

Adultery in a Divorce

Brian: This is the Texas Family Law podcast. I'm Brian Walters. Jake Gilbreath is here with me and we've got another topic for you today. We're going to discuss adultery and what happens when there's a divorce and adultery is a reason. It's an issue that can affect both the property division and could affect child custody.

It can also affect the reason that a divorce is granted. So really there can be three ways that it affects a divorce. So, Jake do you want to talk first about what is kind of the simplest of those which is the reason that the divorce is granted, and the history behind that and what the options are if adultery is an issue.

Jake: Yeah. And you know, it's something that's always talked about at the initial consult. I mean, it's awful when it happens in a marriage and obviously it's a cause for divorce that we deal with quite a bit. You know, frankly, if you read the statistics, I think probably half of all marriages have this issue.

So as you can imagine, it causes a lot of divorces and of course, a lot of hurt feelings. It can make the case more difficult or more emotional, understandably. If that issue comes up in the marriage, then it comes up in the divorce. So when people come in, a lot of times they're asking what are the grounds for divorce?

And the answer usually sounds like "I think my spouse committed adultery and I want to get divorced based on the grounds of adultery." So like Brian was saying, thinking back on the history of the reason why we had what we "call grounds for divorce", the most common being insupportability, which is the "no-fault" divorce.

The legal term for this is insupportability. There's no "fault grounds" alleged or anything, but that's just what most divorces proceed under, though you can proceed under fault grounds. The family code sets out cruelty, for example, as a fault ground, and adultery is a fault ground that the court can grant the divorce on as well.

So when the divorce is actually filed you have the option to just plead it, kind of just generally saying the marriage has become insupportable or you can put those specific grounds in, and say there's adultery, there's cruelty, etc. when you file for divorce.

The reason why the family code has the grounds that actually used to be in, I'm not sure on the exact decade, but around the sixties or seventies, there wasn't the no fault divorce in Texas and the law States in the United States. There wasn't a no fault divorce. You actually had to prove fault grounds in order to get a divorce, you had to prove that your spouse committed adultery, or you had to prove that your spouse was cruel.

They changed that. And of course you have the problem that people would embellish or make up fault grounds. They wanted a divorce but they couldn't just tell the courts that. You'd have to prove something awful was going on in the marriage and so it would cause people to lie. That's why the legislature started pushing for no fault divorces, but that option, you know, like Brian was saying, the option is still there to complete it.

It's important to note that you don't have to plead cruelty or adultery or anything to actually bring it up in a divorce. I mean, it goes into the, in supportability. And so the case law is clear that the court can still consider adultery. Even if you haven't put in your petition, although it's probably good practice to still put it in your petition, but even if you don't, the court can still consider that when dividing a property and can hear evidence on that.

Last thing I'll say about grounds is that people forget adultery is actually a jury question. Fault grounds is actually a jury question. You can go put it to a jury to decide what are the grounds for divorce. I think I've only tried that once. Well, Brian, you and I tried one on cruelty last year. You know, we brought cruelty grounds and some other torts and a divorce and the jury gave us a cruelty finding, which then affected property division.

I tried one earlier this year on an adultery that the other side alleged, and I think they brought it up more trying to sort of taint the jury, with regards to the child custody case. I actually think that backfired a little bit for them, but that was the strategic reason why they brought that to a jury.

So now, turning from that topic. Brian, when you have clients coming and asking you about adultery, how it affects property division, what are your thoughts on that?

Brian: I think adultery really does affect it.

However, I think it depends a lot on a number of factors, and these are often hard to predict. The first time you sit down with somebody, I think the individual judge makes a difference. The person who's going to make that property division decision and some I think are more concerned about that than others.

I think the nature of the adultery can be a factor. I mean, technically if somebody filed for divorce and then they separate and a year and a half later they're in trial, if they start dating somebody, after that separation, even after they filed, that's technically still adultery because you're still married.

