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Power Abuse as a Basis for Alienation of Affections: *Nelson v. Jacobsen*

Since the 1930's the tort of alienation of affections has come under increasing criticism.¹ As a result, the cause of action has been abolished or restricted in a majority of jurisdictions.² Most of the modifications have been legislative.³ However, within the last five years two states have judicially abolished the cause of action for alienation of affections.⁴ In *Nelson v. Jacobsen*,⁵ the Utah Supreme Court significantly limited the Utah cause of action for alienation of affections. Despite the trend toward restricting this tort, Justice Stewart, in a dissenting opinion, offered a new basis for asserting the cause of action. This note will focus on the strengths and weaknesses of Justice Stewart's abuse of power theory.

1. See, e.g., Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WIS. L. REV. 417 (1935); Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935) [hereinafter cited as *Legislative Attack*]; Kane, *Heart Balm and Public Policy*, 5 FORDHAM L. REV. 63 (1936); Note, *The Suit of Alienation of Affections: Can Its Existence Be Justified Today?*, 56 N.D.L. REV. 239 (1980); Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME LAW. 426 (1972) [hereinafter cited as *The Case for Retention*].

2. *Nelson v. Jacobsen*, 669 P.2d 1207, 1214 (Utah 1983).

3. Eighteen states and the District of Columbia have abolished the action by statute: ARIZ. REV. STAT. ANN. § 25-341 (Supp. 1984); CAL. CIV. CODE § 43.5 (West 1982); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. § 52-572b (1983); DEL. CODE ANN. tit. 10, § 3924 (1974); D.C. CODE ANN. § 16-923 (1981); GA. CODE ANN. § 30-109.1 (1980); IND. CODE ANN. § 34-4-4-1 (Burns 1973); ME. REV. STAT. ANN. tit. 19, § 167 (1964); MD. CTS. & JUD. PROC. CODE ANN. § 5-301(a) (1984); MICH. COMP. LAWS ANN. § 600.2901 (West 1968); MINN. STAT. ANN. § 553.02 (West Supp. 1985); MONT. CODE ANN. § 27-1-601 (1983); NEV. REV. STAT. § 41.380 (1979); OR. REV. STAT. § 30.840 (1983); VA. CODE § 8.01-220 (1950); W. VA. CODE § 56-3-2A (Supp. 1984); WIS. STAT. ANN. § 768.01 (West 1981); WYO. STAT. § 1-23-101 (1977). Six states have abolished money damages at law for alienation actions: ALA. CODE § 6-5-331 (1975); FLA. STAT. ANN. § 771.01 (West 1964); N.J. STAT. ANN. § 2A:23-1 (West 1952); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976); OHIO REV. CODE ANN. § 2305.29 (Page 1981); VT. STAT. ANN. tit. 15, § 1001 (Supp. 1983). Louisiana has never recognized a cause of action for alienation of affections. *Moulin v. Monteleone*, 165 La. 169, 115 So. 447 (1927).

4. *Fundermann v. Mickelson*, 304 N.W.2d 790 (Iowa 1981); *Wyman v. Wallace*, 94 Wash. 2d 99, 615 P.2d 452 (1980).

5. 669 P.2d 1207 (Utah 1983).

I. *Nelson v. Jacobsen*

The marriage of Brett and Brenda Nelson was troubled from the start. After two months of marriage, Brett, the plaintiff, informed Brenda that he wanted a divorce. Brett habitually came home drunk and beat his wife. On one occasion he threatened to "break every bone in her body" as he tossed his hunting knife into the floor of their home.⁶ Brett was fired from his job after arriving for work intoxicated in a company vehicle. At the time, he was accompanied by an underage female to whom he had made sexual advances earlier that evening.⁷

During this period, Jeff Jacobsen, the defendant, became a mutual friend of the Nelsons. Within a month after their acquaintance, Brenda was making sexual advances toward Jacobsen. The advances were initially unreciprocated. However, on one occasion Brenda convinced Jacobsen to take her to Las Vegas after explaining to Brett that she wanted time alone to think about their marriage.⁸

Fifteen months after her marriage to Brett, Brenda left her husband and moved in with Jacobsen. Before Brenda left, Brett commenced a suit against Jacobsen for alienation of his wife's affections and was awarded \$84,600 by the trial court, including \$25,000 in punitive damages.⁹ The judgment was appealed to the Utah Supreme Court. A major issue on appeal was whether the cause of action for alienation of affections should be retained in Utah.

