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Jamie Heard

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THE NATIONAL TREND OF ABOLISHING ACTIONS FOR THE ALIENATION OF A SPOUSE'S AFFECTION AND MISSISSIPPI'S REFUSAL TO FOLLOW SUIT

Jamie Heard

I. INTRODUCTION

The life of law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.¹

As accurately observed by Oliver W. Holmes, for the law to be effective, it must evolve with the realities of human society. The right of a plaintiff spouse's recovery for the alienation of his or her spouse's affection by a third party's intentional interference with the marriage has its origin in the outdated common law notion that wives were the property of their husbands² and no longer serves an effective purpose in today's society. An action for alienation has become little more than a vehicle for extortion and harassment and does not, in any way, protect the familial relationship, as is alleged by supporters of the preservation of the action.³ Accordingly, Mississippi should join the majority of states in the nation that have already legislatively or judicially abolished the action.⁴

To quote from a 1976 Washington Court of Appeals opinion, this Note will explain that the "justification for the abolition of such actions lies in the fictitiousness of [the action's] underlying assumptions, the unwillingness of courts to modify the governing rules [of such actions] to accord with social realities, and the ineptitude of the judicial process to prevent vicious

1. *Wyman v. Wallace* 549 P.2d 71, n.1 (Wash. App. 1976) (quoting O. W. HOLMES, JR., *THE COMMON LAW* 1-2 (1881)).

2. See discussion *infra* part II.

3. See discussion *infra* part V.

4. See discussion *infra* parts III and V.

settlements out of court.”⁵ This Note will first discuss the general history and nature of the tort of alienation of a spouse’s affection⁶ and, in an effort to persuade the courts and legislature of Mississippi to abolish the tort, it will also discuss the legislative and judicial abolition of alienation actions by a vast majority of other states in the nation.⁷ This Note will also discuss the constitutionality of such statutory abolishment,⁸ the arguments in opposition of such abolishment,⁹ and exceptions to the general rule of abolishment.¹⁰ Finally, this Note will discuss Mississippi’s position on the issue¹¹ and explain why Mississippi should join the list of states that prohibit alienation actions.¹²

II. HISTORY OF THE TORT

The tort of alienation of affection has its origins in the common law theory that a wife and her services, society, conjugal affection, and consortium were the property of her husband.¹³ When the husband experienced a loss of or an injury to these so-called “property interests” in his wife as the result of another man’s wrongful influence, the common law accorded him an action at law against the wrongdoer. In essence, the injured husband was compensated for the loss of his wife’s services, society, conjugal affection, and consortium with a monetary award.¹⁴

At common law, there were two causes of action that could be brought against a third party for his intentional interference with a man’s marital relationship with his wife – enticement and seduction.¹⁵ The tort of enticement “involved assisting or inducing a wife to leave her husband by means of fraud, violence, or persuasion.”¹⁶ By definition, enticement required a physical separation of the husband and wife caused by the third party’s wrongful inducement.¹⁷ Also referred to as abduction, the tort of enticement has evolved into what is now commonly known as the tort of alienation of affection.¹⁸ The second basis for recovery - an action for seduction (commonly known today as criminal conversation) – only “required an adulterous relationship between the plaintiff’s spouse and the defendant.”¹⁹ But unlike the tort of enticement, “no physical separation of the

5. *Wyman*, 549 P.2d at 73.

6. See discussion *infra* part II.

7. See discussion *infra* parts III and V.

8. See discussion *infra* part IV.

9. See discussion *infra* part VI.

10. See discussion *infra* part VII.

11. See discussion *infra* part VIII.

12. See discussion *infra* part IX.

13. *Moulin v. Monteleone*, 115 So. 447, 450 (La. 1928).

14. *Id.*

15. Michele Crissman, *Alienation of Affection: An Ancient Tort – But Still Alive in South Dakota*, 48 S.D. L. REV. 518, 519 (2003) (citing *Hoye v. Hoye*, 824 S.W.2d 422, 424 (Ky. 1992)).

16. *Hoye v. Hoye*, 824 S.W.2d 422, 424 (Ky. 1992) (quoting PROSSER AND KEETON, *THE LAW OF TORTS* 917-19 (5th ed. 1984)).

17. *Id.*

18. *Id.*

19. *Id.*

husband and wife was necessary” for the husband’s recovery of damages for the seduction of his wife.²⁰

One of the first actions for enticement, or rather, for alienation of a spouse’s affection, was brought before an English Court of Common Pleas in 1745.²¹ In *Winsmore v. Greenback*, the plaintiff husband alleged that the defendant paramour “maliciously and wickedly intending to injure the plaintiff . . . and to alienate the affection of the wife from the plaintiff . . . persuaded procured and enticed the said wife to depart and absent herself from the plaintiff.”²² The court recognized that the husband’s “exclusive and legally enforceable right to his wife’s services” entitled him to compensation for his loss.²³

In the eighteenth and nineteenth centuries, a wife was considered inferior to her husband and therefore had no property rights in her husband as he did in her.²⁴ As a result, actions against a third party for enticement or seduction were only available as means of recovery to the superior husband.²⁵ The common law concept that a husband had property rights in his wife justified his recovery for the loss of these interests as a result of a third party’s enticement or seduction of his wife during these earlier times.

However, the social evolution of the late nineteenth and early twentieth centuries threatened the torts’ rationale.²⁶ The extension of legal rights to women - such as the right to own property and the right to personally recover for their own personal injury - and the growing trend of equal legal treatment of both males and females negated the contention that women could not pursue an action for the enticement or seduction of their husbands.²⁷ In light of the wives’ acquisition of such rights, the courts “were then confronted with the issues as to the continued viability of the tortious causes of actions. Because the derivation of these torts was based on the legal inferiority of women, courts could reasonably determine to either [(1)] deprive their use to a husband or [(2)] extend their use to a wife.”²⁸ The courts chose the latter and then realized that the “[e]xtension of these rights of action to the wife necessitated adjusting their rationale.”²⁹ Accordingly, the torts of enticement and seduction, now referred to as alienation of affection and criminal conversation, “came to be seen as means to preserve marital harmony by deterring wrongful interference” with the marriage by a third party.³⁰

20. *Id.*

21. Crissman, *supra* note 15, at 519 (citing Nathan P. Feinsinger, *Legislative Attack on ‘Heart Balm’*, 33 MICH. L. REV. 979, 992 (1935)).

22. *Wright v. Lester*, 126 S.E.2d 419, 421 (Ga. 1962) (quoting *Winsmore v. Greenbank*, Willes 577, 125 Eng. Repts. 1330 (1745)).

23. Crissman, *supra* note 15 at 519 (citing *Nelson v. Jacobsen*, 669 P.2d 1207, 1224 (Utah 1983)).

24. *Moulin v. Monteleone*, 115 So. 447, 450 (La. 1928).

25. *Id.*

26. *Hoye v. Hoye*, 824 S.W.2d 422, 424 (Ky. 1992).

27. *Moulin*, 115 So. at 450-51; *Hoye*, 824 S.W.2d at 424.

28. *Hoye*, 824 S.W.2d at 424 (citing Feinsinger, *supra* note 21 at 1008).

