. A06978 (N.Y. 2007).

⁸³ N.Y. Assem. B. A9398 (N.Y. 2007).

New York.⁸⁴ The stance of Catholic leaders is traditional, supporting the view that "marriage is a sacred contract that should not be ended on a whim."⁸⁵ Opponents to divorce reform, like the Church, point to the increase in divorce rates since the adoption of no-fault.⁸⁶ The basic premise of this argument is that the reduction of legal restrictions may make divorce more accessible by reducing "the legal obstacles, the economic costs, and the psychological consequences of divorce."⁸⁷ However, there is conflicting evidence as to the connection between state adoption of no-fault divorce and the sharp increase in the country's divorce rates over the last thirty years.⁸⁸ Even though there is substantial evidence on either side, one of the more recent studies postulates that the positive effects of no-fault on divorce rates were substantially overestimated.⁸⁹

Perhaps surprisingly, some women's groups also oppose liberalizing New York's divorce law due to the adverse effects on the economic position of women and children after divorce.⁹⁰ The New York chapter of the National Organization of Women ("NOW") argues that adoption of true no-fault divorce would have the effect of harming women by allowing the generally wealthier husbands to obtain a divorce before all issues regarding economics

⁸⁴ See DiFonzo & Stern, *supra* note 7, at 569–70 (2007) ("For the next twenty years, the Catholic Church would prove a formidable opponent of divorce reform. As soon as a bill to liberalize divorce appeared before the New York legislature, a Catholic Welfare League representative would contact lawmakers to remind them that the church was opposed.").

⁸⁵ Nahal Toosi, *Untying the Knot Not so Easy in N.Y.*, CHARLESTON GAZETTE, 2007 WLNR 6084131 at 2.

⁸⁶ For support of the premise that unilateral divorce raises divorce rates, see Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AM. ECON. REV. 3, 608 (1998); see also Paul A. Nakonezny, Robert D. Shull & Joseph Lee Rodgers, *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 2, 477 (1995). But see Norval D. Glenn, *Further Discussion of the Effects of No-Fault Divorce on Divorce Rates*, 61 J. MARRIAGE & FAM. 802 (1999); see also Norval D. Glenn, *A Reconsideration of the Effect of No-Fault Divorce on Divorce Rates*, 59 J. MARRIAGE & FAM 4, 1023 (1997).

⁸⁷ Nakonezny, *supra* note 86.

⁸⁸ Friedberg, *supra* note 86.

⁸⁹ Glenn, *supra* note 86 (speculating that the implementation of no-fault came after the states had already lowered the standards for divorce, and questioning the ambiguous evidence on which the claims of increased divorce rates were made); see also IRA MARK ELLMAN, ELIZABETH SCOTT, PAUL KURTZ & BRIAN BIX, *FAMILY LAW: CASES, TEXTS, PROBLEMS* 242 (4th ed. 2004) (stating that "the United States has experienced the only period in its history during which divorce rates have declined consistently for a quarter century.").

⁹⁰ See DiFonzo & Stern, *supra* note 7, at 591; see also Stephen J. Bhar, *Social Science Research on Family Dissolution: What It Shows and How It Might Be of Interest to Family Law Reformers*, 4 J. LAW & FAM. ST. 5, 8 (2002) (noting that following divorce, women had a 27 percent decline in their standard of living while men had a 10 percent increase in their standard of living).

and support for the dependent wife have been resolved.⁹¹ As the head of the state chapter states, “[t]he moneyed spouse, with no-fault, can literally hide the assets, take off, get married before the wife even knows what hit her.”⁹² In addition, opponents of no-fault view divorce as a bargaining tool which women, especially low-income earners, possess during divorce proceedings.⁹³ If the husband is allowed to unilaterally file for divorce, a strategic bargaining chip is destroyed and women are left with little to no economic protection.⁹⁴ NOW rests its long-standing stance, opposing unilateral no-fault, on the socio-economic position of women in society.⁹⁵ The organization’s claim is that women overwhelmingly sacrifice their career and financial independence in order to fill the role of housewife and mother.⁹⁶ As a result, the group urges, the state should ensure that these women and children are not left destitute after divorce before considering no-fault reforms.⁹⁷ Similarly, the Coalition of Fathers and Families of New York “vigorously opposes” no-fault divorce.⁹⁸ The Coalition premises its opposition on what they perceive as an easy exit, and do not support what they see as an empowering of the exiting party to leave the spouse who wants to preserve the marriage.⁹⁹

Another potential source for the New York legislature’s hesitation in adopting no-fault divorce is the recent trend of some

⁹¹ *See id.*

⁹² Toosi, *supra* note 85, at 2.

⁹³ *See* PARKMAN, *supra* note 5.

⁹⁴ *Id.* at 13–14 (“Still the spouses who were the most in need of bargaining power at divorce frequently were wives in marriages of long duration. The vulnerability of women after lengthy marriage has been explained by the timing of the contributions of men and women to marriage. The contributions of married women are often front-end loaded relative to married men: married women have traditionally placed a special emphasis on child rearing that occurs early in a marriage, but the income earning contribution tends to increase over the duration of the marriage. When the children leave the home, the contribution of the wife to the marriage can fall, although the contribution of the husband continues to grow.”).