Justice Oaks, writing for the majority, retained the tort in Utah but significantly altered the elements which a plaintiff must establish in order to be successful. Justice Oaks referred to *Wilson v. Oldroyd*,¹⁰ the "leading" Utah case,¹¹ which outlined the traditional elements of alienation of affections as "(a) [t]he fact of marriage, (b) that the defendant wilfully and intentionally, (c) alienated the wife's affections, (d) resulting in the loss of the comfort, society and consortium of the wife, and (e) (to justify punitive damages) a charge of malice."¹²

6. *Id.* at 1209-10.

7. *Id.* at 1210.

8. *Id.*

9. *Id.* at 1211.

10. 1 Utah 2d 362, 267 P.2d 759 (1954).

11. *Nelson*, 669 P.2d at 1218.

12. *Wilson*, 1 Utah 2d at 367, 267 P.2d at 763.

The *Nelson* court altered this basic test with two "clarifications and elaborations."¹³ First, the plaintiff must prove that the "effect of the defendant's conduct outweighed the combined effect of all other causes, including the conduct of the plaintiff spouse and the alienated spouse" in causing the alienation.¹⁴ Second, on the issue of damages, the court declared that

in trying to make the damages "proportionate" to the loss of the injured spouse, the trier of fact should consider the duration and quality of the marriage relation, including the extent to which genuine feelings of love and affection existed between the spouses prior to the intervention of the defendant.¹⁵

This test focuses not only on the conduct of the defendant, but on the conduct of the plaintiff as well. Most jurisdictions maintaining the action have required the defendant's conduct to be the "controlling cause" of the alleged alienation.¹⁶

Justice Durham's dissent noted that alienation of affections as a cause of action has its roots in the notion that a husband has a property interest in his wife. Justice Durham argued that the lack of "any affirmative reasons in policy or precedent for the retention of this cause of action in Utah" justified its elimination.¹⁷ She also criticized the majority for making "the requirements for recovery so difficult that it is unlikely anyone will ever pursue this cause of action in court again." As a result, "its most likely use will be *outside* of the courtroom, as a tool to extort 'settlements' from prospective defendants."¹⁸

In a separate dissent, Justice Stewart recognized that certain relationships such as professor-student, physician-patient, or employer-employee may be used by the person in the superior position to produce an alienation "between the one in [the] inferior position and his or her spouse."¹⁹ He argued that the majority's test was too broad and concluded that alienation cases should be limited to situations in which there has been an abuse of power or authority.²⁰

13. *Nelson*, 669 P.2d at 1219.

14. *Id.*

15. *Id.*

16. *See, e.g.*, *Heist v. Heist*, 46 N.C. App. 521, 265 S.E.2d 434 (1980); *Long v. Fischer*, 210 Kan. 21, 499 P.2d 1063 (1972); *Pedersen v. Jirsa*, 267 Minn. 48, 125 N.W.2d 38 (1963); *Schneider v. Mistele*, 39 Wis. 2d 137, 158 N.W.2d 383 (1968).

17. *Nelson*, 669 P.2d at 1223 (Durham, J., dissenting).

18. *Id.* (emphasis in original).

19. *Id.* at 1222 (Stewart, J., dissenting).

20. *Id.*

II. ANALYSIS

Justice Stewart's "abuse of power" theory is unique. But while the abuse of power theory has some advantages, it leaves unanswered many of the arguments supporting abolition of the tort of alienation and would be difficult to apply in practice. The approach should therefore not be adopted.

A. *Advantages of Using an Abuse of Power Theory*

The abuse of power theory addresses a number of the criticisms leveled at the tort of alienation. One of the most common arguments for elimination of the tort is that the historical basis for its common law creation no longer exists.²¹ In early England, the husband was thought to have a property interest in his wife and her services. This interest created a cause of action for the property value of the wife in the event she was taken. With the advent of married women's property acts and the recognition of women as legal persons, the concept of the wife as the property of her husband was discarded.²² Furthermore, some jurisdictions do not recognize any valid historical basis for the action, and thus eliminate it altogether.²³ Jurisdictions retaining the action recognize both spouses' right to the society and services of the other, commonly referred to as "consortium."²⁴

Although the historical legal basis for the tort of alienation has disappeared, the original purpose behind its creation arguably still exists. The cause of action for alienation of affections was originally intended to protect marriages of the lower classes from predatory interference by men from more privileged classes, whose position, power, and wealth might easily be abused to entice away daughters or servants.²⁵ Basing an action for alienation on abuse of power or authority is consistent with this purpose. The employer, for example, in an employer-employee rela-

21. See, e.g., *Fundermann v. Mickelson*, 304 N.W.2d 790, 791 (Iowa 1981); *The Case for Retention*, supra note 1, at 430-31; Note, *Hunt v. Hunt: The Status of the "Heartbalm" Torts in South Dakota*, 27 S.D.L. Rev. 160, 161-62 (1982).

