

1988

Greg Norton v. J. Ralph MacFarlane, MD : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

88 0248
GREG NORTON,

Plaintiff-
Respondent,

vs.

J. RALPH MACFARLANE, M.D.,

Defendant-
Appellant.

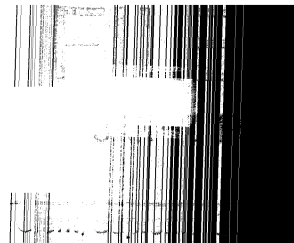
BRIEF OF APPELLANT

Case No. 880248

Interlocutory Appeal From An Order Of The Second
Judicial District Court In And For Weber County, State Of Utah,
The Honorable David E. Roth, District Judge, Presiding

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IN THE SUPREME COURT OF THE STATE OF UTAH

GREG NORTON,	:	
	:	
Plaintiff-	:	
Respondent,	:	BRIEF OF APPELLANT
	:	
vs.	:	
	:	
J. RALPH MACFARLANE, M.D.,	:	Case No. 880248
	:	
Defendant-	:	
Appellant.	:	

STATEMENT OF JURISDICTION AND PROCEEDINGS

This case is before the Court on an Interlocutory Appeal from an Order of the Second Judicial District Court in and for Weber County, State of Utah, by the Honorable David E. Roth, District Judge, denying the defendant's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief Can be Granted (defendant's "Rule 12(b)(6) Motion to Dismiss").

STATEMENT OF ISSUES ON APPEAL

I: SHOULD THE UTAH SUPREME COURT JOIN THE MAINSTREAM OF AMERICAN LEGAL OPINION BY ABOLISHING THE TORT OF ALIENATION OF AFFECTIONS, AN ACT CONSISTENT WITH THE COURT'S OPINION IN HACKFORD V. UTAH POWER & LIGHT AND WITH THE LEGISLATURE'S ADOPTION OF IRRECONCILABLE DIFFERENCES AS A GROUND FOR NO-FAULT DIVORCES?

II: SHOULD THE UTAH SUPREME COURT JOIN THE MAINSTREAM OF AMERICAN LEGAL OPINION BY ABOLISHING THE TORT OF CRIMINAL CONVERSATION, A CAUSE OF ACTION THAT IS EVEN MORE SUBJECT TO ABUSE AND TO YIELDING IRRATIONAL RESULTS THAN ALIENATION OF AFFECTIONS?

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES,
ORDINANCES, RULES, AND REGULATIONS

30-2-4. Wife's right to wages--Actions for personal injury.

A wife may receive the wages for her personal labor, maintain an action therefor in her own name and hold the same in her own right, and may prosecute and defend all actions for the preservation and protection of her rights and property as if unmarried. There shall be no right of recovery by the husband on account of personal injury or wrong to his wife, or for expenses connected therewith, but the wife may recover against a third person for such injury or wrong as if unmarried, and such recovery shall include expenses of medical treatment and other expenses paid or assumed by the husband.

Utah Code Annotated § 30-2-4 (1984)(emphasis added).

30-3-1. Procedure - Residence - Grounds.

. . .

(3) Grounds for divorce:

. . .

 (h) irreconcilable differences of the marriage;

Utah Code Annotated § 30-3-1(3) (Supp. 1988)(emphasis added).

STATEMENT OF THE CASE

Nature of the Case

The Amended Complaint in this case alleges that

(1) the defendant alienated the affections of the plaintiff's wife away from the defendant and (2) the defendant committed

the tort of criminal conversation by engaging in sexual relations with the plaintiff's spouse. The Amended Complaint seeks \$200,000.00 in compensatory damages for the plaintiff's alleged "emotional distress, mental anguish, embarrassment, loss of the services and consortium of his wife," and child care expenses, along with \$200,000.00 in punitive damages based on an allegation of malice.

Course of Proceedings and Disposition in Court Below.

The original Complaint in this case contained three causes of action. Record, at 1. The defendant brought a Rule 12(f) Motion to Strike, Record at 9, and the plaintiff amended his Complaint to include only the two causes of action for alienation of affections and criminal conversation, Record at 39, whereupon the motion to strike was denied. Record at 65. Next, the defendant filed his Rule 12(b)(6) Motion to Dismiss. Record at 70. After extensive briefing, the defendant's motion was argued before Judge David E. Roth, who issued a ruling denying the motion on the grounds that he was bound by Utah Supreme Court precedent to recognize the continued existence of alienation of affections and criminal conversation actions. Record at 148. A final order denying the defendant's Rule 12(b)(6) Motion to Dismiss was filed on June 9, 1988. The defendant submitted his Petition for Permission to Appeal from an Interlocutory Order by the Second Judicial District Court of Weber County, State of Utah, Denying the Defendant's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon

Which Relief Can Be Granted on June 28, 1988. Record at 196. On August 1, 1988, the Utah Supreme Court granted that Petition, and this appeal followed. Proceedings in the District Court were stayed by order of Judge Roth as of August 10, 1988, Record at 193, pursuant to a motion by the defendant Record at 184. No answer has been filed to date in this case.

Statement of Facts

No facts have been developed in this case, except the fact that the plaintiff is suing the defendant under the theories of alienation of affections and criminal conversation with specific claims of damages and prayers for relief as discussed above. There are, of course, factual allegations in the Complaint, but no answer has been filed, and therefore, no facts have been admitted, denied, or otherwise determined. Since this is an appeal from a denied Rule 12(b)(6) motion, the defendant-appellant recognizes his burden of showing that the amended complaint fails to state a claim upon which relief can be granted even if all of the allegations contained therein were assumed to be true for purposes of argument. This appeal, therefore, presents a pure question of law as to whether, in the abstract, causes of action for alienation of affections and criminal conversation ought to exist in Utah.

SUMMARY OF ARGUMENT

The defendant seeks the abolition of the torts of alienation of affections and criminal conversation in Utah.

Alienation of affections is a judicially-created tort

that derives from the obsolete view that a husband owns his wife. Modern attempts to find a rationale for the tort's continued viability have been largely devoid of meaningful content. The tort lacks a cohesive and defensible public policy basis that is consistent with the rest of the body of Utah law.

Many public policy considerations strongly favor the tort's abolition. First, and foremost, the tort treats the so-called "alienated spouse" as a piece of furniture and not a human being. The tort assumes that the "alienated spouse" is incapable of freely choosing upon whom to bestow his or her affections, and the tort denies the "alienated spouse's" right to pursue happiness. Second, alienation of affections actions have no deterrent effect. Third, it is exceptionally difficult to accurately determine damages in alienation of affections cases. Fourth, alienation of affections lawsuits are often brought or threatened for blackmail purposes. Fifth, alienation of affections lawsuits are often brought for the improper purpose of injuring the "alienated spouse" by attacking somebody who is emotionally close to that individual. Sixth, alienation of affections actions are entirely inconsistent with this court's recent decision in Hackford v. Utah Power & Light Co. prohibiting loss of consortium damages. Finally, abolishing this archaic tort would put Utah within the mainstream of American legal thinking. Viewed collectively, these policy considerations

make a compelling argument in favor of abolishing the tort of alienation of affections in Utah.

The judicially-created tort of criminal conversation is even more deserving of abolition than alienation of affections. It is plagued with almost all of the defects of alienation of affections. In addition, criminal conversation is a virtually strict liability tort, which has led to absurd results in practice. Not surprisingly, criminal conversation has been even more roundly rejected than alienation of affections by the mainstream legal community.

