

5-13-2014

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Recommended Citation

Joanna L. Grossman, *Married Couple's Phone Sex Did Not Force Divorce Clock to Reset* VERDICT (2014)

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Verdict

May 13, 2014

[Joanna L. Grossman](#)

Married Couple's Phone Sex Did Not Force Divorce Clock to Reset



If a married couple, living apart, engages in phone sex, are they still separated? This question was crucial to Nick Bergeris's quest for divorce because he filed on grounds of a 12-month separation (a legal ground for divorce in Maryland) that was free of in-person sex, but not free of phone sex. He was denied the divorce by the trial court, but that ruling was recently **reversed on appeal** (<http://www.mdcourts.gov/opinions/cosa/2014/0405s12.pdf>). Did the court get it right?

Bergeris v. Bergeris: The Marriage and the Separation

Nick and Jeanine Bergeris married in Maryland in 2006. In June 2010, Jeanine sought and received a restraining order against Nick, which led him to move out. After the order expired six months later, the couple continued to reside in separate residences. They did resume an intermittent sexual relationship, but that ended as well in March 2011. After that time, the parties never spent a night under the same roof and never had in-person intimate contact. But the wife argues, and the husband concedes, that they communicated via telephone calls and text messages that “were of an explicit or provocative sexual nature.”

In March 2012, the husband, who had filed for divorce previously, amended his complaint to request divorce on grounds of a 12-month uninterrupted separation. The wife moved to dismiss the complaint on the grounds that the couple had, in fact, “cohabitated and engaged in marital relations” during the supposed period of separation. Because this issue could derail the divorce proceeding entirely, the trial judge elected to hold a hearing on the nature of their interactions during the alleged separation.

Maryland Divorce Law: The Past and Present Combined

Whether the husband or the wife has the better of this claim depends on the grounds for divorce in Maryland—and the best way to interpret the relevant statute.

Before the late 1960s, divorce was only available in American states on the basis of marital fault. Divorce was a remedy granted to an innocent spouse when the other spouse had breached some essential aspect of the marriage contract. The plaintiff-spouse had to provide corroborating evidence to support the grounds for divorce that he or she alleged; confession by the defendant spouse was not sufficient. There was no such thing, in theory, as divorce by agreement. (In fact, couples colluded all the time, trumping up evidence of fault and putting on a show for the

court.) Traditional fault grounds for divorce included adultery, abandonment, neglect, and commission of a felony. Later grounds included intemperance and cruelty.

Beginning in 1969, the tides of divorce law began to turn. California adopted the nation's first "no-fault" divorce law, which permitted couples to obtain a divorce upon a finding of "irreconcilable differences." Every state eventually followed suit by adding at least one no-fault ground for divorce. (New York was slow, not adding a true no-fault ground until 2011, as I have [written about here \(http://writ.lp.findlaw.com/grossman/20100622.html\)](http://writ.lp.findlaw.com/grossman/20100622.html).)

No-fault grounds can take the form of a substantive standard like California's, which does not look to see who is at fault for marital breakdown, but looks instead at whether the marriage is objectively dead. No-fault grounds can also take the form of a mandatory period of separation, which then provides a ground for divorce. This type of ground simply uses living apart as a proxy for marital breakdown.

With either type of no-fault, the original legislative intent was to move away from a system that artificially blamed marital breakdown on a single behavior or even a single person and towards a system that tried to differentiate between marriages that could be saved and marriages that could not.

Some states, including Maryland, retained their fault-based grounds for divorce and simply added a no-fault ground. In the initial shift to no-fault, Maryland had three grounds that might apply when a couple ceased living together. The law included (and still includes) a fault-based ground for desertion if it lasted at least twelve months and there was no reasonable hope of reconciliation. This ground would be relevant if one spouse made the unilateral decision to move out.

The law also included two no-fault grounds premised on separation. One ground allowed divorce after one year, but only if the separation was mutual and voluntary (or became that way at least twelve months before the divorce petition was filed), with no intent to resume the marriage relationship. A second ground required a separation of two years, but imposed no requirements regarding intent or mutuality. In 2011, the legislature collapsed these two separation grounds into one, which allows divorce predicated on a "12-month separation, when the parties have lived separate and apart without cohabitation for 12 months without interruption before the filing of the application for divorce." This ground does not require proof that the separation was voluntary or mutual, only that it occurred, that it lasted for a sufficient length of time, and that it was uninterrupted.

The question raised by the *Bergeris* case is about the meaning of living "separate and apart without cohabitation." There was no question that the Jeanine and Nick Bergeris lived in different houses for twelve months prior to his amending his complaint for divorce. Is it possible that they nonetheless "cohabited" within the meaning of the statute?

In family law, cohabitation traditionally refers to the act of living together in an intimate relationship. Roommates do not "cohabit"; unmarried lovers do. Cohabitation is a requirement for proof of common-law marriage (along with intent and agreement to marry) because it is deemed an essential attribute of marriage. And, as reflected in both fault and no-fault divorce laws, the absence of cohabitation over an extended period of time is a reflection of marital breakdown.

