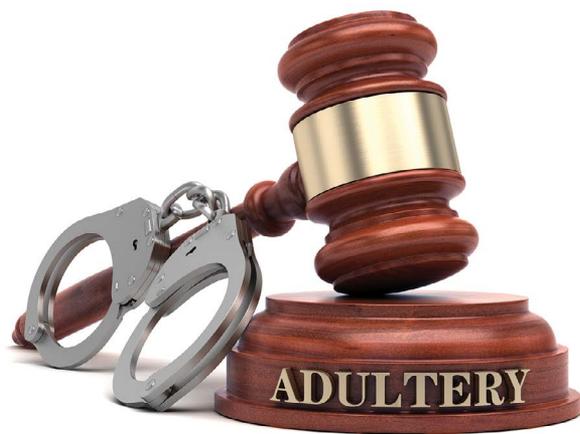


Unfaithfully Yours: Re-Examining Adultery as a Bar to Spousal Support

by Brian M. Hirsch, Esquire



Clients pay good money for family lawyers to guide them through the divorce process, especially when it comes to estimating the amount and duration of spousal support if the matter goes to trial. While this is a difficult task, predicting spousal support awards has become more an exercise in “odds making” than rendering professional advice when the party requesting support has committed adultery.

The amount, duration, and nature of spousal support are determined by thirteen statutory factors, which have been refined over the years.¹ They include such factors as length of the marriage, standard of living, health of the parties, contribution toward the other party’s career, and absence from the job market due to parenting responsibilities. After considering testimony, evidence, and argument, trial courts review each of these factors in making a spousal support award.

However, if the trial court finds the party requesting support has committed adultery, it can bar him or her from ever receiving spousal support.² This one fact takes the analysis from a balanced consideration of many factors down to one factor, and can result in a permanent ban on a party from ever receiving a dime in support.³ Yet, a court can avert this outcome by finding a manifest injustice under Virginia Code § 20-107.1(B). Whether the prospective payor can prove adultery and the prospective recipient can prove a manifest injustice has created a tremendous amount of uncertainty when negotiating and trying spousal support cases. Perhaps it is time to consider whether this bar to support and its

exception should continue, especially since a trial court can now consider fault as a factor under Virginia Code § 20-107.1(E)(13) when awarding spousal support.

Adultery as a Bar to Support

Adultery must be proven by “clear and convincing evidence”⁴ as opposed to the typical standard of preponderance of the evidence. This higher standard has been defined as “that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.”⁵ Mere suspicion of an affair is not enough to prove adultery.⁶

If the trial court finds that the party requesting spousal support has committed adultery, it must next determine if barring the adulterous spouse from receiving spousal support would result in a “manifest injustice” under Virginia Code § 20-107.1(B). This exception allows the trial court to award spousal support to an adulterous spouse “notwithstanding the existence of such ground if the court determines from clear and convincing evidence, that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties.”

The most cited case examining this exception is *Congdon v. Congdon*.⁷ In *Congdon*, the court of appeals affirmed the trial court’s finding of a manifest injustice. Although Ms. Congdon had committed adultery, Mr. Congdon’s repeated boorish behavior toward her, combined with his substantial separate wealth, outweighed her wrongdoing. Courts have found a manifest injustice in situations where the respective degrees of fault were less disparate, such as in *Barnes v. Barnes*.⁸ In *Barnes*, the court of appeals affirmed a

manifest injustice finding where the wife admitted to an affair. However, both parties conceded the marriage had ended prior to their separation, and the wife testified that the husband would not spend time with her and sometimes made crude remarks toward her. In *Nowlakha v. Nowlakha*,⁹ the court of appeals upheld a manifest injustice finding where the trial court found that the wife had engaged in multiple affairs, but the evidence showed a gradual dissolution of the marriage attributable less to any fault but more from a clash of cultures and the parties' inability to communicate.

Despite a substantial number of cases finding a manifest injustice and allowing an adulterous spouse to receive support, Ms. Mundy was not as lucky in *Mundy v. Mundy*.¹⁰ Ms. Mundy had multiple affairs and received \$1.8 million in an equitable distribution award. Mr. Mundy received approximately the same in assets, but was a model husband and father. The trial court reasoned that barring Ms. Mundy from receiving spousal support constituted a manifest injustice given Mr. Mundy's \$850,000 annual income (contrasted with Ms. Mundy's \$33,000 imputed annual income), and awarded her spousal support. Mr. Mundy appealed, and the court of appeals reversed the trial court, leaving Ms. Mundy with no spousal support and calling her "a work-capable, millionaire spouse, guilty of repeated acts of adultery with several co-respondents."¹¹

While there are differences in these cases, all of the trial courts awarded spousal support since they found barring spousal support would create a manifest injustice, despite adultery on the recipient's part. Yet, the court of appeals evidently saw a line in *Mundy* that the trial court did not, only adding to the uncertainty for family lawyers advising a client in adultery cases.