ARGUMENT

- I. THE UTAH SUPREME COURT SHOULD JOIN THE MAINSTREAM OF AMERICAN LEGAL OPINION BY ABOLISHING THE TORT OF ALIENATION OF AFFECTIONS, AN ACT CONSISTENT WITH THE COURT'S OPINION IN HACKFORD V. UTAH POWER & LIGHT AND WITH THE LEGISLATURE'S ADOPTION OF IRRECONCILABLE DIFFERENCES AS A GROUND FOR NO-FAULT DIVORCES.

- A. Alienation of affections is a judicially created tort in Utah, with no constitutional or statutory basis, which may therefore be judicially abolished.

In Wilson v. Oldroyd, 1 Utah 362, 267 P.2d 759 (1954), the Utah Supreme Court defined "the essential allegations of the cause of action for alienation of affections" as:

(a) the fact of marriage, (b) that the defendant willfully 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.

Wilson, 267 P.2d at 763. In Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983), the Utah Supreme Court declared that "the right to recover for alienation of affections now extends to both spouses equally," Nelson, 669 P.2d at 1215, and added the following two "clarifications and elaborations":

First, the requirement that the defendant's acts must have constituted the 'controlling cause' of the alienation of affections means that the causal effect of the defendant's conduct must have outweighed the combined effect of all other causes, including the conduct of the plaintiff's spouse and the alienated spouse. For this purpose, a defendant is properly chargeable with the effect of mere acquiescence in the overtures of the alienated spouse where the defendant knows or has reason to know that such acquiescence will damage the marital relationship.

Second, 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 affections existed between the spouses prior to the intervention of the defendant.

Nelson, 669 P.2d at 1219.

The Nelson court also provided guidance concerning punitive damages in alienation of affections actions. The court stated that in order to meet the prerequisite showing of malice, "the plaintiff must show 'circumstances of aggravation in addition to the malice implied by law from the conduct of

defendant in causing the separation of plaintiff and [his or her spouse] which was necessary to sustain recovery of compensatory damages.'" Nelson, 669 P.2d at 1219 (brackets in original) (quoting Heist v. Heist, 46 N.C.App. 521, 527, 265 S.E.2d 434, 438 (1980)). Furthermore, any award of punitive damages must take into consideration a number of factors, including evidence of the defendant's net worth or income. Id.

There is no constitutional provision or statute that authorizes or requires the recognition of alienation of affections as a cause of action in Utah.

Because alienation of affections is a judicially created cause of action, without any constitutional or statutory support, it may be judicially abolished. When Washington became the first state to judicially abolish the tort, it made the following observations:

The action for alienation of a spouse's affections is a judicially created doctrine in this state. The action existed at common law, and was adopted into the jurisprudence of this state. See, e.g., Beach v. Brown, 20 Wash. 266, 55 P. 46 (1898). The legislature of this state has not specifically provided for an action for alienation of affections.

No doubt has ever been expressed regarding the courts' power to abolish this judicially created action for alienation of a spouse's affections. Our original decision in this case recognized that '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.' In the instant case,

the question of abolition of the action has been squarely presented to the courts of this state and, since the action was created judicially, the courts have the power to resolve this question.

Wyman v. Wallace, 94 Wash.2d 99, 615 P.2d 452, 453-454 (1980) (citations omitted).

Beyond having the power to abolish alienation of affections, this Court has an obligation as the guardian of the common law to reexamine the continued viability of a tort that this Court recently called "a historical anomaly." Hackford v. Utah Power & Light Co., 740 P.2d 1281, 1286 n.3 (Utah 1987). If alienation of affections is no longer supported by a solid theoretical foundation, or if public policy considerations favor abolition of the tort, then the tort ought to be abolished. The strength of our common law tradition is dependent upon the judiciary's constant pruning of obsolete notions and legal theories to create a healthier and more just body of law.

B. Alienation of affections is a tort derived from the archaic and unacceptable notion that a wife is the property of her husband.

The history of the tort of alienation of affections was admirably traced in Justice Durham's detailed concurring and dissenting opinion in Nelson. 669 P.2d at 1223-1227. Originally, the tort was derived from the notion that under the medieval concept of social status, when a woman married she lost her legal and spiritual existence as an individual,

becoming instead a part of her husband and one of his chattels. As one modern commentator put it:

Early courts were exclusively controlled by men, and the origin of alienation of affections must necessarily be considered with that in mind. At common law, a wife was more than a "mere chattel;" she was a man's most prized possession. Therefore, enticing away a man's wife was perhaps the ultimate tort.

Comment, Alienation of Affections: Flourishing Anachronism, 13 Wake Forest L.Rev. 585-588 (1977). The concept that a wife has no separate legal identity and is merely the property of her husband is entirely inconsistent with modern legal thinking. That point was admitted by the majority in Nelson v. Jacobsen, and the majority put forth the following as an acceptable modern rationale for the tort:

While the archaic notion of "wife as chattel" may have served as the historical foundation for this cause of action, its modern context bears little resemblance to that notion. The right to recover for alienation of affections now extends to both spouses equally. See, e.g., Heist v. Heist, 46 N.C.App. 521, 265 S.E.2d 434 (1980); Burch v. Goodson, 85 Kan. 86, 116 P.2d 216 (1911). Moreover, an action for alienation of affections is no longer based on the premise that either spouse constitutes the "property" of the other, but on the premise that each spouse has a valuable interest in the marriage relationship, including its intimacy, companionship, support, duties, and affection. Note, "The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship", 48 Notre Dame Law. 426 430-31 (1972).

Nelson v. Jacobsen, 669 P.2d at 1215 (emphasis in the original). Interestingly, Nelson is the first Utah case to make the tort of alienation of affections available to both spouses. Wilson v. Oldroyd talks specifically in terms of alienation of "the wife's affections." Wilson, 267 P.2d at 763.

In Nelson, the majority opinion, by rejecting the existing historical "wife as chattel" basis for the tort, in effect created a new tort based on the asserted "valuable interest in the marriage relationship". Nelson 669 P.2d at 1215 (emphasis in the original). As the next section of this brief demonstrates, although that justification may be facially appealing, it is fatally flawed.

- C. The rationalization that "each spouse has a valuable interest in the marriage relationship" is inaccurate when considered in light of Utah law.

The statement by the majority in Nelson v. Jacobsen that "each spouse has a valuable interest in the marriage relationship , including its intimacy, companionship, support, duties and affection" may seem at first glance appealing. If the statement is true as a general matter of Utah law, then alienation of affections actions simply connote one of many possible ways in which that incorporeal interest may be invaded, leading to liability. In effect, alienation of a spouse's affections would simply be a means by which the tort

of interfering with a party's marriage relationship might be conducted.

The problem with the foregoing theory is that there is no general tort of "interference with the marriage relationship" under Utah law. If there is, and if each spouse truly has a generally protectable interest in the marriage relationship itself, then any wrongful act that damages the marriage relationship should be actionable, provided that basic tests of causal proximity can be met. Thus, a wide range of injuries to spouse "A" should result in a cause of action in favor of spouse "B" for the harm caused to spouse "B's" interest in the marriage relationship. For example, if Defendant negligently injures Husband in a car accident, then Wife ought to be able to sue Defendant for his negligent interference with her interest in her marriage relationship with Husband. It is reasonably foreseeable that when a defendant negligently causes a car accident, the defendant may injure somebody else, and that the injured party may be married, and that the injuries may damage the injured party's spouse's marriage relationship. Thus, causality is established.