The Role of Cohabitation in Marriage and Divorce

The *Bergeris* case raises two questions: (1) Is sex equivalent to "cohabitation" for purposes of gauging whether a couple is really separated; and (2) If so, does phone sex count?

The trial court ruled that, under prior Maryland cases, "without cohabitation means without sexual relations." Moreover, the judge concluded, "phone sex comes within the broader definition of sexual relations that is broader than sexual relationship." In other words, the judge answered both questions in the affirmative. In other words, the phone sex in January 2012 caused the separation clock to restart, which meant the petition for divorce filed in March 2012 on grounds of separation was premature.

The Special Court of Appeals, which issued the recent ruling in the *Bergeris* case, agreed with the trial court's

first conclusion. Although cohabitation is a concept that embraces more than a couple's sexual relationship, in the divorce context, cohabitation means sex. And a couple that is living separate and apart with the intent to establish the no-fault ground of separation must refrain from sexual relations throughout the required period.

But the appellate court disagreed about the answer to the second question. Phone sex, in whatever form, does not fall within the meaning of "cohabitation." The husband's lawyer argued that there was no precedent for such a broad interpretation of sexual relations or cohabitation. But probably more persuasively, he pointed out the impracticality of such a definition. As he argued to the court:

Also, there's no evidence here of what this was. I mean, I hate to, I don't want to have to get into these sorts of issues, but this is where we find ourselves. How dirty was the talk? How long did it last? What was said? I mean, I don't think there's any way to verify that. . . . [T]hree hours and 57 minutes we were fighting about our divorce case, and then three minutes we had phone sex, whatever that is. There's no way to define that. Maybe that's part of the reason why there is no authority on that, because how do you, what sort of slippery slope is that? I mean . . . people either engage in sex or they don't.

The lawyer was making two arguments in this speech—that there's no way to define phone sex (a legal standard problem), but also no way to tell whether it happened (an evidentiary problem). The first is more compelling than the second. It would be difficult to draw a line between talk or text messages that are sexual enough to constitute phone sex and those that merely have a sexualized tone or include some sexual components. And while it might be difficult to prove whether two people engaged in phone sex, however defined, it can also be difficult to prove that they engaged in non-virtual sex if one of them denies it.

The appellate court was clearly troubled by the problem of defining phone sex, but it was also persuaded by cases from other jurisdictions on the definition of adultery. Adultery—cheating on one's spouse that may be a basis for a fault-based divorce and/or a crime, depending on the jurisdiction—is generally defined to require a physical relationship. The *Bergeris* court relied on cases from Louisiana and Florida concluding that phone sex with someone other than one's spouse does not constitute adultery. Nor do "emotional" affairs.

Thus, the court concluded, "occasional instances of telephonic or electronic communication talking about sex, unaccompanied by intimate physical sexual contact, do not rise to the level of cohabitation. Accordingly, we conclude that the circuit court erred in dismissing Husband's complaint based on the court's factual finding that he and Ms. Bergeris engaged in phone sex . . . within the year prior to the application for divorce."

Did the Court Get It Right?

The court's conclusion is a perfectly reasonable one, given the statutory text and the definitional problems aptly raised by the husband's lawyer. However, let me suggest two considerations that might have supported the opposite conclusion.

First, the definition of sex in the adultery context may not be appropriate in the separation context. Given that adultery was once widely criminalized, and is still a crime in many states, the definition cannot be vague or ambiguous, such that people will unwittingly cross the line and suffer potentially serious consequences. Moreover, the definition of adultery in the divorce context is focused on a spouse's sex with a third party—someone other than one's spouse. Certainly part of the insistence on monogamy is about protecting trust, stability, and other emotional aspects of a marriage. But part of the reason is to protect an unsuspecting spouse from the health risks of a non-monogamous relationship. When a spouse cheats—and then comes home for more—the other spouse has a greater risk of contracting an STD. To the extent this justifies divorce based on adultery—or a criminal conviction for adultery—phone sex does not pose the same risks.

Second, if one considers the history of the shift to no-fault divorce, one may conclude that phone sex is really no different than in-person sex. The no-fault laws based on uninterrupted periods of separation were designed as a proxy for marital breakdown. If a couple lives separate and apart, without sexual relations, for a lengthy period, and no reconciliation was sought or obtained, that is a pretty good indicator that the marriage is indeed over.

Perhaps that couple has mutually gone their separate ways and not looked back. Or perhaps one spouse has remained steadfast in his or her refusal to live as a married couple. Either way, the marriage is dead. But can the same be said for a couple that lives apart but intermittently gets on the phone and talks dirty to one another? Perhaps such a marriage isn't dead at all, and the clock should reset to see which way the marital winds are blowing.

These considerations may be tangential enough that they are outweighed by the problems of definition, proof and precedent that swayed the appellate court. Then again, if the court had upheld the ruling against the husband, he would be denied the divorce today, but not forever. All he would need to do is start a new 12-month clock and resist the urge to pick up the phone.



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