⁹⁵ *See* Weinstein A-03027-NOW NYS Opposes No-Fault Divorce, http://www.nownys.org/leg_memos/oppose_a03027.htm (examining the effect of no-fault law in California which according to a California Senate Report on Family Equity had created “unintended hardships” for women and children).

⁹⁶ *Id.*

⁹⁷ Though not in favor of unilateral divorce, NOW is in support of a bill that would order the moneyed spouse to pay meaningful expert and legal fees during the divorce proceeding in order to ensure both parties are on equal footing. *See id.*

⁹⁸ *See* DiFonzo & Stern, *supra* note 7, at 592.

⁹⁹ *See id.* (As a member of the Coalition of Fathers and Families New York states, “[N]o-fault laws have essentially acted to empower whichever party wants out, leaving the spouse who wants to preserve the marriage powerless to prevent its dissolution and with no recourse but acquiescence.”).

states to backtrack and limit the effects of no-fault divorce legislation. In an effort to improve marriage, three states have created an alternative form of marriage, referred to as covenant marriage.¹⁰⁰ Louisiana was the first state to adopt a law re-establishing a more binding form of marriage in which divorce is only permitted in narrow circumstances, such as adultery, abuse, abandonment, a lengthy marital separation or imprisonment.¹⁰¹ These new reforms have remained unpopular, with most couples choosing not to opt-in to such restrictive marriages.¹⁰²

Anti-reform movements and groups, such as the ones discussed above, have been successful, thus far, at keeping reform in New York at bay in spite of the Chief Judge's vocal cries for change. While the pending no-fault legislation works its way through the New York legislature, the Chief Judge has turned her attention to a second-best alternative, a collaborative law center geared to alleviating some of the current difficulties New York couples face during marital dissolutions.¹⁰³

II. COLLABORATIVE LAW

A. The A B C's of Collaborative Law

Collaborative law is an "attorney driven movement, developed by attorneys out of the recognition that courts can produce

¹⁰⁰ Matthew J. Astle, *An Ounce of Prevention: Marital Counseling Laws as an Anti-Divorce Measure*, 38 FAM. L.Q. 733, 735 (2004) (discussing the trend of marital counseling laws and covenant marriage laws as an anti-divorce measure).

¹⁰¹ Covenant marriage: (1) restricts the grounds upon which divorce can be granted, (2) requires the couple to undergo some form of premarital counseling and (3) requires the couple to sign a declaration of intent to do everything in their power to save the marriage, included, but not limited to, marital counseling before a marriage license is issued. See Edmund V. Ludwig, *Friendage*, 3 ROGER WILLIAMS U. L. REV. 149, 156 (1997); see also Astle, *supra* note 100, at 735-36 ("Louisiana's law was deliberately designed as an attempt to strengthen families by presenting a new paradigm of commitment in marriage, and all three states' laws are seen as a revolutionary attempt to strengthen marriage.").

¹⁰² Studies indicate that extremely low numbers of couples have opted for the more binding marriage contract in those states which offer the choice. One study by Steven Nock, a sociologist at the University of Virginia, states that two percent of couples in Louisiana have entered into covenant marriages and that similar numbers are estimated in Arizona and Arkansas. See Jonathan Mummolo, *Va. Foundation Seeks to Reduce Divorces*, WASH. POST, July 26, 2007 available at <http://www.washingtonpost.com/wpdyn/content/article/2007/07/25/AR2007/072502199.html>.

¹⁰³ See Hakim, *supra* note 11.

very bad outcomes for families.”¹⁰⁴ The process was first introduced by family law practitioner Stuart Webb after his self-proclaimed “family law burnout” began to affect his ability to practice adversarial family law.¹⁰⁵ Webb’s resolution was to stop going to court and to begin representing his clients through a process of negotiation in which the clients themselves were participants.¹⁰⁶ In the event the negotiations broke down, Webb would withdraw and the clients would be forced to seek new counsel.¹⁰⁷ The process that emerged can be characterized as an interest-based, cooperative series of negotiations where the parties participate freely with their counsel to arrive at a settlement without going to court.¹⁰⁸ The system “combines the positive problem solving focus of mediation with the built-in lawyer advocacy and counsel of traditional settlement-oriented representation.”¹⁰⁹ “Because the model has as its core element an agreement that no participants, neither lawyers nor clients, will threaten or resort to court intervention during the pendency of the collaborative work,” the final result is a collaborative law settlement agreement created entirely outside the court system.¹¹⁰

There is also evidence that collaborative family law is an effective method that is successful in both amicable and hostile divorce negotiations.¹¹¹ By focusing on identification and attainment of each party’s respective interests, collaborative law allows feuding couples to move away from position bargaining and towards amicable resolution of the divorce process.

