

Infidelity & Divorce: Should Conduct Count?

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Hypothetical: The former president of the United States, William Jefferson Clinton, and his wife, Hillary Rodham Clinton, purchase a home on Martha's Vineyard upon the expiration of his term of office. After residing there for the required jurisdictional period, Ms. Clinton files for divorce in Massachusetts, alleging, among other things, that her husband's sexual misconduct caused an irretrievable breakdown of their marriage and that, because of his misconduct, she deserves a greater share of the marital estate. Will the trial court care about his sexual misconduct in dividing the marital assets?

In making determinations regarding alimony and the equitable distribution of property, the Probate & Family Court must consider the "conduct of the parties during the marriage." G.L.c. 208, §34.

The statute does not define "conduct." However, caselaw has developed the meaning to be primarily that which impacts the economic well being of the marriage.¹

As a result, divorce practitioners have found that the trial court is seldom interested in hearing allegations of marital infidelity in the context of a divorce case.

It is our thesis that, by declining to consider marital infidelity during the marriage, courts are in conflict with the Legislature, which did not carve out such an exception to the term "conduct."



While we support no-fault divorce, the elimination of the need to demonstrate fault to obtain a divorce should not lead courts to ignore marital conduct for other purposes, such as determining equitable distribution of marital assets.

We find it particularly troubling that even with the onset of HIV and the increasing prevalence of sexually transmitted diseases (STDs), infidelity is seldom considered by the courts, even where such conduct puts the other party at risk.

'More Good Than Harm'

The origins of the courts' reluctance to consider marital infidelity can be traced to the adoption of no-fault divorce statutes in the 1970s. Under these new laws, divorce could be obtained solely on the basis of a breakdown in the marital relationship.

In fact, in many states a new terminology evolved: marriages were "dissolved," with neither party "divorcing" the other.

Massachusetts adopted its no-fault statutes, G.L.c. 208, §§1A and 1B, in 1975. Previously, a divorce could be granted only if one party succeeded in proving fault on the part of his or her spouse.²

The so-called "no-fault" statutes eliminated the need for proof that one party was guilty of adultery, drug or alcohol problems, cruel and abusive treatment, or abandonment.

Many benefits were anticipated from the adoption of no-fault divorce, including lower transaction costs, less stigma associated with divorce, less manipulation of fault allegations to influence child custody determinations, and easier access to divorce for victims of domestic violence. To a great extent, those benefits have been realized.

Moreover, notwithstanding the increased divorce rates which have accompanied the adoption of no-fault divorce statutes, we believe that no-fault has done far more good than harm.

However, we question whether the abandonment of fault as a necessary basis for obtaining a divorce should have led courts to more or less abandon any consideration of marital infidelity.

Our contention is that marital infidelity should be considered by the courts as one (but only one) of the forms of “conduct” — or more accurately, misconduct — cognizable under G.L.c. 208, §34. This is a change that could be made by the courts in their interpretation of §34 or it could be made legislatively.³

There are several reasons why such a change is needed. First, divorce imposes substantial economic costs on family members. Two households cannot operate as inexpensively as one, and dividing marital income and assets in two dramatically impairs each of the parties’ financial circumstances.

When divorce is the result of marital infidelity by one of the spouses, the faithful spouse almost always questions — often for good reason — the fairness of distributing these economic costs equally, which, in a long-term marriage, is usually the result.⁴

Second, for most families divorce imposes substantial psychological costs. If the parties have minor children, much of the psychological burden is borne by those who were not responsible for the divorce but whose lives may nevertheless be dramatically impacted by it.

When such an impact results from marital infidelity, society has a responsibility to consider whether, from the standpoint of deterrence, such misconduct should be cost-free.

Third, as noted above, in this age of HIV and other STDs, the health risks associated with marital infidelity are grave. If one party is left to live with the specter of a future terminal illness which resulted from the marital infidelity of the other, or suffers potential fertility problems because of the other party’s having been exposed to an STD during the course of the marriage, a trial court should consider whether the unfaithful spouse deserves equal financial consideration.