22. *Nelson*, 669 P.2d at 1223-25 (Durham, J., dissenting); *Schuppin v. Unification Church*, 435 F. Supp. 603, 608 (D. Vt. 1977); *Legislative Attack*, supra note 1, at 992-93.

23. See, e.g., *Fundermann v. Mickelson*, 304 N.W.2d. 790, 791 (Iowa 1981).

24. *Nelson*, 669 P.2d at 1225-26 (Durham, J., dissenting); Note, *Alienation of Affection and Defamation: Similar Interests—Dissimilar Treatment*, 30 CLEV. ST. L. REV. 331, 361-62 (1981) [hereinafter cited as *Alienation*]; *The Case for Retention*, supra note 1, at 427.

25. See 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 607 (1956); see also MICH. COMP. LAWS ANN. § 600.2901 (West 1968).

tionship may have the same opportunity to abuse his position and power as the traditional "privileged classes." However, most jurisdictions that have cited the lack of a historical basis as justification for eliminating the action have not been persuaded by the existence of other historical purposes.²⁶ Whether a jurisdiction will recognize a valid purpose for the action without relying on the legal theory upon which it was established remains uncertain.

Another "more subtle and more persuasive"²⁷ attack on the tort of alienation charges that any marriage vulnerable to attack from an outsider is already on questionable ground and not worthy of judicial protection.²⁸ Further, there is no sound justification for allowing a plaintiff who would likely be motivated by revenge, vindication, spite or similar emotions to proceed with the action.²⁹ After all, ill-willed plaintiffs who share the fault for destroying their own marriage should not be rewarded in an alienation action.

Even if weak marriages are inherently vulnerable and not worthy of protection, a spouse in a good marriage may also be susceptible to the advances of a person in a position of power or authority, such as an employer. The abuse of power theory recognizes such a threat. A spouse is justified in bringing the action because society has an interest in assuring that persons in positions of power appropriately discharge their duties toward those in subordinate positions. Justice Stewart stated that "[t]hose who use positions of power or authority for the purpose of obtaining sexual favors and produce an alienation of affections between the one in an inferior position and his or her spouse, abuse and overreach any legitimate power they may have."³⁰ An additional benefit of Stewart's theory is that, by limiting the availability of an action for alienation of affections to those who

26. In fact, research fails to disclose any case which has identified the historical purpose mentioned by Harper and James.

27. *Nelson*, 669 P.2d at 1217.

28. *See, e.g., Wyman v. Wallace*, 15 Wash. App. 395, 400, 549 P.2d 71, 74 (1976), *rev'd*, 588 P.2d 1133 (1979), *aff'd*, 615 P.2d 452 (1980). ("In our opinion, a viable marriage is not one where the 'mental attitude' of one spouse towards the other is susceptible to interference by an outsider. Such a proposition assumes an inherent fickleness and frailty in human character to which we do not subscribe.")

29. *Id.* at 400, 549 P.2d at 73-74 (1976); *The Case for Retention*, *supra* note 1, at 431.

30. *Nelson*, 669 P.2d at 1222 (Stewart, J., dissenting).

could establish abuse of power as the cause of the alleged harm, it would limit the number of such actions.

B. Disadvantages of An Abuse of Power Theory

Despite the advantages of basing a cause of action for alienation of affections on an abuse of power or authority, there are persuasive arguments against adopting such a theory. The legislatures that have abolished alienation of affections as a cause of action have been concerned that it may be used as a tool for extortion and blackmail.³¹

The abuse of power position not only fails to reduce the possibility that the tort of alienation could be used for purposes of blackmail, it arguably increases it. Whenever a particular group is singled out for specialized treatment its members are invariably watched by the public. Declaring that persons in positions of power or authority are potential defendants in aliena-

31. Illustrative of the attitudes of the legislatures which have abolished the action is the following preamble to the Florida statute abolishing alienation actions:

WHEREAS, The remedies provided for by law for the enforcement of action based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry have been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases have resulted in the perpetration of frauds, exploitation and blackmail, it is hereby declared as the public policy of the State of Florida that the best interest of the people of the State will be served by the abolition of such remedies. Consequently, in the public interest the necessity for the enactment of this article is hereby declared as a matter of legislative determination . . .