Under Utah law, however, an action by Wife to recover for the harm to her marriage (and in particular its "intimacy, companionship, support, duties, and affection," to quote Nelson) caused by Defendant's negligent injury of Husband in a car accident would be deemed a suit for loss of consortium damages. Loss of consortium actions are explicitly barred by

this court's very recent decision in Hackford v. Utah Power & Light Co., 740 P.2d 1281 (Utah 1987).

Countless other examples could be given, but the foregoing demonstrates that there is no general legally cognizable and protectable interest in the marriage relationship as such under Utah law. Indeed, under all of Utah law there appear to be only two conditions where the alleged "interest in the marriage relationship" is legally enforceable. One area is in wrongful death cases, as provided by Article XVI, Section 5, of the Utah Constitution; the other area is in alienation of affections and/or criminal conversation actions.

The majority in Nelson, therefore, could not have been referring to a generally protected "interest in the marriage relationship," since no such interest exists; rather, they were referring to a purported interest in each spouse not to have the marriage relationship disrupted by the attempts of third parties to alienate the affections of the other spouse. Phrased that way, however, the rationale supporting Nelson v. Jacobsen turns out to be a tautology. In effect, Nelson says that there should be a cause of action for alienation of affections because each spouse in a marriage has a right not to have the other spouse's affections alienated. Such reasoning does not provide a sound analytical basis for the continued existence of a cause of action that has been widely rejected by the majority of American jurisdictions.

- D. The tort of alienation of affections ignores the "alienated spouse's" status as a human being who should be free to change his or her own emotions and affections.

Our Declaration of Independence contains these words, which form the core of America's concept of jurisprudence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence, para. 2 (U.S. 1776). Those unalienable rights extend to the key non-party figure in alienation of affections actions, the so-called "alienated spouse." Merely because a couple is married does not give one spouse the right to hold the other spouse's emotions hostage, or to prevent the other spouse from achieving a state of happiness. Yet that is precisely the effect of alienation of affections actions. The very existence of the tort means that a spouse must conscientiously avoid relationships that could expand the spouse's horizons in a way that might damage the marriage relationship, even at the expense of the spouse's own happiness. Otherwise, the other participant in the relationship may become a defendant in an alienation of affections lawsuit.

One essential point to remember is that alienation of affections actions have nothing to do with sex or sexual relationships per se. Rather, the tort lies in all cases where

the defendant is aware of the existence of the marriage, and yet willfully and intentionally alienates the plaintiff's spouse's affections away from the plaintiff. Wilson, 267 P.2d at 763. Even the "intentional and willful" standard is not hard and fast since "a defendant is properly chargeable with the effect of mere acquiescence in the overtures of the alienated spouse where the defendant knows or has reason to know that such acquiescence will damage the marital relationship." Nelson, 669 P.2d at 1219.

Thus, alienation of affections actions can arise in many anomalous and unfair situations. For example, an individual's parents, who bore and raised that individual as a child, clearly have at least as much of an interest in the affections of an individual as that individual's spouse. Yet if, for example, spouse "A's" parents and spouse "B" fervently hate each other, with the result that spouse "A" eventually divorces spouse "B," spouse "B" can sue spouse "A's" parents for alienating spouse "A's" affections. Poulos v. Poulos, 351 Mass. 603, 222 N.E.2d 887, 890 (1967). But cf. Bradford v. Bradford, 165 Or. 297, 107 P.2d 106, 109 (1940) (recognizing a parental privilege to act in good faith for the best interest of the child). Of course, the law recognizes no parallel cause of action in "A's" parents if, as a result of their bickering with spouse "B," spouse "B" chooses to move the family across the country from the parents-in-law and pressures spouse "A" into ostracizing spouse "A's" parents.

There are also situations in which an individual may attempt to intentionally alienate a spouse in order to protect that spouse. Our courts and newspapers are full of tragic stories where an abused spouse (almost invariably the wife) refused to believe that she should leave her husband until finally great physical injury or death had occurred. Often the physical injury extends beyond the abused spouse to the couple's children. Yet, a social worker who sets out to disillusion the wife of the notion that she and her children somehow deserve to be beaten, undoubtedly knows and intends that his or her actions may lead to divorce or separation. Under such a set of circumstances, the social worker who is trying to prevent serious injury to mother and children has committed the tort of alienation of affections under existing Utah law. Nor is the problem unique to social workers; ministers, professors, friends, anybody who is aware that by their actions they may change an individual's perception of the world, and who desire that result even though it may have adverse impact on the individual's marriage, is a proper target for an alienation of affections lawsuit. For example, while decisions involving ministers have recognized a general religious privilege, see Radecki v. Shuckardt, 50 Ohio App. 2d 92, 361 N.E.2d 543, 545 (1976), courts also find that the privilege does not cover cases that have crossed the fine line between acceptable religious zeal and an improper motive. See Hester v. Barnett, 723 S.W.2d 544 (Mo. Ct. App. 1987) (allowing

cause of action against minister who advised wife to leave her husband and who harassed the family publicly); Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105, 107 (1975) (use of shunning can constitute alienation of affections); Carrieri v. Bush, 69 Wash. 2d 536, 419 P.2d. 132, 136-137 (1966).

Even allowing alienation of affections actions in the more stereotypical case--where a third person develops an emotional or romantic bond with a spouse, thereby damaging the spouse's marriage--denies the emotional independence of that spouse. The tort presupposes that the "alienated spouse" is incapable of exercising his or her free will in determining to whom he or she will direct emotional or romantic energies. As Justice Stewart correctly pointed out in his opinion in Nelson:

We do not live in a day, if ever there were one, when male or female Casanovas cast a spell that all but nullifies the willpower of a member of the opposite sex. Persons who have been married do not generally fall prey to overwhelmingly seductive powers of another like some inert piece of iron drawn inexorably into the ever stronger field of power of a magnet. The affection of the married persons for each other is usually alienated by their own conduct or misconduct.

Nelson, 669 P.2d at 1222 (Stewart J. concurring and dissenting). If marriage is no longer meeting the emotional needs of one spouse, and that spouse desires to find emotional and romantic comfort elsewhere, a lawsuit for alienation of affections will do nothing to restore the weak marriage, but will only interfere with the "alienated spouse's" new found happiness.

- E. The analogy sometimes drawn between alienation of affections actions and interference with contractual relationships, or prospective economic relationships, is inaccurate.

A common defense of alienation of affections as a tort is that it is really very similar to such well recognized torts as interference with contractual relationships and interference with prospective economic relationships. Actually, alienation of affections is very different from those torts.

The tort of interference with a contractual relationship arises, by definition, out of a contract. In a normal contract, each contracting party is bound to do specified acts, and neither party may unilaterally terminate those commitments. Liability for interference with a contractual relationship occurs when a third party intentionally induces one of the contracting parties to breach the contract. The third party's liability is derived from, and directly connected with, the inherent liability of the party that breached the contract.

In a marriage, by contrast, the spouses have very limited legal obligations to each other. Neither spouse is legally obliged to give any comfort, to or have any affection for, the other spouse. A spouse cannot sue in court to force the other spouse to give affection, or to pay damages for the lack of affection. Yet alienation of affections holds a third

party liable for inducing a spouse to stop giving the comfort and affection that the spouse was never legally obligated to give. Unlike interference with a contractual relationship, where both the inducer and the actor (breaching party) are equally liable, in alienation of affections the inducer is held liable while the actor (the alienated spouse who has withheld affection) is not liable for his or her actions.