That's an example where I don't think many people or judges would consider that a reason to divide property differently. There's a couple of ways that it did. I think it could have more of an effect is kind of the terms of it. You know, if it was really egregious behavior, that probably is gonna affect somebody more than a one off thing or an after a separation type situation.

Now this is a little bit of a different subject, but it's often related; if some money was spent on this other person, that can affect a property division as well. Lastly, if somebody is lying about it to the court, even though the adultery in and of itself might not be a big factor, just the fact that they're not being truthful about it can anger a judge and then have them decide to take some action, in the property division to compensate for that.

All because they're overall upset with them. That's been my experience. I think it's changed a little bit over the years and I think it's become less of a factor over the years.

It's not a straight line and I still see it become an issue and be taken into account. What's your experience?

Jake: With that? Yeah, I think that's right. And to pick it up with what you said about if you lie about it, if I have a client and they've had an affair, then I give them the advice to just be honest about it.

I mean, it's hurtful and it's painful. It's painful to talk about. It's painful. You know, sometimes the spouse doesn't even know until the divorce. But I always tell my clients to be honest. Yeah. Just like you were saying, Brian, with that, that it will affect things. If you sit there and you lie about it, and then you get caught lying about it bad things happen.

One, it increases the pain from it. And then two, the judge is going to punish you for that either through attorney's fees or property division. And then also nobody's going to believe you. I did have a client. It was in front of a jury and an adultery that wasn't an issue, but it was a divorce and so it came up. The jury at least thought he was lying about whether or not he had an affair and it affected custody stuff.

It made him less credible. He was clearly lying about this relationship rather than just being honest and saying "Look, this is, it's an awful thing that I did it I'm ashamed. I'm not proud of it, but, but it happened and I'm so sorry," and you move on. That's how you address it. But yeah, on property division I had a judge on a panel once in Travis County. I think the way he put it as he saw it, I thought this was an interesting, and probably the right way of looking at it.

He sort of said "look, you know, it, it always affects property. He said always affects property in his mind. But you know, when you look at the egregiousness of it, if it's an affair on your way out the door, that's not right. And it's not good. But that's way different than, you know, the, the doctor who's having an affair for four years, and not telling his or her spouse and while kind of planning for the exit as though, you know, this person kind of has a headstart."

They know the marriage is over for three or four years. They're having this long affair and then the other spouse, I mean, cause the marriage is a partnership. The other spouse has no clue. That this marriage is over and they're continuing on in the partnership. And he said, then he'll have it affect property more.

But you're right. It's judge to judge, it's County to County. Probably in more rural counties they take it more seriously, probably in the more urban counties because they see so many cases, it's probably less serious, but it is something that needs to be brought up.

Anytime there's property involved then that's where it leads to the question of, "well, how does it affect child custody?" And we do have that conversation with people. I think kind of the same analysis goes. It depends judge to judge. I mean, I think probably 90 out of a 100 judges would say adultery has no effect on child custody.

I don't consider it. And you can debate whether that's right or wrong about whether they should consider or not. But most of them will say I don't consider it when deciding kid issues.

I think that's what they say. I mean, we're all human though. I'd be curious what your attitudes about that are, Brian, but I do think, and I tell clients this.

You know, the judge will tell you that he or she doesn't consider the adultery within decided child custody issues, but it's in the back of everybody's head. You know it's not that the judge is looking to punish the adulter, or somebody who had an affair with child custody stuff, but it's going to be in the back of that judge's mind whenever they make any decision, but that's just human nature.

And so, you know, it goes back to what you were saying, Brian, it's just more reasonable to be honest about it. If you've had the affair then say, yes, I had the affair, it doesn't make me a bad parent.

Probably, it could make me a bad spouse. It doesn't necessarily make me a bad parent. On the flip side, if you have the person who has had the other spouse having an affair and you're representing that parent then you do talk about it and you say "This person's priorities aren't there. They're not there for their child. Their priorities are out having a relationship. Outside of the marriage while the other parents committed to the marriage and committed to the family unit." So it is brought up both ways, even with judges, adamantly telling you it doesn't affect their decision.