29. *Id.*

30. *Id.*

However, it seems as though that now the torts of alienation of affection and criminal conversation are no longer useful in the preservation of the marital relationship.³¹ Rather, as most jurisdictions have recognized, an alienation action has become less compensatory and more vindictive in nature and does not, in fact, protect a marital relationship from third party interference.³² The New Jersey Superior Court observed:

The public ha[s] come to look upon 'heart balm' suits as devices for extracting large sums of money without proper justification. They [a]re a fruitful source of coercion, extortion and blackmail. Manufactured suits, with their always present threat of publicity, [a]re often used to force a settlement . . . [T]here is good reason to believe that even genuine actions [a]re 'brought more frequently than not, with purely mercenary or vindictive motives; that it is impossible to compensate for such damage with what has derisively been called 'heart balm' . . . and that no preventative purpose is served, since such torts seldom are committed with deliberate plan.'³³

In light of the somewhat arbitrary shift in justifications for the preservation of the action and the tort's ineffectiveness in actually preserving the marital relationship, courts and legislatures across the nation have abolished the tort of alienation of affection, as well as the tort of criminal conversation.³⁴

III. LEGISLATIVE ABOLISHMENT

Since Indiana's legislature first abolished the tort of alienation of affection in 1935,³⁵ thirty-one states have followed suit by enacting similar statutory prohibitions against such actions, including the states of Colorado and Minnesota.³⁶ Section 13-20-201 of the Colorado Revised Statutes Annotated rationalizes that actions based on alienation of affection, as well as

31. See discussion *infra* parts III and IV.

32. See discussion *infra* parts III and IV.

33. *Magierowski v. Buckley*, 121 A.2d 749, 756 (N.J. Super. 1956) (quoting PROSSER AND KEETON, *THE LAW OF TORTS* 697 (2d ed. 1955)).

34. See discussion *infra* parts III and IV. While criminal conversation and alienation of affection are closely related actions, they are considered as separate and distinct torts for the purpose of this Note and accordingly, the tort of criminal conversation will not be discussed in detail.

35. William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 ARIZ. ST. L.J. 985, 1007 (2001) (citing 1935 Ind. Acts c. 208, codified as IND. CODE § 34-12-2-1).

36. ALA. CODE § 6-5-331 (1975); ARIZ. REV. STAT. ANN. § 25-341 (1977); ARK. CODE ANN. § 16-118-106 (1989); CAL CIV. CODE § 43.5 (1939); COLO. REV. STAT. ANN. § 13-20-202 (2009); CONN. GEN. STAT. § 52-572b (1967); DEL. CODE ANN. § 3924 (1972); D.C. CODE § 16-923 (1977); FLA. STAT. § 771.01(1945); GA. CODE ANN. § 52-1-17 (1979); KAN. STAT. ANN. § 23-208 (1982); ME. REV. STAT. ANN. tit. 14, § 301 (1985); MD. CODE ANN., FAM. LAW § 3-103 (1984); MASS. GEN. LAWS ch. 207, § 47B (1985); MICH. COMP. LAWS § 600.2901 (1961); MINN. STAT. § 553.02 (1978); NEB. REV. STAT. § 25-21.188 (1986); NEV. REV. STAT. § 41.380 (1979); N.J. STAT. ANN. § 2A:23-1 (1935); N.Y. CIV. RIGHTS LAW § 80-a (1962); N.D. CENT. CODE § 14-02-06 (1983); OHIO REV. CODE ANN. § 2305.29 (1978); OR. REV.

those based on criminal conversation, seduction, and breach of contract to marry, have “been subjected to grave abuses, caused extreme annoyance, embarrassment, humiliation, and pecuniary damage to many persons wholly innocent and free of any wrongdoing who were merely the victims of circumstances.”³⁷ The Colorado statute further provides that these so called “heart balm” actions “have been exercised by unscrupulous persons for their unjust enrichment, and have furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds.”³⁸ Minnesota’s statutory probation of the tort of alienation of affection adds that these actions “have caused intimidation and harassment to innocent persons.”³⁹ In accordance with these considerations and others, thirty-two states have enacted similar legislation to reflect that “the best interests of the people . . . will be served by the abolition” of actions based upon alienation of affection.⁴⁰

Three other states – Montana, New Hampshire and Oklahoma – have legislatively abolished the tort as it pertains to the alienation of affection of a spouse but are silent as to the alienation of the affection of a parent or child.⁴¹ It has been argued that Montana’s statutory exclusion of an action for alienation of a spouse’s affection implicitly creates a cause of action for the alienation of a child’s affection - *expression unius est exclusion alterius*.⁴² However, Montana’s Supreme Court observed that the abolition of one cause of action does not necessarily create another and therefore refused to recognize the claim.⁴³ Oklahoma’s Court of Appeals has also addressed the silence of its statute and similarly held that children do not have a cause of action against a third party arising out of the alienation of their parent’s affection.⁴⁴

Unlike the others, Pennsylvania’s “heart balm” statute provides that the tort of alienation is abolished except where the defendant is a parent, brother, sister, or a person formerly *in loco parentis* to the spouse of plaintiff.⁴⁵ In other words, where the affection of the plaintiff’s spouse is alienated by the plaintiff’s immediate in-laws or “a person taking on all or some of the responsibilities” of a guardian or caretaker,⁴⁶ the action may be

STAT. § 31.980 (1975); R.I. GEN. LAWS § 9-1-42 (1985); TENN. CODE ANN. § 36-3-701 (1989); TEX. FAM. CODE ANN. § 1.107 (1997); VT. STAT. ANN. tit. 15, § 1001 (1973); VA. CODE ANN. § 8.01-220 (1977); W.VA. CODE § 56-3-2a (2009); WIS. STAT. § 768.01 (2009); WYO. STAT. ANN. § 1-23-101 (1941).

37. COLO. REV. STAT. ANN. § 13-20-201 (1937).

38. *Id.*

39. MINN. STAT. § 553.01 (1978).

40. NEV. REV. STAT. § 41.370 (1979).

41. MONT. CODE ANN. § 27-1-601 (2007); N.H. REV. STAT. ANN. § 460:2 (2009); OKLA. STAT. § 8.1 (1976). See *infra* part VII, for a discussion of actions involving the alienation of a family member’s affection

42. “The expression of one thing implies the exclusion of another.” See *Vieke v. Heikkinen*, 120 P.3d 809 (Referenced in Decisions Without Published Opinions Table), 2005 WL 1633561, *2 (Mo. 2005).

43. *Vieke*, 2005 WL 1633561.

44. *Nash v. Baker*, 522 P.2d 1335 (Okl. App. 1974).

45. 23 PA. STAT. ANN. § 1901.

46. BLACK’S LAW DICTIONARY 652 (Abridged 8th ed. 2005).

maintained. Regardless of the extent of these statutes' abolition of alienation actions, the mere existence of such statutes demonstrates the severity of the impact that alienation actions have had on the public and the obvious need for a legislative or judicial response.

IV. CONSTITUTIONALITY OF LEGISLATIVE ABOLISHMENT

The constitutionality of the legislative abolishment of the tort of alienation of affection has been questioned by those who have been denied recovery pursuant to such statutory prohibitions of alienation actions. However, where challenged, the so-called "heart balm" statutes have been consistently held constitutional, with only one exception.⁴⁷ In *Heck v. Schupp*, the Illinois Supreme Court struck down the state's former statute prohibiting alienation actions based on a rather vague combination of the state's constitutional provisions.⁴⁸ However, no other court has followed the logic of the *Heck* court.⁴⁹

The constitutionality of the statutory abolition of alienation actions has been questioned in light of state constitutional "open courts" provisions providing that "[e]very person out to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property or reputation ought to obtain, by law, right and justice freely . . . completely and without denial, promptly, and without delay."⁵⁰ In response to an argument that the abolishing statute denies the injured party a remedy for the wrongful act of alienation committed against him, a Texas Court of Appeals held that the legislative purpose and rationale of the abolishing statute – namely, to curtail the abusive nature of alienation actions – outweighs a litigant's right of recovery under the "heart balm" statutes.⁵¹ This is especially true where other avenues of relief are available in lieu of an alienation of affection action, such as an action for the intentional infliction of emotional distress or the favorable utilization of the actions of the wayward spouse in the equitable division of marital property in the resulting divorce action.⁵²

It has also been argued that the statutory abolishment on alienation actions "impairs the obligation of a private contract of marriage which amounts to a violation of the United States Constitution [providing] that 'no State shall . . . pass any . . . law impairing the obligation of contracts.'"⁵³ Challengers contend that "by abolishing the causes of action for alienation

47. *Magierowski*, 121 A.2d at 757-58 (citing *Heck v. Schupp*, 68 N.E.2d 464 (Ill. 1946)).

