PREFACE TO THE 2024-2025 EDITION

In the Preface to the First Edition of Law and the Family New York, which was published in 1966, Professor Henry H. Foster and Dr. Doris Jonas Freed wrote:

> An attempt has been made in these volumes to place family law in its social context and to comment upon existing law in terms of social purpose and social consequence. It is hoped that a realistic approach has been made and that there has been a sufficient awareness of social change that inevitably shapes law or practice. Volume I deals with the termination of marriage by Divorce, Separation, and Annulment, and touches upon the status of marriage itself. Volume II is intended to cover the Economic Aspects of Marriage and Divorce, including temporary and permanent alimony, counsel fees, support, and child custody. Future volumes are planned to cover family rights and liabilities, both inter se and as to strangers, and the Family Court Act and its various provisions.
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> Our objective has been a functional one and it is hoped that each volume will be of practical use to the practitioners of family law. We have not attempted a definitive treatise on family law nor to compile a work that would appeal primarily to scholars in the field. Emphasis has been placed upon existing law. But in addition to the citation of current authority, we have made an effort to anticipate change and to relate decisions to observable tendencies and trends in basic public policy. We expect to supplement, expand, or revise this commentary on New York family law as changing law and circumstances warrant. In this field, the final chapter is never written.

At the time that Preface was written, adultery was the only ground for divorce in New York, the custody of children was almost always awarded to the mother and only husbands could be directed to pay alimony, child support, and counsel fees.

The New York Divorce Reform Law (Laws of 1966, Ch. 254) was signed by the Governor on April 27, 1966. Most of the law, including the additional grounds for divorce, became effective September 1, 1967. Perhaps the outstanding achievement of this reform legislation was the omission of any of the traditional defenses to the new grounds for divorce. The new grounds included abandonment, cruel and inhuman treatment, imprisonment for a year, and living separate and apart pursuant to a separation agreement or decree. The latter two separation grounds [DRL

§ § 170(5) and (6)] were intended to serve as no-fault grounds for divorce, and in *Gleason v. Gleason*,[1] the constitutionality of the grounds and their retroactive application were sustained.

Volume 1 of Law and the Family New York was revised in 1972 by Professor Foster and Dr. Freed. At that time the authors wrote about the 1966 Divorce Reform Law:

> Although there have been and will be revisions of the Divorce Reform Law, a definite pattern has emerged. New York has retained the fault ground of adultery, to which the traditional defenses apply, has added the additional fault grounds of abandonment, imprisonment, and cruel and inhuman treatment, and has superimposed separation pursuant to an agreement or decree as an alternative to divorce based on fault. However, some but not all dead marriages may be terminated by divorce and there must be either an agreement or a decree of separation. Illogically, it makes no difference under the Divorce Reform Law that there is a marriage that is irretrievably broken down if there is no separation agreement or decree of legal separation. A spiteful spouse may bar the other party from divorce by not signing an agreement or obtaining a decree. .... The public policy espoused in the *Gleason* decision, namely, that there is a public interest in the termination of dead marriages, should lend encouragement to the enactment of a broader separation or irretrievable breakdown ground for divorce, or the deletion of the requirement that separation be pursuant to a separation agreement or decree.

On March 5, 1979, the Supreme Court of the United States, rendered its momentous decision in *Orr v. Orr* and its companion case from New York, *Childs v. Childs*.[2] *Orr v. Orr* held that gender-based alimony statutes are unconstitutional under the Equal Protection Clause of the United States Constitution. An important by-product of *Orr v. Orr* was that it mandated a rewriting of the New York Alimony Law and provided the opportunity for the enactment of the 1980 Equitable Distribution Law, but the irretrievable breakdown ground for divorce remained elusive for many years.

On July 19, 1980, real reform came to New York with the enactment of the New York Equitable Distribution Law which adopted the premise that contemporary marriage involves an "economic partnership." Under the Equitable Distribution Law, "fault" is one of the factors that may be considered by the court in making an equitable distribution of marital property. Either party

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[1] Gleason v. Gleason, 26 N.Y.2d 28, 308 N.Y.S.2d 347, 256 N.E.2d 513 (1970).

[2] Orr v. Orr, 440 U.S. 268, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979); Childs v. Childs, 99 S.Ct. 1488, 60 A.D.2d 639, 440 U.S. 952, 99 S. Ct. 1488, 374 N.E.2d 1247, 59 L. Ed. 2d 766 (1979), on remand, 69 A.D.2d 406, 419 N.Y.S.2d 533 (2d Dep't 1979), cert. den and app. dismd, 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253 (1980).

may be awarded post-divorce maintenance according to a statutory formula and the pre-separation standard of living is one of 15 factors for the court to consider if it decides to make an upward or downward adjustment in the formula amount. The term "marital property" is broad and expansive. While "marital property" is equitably distributed, equitable does not mean equal, and the attorney for the non-title holding spouse has the burden of establishing what is in the "marital pot," as well as its value, while a lawyer who claims his clients' property is "separate" must prove it.

I joined Harry and Doris as their co-author in 1985 and my name appeared in the 1986 Cumulative Supplement to Law and the Family New York. Law and the Family New York Second Edition, by Foster, Freed and Brandes was published in 1987. The Second Edition was expanded to nine volumes by 1999 with the addition of the two Child Custody, Child Support, and Appellate Practice volumes drafted in 1997 and the two Family Court volumes drafted in 1998 and 1999 with the assistance of Bari Brandes (now Corbin) of the New York Bar.

With the enactment of the Equitable Distribution Law, the focus of the trial moved away from proving grounds for divorce sufficient to bar a guilty wife from receiving alimony. New York remained a "fault" state until 2011 when it adopted the irretrievable breakdown ground for a divorce. However, New York still requires a dissolution of the marriage before the court can "equitably distribute" the fruits of the marital partnership. Although New Yorkers can obtain a "no-fault" divorce on irretrievable breakdown grounds, the marriage may not be dissolved on this basis until all the ancillary issues between the parties are resolved by agreement or trial.

Law and the Family New York has been expanded to twelve volumes since 1966 with the changes in the law to become a definitive treatise on New York Family Law. The emphasis in Law and the Family New York 2024-2025 Edition is upon existing New York law as well as Interstate Conventions, Federal Law, and International treaties that affect and govern portions of New York Family Law. Last year I added a chapter on Native American Domestic Relations which has been expanded in the 2024 Edition. The 2024 Edition also contains new chapters on electronic filing in the Supreme Court and in the Appellate Division. We expect to continue to supplement and/or revise this work as changing laws and circumstances warrant. As Professor Foster and Dr. Freed wrote in 1966: "In this field, the final chapter is never written."

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