Assessing "Manifest Injustice" in Spousal Support Cases:

Playing the Blame Game

by Brian M. Hirsch

Here's a familiar fact pattern: The parties have a miserable marriage of fifteen years. The husband makes one hundred thousand dollars per year. The wife is a stay-at-home mom. The husband is unhappy and has been difficult to live with. Maybe he suffers from depression. Maybe he is just "emotionally unavailable" due to a bad childhood, or maybe his career is burning him out.

The wife is equally unhappy. Maybe her spouse is not fulfilling her needs. Maybe being a stay-at-home mom is not as satisfying as her former career, or maybe she suffers from depression after being in a loveless marriage. The parties' sex life is long over. The wife has an affair with a neighbor. The husband suspects something is wrong. His suspicions are confirmed by a private investigator.

The wife walks into your office with a Complaint for Divorce alleging adultery. You explain that, according to Virginia Code § 20-107.1, she might be permanently barred from receiving spousal support. She tells you that she has not had a paying job in nine years, and her three children (ages ten, seven and five) still need her at home. She explains that the affair lasted only a few weeks, was the only act of infidelity during her marriage and it ended several months ago. She asks whether there isn't something in the law that would allow her to receive spousal support.

It depends. The exception to adultery as a permanent bar to spousal support was enacted in 1988. The statute allows an award of spousal support in the face of adultery "if the court determines from clear and convincing evidence, that a denial of support and maintenance would constitute a manifest injustice, based upon the respective degrees of fault during the marriage and the relative economic circumstances of the parties." Virginia Code § 20-107.1B, as amended.

There are a few notable features to the statute. First, it raises the standard of proof to "clear and convincing evidence." Clear and convincing evidence has been defined as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Congdon v. Congdon,* 40 Va. App. 255, 263, 578 S.E.2d 833, ___ (2003) *citing Lanning v. Va. Dept. of Transp.*, 37 Va. App. 701, 707, 561 S.E.2d 33, 36 (2002) (citations omitted).[1]

The test for finding a manifest injustice is in the conjunctive. The court must consider the respective degrees of fault during the marriage and the relative economic circumstances of the parties. *Congdon v. Congdon,* 40 Va. App. 225, 264, 578 S.E.2d 833 (2003).

The best-known manifest injustice case is *Congdon v. Congdon,* 40 Va. App. 225, 578 S.E.2d 833 (2003), which is a classic example of the exception. Mrs. Congdon conceded that she engaged in an extramarital affair for at least five years during the marriage. However, the evidence also showed Mr. Congdon was a coarse individual. He would often engage in conversations in front of his children about "strip joints and topless bars," and talked crudely about sex over the parties' twenty-year marriage. *Id.* at 259. He complained about the wife's weight, appearance, housekeeping and spending habits. He called her a witch. He was a heavy drinker. He controlled family finances, and he once threatened to move out of town if Mrs. Congdon did not stop speaking with her parents. *Id.* at 260.

Mr. Congdon's financial ability was as great as his manners were poor. He had a college degree, a stable position in the family trucking business, an annual salary of $250,000 and income from corporate dividends and family gifts. He had more than six million dollars in assets. Mrs. Congdon earned $10 per hour at the time of the hearing.

There is no question of the enormous disparity in the Congdon's economic circumstances. Thus, all that was left for the trial court to decide was the "respective degrees of fault" provision of Virginia Code §20-107.1B. This would juxtapose Mrs. Congdon's affair with Mr. Congdon's relentless crude behavior. In doing so, the trial court found a manifest injustice and awarded Mrs. Congdon spousal support. The court of appeals, in affirming the trial court, stated:

> The law does not excuse, condone, or justify [Ms. Congdon's] infidelity. But neither does the law turn a blind eye to [Mr. Congdon's] behavior, which multiple witnesses described as both unrestrained and longstanding. *Id* at 266.

Courts have found a manifest injustice in situations where the respective degrees of fault were less disparate than in *Congdon.* In *Barnes v. Barnes,* 16 Va. App. 98, 428 S.E.2d 294 (1993), the wife admitted to a post-separation affair. However, the parties both conceded that their marriage had ended prior to their separation. The trial court granted the husband a divorce on the wife's adultery, but awarded her spousal support under a manifest injustice theory.

