

DATING DURING DIVORCE

The purpose of this pamphlet is to assist you in answering questions that you may have regarding dating during divorce and the law in North Carolina. It is, of course, impossible to answer all of your questions in a short brochure such as this, so we want to encourage you to ask other questions of your lawyer at the appropriate time.

1. Q. After I separate from my spouse, am I free to date other people?

A. Yes and no. You are free to associate with whomever you choose. However, until a final decree of divorce is entered, you are still married. Sexual relations with anyone other than your spouse is still a crime in North Carolina. Adultery is a misdemeanor, but since the district attorney usually has more pressing matters to handle, criminal prosecution is not your primary concern. Your chief concerns should be how a new relationship will affect:

1. custody or visitation with your children
2. your children and your relationship with them
3. whether you pay or receive spousal support
4. the amount of spousal and/or child support that you receive or pay
5. your ability to effectively negotiate a property settlement with your spouse

2. Q. But adultery has nothing to do with custody, right?

A. Not so fast. There are several reasons why adultery is dangerous in custody cases:

- First, while the law may say that adultery per se doesn't matter, the judge is the decision-maker in your case. The judge has a great deal of discretion in custody cases and in awarding or restricting visitation rights. Some judges might not be bothered or offended by adultery; others would be loathe to grant custody or normal visitation rights to a parent carrying on an adulterous affair.
- Second, while a divorce might end the marriage, it won't end the relationship with the other parent over the minor children. The parents will have to deal with each other on a frequent basis over a period of years, and post-divorce cooperation clearly is in every client's best interest. It is hard to imagine how having an affair

before the divorce is complete can have a positive effect on the spouse's feelings for the adulterer, but the possibility that it will poison any spirit of cooperation is readily apparent. The need for future negotiation is inevitable, and negotiating with a friend is usually easier than negotiating with an enemy.

- Third, child support is important in every child custody or visitation case. Generally, the North Carolina Child Support Guidelines will determine the amount of child support paid or received in a given case. The Guideline amount is presumed to be sufficient to meet the reasonable needs of the child(ren). Under the Guidelines, the amount of child support is determined by the incomes of the parents. But, the court may deviate or vary from the Guideline amount under appropriate circumstances. For example, if one parent is living with another person and sharing expenses, the needs of the child(ren) for fixed expenses like housing, electricity, natural gas, water and other utilities are reduced because of the presence of another person in the residence.
- Finally, most new relationships which begin before a divorce is final are unlikely to succeed. When children have been made a part of that relationship they experience another loss. Children who suffer repeated losses can become reluctant to develop closer relationships. Not only is this damaging to the children, but many judges are very concerned about the impact of introducing children to a significant other while a divorce is pending.

3. Q. *What does dating have to do with whether I pay or receive spousal support?*

- A. Maybe a lot. This subject is covered more fully in our Family Law Information Letters #14 and #34, but in general, you should know that the law regarding spousal support changed effective October 1, 1995. For cases filed prior to October 1, 1995, the spouse seeking support had to prove that the other spouse was guilty of some marital fault. Among other things, this fault included adultery, indignities, and constructive abandonment. Dating or other social activities with a person to whom you are not married may be relevant to establishing one or more of the fault grounds necessary for an award of spousal support by the court. This is true even after you have separated from your spouse. For cases filed on or after October 1, 1995, marital misconduct is not essential for a claim for post-separation support or alimony. Marital misconduct occurring after the date of separation is only relevant to prove that similar behavior also existed before the date of separation. Marital misconduct includes "illicit sexual behavior" and indignities. A dependent spouse who has committed an act of illicit sexual behavior before the date of separation cannot be awarded alimony. A supporting spouse who has committed an act of illicit

sexual behavior before the date of separation must pay alimony. When both spouses have committed acts of illicit sexual behavior, the court will weigh the relative fault of the parties to determine whether support should be awarded. "Illicit sexual behavior" includes sexual intercourse and other sexual acts engaged in with someone other than your spouse. Your relationship with a person of the opposite sex may be considered an indignity or constructive abandonment of your spouse, even if you have not engaged in sexual acts.

4. Q. *What does dating have to do with how much I pay or receive in spousal support?*

- A. Dating will have little or no impact on how much spousal support you pay or receive, unless you share a residence or "cohabit" with someone. Cohabitation means: "the act of two adults dwelling together continuously and habitually in a private heterosexual relationship ... or a private homosexual relationship. Cohabitation is evidenced by the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations."

If you share a residence with someone, this living arrangement affects the amount of your monthly expenses and your need for support from your spouse or your ability to contribute to the support of your spouse. This is true whether you are romantically involved with this person or not. If you are romantically involved with a person with whom you share a residence, a court may determine that you are cohabiting with that person. Cohabitation by a spouse receiving support can be a basis for the reduction or termination of spousal support.

5. Q. *But if I don't have children and alimony is not an issue, I can carry on my extramarital relationship while my property settlement is being negotiated, right?*

- A. Wrong. Extramarital sexual relations before divorce can have an adverse affect on the other spouse, perhaps leading to unwanted complications in your settlement negotiations. This risk is especially high if the other spouse did not know of the "other woman" or the "other man" before agreeing to a negotiated settlement, but it can arise even if there was full knowledge beforehand. Infidelity typically causes hurt, embarrassment and anger, especially when the adultery is public knowledge. A relationship while the divorce is pending can create these feelings, and the risk is that the spouse will seek vindication or revenge. This motive may manifest itself in serious problems when your lawyer tries to bargain for a "fair" division of property or to avoid an excessive settlement demand from the injured spouse. Steer clear of adulterous conduct if you want your lawyer to be able to deal with opposing counsel based on facts and finances, rather than hurt feelings.

- 6. Q. I've heard about heart-balm lawsuits against "the other woman" or "the other man." Can dating after separation give cause to that kind of lawsuit?**
- A. Heart-balm lawsuits against "the other man/woman," mean that your spouse files an alienation of affection claim and a claim for criminal conversation. Early in 2002 the Court of Appeals ruled that a claim of alienation of affection pertains to a dating relationship during the marriage. However, a criminal conversation claim can be maintained and successfully litigated when sexual acts occur before or after the date of separation. Heart-balm lawsuits are complicated and, often, very expensive if taken to trial. Therefore, if you engage in sexual conduct with the person you're dating you could be exposing them to a criminal conversation lawsuit.