

BNA Insights

Practice & Procedure

When Ashley Madison Goes Wrong



By MARGARET RYZNAR

Introduction

One of the biggest family law stories of the summer of 2015—other than *Obergefell* and the resolution of the constitutionality of same-sex marriage, of course—was the hack on Ashley Madison, an online dating site for married people seeking extramarital affairs. The hack resulted in the revelation of details of over 30 million Ashley Madison users. The media soon

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turned its attention to matrimonial lawyers to speculate about the consequences of the hack in terms of divorce. However, perhaps there might not be too many consequences after all, particularly when compared to historical family law.

Technology & Family Law

Despite the fact that the Internet has only become publicly available in the last twenty-five years, online dating has become very popular, with millions of people online dating each month.¹ In fact, the number of people meeting online may soon overtake meeting through friends, church, or family, which all have been sinking in priority due to people's busy lives. In one recent study, more than one in three respondents who married between 2005 and 2012 met their spouse online. Which cohort was happier with their relationships? In fact, those who met online reported slightly higher marital satisfaction and slightly lower rates of marital breakups than those whose relationships began offline.²

For better or worse, there's not much law governing online dating. New Jersey became the first state in 2008 to regulate online dating, requiring dating sites to disclose whether they perform background checks on users, although falling short of requiring any background checks.³ New York, meanwhile, now requires dating services to post a safety awareness notice, and many states have followed with similar regulations.⁴

Although the government has not regulated online dating further to police extramarital affairs,⁵ private

¹ See, e.g., Phyllis Coleman, *Online Dating: When "Mr. (or Ms.) Right" Turns Out All Wrong, Sue the Service!*, 36 OKLA. CITY U. L. REV. 139 (2011).

² William Harms, *Meeting Online Leads to Happier, More Enduring Marriages*, U. CHICAGO NEWS, June 3, 2013, available at <http://news.uchicago.edu/article/2013/06/03/meeting-online-leads-happier-more-enduring-marriages>; John T. Cacioppo, Stephanie Cacioppo, Gian C. Gonzaga, Elizabeth L. Ogburn, and Tyler J. VanderWeele, *Marital Satisfaction and Break-Ups Differ Across On-line and Off-Line Meeting Venues*, *Proceedings of the National Academy of Sciences*, available at <http://www.pnas.org/content/early/2013/05/31/1222447110.full.pdf>.

³ New Jersey's Internet Dating Safety Act aims to inform state residents of the "potential risks of participating in Internet dating services." N.J. STAT. ANN. §§ 56:8-168 to 56:8-173 (2008).

⁴ New York enacted the Internet Dating Safety Act in 2012.

⁵ But see Dr. Joanne Sweeny, *Undead Statutes: The Rise, Fall, and Continuing Uses of Adultery and Fornication Crimi-*

citizens have attempted to do so by hacking into the Ashley Madison site and publishing users' information after their demands for having the site shut down were rebuffed. It is not surprising that the executives of Ashley Madison did not want to shut the site down, with its projected revenue this year of over \$100 million, buoyed by scores of married people all over the world looking for affairs.⁶ However, now that Ashley Madison users have been revealed, what will happen to them under domestic relations law should their spouses file for a divorce?

Affairs & Grounds for Divorce

There is no doubt that infidelity remains a leading causes of divorce, alongside the more modern reasons of financial problems or lack of communication. Historically, people might have also turned to the old heart-balm torts, now available in limited states on limited grounds.⁷ However, it is also true that not every adulterous spouse is served with divorce papers even after an affair is revealed.

In the event of a divorce, fault has been playing a smaller and smaller role, no longer required as a ground in any state. No-fault divorce originated in California in the 1970's and swept the country in the ensuing decades, albeit not without debate regarding the wisdom and merits of allowing people to initiate divorce without a reason such as adultery or abandonment. With New York becoming the last state in the country to enact a no-fault divorce law in 2010, no one needs an Ashley Madison hack to initiate a divorce anymore, although there might be advantages to initiating a fault divorce, such as avoiding waiting periods associated with no-fault divorce.

Affairs & Property Division

Many states have extended the no-fault regime to the application of their property division laws, thereby eliminating the role of adultery in property divisions. In such a case, the Ashley Madison hack has no impact on who gets what in the divorce. Some states still consider fault in a property division, but many of these consider only economic fault, such as if one spouse depletes the marital estate or misuses marital assets.⁸ Some Ashley Madison users may have done exactly that if they had paid out notable amounts for membership fees or paramours.

Those divorcing over Ashley Madison have to worry less, however, about alimony. These days, legislators and courts often prefer the clean break of a property di-

vision over ongoing alimony payments.⁹ In fact, alimony laws have been a major source of change in the field of family law in recent decades. While they used to be more generous, to the tune of lifelong spousal support,¹⁰ the trend has been to limit alimony awards by time or circumstances.¹¹

Just because the applicable family law may not necessarily punish extramarital affairs, however, does not mean that couples cannot choose to do so. In fact, some do so through their premarital or even postnuptial agreements.¹² Thus, the Ashley Madison hack could be problematic for couples whose agreements contain provisions penalizing extramarital affairs.

Affairs & Child Custody Issues

The impact of Ashley Madison seems even less significant when it comes to child-related divorce matters. Today, the child's best interests standard is determinative of child custody and visitation issues.¹³ Typically, state statutes list factors related to the child's best interests, and the sexual behavior of parents is often considered irrelevant.¹⁴

⁹ Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: the Ascendancy of Self Over the Marital Community*, 81 B.U. L. REV. 59, 91 (2001).

