

Affair Despair?

How to deal with adultery in a Texas divorce.

BY DERON SUGG

Clients rarely understand exactly how an affair will affect their divorce, and their lack of knowledge makes perfect sense. Why? The research is too dangerous! Whether you're the spouse engaging in extramarital relations or the one who is suspicious, the last thing you want is for the other to know you're brushing up on the issue. But knowing what infidelity means in the context of a divorce is paramount to developing strategy and understanding what to expect in the divorce process. Here are a few navigation tips:

Tell Your Lawyer

Many clients try to avoid the topic, even when they are the one being cheated on. Your attorney needs to know—and from the outset.

Know the Law and its Limitations

The court may grant a divorce on the fault basis of adultery, but the real question is how an affair will affect the final outcome. So, how *can* an affair affect a divorce? Property division. Courts are obligated to divide marital estates in a “just and right” manner and have wide latitude in doing so. They can consider any number of factors including, but not limited to, age of the parties, education, business opportunities, relative physical conditions, separate estates, the nature of the property being divided, and, of course,

fault in the breakup of the marriage. As such, a court could indeed find an affair played a role in a marriage's breakdown and use it as a factor in dividing the marital estate.

But, here's the nitty-gritty: Fault in the breakup is merely one factor out of many the court *may* consider in dividing the marital estate. Marriage is complex, and most judges understand an affair is seldom the only reason two people divorce. Courts have extensive discretion and your attorney needs to know the judge's tendencies, but I usually estimate an affair will tilt division of the marital estate by 2 percent. You may also argue that, even if an affair occurred, the court should not consider it when dividing the marital estate because it played no role in the *actual breakup of the marriage*. This is especially true if the adultery occurred several years prior and the non-offending spouse was aware but chose to stay in the marriage. Barring major issues with children's exposure to a paramour, adultery should not affect custody issues. If significant funds were spent perpetuating an affair, a waste claim may be necessary.

More Than Money

Whether or not adultery is used to argue one spouse should receive a larger share of the marital estate, parties

shouldn't ignore what is often an even stronger weapon—the affair's emotional impact. For some, affairs are no doubt embarrassing. The prospect of infidelity being discussed in open court or even appearing in a pleading can be harrowing. If you are the “innocent” spouse, you may need to push the issue to gain litigation leverage. If you're on the other side, think about exposure and whether it may cause ancillary issues with employment or other relationships. I generally advise clients who've engaged in an affair to admit it. Why? Because the furious non-offending spouse will often spend more of the marital estate trying to prove the affair and uncover sordid details than my client will lose if the judge happens to believe my client was at fault for the breakup of the marriage.

In Texas divorces, affairs often have less bearing than clients generally assume and impact outcomes more through parties' perceptions than court discretion. **TBJ**



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