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The Suit of Alienation of Affections: Can Its Existence Be Justified Today

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NOTE

THE SUIT OF ALIENATION OF AFFECTIONS: CAN ITS EXISTENCE BE JUSTIFIED TODAY?

I. INTRODUCTION

The law of torts is based on the protection of personal and property interests, both tangible and intangible.[1] Included in this concept is the idea that an individual's relational interest deserves protection.[2] This relational interest is defined as a plaintiff's position relative to one or more third persons, and most conspicuously involves the family relation.[3] This relational tort principle has spawned the action of alienation of affections, a common law grievance that has come under increasing attack in this century.[4] Despite the controversy surrounding the action, its validity has been upheld in two recent appellate court decisions[5] and the action itself continues to linger in many state statutes, including that of North Dakota.[6]

An action for alienation of affections allows a spouse or a child to sue a third party for intentional interference with the marriage relationship. Alienation actions are allowed only if there is a valid marriage.[7] The defendant in the action can be any individual who

1. W. PROSSER, THE LAW OF TORTS § 124 (4th ed. 1971).
2. *See generally* Greene, *Relational Interests*, 29 ILL. L. REV. 460 (1935).
3. *See generally* Foster, *Relational Interests of the Family*, U. ILL. L. FORUM 493 (1962). *See also* Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177 (1916).
4. *See generally* Feinsinger, *Legislative Attack on Heart Balm*, 33 MICH. L. REV. 979 (1935).
5. Wyman v. Wallace, 91 Wash. 2d 317, 588 P.2d 1133 (1979); Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978).
6. N.D. CENT. CODE § 14-02-06 (1971).
7. Van Ellen v. Meyer, 207 N.W.2d 552, 553 (Iowa 1973).

interferes, including a parent or other relative of the injured spouse or child. In addition to allowing the injured party to seek compensatory damages for loss of consortium,[8] most courts allow collection of exemplary damages.[9] The power to enact such statutes is derived from the state's police power to provide for the general welfare,[10] and more specifically inheres in the state's interest in maintaining a stable marital relationship.[11]

Although public perception of the significance of this interest has not declined, the existence of the tort in many jurisdictions is being questioned today. The tort has generated controversy from those who feel that the social utility served by the suit does not outweigh the harm it engenders. The criticism has also been aimed at the outdated nature of the action in contrast to the noticeable liberal change in American social values and personal attitudes in the last half of this century. Judicial perception of the merit of such statutes has also been eroded in light of the increased emphasis on privacy rights found in a long line of cases during the last decade.

It is the purpose of this note to examine the merits of the action for alienation of affections. After discussing the development of the action from its origins in the common law of England to the present, the advantages and disadvantages of the action will be weighed in an attempt to determine the ultimate utility of the action today.

II. HISTORICAL BASIS

The action for alienation of affections developed as one of three torts involving interference with the marital relationship.[12] The earliest of these actions, variously called abduction or enticement,[13] developed from the early writ of ravishment which was available to the husband when his wife was taken from him.[14] The gist of the action for abduction is the physical separation of the

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8. Consortium is defined as "society, companionship, conjugal affections, fellowship and assistance." Rott v. Goehring, 33 N.D. 413, 422, 157 N.W. 294, 296 (1916) (citing Adams v. Main, 3 Ind. App. 232, ____, 29 N.E. 792, 793 (1892)).

9. *See* Tice v. Mandel, 76 N.W.2d 124, 132-33 (N.D. 1956). *Contra*, Siegall v. Solomon, 19 Ill. 2d 145, 166 N.E.2d 5 (1960). Punitive damages are allowed when defendant's conduct is willful, wanton or malicious. Sebastian v. Kluttz, 6 N.C. App. 201, 220, 170 S.E.2d 104, 116 (1969).

10. Siegall v. Solomon, 19 Ill. 2d 145, ____, 166 N.E.2d 5, 8 (1960).

11. *Id.*

12. W. PROSSER, THE LAW OF TORTS, § 124 at 874 (4th ed. 1971).

13. *See* Humphrey v. Pope, 122 Cal. 253, 256, 54 P.847, 848 (1898); 3 RESTATEMENT (SECOND) OF TORTS § 684. Besides the tort of abduction, the Restatement also lists criminal conversation and alienation of affections under "Interference with the Marriage Relation." Abduction and enticement are used interchangeably.

