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LAW AND THE FAMILY

## **ADULTERY AS A GROUND FOR DIVORCE**

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ACTS OF ADULTERY, among the most emotionally charged destroyers of marriage, present unique challenges and opportunities around which to procure a divorce judgment under the Domestic Relations Law (DRL). Since episodes of deviate or sexual infidelity are intrinsically secretive and proof inherently elusive, the plaintiff can imply guilt through indirect or circumstantial evidence so long as it leads the reasonable observer to conclude that the parties were inclined toward adulterous acts and the opportunity existed. Where direct testimony exists, it often comes from suspicious sources like prostitutes and private eyes, and the judge devalues it accordingly; there is a strong possibility, also, that the plaintiff deployed such people to entrap the defendant in the sexual equivalent of a "buy and bust" and get a divorce with the defendant's connivance. Without corroboration, an adulterer's confession is worth even less, since there is the possibility of collusion. Without consent, as in cases where the adulterer can prove mental incapacity, the acts themselves provide no basis for judgment.

If a spouse's adultery is to be used as ground for a divorce action, the plaintiff must also act quickly and decisively. A plaintiff is assumed to have forgiven the defendant if proceedings start more than five years after the offenses were discovered or the plaintiff voluntarily continues to live for long periods with a spouse he or she knows has been unfaithful (cohabitation with merely the suspicion of adultery, without knowledge or proof of actual misconduct, at least will not invalidate the proceeding).

The plaintiff must also not express revenge by engaging in his or her own adulterous acts that would have entitled the defendant, if innocent, to a divorce.

## Definition of Adultery

DRL s170(4) provides that an action may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on the ground of the commission of an act of adultery. Adultery is defined in the statute as the commission of an act of sexual or deviate sexual intercourse, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of the plaintiff and the defendant.

Deviate sexual intercourse includes, but is not limited to, sexual conduct as defined in Penal Law 130.00 (2) and 130.20 (3).

Penal Law 130.00 (2) provides that "deviate sexual intercourse" "means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." Penal Law 130.20 (3) provides: "A person is guilty of misconduct when: ... 3. He engages in sexual conduct with an animal or a dead human body."

From 1787, when Alexander Hamilton's divorce law was enacted until 1967, when the Divorce Reform Law added five new grounds for divorce, adultery was the only ground for divorce in New York. The law reflected the then strong New York public policy against divorce.

## Proof of Adultery

In a divorce action grounded upon the adultery of the defendant, the plaintiff has the burden of proving the material allegations of his or her complaint, even though the defendant defaults in appearing or pleading, or the answer does not put in issue the allegation of adultery. [FN1]

There need not be direct evidence of the actual commission of the adultery, since adulterous acts are usually secret and can be proven ordinarily only by circumstantial and indirect evidence. [FN2] It has frequently been held that to establish adultery by circumstantial evidence, the plaintiff must prove opportunity, inclination and intent. [FN3] There must be evidence of some relation between the parties and such conduct on their part as would tend to establish that the desire and willingness existed to engage in an act of adultery when the opportunity arose.

Proof of opportunity to commit adultery, alone, is insufficient. The evidence of inclination and intent must be clear, positive and satisfactory, such as to lead a reasonable person to the conclusion that the adulterous act was committed when the opportunity was present. [FN4] Where it is shown that the parties charged with adultery had the lascivious desire and the opportunity to gratify it, the fact that they gratified it may be inferred from other facts. [FN5]

The circumstantial evidence of adultery need not be so strong as to admit of no other possible conclusion, or as to convince the court beyond all doubt, but it should point clearly to guilt. [FN6]

#### Paramour, Prostitute, Private Eye

When adultery was the only basis for divorce in New York, the testimony of a correspondent as to intercourse with a spouse was said to be viewed with suspicion. The courts would not generally grant a divorce based on such uncorroborated testimony. [FN7]