Not only is the analogy between alienation of affections and interference with the contractual relationship invalid, the analogy between marriage itself and a contractual relationship, once quite valid, is no longer so today. Even the term "marriage contract," which implies a legal right to enforce the continued existence of a marital relationship, is no longer accurate. When the Utah Legislature adopted the concept of no-fault divorces in 1987, it rejected the notion that a spouse has an enforceable property right in the continued existence of his or her marriage.

Historically the "marriage contract" was recognized as being so strong that early divorces were very difficult to obtain. The plaintiff was required to show that the defendant had breached the marriage vows first, by some fault of the defendant's, before the plaintiff could be released from his or her further marital obligations to the defendant. Otherwise, the defendant had a right to the continued existence of the marital relationship. A court could only terminate the marital relationship upon a finding that the defendant had "breached" the "marriage contract."

The concept of fault as a requisite for divorce, and the corresponding concept of the defendant's right to prevent the divorce from taking place by showing that there had been no fault, continued in theory in Utah law until the passage of the Grounds for Divorce Law of 1987. Chapter 106, Laws of Utah 1987 (now codified as Utah Code Ann. § 30-3-1(3)(h)(Supp. 1988)). Although the grounds for divorce had been progressively relaxed over the years, until that law was passed it was still technically possible for a defendant to prevent a divorce by claiming that he or she had not committed any acts of physical or mental cruelty (to use the most common example) and that the plaintiff was therefore not entitled to a divorce. In theory, if the defendant treated the plaintiff with kindness and had not committed any act that gave rise to a ground for divorce, the plaintiff could not obtain the divorce, even if the plaintiff despised the defendant.

The introduction of no-fault divorces substantially changed the nature of the marriage relationship in Utah. By allowing a divorce on the "grounds" of irreconcilable differences, the legislature allowed the plaintiff to terminate the marriage regardless of the fault or behavior of the defendant. It is impossible to defend against a charge of irreconcilable differences; the mere act of denying the allegation in an answer constitutes proof of the irreconcilable nature of the differences between the parties. A system of divorce law based on irreconcilable differences eliminates the

right of one spouse to insist on the continuation of the "marital contract" so long as that spouse does nothing to breach it.

The marital relationship has gone from one of binding contract to one of a gift freely given, which may be freely withdrawn. There is no cause of action for interference with a prospective gift or for causing the failure of the giftee to give the gift; there should no longer be an action for alienation of affections.

If marriage resembles any sort of a contract, it is most similar to a contract that is terminable at will. There is no cause of action for merely inducing a party to an "at will" contract to legally terminate, rather than breach, that contract. Since a spouse can legally terminate his or her affection for another spouse at any time, there should be no cause of action for inducing a spouse to do so.

The analogy between alienation of affections actions and the tort of interference with a prospective economic relationship is even more far fetched than the analogy to the tort of interference with a contract.

Interference with a prospective economic relationship contains specific safeguards that are not present in alienation of affections actions. The leading Utah case on intentional interference with prospective economic relations lists the elements of the tort as follows: " . . . in order to recover damages, the plaintiff must prove (1) that the defendant

intentionally interfered with the plaintiff's existing or potential economic relations, (2) for an improper purpose or by improper means, (3) causing injury to the plaintiff." Leigh Furniture and Carpet Co. v. Isom, 657 P.2d 293, 304 (Utah 1982) (emphasis added). The "improper purpose or improper means" test provides a critical safeguard that is lacking in alienation of affections actions.

The "improper purpose" option turns on motive. For example, if the plaintiff alleges that the defendant drove customers away from the plaintiff's business, the improper purpose test "will be satisfied where it can be shown that the actor's predominant purpose was to injure the plaintiff." Leigh Furniture, 657 P.2d at 307. On the other hand, if the defendant's purpose in alienating the plaintiff's customers was to gain those customers for the defendant's own business, that is a proper purpose which the law will allow. Id. at 307-308. If the analogy with alienation of affections were valid, then alienating a spouse's affections for the purpose of gaining those affections to oneself, or for the purpose of helping that spouse (much as a consumer advocacy group can properly interfere with a business's prospective economic relationships by pointing out the defects in the business's products) should not constitute an improper purpose, and absent an improper means of employment, should not be tortious.

In Leigh Furniture, the Court defined "improper means" as follows:

The alternative requirement of improper means is satisfied where the means used to interfere with a party's economic relations are contrary to law, such as violations of statutes, regulations, or recognized common-law rules. Such acts are illegal or tortious in themselves and hence are clearly 'improper' means of interference unless those means consist of constitutionally protected activity, like the exercise of First Amendment rights. 'Commonly included among improper means are violence, threats or other intimidation, deceit or misrepresentation, bribery, unfounded litigation, defamation, or disparaging falsehood.' Means may also be improper or wrongful because they violate 'an established standard of trade or profession.'

Leigh Furniture, 657 P.2d at 308 (citations omitted). Justice Stewart argued in Nelson that an "improper means" test based on the existence of "power relationships" should be adopted:

There are those in special positions of power, status or authority who may illicitly use sex to satisfy their own passions or for otherwise improper means. There are any number of such relationships, i.e., professors and students; physicians and patients; psychiatrists, psychoanalysts or psychologists and clients; and employers and employees. Those 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.

Nelson, 669 P.2d at 1222 (Stewart, Justice, concurring and dissenting). His suggestion was, however, rejected by the majority in Nelson.¹ Because alienation of affections actions

lack the important safeguard of an "improper purpose/improper means" test, an analogy between that tort and the tort of interference with a prospective economic relationship is inaccurate.

F. Alienation of affections actions do not deter the conduct they proscribe.

When the Idaho Supreme Court abolished that state's cause of action for alienation of affections, it noted that "[n]ever has there been any documentation that the existence of the action actually protects marriages." O'Neil v. Schuckardt, 112 Idaho 472, 733 P.2d 693, 698 (1986). Indeed, the Court can take judicial notice of the fact that divorce rates have increased significantly in Utah since the leading alienation of affections decision of Wilson v. Oldroyd, 1 Utah 362, 267 P.2d 759 (1954).

An alienation of affections suit is unlikely to save the specific marriage at issue. As the O'Neil court points out, "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." O'Neil, 733 P.2d at 698.

Likewise, there is no reason to believe that the existence of alienation of affections actions currently serves any societal purpose in discouraging third party interferences with marital relationships. Such a deterrent effect is highly

unlikely for three reasons. First, there are very few alienation of affections lawsuits. Indeed, this Court has not upheld an award of damages in an alienation of affections lawsuit since the 1950's. (The verdict in Nelson was set aside, and the case remanded for a new trial, on other grounds. 669 P.2d at 1220.) There are undoubtedly an extremely large number of individuals in this state who could be sued for alienation of affections. The very low ratio of lawsuits brought to potential lawsuits in existence serves to nullify any deterrent effect the tort might have.

The second reason the tort lacks a deterrent effect is the very limited public awareness of the tort. Most people know that you can be sued for negligence, or for breaching a contract. The archaic tort of alienation of affections, however, is probably not well known to the public at large, and perhaps to the bar.

The third reason for the lack of a deterrent effect has to do with human nature. Potential future alienation of affections defendants rarely act in a coldly rational way. Usually they don't do a legal analysis of their proposed actions; rather they tend to operate on an emotional plane. "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." O'Neil, 733 P.2d at 698.