48. *Heck*, 68 N.E.2d 466. See *infra* Part VI for a discussion regarding Illinois' current statute allowing recovery for alienation actions but severely limiting the damages that may be assessed.

49. *Magierowski*, 121 A.2d at 758.

50. *Heck*, 68 N.E.2d at 466 (quoting ILL. CONST. art II, §19).

51. *Smith v. Smith*, 126 S.W.3d 660, 666 (Tex. App. 2004) (citing *Hearings on HB 203 Before the H. Comm. on Judiciary*, 70th Leg., R.S. (March 16, 1987)).

52. *Id.*

53. *Slusher v. Oeder*, 476 N.E.2d 714, 716 (Ohio Ct. App. 1984) (quoting U.S. CONST. art.I, § 10, cl. 1).

of affection and criminal conversation, the state is encouraging the enticement of one spouse by a stranger to the marriage, thereby creating the potential for a breach of the marriage contract in the form of divorce or dissolution."⁵⁴ However, in response, one court has stated that "marriage has never been regarded as a contract within the constitutional prohibitions against laws impairing the obligation of contracts."⁵⁵

Challengers of the abolishing statutes' constitutionality also contend that the statutes deny due process and/or equal protection under the Fourteenth Amendment to the United States Constitution and under similar state constitutional provisions.⁵⁶ However, the United States Supreme Court has explicitly declared that "[a] person has no property, no vested interest, in any rule of the common law."⁵⁷ The Supreme Court of Ohio, in addressing the constitutionality of its statutory prohibition of alienation actions, rationalized that because "there is no property or vested right in any of the rules of the common law . . . they may be added to or repealed by legislative authority,"⁵⁸ so long as "it is to attain a permissible legislative objective."⁵⁹ The Ohio court noted the widespread statutory abolition of alienation actions and added that "the [United States] Supreme Court, by declining to disturb lower-court verdicts on the issue [of the constitutionality], has affirmed the principal that the abolition of suits for alienation of affection and related actions is constitutional."⁶⁰

V. JUDICIAL ABOLISHMENT

Where the legislature has not statutorily abolished the tort of alienation of a spouse's affection, the judiciary of some states has taken it upon itself to do away with the action.⁶¹ In 1928, the Supreme Court of Louisiana was faced with the task of determining whether a right of action even existed for the alienation of a wife's affection in Louisiana.⁶² In *Moulin v. Monteleone*, Augustin Moulin sued his wife's paramour, Frank Monteleone, after returning from a business trip to find his wife living with Monteleone.⁶³ The wife confessed to Moulin that she was intimate with Monteleone and that she would no longer be living with Moulin.⁶⁴ As damages, Moulin sought \$80,000 for "the deprivation of [his] wife's love and affection . . . the loss of her fidelity and assistance . . . the loss of the

54. *Id.*

55. *Id.* (quoting *Moore v. Bur. of Unemp. Comp.*, 56 N.E.2d 520 (Ohio Ct. App. 1043)).

56. *Strock v. Presnell*, 527 N.E.2d 1235, 1241 (Ohio 1988) (citing *Haskins v. Bias*, 441 N.E.2d 842 (1981)).

57. *Id.* (quoting *Munn v. Illinois*, 94 U.S. 113, 134 (1876)).

58. *Id.* (quoting *Leis v. Cleveland Ry. Co.*, 128 N.E. 73 (Ohio 1920)).

59. *Id.* (citing *Silver v. Silver*, 280 U.S. 117 (1929)).

60. *Id.*

61. *Moulin*, 115 So. at 447.

62. *Id.* at 448.

63. *Id.* at 456.

64. *Id.*

companionship and society of [his] wife . . . the humiliation and mental anguish which [he] endured[,] and . . . the breaking up of his home.”⁶⁵

The Louisiana Supreme Court recognized immediately that there was no pertinent law to be found on the subject of a spouse’s love and affection or the alienation thereof in the statutes or jurisprudence of the state.⁶⁶ Chief Justice O’Niell, writing for the majority, rationalized that perhaps the reason that no such statutes exist is “because the law undertakes only to control and regulate human conduct – not human nature.”⁶⁷ The court felt that there were, however, several reasons why none of the lawyers of the state’s bar have ever, prior to that moment, instituted an action for damages based on the alienation of a wife’s affection – one of those reasons being probably the most-cited rationale for the tort’s abolition.⁶⁸

The court explained that at common law:

[the] right of action for damages for alienation of a wife’s affection [wa]s in some measure based upon the same obsolete idea that the wife [wa]s one of the husband’s chattels, and that her companionship, her services and her affection [we]re his property, for the loss of which, by wrongful inducement on the part of another man, the husband out to be compensated with money.⁶⁹

Quoting from Thomas M. Cooley’s treatise on the law of torts, the court noted that when we “direct attention to the remedies which, at common law, the husband might have against third persons for violation of his rights as husband [such as the right to bring an action for the alienation of his wife’s affection], we find them all grounded upon or permeated with the ideas which mark their origin in a rough and uncultivated society.”⁷⁰ The court presumed that the antiquated notions upon which the tort of alienation of affection was founded, along with other considerations,⁷¹ were responsible for the fact that no such right of action had been asserted in

65. *Id.*

66. *Id.* at 448.

67. *Moulin*, 115 So. at 448.

68. *Id.*

69. *Id.* at 450.

70. *Id.* (quoting THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENTLY OF CONTRACT 465 (3d ed. 1878)).

71. *Id.* The Court also recognized that, not only is the tort based on antiquated societal views of marriage, there are other reasons why an action based on alienation of affection has never been initiated in Louisiana. Namely, there is no right of action for damages in Louisiana against one who induces another to violate his or her contract with a third person absent fraud or deception. *Moulin*, 115 So. at 449 (citing *Kline v. Eubanks*, 33 So. 211 (La. 1902)). Because marriage was viewed as a civil contract and because “there is no element of such deception or fraud when a man persuades the wife of another to breach her contract by violating her marriage vow,” there is, therefore, no avenue of recovery under a breach of contract theory. *Id.* Additionally, at the time of the decision, punitive and exemplary damages were not authorized in civil cases. *Id.* at 448 (citing *Serio v. American Brewing Co.*, 74 So. 998 (La. 1917)). And because damages for alienation of affection were essentially punitive, a monetary award was not available to the injured spouse in an action for alienation of affection and therefore, there was no incentive to even bring suit in the first place. *Id.* Further, the Court noted that, in the

Louisiana until *Moulin*.⁷² Because at the time, no such action had been asserted in Louisiana, the Court held that no such cause of action could then be maintained and affirmed the lower court's dismissal of the action.⁷³

The *Moulin* Court did not, *per se*, abolish the tort of alienation of affection, since it held that such a cause of action had not been previously "recognized or ratified" by Louisiana statute or case law in the first place.⁷⁴ However, the court did attempt to explain why the tort had not been so recognized in the state, citing to the antiquated notions upon which the tort was founded. The observations of the *Moulin* opinion, especially with regard to the outdated theory behind the alienation actions, would provide the framework for abolition of the tort by later courts.

