

**Title: Adultery: Does It Make Any Difference?**

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THANK YOU, MR. PRESIDENT. As we watched the Clinton-Lewinsky scandal unfold in Washington, and as we got the sound bites of the Starr report hot off the presses (or the computer screens), that age-old question arises for family law attorneys: does adultery even matter in family law? We don't know the answer in the 40 other states, but in California, the answer is maybe, but not necessarily in ways you think.

**WHAT DOES NO FAULT DIVORCE REALLY MEAN?**

Most people are aware that California is a "no fault" divorce state, that is, one is not required to prove that one's spouse has done something "wrong" in order to obtain a divorce. The only two grounds from which to choose to dissolve a marriage here in California is (a). irreconcilable differences have arisen which have caused a complete break down of the marriage; or (b) incurable insanity. While many are tempted to plead the latter (ie. He must have been CRAZY to think he wouldn't get caught!), it's much more technical than that and most people choose a. Some other states, and California prior to 1970 required "proof" of "fault" (eg. Cruelty, abandonment, adultery, etc.). The result of being the party "at fault" can, in some states, affect the allocation of marital property or the amount or duration of spousal support (alimony). In a "no fault" state, marital infidelity is irrelevant to obtaining a divorce or to the division of property.

Additionally, while California once permitted people to sue for alienation of affection, criminal conversion (spouse stealing), seduction of a person over the age of legal consent and breach of promise to marry, they were done away with some time ago.

**WHAT ABOUT THE CHILDREN**

If an extramarital relationship has carried over after the parties separate, many people wonder whether the fact that the "new girlfriend" or "new boyfriend" is around is reason enough to restrict child custody or visitation. Aside from the anger and embarrassment of the cuckolded spouse, I am frequently asked whether that doesn't confuse the children ("This is contrary to everything we've raised the children to value and believe") and whether, if the new "significant other" spends the night, isn't that teaching the children that sex without marriage is OK, when the parents have always told the children it isn't. The answer is, under the law, the court must make custody orders consistent with the best interests of the children and, unless evidence contradicts the assumption, it is assumed that the children need frequent and continuing contact with each parent. Actually having sex in front of the children is never condoned and shows a gross lack of good judgment. Short of that, while such relationships might be an affront to the dignity of the offended spouse, it is unlikely to have a significant impact on a child custody order.

**SO WHERE MIGHT "ADULTEROUS BEHAVIOR" COME INTO PLAY IN FAMILY LAW?**

1. Misappropriation: During marriage each spouse is charged with the duty to manage marital assets (including income) in a way which hopefully benefits, and, at a minimum, does not harm, the family. If one spouse takes money away from the family for a purpose contrary to the family, that is called a misappropriation. Spending community money on a girlfriend or boyfriend, especially expensive gifts, paying for rent or mortgage, or vacations can be deemed a misappropriation for which the "injured" party is entitled to reimbursement for one half of the funds spent, possibly with interest, from the date of the misappropriation.
2. Interspousal tort. Under non-criminal law, an intentional, unlawful and harmful or offensive contact by one person with the person of another may be considered "battery", for which damages (money) may be assessed. Should an extramarital affair result in the offending party contracting, and giving to the "innocent" party a sexually transmitted

- disease, that may constitute civil "battery". Such an action might need to be prosecuted in a separate civil action apart from the divorce case, but the two cases can be consolidated upon appropriate motion to the court.
3. Supported Spouse. Where one spouse is paying spousal support to the other, if the supported spouse thereafter "cohabits" with a member of the opposite sex, there is a rebuttable presumption that the supported person has a decreased need for spousal support. The supported spouse then has the burden of proving continued need. This does NOT, however, affect child support. Cohabitation has been defined in cases over the years as being something more than roommates, probably requiring romantic involvement, but not necessarily sexual relations. The income of the new boyfriend or girlfriend or even a new spouse of the payor is irrelevant.

### **CONCLUSION**

Infidelity most affects divorce in the negotiation process. Rarely does infidelity fail to elicit a strong, negative emotional response from the "wronged" spouse. In turn, the party who is engaged in the affair may respond out of guilt, become defensive or turn blame onto the other party again, all strong, negative emotional responses. Strong negative emotions are among the things which make divorces more acrimonious, protracted and painful.

The law will be applied neutrally and there may be little legal detriment to adultery. All actions, however have their consequences, whether around a negotiating table, in a court of law, or on the Senate floor.

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