There is certainly support in our caselaw for the proposition that egregious misconduct endangering the other spouse should be considered a “conduct” issue.⁵

Fourth, our courts play an important role as the forum in which our society’s values are articulated. DeTocqueville described our courts as the embodiment of the nation’s moral norms. To be sure, there is much ambivalence, if not hypocrisy, in the public’s views about adultery. Polls suggest high rates of infidelity, as well as high rates of disapproval of the practice.

However, the courts' reluctance to consider marital infidelity as a relevant "conduct" factor in divorce proceedings conflicts with moral views on which there appears to be a broad consensus.

Finally, our courts play an important role in divorce, and other cases, as the forum in which individuals who have suffered a loss have their "day in court." To be sure, this opportunity to be heard — which is fundamental to our system of jurisprudence — can be abused by those who wish to enact private dramas on a public stage. However, it seems incongruous that current practice in a divorce case encourages the introduction of evidence about such matters as who prepared the meals and who took out the trash, while ignoring the question of whether a spouse was having sexual relationships outside the marriage, which may be the most significant conduct issue in the case.

By preventing one of the parties from being heard on an issue of such importance, while at the same time considering issues of less importance, the courts may actually be deepening the bitterness that led the parties to divorce in the first place, thus frustrating the process of healing which is much needed (for the parties and their children) in the wake of divorce.

It is for all of these reasons that we frequently encounter shock and dismay when we explain to clients seeking a divorce that a spouse's infidelity is likely to be of little or no interest to the court, and that the outcome of the case is unlikely to be affected by what our client understandably views as morally reprehensible, if not villainous, behavior by his or her spouse.

For many of these clients, divorce proceedings are their first significant contact with the legal system. They are often very surprised when we inform them that no matter how badly their spouse behaved during the marriage, or in connection with the breakdown of the marriage, the courts are generally not interested in misconduct unless it is related to financial issues or physical violence.

Our concern here is not solely with the impact that this policy has on individual clients. At a broader level, the disparity between the moral views held by our society and the values promulgated by our courts undermines the public's confidence in the fairness of our legal system, as well as its respect for the rule of law generally. To include marital infidelity within the scope of marital "conduct" — as one of the many factors considered by the court — would help to harmonize the norms promoted by our courts with those we teach our children and espouse as a society.

'Legislated Amoralty'

We recognize that there are sound reasons for the courts' current practice of ignoring, for the most part, sexual infidelity by one of the parties to a divorce.



For example, it is often difficult to determine whether marital infidelity has even occurred. The unseemliness of spouses hiring detectives to spy on each other was a feature of fault-based divorces that no one involved in divorce (except perhaps the detectives) welcomed.

The costs of obtaining a divorce could soar if a party seeking a divorce were given a financial incentive to discover and prove that their spouse was having an affair.

However, for society as a whole, the costs associated with marital infidelity — in terms of wrecked marriages and health risks which cannot be wholly eliminated — are likely even greater.

When one adds to the equation the psychological costs and other harm to children caused by infidelity and divorce, the possibility of increased trial costs might be a relatively small price to pay.⁶

As to the unseemliness of investigating infidelity, for the innocent spouse the idea of cost-free infidelity is just as unseemly.

Another reason for avoiding inquiries into adultery is that it is often unclear whether infidelity is the cause of the divorce, a symptom of a failing marriage or a combination of the two.

The unfaithful spouse will often claim that his or her infidelity resulted from problems at home, such as a lack of interest in sex by the other spouse. Courts are understandably reluctant to try to resolve disputes of this kind.

However, the fact that marital infidelity may be understandable does not necessarily lead to the conclusion that it is legally irrelevant “conduct” for purposes of §34. A spouse who is dissatisfied with the sexual aspect of his or her marriage has a number of options, including individual or couples counseling or temporary separation.⁷

Another objection might be that, where the divorcing parties have minor children and joint physical custody of them post-divorce, an economic penalty to the guilty party could have the effect of penalizing the children as well.