14. P. WINFIELD, LAW OF TORT 234 (5th ed. 1950).

spouses, whether through force or persuasion.[15] The action was first recognized in 1745 in the case of *Winsmore v. Greenbank*[16] in which a husband was allowed an action against one who intentionally "persuaded, procured, and enticed" his wife to leave the home. This common law action for abduction or enticement was well received in this country and was adopted by every state except Louisiana.[17] Curiously, the tort of abduction seemed to disappear from the American legal scene around the turn of the century. This change was due perhaps to the strong ties the suit had with the outdated concept of the husband's proprietary interest in his wife.[18] The result is that the action for abduction appears to have been engulfed by the more modern action of alienation of affections.[19]

The second tort involving protection of the marriage relation is criminal conversation. The basis of this action is adultery between the defendant and the plaintiff's spouse.[20] The plaintiff is entitled to recover damages for emotional distress and for defilement of the marriage resulting from the defendant's illicit sexual relations with the other spouse.[21] The action is harsh in that the only two defenses available to the defendant are the plaintiff's consent and the statute of limitations.[22] The social utility served by this action has been questioned in the last thirty years, and some courts have abolished it judicially.[23]

The last of the three actions, alienation of affections, is the usual remedy today for intentional interference with the marital relationship.[24] Although the tort has never been formally recognized in England,[25] it received a favorable response in the

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15. King v. Hanson, 13 N.D. 85, 99 N.W. 1085 (1904). The term "abduct" is derived from the Latin "ab-duco" meaning to lead away. *Id.* at 99, 99 N.W. at 1088. For an illustration of "enticement" *see* Place v. Searle, 2 K.B. 497 (1932).

16. Willes 577, 125 Eng. Rep. 1330 (1745).

17. Louisiana rejected the action judicially. For North Dakota's version of this action *see* N.D. CENT. CODE § 14-02-06 (1971).

18. W. PROSSER, THE LAW OF TORTS § 124 at 874 (4th ed. 1971).

19. *See* Tice v. Mandel, 76 N.W.2d 124 (N.D. 1956). In their opinions, courts have substituted one tort for the other without regard to the wording of the statute. Technically, however, there is a difference between abduction and alienation of affections in that the plaintiff is not required to prove physical separation of the spouses in an alienation action. Despite this difference, the North Dakota courts continue to state that the action is one for alienation, when in fact the statute only allows an action for abduction or enticement. For a clear statement of the difference between the two torts *see* 3 RESTATEMENT (SECOND) OF TORTS §§ 683-84 (1976).

20. Giltner v. Stark, 219 N.W.2d 700, 704-05 (Iowa 1974).

21. Vaughn v. Blackburn, 431 S.W.2d 887, 889 (Ky. 1968).

22. Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978); Comte v. Blessing, 381 S.W.2d 780, 788 (Mo. 1964).

23. *See, e.g.*, Fadgen v. Lenkner, 469 Pa. 272, 365 A.2d 147 (1976).

24. Today, many courts use the word enticement as a substitute for alienation of affections. *See* Anderson v. Sturm, 209 Or. 190, ____, 303 P.2d 509, 510 (1956).

25. Gottlieb v. Gleiser, 1 Q.B. 267 (1958).

United States after being first recognized in New York in 1866.[26] The action can be brought against anyone who disrupts the marriage, including a parent or relative of either spouse. The suit is also available to a child, who may sue for injuries caused by the alienation of one of his parents.[27]

The interests to be protected in an alienation of affections action coincide with the protected interests in actions for criminal conversation and abduction, and are embodied in the term "consortium." These consortium rights originated from a master's quasi-proprietary interest in his servant.[28] Since at common law the wife was considered to be a valuable servant, the master's quasi-proprietary interest was expanded to include loss of the wife's services as well.[29] Gradually, courts shifted their emphasis from the tangible loss of services to the more intangible deprivation of other elements of the marriage.[30] These include loss of the society, companionship, conjugal affections and fellowship of the other spouse.[31]

At early common law, a wife had no identity separate from her husband.[32] As a result, she had no separate property right and thus no protectible interest in the services of her husband. Since the actions for intentional interference with the marriage were at one time based on the concept of services, the wife was effectively precluded from bringing an action at early common law.[33] As courts modernized their conception of protectible marital interests, they recognized that the wife should also be able to sue to protect her interest.[34] This actionable right was recognized by the North Dakota Supreme Court in the case of *King v. Hanson,*[35] in which it

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26. Heermance v. James, 47 Barb. 120 (N.Y. 1866).

27. Wrangham v. Tebelius, 231 N.W.2d 753 (N.D. 1975). Many state courts have denied suits by children for the alienation of a parent on the theory that a child had no such cause of action at early common law. *See also* Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P.2d 984 (1948). *See also* Henson v. Thomas, 231 N.C. 173, 176, 56 S.E.2d 432, 434 (1949). On the whole, there does not appear to be any valid reason why the action should be limited to adults since a child will also feel the effects of the marital disruption.