¹⁰⁴ Schouten, *supra* note 13, at 126 (quoting Jill Chanen, *Newest ADR Option Wins Converts, While Suffering Some Growing Pains*, 92 A.B.A.J. 52, 54 (2006)).

¹⁰⁵ See Stu Webb, *Collaborative Law: An Alternative For Attorneys Suffering ‘Family Law Burnout,’* 88 MATRIM. STRATEGIST 7 (2000).

¹⁰⁶ See William H. Schwab, *Collaborative Lawyering: A Closer Look at an Emerging Practice*, 4 PEPP. DISP. RESOL. L.J. 351, 355 (2004).

¹⁰⁷ *Id.*

¹⁰⁸ See Schouten, *supra* note 13 (discussing the effects of California’s recent codification of collaborative law through Chapter 496).

¹⁰⁹ PAULINE H. TESLER, *COLLABORATIVE LAW: ACHIEVING EFFECTIVE RESOLUTION IN DIVORCE WITHOUT LITIGATION* 8 (2001).

¹¹⁰ Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317 (2004).

¹¹¹ Carrie D. Helmcamp, *Collaborative Family Law: A Means to a Less Destructive Divorce*, 70 TEX. B.J. 196 (2007) (discussing the premise that collaborative law is “not just for people who get along and agree.”).

B. Beginning the Collaborative Law Process

To begin the process, couples interested in a collaborative settlement sign a Participation Agreement, which commits them and their attorneys to “good faith bargaining, voluntary full disclosures, interest-based bargaining, [and] inclusion of relational and long-term interests in the identification of clients’ goals and strategies.”¹¹² By signing this agreement both parties agree to forego formal discovery procedures, unless they mutually agree to them at some later point in time.¹¹³ Furthermore, both parties pledge to “provide good faith responses to any good faith questions and requests.”¹¹⁴ The Participation Agreement defines a good faith question as one that is “reasonably calculated to assist in assessing the merits and/or value of the party’s claim(s) or to otherwise further the process of reaching a settlement of all issues.”¹¹⁵ Because it is possible that either party may divulge information that would have been deemed not discoverable during the court proceedings, the Participation Agreement contains a confidentiality clause.¹¹⁶ The clause states that if the process breaks down, no information disclosed in the collaborative lawyering process may be later disclosed in court.¹¹⁷ Additionally, the Participation Agreement includes a Retainer Agreement that each client enters into with his or her own attorney, which limits the “scope of their engagements—if the process breaks down, the lawyers (and their firms) are disqualified from representing those clients in litigating that dispute.”¹¹⁸ This is arguably the key element in the collaborative law process because “[w]ithout this disqualification agreement, it is business as usual (because every trial lawyer will state that he/she tries to settle all cases) and nothing stands between the parties and the courts except family law lawyers whose training and inclination is to think ‘court.’”¹¹⁹ It is more often the case, however, that settlements be-

¹¹² Tesler, *supra* note 110, at 328.

¹¹³ See James K. L. Lawrence, *Collaborative Lawyering: A New Development in Conflict Resolution*, 17 OHIO ST. J. ON DISP. RESOL. 431, 436 (2002).

¹¹⁴ *Id.* (quoting COLLABORATIVE LAW PARTICIPATION AGREEMENT FOR GENERAL LEGAL MATTERS 2 (Collaborative Law Ctr. 1999)).

¹¹⁵ *Id.*

¹¹⁶ A model collaborative law agreement can be found at http://www.divorcenet.com/states/nationwide/sample_collaborative_law_agreement/view.

¹¹⁷ See *id.*

¹¹⁸ Douglas C. Reynolds & Doris F. Tennant, *Collaborative Law- An Emerging Practice*, 45 B. B. J. 12 (Nov./Dec. 2001).

¹¹⁹ Webb, *supra* note 105.

tween the parties are reached; if the process is terminated, the clients will have paid their attorneys and must then begin anew, securing new representation and incurring additional legal fees.¹²⁰ The withdrawal provision creates an incentive for both the clients and the attorneys and is described as a “powerful architectonic way of changing the mindset of both the client and the attorney.”¹²¹ After all the agreements are signed, meetings may proceed, during which parties and their lawyers begin the process of seeking information, asking questions, and discussing solutions.¹²² The attorneys use their legal and negotiation skills to begin creative problem solving, but all four participants are present and involved in the progress of the sessions.¹²³ To move the process forward, the parties agree to make full and timely disclosure of all relevant information; “no hide the ball; no stonewalling.”¹²⁴ In the event that an expert opinion is necessary, the parties jointly retain a neutral expert.¹²⁵ There are significant cost-savings that can result in cases requiring experts in areas such as business and personal asset valuations and financial planning.¹²⁶ If the process breaks down, the experts are disqualified from future court proceedings, and their work is deemed inadmissible unless otherwise stipulated by the parties.¹²⁷ Also, either party may unilaterally terminate their role in the collaborative process and elect to continue on in the more traditional approach of litigation.¹²⁸ At the conclusion of the collaborative process the settlement is submitted to the court as a proposed final decree.¹²⁹

C. How it Differs From Other ADR Processes

Within the realm of alternative dispute resolution, there is more than one accepted method available to divorce attorneys in

¹²⁰ See Schouten, *supra* note 13, at 128.