Decriminalization of Adultery

A major complicating factor in adultery cases is that adultery is still a crime under Virginia Code § 18.2-365, which survived Senate Bill 174 in 2016 and Senate Bill 1124 in 2017 seeking to make adultery only a fineable offense. The General Assembly appears reticent to reform this law, probably since decriminalizing adultery may give the appearance of condoning it. As a result, an adulterous spouse can still invoke his or her Fifth Amendment privi-

lege against self-incrimination, and stay silent while being cross examined by counsel about his or her infidelity.

This leaves an adulterous spouse in a dilemma when both custody and spousal support are at issue. A mother may have to waive her Fifth Amendment privilege in the custody portion of the case to testify about her short-lived affair to a person who is no longer in her life, and hope to prove a manifest injustice in order to receive spousal support. Or, she can invoke her Fifth Amendment privilege, and hope the judge does not give much weight to the steamy e-mails to her paramour and does not care whether this person is still in the mother's life when deciding custody.¹²

Recent Amendment to Virginia Code § 20-107.1

As of July 1, 2016, "the circumstances and factors that contributed to the dissolution [of the marriage], specifically including any ground for divorce" was added to 20-107.1(E)(13), allowing judges to openly consider fault and other wrongdoing by the parties in awarding support. This makes our spousal support statute consistent with our equitable distribution statute, which includes this same factor in 20-107.3(E)(5).

The question becomes: why is adultery still a complete bar to spousal support when a court can consider fault — including adultery — in awarding support? Under the current two-prong test for determining a manifest injustice, trial courts must struggle with completely cutting off an adulterous spouse from ever receiving spousal support, or trying to find some degree of fault on the payor's part in order to justify awarding support. The new statute allows the trial court to land in the middle ground of awarding support but adjusting it to account for fault by one spouse or the other. It simply makes no sense to allow adultery to be a bar when a court can now consider this factor elsewhere in the statute, rather than reducing it to an "all or nothing" proposition.

Conclusion

The current laws governing adultery and spousal support involve too much speculation on the part of family lawyers when advising clients. Adultery is sometimes the cause of a failed marriage and sometimes it is the effect

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of a failed marriage; allowing a court to consider which it is and to what extent only makes sense. It is time to examine why adultery continues to be a bar to spousal support when no other ground is. Is adultery worse than cruelty? Is desertion less harmful to a marriage than a spouse being unfaithful? These questions truly turn on the facts of each case, and no ground on its face should have more weight or a greater consequence than the others when a court is awarding spousal support.

Endnotes:

- 1 See, VA Code § 20-107.1(E)
- 2 § 20-107.1(B) provides that “[a]ny maintenance and support shall be subject to the provisions of § 20-109, and 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 Any finding of adultery is subject to Virginia Code § 20-94, which prevents a divorce from being granted if “it appear that the parties voluntarily cohabited after the knowledge of the fact of adultery . . . , or that it occurred more than five years before the institution of the suit, or that it was committed by the procurement or connivance of the party alleging such act.”
- 4 See, *Painter v. Painter*, 215 Va. 418, 420 (1975)
- 5 See, *Mundy v. Mundy*, 66 Va. App. 177, 181 (2016)
- 6 See, *Miller v. Miller*, 92 Va. 196 (1895); see also, *Dooley v. Dooley*, 222 Va. 240 (1981)
- 7 *Congdon v. Congdon*, 40 Va. App. 255 (2003)
- 8 *Barnes v. Barnes*, 16 Va. App. 98 (1993)
- 9 *Nowlakha v. Nowlakha*, 14 Vap UNP 2377134 (2014)
- 10 *Mundy v. Mundy*, 66 Va. App. 177 (2016)
- 11 *Id.* at 184
- 12 Further complicating this issue is the trial court’s ability to draw certain inferences if a party fails to provide a reasonable explanation for his conduct, as in *Watts v. Watts*, 40 Va. App. 685 (2003). The same is true of a trial court’s ability under Virginia Code § 20-88.59(G) to draw an adverse interest in a civil hearing if a party refuses to answer on the ground that the testimony may be self-incriminating.



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