Because of the doubtful character and unreliability of private detectives and prostitutes, their testimony was also viewed with suspicion and generally held to be insufficient without some corroboration. [FN8] This rule does not apply to the testimony of a detective who obtained evidence without compensation through friendship to one of the parties, or to the testimony of a person who was a witness to the sexual act, but not as a paid detective. In such instances there need be no corroboration. [FN9]

The rule requiring corroboration in certain situations is not a rule of evidence but merely one for the guidance of the judicial conscience in uncontested cases, and it is not followed as a matter of law in litigated cases where there is a jury. [FN10] The rule is not that such evidence could not be considered by the court, but that in considering it only such weight should be given to it as the conscience of the judge or jurors shall deem it entitled to receive. [FN11]

The reality of the situation being what it is, the courts have held very slight corroboration of the testimony of private detectives, or of prostitutes, to be sufficient to justify the granting of a divorce. This is especially true where the party against whom the testimony is introduced fails to take the stand in his or her own behalf. Such corroboration may be found, for instance, in surrounding circumstances, or in letters of the defendant to the correspondent. [FN12]

#### Confessions

Naturally, this door swings both ways. A divorce will not be granted on adultery grounds solely based upon the confessions of the parties. The courts refuse to grant divorces upon a confession alone, requiring corroboration of some sort in order to avoid collusion. Guided more by its conscience than a rule of evidence, the judicial system seeks to assure the integrity of the system.[FN13] It is not necessary that the corroboration be sufficient by itself to prove the adultery. It is only necessary that it tends to corroborate the confession. [FN14]

A confession of adultery that is clear and distinct, sincere and not collusive, corroborated by the correspondence of the guilty party or other evidence, constitutes a sufficient basis for a judgment of divorce. [FN15]

## Insanity as Defense

Proof that a spouse was mentally incapable at that time of understanding the nature, quality, effect and consequences of the adulterous act is a defense. Although there is no statute expressly establishing defendant's insanity when the adultery was committed, which is a defense, the intent of the statute certainly implies consent or acquiescence. Consent is lacking in the act of an insane person. [FN16]

In *Pajak v. Pajak*, [FN17] since there is no statutory defense to a divorce action in New York based on defendant's cruel and inhuman treatment, the Court of Appeals has held that an attempt to explain or excuse conduct, which would otherwise constitute actionable cruelty, by reason of a defendant's mental illness, cannot be justified. [FN18]

## Statute of Limitations

DRL s210 provides that no action for divorce may be maintained on a ground that arose more than five years before the commencement of the action, except where abandonment or separation pursuant to agreement or judgment is the ground. [FN19] DRL s171 (3) provides that a divorce will not be granted although the adultery of the defendant is established, where there has been no express forgiveness, and no voluntary cohabitation of the parties, but the action is not commenced within five years after discovery by the plaintiff of the offense charged.

If the injured party acquiesces for five years after knowledge of adultery, he or she is presumed to have pardoned or forgiven the offense. [FN20] Moreover, continuous adultery of the defendant, existing and known to the plaintiff for more than five years before the commencement of the action for divorce, is a bar even though the plaintiff produces evidence of adultery with the corespondent within the five-year period. [FN21]

## Plaintiff's Adultery

One of the few instances in life where two wrongs make a right (or in this instance eliminate "rights"), DRL s174(4) provides that the plaintiff is not entitled to a divorce even though the adultery of the defendant is established "where the plaintiff has also been guilty of adultery under such circumstances that the defendant would have been entitled, if innocent, to a divorce."

The adultery of the plaintiff, to bar a divorce, must be such as could be made the basis of an action for divorce by the defendant. Thus, where the adultery of the plaintiff was committed with the connivance of the defendant, the defendant cannot use such adultery as a defense to a divorce action brought against him or

her, since the defendant could not maintain an action for divorce against the plaintiff because of the defendant's connivance.