A new decision by this court affirming the existence of the tort is unlikely to increase its deterrent effect. Admittedly, the number of alienation of affections lawsuits could skyrocket. After two recent decisions reinforce the legitimacy of the tort, it could be legal malpractice for a lawyer to fail to discuss the possibility of an alienation of affections lawsuit in any divorce case where a third party's actions may have contributed to the dissolution of the marriage. There were some 8,985 divorces in Utah in 1987 (according to John Brockert, Director, Bureau of Health Statistics, Utah Department of Health), and undoubtedly a large percentage of those divorces involved intentional interference of some sort by a third party in the marriage, so it is not illogical to assume that thousands of new lawsuits could result from a decision affirming the tort's viability.

Likewise, it is fair to assume that the existence of large numbers of alienation of affections suits, coupled with media attention, could result in greater public awareness of the tort's existence.

Reaffirmation of the tort will not create a meaningful deterrent effect, however, because the third obstacle to creating such an effect, human nature, will not be changed by this court's decision. People have been interfering in other people's marriages since the concept of marriage was first created. Undoubtedly, ancient Samaritans told in-law jokes, and sexual infidelity certainly predates the Bible. Throughout

the ages, societies have used any number of punishments, including death, in attempts to deter such interference, but without avail. There is no reason to believe that even an active and vital tort of alienation of affection will succeed in overcoming human nature.

G. The practical problems associated with alienation of affections actions argue strongly for the tort's abolition.

The most important practical problem with alienation of affections is establishing a meaningful measure of damages. The majority opinion in Nelson states that "the injury in this action seems no more 'intangible' and no more difficult to value than pain and suffering in a personal injury action or the loss of comfort, society, and companionship in an action for wrongful death." Nelson, 669 P.2d at 1217. Appellant respectfully disagrees with that assertion, and submits that it is subject to examination.

"Pain and suffering" damages are measured from a common point of reference, a baseline of being free from pain that jurors can all agree upon. The duration of the pain is usually clearly established by the defendant's own testimony or by expert testimony. The degree of pain, although subjective, can at least be placed in a hierarchy of common human experience with pain that does not depend on the individual juror's value system, sense of morality, or religious beliefs. A broken leg, for instance, is generally more painful than a

minor skin laceration. A jury, therefore, can usually determine if an individual has suffered pain, the duration of that pain, and can make at least a hierarchical estimate of the degree of that pain relative to other kinds of pain.

By contrast, in an alienation of affections case, the jury must start by making a guess as to the quality of the marriage before the defendant's actions, then must determine the quality of the marriage after those actions, and then must determine how much of the decline in the quality of the marriage, if any, is properly attributable to the defendant's actions. (Rarely in pain and suffering cases is the plaintiff responsible for the infliction of a portion of the pain.) What constitutes a "good marriage," or damage to a marriage, is highly personal and subjective; it depends on each juror's unique religious and moral value system, unlike the question of what constitutes not being in pain. Likewise, while most personal injury victims are in a relatively pain free condition before the injury is inflicted, most marriages are far from perfect at the point at which a third party's interference has any effect on the marriage relationship.

The analogy between measuring damages in wrongful death actions and in alienation of affections suits, while much closer than the analogy to "pain and suffering" damages, is still flawed. This Court would have to allow the continued existence of wrongful death actions even if it were convinced that the damages awarded in those cases were essentially guess

work, because the cause of action for wrongful death is constitutionally mandated under Utah law. Utah Const. Art. XVI, § 5. Also, the mere fact that wrongful death cases deal with death makes the damages in those cases easier to calculate. Most importantly, there is no allegation in the typical wrongful death case that the plaintiff had something to do with the loss of consortium or that the spouse would have been "alienated" anyway; the loss of consortium is both final and totally causally related to the defendant's alleged wrong doings.

Another practical problem associated with the tort of alienation of affections is the potential for blackmail. The prospective plaintiff can easily demand a "settlement" from the prospective defendant in order to prevent the plaintiff from making public allegations. The unusually high susceptibility of alienation of affections actions to blackmail is well recognized. See, Nelson, 669 P.2d at 1227 (Durham Justice, concurring and dissenting); O'Neil, 733 P.2d at 698.

Another problem with alienation of affections actions is that they are often brought for the improper purpose of indirectly attacking the "alienated spouse," rather than, or in addition to, "getting even" with the defendant. "The primary motive in bringing the action is often for the plaintiff to vindicate himself and gain revenge on the other spouse and the defendant." O'Neil, 733 P.2d at 698. Allowing such indirect attacks on the "alienated spouse's" exercise of free will

further erodes that person's individual rights and identity. In many cases, the "alienated spouse" and the defendant have subsequently established a perfectly legal relationship. Alienation of affections in such circumstances is little more than a judicially enforceable tool to allow the plaintiff to interfere with the new and successful relationship under the guise of seeking damages for the harm done to the old, failed relationship.

Taken individually, the problems with proving damages, the blackmail potential of alienation of affections suits, or the tendency of such suits to be used for improper purposes may not warrant abolition of the tort. Likewise, other practical difficulties with the tort, such as the possibility of collusive lawsuits, and the conflict between alienation of affections and the right to privacy, probably do not individually warrant abolition of the tort. Indeed, the majority opinion in Nelson considered most of the foregoing arguments and individually dismissed each argument. Nelson, 669 P.2d at 1215-1218. Taken collectively, however, the arguments make a strong case for the abolition of alienation of affections. That is particularly true in light of the weak, almost non-existent, rationalizations put forward in favor of the tort's continued vitality. There comes a point at which a potential cause of action has so many problems associated with it that it should not exist, notwithstanding that each problem individually might be surmounted or ignored were it the only problem with the tort.

- H. Across the nation, the law has increasingly come to reject alienation of affections as a cause of action.

Given the serious problems with the tort, it is not surprising that state legislatures, state courts, and legal scholars have increasingly come to reject alienation of affections.

A comparison of the fourth edition of William Prosser's famous volume on the law of torts with the fifth edition gives a literal hornbook example of the change in legal thinking that occurred between 1971 and 1984. The fourth edition of Prosser's work, published in 1971, strongly questioned the desirability of abolishing alienation of affections, criminal conversation, and seduction as torts. See W. Prosser, Handbook of the Law of Torts, § 124 (4th ed. 1971).

The fifth edition, published in 1984, a year after Nelson v. Jacobsen, however, takes a decidedly different approach. In the exact spot where Prosser had previously criticized legislative abolition of alienation of affections, criminal conversation, and seduction, the fifth edition has replaced that language with the following quote:

The trend against [alienation of affections and criminal conversation] actions has moved slowly, but in the light of increased personal emphasis in our society and personal choice, the de-criminalization of sexual activities in many states, and skepticism about the role of law in protecting feelings and enforcing highly personal morality, it seems doubtful that

the trend will be reversed. It is, however, possible to draw distinctions, and to provide relief where the interference with family relations is accomplished by means of some independent tort, such as fraud or defamation, or where the defendant has taken advantage of a person incapable of full consent, such as a child or an incompetent. It may well be that the accommodation of the conflicting ideals of personal freedom on the one hand and stable family life on the other will in the future be accommodated along these lines rather than by retaining the pure common law actions.

W. Page Keeton, ed. Prosser and Keeton on the Law of Torts, § 124 (5th ed. 1984) (W. Prosser died in 1972).

The change in mainstream legal thinking, away from the continued existence of alienation of affections and criminal conversation actions, is evident not only in the most recent edition of Prosser and Keeton on Torts, but also in recent law review writing. Since the Nelson opinion, both the University of Utah Law Review and the Brigham Young University Law Review have come out with articles that criticize the reasoning in Nelson and strongly attack the tort of alienation of affections itself. Note, Alienation of Affections, 1985 Utah L. Rev. 215 (1985); C. Haws, Power Abuse as a Basis for Alienation of Affections: Nelson v. Jacobsen, 1985 B.Y.U.L. Rev. 183 (1985). It is fair to say that the trend of recent legal commentators is distinctly against the continued existence of causes of action for alienation of affections and criminal conversation.

