

Post-Separation Adultery: It's Time to Move On

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Virginia Code § 20-91(A)(1) reads: “A divorce from the bond of matrimony may be decreed: 1) For adultery...” This language has always been interpreted to mean that adultery is a ground for divorce even if it occurred after the parties have permanently separated¹. Adultery presently is defined as sexual intercourse between a married person and someone not his/her spouse, meaning that one can commit adultery at any time until entry of a final order of divorce, and there is no case law excluding post-separation adultery from that definition.

Virginia Courts have the authority to “punish” an adulterous spouse through the exercise of discretion in determining an award of spousal support and/or equitable distribution. Va. Code § 20-107.3(E)(5) requires the Court to consider “the circumstances and factors which contributed to the dissolution of the marriage, *specifically including any ground for divorce under the provisions of subdivision A (1) of § 20-91...*” When adultery has only occurred after the date of separation, it hasn’t “contributed to the dissolution of the marriage”; and yet the court must still consider it because it is a ground for divorce.²

Similarly, post-separation adultery can potentially bar the adulterous spouse from receiving spousal support. Va. Code § 20-107.1(B) provides: “...no permanent maintenance and support shall be awarded from a spouse *if there exists in such spouse’s favor a ground of divorce under the provisions of subdivision A (1) of § 20-91*.”³

As a result, post-separation adultery is often zealously asserted in litigation, to the emotional and financial detriment of both parties. Without an exception or exclusion for adultery that has occurred after the date of separation, these statutes promote “gotcha” litigation where separated parties cannot move on with their personal lives without risking potential financial and family relational consequences for doing so.

Allowing courts to consider post-separation adultery in making spousal support awards and dividing marital assets can result in an undeserved adverse economic impact on the alleged adulterer’s financial outcome, and a similarly undeserved windfall for the other spouse. It also allows litigating spouses to greatly increase, or threaten to increase, the cost of litigation on both sides, leveraging an “extramarital relationship” that did not have anything to do with the reasons for the dissolution of the marriage.

Romantic relationships that occur solely after the parties’ separation should be excluded from the definition of adultery and eliminated as a ground for divorce, and therefore should also not be a factor in the court’s equitable distribution of marital assets, nor in the determination of spousal support. If Code § 20-91 were modified as set forth below (underlined), the inequities resulting from treating post-separation adultery as equivalent to pre-separation adultery would be eliminated:

a spouse, *shall consider the circumstances and factors which contributed to the dissolution of the marriage, specifically including adultery...*” It’s arguable that post-separation adultery should not be considered by the court in determining spousal support unless the divorce is granted on that ground, as the adultery referenced in subsection (E) is qualified by the factors that contributed to the dissolution of the marriage.

1 (Absent condonation as set forth in Code § 20-94.)

2 It is unclear whether post-separation adultery must be pled as a ground for divorce in order for the court to consider it in applying § 20-107.3(E)(5).

3 However, Code § 20-107.1(E) states: “The court, in determining whether to award support and maintenance for

§ 20-91. *Grounds for divorce from bond of matrimony; contents of decree.*

A. *A divorce from the bond of matrimony may be decreed:*

(1) *For adultery that occurred prior to the final separation of the parties...*

Adding such language would allow the General Assembly to make clear that adultery remains a ground for divorce, but only if it happened before the parties separated. With this change, the references to § 20-91(A)(1) in the equitable distribution and spousal support statutes would no longer allow the courts to consider post-separation relationships in their rulings. Adultery that occurred prior to separation would remain fully actionable, and subject to consideration in equitable distribution and spousal support determinations. Further, the fact that an adulterous relationship occurred after the date of separation would not preclude the other spouse from alleging that the adultery also occurred prior to the separation, and therefore would be a ground for divorce.

Opponents may argue that this change is contrary to the Commonwealth's public policy in favor of marriage, claiming that the reason for the statutorily required 6-month or 1-year separation prior to filing for divorce is to promote the possibility of reconciliation, and "allowing" adultery to occur during the period of separation is therefore contrary to that policy. Counter-arguments would include: a) very few separated spouses actually reconcile and remain together permanently as a result of the statutory waiting period; and b) allowing separated spouses to date and pursue other romantic relationships could lead the spouses to realize that the grass isn't greener, so to speak, and ultimately result in reconciliation.

Adopting this change to the adultery statute will benefit divorcing spouses by allowing them to move on with their personal lives without fear of suffering unwarranted financial repercussions, and by reducing the amount of potential conflict and resulting attorney fees associated with pursuing claims of adultery that did not cause the dissolution of the marriage.

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