

Findings



Dedicated to the
Preservation of the Family

Protecting Marriage

10 Good Reasons to Preserve Meaningful Tort Laws

By John Rustin and Jere Z. Royall, J.D.



he family has long been recognized as the building block of society, but with divorce rates at record levels in the United States and North Carolina, and the very definition of

marriage and family under attack, the underpinning of the family, namely marriage, continues to crumble.¹

While most citizens would agree that the government should provide public policies to preserve and protect marriages and families, a move is afoot in the North Carolina General Assembly to abolish two of our centuries-old laws that are designed to do just that. These common law tort actions, known as alienation of affections and criminal conversation, erect a wall of protection around marriages from outside interference and adultery. These laws represent the only practical remaining legal barrier against an outside party who intentionally and maliciously intrudes into and destroys a marriage and/or who has a sexual relationship with someone else's husband or wife.

There have been a number of bills introduced in the North Carolina General Assembly over the past several years to eliminate these torts.² This paper provides an in-depth analysis of the civil actions of alienation of affections and criminal conversation and points out why the preservation of these laws is an important component of preserving and protecting marriage in North Carolina. Much of the discussion herein is based on actual debate in the General Assembly on legislation that would eliminate the alienation of affection and criminal conversation torts.

Historical Background

The original intent of the alienation of affections and criminal conversation laws

was to protect marriages from intentional interference by third parties and to provide consequences when interference did occur. Although they are usually used together, alienation of affections and criminal conversation are two very distinct causes of action with different elements and different historical origins.³

Alienation of Affections

The origin of alienation of affections as a cause of action can be traced to the English cause of action for abduction. In these cases, a husband could recover damages for the loss of the "society and services" of his wife. The word "consor-

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tium" was used to describe these legal rights of the husband, with respect to his wife, in the 1620 English case *Hyde v. Scysson*.⁴ Later English cases required that the wife must be physically removed from the home. The husband could recover damages from anyone who intentionally removed her or "enticed" her to leave, resulting in his loss of consortium. It was subsequently adopted in every state in the country except Louisiana.⁵ North Carolina first recognized the action for enticement in the 1849 case of *Barbee v. Armstead*.⁶

Toward the end of the 19th century and in the early 20th century, the legal status of women in most states in the country, including North Carolina, began to improve. The Married Women's Property Acts gave women the power to own property, keep their earnings, and sue and be sued. After

the Act was passed, men retained the right to sue for alienation of affections and criminal conversation, but now the wife had a right to sue using the same actions. As the American court system began to develop its own cause of action, previous actions for "abduction" and "enticement" gave way to a more modern name—alienation of affections.⁷ The tort of alienation of affections was first recognized in New York in the 1866 case *Heermance v. James*.⁸ Removal of the spouse was no longer required, and consortium came to include a more emotional definition that embraced "love, society, companionship and comfort."⁹

For a plaintiff spouse to recover for alienation of affections, the following elements are required:

- (1) the parties to the marriage were happily married and that genuine love and affection existed between them;
- (2) that such love and affection was alienated and destroyed; and
- (3) that the wrongful and malicious acts of the defendant brought about the loss and alienation of such love and affection.¹⁰

The exclusive right of sexual intercourse is not the right protected in this type of case. The actual affection between spouses is the right protected. In fact, in-laws and religious organizations have been defendants in alienation of affections suits.

Criminal Conversation

A lawsuit for criminal conversation is a civil claim for adultery. Unlike alienation of affections, this tort action does protect the exclusive right to marital intercourse between spouses. In early common law, this tort was known as "seduction." Seduction required that sexual relations had occurred between the plaintiff's spouse and the defendant. There was no requirement for a physical separation between husband and wife. The intent behind this tort is to protect

family honor, prevent defilement of the marriage bed and the suspicion that could be cast upon the legitimacy of the offspring.¹¹

For a plaintiff spouse to recover under criminal conversation, the following elements are required:

- (1) marriage between the spouses and
- (2) sexual intercourse between defendant and plaintiff's spouse during the marriage.¹²

10 Good Reasons to Keep These Laws

The following is an analysis of various aspects of the alienation of affections and criminal conversation civil actions. Throughout the legislative debate on this issue, invalid and confusing arguments have been brought forward by those who propose to abolish these valuable torts. In order to provide clarification on these matters, the following information has been compiled and confirmed with numerous attorneys who practice family law in North Carolina.