The Supreme Court of Washington cites favorably to the *Moulin* opinion in its 1980 decision to abolish the tort of alienation of affection.⁷⁵ In *Wyman v. Wallace*, the Court pointed out that the "action for alienation of a spouse's affection [was] a judicially created doctrine" in Washington, "exist[ing] [at] common law, and. . . adopted into the state's jurisprudence but not specifically provided for by statutory legislation."⁷⁶ Therefore, it was within the Court's judicial power to abolish the tort, since "a rule of law which has its origins in the common law and which has not been specifically enacted by the legislature may be modified or abolished by the courts when such revision is mandated by changed conditions."⁷⁷

The Washington Supreme Court quoted and summarily agreed with the lower court's reasons for abolishing the tort.⁷⁸ The Washington Court of Appeals began by asking the question, "Should the common-law action for the alienation of affection of a spouse be abolished?"⁷⁹ The court responded in the affirmative and explained that "[w]hen a judicial conclusion of the past which established a public policy comes again before the courts, accepted assumptions should be reexamined in the light of current conditions and thinking."⁸⁰ Accordingly, the opinion goes on to "question the action for alienation of affection in the light of contemporary opinion, having in mind the ramifications . . . of the impact of the action upon those [parties] involved . . . directly or indirectly."⁸¹

The Washington court discussed several aspects of an action based on alienation of affection, including the motives for the initiation of such an

absence of a statute conferring a right of action for damages for alienation of a wife's affection, there is no such right. *Id.* at 451.

72. *Moulin*, 115 So. at 452.

73. *Id.* at 452, 457.

74. *Id.*

75. *Wyman v. Wallace*, 615 P.2d 452 (Wash. 1980) (on Petition for Reconsideration of *Wyman v. Wallace*, 588 P.2d 1133 (Wash. 1979)).

76. *Id.* at 453 (citing *Beach v. Brown*, 55 P.46 (1898)).

77. *Id.* (quoting *Wyman*, 588 P.2d at 1134).

78. *Id.* at 455.

79. *Wyman v. Wallace*, 549 P.2d 71 (Wash. App. 1976).

80. *Id.* (citing *Pierce v. Yakima Valley Memorial Hop. Ass'n*, 260 P.2d 765 (Wash 1953)).

81. *Id.* at 71-72.

action in the first place.⁸² It observed that a major motivating factor in bringing a suit for alienation of affection is the plaintiff's need to exact revenge, humiliation, and punishment on the paramour or former spouse.⁸³ Accordingly, in an effort to avoid such results at any cost, a defendant paramour is essentially coerced into a monetary settlement with the plaintiff spouse in exchange for the preservation of the parties' reputations – a process that the Court of Appeals referred to as “legalized blackmail.”⁸⁴

Along with concerns regarding the impact of such proceedings upon any children indirectly involved⁸⁵ and with the indefinite standards for assessing damages,⁸⁶ the court also pointed out the fallacy in the notion that the action prevents misconduct and protects the marital relationship.⁸⁷ It rationalized that a solid marriage is not one where the affection of one spouse is subject to alienation by a third party.⁸⁸ According to the court, “viable, contented marriages are not broken up by the vile seducer of the Nineteenth Century melodrama, though this is what the suit for alienation assumes. In fact the break-up is the product of many influences.”⁸⁹ In light of these considerations, the court found “so little possible social utility in the action, when balanced against the social and individual harm that it can cause, that [it] could not justify [an action based on alienation of affection] in contemporary society.”⁹⁰ The Court of Appeals dismissed the action and the Supreme Court of Washington ultimately affirmed.⁹¹

In 1981, the Supreme Court of Iowa joined Washington in the judicial abolishment of the tort of alienation of affection, citing to both the *Moulin* and *Wyman* opinions.⁹² In *Fundermann v. Mickelson*, the court boldly stated it has “become convinced that there is inherent and fatal contradiction in the term ‘alienation of affection.’”⁹³ Justice Harris, writing for the majority, explained that “alienation belies the affection.”⁹⁴ In other words, true or genuine affection is not, by definition, subject to alienation. According to the *Fundermann* Court (in agreement with the logic of the *Wyman* Court):

82. *Id.* at 72-74.

83. *Id.* at 73.

84. *Id.* at 72 (citing M. GROSSMAN, *THE NEW YORK LAW OF DOMESTIC RELATIONS* § 313 (1947); H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* §10.2 at 267 (1968)).

85. *Wyman*, 549 P.2d at 71.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 73.

91. *Wyman*, 549 P.2d at 74; *Wyman v. Wallace*, 615 P.2d 452 (Wash. 1980). It should be noted that the Supreme Court initially reversed the Court of Appeals, stating that “clear reasons and an evident factual basis” for abolition of the long-standing cause of action were lacking. *Wyman v. Wallace*, 588 P.2d 1133, 1134 (Wash. 1979). However, upon a discretionary review granted by the Washington Supreme Court, that opinion vacated by *Wyman*, 615 P.2d 452.

92. *Fundermann v. Mickelson*, 304 N.W.2d 790 (Iowa 1981).

93. *Id.* at 791.

94. *Id.*

The action has survived in the hope that it affords some protection to existing family relationships. But this lofty hope has proven illusory. Human experience is that the affection of persons who are devoted and faithful are not susceptible to larceny no matter how cunning or stealthful. And it is folly to hope any longer that a married person who has become inclined to philander can be preserved within an affectionate marriage by the threat of an alienation suit.⁹⁵

The Iowa court also noted a very real problem with alienation trials by stating that where a jury must decide which came first for the purposes of causation, the breakdown of the marriage or the alienating misconduct, the jury must do so "after learning of conduct of which they strongly disapprove and which society condemns."⁹⁶ The court opined that "[i]t is illogical to pretend that juries can dispassionately resolve the factual disputes in alienation suits, such as causation, in the same manner as in other cases."⁹⁷ However, it clarifies that notwithstanding the potential prejudice a paramour risks in the face of a jury, it is actually the theory of recovery that is flawed.⁹⁸ Noting the "unmistakable trend away from allowing alienation suits," the Iowa Supreme Court joined Washington in the judicial abolishment of the tort.⁹⁹

In 1986, the Idaho Supreme Court was also faced with the decision to abolish the tort of alienation of affection.¹⁰⁰ However, in *O'Neil v. Schuckardt*, the court was faced with a very different defendant than the paramour who is normally sued by an injured spouse.¹⁰¹ In *O'Neil*, the plaintiff spouse brought an alienation action against his wife's mother and sister, her church, and several of its leaders and members.¹⁰² The facts of the case suggest that the defendants convinced the plaintiff's wife that their marriage was invalid in the eyes of God because the plaintiff was not Catholic nor had he taken instruction in the faith and that she could not, therefore, live with the plaintiff as his wife since to do so would be to commit moral sin.¹⁰³ The plaintiff husband brought the alienation suit on behalf of himself and the children born of the marriage.¹⁰⁴

In its decision to abolish the tort, the Supreme Court of Idaho considered the *Wyman* opinion to be directly on point, citing favorably its reasons for abolishment.¹⁰⁵ The *O'Neil* Court noted the purported purpose for the

95. *Id.*

96. *Id.*

97. *Id.*

98. *Fundermann*, 304 N.W.2d at 791.

99. *Id.* at 792.

100. *O'Neil v. Schuckardt*, 733 P.2d 693 (Idaho 1987).

101. *Id.* at 695.

102. *Id.*

103. *Id.*

104. *Id.* at 694.