Such a problem can be easily remedied, however, by adjusting the timing of any financial impact so as to avoid or minimize the effect on the children.

Critics may also argue that the courts should not “legislate” morality. In our view, however, the Legislature has already spoken by including marital conduct in the list of mandatory factors under Chapter 208, §34.⁸

By ignoring marital infidelity, it is the courts that have, in effect, “legislated” amorality. If the Legislature is truly out-of-step, statutory reform is appropriate to eliminate the mandate to consider conduct.

Critics might also contend that judicial change is unnecessary under current law because parties have the option of choosing between “fault-based” and “no fault” divorce.



This procedural and substantive distinction does not, however, necessarily entail a different result with respect to alimony and property division, since fault may be used simply to determine that grounds for divorce have been established and not considered in the allocation of assets.

We are not aware of any evidence that alimony and property awards are significantly different in fault-based and no-fault divorces.⁹

Finally, many may view the change we propose as unnecessary. The current regime, they might argue, represents a sound balance of competing goals and interests. However, the times have changed in two significant respects.

First, the current epidemic of HIV and STDs shifts the balance substantially in favor of considering marital infidelity as a “conduct” factor.

Second, public attitudes about infidelity have shifted in recent years (in part, perhaps, because of mounting concerns about the health risks associated with infidelity), therefore the failure of the courts even to consider such misconduct leaves the courts out of step with public morality — a costly dissonance from the standpoint of public respect for our legal system.

Of course, a consideration of conduct of all types, including marital infidelity, does not necessarily mean that one spouse should be penalized in the property division because he or she was unfaithful. On the contrary, each case should be considered on its own merits.

Moreover, we are not arguing that marital infidelity should necessarily be given any greater emphasis than other conduct issues, such as dissipation of assets, substance abuse or failure to contribute to the marital partnership.

After all, “conduct” is only one of 17 factors listed in §34, and marital infidelity may be only one aspect of marital conduct in a much larger tableau of conduct issues. It is certainly well settled that the courts are given broad discretion in “the weight to be accorded each of the §34 factors.” *Langerman v. Langerman*, 9 Mass. App. Ct. 869, 870 (1980).

In short, we do not propose a litmus test, but instead urge either (a) that the courts give due deference to the statute by interpreting “conduct” to include marital infidelity among other issues, or (b) that the Legislature amend the statute to clarify the meaning of this term.

Before concluding, we would be remiss if we did not return briefly to our hypothetical.

Given the nation’s weariness with inquiries into the details of President Clinton’s sexual escapades, it is hard to imagine that any court would wish to revisit those issues.



Counsel for the president might also contend that Ms. Clinton tacitly consented to his having illicit affairs, since over the years of their marriage these affairs had formed a pattern that was virtually a matter of public record.

Counsel for Ms. Clinton might protest that her forbearing from seeking a divorce years ago was an agonizingly painful decision that she made solely to benefit her husband's political career and to enable Chelsea to grow up in an intact family.

The principle that "no good deed goes unpunished" may be one of life's ironies, her lawyers would protest, but it should not be the policy of our courts.

We are reluctant to express a view as to how the Clintons' assets should be divided, although (for the reasons discussed above) we think Ms. Clinton has the better of the argument.

In sum, we believe that no matter how unseemly or difficult it may be to examine the issue of infidelity in a marriage, as a society we lose more than we gain by turning a blind eye to this issue in our courts.

Notes

¹ See Monroe Inker & Charles Kindregan, 2A M.P.S. Family Law and Practice §40.7 at 21 (1996) (conduct is primarily relevant when it has an economic impact on the marital enterprise"). For example, in *Singer v. Singer*, 8 Mass. App. Ct. 113, 119-21 (1979), the Appeals Court held that a spouse's adultery was largely irrelevant to property division and alimony determinations. See also *Kane v. Kane*, 13 Mass. App. Ct. 557 (1982) (holding that fundamentally, the court's consideration of "conduct of the parties' in relation to property division relates to conduct which impacts on the economic well-being of the marital enterprise); *Putnam v. Putnam*, 5 Mass. App. Ct. 10, 16 (1977) (holding that conduct of the parties does not primarily mean blameworthy conduct judged by moral standards). Curiously, economic contribution is actually a discretionary factor under G.L.c. 208, §34, even though it is routinely viewed as one of the most important factors.