1. Abolishing alienation of affections will eliminate the legal deterrent from third party intrusion into marriages.

Alienation of affections is a civil action that allows for a remedy when a marriage is broken up through the actions of someone outside of the marriage—a third party. This is not an action against the spouse, but against the third party who was involved in breaking up the marriage. The plaintiff must establish all of the following: there was a marriage with love and affection; the love and affection was alienated and destroyed; and the wrongful and malicious acts of the third party produced the loss of love and affection.¹³ According to the General Assembly analysis of this bill, the tort of alienation of affections is designed to “protect the marital right of the affection, society, companionship and assistance of the other spouse.”¹⁴ In other words, this tort is designed to protect marriages from third party intrusion and to create accountability and penalties for third parties who pursue a relationship with a married person and alienate the affections of the married person from their spouse. Some argue that there is no way to measure how strong a deterrent this law is—the same could be argued for the death penalty. Jury verdicts in favor of aggrieved spouses over the past several years have provided continued publicity and awareness of the law. In addition to the affects this may have on people who are not involved in the cases, it is reasonable to expect that an individual who has been

involved in an alienation of affections action will think twice before pursuing a relationship with another married person. One thing is certain, if these torts are abolished, no practical legal deterrent against such behavior will exist.

2. Intruding third parties can break up good marriages.

Some proponents for abolishing these torts argue that good marriages cannot be destroyed by third parties. This denies the reality that an individual can be targeted and wooed away from their spouse. It also ignores the wrongful and malicious acts of the third party, especially when the third party intentionally pursues the husband or wife without regard to their marital status. It is in marriages in which love and affection exists that an alienation of affection action has validity, as the existence of love and affection is a required element of a successful alienation of affection claim. A marriage that lacks love and affection lacks one of the critical required elements in proving alienation of affections.

3. Abolishing criminal conversation will have the practical effect of legalizing adultery in North Carolina.

Criminal conversation is a tort action against a third party for having a sexual relationship with another person's husband or wife. The plaintiff must prove that the husband or wife was married and that the third party had sexual intercourse with the husband or wife during the marriage.¹⁵ This is a civil remedy for a criminal action. While fornication and adultery remain criminal offenses in North Carolina, such actions are rarely, if ever, prosecuted. As a result, abolishing this tort will have the practical effect of legalizing adultery.

4. No other legal remedy exists for an aggrieved spouse to seek justice from an individual who has intruded into and broken up their marriage and/or who has had a sexual relationship with their husband or wife.

It has been suggested that the tort action of intentional infliction of emotional distress will be available to the aggrieved spouse in the absence of the torts of alienation of affections and criminal conversation. This is not the case. The North Carolina Court of Appeals has found that adultery, “does not evidence the extreme and outrageous conduct which is essential to this cause of action [intentional infliction of emotional distress].”¹⁶ Furthermore, the legal encyclopedias, *American Jurisprudence* and *American Law Reports Digest*, have

surveyed case law across the nation on these actions. Both encyclopedias report that in states that have abolished alienation of affections and criminal conversation, no other action resembling these torts may be substituted, because it frustrates the intent of the legislature when they abolished these laws.¹⁷ The Ohio Supreme Court stated that the state legislature, “in enacting a statute abolishing these torts, intended to eliminate these common-law actions regardless of the title they were given or the severity of the alleged misconduct.”¹⁸ Furthermore, in *Poston v. Poston*, referenced above, the North Carolina Court of Appeals also clarified that commercial contract law does not apply to marriage; therefore, actions regarding interference with a contract cannot be sought as a remedy against someone who breaks up a marriage.¹⁹

5. Women and men have equal standing under the law to bring these actions, and both women and men file these lawsuits.

Some argue that because these torts find their origin in Elizabethan law and have been in place for hundreds of years, they are antiquated. They contend the laws were put into place when women were treated as chattels, or property, and such laws do not reflect current societal standards. This argument is invalid and is an emotional ploy to cloud the issue in an attempt to gain support for the bill. In present-day society, women and men have equal standing under the law, and both women and men bring these actions.

