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In an 'irreconcilable differences' divorce system, what about marital misconduct?

For lawyers practicing in the family law arena, a common question from a prospective client is what role a spouse's misconduct plays in the proceedings. It is important that the lawyer be clear on the limitations of marital misconduct so that there is no misunderstanding as to the focus of the tasks ahead.

Since the inception of the Illinois Marriage and Dissolution of Marriage Act (IMDMA) in 1977, one of the stated purposes of the statute was to eliminate the role of fault in the adjudication of the rights and responsibilities under the IMDMA except as it related to grounds – a reason for the divorce (Cf. *In re Marriage of Von Zuidam*, 162 Ill App 3d 942, 944-45 (1st Dist. 1987)).

In 1984, Illinois took a step forward introducing “no-fault” provisions (“irreconcilable differences”) to the grounds for divorce. Finally, in 2016, the laws were revamped, and the only basis for a divorce in Illinois is now irreconcilable differences.

Under the current law, one of the stated purposes of the IMDMA continues to be “to eliminate the consideration of marital misconduct in the adjudication of rights and duties incident to dissolution of marriage, legal separation and declaration of invalidity of marriage ...” [750 ILCS 5/102(9)].

The statutory provisions for the allocation of property [750 ILCS 5/503(d)], determination of maintenance rights [750 ILCS

5/504(a)] and determining each parent's child support responsibilities [750 ILCS 5/505(a)] explicitly prohibit the consideration of marital misconduct is resolving these issues.

As to the allocation of parental responsibilities (formerly called custody and visitation), the law provides that “the court shall not consider conduct of a parent that does not affect that parent's relationship to the child [750 ILCS 5/602.5(e)].”

While the actual misconduct may not be relevant, in some circumstances the effect of the misconduct or ancillary issues that relate to such actions (or inactions) may still be relevant. While there are many instances where the effect of misconduct can be relevant, consider the following as examples:

- If a spouse during the marriage spends funds on a significant other while still married, these expenditures can be re-credited to

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the marital estate labeled as dissipation. This determination must consider whether the expenditures are for a purpose unrelated to the marriage (Cf. *In re Marriage of Romano*, 2012 IL App (2d) 091339, ¶86).

- In evaluating the standard of living, if one spouse is in an extra-

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marital relationship spending large sums on luxury living/items while the other spouse is being asked to live in a relatively low standard of living, in addition to dissipation, the expenditures can also be compelling evidence of and corroborate a standard of living.

a spouse, the cohabitation is a basis to deny or terminate support rights.

- In instances of domestic violence, the misconduct will become relevant to any protections necessary and possibly damages as a result of the conduct that can be part of the dissolution of marriage proceedings.

- If a parent continuously is unavailable or unable to participate in parenting responsibilities due to his or her choices that have negative effects on his or her time with the children, the conduct by statute does affect the relationship with the child and becomes relevant.

It is critical for the lawyer to explain to the client the limitations on misconduct to avoid a client focus on issues that will not advance any relevant issues in the proceedings. While there are some who will try to threaten or attempt to use misconduct issues to try to achieve some form of emotional leverage in the proceedings, a client who understands the limitations can make better decisions on the focus of the case.

If misconduct issues evolve and become the main focus of the proceedings without being properly tied to a relevant issue, the end results are a significant expenditure of time, very expensive litigation and dissatisfied clients. Keeping the client focused on the relevant issues is more productive and can lead to clients who are more appreciative, especially as referral sources.