Publisher page limitations in the second edition restricted the amount of material and number of problems that we could share with student readers. However, the web provides us with the opportunity to provide more expansive explanations of the law to in the chapters and to add more problems for review and reflection. We believe that the additional explanatory material and problems will further enhance a student’s ability to master family law and provide an added intellectual boost when preparing for final family law examinations.

Note: This material is available only to a student who has purchased the first or second edition of the Family Law Examples and Explanations book or a member of the faculty. It may not be copied or reproduced in any form without the express written consent of authors. Students who have purchased the second edition may, of course, download and print out this supplemental material for their individual use.

**Chapter 4, Section 12: Divorce--Adultery**

It may be of historical interest that following the Reformation, a divorce by Act of Parliament in England was permitted from 1669 until 1857. There were approximately 300 parliamentary divorces sought and all but four were in favor of male petitioners. The process apparently involved the Ecclesiastical Courts and the House of Lords, and the sole ground upon which a divorce could be granted was adultery. A petitioning husband was only required to prove that his wife had committed adultery on one occasion. However, a petitioning wife was required to produce evidence that her husband’s adultery was both aggravated and repeated. This double standard was ultimately incorporated into Divorce and Matrimonial Causes Act 1857. Book Review, Margaret Harrison, 30 Melb. U. L. Rev. 594, 596 To Have but Not to Hold: A History of Attitudes to Marriage and Divorce in Australia 1858-1975 by Henry Finlay (August 2006).

The difficulty with asserting adultery as the sole ground for divorce in some jurisdictions such as New York prior to changes that occurred in the 1960s is illustrated by Cohen v. Cohen, 103 N.Y.S.2d 426( N.Y. Sup. 1951). In Cohen the court refused to grant the wife a divorce on the ground of adultery even though her husband had been convicted of sodomizing another male. The court reasoned that because New York’s Penal Law controlled, and sodomy did not constitute adultery under the statute, there was no basis for the wife’s action.

The extent to which the application adultery as a ground for divorce in New York has been liberalized is illustrated by Golub v. Ganz, 802 N.Y.S.2d 526 (App. Div. 2005). In that case the wife asserted adultery as the ground for her divorce. The court granted the divorce even though the adultery did not occur during
the marriage. Rather, it occurred after the divorce was filed. The court found nothing in the New York divorce statute that precluded divorce on this ground.


**EXAMPLE:** Assume that Charles and Sarah marry. Shortly after their marriage, Sarah observes that Charles is spending an unusual amount of time chatting with the next door neighbor, Gail. Gail is single and often appears in her yard in clothing that Sarah considers indecent. On several occasions, when Gail asked Charles to help repair something in her home that was broke, Charles, according to Sarah, “jumped at the chance.” When Sarah observed Charles and Gail hugging in the back yard when Gail had just come out of her pool in a bikini, she filed for divorce. She asserted adultery as her sole ground.

At the trial, Charles testified that he has hugged Gail, that he has kissed Gail, and that he loves her as a friend. When explaining his feeling towards Gail, he stated: “I feel close to her in the way that we have become friends. We found common ground together in the divorce matter. She's been through a divorce. She seems to relate and understand what I'm going through. And she's become a good friend and we do a lot of things together.”

Charles denied any type of romantic involvement or sexual relationship, and denied any plans of marriage. Gail testified in a similar manner. She said that she and Charles shared lunches in which they meet at the park, feed the ducks, and eat peanut butter and jelly sandwiches while discussing life's problems. When asked about Charles’s feelings towards her, she stated that he “loves me as a person. Maybe the person I am, you know. But as far as being in love with someone, you know—(witness shakes head in negative response).” Both parties stated that the two were not romantically involved, only that they had developed a strong friendship, as they both shared the experience of going through divorce. On Charles’ motion to dismiss the divorce petition, how will a court most likely rule?

**EXPLANATION.** In order to obtain a divorce based upon adultery, one must prove by clear and convincing evidence an adulterous inclination and a reasonable opportunity fulfill that inclination. Though admittedly if taken at face value, the meetings in the park could indicate a relationship of a different character, these lunches are also characteristic of the type of activity which can occur when a person is experiencing a troubling time and would need a friend's advice. When taking the testimony as a whole, including the hugging and kissing, Charles's alleged infidelity has not been proven by clear and convincing evidence. When one alleges adulterous activity, “the burden of proof is a heavy one ... because the evidence must be logical, tend to prove the facts charged, and be inconsistent with a reasonable theory of innocence.” (This problem is based on *Spence v. Spence*, 930 So.2d 415 (Miss. App. 2005) (evidence insufficient to justify granting divorce on ground of adultery).