A good hornbook is not so much a statement of what the author believes the law ought to be, as it is an analysis of what the law is and where the law is going. Viewed in that light, the change between the fourth and fifth edition of Prosser on Torts reflects the change in mainstream jurisprudential thinking between 1971 and 1984. For instance, in 1971, no court had judicially abolished alienation of affections actions, although Louisiana, because of its unique code law based legal system, had never recognized the action. See Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927). Between 1980 and the publication of Prosser's fifth edition in 1984, Iowa and Washington did judicially abolish the cause of action. Funderman v. Mickelson, 304 N.W.2d 790 (Iowa 1981); Wyman v. Wallace, 94 Wash. 2d 99, 615 P.2d 452 (1980). Since then, our sister state of Idaho, in the O'Neil decision, has joined the trend towards judicial abolition of alienation of affections. In addition, the majority of states and the District of Columbia have abolished alienation of affections by statute,² or abolished such actions except for insignificant exceptions,³ or have limited such actions to injunctive relief.⁴

All told then, alienation of affections actions for damages are not generally maintainable in at least thirty-five states. Utah should join the mainstream of American legal thinking, which increasingly favors abolition of this obsolete tort.

- I. This Court's recent decision in Hackford v. Utah Power & Light Co. denying recovery for loss of consortium damages is in direct and irreconcilable conflict with the continued existence of alienation of affections actions.

The principal elements of damages in an alienation of affections suit are loss of the alienated spouse's support, companionship, love and affection. Those types of damages have been recognized by this Supreme Court as falling under the rubrick of "loss of consortium damages." Ellis v. Hathaway, 27 Utah 2d 143, 493 P.2d 985, 986 (1972). See also Black v. United States, 263 F. Supp. 470, 476 (D. Utah 1967). Numerous Utah Supreme Court cases recognize that the Married Woman's Act of 1898, Utah Code Ann. § 30-2-4, which states in part that "[t]here shall be no right of recovery by the husband on account of personal injury or wrong to his wife", prohibits an action for loss of consortium damages (except in wrongful death cases where they are specifically authorized by Article XVI, Section 5, of the Utah Constitution). See e.g., Tjas v. Proctor, 591 P.2d 438, 440 (Utah 1978); Ellis, 493 P.2d at 986; Black, 263 F. Supp. at 471-80 (federal court trying to determine state law before first Utah decision). Any doubt that may have existed about the issue was put to rest by this Court's recent decision in Hackford v. Utah Power & Light Co., 740 P.2d 1281 (Utah 1987).

It is extremely difficult to see a theoretical justification for allowing loss of consortium damages in

alienation of affections actions, while not allowing them in other tort actions. Since 47 states recognize a loss of consortium action as a general principle of law, Hackford, 740 P.2d at 1288 (Howe, J. concurring in the result), and since only a handful of states appear to have a viable cause of action for alienation of affections, Utah is probably unique in allowing the collection of loss of consortium damages in alienation actions, but not in normal tort actions. That anomalous result is simply unsupportable. See Hackford, 740 P. 2d at 1293 (Durham and Stewart, JJ. dissenting). A plaintiff whose spouse was intentionally maimed and crippled by the defendant would have no cause of action for loss of consortium damages, while a plaintiff whose spouse had allowed or even encouraged an alienation of his or her affections "by" the defendant would be entitled to loss of consortium damages.

Justice Zimmerman recognized the inequity in that situation in his majority opinion in Hackford, but apparently because the issue of the validity of a cause of action for alienation of affections was not before the court, he could do nothing to resolve the conflict. Justice Zimmerman's opinion did point out, however, that "[a]s for this Court's recognition of the alienation-of-affections cause of action in Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983), its continued existence is a historical anomaly and should not be relied on to create new causes of action." Hackford, 740 P.2d at 1286 n.3. Now is the time for the Court to eliminate the "historical anomaly."

The 1987 Hackford case clearly illustrates both this Court's intention to disallow a general cause of action based on loss of consortium damages, and the conflict between that position and the continued viability of a cause of action for alienation of affections. To allow a claim for alienation of affections based on loss of consortium damages, while such a claim is unequivocally denied to all other tort claimants (except in wrongful death actions, pursuant to the Utah constitutional provision) would be highly inequitable.

Justice Howe, in his concurring opinion in Hackford, distinguished loss of consortium from alienation of affections actions as follows:

The comparison made by the plaintiff between an action for loss of consortium and an action for wrongful death or for alienation of affections is unavailing. Actions for wrongful death are protected by the Utah Constitution, art. XVI, § 5, and were unaffected by the legislative enactment of § 30-2-4. Actions for alienation of affections are not derivative from a tort committed on the alienated spouse. The latter is not injured at all. Rather, alienation of affections arises from a tort committed on the non-alienated spouse by interference with his or her marriage contract. An action by a husband for alienation of affections such as Nelson v. Jacobsen, 669 P.2d 1207 (Utah 1983), can in no wise be said to be brought "on account of personal injury or wrong to his wife," as prohibited by § 30-2-4.

Hackford, 740 P.2d at 1287 (Howe, J., concurring in the result).

That argument is based on a questionable premise, namely that the "alienated spouse" is never injured at all.

There are undoubtedly many occasions on which the "alienated spouse" is not injured, or has even benefited by being "alienated." On the other hand, that is not always the case. Sometimes the "alienated spouse" is an unwilling participant in the events causing the alienation. An example would be the type of situation discussed by Justice Stewart in his Nelson opinion, where a person in a position of power uses that power to make sexual advances and obtain sexual favors from an unwilling victim. Likewise, there are many situations where the spouse may have been a voluntary and even enthusiastic participant in the actions causing an alienation, but subsequently came to regret his or her actions and the damage that those actions had on his or her marriage.

Even if the "alienated spouse" were never injured, it does not follow that the lack of such an injury should affect the plaintiff's right to recover damages. There is no logical reason why the plaintiff's ability to recover damages for the loss of support, companionship, love and affection of the plaintiff's spouse (who actually suffers the physical injury or alienation) should turn on whether the plaintiff's spouse was herself injured. See Hackford, 740 P.2d at 1291 (Durham J., dissenting) (action for loss of consortium, although nominally derivative, is actually an action for direct harm to the plaintiff). Justice Howe's argument would be analogous to saying that the right of a passenger in a vehicle to recover for damages caused in an accident is dependent on whether the driver of the vehicle was able to escape injury.

Under Utah law, loss of consortium damages should be denied pursuant to Hackford regardless of whether the plaintiff's spouse withheld support, companionship, love and affection from the plaintiff due to having been physically injured by the defendant or due to the defendant's alienating that spouse's affections. It would be a sad irony if the Married Woman's Act, which was designed to give wives legal independence, was held to bar loss of consortium actions, but not alienation of affections actions arising from a wife's exercise of her free will.

II. THE UTAH SUPREME COURT SHOULD JOIN THE MAINSTREAM OF AMERICAN LEGAL OPINION BY ABOLISHING THE TORT OF CRIMINAL CONVERSATION, A CAUSE OF ACTION THAT IS EVEN MORE SUBJECT TO ABUSE AND TO YIELDING IRRATIONAL RESULTS THAN ALIENATION OF AFFECTIONS.