28. W. PROSSER, THE LAW OF TORTS § 124 at 873 (4th ed. 1971). The husband was said to have a personal and exclusive right in the person of his wife. The wife was essentially the "property" of the husband. *See* Tinker v. Colwell, 193 U.S. 473, 481 (1904).

29. Hyde v. Scyssor, 79 Eng. Rep. 462 (1620).

30. *See* Lippman, *The Breakdown of Consortium,* 30 CALIF. L. REV. 651 (1930); Holbrook, *The Change in the Meaning of Consortium,* 22 MICH. L. REV. 1 (1923).

31. Rott v. Goehring, 33 N.D. 413, 157 N.W. 294 (1916). Some courts have included financial support as an element of consortium. Fischer v. Mahlke, 18 Wis. 2d 429, 118 N.W.2d 935 (1963). The loss or impairment of any of the elements will support an action for alienation of affections. Edgren v. Reissner, 239 Or. 212, 396 P.2d 564 (1964).

32. Duffies v. Duffies, 76 Wis. 374, 376, 45 N.W. 522, 523 (1890).

33. King v. Hanson, 13 N.D. 85, 99 N.W. 1085 (1904). For an interesting historical treatment of this subject, *see* Duffies v. Duffies, 76 Wis. 374, 45 N.W. 522 (1890).

34. Bennett v. Bennett, 116 N.Y. 159, 23 N.E. 17 (1889). *See also* Jaynes v. Jaynes, 39 Hun. 40 (N.Y. 1886).

35. 13 N.D. 85, 99 N.W. 1085 (1904).

was held that the wife should have a cause of action for violation of her personal right when her husband was enticed from her, since the wife could no longer be considered as a chattel of her spouse.[36] This judicial construction supplemented the passage of Married Women's Property Acts by many state legislatures in the late 19th century.[37] These acts granted to women the same rights to own property as men already had.

Once the woman's right to sue was recognized, the evolution of the action for alienation of affections was essentially complete. This recognition of the wife's right to own property was tied to the concept that the wife now had a protected interest in the services of her husband, as the husband had always had in her. In part, it is this concept of a mutual "property interest" in the services of the respective spouses that has subjected the action for alienation of affections to the criticism that the tort is an anachronism.

III. ALIENATION OF AFFECTIONS

The primary element of the tort of alienation of affections is the purposeful alienation of one spouse's affections from the other, in derogation of that spouse's legally protected marital interests.[38] The act of the defendant must be purposeful. An actual intent to alienate, however, is not necessary if the defendant's acts are inherently wrong and seductive.[39] Generally four things must be proved in order for the plaintiff to prevail: (a) the existence of the marriage at the time of alienation, (b) wrongful conduct by the defendant with the plaintiff's spouse, (c) the loss of affection or consortium, and (d) a casual connection between the defendant's conduct. and the deprivation of consortium.[40] Though the interest being vindicated is the same as that involved in criminal conversation, it is not imperative in the suit for alienation that the plaintiff

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36. *Id.* at 97, 99 N.W. at 1088.

37. *See, e.g.*, North Dakota Century Code section 14-07-05, which states as follows:

> The wife after marriage has with respect to property, contracts, and torts the same capacity and rights and is subject to the same liabilities as before marriage, including liability to suit by her husband. In all actions by or against her, she shall sue and be sued in her own name.

N.D. CENT. CODE § 14-07-05 (1971).

38. 3 RESTATEMENT (SECOND) OF TORTS § 683 (1976). The Restatement has eliminated the word "consortium" due to ambiguity and has substituted the particular interests invaded. *Id.* Comment C at 478. For a discussion of the features of the action, *see* Brown, *The Action for Alienation of Affections*, 82 PA. L. REV. 472, 474-78 (1934).

39. Tice v. Mandel, 76 N.W.2d 124, 130 (N.D. 1956). *Cf.* Kelsey-Seybold Clinic v. Maclay, 466 S.W.2d 716, 719 (Tex. 1971). The defendant's actions must be the controlling cause of the resulting alienation. Bishop v. Glazener, 245 N.C. 592, 596, 96 S.E.2d 870, 873 (1957).

