

Outside Counsel

Expert Analysis

MeToo Movement: Misconduct and Divorce

Harvey Weinstein, Matt Lauer, Louis C.K., Bill O'Reilly—these are just a few of the high-profile names that have been toppled by the MeToo Movement., a social movement which ignited a cultural reckoning around sexual assault and harassment and was so powerful that Time Magazine named it the “2017 Person of the Year.”

The downfall of these high-profile men, whose names have long been synonymous with fame, privilege and power, has damaged not only their public personas, but their personal lives as well. Days after the Harvey Weinstein scandal broke, his wife Georgina Chapman, publicly denounced his “unforgivable actions” and announced she was leaving him. Some three months later, their divorce purportedly settled. For Ms. Chapman, or any of the countless other women

By
**Kara M.
Bellew**



whose husband’s bad behavior have impacted their livelihoods and brought embarrassment to their families, the question invariably becomes what role, if any, does this misconduct play in a divorce.

Role of Fault in Divorce

Although New York is a “no fault” divorce state (meaning that neither party must prove fault to be granted a judgment of divorce), the role of marital fault *can* be considered when distributing assets between the parties. New York is an “equitable distribution” state and the division of assets need not be equally allocated between spouses. In determining an “equitable” division of assets, a court will consider many factors, including the length of the marriage

(the longer the marriage, the closer to a 50 percent-50 percent division); the age and health of the parties; the direct and indirect contributions of each party to the acquisition of marital property; and the probable future financial circumstances of each party. There is also a

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catch-all provision that allows the court to take “any other factor” into account that may be “just and proper” when dividing the assets.

Marital fault can only be considered in the catch-all provision where the misconduct is so egregious that it “shocks the conscience.” This is referred to as “egregious fault.” Courts in New York have often found egregious fault in connection with allegations of extreme domestic violence. In fact, the standard for egregious fault

arose from a 2002 case where a husband beat his wife with a pipe and a barbell and was indicted for attempted murder. In that case, the judge awarded the wife 95 percent of the marital assets, as it reasoned that a more equal division would have been unjust and improper. Like domestic violence, the impact of one spouse's criminal conduct, whether violent or non-violent, has also been held to rise to the level of egregious fault. In a recent 2017 case, a husband was charged with insider trading and conspiracy. As he maintained his innocence, an S.E.C. investigation ensued as did a full criminal trial after which he was found guilty. Following the husband's criminal trial and incarceration, the parties' two sons suffered from severe emotional distress. The court held that the conduct of the Husband, which destabilized the well-being of the family and reduced their standard of living, constituted egregious fault. As such, the wife was ultimately awarded 60 percent of the marital home.

For women like Ms. Chapman and Ms. Lauer, whose husbands have allegedly perpetrated criminal acts of sexual assault, they may be able to argue that this rises to the level of egregious fault such that a greater percentage of the

marital assets should be awarded to them in a divorce.

Role of Dissipation

Separate and apart from the issue of "egregious fault," a wronged spouse can also be financially compensated by seeking the return of assets into the marital estates if one spouse has "dissipated" them. Money spent on pursuits "outside the marriage" such as gambling, drugs, alcohol, and/or extramarital affairs have commonly been considered wasteful dissipation in New York. For example, if Mr. Weinstein used marital funds to buy the silence of his many accusers over the years or bankroll his countless extramarital affairs, then Ms. Chapman could argue that he engaged in a wasteful dissipation of marital assets and he should be ordered to pay these funds back to the marriage. This is a distinct argument from "egregious fault" in that the aggrieved spouse is not asking for more than half of the marital assets, but rather that certain assets be constructively returned to the marital estate and then divided equally. The practical and logistical problem with the wasteful dissipation argument is that it is often difficult to prove (people tend to make some effort to cover up their extramarital/nefarious pursuits by using cash and fake

names, although the countless men who set up Ashley Madison online dating profiles with their real contact information belie that argument). An aggrieved spouse can often spend more in legal and forensic accounting fees trying to trace the dissipated assets than she likely would recover. Nonetheless, for someone whose bad acts were as widespread and (expensive) as Mr. Weinstein's, the dissipation argument is probably a wise one to make.

Role of the Prenuptial Agreement

Although both Ms. Chapman and Ms. Lauer could potentially argue egregious fault or the dissipation of marital assets, it is widely reported that both women have prenuptial agreements. A prenuptial agreement, commonly referred to as a "prenup," is a contract entered into prior to marriage which generally sets forth how money and property will be divided in the event of a divorce or at the time of death, if the parties are still married. A validly executed prenuptial agreement most likely renders moot allegations of egregious fault or dissipation, as the agreement itself would generally address a division of assets in the event of a divorce.

Although many may believe that a spouse's bad behavior should

nullify the terms of a prenuptial agreement (particularly one which is not that favorable to an aggrieved spouse), this is not the case. A validly executed prenuptial agreement can only be invalidated if the party challenging the agreement can demonstrate that it was the product of fraud, duress, overreaching resulting in manifest unfairness, or other inequitable conduct. The conduct exhibited by Mr. Weinstein and Mr. Lauer, although arguably deplorable (and in many instances, allegedly criminal), is not enough on its own to invalidate a prenuptial agreement. That said, if these men and others like them have any compunction whatsoever, their remorse and desire for a quick resolution (versus more bad press with highly-publicized divorce litigation) may engender them to be more generous than the terms of the prenuptial agreement require them to be. For example, it is widely reported that Ms. Chapman received a more generous financial settlement than that provided by the couple's prenuptial agreement.

Had the parties not had a prenuptial agreement, Ms. Chapman could have argued that Ms. Weinstein's conduct devalued the fashion label, Marchesa, which she co-founded. Marchesa, long a mainstay of red-carpet

events around the world, saw both collaborators and celebrities distance themselves in the wake of the Weinstein scandal. Although this may have been a consideration in agreeing to a more generous financial settlement for Ms. Chapman, it is an issue that would have been ripe for a court's consideration if the parties were in litigation.

Role of Children

Although prenuptial agreements address how money and property will be divided in the

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event of a divorce or death, they do not address how custody will be resolved. Instead, custody is determined by what is in the "best interests of the child" at the time of a divorce. In a custody dispute, most everything is relevant and certainly each parent's judgment is a central consideration in any custody determination. Although it can be argued that

allegations of sexual harassment and assault do not have a direct impact on a child, when the parent is a public figure, the impact is likely more pronounced. The shame and embarrassment that ensues from one parent's public scandal, coupled with the likely emotional distress, would be factors for a court to consider when making a custody determination.

Conclusion

For women like Ms. Chapman and Ms. Lauer, whose sense of betrayal and disgust likely run deep, there is often little sense of justice that can be reclaimed in a divorce. However, if they can walk away with a greater share of the marital assets, the financial security to provide for their children, and the ability to keep their children safe in their care and primary custody, then it is likely that they will have persevered in reclaiming some sense of justice for themselves.