Similarly, the commission of an act or acts of adultery by the plaintiff more than five years before the commencement of the action, and then known by the defendant to have been committed, does not bar the plaintiff's right to a divorce judgment. Since the defendant could not maintain an action for divorce against the plaintiff because of the lapse of time, it follows that the plaintiff's misconduct is not a defense. [FN22] Moreover, the commission of adultery by the plaintiff does not operate as a defense where it has been forgiven or condoned by the defendant, [FN23] since the defendant could not maintain an action for a divorce on the basis of a condoned offense.

### Forgiveness

Even though the adultery of the defendant is established, DRL s171(2) provides that a divorce will not be granted where the adultery has been forgiven by the plaintiff. Forgiveness, thus legally releasing the injury, is called "condonation." The defense of condonation or forgiveness may, in the words of the statute, be proved "either affirmatively or by the voluntary cohabitation of the parties, provided it is with knowledge of the facts. Where the plaintiff has voluntarily cohabited with the defendant with full knowledge that the defendant has been unfaithful, it is presumed that the plaintiff has condoned or forgiven the injury. [FN24]

Cohabitation, and thus condonation, will be inferred from the fact of living together as husband and wife, where nothing appears to the contrary. However, in the absence of any other evidence tending to establish forgiveness, a single act of intercourse between the parties is not such a voluntary cohabitation of the parties as to prove forgiveness, particularly where the intercourse was committed while the plaintiff was emotionally upset and under the influence of alcohol. [FN25]

For cohabitation to constitute forgiveness of the adultery, it must take place with full knowledge of the fact. This means that the cohabitation must be with knowledge that the defendant committed adultery. It must appear with reasonable clearness that the plaintiff had sufficiently substantial knowledge upon which to base a belief in the guilt of the defendant, not only of the particular act of adultery, but of all the then existing charges of adultery. The plaintiff must not only have some indication of the fact of adultery, but must believe the fact to be true. [FN26]

Mere circumstances of a suspicious nature, where the adultery is denied by the alleged guilty party, do not constitute such knowledge of the misconduct that subsequent cohabitation establishes forgiveness. Moreover, the plaintiff may not be held to have condoned the adultery where his or her knowledge of the adultery

lies entirely in the other person's confession. It must appear that the plaintiff has some proof in addition to the confession. [FN27]

### Revival of Offense

Condonation or forgiveness of the offense of adultery that constitutes a defense to an action for divorce is not absolute, but it is conditioned upon the defendant's future good conduct. Where the defendant commits adultery subsequent to the condonation, the condoned adultery is revived. The condonation will also be nullified and the original adultery revived by subsequent cruelty or abuse or indignities amounting to marital misconduct. [FN28]

### Procurement

Even though the adultery of the defendant is established, DRL s171 (1) provides a statutory bar if the adultery was committed by the procurement or with the connivance of the plaintiff. "Connivance" has been defined to be the corrupt consenting of a married party to the adultery of the spouse from which that party afterward seeks a divorce. [FN29] The basis of the defense of connivance is *volenti non fit injuria*, or that one is not legally injured if he or she has consented to the act complained of or was willing that it should occur. [FN30]

If the plaintiff has conspired with another person to have the latter commit adultery with the defendant, the plaintiff connives at such adultery. [FN31] The plaintiff, however, is not guilty of connivance merely because he or she failed to prevent or discourage the adultery by the defendant. [FN32] The fact that the plaintiff willfully abandoned the defendant does not establish that the plaintiff consented to adultery by the defendant during the period of abandonment and that the plaintiff was therefore guilty of connivance. [FN33]

Where one spouse suspects that the other is about to commit adultery, he or she may obtain evidence of the act without being guilty of connivance. [FN34] However, where a spouse hires someone for the express purpose of committing adultery with the other spouse, there is a corrupt consent and a connivance at the adultery. [FN35] An act of adultery is deemed to have been procured by the plaintiff where it appears that it was committed by the defendant with someone hired by the plaintiff to obtain evidence of the defendant's adultery, since the plaintiff is charged with responsibility for the act of his or her agent, even though the agent was not hired for the purpose of committing adultery. [FN36]