105. *Id.* at 697.

existence of the tort and unequivocally rejected the arguments in support of its preservation.¹⁰⁶

The action for alienation of affections purportedly exists to discourage third persons from weakening marriages. However, a marriage is not likely to falter without the active participation of one of its members. Never has there been any documentation that the existence of the action actually protects marriages. In fact, once suit has been brought, it notifies the public that the marriage is unstable, embarrasses the spouses and their children, and adds more tension to the family relationship. . . . The unplanned nature of the tort, at least where sexual activities are involved, makes the threat of any damage suit unlikely to deter the culpable conduct that has allegedly interfered with the marriage.¹⁰⁷

The Court cited several other rationales in support of the tort's abolition, some of which merely echoed the logic of the *Wyman* and *Fundermann* Courts. It noted the ill effects of the action on children involved in the marriage, the extortionate use of alienation suits by plaintiff spouses looking for a quick monetary settlement, and the difficulty of determining whether the defendant or the alienated spouse (who was arguably not happy with the marriage in the first place) is primarily responsible for the alienation.¹⁰⁸ The court also agreed with the earlier *Fundermann* opinion that, in light of the intangible nature of the injuries involved in an alienation action, "damages awards have few standards, making it easier for verdicts to be tainted by passion and prejudice."¹⁰⁹ The Supreme Court of Idaho considered these factors to outweigh any benefit of an alienation action and abolished it accordingly.¹¹⁰

Citing the *Wyman*, *Fundermann*, and *O'Neil* opinions, Kentucky, South Carolina, and Missouri followed suit and judicially abolished the tort of alienation of affection, all focusing their opinions on the antiquated notions upon which the tort is based and the flawed rationale upon which the tort has been thus far maintained.¹¹¹ As stated by the Supreme Court of Missouri, echoing the opinions of the highest courts of Kentucky and South Carolina, "the tort of alienation of affection can no longer be adequately

106. *O'Neil*, 733 P.2d at 698.

107. *Id.* (citing *The Suit of Alienation of Affection: Can its Existence be Justified Today?*, 56 N.D.L.REV. 239, 251 (1980)).

108. *Id.*

109. *Id.*

110. *Id.*

111. *Hoye v. Hoye*, 824 S.W.2d 422, 424 (Ky. 1992); *Russo v. Sutton*, 422 S.E.2d 750 (S.C. 1992); *Helsel v. Noellsch*, 107 S.W.3d 231 (Mo. 2003).

justified.”¹¹² The Missouri court explained that “the original property concepts justifying the tort are inconsistent with modern law [and] [t]he modern justification that the tort preserves marriages is a fiction.”¹¹³

VI. ALIENATION ACTIONS STILL RECOGNIZED IN SOME STATES

While the majority of states have either judicially or legislatively abolished the tort of alienation of affection, a handful of states still recognize alienation as a viable cause of action, including New Mexico,¹¹⁴ Hawaii,¹¹⁵ South Dakota,¹¹⁶ Illinois,¹¹⁷ Utah¹¹⁸ and, of course, Mississippi.¹¹⁹ In the face of the growing trend of abolishment of the tort, the courts of these states have not, however, set forth persuasive arguments in support of the preservation of the right of action. Two of these courts have acknowledged the trend of abolishment and even expressed their dissatisfaction with the action as an avenue for the recovery of damages. However, finding themselves powerless to judicially abolish the tort, the tort still remains a feasible avenue of recovery in those states.

In 1999, the Supreme Court of South Dakota addressed the public policy concerns with alienation actions but noted that in light of the statutory nature of the action, and absent a constitutional defect in the statute, the Court is “compelled to leave the cause of action intact and instead defer to the legislature’s ability to decide if there is a need for its elimination.”¹²⁰ The court explained that the members of the bench “are not legislative overlords empowered to eliminate laws whenever [they] surmise that [the laws] are no longer relevant or necessary.”¹²¹

Nonetheless, the South Dakota court recognized, in earlier opinions, the national trend of abolishing the tort and that the tort has “outlived [its] usefulness and [is an] ‘archaic holdover from an era when wives were considered the chattel of their spouse.’”¹²² The court quoted from its plurality opinion in *Hunt v. Hunt*¹²³ to reflect the strong policy arguments previously advanced by the members of the court in favor of abolishment.¹²⁴

The underlying rationale for alienation suits, that is, the preservation of the marriage, is ludicrous. And it is folly to

112. *Helsel*, 107 S.W.3d at 233.

113. *Id.*

114. *Hakkila v. Hakkila*, 812 P.2d 1320, 1326 (N.M. Ct. App. 1991) (citing *Thompson v. Chapman*, 600 P.2d 302 (N.M. Ct. App. 1979)).

115. *Hunt v. Chang*, 594 P.2d 118, 123 (Haw. 1979).

116. *Veeder v. Kennedy*, 589 N.W.2d 610, 616 (S.D. 1999).

117. 740 ILL. COMP. STAT. 5/0.01 (2009).

118. *Norton v. Macfarlane*, 818 P.2d 8, 15 (Utah 1991).

119. *Fitch v. Valentine*, 959 So. 2d 1012, 1020 (Miss. 2007).

120. *Veeder*, 589 N.W.2d at 616 (citing S.D. Codified Laws § 20-9-7 (2008)). South Dakota derives the action of alienation of affection from statutory law providing that “[t]he rights of personal relation forbid the abduction or enticement of a wife from her husband.”

121. *Id.*

122. *Id.* at 615 (quoting *Hunt*, 309 N.W.2d at 821).

123. *Hunt*, 309 N.W.2d at 822.

124. *Veeder*, 589 N.W.2d at 616 (quoting *Hunt*, 309 N.W.2d at 822).

hope any longer that a married person who has become inclined to philander can be preserved within an affectionate marriage by the threat of an alienation suit. Where . . . neither party holds the marriage in the high regard that it should be held, the existence of . . . alienation of affections . . . as [a remedy] fosters bitterness, promotes vexatious lawsuits, uses the marriage as a means of blackmail and character assassination, puts the marriage in the marketplace, and generally exposes the marriage to a public cleansing with a price tag attached upon it.¹²⁵

However, despite the court's seemingly strong position advocating the abolition of alienation of affection, the action still remains an available avenue of redress in South Dakota.¹²⁶

Similarly, while the right of action has not been abolished in New Mexico, the Court of Appeals of New Mexico has stated that it "look[s] with disfavor on claims for damages based upon alienation of affection."¹²⁷ In *Thompson v. Chapman*, the court added that if it had the power to do so, it "would follow in the footsteps of *Wyman v. Wallace*"¹²⁸ in abolishing the tort.¹²⁹ While the Supreme Court of New Mexico "has not yet formally abandoned the doctrine," it has cited *Thompson v. Chapman* "with apparent approval in support of the proposition that 'not all interests which individuals claim as worthy of legal protection are in fact afforded such protection under our law.'"¹³⁰ Therefore, it seems as though New Mexico may soon join the ranks of Washington, Iowa, and others who have judicially abolished the tort of alienation of affection.

After a failed attempt to legislatively abolish the tort of alienation of affection,¹³¹ the Illinois legislature sharply limited alienation actions by passing a statute that allows the recovery of only *actual* damages resulting from the alienation of the affection of one's spouse.¹³² The Alienation of Affection Act of Illinois provides, in part:

[T]he remedy . . . provided by law for the enforcement of the action for alienation of affection has been subjected to grave abuses and has been used as an instrument for blackmail by unscrupulous persons for their unjust enrichment, due to the indefiniteness of the damages recoverable in such actions and the consequent fear of persons threatened with such actions that exorbitant damages might be assessed

125. *Id.*

126. *Id.*

127. *Thompson v. Chapman*, 600 P.2d 302, 304 (N.M. Ct. App. 1979).

128. *Wyman v. Wallace*, 549 P.2d 71 (Wash. App. 1976).

129. *Thompson*, 600 P.2d at 304.

130. *Padwa v. Hadley*, 981 P.2d 1234, 1240 (N.M. Ct. App. 1999) (citing *Lovelace Medical Center v. Mendez*, 805 P.2d 603, 610 (N.M. 1991)).

