



Family Law News

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Adultery: Who Cares. /?/!/*@%#!

By: Lindsay Parvis, Esquire

Do we care about the role of adultery in our cases? Does the Court? Should our clients care (as much as they do)? And, should we care more?

Many of us would say adultery has little or no impact on the outcome of a case. Perhaps more precisely, it should be said that adultery has an unknowable and unpredictable impact. That said, perhaps we jaded practitioners dismiss its importance to our clients and relevance to the court if properly presented.

Legal and Historical Context

While we all know that adultery is relevant as a ground, a circumstance contributing to the parties' estrangement (monetary award and alimony), and to custody as relates to the child(ren)'s welfare, why do we care legally?

The Reports of the Governor's Commission on Domestic Relations Laws (available in PDF on the Maryland State Law Library's Online Catalog) provide interesting insight:

Alimony "[T]o frame a proposal that would provide the fairest possible outcome of the alimony problem for most divorcing parties in this State, while vesting the Judiciary with discretion adequate to make special provision for the special virtues of Galahad and Griselda, and the special vices of Jezebel and Mr. Hyde" (January 1982 Report). "It is contrary to common experience to suppose that a Court will in fact ignore the comparative rectitude of the parties and regard virtue and vice in the same light, and it is contrary to the principles of equity that a Court should do so." (January 1980 Report)

Monetary Award "As virtue, embodied in the respective contributions of the spouses to the well-being of the family which is involved in the first factor, is relevant to the rights and equities of the parties in their marital property, so also is its correlative of fault, embodied in the fourth factor, which refers to the circum-

stances and facts which contributed to their estrangement...[C]ertainly equity requires that the listed factors be weighed by the Court and that the parties' contribution to the familial well-being and their contribution to familial ill-being both be considered." (January 1978 Report)

Grounds The Commission's Report (January 1982) is remarkably devoid of discussion, except as relates to recrimination and condonation.

What Adultery Is

Adultery is voluntary sexual intercourse between a married person and a person who is not their spouse. *Flood v. Flood*, 24 Md.App. 395, fn. 1 (1975). In the absence of direct personal observation of the act, circumstantial evidence from which a court can infer the adultery occurred is necessary to prove adultery. *Dougherty v. Dougherty*, 187 Md. 21, 27-28 (1946). Specifically, the spouse alleging adultery has the burden of showing, with corroboration, an adulterous spouse's disposition to commit adultery with the paramour and opportunity to commit adultery. *Id.* Mere suspicion and indiscretion alone are insufficient proof. *Donovan v. Scuderi*, 51 Md.App. 217, 222-223 (1982), internal citations omitted.

A Reality Check

No matter what the law says or intended, who cares and how much? A survey of practitioners in the real world sheds light...

According to **Carlos M. Lastra, Esquire**, a partner at Brodsky, Renehan, Pearlstein, Lastra & Bouquet in Gaithersburg, Maryland:

Adultery can be persuasive when it is the reason for the estrangement, as opposed to a symptom. When adultery is at issue, focus on whether marital income and assets were diverted in result. Where adultery caused the estrangement, despite no tangible financial effects, presenting the required proof can also benefit the client's feeling s/he was heard and so got a fair trial. When weighing whether and how to present adultery to the court, preparation is key: to show the level of deception, length and breadth of adultery, impact in the client's specific case (such as adultery continuing during marriage counseling, using adultery to attack the wronged spouse), and impact on adulterer's credibility.

From **Regina DeMeo, Esquire**, Senior Counsel with Joseph Greenwald & Laake's Rockville office and current Co-President of Collaborative Divorce Association, Inc.:

From Where I sit...(Continued from page 4)

- 13 *Durkee v. Durkee*, 144 Md. App. 161 (2002)
- 14 *Id.*, 144 Md. App. at 186
- 15 *Stull v. Stull*, 144 Md. App. 237 (2002)
- 16 *Petitto v. Petitto*, 147 Md. App. 280 (2002)
- 17 *Petitto v. Petitto*, 147 Md. App. 280 (2002)
- 18 *John O. v. Jane O.*, 90 Md. App. 406, (1992)

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The most painful reality is that at the end of the day, the court may not be able to compensate someone who dedicated 20 faithful years to his/her family, only to have the other spouse run off with a younger model. The best advice I can give these clients is to seek counseling immediately, so that they can air their feelings, start the healing process, and hopefully get their emotions under control so that they can make sound financial decisions with respect to their legal divorce (which is different from the emotional divorce that may not come until much later.)

I am reminded of a quote I found in a fortune cookie not long ago: Love is like War, so easy to start, so difficult to stop. But it is our job to stop the war, and not feed into the anger our clients are feeling. It is our duty to be the voice of reason.

Ronald Bergman, Esquire of Houlon, Berman, Bergman, Finci, Levenstein & Skok, with offices in Greenbelt and Rockville, gives a broad view:

I have been practicing family law for over 35 years across the state. When I first started practicing, the issue of adultery carried some weight in some of the more conservative counties, and slightly affected alimony, marital property and attorney's fees awards. Mediation was uncommon in the 70's and early 80's. During the initial interview process, the clients were greatly concerned about the impact of adultery, and despite some reassurance that it wouldn't make a large impact, that attitude oftentimes carried through during the mediation process. So, for negotiation purposes, there was still leverage.

During the last 20-25 years, the affect of allegations of adultery has had much less of an impact on the outcome of cases in both mediation and litigation, except for monetary awards and settlements involving attorney's fees. However, regardless of your advice, the client's attitude can still be emotional and adversely impact the handling of the case.