¹⁰ David H. Relsey & Patrick P. Fry, *The Relationship Between Permanent and Rehabilitative Alimony*, 4 J. AM. ACAD. MATRIM. LAW. 1 (1988).

¹¹ For example, in Indiana, maintenance is available only in three circumstances: 1) for as long as a spouse cannot support himself or herself due to a physical or mental incapacity, 2) a spouse cannot support himself or herself due to a physically or mentally incapacitated child, or 3) up to 3 years of "rehabilitative maintenance" based on a) the educational level of each spouse, b) interruptions in a spouse's education, training, or employment based on homemaking or caregiving responsibilities, c) the earning capacity of each, and d) the time and expense necessary to acquire sufficient education or training to enable the spouse who is seeking maintenance to find appropriate employment. INDIANA CODE 31-15-7-2. However, these limits and clear guidelines have not eliminated litigation on alimony. In the time period of October 1, 2012 to September 30, 2013, litigants brought several cases on alimony in the Indiana courts. For example, *Banks v. Banks*, 980 N.E.2d 423 (Ind. App. 2012); *Alexander v. Alexander*, 980 N.E.2d 878 (Ind. App. 2012). "[T]he Massachusetts Alimony Reform Act (Alimony Reform Act of 2011) is the latest and the most comprehensive of such legislation." Charles Kindregan, *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 SUFFOLK U. L. REV. 41 (2013).

¹² See, e.g., Margaret Ryznar & Anna Stepień-Sporek, *To Have and To Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 42 (2009).

¹³ For a useful background on the American best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006).

¹⁴ For example, in Indiana, the relevant factors for determining the best interests of the child are typical and include the age and sex of the child; the wishes of the child's parent or parents; the wishes of the child, with more consideration given to the child's wishes if the child is at least 14 years of age; the interaction and interrelationship of the child with the child's parent or parents, the child's sibling, and any other person who may significantly affect the child's best interests; the child's adjustment to the child's home, school, and community;

nal Law, 46 LOY. U. CHI. L.J. 127, 169-70 (2014) (noting that some states "have kept their criminal adultery and fornication laws").

⁶ Lianna Brinded, *Ashley Madison's CEO Explains How 'Female Equality' Is Driving Women to Cheat*, BUSINESS INSIDER (Apr. 24, 2015), available at <http://www.businessinsider.com/ashley-madison-boss-noel-biderman-told-us-about-how-female-equality-is-driving-revenue-2015-4?r=UK&IR=T>.

⁷ *The "Heartbalm" Twins: Alienation of Affections and Criminal Conversion/Conversation*, 2 LITIGATING TORT CASES § 25:12 (2014).

⁸ See, e.g., Indiana Code 31-15-7-5, stating a presumption for equal division of marital property except when rebutted by, *inter alia*, "[t]he conduct of the parties during the marriage as related to the disposition or dissipation of their property."

However, such behavior might become relevant if it is egregious enough to create issues for the child. Furthermore, an extramarital affair may influence the application of the child's best interests standard.¹⁵ Finally, the sense of anger stemming from a divorce caused by adultery can be counterproductive to a child's best interests.¹⁶

the mental and physical health of all individuals involved; evidence of a pattern of domestic or family violence by either parent; and evidence that the child has been cared for by a de facto custodian. INDIANA CODE 31-17-2-8.

¹⁵ In one survey, the authors found that an extramarital affair seemed to impact people's perceptions of parenting abilities. Ashley M. Votruba, Sanford L. Braver, Ira Mark Ellman, & William V. Fabricius, *Moral Intuitions About Fault, Parenting, and Child Custody after Divorce*, 20 PSYCHOL. PUB. POL'Y & L. 251, 259 (2014) ("But despite our efforts, we cannot rule out the possibility that some of those who penalized the offending parent in either test case believed the behavior in question cast doubt on their capacity as a parent.").

¹⁶ See, e.g., Solangel Maldonado, *Cultivating Forgiveness: Reducing Hostility and Conflict after Divorce*, 43 WAKE FOREST L. REV. 441, 452-53 (2008) ("Although divorcing parents experience a host of emotions, the most destructive emotion as far as children are concerned is anger. Angry parents sometimes refuse to reach a parenting time agreement; denigrate the other parent to the children; deny, interfere with, or place unrealistic restrictions on visitation; withhold child support; or, although not common, make false accusations of abuse. An angry spouse may also launch a custody battle out of spite. While some parents contest custody or parenting time schedules be-

Conclusion

In many ways, adultery is nothing new to family law, which has developed ways of dealing with it. However, the Internet is far newer—publicly available only since the 1990's—and so is online cheating. The Ashley Madison debacle might just test the family law's approach to Internet use and divorce.¹⁷

To a certain extent, these boundaries have already started to be tested. For example, the social networking giant Facebook not only facilitates extramarital romances, but easily proves that they existed. In 2010, 81 percent of divorce lawyers surveyed by the American Academy of Matrimonial Lawyers saw an increase in the number of cases using social networking evidence in the last five years, with Facebook being the top source for online evidence.¹⁸ Ashley Madison might just up the ante.

cause they are genuinely concerned about their children's best interests, negative emotions are often "the deeper, underlying force driving these actions.").

¹⁷ See, e.g., Sandi S. Varnado, *Avatars, Scarlet "A"'S, and Adultery in the Technological Age*, 55 ARIZ. L. REV. 371 (2013) (examining whether online infidelity should only constitute adultery).

¹⁸ Patrick Marshall, Note, *What You Say on Facebook May Be Used against You in a Court of Family Law: Analysis of This New Form of Electronic Evidence and Why It Should Be On Every Matrimonial Attorney's Radar*, 63 ALA. L. REV. 1115 (2012).