

HOW DOES SUBSTANCE ABUSE IMPAIRMENT FACTOR INTO FAMILY COURT PROCEEDINGS

By Joseph M. Considine, Esq.

In last months' edition of Sober World, we discussed how substance abuse and treatment may factor into divorce and child custody proceedings. In this edition, we discuss the role that substance abuse has in determinations about whether or not to award alimony and how a marital estate should be divided.

Awards of alimony and property are based upon a number of factors set forth in Florida Statutes Section 61.08, Section 61.075 and relevant case law. The alimony factors include the length of the marriage; the reasonable needs of the spouse seeking alimony and the ability of the spouse expected to pay support; the ability of the spouse to be self-supporting; and whether the spouse has decided to not be employed among other factors. The issues of property distribution focus on when the property was acquired and how it was acquired.

Alimony Considerations

Two instances in which courts have to deal with substance abuse issues arise in the context of where a spouse seeks alimony in the initial divorce or when the former spouse paying alimony has lost employment due to substance abuse impairment and now seeks to reduce his alimony obligation.

In these cases, courts will look to a determination of whether there is a voluntary decision to not be employed. Hence, the judge has to make a determination about whether or not the spouse is voluntarily underemployed or unemployed. How does a person's substance abuse impairment relate to the voluntariness of not being employed or losing employment? The Court also looks to the issue of misconduct. Unfortunately, sometimes courts treat substance abuse as misconduct and essentially punishes the impaired individual.

Courts Slow To Catch Up With Science

The science of addiction and alcoholism informs us that it is a disease which involves an involuntary process. The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, is the latest version of the American Psychiatric Association's standard text on the names, symptoms, and diagnostic features of every recognized mental illness, including addictions. The DSM 5 criteria for substance use disorders are based on decades of research and clinical knowledge. The DSM 5 allows clinicians to specify how severe the substance use disorder is, depending on how many symptoms are identified and can be classed as mild substance use disorder, moderate substance use disorder, or a severe substance use disorder.

The law and the courts usually lag behind science and so there is a paucity of direction from the courts on how to factor substance abuse impairment into a decision regarding an award of alimony. In the last thirty years the courts have been fairly consistent in recognizing that alcoholism is a disease and therefore is not an act of volition or voluntary.

Alcoholism Is Not Voluntary

In a case decided in 1989, a surgeon who was paying alimony to his former spouse lost hospital privileges because he was impaired. Obviously, the loss of hospital privileges reduced his income forming the basis for his request to reduce the amount of alimony he had to pay. The Fourth District Court of Appeal decided that the lost hospital privileges were the result of his alcoholism and that his alcoholism was the cause of his reduced income and that his disease was an involuntary change of circumstances thereby permitting the surgeon to reduce his alimony obligation to the former spouse. In that case, the court noted that alcoholism is not voluntary and formed the basis for modification of alimony. Interestingly enough, the Court pointed out that there was no evidence that the former husband's alcoholism was voluntary as no witnesses were provided to that point. **Haas v. Haas**, 552 So.2d 252 (4 DCA 1989). So then, would it matter if the former wife had put on evidence that the surgeon had not sought treatment or sought to recover from his disease?

As a lawyer for a spouse seeking an award of alimony, it is important to show attempts at treatment even if unsuccessful. The lawyer for the spouse being asked to pay alimony may want to determine if there is any evidence of refusal to go to treatment. It is important to show that the addict has at least tried to recover. In a case decided in 2009, the Court remarked in its opinion that the parties jointly decided to refrain from the Husband going to treatment and therefore the Husband would not be punished by his failure to go to treatment in the decision about the payment of alimony.

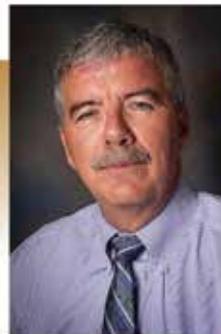
In a case decided in 1987, the same 4th DCA in **Barry v. Barry**, 511 So.2d 649 (4 DCA 1987) issued its opinion that alcoholism was properly characterized as an illness for purposes of determining a fair distribution of assets and liabilities. Interestingly, that court did not address whether alcoholism is voluntary or not. There the trial court had treated Wife's alcoholism as marital misconduct and essentially punished her by awarding only \$900 per month in alimony. The Court heard evidence that it was not in the wife's best interest to give her too much money because of her illness. Part of the court's decision may have been the very practical issue of whether or not it is wise to give an active addict a large sum of money. However, I would have argued that she is entitled to it under the law and that a trust should have been created with a family member acting as the trustee for the woman to provide only the necessary funds for her living expenses.

Not Entitled To Greater Share of Property

Sometimes a spouse who has had to care for the addicted spouse might want to seek a larger share of the marital assets in their divorce. Wisely, a court has decided that alcoholism is properly characterized as an illness for purposes of determining property rights in a dissolution case. A spouse's additional services to the family as a

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result of the other spouse's addiction are not considered to be services beyond normal marital duties where they are necessitated by the other spouse's illness and does not warrant the award of more than 50% of the marital assets.

If there is an impending divorce and substance abuse is an issue, it is always advisable to seek treatment and to make a good faith effort to recover. If one loses a job as a result of addiction, the courts are not going to punish the addict if there have been attempts to recover even if unsuccessful. Addiction is not a voluntary issue and the courts generally do not punish the addict but there should be attempts to recover.

Joe Considine has practiced law in South Florida since 1983. His practice is limited to family law and addiction related law including the Marchman Act. Joe works extensively with families whose loved ones have substance abuse and mental health problems as an attorney.
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