131. See *supra* notes 46-47 and accompanying text.

132. 740 ILL. COMP. STAT. § 5/1, *et seq.*

against them. It is also . . . declared that the award of monetary damages in such actions is ineffective as a recompense for genuine mental or emotional distress.¹³³

In light of these considerations, the legislature declared that the best interests of the people of the state would be served by severely limiting the damages recoverable in alienation actions.¹³⁴ The legislature was of the opinion that any punishment of persons guilty of the alienation of the affection of another's spouse should be imposed under criminal statute and should not be left to civil juries who are free to punish the wrongdoers by the imposition of punitive, exemplary, vindictive, or aggravated damages.¹³⁵ Accordingly, the Act limits recovery in alienation actions to actual damages sustained and excludes punitive, exemplary, vindictive, or aggravated damages.¹³⁶ In addition, the statute prohibits the consideration of certain elements in determining damages, including: the wealth or position of the defendant or the defendant's prospects of wealth; mental anguish suffered by the plaintiff; any injury to the plaintiff's feelings; shame, humiliation sorrow or mortification suffered by the plaintiff; and defamation or injury to the good name or character of the plaintiff or dishonor to the plaintiff's family.¹³⁷

One of the only jurisdictions, other than Mississippi, that seems to avidly support the preservation of alienation actions is Utah.¹³⁸ When addressed with the argument for abolition of the tort in *Nelson v. Jacobsen*, the Supreme Court of Utah held that the tort of alienation of affection should remain a viable cause of action in order to adequately protect marital consortium interests.¹³⁹ In *Nelson*, the court rationalized that, contrary to allegations that an alienation action's purpose is to protect and preserve the marital relationship, an alienation action actually seeks to "compensate a spouse who has suffered loss and injury to his or her marital relationship through the intentional interference of a third party."¹⁴⁰ Accordingly, the court rejected the defendant's argument that the tort should be abolished because it does not achieve its intended purpose.¹⁴¹

The *Nelson* Court also stated, in response to the defendant's argument that the tort should be abolished in light of the action's susceptibility to abuse, that "even if some alienation actions are motivated primarily by spite or extortion, that is no basis on which to abolish the cause of action altogether."¹⁴² It further explained that the difficulty of assessing damages and proving causation are both insufficient to deny recovery where raising

133. 740 ILL. COMP. STAT. § 5/1.

134. 740 ILL. COMP. STAT. § 5/1.

135. 740 ILL. COMP. STAT. § 5/1.

136. 740 ILL. COMP. STAT. §§ 5/2; 5/3.

137. 740 ILL. COMP. STAT. §5/4.

138. *Norton v. Macfarlane*, 818 P.2d 8 (Utah 1991).

139. *Nelson v. Jacobsen*, 669 P.2d 1207, 1215 (Utah 1983).

140. *Id.* at 1215-16.

141. *Id.*

142. *Id.*

the plaintiff's burden of proof on the issue of causation and redefining the factors bearing on damages would improve the "fairness" of the cause of action.¹⁴³ In 1991, the Utah Supreme Court's decision in *Norton v. Macfarlane* reaffirmed the holdings of the *Nelson* opinion and the state still continues to recognize the tort of alienation of affection today.¹⁴⁴

VII. BREACH OF FIDUCIARY DUTY

The statutes and judicial opinions that have abolished the tort of alienation of affection have certainly made exceptions to the general rule. "An exception [sometimes] arises when a defendant owes a plaintiff an independent duty of care, such as when that defendant also has a special relationship with the plaintiff."¹⁴⁵ For example, an alienation action may be available where a paramour owes the plaintiff a fiduciary duty pursuant to the paramour's status as the plaintiff's psychiatrist or marital counselor, to refrain from any acts which would result in the alienation of the affection of the plaintiff's spouse.¹⁴⁶ "In such an instance, the defendant does more than just intrude into the marriage; he breaches an independent duty of care and loyalty toward the cuckolded spouse."¹⁴⁷ As one court has explained, the defendant paramour "is not just 'the mailman, the milkman, or the guy next door.'"¹⁴⁸

In *Destafano v. Gabrian*, the Colorado Supreme Court upheld an action which was, essentially, a claim for alienation of affection.¹⁴⁹ However, in *Destafano*, the plaintiff sued his priest, alleging that the priest engaged in actions during marriage counseling, namely sexual intercourse with the plaintiff's wife, that caused the dissolution of his marriage.¹⁵⁰ The court dismissed the plaintiff's claims for negligently conducting counseling and intentional infliction of emotional distress, since those allegations "plainly set forth claims for alienation of affection and criminal conversation."¹⁵¹ However, because the tortfeasor owed the plaintiff a fiduciary duty as his marriage counselor, the claim for breach of fiduciary duty remained.¹⁵² The court stated that "the nature of the counseling relationship . . . gives rise to a clear duty on [the counselor's part] to engage only in activity or conduct calculated to improve the [couple's] marriage."¹⁵³ The Colorado Supreme Court added that it "should not read the statute so broadly as to preclude any cause of action involving extramarital affairs."¹⁵⁴ Since the counselor breached a duty owed directly to the plaintiff, the plaintiff was,

143. *Id.* at 1217-18.

144. *Norton*, 818 P.2d at 9.

145. *Padwa v. Hadley*, 981 P.2d 1234, 1239 (N.M. Ct. App. 1999).

146. *Id.* (citing *Figueiredo-Torres v. Nickel*, 584 A.2d 69, 75-77 (1991)).

147. *Id.*

148. *Id.* (quoting *Figueiredo-Torres*, 584 A.2d at 75-75).

149. *Destafano v. Gabrian*, 763 P.2d 275 (Co. 1988).

150. *Id.* at 279.

151. *Id.* at 288.

152. *Id.* at 289.

153. *Id.* (citing *Horak v. Biris*, 474 N.E.2d 13 (1985)).

154. *Id.* at 281-282.

in effect, able to maintain an alienation of affection claim against the counselor masked as a claim for breach of fiduciary duty.

While Colorado's Supreme Court allows for recovery in such a situation, the Supreme Court of Ohio has expressly held otherwise.¹⁵⁵ In *Strock v. Pressnell*, as in *Destefano*, a plaintiff husband brought suit against his minister who allegedly engaged in an affair with the plaintiff's wife while the couple was seeking marital counseling.¹⁵⁶ The Ohio Supreme Court stated with respect to the plaintiff husband's claim for breach of fiduciary duty, that "it is not the conduct but the results of the conduct which are sought to be compensated, the result being estrangement of the spouse and implied sexual relations of the spouse."¹⁵⁷ The court found that "[s]uch clearly falls within [the statute abolishing claims for criminal conversation and alienation of affection]" and accordingly dismissed the claim.¹⁵⁸

VIII. ALIENATION OF AFFECTION IN MISSISSIPPI

The Mississippi Supreme Court reviewed one of the first actions in Mississippi for the alienation of a spouse's affection in 1927.¹⁵⁹ In *Brister v. Dunaway*, the plaintiff spouse brought an action against his wife's paramour for alienation of his wife's affection and criminal conversation.¹⁶⁰ The *Brister* Court addressed the requirements to sustain an action for criminal conversation, but was not as forthcoming with regard to the requirements to sustain an action for alienation of affection.¹⁶¹ The court later clarified those requirements in its 1932 decision in *Stanton v. Cox*.¹⁶² In *Stanton*, the court stated:

In order to sustain an action for the alienation of the [spouse's] affection it must appear, in addition to the fact of alienation or the facts of the [alienated spouse's] affection for the defendant, that there had been a direct interference on the defendant's part, sufficient to satisfy the jury that the alienation was caused by the defendant. . . [T]he plaintiff must show that there was a direct interference upon the upon the part of the defendant that not only was there infatuation of the [spouse] for the defendant, but that the defendant by wrongful act was the cause of it.¹⁶³

155. *Strock v. Pressnell*, 527 N.E.2d 1235, 1236 (Ohio 1988).