The husband appealed, claiming that there were no "respective degrees of fault" since there was no finding of marital fault on his part. The court of appeals disagreed, stating that respective degrees of fault were not limited to legal grounds for the divorce. It also included "all behavior that affected the marital relationship, including any acts or conditions which contributed to the marriage's failure, success, or well-being." *Id.* at 16 Va. 298. The court recalled the wife's testimony that the husband did not spend time alone with her and that he would sometimes make crude remarks toward her. This, coupled with the parties' joint concession that the marriage had essentially ended prior to their separation, satisfied the "relative degrees of fault" element of the test.

It appears inconsistent to find a manifest injustice in *Congdon* (where Mr. Congdon acted so reprehensibly toward his wife), and to also find it in *Barnes* (where the marriage seemed to merely die on the vine). The explanation lies in the differing weight often assigned to pre- and post-separation adultery.[2] *Congdon* involved preseparation adultery, and took some persuasive evidence of Mr. Congdon's fault to overcome this. In *Barnes*, the wife admitted to postseparation adultery, but the trial court concluded that the marriage was irretrievably lost prior to this. This same pre/postseparation adultery analysis was applied in finding a manifest injustice in *Zasler v. Zasler,* 2003 WL 22076354 (Va. App.) (wife committed preseparation adultery, but husband used cocaine, induced wife to use it, and was arrested for assaulting wife with a knife), and in *Porter v. Porter,* 2004 WL 1556000 (Va. App.) (wife awarded spousal support when her adultery occurred fourteen months after separation and husband announced his desire to separate while the parties were still living together).

An interesting aspect of the manifest injustice cases is the interplay between the two elements—disparity in economic circumstances and the respective degrees of fault. The statute does not state whether each prong must be independently satisfied, or if the two factors combined must rise to the level of a manifest injustice. The court of appeals has interpreted the statute so that "a party obtaining spousal support need not prevail independently on *each* prong by clear and convincing evidence." *Porter v. Porter*, 2004 WL 1556000 at 3 (Va.App.). Instead, it is the *totality* of the two factors which the court must weigh in determining the existence of a manifest injustice.[3] This can result in the weight of one element being far greater or less than the other. However, this does not matter so long as the two elements, when taken together, convince the trial court that barring spousal support to an adulterous spouse would constitute a manifest injustice.

Henke v. Henke, 2005 WL 2335378 at 1 (Va. Cir. Ct. 2005) demonstrates that the greater the disparity in economic circumstances the less proof is required of respective degrees of fault. Here, the wife had committed adultery on several occasions. However, the wife was disabled, and receiving only modest Social Security disability payments. The husband earned ninety-three thousand dollars annually. The court, in awarding spousal support to the wife, merely stated that the marriage did not end because of the adultery, but "was doomed soon after the parties' youngest child was born." *Henke v. Henke,* 2005 WL 2335378 at ___ (Va. Cir. Ct.). Had Ms. Henke been gainfully employed, it is less likely that the court would have found a manifest injustice.

Barnes seemed to agree with this when it stated that

> [e]ven though one party may have been the major force in creating the "fault during the marriage" which led to its dissolution and the other spouse may have been relatively blameless,

> those conditions constitute but one of the factors the court must weigh. The court must also weigh and consider the parties' relative economic positions in deciding whether it would be manifestly unjust to deny a spousal support award.

Barnes v. Barnes, 16 Va. App. 98, 102, 428 S.E.2d 294, ___ (1993)

This policy places a greater burden on higher wage earners than lower wage earners to behave better toward their spouses and permits spouses of these higher wage earners to commit adultery and still receive spousal support. Assume the wife earns fifty thousand dollars per year and commits adultery in a long-term marriage. Why should her husband who earns two hundred fifty thousand dollars per year be expected to behave better during the marriage than if he earned seventy-five thousand dollars? The converse is also true. Why should a lower wage earner get to behave worse to his or her adulterous spouse?

The manifest injustice exception states that once a court determines that there is no impediment to awarding spousal support, the adultery becomes irrelevant.[4] Spousal support is awarded as though the adultery did not occur. While fault (both actual grounds and factors and circumstances contributing to the dissolution of the marriage) is a statutory factor in making an equitable distribution award[5], it is not a factor under § 20-107.1 in awarding spousal support.