6. Potential abuse of the law is not a valid reason to abolish these torts.

It has been argued that these torts are susceptible to abuse; that they are sought for purposes of blackmail, greed and revenge; and that they offer a disproportionate settlement value for “unscrupulous plaintiffs.” Most tort actions are subject to abuse, and even if such abuse occasionally exists, the appropriate remedy is not to abolish the tort actions, but to discipline the lawyers. Civil Procedure Rule 11 holds lawyers liable for bringing lawsuits that are not well grounded or are brought for any improper purpose.²⁰ Because alienation of affections is difficult to prove, an innocent party has little to fear from the threat of such action. If it cannot be proven that love and affection existed, then the plaintiff has no case. Furthermore, if it cannot be proven that the defendant's relationship with the married party resulted in the loss of that spouse's love and affection for their husband or wife, the plaintiff has no case. In criminal

conversation, if the defendant did not have sexual intercourse with someone else's husband or wife, then they have nothing to fear. As for "unscrupulous" plaintiffs, it is important to remember that the plaintiffs in these cases are spouses who have been wronged. These individuals are suing a third party who engaged in a wrongful and malicious action that resulted in the breakup of their marriage or to extramarital sexual acts that defiled their marriage.

7. Lawmakers should not abolish these laws in order to provide immunity for the wealthy.

Proponents of abolishing these laws argue that these cases are costly to defend; that wealthy people are the targets of these actions; and that there is no good way to measure damages. Again, these issues apply to many tort cases and are not valid reasons for doing away with the laws. These cases are typically not contingency cases, and they are costly for the plaintiff to bring, as well. Whether a defendant has any assets is a consideration in any tort action. These laws should not be abolished simply to protect the wealthy and provide them immunity from the consequences of their wrongful acts. The difficulty of measuring compensatory and punitive damages is common with many tort actions but is not a reason for eliminating a legal remedy when someone has been wronged.

8. These actions are brought against a third party and are completely separate from equitable distribution, alimony, and child support.

Some have argued that alienation of affections and criminal conversation cases are brought in a strategic manner to create leverage when dealing with equitable distribution, alimony and child support during a divorce proceeding. Alienation of affections and criminal conversation actions are totally separate legal actions from matters in a divorce proceeding. Unlike equitable distribution, alimony and child support, alienation of affection and criminal conversation actions are brought against the third party, not the plaintiff's spouse. Because these are totally separate actions from equitable distribution, alimony and child support, the outcome of an alienation of affections or criminal conversation case has no bearing on these other matters, and vice versa.

As mentioned earlier, if the action of bringing one of these cases is not well grounded or is for any improper purpose, the plaintiff's attorney could be subject to disciplinary action under Rule 11.

Only if the wrongdoing husband or wife and the third party have maintained an extramarital relationship after the marriage was destroyed could the aggrieved spouse conceivably use these torts as leverage in an equitable distribution, alimony and child support case. This is so because these actions are brought against the third party and not the wrongdoing spouse. If a relationship between the third party and the wrongdoing husband or wife no longer exists, the effect of suing the third party would be of no consequence to the wrongdoing husband or wife. In other words, if an extramarital relationship no longer exists, the aggrieved spouse would have no avenue in which to apply leverage to their husband or wife by suing the third party. If an

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extramarital relationship continued after the marriage was destroyed, however, even greater evidence exists that the affections of the husband or wife were alienated and destroyed by the third party. Any other argument to abolish these torts because of their coercive use is an argument to protect the guilty from being responsible for their actions—actions that are not only destructive to families, but to society as a whole.

9. These torts support and protect families and children.

Supporters of legislation to eliminate these torts argue that these lawsuits are harmful to children and create higher levels of animosity between the children's parents. Nothing could be farther from the truth. These tort actions are designed to deter interference in marriages and adultery in the first place and to protect marriages from the devastation of divorce. There are few things more important to children than a stable home and family, and building a protective wall around marriages through the maintenance of these laws helps to support the sanctity of the family. It is important to

remember that these actions are not brought against the spouse, but against the outside party that interfered with the marriage. At the point when these actions are brought, most marriages have been destroyed and significant damage to the children already has been done. Instead of experiencing additional harm, children can learn a valuable life lesson in seeing how to respond in a fair, legal and ethical manner to someone who has harmed them.

10. Lawmakers should protect and defend marriages, not contribute to the breakup of the family.

Some have argued that these torts allow a wronged spouse to shift all the blame for the breakup of a marriage or a spouse's infidelity to the third party. To the contrary, the existence of these laws allows for all the responsible parties to be held accountable for their actions. The real situs of responsibility lies both with the guilty spouse and the third party. If there is a resulting divorce, the guilty spouse faces accountability for their actions during equitable distribution, alimony, child support, and child custody proceedings. These torts make it possible for the third party to be held responsible and accountable for their actions. If these torts are abolished, there would be no practical restraint or legal barrier against a third party intruding into a marriage, breaking up the marriage and having a sexual relationship with someone's husband or wife.