Darcy Shoop, Esquire, a solo collaborative divorce attorney in Rockville and Past-President of Maryland Collaborative Practice Council and Collaborative Divorce Association, Inc., weighs in on the impact in the collaborative process:

In collaborative cases, acknowledgement of, rather than blame for, a sexual relationship outside the marriage can be important to help move settlement forward. Often the deep hurt and sense of betrayal felt by one spouse can be contained if those feelings are recognized by the other spouse. In one case, a spouse continued to deny such a relationship and the anger so obviously experienced by the other spouse during collaborative meetings created an almost insurmountable obstacle to productive discussion. The spouse who had the relationship was encouraged privately by the collaborative coach and lawyer to reveal the truth. At the next meeting, the relationship was confirmed and

regrets were expressed by that spouse. The other spouse said the confirmation was critical in helping to process the anger. The case ultimately reached amicable resolution.

Jeffrey N. Greenblatt, Esquire, of The Law Office of Jeffrey N. Greenblatt in Montgomery County, provides practical advice:

Clients think adultery is the be all, end all, whereas, if all else is equal, it alone rarely has a significant impact on most judges, who usually don't exact revenge upon the errant spouse. His greatest success pursuing an adulterous spouse arose from flagrant adultery, as if to purposefully hurt his client, coupled with outrageous expenditures on the paramour. The cost of pursuing an adultery claim must be weighed, and can be significant depending upon where the adultery occurs. There is a cost-benefit analysis for clients when deciding whether to spend \$10,000 - \$15,000 in investigative costs to prove the adultery when there is uncertainty as to what benefit the client would derive, if any (since no attorney can know if a client will be \$10,000-\$15,000 better off in the end). If the cost is less, then the decision is easier. A tip: It is usually cheaper to hire a private investigator here, even if you need to pay for their travel to investigate out of state/country because the cost at the time of trial is likely to be less, and you have the security of knowing that the investigator is close at hand.

Kenneth D'Angelo, a private investigator and founder of Target Investigations in Gaithersburg, provides a unique view:

His cases tend to fall into two categories: 1) proving grounds with opportunity and disposition; or, 2) custody matters, documenting impact of the adultery on the children (mistreatment, drug/alcohol use) and spending time away from family and money on a paramour instead of on the child(ren). For many clients, the key question is whether their spouse is telling the truth or lying. Ken finds clients are satisfied when they find out the truth, because until that point the client is in a quandary about whether or not to believe their spouse. In his experience as a fact witness, judges do not tend to make a huge case out of adultery - they prefer to establish the facts, prove the grounds, and move on. His tips for attorneys: Whether you are hands on or hands off, advise the private investigator what you want done and where to focus so the client's dollars are used wisely; don't overlook the emotional component by dismissing the adultery - clients need closure.

Karen Freed, LCSW-C, BCD, a therapist and collaborative divorce coach in Bethesda, offers the following advice:

The sense of betrayal is extremely deep and painful for the non-adulterer, and a constant point of tension is how much detail they

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need to know versus how destructive the knowledge will be. For attorneys, it is important not to minimize the impact of the affair on both parties, not just the non-adulterer spouse (as an adulterer's guilt can urge him/her to give up everything or be an obstacle to resolution if ignored). Attorneys should not use the affair as a whipping boy to gain advantage in the case; whether there is one affair or many, a betrayal is a betrayal and spouses need to find a way to move past this in negotiations and to coparent.

The Honorable Ann Sundt, Retired Judge of the Circuit Court for Montgomery County and Mediator with Creative Dispute Resolutions in Gaithersburg, brings two very helpful perspectives:

While adultery is alive and well, effective attorneys know there is no compensation for a broken heart. An attorney should do more than present a sobbing client in court; the judge wants to know what you want the judge to do. Answer that question with quantified financial damages as if it were any other type of damages case. Is there a period of time without expectation that the "wronged" spouse would work because of depression/grief/betrayal? Is there a need for mental health treatment and what is the cost? Should the therapist be called as witness? Is the adulterer lying or not respecting rules & procedures elsewhere? Make sure your client is prepared for this and understands that a sympathy play alone is not enough because judges are limited in how they can respond empathetically in fashioning a remedy.

In mediation, the issues can be explored more specifically, including the parties' positions resulting from the betrayal and

how these manifest as settlement demands. This is especially so when the "wronged" spouse finds themselves questioning everything and having confidence in nothing. It can be a great moment when in mediation an adulterer says "I never meant to hurt you. I did not realize the pain I would cause you." A mediator can show an aggrieved party that s/he feels badly for their pain; a judge cannot due to perceptions of bias.

Conclusion

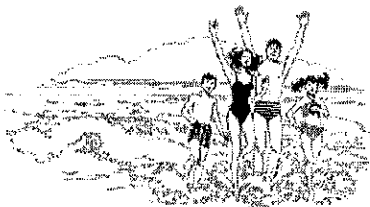
Adultery is indeed alive and well. As attorneys, we operate in logic and reason, so tend to dismiss the impact of adultery on the bottom line because there is no tangible financial benefit and the cost to obtain proof may not be justified when other grounds exist. An emotional issue, adultery seemingly takes us outside of logic and reason. Because our clients and the law care, in the end, so should we.

Through informed client cost/benefit discussions, efficiently working with private investigators, developing a strategy balancing grounds versus contributing circumstances, and diligently quantifying and proving any financial damages, we put logic and reason to work and so show our clients we, too, care.

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