¹²¹ Lawrence, *supra* note 113, at 434.

¹²² See Elizabeth K. Strickland, *Putting “Counselor” Back in the Lawyer’s Job Description: Why More States Should Adopt Collaborative Law Statutes*, 84 N.C. L. REV. 979, 985 (2006).

¹²³ See *id.* at 985–86.

¹²⁴ Reynolds & Tennant, *supra* note 118, at 12.

¹²⁵ See Strickland, *supra* note 122.

¹²⁶ *Id.*

¹²⁷ *Id.*; see also Ted Schneyer, *The Organized Bar and the Collaborative Law Movement: A Study in Professional Change*, 50 ARIZ. L. REV. 289, 295–96 (2008).

¹²⁸ See Strickland, *supra* note 122.

¹²⁹ *Id.*

negotiating a settlement.¹³⁰ The first and most used method is mediation.¹³¹ Mediation involves using a neutral third party to negotiate who does not represent either party, and who does not possess the authority to impose a decision.¹³² The basic premise of mediation is one of "self-determination, that is, the parties are responsible for making substantive decisions in their case rather than the professionals that they hire or the courts."¹³³ There are a number of variables in the mediation process that depend on the local culture.¹³⁴ For example, whether or not the parties have lawyers, and if so, whether those lawyers attend the mediation may be a result of established norms in the area.¹³⁵ In addition, the background of the mediator may have an effect on whether the negotiation focuses on legal issues and rules or on emotional and therapeutic issues.¹³⁶ A common concern in mediation, however, is that the mediator's neutrality may pose a problem when the parties are unable to effectively negotiate with one another.¹³⁷ The disadvantaged party may not have his or her interests protected during the mediation.¹³⁸ Collaborative law differs from mediation in that it provides each party with a lawyer who is able to provide legal advice and advocacy.¹³⁹ Yet, at the same time, the disqualification agreement and the collaborative law culture have the unique effect of providing incentives for lawyers to settle the matter through negotiation rather than have their clients withdraw and pursue litigation.¹⁴⁰

¹³⁰ See John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004) (exploring the development of various alternative dispute resolution methods, including collaborative law, within the practice of family law in the United States).

¹³¹ *Id.*

¹³² See Dori Cohen, *Making Alternative Dispute Resolution (ADR) Less Alternative: The Need For ADR As Both A Mandatory Continuing Legal Education Requirement And A Bar Exam Topic*, 44 FAM. CT. REV. 640, 642 (2006).

¹³³ Lande & Herman, *supra* note 130, at 282.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*; see also TESLER, *supra* note 109, at 3 n.8 (highlighting that "foot-dragging and other less-than-good faith orientations to the mediation can render effective mediation by a single neutral professional difficult or can compromise the evenhandedness and stability of mediated outcome.").

¹³⁸ See Lande & Herman, *supra* note 130.

¹³⁹ *Id.* at 282 ("As advocates, collaborative lawyers are not required to be neutral and thus can strongly present clients' interests and position, compensating for clients' difficulties in doing so.").

¹⁴⁰ See Gregg Herman, *ADR and Family Law*, 14 DISP. RESOL. MAG. 37, 39 (2008) ("The goal is to make the cost of failure to everyone so extreme that settlement becomes almost an

Collaborative law also differs from cooperative law, another alternative dispute resolution method gaining popularity in the field of matrimonial law. Cooperative law is a relatively small movement that is similar to collaborative law except that it does not incorporate the disqualification agreement.¹⁴¹ Rather, the process includes a written agreement to make full, voluntary disclosure of all financial information, avoid formal discovery procedures, utilize joint rather than unilateral appraisals, and use interest-based negotiation.¹⁴² The result is that a client engaged in the cooperative law method is able to withdraw from negotiations and litigate the dispute without having to hire and educate a new lawyer.¹⁴³

Furthermore, collaborative law, unlike other forms of alternative dispute resolution, is not governed by court or jurisdictional rules.¹⁴⁴ The result is to free the parties from “trial or filing dates, as well as ‘surprise court orders based upon spite or revenge,’”¹⁴⁵ and to allow the parties “to conclude their agreement at their own pace.”¹⁴⁶ The lack of time constraints provides lawyers the opportunity to remove a difficult client from the negotiation table and work with the client on getting back to the process.¹⁴⁷ Collaborative law remains a unique method of alternative dispute resolution, as “[o]nly in collaborative practice is the option-generating and negotiating process conducted by two trained legal advocates committed to consensual dispute resolution and skilled in interest-based bargaining who share a commitment to help clients stay on the high road and discover common ground for solutions.”¹⁴⁸

D. Ethical Considerations

At first glance, the collaborative process may seem at odds with several of the professional conduct rules, including rules relating to zealous advocacy, limitation on scope of representation, con-

imperative. The theory is to entirely remove the threat of litigation from the settlement process.”).