I don't think that's the case. I think it affects the decisions and I do think it particularly affects juries on deciding the case. A lot of times if you play it right, then it can affect a jury's decision on child custody. What are your thoughts?

Brian: I think that's right on.

And another way that it can affect it is if the children are exposed to this other person who they're having an affair with, I think that's easily stomach turning and especially if they're introducing them as mommy or daddy or something like that.

I don't think anybody's going to consider that that's good judgment as a parent. It starts to make a judge think, "well, this person is not capable of putting the interests of their children first. They're putting their interest in this relationship with this person they're cheating on with the nuts, that's never going to be helpful in a case."

I think if it's a clearcut custody case, you know I think you're right. It's not going to make a difference, but if it's a close case, these things can and I think it's something we've kind of touched on with all three of these topics. I'm old enough to remember when it was really hard to prove adultery.

I mean you used to in the olden times, and by that I mean 10 years ago, you know, you might need to hire a PI to try to take a picture of somebody come in someone's car and another person's driveway, or, you know, catch them together at a restaurant or something like that. That's not the case anymore.

It's all on your phone. And, you have zero right to privacy, to your phone or what's on your phone in a divorce or in a custody case. We went through the discovery process. And if you

think you've erased it you're probably mistaken as well. And so now it's become much easier.

And I think people out of just, I don't know if it's honesty or just out of a self preservation but they rarely deny it anymore if it occurred, probably because they know there's evidence everywhere about it. So, and I tell my clients that up front, if they really want to know everything that's ever been on your phone they're going to find out.

So in some ways that's been helpful to get the truth out there and deal with it from there.

Jake: Yeah. I mean, that's more reason to just, you know, frankly, be honest about it. If you say it, I get it.

People feel bad when they have an affair and they should, the type of affair they come in and say, well, I don't want to tell my spouse, I'm not going to answer those questions. I'm not going to respond to that interrogatory about what? About an affair? I'm not going to give them the discovery they're asking. It's like, you're now just stoking the curiosity of the other side. I mean, Brian already represents some and the other side says, well, I'm not going to answer questions about whether or not I've had an affair.

I'm not going to give you my phone records. Well, guess what we're going to be focused on now. And you know, it really is just better. I tell the clients that it really is just better to be open and honest about it. And then everybody can and it kind of stops a lot of the digging.

I mean, cause I do think, you know, you can overplay it on the flip side. If I have a client that sits there and goes, look, I had an affair and I feel awful and it's been going on for six months and that's why I filed for divorce. And the other side, it's like, well I want every single text message and I want every single email with you, this person.

You know, if you're admitting to it, I think you can, at a certain point, go make a pitch to a judge. It's like, alright, this is, this is overboard. Where now they're, now they're just picking up the wound, but we've already admitted to it. We've already acknowledged it stipulated. There's a relationship. And you know, that doesn't need to be this constant churning and drilling and stuff.

So it's a delicate balance. I mean, it's such a sensitive topic as it is, and it's just a delicate balance, both ways. If you have the person who's had the affair of how to deal with it. But then on the flip side, you know, they have the, you have the spouse that was cheated on, you know, you have to, you have to know how to use that in the case, to where it affects possibly the case.

It sounds cheesy to get the justice that you deserve in the case, but at the same time, not overplaying it and saying, you know, I want 120% of the property now, or, you know, I want to never see his kids again, because of the affair.

It can go both ways. And so it's, you have to know your judge, you have to know the opposing counsel, know the judge, know how things play on that court on either side of the case. It's not fun for anybody to deal with, but it is unfortunately something that we deal with and it's important that it's addressed appropriately, either in a divorce or child custody

case. So I think that's probably what we have to say on the topic. You know, I think last podcast we said we'd do a more cheery topic, after talking about debts last time now we're talking about affairs this time. Maybe we'll find a happier topic to talk about next time, but you know, just like debts, it's an important thing to talk about.

It's something that comes up and we're ready to address it if it does, on either side of the case.

Brian: Alright, thank you. We'll talk soon.

Jake: Alright. Thanks, Brian.