156. *Id.*

157. *Id.* at 1243.

158. *Id.* at 1243-44.

159. Phillip Sykes, *Intentional Torts – Alienation of Affection – An Inference of Defendant's Intentional Interference in Plaintiff's Marital Relations is Sufficient to Prove Alienation*, 63 Miss. L.J. 249, 255 (1993) (citing *Brister v. Dunaway*, 115 So. 36 (Miss. 1927)). See also *Saunders v. Alford*, 607 So. 2d 1214, 1218 (Miss. 1992).

160. *Brister v. Dunaway*, 115 So. 36, 37 (Miss. 1927).

161. *Id.* at 38.

162. Sykes, *supra* note 159, at 256-57 (citing *Stanton v. Cox*, 139 So. 458 (Miss. 1932)).

163. *Stanton v. Cox*, 139 So. 458, 460-461 (Miss. 1932) (internal citations omitted).

The *Stanton* Court also suggested that the purpose of an alienation action was to preserve the marital relationship, stating that “[s]o long as a husband and wife are living together, strangers who interfere with their marital relations, even though the domestic relation has become strained, must know that they cannot accept propositions which lead to the dissolution of the matrimonial tie.”¹⁶⁴

Almost seventy years later, in *Overstreet v. Merlos*, a defendant paramour expressed the need for abolition of the tort of alienation of affection in support of the lower court’s dismissal of an alienation claim made against him.¹⁶⁵ In response, the Supreme Court of Mississippi recognized the antiquated nature of alienation actions, but summarily stated that “[p]recedent supports common law alienation claims and the circuit court is bound to follow such.”¹⁶⁶ In *Overstreet*, because the lower court dismissed the alienation action against the paramour on other grounds, the Supreme Court refused to address the need for abolition of the tort.¹⁶⁷ The court explained that “[e]ven antiquated causes of action have to be nullified by judicial fiat.”¹⁶⁸

Two years after *Overstreet*, the Supreme Court of Mississippi noted for the second time the outdated nature of the tort of alienation of affection.¹⁶⁹ However, in *Saunders v. Alford*, the court again found that it was not concerned with the tort of alienation of affection since the lower court ruled in favor of the appellant on the issue of alienation and addressed only the issue of abolition of the tort of criminal conversation.¹⁷⁰

In *Saunders*, the plaintiff spouse brought an action against his wife’s paramour for the alienation of her affection and criminal conversation.¹⁷¹ Justice Banks, writing for the majority, recognized that these so called ‘heart balm’ torts have been abolished by a majority of jurisdictions, and that it was within the court’s discretion to likewise judicially abolish such common law torts in Mississippi.¹⁷² In abolishing the tort of criminal conversation, the court noted that the right sought to be protected by the tort is “the exclusive right of one spouse to sexual intercourse with the other.”¹⁷³ According to the court, the tort of criminal conversation “comes closest in form to a strict liability tort” since all that must be proven is that the defendant engaged in a sexual act with the plaintiff’s spouse without the plaintiff’s permission.¹⁷⁴ The court reasoned that the tort of criminal

164. *Id.* at 461.

165. *Overstreet v. Merlos*, 570 So. 2d 1196, 1197 (Miss. 1990).

166. *Id.* at 1198 (citing *Camp v. Roberts*, 462 So. 2d 726 (Miss. 1985)).

167. *Saunders v. Alford*, 607 So. 2d 1214, 1218 (Miss. 1992) (citing *Overstreet*, 570 So. 2d at 1198).

168. *Overstreet*, 570 So. 2d at 1198 (Miss. 1990).

169. *Saunders*, 607 So. 2d 1214.

170. *Id.* at 1218.

171. *Id.* at 1215.

172. *Id.* at 1215-1216, 1219.

173. *Id.* at 1216 (quoting *Bearbower v. Merry*, 266 N.W.2d 128, 134 (Iowa 1978)).

174. *Id.* at 1215 (citing *Fadgen v. Lenkner*, 365 A.2d 147, 149 (Pa. 1976)).

conversation has “outlived its usefulness” and cited logic for its abolishment that echoed the very same reasons that other jurisdictions have proposed in support of the abolishment of the tort of alienation of affection, including the tort’s lack of preservation of the marital relationship and growing abusive use of the actions as a means for vindication.¹⁷⁵ While the court did not abolish the tort of alienation of affection, the *Saunders* opinion nonetheless confirms the court’s power to abolish the tort of alienation of affection and the reasons given by the *Saunders* Court in support of the abolition of criminal conversation apply equally to the abolition of alienation actions.

Finally, in the 1999 case of *Bland v. Hill*, the issue of abolishment of the tort of alienation of affection was properly before the Mississippi Supreme Court.¹⁷⁶ In *Bland*, the plaintiff husband filed a complaint against his wife’s paramour for compensation for the loss of the affection of his wife.¹⁷⁷ At trial, the jury awarded the plaintiff spouse \$200,000 in damages.¹⁷⁸ The defendant paramour appealed and asked the court to abolish the tort of alienation of affection.¹⁷⁹

Justice Pittman, writing for the majority, began by stating that the purpose of an alienation action is to protect “the love, society, companionship, and comfort that form the foundation of marriage.”¹⁸⁰ The court outlined the elements of proof required to maintain an action for the alienation of a spouse’s affection – wrongful conduct on the part of the defendant, a loss by the plaintiff spouse of the affection or consortium of his or her spouse and particularly, “a causal connection between such conduct and the loss” – and commented on the difference between an alienation action and an action for criminal conversation.¹⁸¹ Noting its earlier abolition of the tort of criminal conversation and its refusal to extend that abolition to include the tort of alienation of affection, the court again cited to the tort’s intended purpose to protect the underlying foundation of marriage.¹⁸² Refusing to abolish the tort, the court stated that it “believe[s] that the marital relationship is an important element in the foundation of our society [and t]o abolish the tort of alienation of affection would, in essence, send the message that [the court is] devaluing the marriage relationship.”¹⁸³

Justice McRae, dissenting in part,¹⁸⁴ stated that while he agrees that the marital relationship is an important foundation of society, he disagrees

175. *Saunders*, 607 So. 2d at 1215-1218.

176. *Bland v. Hill*, 735 So. 2d 414 (Miss. 1999).

177. *Id.* at 415.

178. *Id.*

179. *Id.*

180. *Id.* at 417 (citing *Saunders*, 607 So. 2d at 1215).

181. *Id.* (citing *Saunders*, 607 So. 2d at 1215-1216).

182. *Bland*, 735 So. 2d at 417-18 (citing *Saunders*, 607 So. 2d at 1215).

183. *Id.* at 418.