A. The tort of criminal conversation has only been recognized once under Utah law, in the 1959 case of Cahoon v. Pelton.

The Utah Supreme Court has only once analyzed the question of whether a cause of action should exist in Utah for the tort of criminal conversation. In Cahoon v. Pelton, 9 Utah 2d 224, 342 P.2d 94 (1959), the court recognized the existence of a cause of action, based on the existence of the tort at English common law, although the English tort had been abolished long before Utah gained statehood and, in any event, was based on the antiquated notion that a husband had a property right in his wife. The Utah Supreme Court acknowledged that that notion "is contrary to the law on that

subject as developed in this state and most, if not all, of the states in this country." Id., 342 P.2d at 98. Even so, this Court affirmed the cause of action. Id. In so doing, the court created a new basis for the tort, namely "the exclusive right of either spouse to intercourse with the other." Id.

Criminal conversation actions are entirely a judicial creation in Utah. Like alienation of affections actions, criminal conversation actions are without any constitutional or legislative support. As a creature of the common law, the tort of criminal conversation can be abolished by this Court if it deems it advisable to do so.

B. The main public policy arguments against alienation of affections apply equally well to the tort of criminal conversation.

The tort of criminal conversation suffers from the same theoretical and practical weaknesses as the tort of alienation of affections. For example, criminal conversation certainly provides at least as much opportunity for blackmail and improperly motivated suits as does alienation of affections. Moreover, it is even harder to measure damages in a criminal conversation case than in an alienation of affections case because discernable damage to the marriage is not a requirement of the former tort. The jury in effect must guess at the value of the plaintiff's hurt feelings caused by knowing that his or her spouse had engaged in sexual relations with defendant. Otherwise, the measure of damages in the two

actions is basically identical. As a result, criminal conversation actions are as inconsistent with the Hackford rule barring loss of consortium damages as are alienation of affections actions. The primary differences between alienation of affections and criminal conversation are twofold. First, sexual conduct is a prerequisite to a criminal conversation action. Second, criminal conversation has even fewer safeguards than alienation of affections.

C. The lack of recognized defenses makes criminal conversation actions more subject to abuse and absurd results than alienation of affections actions.

The elements of the tort of criminal conversation, as defined in Cahoon, appear to border on strict liability. All that is required for the plaintiff to establish a prima facie case is proof that the defendant engaged in "adultery in violation of the criminal law" with the plaintiff's spouse. Id., 342 P.2d at 98-99. It is arguably no defense that the "guilty spouse" consented or even enticed the defendant. Id., 342 P.2d at 98. Indeed, few defenses to criminal conversation exist except for a defense based on the consent of the plaintiff to the act.

It is precisely the irrational and inequitable strict liability nature of this tort that has caused it to be even more disfavored among courts and commentators than alienation of affections. The Supreme Court of New Hampshire, for

example, recently abolished the tort of criminal conversation, even though it apparently retains a cause of action for alienation of affections, when it found itself in the absurd situation of otherwise having to uphold a verdict for criminal conversation against a wife based on her sleeping with her husband.

In Joan Feldman v. Darlene Feldman, 125 N.H. 102, 480 A.2d 34 (1984), both the plaintiff and the defendant were unwittingly married to the same husband. The husband had married the plaintiff in 1962 in New Hampshire and had fathered three children with her. His job required extensive travel and he was rarely at home in New Hampshire. He met the defendant in Tokyo in 1970; he told her that he was divorced. After a period of courtship, he married the defendant in 1973, established his home with her in Las Vegas, and had a son by her in 1976. All the time, the husband maintained his relationship with his first wife and family, and neither the plaintiff nor the defendant knew of the other one's existence. The plaintiff learned of her husband's marriage to the defendant in 1981. She divorced him, and brought an action for alienation of affections and criminal conversation against the defendant shortly thereafter. The trier of fact (a master) found in favor of the defendant on the alienation of affections claim. The master determined that the defendant was entirely innocent of any intent to alienate the mutual husband's affections from the plaintiff, whom she did not know existed.

The master found, however, that the plaintiff in a criminal conversation action "need only prove an occurrence of sexual intercourse between the defendant and the plaintiff's spouse, and that the only possible defense for the action is consent or condonation by the plaintiff." Feldman, 480 A.2d at 35. He therefore awarded \$35,000 in damages to the plaintiff.

In reviewing the case, the New Hampshire Supreme Court agreed that the trier of fact had correctly interpreted and applied the law of criminal conversation to the case. Id. The court disagreed, however, with the fact finder's opinion that abolishing the tort of criminal conversation was a "legislative function." The court determined that it had the authority to abolish the tort of criminal conversation:

As a common-law tort, the action for criminal conversation is a creation of the judiciary. Consequently, it is the duty of the judiciary to examine it and make such changes as justice requires when the Legislature has chosen not to act. The Legislature expressed its will by enacting laws, not by failing to do so. Furthermore, its inaction could be motivated by its assumption that if a judicial developed rule is unjust, the courts will overrule it. It follows that the general rule of deference to the legislative intent has no application here, where the Legislature has expressed no intent that the cause of action be retained.

Id., 480 A.2d at 35 (quotations and citations omitted). The New Hampshire Supreme Court thereupon abolished the cause of action for criminal conversation, after noting that a solid

majority of the states and the District of Columbia had already done likewise. Id., 480 A.2d at 35-36.

D. Mainstream American legal opinion is even more opposed to criminal conversation actions than to alienation of affections actions.

Not surprisingly, in light of the absurd results that the tort can produce, courts are even more willing to abolish criminal conversation on their own initiative than they are to abolish alienation of affections. All told, seven states have done so. Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978); Kline v. Ansell, 287 Md. 585, 414 A.2d 929 (1980); Feldman v. Feldman, 125 N.H. 102, 480 A.2d 34 (1984); Lynn v. Shaw, 620 P.2d 899 (Okla. 1980); Fadgen v. Lenker, 365 A.2d 147 (Pa. 1976); Hunt v. Hunt, 309 N.W.2d 818 (S.D. 1981); Erwin v. Coluccio, 32 Wash. App. 510, 648 P.2d 458 (1982). In addition, Louisiana long ago refused to recognize the tort, Moulin v. Monteleone, 165 La. 169, 115 So. 447, 448-49 (1927), and the recent O'Neil opinion in Idaho discussed above in connection with alienation of affections leaves no doubt that Idaho would join the ranks of those states that prohibit the cause of action if it were called upon to do so.

This move to judicially abolish criminal conversation is relatively new. Of the nine states discussed above, all except Louisiana have acted since 1976, at least 17 years after the Utah Supreme Court's sole analysis of criminal conversation in Cahoon.

Legislatures also take a dim view of criminal conversation actions. Many states have legislatively abolished the tort,⁵ while other states have eliminated the right to collect money damages.⁶

Even commentators who strongly support the continued existence of a cause of action for alienation of affections believe that the tort of criminal conversation ought to be abolished. For instance, one particular article, The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship, 48 Notre Dame Lawyer 426 (1972), was obviously highly persuasive to the Utah Supreme Court majority in Nelson v. Jacobsen. It is quoted or cited in the majority opinion at least four times in support of four different arguments favoring the retention of a cause of action for alienation of affections. Nelson, 669 P.2d at 1215, 1216, 1217, and 1218. Yet with regard to criminal conversation, the article's author makes the following condemnation:

There is growing evidence that extramarital sexual activity is becoming not only more common but more acceptable, apparently even to the partners to the marriage. In this state of affairs the action for criminal conversation as it now stands is largely outdated. As has been indicated the defendant's ignorance of the marriage does not constitute a defense against the charge of adultery; nor does proof that the faithless spouse encouraged the adulterous act. To allow recovery on the basis of the sexual conduct alone without proof of a resulting diminution of affections or similar loss would leave the door open to flagrant injustices. In other words, the

right of the spouse flowing from the marital relationship would no longer be conclusively presumed to include a monopoly interest in his or her partner's sexual intercourse.