### Collusion

Collusion between the parties to a divorce action based on adultery will bar the granting of a divorce. [FN37] The term "collusion" as applied to a divorce proceeding has been broadly defined to be an agreement between a husband and wife to procure a judgment dissolving the marriage contract, which, if the facts

were known, the court would not grant. [FN38] The term "collusion" also has been more narrowly defined as an agreement between husband and wife for one of them to commit, or to appear to commit, or to be represented in court as having committed, a breach of the matrimonial duty, for the purpose of enabling the other to obtain the divorce. [FN39]

It should be noted that General Obligations Law s5-311, as amended in 1966, provides that an agreement made between a husband and wife shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds for divorce. Thus, conduct that formerly might be regarded as "collusive" may not be so regarded under the current expression of public policy.

While connivance and collusion are closely related, the distinction between them is that connivance is a unilateral act by one spouse, whereas collusion is a corrupt agreement between both spouses. Thus, to constitute collusion there must be an actual agreement between husband and wife to procure a divorce. [FN40]

The readiness of one of the parties to a divorce action to assist the other in the legal proceedings is not of itself collusive, although it invites scrutiny into the facts to ascertain whether they are false or, if true, whether there was an arrangement to procure a divorce. [FN41] Similarly, the mere furnishing of information to the plaintiff by the defendant of his past acts of adultery does not constitute collusion barring the plaintiff from a divorce. It is only a circumstance to be taken into consideration by the court in determining whether there actually has been collusion. [FN42] The law contemplates collusion in the offense, not in furnishing evidence of it. [FN43]

The commission of adultery, or the creation of the appearance of having committed it, with the consent or privity of the other party, or under an arrangement between the spouses, has been held to be collusion. [FN44] However, the failure of the defendant to appear and defend an action of divorce is not of itself collusion, although it may, along with other circumstances, be evidence of it. [FN45]

Any arrangement or plan between the parties whereby evidence of a valid defense to a divorce action is suppressed constitutes collusion. [FN46] Clearly, an agreement between the parties to an action for a divorce that the defendant shall withdraw opposition to, or not defend, the action is collusive. [FN47] However, agreements relating to alimony, or the adjustment of property rights that do not directly induce the procurement of a divorce, do not constitute such collusion as will bar a divorce. [FN48]

Collusion, Settlement

There is an exceedingly fine line drawn between collusion and proper settlement of differences preparatory to divorce, and the distinction may depend upon verbal niceties, semantics and assumptions as to motivation. If the term is given a broad definition, many, if not most, uncontested divorces accompanied by settlement agreements may be labeled "collusive." The proper definition of the term, however, should depend upon the legal and social consequences entailed, and since today it comports with public policy to amicably settle differences and to plan for the future, only a blatant "buying off" of a meritorious defense, a conspiracy to fabricate or suppress facts and to work serious fraud on the court, should be deemed "collusion."

FN1. Domestic Relations Law s211.

FN2. *Yates v. Yates* (1914) 211 NY 163, 105 NE 195; *Mattison v. Mattison* (1911) 203 NY 79, 96 NE 359.

FN3. *Trumpet v. Trumpet* (1961, Sup) 215 NYS2d 921; *Fleck v. Fleck* (1957) 6 Misc2d 202, 163 NYS2d 218; *Brooks v. Brooks* (1953, Sup) 120 NYS2d 335.

FN4. *Brooks v. Brooks*, supra; *Pollock v. Pollock*, (1877) 71 NY 137; *Bosch v. Bosch*, (1949) 275 App Div 1046, 91 NYS2d 841.

FN5. *Kay v. Kay* (1932) 235 App Div 25, 256 NYS 147; *Kerr v. Kerr* (1909) 134 App Div 141, 118 NYS 801.

