Young Trial Lawyers

Invoking the Fifth Amendment in adultery cases: Do cheating spouses get to cheat the system?

by Melanie A. Friend

For more than 4,000 years, laws have prescribed harsh punishments for those who commit adultery. Under Hammurabi's Code more than 38 centuries ago, drowning was the penalty for both parties caught in the act of adultery, though if the woman's husband pardoned her, the king had the discretion to also pardon the accused man. If not actually caught in the act, Hammurabi devised a method of proving the guilt or innocence of a wife accused by her husband of adultery: The woman had to "jump into the river for her husband," meaning that she was thrown into the river, and if carried away by the current, she was deemed guilty. If she remained still and unharmed, then she was certainly innocent.

American law has evolved somewhat from using a spouse's buoyancy to determine guilt of adultery. To divorcing parties, however, the procedural rules controlling litigation of an adultery claim can seem no more logical or equitable than trusting the whims of the river, particularly with regard to the interplay of the criminal adultery statute with divorce laws. Virginia family law practitioners regularly face clients who, convinced their spouses have sexual relationships outside the marriage, cannot comprehend why the law would allow an adulterer to refuse to answer questions pertaining to an alleged affair. Worse, as practitioners must explain to the frustrated client, the refusal to answer cannot be construed against the spouse, and without compelling evidence from some other source, a spouse's unfaithfulness may have little to no impact upon the outcome of the divorce suit, despite the very minimal risk of prosecution.

Despite doubts regarding the constitutionality of criminal prohibitions on adultery after the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), 21 states, including Virginia, still have statutes criminalizing adultery.[1] In the wake of *Lawrence*, several states' laws criminalizing sodomy, fornication, and adultery were struck down by either judicial review or legislative repeal.

Criminal statutes in the states that still prohibit adultery vary widely. For a conviction for adultery, Virginia imposes a fairly minimal penalty of a fine not exceeding $250. Va. Code §18.2-11 (1975). In contrast, several other states categorize the crime as a felony. For example, the applicable Oklahoma statute provides for a maximum five-year jail sentence. Okla. Stat. Ann. Tit. 21§ 871 (1910). In Minnesota, adultery is only a crime for a married woman or for a man who has sex with a married woman. Minn. St. Ann. §609.36 (1963). It is not a crime for a married man to have extramarital sex. *Id.* In South Carolina, adultery itself is a misdemeanor, which "shall be severally punished by a fine of not less than one hundred dollars nor more than five hundred dollars or imprisonment for not less than six months nor more than one year or by both fine and imprisonment, at the discretion of the court." S.C. Code Ann. §16-15-60 (1962). In addition to the misdemeanor statute, South Carolina classes adultery among certain other sexual offenses, which when committed within 100 yards of a school or child care facility, can carry a separate penalty of up to ten years imprisonment and a $10,000. S.C. Code Ann. §63-13-200 (1962).

Though the Virginia Supreme Court has not ruled directly on the constitutionality of Va. Code §18.2-365, which makes adultery a class four misdemeanor, the Court held that Va. Code §18.2-344, the statute criminalizing fornication, violated the Constitution by infringing on the rights of consenting adults to "engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment." *Martin v. Ziherl*, 269 Va. 35, 42 (2005) (quoting *Lawrence*, 539 U.S. 558 at 564). The Virginia Supreme Court specifically noted that their holding in *Martin* did not address conduct involving

minors, non-consenting adults, prostitution, or public sexual activity. The opinion was silent on the issue of adultery, but the District Court for the District of Columbia, analyzing a sexual harassment claim in *Martin* in *Thong v. Andre Chekry Salon*, 634 F.Supp.2d 40, 46-47 (2009), concluded that the holding in *Martin* would extend to the adultery statute.

> While both *Zysk* and *Martin* deal explicitly only with Virginia's fornication statute and not its adultery statute, there is nothing in the *Martin* opinion which limits itself to the fornication statute. In ruling the fornication statute unconstitutional, the court in *Martin* gave as its reason that the provision, "by subjecting certain private sexual conduct between two consenting adults to criminal penalties ... infringes on the rights of adults to 'engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution.' " *Id.* at 42, 607 S.E.2d 367, *citing Lawrence v. Texas*, 539 U.S. 558, 564, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003). The court added, "our holding, like that of the Supreme Court in *Lawrence*, addresses ... private, consensual conduct between adults and the respective statutes' impact on such conduct." *Id.* at 43, 607 S.E.2d 367.
>
> It is unclear why the defense believes that this holding is at all limited to the fornication statute; even though the ruling did not declare the adultery statute unconstitutional, it does say that "*Zysk* is no longer controlling precedent to the extent that its holding applies to *private, consensual sexual intercourse*" *Id.* at 43, 607 S.E.2d 367 (emphasis added). While it could not be said that the opinion *strikes down* the adultery statutes per se, it makes clear that it considers statutes criminalizing *private, consensual, sexual intercourse* irrelevant for the purposes of civil litigation. *Id.* (emphasis in original).