This makes § 20-107.1 an "all or nothing" statute. Either the court finds a manifest injustice and awards spousal support without giving any weight to the adultery when making the award, or it does not find a manifest injustice, which results in a permanent bar to spousal support. The law does not take this same approach when dividing property. Virginia's equitable distribution statute (*i.e.,* Virginia Code § 20-107.3) allows the court to consider adultery and other attendant bad acts when dividing marital property, and give whatever weight the court deems appropriate. Reconciling these two statutes (*e.g.,* all or nothing for spousal support versus a sliding scale of wrongdoing for property division) is difficult in light of the similarities of factors, which the two statutes require the court to consider.

Both Virginia Code §§ 20-107.1 and 20-107.3 require the court to consider all of the following:

- Duration of the marriage[6]
- Ages, and mental and physical conditions of the parties[7]
- The contributions, monetary and nonmonetary, of each party to the well-being of the family[8]
- Tax consequences to each party[9].

To the extent the two statutes differ, they do so along logical lines. Each party's income—and the extent to which each sacrificed a career—are considerations in the spousal support statute but not the equitable distribution statute. How and when marital property was acquired and the liquid and nonliquid nature of marital property are proper considerations when dividing property but are not when awarding spousal support. Why, then, is fault a consideration when dividing property but not when determining the amount and nature of spousal support (as opposed to deciding whether to award it at all)? It is naive to believe that no court has ever given a lower spousal support award after finding a manifest injustice. How much of a discount is applied by judges who choose to "hold their noses" and grant an adulterous spouse some spousal support instead of declaring a permanent bar to spousal support? Wouldn't courts approach the topic more honestly if they could discount an award of spousal support by some amount due to a party's fault instead of deciding whether to even make such an award? This would also solve the problem of the high wage earner married to the adulterous spouse being held to a higher standard of conduct during the marriage (or the lower wage earner being held to a lower standard).

In determining spousal support, it is more forthright to consider the marriage in terms of the parties' positive monetary and nonmonetary contributions, as well as their negative monetary and nonmonetary contributions. This concept was first applied to equitable division in *O'Loughlin v. O'Loughlin,* 20 Va. App. 522, 458 S.E.2d 323 (1995). In *O'Loughlin,* the court awarded Mr. O'Loughlin a smaller percentage of marital property due to his ongoing and open affair during the marriage, which the court considered a negative nonmonetary contribution. Why should this same rationale not be applied in spousal support cases? There is no compelling rationale to retain the "all or nothing" aspect to adultery as a bar to spousal support. It is more logical to permit a court to consider fault and factors and circumstances contributing to the dissolution of the marriage in determining the amount and nature of a spousal support award.

Until the General Assembly modifies the current spousal support statute, Virginia courts will be placed in the unenviable position of either completely overlooking the adultery or forever barring a spouse from receiving spousal support because of it. Our legislature should consider a middle ground between these two extremes. ⚖

Endnotes:

1 This is a level higher than "preponderance of the evidence" which has been described as something made to appear "more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal, notwithstanding any doubts that may still linger there." *See, Lamar Co. v. Board of Zoning*

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Appeals, 270 Va. 540, 549, fn, 5, 620 S.E.2d 753, ____ (2005), citing *Northern Virginia Power Co. v. Bailey,* 194 Va. 464, 471, 73 S.E.2d 425, ___ (1952).

2 Both preseparation and postseparation adultery create a ground for divorce. *See, eg., Robertson v. Robertson,* 215 Va. 425 (1975), *Surbey v. Surbey*, 5 Va.App. 119 (1987).

3 As the Court stated in *Congdon,* "it is whether clear and convincing evidence of [the parties'] respective degrees of marital fault—coupled with an examination of the economic disparities between them—supports a finding of manifest injustice." *Congdon,* 40 Va. App. At 266, 578 S.E.2d at 838.

4 Virginia Code § 20-107.1E first requires the court to consider *whether* to award spousal support. If there is no impediment to awarding support, then § 20-107.1 requires the court to consider various factors in "determining the nature, amount and duration of an award."

5 *See*, Virginia Code § 20-107.3E(5).

6 *See* Virginia Code § 20-107.1E(3) and 20-107.3E(3).

7 *See* Virginia Code § 20-107.1E(4) and 20-107.3E(4).

8 *See* Virginia Code § 20-107.1E(6) and 20-107.3E(1).

9 *See* Virginia Code § 20-107.1E(13) and 20-107.3E(9).