

## Proving Adultery in the Commonwealth of Virginia

Of the four fault-based grounds for divorce, adultery garners by far the most attention. Making the decision to pursue adultery as a grounds for divorce can be complicated for a number of reasons. This posting is not my attempt to flush out those considerations. Rather, it is my aim to examine methods used by attorneys to establish adultery, so you might better understand the relative merits of your claim.

If you don't already know, adultery involves one spouse voluntarily having sexual intercourse with another person who is not his or her spouse. Along with adultery, sodomy (i.e. oral or anal sex with a person of the same sex, opposite sex or animal) and buggery (i.e. bestiality) are also fault-based grounds within this general category of fault. See Virginia Code Annotated Sec. 20-91(1). Adultery is also a Class 4 misdemeanor in Virginia. See Virginia Code Annotated Sec. 18.2-365. As a practical matter, this means that an adulterer and his or her significant other have a constitutional right under the Fifth Amendment of the U.S. Constitution to refuse to testify about their illegal acts.

Unsurprisingly, knowing adultery has occurred and persuasively proving it to a Virginia Circuit Court judge are two very different things. In Virginia, adultery must be proved by a “clear and convincing” standard of evidence. While that standard is lower than the classic “beyond a reasonable doubt” criminal standard, it is as high a standard as is available in a civil courtroom. In the face of both the Fifth Amendment denials and the high “clear and convincing” standard – and often without any direct evidence of adultery – successfully demonstrating what you believe has occurred may seem daunting. How do you demonstrate for a judge that your spouse has committed adultery? The answer: circumstantial evidence.

- Did the adulterer say or write things to the paramour; were letters, notes, cards or e-mails exchanged between the adulterer and paramour? Attorneys can issue subpoenas to internet service providers and obtain existing e-mails. Introducing e-mails at trial can present certain evidentiary challenges, but the information they contain can be crucial to helping you frame your allegation and corroborate testimony. E-mails alone, however, do not prove adultery.
- Did the adulterer use a cell phone to call his or her paramour? Attorneys can issue subpoenas to cellular phone service providers and obtain records of out-going and in-coming calls. (NB: Instant messages and text messages are typically not available via subpoena.) Phone records can demonstrate repeated calls to a suspected paramour and help establish the relationship. Suspicious, yes. But, like e-mails, phone calls alone do not prove adultery.
- Did the adulterer use a credit or debit card to purchase meals, gifts, hotel rooms, plane tickets or other such items for his or her paramour?

Attorneys can issue subpoena to financial institutions and obtain records of charges made on selected accounts. Credit card statements can be used to establish where the adulterer was on any given day and on what he spent marital funds. Helpful, certainly. Definitive? No.

Individually, e-mails, phone calls and expenses may not suffice, but together you can use them to persuasively tell a “common sense story” of the illicit relationship. For example, e-mails may illustrate the early stages of a relationship, record day-to-day contact and certain activities a boyfriend and girlfriend might do together. Phone records showing frequent phone calls may further confirm the improper relationship and reflect calling patterns closer to what one might expect from a boyfriend/girlfriend. Charge account statements confirm the relationship still further by recording activities and supporting the notion that expenses incurred were consistent with traditional courting behavior. Circumstantial evidence of this sort, coupled with limited direct evidence (e.g. private investigator’s reports and pictures) and an adulterer’s less than credible attempts to rationalize the evidence, may suffice to demonstrate wrongdoing.

If you have questions about your adultery claim, feel free to drop me a line.