¹⁴¹ See Lande & Herman, *supra* note 130.

¹⁴² See *id.*

¹⁴³ *Id.*

¹⁴⁴ See Strickland, *supra* note 122.

¹⁴⁵ Schouten, *supra* note 13, at 128 (quoting Strickland, *supra* note 122, at 986).

¹⁴⁶ *Id.*

¹⁴⁷ See Strickland, *supra* note 122, at 988.

¹⁴⁸ Tesler, *supra* note 110, at 330.

flict of interest, confidentiality and withdrawal from representation.¹⁴⁹ However, a number of state bars have analyzed the collaborative law practice and with one exception have concluded that "it is not inherently inconsistent with the Model Rules."¹⁵⁰ The first issue was whether collaborative lawyers are able to *zealously advocate* for their clients' interests if they are also required to work cooperatively with opposing counsel, and if they are unable to pursue litigation.¹⁵¹ This concern remains unwarranted, as collaborative law lawyers are required to advance their clients' interests by advising and negotiating accordingly, and "negotiation does not necessarily imply a lack of zeal."¹⁵² In addition, the lawyers exhibiting concern for the other parties' interests may at times better serve their own clients' interests.¹⁵³

The second issue that posed a potential ethical dilemma was the supposed conflict of interests. Collaborative law groups are made up of lawyers organized to "engage in common activities and, as such, may be seen to resemble law firms in certain respects."¹⁵⁴ This issue implicated Model Rule 1.7, concerning the possibility of conflicting interests between clients represented by related counsel.¹⁵⁵ However, after analyzing the rules, as well as one ethics committee opinion that has addressed the matter, Professor John Lande concluded that collaborative law practice groups probably would not be considered firms under the Model Rule, considering that members "do not hold themselves out as a firm or share access to client information," and as a result the method is not at odds with the Model Rules.¹⁵⁶

A third potential issue arose concerning the attorney's ability to maintain client confidentiality while at the same time participating in the full and open disclosure necessary to the collaborative law process. Rule 1.6 of the Model Rules states "[a] lawyer shall not reveal information relating to the representation of a client un-

¹⁴⁹ John Lande, *Possibilities for Collaborative Law: Ethics and Practice of Lawyer Disqualification and Process Control in a New Model of Lawyering*, 64 OHIO ST. L. J. 1315, 1330-31 (2003).

¹⁵⁰ *Ethical Considerations in Collaborative Law Practice*, 2002 A.B.A. STANDING COMMITTEE ON ETHICS & PROF. RESP., Aug. 9, 2007, at 2. Colorado is the only opinion to conclude that a non-consentable conflict arises in collaborative practice.

¹⁵¹ See Lande, *supra* note 149, at 1331.

¹⁵² *Id.* at 1335.

¹⁵³ *Id.*

¹⁵⁴ Schwab, *supra* note 106, at 364.

¹⁵⁵ MODEL RULES OF PROF'L CONDUCT R. 1.7(A) (Discussion Draft 1983).

¹⁵⁶ Schwab, *supra* note 106, at 364.

less the client gives informed consent.”¹⁵⁷ Collaborative law maintains that a lawyer is “bound by the voluntary ethical undertakings of the collaborative process to refuse to go forward unless the information is disclosed.”¹⁵⁸ Thus, in a situation in which a client reveals a relevant and prejudicial piece of information to his collaborative lawyer, the attorney may either withdraw or obtain the client’s informed consent to make the disclosure.¹⁵⁹ Either case avoids any type of conflict with the Model Rules.

The last area of concern was the disqualification agreement. Legal ethics rules restrict the lawyer’s authority to withdraw from representation and to use retainer agreements authorizing withdrawal.¹⁶⁰ The collaborative law disqualification agreements, however, differ substantially from traditional withdrawal agreements, which may place “excessive pressure on clients to settle.”¹⁶¹ The collaborative model requires the attorneys to “facilitate the transfer to successor counsel,” which may mean exchanging necessary information or helping a client find another lawyer.¹⁶² In either case, such behavior satisfies the attorney’s professional responsibilities. After considering these same aforementioned issues, the ABA recently advised that:

Before representing a client in a collaborative law process, a lawyer must advise the client of the benefits and risks of participation in the process. If the client has given his or her informed consent, the lawyer may represent the client in the collaborative law process. A lawyer who engages in collaborative resolution

¹⁵⁷ MODEL RULES OF PROF’L CONDUCT R. 1.6 (Discussion Draft 1983).

¹⁵⁸ Schwab, *supra* note 106, at 364.

¹⁵⁹ *See id.*

¹⁶⁰ *See* Lande, *supra* note 149, at 1344.