184. Justice McRae concurred with the majority’s evidentiary ruling regarding the underlying alienation suit but believed that this opportunity should have been taken “to abrogate once and for all the tort known as alienation of affection.” *Bland*, 735 So.2d at 425-26 (McRae, J., concurring in part and dissenting in part).

with the majority's statement that abolishment of the tort of alienation of affection would send the wrong message to the people of the state.¹⁸⁵ According to Justice McRae, citing to the *Wyman*, *Fundermann*, and *O'Neil* opinions discussed *supra*,¹⁸⁶ "[t]he alienation suit is an anachronism which [the court] would do well to rid [themselves] of."¹⁸⁷ He added that such suits "have afforded a fertile field for blackmail and extortion by means of manufacturing suits in which the threat of publicity is used to force a settlement"¹⁸⁸ and "[a] wealth of experience has demonstrated that these lawsuits so much more harm to society than good."¹⁸⁹

In response to Justice McRae's position, Justice Smith, in his concurring opinion joined by Justice Banks and joined in part by Justice Waller, stated that in light of the *Saunders* Court's abolishment of criminal conversation, an action for alienation of affection is the only legal remedy for an injured spouse where a third party has wrongfully interfered with his or her marriage.¹⁹⁰ According to Justice Smith, abrogation of the tort would leave injured spouses who were otherwise entitled to compensation without a means of redress for the wrongful act of interference committed upon him or her, resulting in the demise of his or her marriage.¹⁹¹ He added that the dissent's argument in support of abolishment of alienation actions is "somewhat akin to the view that 'everybody else is doing it, so should I,'" and that Mississippi should not "get aboard this runaway train."¹⁹²

The issue of abolition of the tort was brought before the Court of Appeals of Mississippi in 2001.¹⁹³ In *Gorman v. McMahon*, the appellate court cited *Bland* and summarily dismissed the issue, stating that the appellant was simply asking the court to "address a question that the Mississippi Supreme Court has previously answered."¹⁹⁴ However, in 2007, the Mississippi Supreme Court again took it upon themselves to readdress whether the tort of alienation of affection should be abolished and declined to do so.¹⁹⁵

In *Fitch v. Valentine*, the plaintiff spouse brought an action against his wife's paramour who engaged in an adulterous affair with his wife, impregnated her, and allegedly offered his wife money and gifts in an effort to persuade her to end the matrimony.¹⁹⁶ The wife, however, testified that her affection for her husband had expired before the adulterous relationship commenced and that the adulterous relationship with the defendant

185. *Bland*, 735 So. 2d at 427 (McRae, J., concurring in part and dissenting in part).

186. See discussion *supra* Part IV.

187. *Bland*, 735 So. 2d at 427 (McRae, J., concurring in part and dissenting in part).

188. *Id.* at 426 (McRae, J., concurring in part and dissenting in part) (quoting PROSSER AND KEETON, *supra* note 16 at 229).

189. *Id.* at 427 (McRae, J., concurring in part and dissenting in part).

190. *Id.* at 422 (Smith, J., specially concurring).

191. *Id.*

192. *Id.*

193. *Gorman v. McMahon*, 792 So. 2d 307 (Miss. Ct. App. 2001).

194. *Gorman*, 792 So. 2d at 318 (citing *Bland*, 735 So. 2d at 417-18).

195. *Fitch v. Valentine*, 959 So. 2d 1012 (Miss. 2007).

196. *Id.* at 1015-17.

was itself the result of her unhappy marriage to her husband.¹⁹⁷ At the trial of the matter, the jury unanimously found in favor of the plaintiff husband and awarded him \$642,000 in actual damages and \$112,500 in punitive damages against the defendant.¹⁹⁸ The defendant paramour appealed and argued that the court “should abolish the tort of alienations as a matter of public policy.”¹⁹⁹

Justice Randolph, writing for the majority, cited favorably to Justice Smith’s statement in *Bland v. Hill* that Mississippi should not jump on the abolition bandwagon, leaving an offended spouse without a means of recovery “for the wrongful conduct of a third party who willfully and intentionally interferes in and aids in destroying a marriage.”²⁰⁰ The court explained the justification and need for the viability of the tort of alienation of affection by stating that “[i]n addition to protecting the marriage relationship and its sanctity, the tort of alienation of affection also provides an appropriate remedy for the intentional conduct which causes a loss of consortium.”²⁰¹ Justice Randolph commented that where a person is injured by the negligent acts of another, the injured person’s spouse often has a separate claim for loss of consortium and therefore, it would be inconsistent law to allow a spouse to recover for the loss of consortium caused by a third party’s negligence, but refuse to allow a spouse to recover for the same loss caused by a third party’s *intentional act*, as does an alienation action.²⁰² In conclusion, the court affirmed the judgment and damages awards and again stated that “in the interest of protecting the marriage relationship and providing a remedy for intentional conduct which causes a loss of consortium, this Court declines the invitation to abolish the common law tort of alienation of affection in Mississippi.”²⁰³

Justice Dickinson specially concurred, boldly expressing his dissatisfaction with the majority’s decision to sustain the tort of alienation of affection, stated:

In my view, Mississippi should abandon the five other states which continue to fully recognize the antiquated common law tort of alienation of affection and join the other forty-two states who refuse to do so. . . . Nevertheless, I have been unsuccessful in persuading the benevolent majority which holds that the ancient and infirm cause of action shall continue to breathe in Mississippi. That said, I shall respect the majority’s decision and apply the law to alienation of affection cases which find their way here, including the case

197. *Id.* at 1017.

198. *Id.*

199. *Id.* at 1018.

200. *Id.* at 1019 (quoting *Bland*, 745 So.2d at 422 (Smith, J., specially concurring)).

201. *Fitch*, 959 So. 2d at 1020 (citing *Bland*, 735, So.2d at 418).

202. *Id.* (quoting *Helsel v. Noellsch*, 107 S.W.3d 231, 234 (Mo. 2003) (Benton, J., dissenting)).

203. *Id.*

before us today. First, however, I shall state my case for abolition of the cause of action.²⁰⁴

Justice Dickinson went on to discuss the historical backdrop upon which the tort was founded and noted the change in the rationale for the action from a means of compensation for lost “property” to a means of preserving marriages and discouraging third-party interference therewith.²⁰⁵ Like other supporters of abolition, Justice Dickinson found the current rationale underlying the tort to be a legal fiction – stating several times that the tort does not, in fact, preserve or stabilize a marital union.²⁰⁶ In addition, Justice Dickinson observed that (1) spousal affection is not a form of property that one can own or for the loss of which, a person should recover,²⁰⁷ (2) although an alienation action is theoretically compensatory, “the true nature of the claim is punitive,” as evidenced by the vindictive motives primarily cited for the initiation of alienation actions and the tool for extortion and blackmail that alienation actions have become;²⁰⁸ (3) any injuries that might have been caused by the wrongful conduct are not deterred by an alienation action, but rather, are exacerbated by the process of the action;²⁰⁹ and (4) “no clear standards for compensating the plaintiff exist[, opening] the door for . . . awards . . . usually tainted by passion and prejudice.”²¹⁰ Accordingly, Justice Dickinson opined that Mississippi recognize that alienation actions have “outlived any relevance or usefulness they may have once possessed,” and urged the court to abolish the tort.²¹¹

IX. CONCLUSION

Mississippi should abolish the tort of alienation of a spouse’s affection, just as it has abolished the tort of criminal conversation. The warped rationale upon which the tort relies is nothing more than fiction - alienation actions *do not* protect marriages from wrongful interference. While to abolish the tort of alienation of affection would leave an injured spouse without a means of redress for the wrongful interference with his or her marriage, one must question the extent that such injuries can be adequately compensated by a monetary award. Moreover, alienation actions have fueled vicious out of court settlements in an effort to preserve the reputations of the parties involved. These considerations alone outweigh the need for preservation of the action, if such a need exists. Accordingly, the legislature and/or courts of Mississippi should take heed to the opinions of Justices McRae and Dickinson and follow the national trend in abolishing the tort of alienation of affection. Alternatively, the legislature or judiciary

204. *Id.* at 1030 (Dickinson, J., specially concurring) (internal citation omitted).

205. *Id.* at 1030-31 (Dickinson, J., specially concurring).

206. *Id.* at 1032-35 (Dickinson, J., specially concurring).

207. *Fitch*, 959 So. 2d at 1033 (Dickinson, J., specially concurring).

208. *Id.*

209. *Id.*

210. *Id.* at 1034-135 (Dickinson, J., specially concurring) (internal citations omitted).

211. *Id.* at 1036 (Dickinson, J., specially concurring) (citing *Saunders*, 607 So.2d at 1219).

should severely limit the amount of damages potentially recoverable in an alienation action in order to curtail the abuse that the action has become so susceptible to.