"Complete Defense" Amendment

Another matter worth noting is an attempt to provide a defense to an alienation of affections action if the wayward spouse consented to having their affection alienated. An amendment offered by Sen. Frank Ballance (D-Warren) during debate on the Senate floor in the 2001 session proposed to create a "complete defense to the common law cause of action for alienation of affections" if "the spouse whose affections were allegedly alienated consented to the conduct giving rise to the cause of action."²¹ In other words, if the husband or wife who was involved in the extramarital relationship consented to being in the relationship, then the aggrieved spouse would have no case against the third party. This amendment would effectively abolish the alienation of affections tort action, because in practically any case in which this action could be brought against a third party, the husband or wife whose affections were alienated would have consented to be in the relationship. If they did not, the third party would likely face charges of kidnapping or rape. This

amendment was defeated on the Senate floor by a 21-24 vote.

Conclusion

For hundreds of years in North Carolina, marriage has been viewed as sacred, valued, and worthy of protection. By abolishing these two laws, the State's policy will shift dramatically away from this principle to a position that does nothing to protect marriages from third party intrusion. No longer will an aggrieved spouse have any legal recourse against a third party who, through wrongful and malicious acts, breaks up their marriage. No longer could a third party be held accountable for their wrongful and malicious acts of interference in a marriage and for committing the act of adultery.

The State's policy toward third party intrusion into marriages should remain absolutely clear—that such interference will not be tolerated, and if an individual does pursue someone who is married and wrongfully and maliciously breaks up their marriage and/or commits adultery with someone else's husband or wife, they can be held accountable and liable for their actions. These valuable laws of alienation of affection and criminal conversation should remain intact and any effort to abolish them should be defeated.

John Rustin is Director of Government Relations and Jere Z. Royall is the staff attorney for the North Carolina Family Policy Council.

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Endnotes

1. Fagan, Patrick F. and Robert Rector. "The Effects of Divorce on America." The Heritage Foundation. June 5, 2000. See also: North Carolina Vital Statistics, Volume 1: Population, Births, Deaths, Marriages, Divorces available online at <http://www.schs.state.nc.us/SCHS/healthstats/>.
2. North Carolina General Assembly. HB 576. Abolish Alienation of Affection/Criminal Conversation. 2001. See also HB 493. Alienation of Affection/Criminal Conversation. 1999.
3. 41 Am. Jur. 2d, Husband and Wife, § 269, p. 182.
4. *Hyde v. Scysson*, 79 Eng. Rep. At 462 (England 1620).
5. *Moullin v. Montleone*, 115 S. 447 (Louisiana 1927).
6. *Barbee v. Armstead*, 32 N.C. (10 Ired.) 530.
7. James Leonard, *Cannon v. Miller: The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina*, 63 N.C. L. REV. 1320 (1985).
8. *Heermance v. James*, 47 Barb. 120 (N.Y. App. Div. 1866).
9. W. PROSSER & W. KEETON, *The Law of Torts* § 124, at 929 (5th ed. 1984).
10. *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E. 2d 234, 237 (1996).
11. W. PROSSER & W. KEETON, *The Law of Torts* § 124, at 929 (5th ed. 1984).
12. *Coachman v. Gould*, 122 N.C. App. 443, 446, 470 S.E. 2d 560, 563 (1996).
13. *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E. 2d 234, 237 (1996).
14. Legislative Bill Analysis of HB 576 presented to House Judiciary 1 Committee, April 10, 2001.
15. *Coachman v. Gould*, 122 N.C. App. 443, 446, 470 S.E. 2d 560, 563 (1996).
16. *Poston v. Poston*, 112 N.C. App. 849, 851, 436 S.E. 2d 854, 856 (1993).
17. 41 Am Jur 2d section 271; ALR Digest: Husband and Wife sections 138-145.
18. *Strock v. Pressnell*, 527 NE2d 1235 (1988).
19. *Poston v. Poston*, 112 N.C. App. 849, 851, 436 S.E. 2d 854, 856 (1993).
20. N.C. General Statutes § 1A-1, Rule 11(a).
21. North Carolina General Assembly. Amendment H576-ASV-72[v.3] to HB 576. September 4, 2001.

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