¹⁶¹ Disqualification agreements differ from traditional withdrawal agreements in at least five ways. First, in collaborative law if the client wants to litigate the disqualification agreement requires the client to discharge his or her lawyer; the lawyers themselves do not suddenly threaten to withdraw. Second, the disqualification agreement is the central element of the collaborative law arrangement and clients are well informed. This is usually not the case in traditional retainer agreements where clients may not have understood the boilerplate language. Third, the disqualification agreement in collaborative law is used to benefit the clients, not the lawyers. In traditional withdrawal agreements the lawyers are protecting themselves from clients “who take possibly unreasonable risks to try cases rather than accept particular offers.” Fourth, the timing of the invocation of the withdrawal differs between the two processes. In traditional withdrawal, the case will usually be in litigation, while in collaborative law the litigation will not have even started. The fifth distinction and perhaps the most problematic, is that the unlike in traditional withdrawal provisions, collaborative law disqualification agreements allow any party’s action to force the discharge of the other party’s lawyer. *See id.* at 1351–54.

¹⁶² Schwab, *supra* note 106, at 365.

processes still is bound by the rules of professional conduct, including the duties of competence and diligence.¹⁶³

According to this ABA opinion, collaborative law may be practiced in a manner that fits well within the proscribed guidelines of the Model Code of Professional Responsibility.

III. COLLABORATIVE LAW: HANDICAPPED BY NEW YORK'S HOSTILE FAULT-BASED DIVORCE SCHEME

A. Applying a Band-Aid When Stitches are Needed: Collaborative Law Not A Strong Enough Remedy for New York's Ailing Couples

Judge Kaye, a long time proponent of no-fault divorce, has now resolved to bring collaborative law to New York State. In her annual address on the judiciary in 2007, the Chief Judge of New York announced plans to build the Collaborative Family Law Center.¹⁶⁴ The center, which will serve all five boroughs, "is intended to make divorce faster and cheaper for couples who want amicable settlements."¹⁶⁵ The project, which did not require legislative approval, will serve as a pilot project on alternative approaches to divorce.¹⁶⁶ Uncharacteristically, New York will be the first state to offer state-funded staff attorneys and pro bono services.¹⁶⁷ In Judge Kaye's words, "spouses who choose this approach will find that the financial and emotional cost of divorce is reduced for everyone involved — surely a step in the right direction."¹⁶⁸

Still the question remains, will the Center have any real effect for those couples most affected by New York's stringent requirements? As Judge Kaye stated, the center will help couples who "choose this approach," but what about couples in which both spouses are not committed to pursuing a separation or divorce?

¹⁶³ *Ethical Considerations in Collaborative Law Practice*, A.B.A. STANDING COMMITTEE ON ETHICS & PROF. RESP., *supra* note 150, at 1 n.1 (stating "this opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through February 2007.").

¹⁶⁴ See Hakim, *supra* note 11.

¹⁶⁵ *Id.*

¹⁶⁶ See *id.*

¹⁶⁷ See Heidi Bruggnik, *Detoxifying Divorce*, JUDICIAL REPORTS, http://www.judicialreports.com/2007/11/the_cooperative_splitup.php.

¹⁶⁸ Hakim, *supra* note 11.

New York's current reliance on fault creates the possibility that one party may ensure that a divorce is not available to the other spouse. If one spouse in the marriage does not want to even entertain the issue of divorce, he or she has the ability to indefinitely stop the proceedings.¹⁶⁹ Unless there is "fault" to allege against such a party, a spouse in search of a divorce may be trapped in a marriage with few practical options. Unfortunately, collaborative law is not suited to deal with these types of situations. Collaborative law focuses on the husband and wife working together to make difficult decisions about all aspects of the divorce.¹⁷⁰ The method forces a couple to sit down together with their attorneys in order to create an agreement.¹⁷¹ However, the New York family law scheme creates incentives for both spouses to try to prove that the other has "committed blameworthy acts." The most important asset in this scheme is a "get-tough lawyer" who will bring all of their "advocacy and adversarial tools to the matrimonial court, along with the high costs of litigation both financial and emotional."¹⁷² As long as New York continues to be a fault-dominated system, the state will continue to promote an adversarial process.¹⁷³ A potential method for gaining added support for the Center would be to pursue statutory approval. Such action will potentially have the effect of offering more legitimacy to the method and may begin to shift New York's divorce culture to a more collaborative attitude.

B. The Need for Statutory Approval

Though the future Collaborative Family Law Center of New York City did not need legislative approval, it is just such approval and statutory recognition of the collaborative law method that will most aid the Center's popularity and effectiveness.¹⁷⁴ New York should follow the lead of states such as Texas and North Carolina. In 2001, Texas was the first state to adopt a statute specifically rec-

¹⁶⁹ See N.Y. DOM. REL. LAW § 170 (CONSOL. 2008). Unless one spouse is able to allege one of the enumerated faults the only other avenue for a divorce is for the parties to agree to the terms of a separation agreement. If one party refuses to participate in the agreement then the court is left with no statutorily recognized avenue through which to grant the divorce.

¹⁷⁰ See Johnson, *supra* note 52.

