

## **APPLICATION OF THE FIFTH AMENDMENT IN FAMILY LAW CASES**

The Fifth Amendment privilege against self incrimination, guaranteed by the United States and Illinois constitutions, is alive and well in family law cases. With some differences, the privilege may be claimed by a litigant in a family law civil case just as in a criminal case. The Fifth Amendment issue may surface at the pleading stage, during the discovery process, or at trial.

At the pleading stage a spouse can be called upon to confront a claim of adultery. Instead of answering the claim, the accused spouse might respond with a pleading which invokes the Fifth Amendment right. The use of the Fifth Amendment in civil cases is permissible. Gabriel v. Columbia National Bank of Chicago, 228 Ill.App.3d 240, 592 N.E.2d 556 (1<sup>st</sup> Dist. 1992). Pleading the Fifth instead of denying the adultery allegations can draw a motion for judgment on the pleadings because of the lack of a denial. However, this tactic has not proved successful. The authorities hold that a judgment may not result solely from a failure to respond where instead the Fifth Amendment right has been pled. Rather, there must be independent evidentiary support. Id.

It could be argued that adultery under the Illinois Marriage and Dissolution of Marriage Act is not the same as adultery under the Illinois Criminal Code, and therefore a Fifth Amendment claim is inappropriate. Adultery under the Divorce Act is generally considered to be a carnal act committed by one of the spouses subsequent to the marriage. Wolfrum v. Wolfrum, 5 Ill.App.2d 471, 126 N.E.2d 34 (3<sup>rd</sup> Dist. 1955). On the other hand, the criminal code adds a further requirement that the sexual intercourse be open and notorious. 720 ILCS 5/11-7. In practice, this distinction seems to make little difference and the accused spouse is generally allowed to maintain the Fifth Amendment claim.

The issue can also arise during the discovery process. Deposition questions regarding the adultery addressed to the accused spouse, or to the paramour, typically go unanswered in favor of a Fifth Amendment claim. Requests for incriminating documents, regarding hotel stays and gifts for example, are refused because of the possibility of self incrimination.

Proof of adultery at trial can be quite difficult. The likelihood that the accused spouse and the paramour will claim their Fifth Amendment privileges at trial compounds the courtroom problem of establishing adultery. The case law does allow proof of adultery by circumstantial evidence and without specific evidence of sexual intercourse. The reasoning is that the act, by its very nature, is secretive and direct evidence is rarely available. Marcy v. Marcy, 400 Ill. 152, 79 N.E.2d 207 (1948). Another aid in proving the allegations is that the court is allowed to draw a negative inference against the party claiming the Fifth Amendment. A litigant's silence can be considered in light of other evidence. Dimensions Medical Center, Ltd. v. Principal Financial Group, Ltd., 1996 WL 494229 (N.D.Ill.); Baxter v. Palmigiano, 425 U.S. 308, 96 S.Ct. 1551 (1976). This, of course, is vastly different than in a criminal case where no inference or other prejudice can result from invoking the protection against self incrimination.

Since grounds are rarely in issue these days, and since few cases go to trial on adultery, a Fifth Amendment claim in this context is not a common occurrence. However, there is a real possibility that a spouse will raise the privilege against self incrimination in other settings. For example, allegations of certain kinds of gambling, the taking of money, or physical abuse, might suggest criminal exposure so that the privilege would come into play. Therefore, Fifth Amendment issues have a broader application than might be initially readily apparent.

\* \* \* \*

Jay A. Frank is a matrimonial practitioner in Chicago, Illinois with over 30 years of experience. He has been selected as one of the top family law attorneys in Illinois.