48 Notre Dame Lawyer at 433 (the validity of the author's position is confirmed by the absolute lack of enforcement of Utah's adultery law, which some might suggest remains on the books only because the Utah Legislature does not want to appear to be encouraging extra-marital relationships by repealing it). Thus, even conservative commentators who favor retention of alienation of affections actions deny the continued viability of the rationale that the Utah Supreme Court used thirty years ago in recognizing a cause of action for criminal conversation.

CONCLUSION

In short, alienation of affections is an obsolete tort. It is based on the archaic assumption that wives are their husband's property, unable to exercise their own free will, and that husbands have a legal right to the continued affection of another human being. By contrast, under current Utah law a husband does not even have the right to the continuation of his marriage, much less the affections of his spouse. Alienation of affections actions are fraught with practical problems. Further, an action for alienation of affections is basically an action for loss of consortium; Utah

law does not allow loss of consortium damages for any other tort (except for constitutionally mandated damages in wrongful death cases). As a matter of fairness, and in recognition of the need for change and growth in the common law, Utah ought to abolish the cause of action for alienation of affections.

Likewise, criminal conversation is no longer a viable tort. It is subject to gross abuse and can lead to real injustices. In the three decades that have passed since Utah's only decision on the matter, legislatures, courts and commentators (including one recently relied on by the Utah Supreme Court in retaining alienation of affections) have become increasingly hostile to what is perceived as an unjust and inequitable strict liability tort. It is now time for Utah to join the growing ranks of states that have abolished this outmoded cause of action.

Based on the foregoing arguments, the defendant, J. Ralph Macfarlane, appeals to this Supreme Court for a decision declaring that alienation of affections and criminal conversation are no longer recognizable torts under Utah law, and reversing Judge Roth's order denying the defendant's Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim Upon Which Relief may be Granted.

DATED this fourth day of January, 1989.

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ENDNOTES

1 One weakness in Justice Stewart's "power relationship" argument is that it does not explain why a cause of action should lie in the spouse of the victim of a power relationship. Unwanted sexual advances by an employer are unquestionably illegal; unwanted sexual advances by professors, physicians, psychiatrists, psychoanalysts or psychologists are serious violations of professional ethics that can lead to a loss of credentials, and such advances are usually inherently tortious under various theories. In each case a cause of action or remedy other than alienation of affections is available to the recipient of the advances. Of course, if an intimate relationship develops between a person in authority and an underling as a result of mutual attractions, that situation is really no different from any ordinary alienation of affections action, of the type that Justice Stewart apparently would have abolished in Nelson. For a further critique of the "power relationship" approach, see C. Haws, Power Abuse as a Basis for Alienation of Affections: Nelson v Jabobsen, 1985 B.Y.U. L. Rev. 183 (1985).

2 Ariz. Rev. Stat. Ann. § 25-341 (Supp. 1988); Cal. Civ. Code § 43.5 (West 1982); Colo. Rev. Stat. § 13-20-202 (1987); Conn. Gen. Stat. § 52-572b (1987); D.C. Code Ann. § 16-923 (1981); Ga. Code Ann. § 51-1-17 (1982); Ind. Code Ann. § 34-4-4-1 (Burns 1986); Me. Rev. Stat. Ann. tit. 19, § 167 (1981); Md. Cts. & Jud. Proc. Code Ann. § 5-301(a)(1984); Mass. Gen. Laws Ann. ch. 207, § 47B (West Supp. 1988); Mich. Stat. Ann. § 27A.2901 (1988); Minn. Stat. § 553.02 (1988); Mont. Code Ann. § 27-1-601 (1987); Neb. Rev. Stat. § 25-21,188 (Supp. 1988); Nev. Rev. Stat. § 41.380 (1986); N.D. Cent. Code § 14-02-06 (Supp. 1987); Or. Rev. Stat. § 30.840 (1987); Tex. Fam. Code Ann. § 4.06 (Supp. 1989); Va. Code § 8.01-220 (1950); W. Va. Code § 56-3-2a (Supp. 1988); Wis. Stat. Ann. § 768.01 (1981).

3 Okla. Stat. Ann. tit. 76, § 8.1 (West 1987) (action permitted only if spouse was a minor or incompetent at time of alleged alienation); Pa. Stat. Ann. tit. 48, § 170 (Purdon 1965) (action permitted only if defendant is blood relative of plaintiff).

4 Ala. Code § 6-5-331 (1975) (injunction permitted, see, Logan v. Davidson, 282 Ala. 327, 330, 211 So.2d 461, 463 (1968)); Del. Code Ann. tit. 10, § 3924 (1974) (abolished cause of action for "sums of money as damages"); Fla. Stat. § 771.01 (1986) (abolished "sums of money as damages"); N.H. Rev. Stat. Ann. § 460:2 (1983) (prohibits civil actions for damages, but see 125 N.H. 102, 480 A.2d 34 (1984) which effectively abolished the cause of action); N.J. Rev. Stat. § 2A:23-1

(1987) (abolished action for sums of money); N.Y. Civ. Rights Law § 80-a (McKinney 1976) (abolished action for sums of money); Ohio Rev. Code Ann. § 2305.29 (Page 1981) (Abolished action for civil damages); Vt. Stat. Ann. tit. 15, § 1001 (Supp. 1988) (abolished actions for sums of money); Wyo. Stat. § 1-23-101 (1988) (abolished action for monetary damages).

5 Ala. Code § 6-5-331 (1975); Cal. Civ. Code § 43.5 (West 1982); Colo. Rev. Stat. § 13-20-202 (1987); Conn. Gen. Stat. § 52-572f (1987); D.C. Code Ann. § 16-923 (1981); Ga. Code Ann. § 51-1-17 (1982); Ind. Code Ann. § 34-4-4-1 (Burns 1986); Mass. Gen. Laws Ann. ch. 207, § 47B (West Supp. 1988); Mich. Stat. Ann. § 27A.2901 (1988); Minn. Stat. § 553.02 (1988); Neb. Rev. Stat. § 25-21,188 (Supp. 1988); Nev. Rev. Stat. § 41.380 (1986); N.D. Cent. Code § 14-02-06 (Supp. 1987); Or. Rev. Stat. § 30.850 (1981); Tex. Fam. Code Ann. § 4.05 (Supp. 1989); Va. Code § 8.01-220 (1950); Wis. Stat. Ann. § 768.01 (1981).

6 Del. Code Ann. tit. 10, § 3924 (1974); Fla. Stat. § 771.01 (1986); N.J. Stat. Ann. § 2A:23-1 (1987); N.Y. Civ. Rights Law § 80-a (McKinney 1976); Ohio Rev. Code Ann. § 2305.29 (Page 1981); Vt. Stat. Ann. tit. 15, § 1001 (Supp. 1988); Wyo. Stat. § 1-23-101 (1988).

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of January, 1989, I caused to be mailed, postage prepaid, four (4) true and correct copies of the foregoing BRIEF OF APPELLANT, to the following parties of record:

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