¹⁷¹ See *id.*

¹⁷² *Id.*

¹⁷³ See *id.*

¹⁷⁴ See generally Strickland, *supra* note 122 (discussing the various benefits from states adopting collaborative law statutes).

ognizing the collaborative legal practice.¹⁷⁵ The Texas code defines Collaborative law as:

a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.¹⁷⁶

The Texas statute also allows parties to form a written agreement to conduct the dissolution of their marriage, as well as providing the definition produced above.¹⁷⁷ In 2003, North Carolina followed suit, adopting a similar statute, though more detailed.¹⁷⁸ The North Carolina statute includes definitions, including the basic definitions for collaborative law, collaborative law agreements, collaborative law procedures, collaborative law settlement agreements, and third-party experts. In addition, the North Carolina statute "expressly states that a valid collaborative law agreement tolls all legal deadlines, including statutes of limitation, setting trial and hearing dates, filing and discovery deadlines, and scheduling orders."¹⁷⁹

The California Legislature has also recently codified the collaborative law process through Chapter 496.¹⁸⁰ The bill allows the parties, by written agreement, to utilize a collaborative law process, rather than an adversarial judicial proceeding to resolve those disputes.¹⁸¹ As California Assembly Member Dymally states, "Chapter 496 'recognize[s] and encourage[s] the process of collaborative law as a legitimate means by which to resolve and complete dissolution proceedings.'"¹⁸² He further went on to explain that "legitimizing the collaborative law process through codification will result in practitioners and judges alike supporting and encouraging it."¹⁸³ Like in Texas, it was important for the California legislature

¹⁷⁵ TEX. FAM. CODE ANN. §§ 6.603, 153.0072 (Vernon 2001 & Supp. 2005).

¹⁷⁶ TEX. FAM. CODE ANN. §§ 6.603(b) (Vernon 2001).

¹⁷⁷ See Strickland, *supra* note 122, at 988–89.

¹⁷⁸ N.C. GEN. STAT. ANN. §§ 50–70, 50–79 (West 2003).

¹⁷⁹ Strickland, *supra* note 122, at 991.

¹⁸⁰ See Schouten, *supra* note 13, at 126.

¹⁸¹ CAL. FAM. CODE § 2013(a) (Deering 2008) (enacted by Chapter 496).

¹⁸² Schouten, *supra* note 13, at 132.

¹⁸³ *Id.*

to pass legislation that would prohibit court intervention.¹⁸⁴ Otherwise, the local court rules, such as mandatory conferencing and scheduling requirements, would sanction the parties and counselors even when they all agreed to resolve their issue privately.¹⁸⁵ California's pending legislation is indicative of the need in New York to pass similar legislation, codifying the collaborative law process. Avoiding legislative approval will only have the effect of further debilitating the method's ability to help New York couples reach amicable settlements. As Mr. Crouch of Americans for Divorce Reform states, "[T]here are some people who believe that the law makes absolutely no difference in human behavior, but I don't believe that. It's part of changing the culture, especially laws that are intelligently designed so they don't just affect what goes on in the courtroom; they actually become part of people's beliefs about what duties they owe to each other — become part of the rules of life."¹⁸⁶ Integrating collaborative law into the New York legal landscape is a necessary step in the divorce reform process.

C. The Proposed Uniform Collaborative Law Act

In 2007, in an attempt to standardize the collaborative law legislation around the country, the National Conference of Commissioners on Uniform State Laws introduced a draft of the Collaborative Law Act.¹⁸⁷ The Act defines and regulates the collaborative law process but does not regulate the professional responsibility obligations of counsel, as these are established by the rules of professional responsibility.¹⁸⁸ The Act lists three main goals: (1) to establish minimum terms and conditions for Collaborative Law Participation Agreements designed to help ensure that parties considering participating in collaborative law enter into the process with informed consent, (2) to describe the appropriate re-

¹⁸⁴ See *id.* at 134.

¹⁸⁵ See *id.*

¹⁸⁶ Brad Knickerbocker, *More States Stir Against Ease of No-Fault Divorce*, CHRISTIAN SCI. MONITOR, Feb. 1, 2005, available at <http://news.public.findlaw.com/csmonitor/s/20050201/20050201091506.html>.

¹⁸⁷ COLLABORATIVE LAW ACT, available at <http://www.law.upenn.edu/bll/archives/ulc/ucla/oct2007draft.htm> (proposed draft for discussion only, Aug 28, 2007). The ideas and conclusions set forth in the draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter.

¹⁸⁸ See *id.*

lationship of collaborative law with the justice system and (3) to meet the reasonable expectations of parties and counsel for confidentiality of communications during the collaborative law process by incorporating evidentiary privilege provisions based on those provided for mediation communications in the Uniform Mediation Act.¹⁸⁹ The Act is careful not to regulate in detail how collaborative law should be conducted, rather it "aims to establish a platform for the recognition and future development" of the process.¹⁹⁰ The draft of the act also includes thoughts on the importance of a uniform act due to the potential for collaborative law processes to be carried out through conference calls between counsel and parties in different states and even over the Internet.¹⁹¹ As the drafters state, "[A] Uniform Collaborative Law Act will help bring order and understanding of the Collaborative Law Process across state lines, and encourage the growth and development of Collaborative Law in a number of ways."¹⁹² The Act would help ensure that Collaborative Law Agreements entered into in one state are enforceable in another state if one of the parties moves or relocates.¹⁹³ It would also ensure more predictable results if a communication made in a collaborative law process in one state is sought in litigation or other legal processes in another state.¹⁹⁴ The proposed draft of the Uniform Collaborative Law Act provides New York with a model on how it should structure its own legislation and highlights the importance of statutory recognition and codification within each state.¹⁹⁵

IV. CONCLUSION

A change in the law cannot be expected to occur overnight, or even in a year, but after over four decades since the first no-fault provision was adopted, the New York Legislature still refuses to

¹⁸⁹ *Id.* at 7–8.