FN6. *Braun v. Braun* (1935) 245 App Div 194, 281 NYS 25; *Allen v. Allen*, (1886) 101 NY 658, 5 NE 341; *Fleck v. Fleck*, (1957) 6 Misc2d 202, 163 NYS2d 218.

FN7. *Glaser v. Glaser* (1901) 36 Misc 231, 73 NYS 284; *Delling v. Delling* (1901) 34 Misc 122, 69 NYS 479; *Fawcett v. Fawcett* (1899) 29 Misc 673, 61 NYS 108.

FN8. *Winston v. Winston* (1901) 165 NY 553, 59 NE 273, affd 189 US 506, 47 L Ed 922, 23 S Ct 852; *Moller v. Moller* (1889) 115 NY 466, 22 NE 169.

FN9. *Filocco v. Filocco* (1942) 263 App Div 296, 32 NYS2d 552; *Yates v. Yates*, supra.

FN10. *Yates v. Yates*, supra. *Simons v. Simons* (1945) 270 App Div 88, 58 NYS2d 558; *Trumpet v. Trumpet* (1961, Sup) 215 NYS2d 921; *Barber v. Barber* (1953, Sup) 119 NYS2d 773.

FN11. *Yates v. Yates*, supra; *Braun v. Braun* (1935) 245 App Div 194, 281 NYS 25.



FN12. See *Yates v. Yates*, supra; *Winston v. Winston* (1901) 165 NY 553, 59 NE 273, affd 189 US 506, 47 L Ed 922, 23 S Ct 852; *McCarthy v. McCarthy* (1894) 143 NY 235, 38 NE 288; *Moller v. Moller* (1889) 115 NY 466, 22 NE 169.

FN13. *Betts v. Betts*, 1 Johns Ch 197; *Madge v. Madge*, (1886, NY) 42 Hun 524; *Anonymous*, 17 Abb Pr 48; *Barbara v. Barbara*, (1945,Sup) 57 NYS2d 156.

FN14. *Monypeny v. Monypeny*, (1916) 171 App Div 134, 157 NYS 11; *Lake v. Lake*, (1946, Sup) 60 NYS2d 105.

FN15. *Crowley v. Crowley* (1959) 18 Misc 2d 586, 186 NYS2d 60.

FN16. *Laudo v. Laudo* (1919) 188 App Div 699, 177 NYS 396; *Horn v. Horn*, (1911) 142 App Div 848, 127 NYS 448; *Rathburn v. Rathburn*, 40 How Pr 328.

FN17. (1981, 4th Dept.) 85 App Div 2d 923, 446 NYS2d 765, motion gr 55 NY2d 1035, 449 NYS2d 712, 434 NE2d 1079, affd 56 NY2d 394, 452 NYS2d 381, 437 NE2d 1138

FN18. *Cook v. Cook*, 53 Barb 180

FN19. DRL s210.

FN20. *Ackerman v. Ackerman* (1910) 200 NY 72, 93 NE 192; *Gouch v Gouch* (1910) 69 Misc 436, 127 NYS 476.

FN21. *Valleau v. Valleau*, 6 Paige 207; *Coyne v. Coyne* (1946) 271 App Div 895, 67 NYS2d 488, affd 297 NY 927, 79 NE2d 748; *Rosenbaum v. Rosenbaum* (1968) 56 Misc2d 221, 288 NYS2d 285.

FN22. *Fleischer v Fleischer* (1947) 188 Misc 402, 68 NYS2d 6; *Mays v. Mays* 18 (1940, Sup) 22 NYS2d 702, affd 261 App Div 984, 27 NYS2d 436; *Ryan v. Ryan* (1928) 132 Misc 339, 229 NYS 511; *Weiger v. Weiger* (1946) 270 App Div 770, 59 NYS2d 444; *Bleck v Bleck* (1882, NY) 27 Hun 296.