² In 1785, the grounds for divorce in Massachusetts were incest, bigamy, impotency and adultery. Today, the fault-based grounds for divorce in Massachusetts are: adultery; impotency; utter desertion (continued for one year next prior to the filing of the complaint); gross and confirmed habits of intoxication caused by voluntary and excessive use of intoxicating liquor, opium or other drugs; cruel and abusive treatment; if a spouse being of sufficient ability, grossly or wantonly and cruelly refuses or neglects to provide suitable support and maintenance for the other spouse. G.L.c. 208, §1. Under §§1A and 1B, a divorce can be granted on the grounds of an "irretrievable breakdown of the marriage."

³For example, the Legislature could add the following sentence, or something similar, to §34: "For purposes of this section, the term 'conduct' shall include any act or omission during the course of the marriage which harms the other party to the marriage, or causes substantial risk of harm, during the marriage, including without limitation sexual or financial misconduct and physical abuse." Under current law, physical abuse and financial misconduct are routinely considered by the courts, but sexual misconduct is not.

⁴ The fundamental inquiry for a court under Chapter 208, §34 is an "equitable" distribution of assets and award of alimony. Given this focus on fairness and the application of partnership principles to the dissolution of marriage (see generally Monroe Inker & Charles Kindregan, 2 M.P.S. Family Law and Practice § 26.6 at 17 (1996)), it is surprising that the courts do not look to a spouse whose infidelity causes the breakdown of a marriage to bear an appropriate share of the costs of the dissolution, just as in a business context an individual whose partner had breached his or her fiduciary duty to the co-partner could seek compensation for resulting financial costs. As one eminent divorce practitioner has stated, "it is not unreasonable to give notice to those who make a commitment to marriage that there will be an added cost to them if the relationship ends ... due to their misconduct. ... There is nothing unfair in expecting that the balance of financial hardships should fall more heavily on the person causing the problem." D. Schiller, "Fault Has a Role in No-Fault Divorce" 5 (paper delivered at meeting of the American Academy of Matrimonial Lawyers, November 1996).

⁵ See, e.g., *Johnson v. Johnson*, 22 Mass. App. Ct. 955, 956 (1986) (rescript) (taking into account husband's "abusive conduct, both mental and physical," toward the wife); *Bacon v. Bacon*, 28 Mass. App. Ct. 117, 120 (1988) (same).

⁶ It is not entirely clear that an increase in trials would occur. An individual whose spouse was unfaithful might wish to avoid a trial as fervently as the spouse, given the extent to which such proceedings would compromise the parties' privacy. Moreover, our experience in Probate & Family Court suggests that in most cases where infidelity has caused the breakdown of the marriage, the aggrieved party already uses every opportunity to bring that issue to the attention of the court.

⁷If the courts considered marital infidelity as a factor under §34, one effect might be greater effort to resolve marital difficulties. See D. Schiller, "Fault Has a Role in No-Fault Divorce" 5 (paper delivered at meeting of the American Academy of Matrimonial Lawyers, November 1996) (states who require their courts to be blind to fault when considering economic issues in dissolutions of a marriage do nothing to encourage cooperation and accountability between spouses.").

⁸ In doing so, the Legislature has rejected the path taken by 17 states that do not consider marital conduct in connection with property distribution and 25 states that do not consider it in connection with alimony. See D. Schiller, "Fault Has a Role in No-Fault Divorce" 5 (paper delivered at meeting of the American Academy of Matrimonial Lawyers, November 1996).

⁹ In *Singer v. Singer*, 8 Mass. App. Ct. 113 (1979), the court rejected the argument that allegations of adultery should be considered in a different light under G.L.c. 208, §34 depending on who had sought the divorce and whether it was sought under §1, as opposed to §1B.

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