¹⁹⁰ *Id.* at 8.

¹⁹¹ *See id.* at 11.

¹⁹² *Id.*

¹⁹³ *See* COLLABORATIVE LAW ACT, *supra* note 187, at 11.

¹⁹⁴ *See id.* ("Without uniformity, there can be no firm assurance in any state that a privilege for communications during the Collaborative Law Process will be recognized. Uniformity will add certainty on these issues, and thus will encourage better-informed party self-determination about whether to participate in Collaborative Law.").

¹⁹⁵ COLLABORATIVE LAW ACT, *available at*, http://www.law.upenn.edu/bll/archives/ulc/ucla/2008june_interim.htm (proposed draft for discussion only, June 4, 2008) (this is the most current proposed draft).

budge. Societal mores have changed, and laws regulating family life should follow suit. Twenty-first century marriages are no longer characterized as “for life.” Rather, individuals and the government are aware of the bleak statistics concerning divorce rates.¹⁹⁶ The current problem facing marital law is a state, such as New York, which blindly and stubbornly holds onto a view of marriage that is outdated and impractical. In New York, marriage has the potential of becoming an unbreakable and never-ending relationship, regardless of the wishes of one or both of the parties.¹⁹⁷

Facing an impasse in the legislature, Judge Kaye has turned her attention to collaborative law. The plan is forward thinking and as “years of experience with collaborative law indicates . . . no other dispute-resolution modality matches collaborative law in its ability to manage conflict, elicit creative ‘out of the box’ solutions, and support parties in realizing their highest intentions for their lives after the legal process is over.”¹⁹⁸ As seen in other states, such as Texas and California, collaborative law is a vital and beneficial tool for couples attempting to reach a divorce settlement, and has the ability to more aptly deal with “complex family situations than does traditional litigation.”¹⁹⁹ While New York’s plan to provide staff attorneys and pro bono services at the Collaborative Family Law Center is innovative, the Center still lacks the legitimacy to have a tangible impact on New York residents. At the most basic level, codification of the collaborative law process is necessary to achieve these ends.²⁰⁰

In addition, efforts must not be removed from the ultimate goal of introducing true no-fault divorce in New York. The collaborative law process is just a starting point to alleviating some of the problems facing divorcing couples in New York. Though the Collaborative Family Law Center proposed by Judge Kaye is a step in the right direction, it does little to actually lessen the strain of the practical absence of no-fault divorce. Arguably, the creation of the Family Law Center in New York City will “help make divorce faster and cheaper for some couples who want an amicable settlement. . . . [b]ut as [Judge Kaye] well recognizes, it is no substitute

¹⁹⁶ In the year 2005, the most recent statistics available, the divorce rate was 3.6 per 1,000 population. See *Births, Marriages, Divorces and Deaths*, 54 NAT’L VITAL STAT. REP. 20, July 21, 2006.

¹⁹⁷ Strickland, *supra* note 122, at 995.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 995–96.

²⁰⁰ *Id.* at 992 (discussing how statutes have begun to give “definition and clarity to a growing branch of [the] law.”).

for having New York finally join the rest of the country in enacting a no-fault divorce provision to curtail the lying and finger-pointing that make negotiations a lot uglier, costlier and longer than they have to be.”²⁰¹ As New York State Supreme Court Justice Judith Gische states, “[t]he lack of no-fault is a legal thing that needs to be changed . . . even in collaborative law you still need to go to court and get a judgment by a ground that’s recognized.”²⁰² The heart of the problem is clear: New York needs to join the rest of the nation and provide its residents with the option of filing for a unilateral, no-fault divorce. Patchwork fixes such as this Collaborative Law Center are only temporary and disjointed attempts at alleviating a problem far more expansive and pervasive.

Judge Kaye deserves praise for her efforts in the area of family law in New York. She has become a pioneer of reform and has repeatedly brought attention to and highlighted the deficiencies in the current fault-based system. Collaborative law is a novel and much needed improvement to the current hostile and entrenched nature of divorce proceedings. Unfortunately, the landscape of New York divorce law is so saturated with fault that it will most likely prove to be an infertile place for the collaborative law method to truly take hold and flourish.

²⁰¹ *Upgrading New York’s Courts*, N.Y. TIMES, Mar. 11, 2007, at 14WC.

²⁰² Bruggink, *supra* note 167.