FN23. *Ryan v. Ryan*, supra.

FN24. *Wood v. Wood*, supra; *Brown v. Brown* (1940, Dom Rel Ct) 21 NYS2d 325.

FN25. *Kinley v. Kinley* (1952, Sup) 115 NYS2d 341.

FN26. *Donnelly v Donnelly* (1947) 272 App Div 779, 69 NYS2d 651; *Merrill v. Merrill* (1899) 41 App Div 347, 58 NYS 503; *Diggs v. Diggs* (1919) 187 App Div 859, 175 NYS 791.

FN27. Harris v. Harris, supra; Deisler v. Deisler (1901) 59 App Div 207, 69 NYS 326; Merrill v. Merrill, supra; Uhlmann v. Uhlmann, supra.

FN28. Ohms v. Ohms, (1955) 285 App Div 839, 137 NYS2d 397; Smith v. Smith, 4 Paige 432; Johnson v Johnson, 14 Wend 637; Timerson v. Timerson, 2 How Pr NS 526.

FN29. Santoro v. Santoro (1945, Sup) 55 NYS2d 294, affd 269 App Div 859, 56 NYS2d 539.

FN30. Myers v Myers, 41 Barb 114.

FN31. Fisher v. Fisher (1917) 220 NY 710, 116 NE 1044.

FN32. Reiersen v. Reiersen (1898) 32 App Div 62, 52 NYS 509.

FN33. McNeir v. McNeir (1911) 76 Misc 661, 129 NYS 481, affd 151 App Div 889, 135 NYS 1126; Mattison v. Mattison (1908) 60 Misc 573, 113 NYS 1024, revd 203 NY 79, 96 NE 359; Griffin v Griffin, 23 How Pr 183.

FN34. Reiersen v. Reiersen, supra.

FN35. Helmes v. Helmes (1898) 24 Misc 125, 52 NYS 734.

FN36. See McAllister v. McAllister (1912, Sup) 137 NYS 833; Tuck v. Tuck (1907) 117 App Div 421, 102 NYS 688.

FN37. Hanks v. Hanks, 3 Edw Ch 469; Dodge v. Dodge (1904) 98 App Div 85, 90 NYS 438; Galloway v. Galloway (1904) 92 App Div 300, 86 NYS 1078; Goldner v. Goldner (1900) 49 App Div 395, 63 NYS 431; Bowe v. Bowe (1907) 55 Misc 403, 106 NYS 608; Cowan v. Cowan (1898) 23 Misc 754, 53 NYS 93; Huntley v. Huntley (1893) 73 Hun 261, 26 NYS 266.

FN38. Doeme v. Doeme (1904) 96 App Div 284, 89 NYS 215.

FN39. Fuchs v. Fuchs (1946, Sup) 64 NYS2d 487; McIntyre v. McIntyre (1894) 9 Misc 252, 30 NYS 200.

FN40. Doeme v. Doeme (1904) 96 App Div 284, 89 NYS 215; Bowe v. Bowe (1907) 55 Misc 403, 106 NYS 608; McIntyre v. McIntyre, supra.

FN41. Dodge v. Dodge, supra.

FN42. Rosenzweig v. Rosenzweig (1931) 231 App Div 13, 246 NYS 231; Lake v. Lake (1946, Sup) 60 NYS2d 105.

FN43. *Rosenzweig v. Rosenzweig* (1931) 231 App Div 13, 246 NYS 231.

FN44. *Dodge v. Dodge*, *supra*; *Goldner v. Goldner*, *supra*; *Huntley v. Huntley* (1893) 73 Hun 261, 26 NYS 266.

FN45. *Galloway v. Galloway*, *supra*.

FN46. *Peck v. Peck* (1887, NY) 44 Hun 290.

FN47. *McIntyre v. McIntyre*, *supra*.

FN48. *Daggett v. Daggett*, 5 Paige 509; *Doeme v. Doeme*, *supra*.

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