FLA. STAT. ANN. § 771.01 (West 1964) (note on history and source of law). See also N.J. STAT. ANN. § 2A:23-1 (West 1952).

The majority dismissed this criticism by emphasizing that "[i]t is noteworthy that our research has disclosed only one case in which there was evidence that the plaintiff and the 'alienated' spouse colluded for purposes of extortion and in that case recovery was denied." *Nelson*, 669 P.2d at 1216 (citing *Wilson v. Aylward*, 207 Kan. 254, 464 P.2d 1003 (1971)). The court's research on this point was not exhaustive. In *Buckley v. Francis*, 78 Utah 606, 608, 6 P.2d 188, 190 (1931), a Utah case not mentioned in *Nelson*, the court noted:

Mrs. Buckley testified that, after she secured her divorce, and before this action was begun, the plaintiff came to her and said: "Ada, if you will just testify in court that John Francis broke up our home I will get at least \$5,000. I will give you \$2,000 and keep \$3,000 and start up in business." . . . The plaintiff did not deny that such a conversation was had.

For other examples of alleged extortion attempts utilizing alienation actions, see *Sandler v. Schmidt*, 263 S.W.2d 35 (Mo. 1953); *Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1982).

tion suits would serve notice to potential extortionists of a target group. In addition, persons in positions of power and authority could be more willing to settle a bogus claim than risk damage to their reputation caused by the publicity of a lawsuit, regardless of the chance that they would eventually be vindicated.

In addition to the possibility of extortion, several courts have urged abolition of alienation actions because "there are no helpful standards for assessing damages."³² The Stewart theory does not consider this argument. The theory merely identifies who can be sued, rather than suggesting standards for calculating damages. Thus, if the defendant occupies a position of power over the alienated spouse, ill-willed plaintiffs that are largely responsible for destroying their own marriages may exploit Stewart's theory to gain unwarranted damages.

Finally, the abuse of power theory is not useful because the target relationships are often immune from alienation actions. Justice Stewart suggested that an action for alienation should be limited to instances in which the defendant has occupied a position of clear authority or power over the plaintiff's spouse. His examples of this type of relationship included teacher-student, physician-patient, and employer-employee.³³ However, as the Washington Supreme Court explained, "a parent, near relative or one standing in a professional or semiprofessional relationship to a marital partner may be clothed with a qualified privilege to reasonably and in good faith intervene in the domestic affairs of a married couple."³⁴ While not absolute, this privilege can only be overcome by proof that the defendant was motivated by a high degree of malice.³⁵ Furthermore, in-laws, the most common defendants in alienation actions, clearly fall within the group of persons having a qualified privilege to intervene in marital relationships.³⁶ Thus, if a husband brought an action against his mother-in-law for alienation of his wife's affection, he would have to prove, first, that his mother-in-law was in a position of power or authority and, second, that she acted with malicious intent. The other groups singled out by Justice Stewart as po-

32. See, e.g., *Wyman v. Wallace*, 94 Wash. 2d 99, 102, 615 P.2d 452, 455 (1980).

33. *Nelson*, 669 P.2d at 1222 (Stewart, J., dissenting).

34. *Carrieri v. Bush*, 69 Wash. 2d 536, 543, 419 P.2d 132, 136 (1966); see also L. GREEN, W. PEDRICK, J. RAHL, E. THODE, C. HAWKINS, A. SMYTH, & J. TREERCE, *ADVANCED TORTS* 1148-49 (1977).

35. *Carrieri*, 69 Wash. 2d at 543, 419 P.2d at 136-37.

36. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 876 (4th ed. 1971); *Alienation*, *supra* note 24, at 359.

tential defendants are also likely to enjoy a qualified privilege to intervene in the marital relationship.

III. CONCLUSION

The Utah Supreme Court in *Nelson v. Jacobsen* substantially redefined the cause of action for alienation of affections by making it more difficult to prove the elements of causation and damages. Justice Stewart dissented and argued that the action should be limited to instances where the defendant caused the loss of affections through an abuse of power or authority. Although innovative in its approach, the theory could increase the likelihood of the cause of action being used as a tool of extortion. Moreover, the abuse of power theory remains incompatible with the defense of privilege available to many of the target classes. Although the theory has some beneficial aspects, it fails to resolve many of the significant problems relating to alienation actions and should therefore be rejected.

Karl N. Haws