Whether Virginia appellate courts would concur with the analysis in *Thong* remains to be seen. Because our appellate courts have not addressed the issue directly, the criminal adultery statute, whether regularly prosecuted, has an undeniable impact on the practice of family law. Defendants in divorce cases based on an adultery claim regularly assert their Fifth Amendment privilege against self-incrimination. In divorce, as in any other civil suit in Virginia, "the exercise by a party of any Constitutional protection shall not be used against him." Virginia Code §8.01-223.1 (1985). Although nothing in the plain language of §8.01-223.1 prevents a court from drawing an adverse inference from a paramour's invocation of the Fifth Amendment, neither does the language of the section require an adverse inference in that situation. *See Goldmann v. Goldmann*, No. 1071-02-2, 2002 WL 31890915 at *5 (Va.App. Dec. 31, 2002) (holding that no such inference is required). Given the clear and convincing standard by which a party must prove adultery, the Fifth Amendment creates a solid blockade to the use of adultery as a factor in support or as a negative non-monetary contribution to the marriage in equitable distribution.

The Virginia Court of Appeals has repeatedly stated that "to establish a charge of adultery, the evidence must be clear, positive and convincing. Strongly suspicious circumstances are insufficient." *Romero v. Colbow*, 497 S.E.2d 516 at 519, 27 Va. App. 88 at 93 (1998) (quoting *Painter v. Painter*, 211 S.E.2d 37, 38, 215 Va. 418, 420 (1975)). When faced with an accused spouse invoking the Fifth Amendment, the Court of Appeals has found insufficient evidence of adultery when a husband saw his wife kissing another man, found photos of her half-dressed, which were taken in the other man's home and office, and obtained credit card statements showing that his wife had regularly used the other man's credit card. *Id.* The Court of Appeals has explained that "[w]hile repeated overnight stays may suggest a romantic relationship, that fact alone is not clear and convincing evidence of adultery." *Helbert v. Helbert*, No. 07-94-98, 1998 WL 527080 at *2 (Va.App. Aug. 25, 1998) (*citing Seemann v. Seemann*, 355 S.E.2d 884, 886, 233 Va. 290, 293 (1987).

A review of the relevant cases will not net much in the way of guidance on reliable proof of or defense against a claim of adultery, although the Court of Appeals consistently reviews the record to determine "not only whether the evidence merely established suspicious conduct, but also whether a credible explanation existed for the circumstances." *Watts v. Watts*, 581 S.E.2d 224 at 227, 40 Va.App. 685 at 690 (2003) (quoting *Hugues v. Hughes*, 531 S.E.2d 645, 649, 33 Va.App. 141, 150 (2000)). In that respect, difficulty arises for the attorney of the plaintiff when the accused spouse invokes the Fifth Amendment: Clearly, no credible explanation can be offered if the accused spouse provides no response to the relevant questions, and the refusal to answer cannot be used to create a negative inference.

Without the ability to require a spouse to admit or deny, under oath, an allegation of adultery, litigation necessarily becomes more expensive, involving the use of private investigators and compilation of as much circumstantial evidence as possible. Granted, repeal of the adultery statute and the consequent unavailability of the Fifth Amendment protection assumes that a guilty

spouse would give truthful testimony, but at least timely requests for admission could illuminate whether or not the issue would require extensive discovery and depositions to prepare for trial. Absent the Fifth Amendment protection, perhaps an adulterous spouse would be wise to simply stipulate to the adultery, remove proof of the transgression from the disputed issues, and avoid hours of detailed testimony about his or her transgressions.

Assuming Virginia's criminal adultery statute remains constitutional after *Lawrence*, to what end does it remain on the books? Family law practitioners can attest that the offense is fairly widespread but very rarely prosecuted. Sponsoring a bill for repeal of the criminal adultery statute may not be an issue legislators want to rush to address for fear of alienating voters, but this arcane and rarely prosecuted misdemeanor offense serves, in reality, not as a deterrent to the behavior it seeks to penalize but rather as an obstacle to fair and efficient resolution of family law matters. Instead of attaching the label of crime and a minor fine to the offense, the law would better serve the people of Virginia by allowing adultery to be addressed as a matter of family law.

Melanie A. Friend practices family law at CowanGates in Richmond, focusing on divorce, child custody and visitation, spousal support, child support, adoption, and prenuptial agreements. She is qualified as a guardian ad litem for children. She obtained her law degree from William & Mary School of Law, where she earned Honors for excellence in research, writing and client relations. In addition, she served as member of the Moot Court Team and National Trial Team. In 2003, Melanie graduated summa cum laude from Thiel College with a bachelor of arts degree in English.

Endnotes

1. Ala. Code §13A-13-2 (1977); Ariz. Rev. St. Ann. §13-1408 (1977); Colo. Rev. Stat. Ann. §18-6-501 (2004); Fla. Stat Ann §798-01 (1986); Ga. Code Ann. §16-6-19 (1833); Idaho Code §18-6601 (1972); Ill. Comp. Stat §5/11-35 (1961); Kan. Stat. Ann §21-5511 (2010); Md. Code Ann., Criminal Law §10-501(2002); Mass. Gen. Laws 272 §14 (1978); Mich. Comp. Laws Ann. §750-29, et seq. (2004); Minn. Laws §609.36 (1963); N.H. Rev. Stat. Ann. §645:3; N.Y. Penal Law §255.17 (1965); N.D. Cent. Code §12.1-20.09 (1973); Okla. Stat. Ann. Tit. 21 §871 (1910); R.I. Gen. Laws §11-6-2 (1989); S.C. Code Ann. §16-15-70 (1962); Utah Code Ann. §76-7-103 (1953); Va. Code Ann. §18.2-365 (1975); Wis. Stat. Ann §944.16.