40. Bearbower v. Merry, 266 N.W.2d 128, 129 (Iowa 1978); Jones v. Williams, 247 S.C. 100, ____, 145 S.E.2d 683, 684 (1965).

supply proof of sexual relations between the spouse and the defendant.[41] Unlike the suit for abduction, the plaintiff in an alienation action can recover even through the spouses have remained together.[42]

The action for alienation of affections proceeds on the assumption that a perfectly harmonious marital relationship has been divided by a scheming intruder. As a consequence, there is a presumption of affection between husband and wife in either spouse's action for alienation.[43] Because the law further presumes that there is always a possibility of reconciliation between the husband and wife, under the majority view the plaintiff may be successful in his action even when there is no affection between the spouses.[44] These presumptions leave the defendant with a difficult burden. Nevertheless, several defenses can be raised. The defendant will be exonerated if he can show that he was not responsible for the alienation,[45] or that the plaintiff consented to the defendant's actions in interrupting the marriage.[46] Other defenses exist when the straying spouse voluntarily gives his or her affections[47] absent encouragement by the defendant and, under the minority view, when the defendant can show there was no love between the spouses.[48] Nor will the defendant be liable if he did not know of the existence of the marriage, or if the statute of limitations has run.[49] In the situation where the defendant is a parent of one of the spouses, the defendant is accorded the privilege of advising and protecting his or her children and the plaintiff can recover only where the interference is malicious.[50] Thus, if the advice was given in good faith, no cause of action is available.[51] These standards reflect the law's protection of the affections present in the parent-child relationship as well as the marital relationship.[52]

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41. Nabors v. Keaton, 216 Tenn. 637, 640, 393 S.W.2d 382, 383 (1965). Requiring proof of sexual relations would of course virtually eliminate actions against parents or other relatives.

42. Alaimo v. Schwanz, 56 Wis. 2d 198, 201, 201 N.W.2d 604, 606 (1972). *See also* J. MADDEN, PERSONS AND DOMESTIC RELATIONS 166 (1931).

43. Allen v. Lindeman, 259 Iowa 1384, 1387, 148 N.W.2d 610, 613 (1967). *See also* Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 995 (1935).

44. Gibson v. Gibson, 244 Ark. 327, ____, 424 S.W.2d 871, 874 (1968).

45. Poulos v. Poulos, 351 Mass. 603, ____, 222 N.E.2d 887, 890 (1967).

46. Comte v. Blessing, 381 S.W.2d 780, 784 (Mo. 1964).

47. Archer v. Archer, 31 Tenn. App. 657, ____, 219 S.W.2d 919, 921 (1947). *Contra*, Chestnut v. Sutton, 207 N.C. 256, 176 S.E. 743 (1934).

48. Booth v. Krause, 78 Ohio App. 461, ____, 65 N.E.2d 89, 92 (1946). The majority position is that the absence of affection will only mitigate damages. Wilson v. Hilske, 132 Vt. 506, 508, 321 A.2d 16, 18 (1974). This majority view is consistent with the presumption of the possibility of reconciliation between the spouses.

49. Bearbower v. Merry, 266 N.W.2d 128, 130 (Iowa 1978).

50. Acchione v. Acchione, 376 Pa. 36, 101 A.2d 642 (1954).

51. Jefferson v. Kenoss, 38 Cal. App. 496, 101 P.2d 711 (1940).

52. Koehler v. Koehler, 248 Iowa 144, 79 N.W.2d 791 (1956). *Accord*, Carrieri v. Bush, 69 Wash. 2d 536, 419 P.2d 132 (1966).

The damages recoverable for interference with the marriage relationship were once limited to the value of the wife's lost services.[53] Recognition by the courts, however, of more intangible rights deserving of protection has broadened the scope of damage awards and caused an increase in the amounts awarded.[54] Damages today may be given for lost comfort, love, companionship, and support.[55] Modern awards also compensate such injuries as mental anguish, loss of social position, humiliation, and pecuniary loss due to disruption of the marriage.[56] Most states also allow punitive damages when it appears the defendant's conduct was willful or wanton.[57]

The action for alienation of affections has existed in North Dakota since its enactment by statute in 1895. The law provides that "the rights of personal relation forbid: the abduction or enticement of a husband from his wife, or the abduction or enticement of a wife from her husband."[58] Although the statute gives a right of action for enticement or abduction, all the cases reported under the statute have been brought for alienation of affections.[59] It therefore appears the two torts have merged under the action for alienation of affections.

The elements of the action in North Dakota accord generally with those in other states. There must be wrongful conduct of the defendant, loss of consortium, and a causal connection between such conduct and loss.[60] North Dakota courts have not required proof of abandonment,[61] and have further held that the plaintiff's separation from his or her spouse prior to the interference by the defendant will not defeat the action.[62] Both compensatory and

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53. Curry v. Kline, 187 Kan. 109, 353 P.2d 508 (1960). Since the wife had no cause of action at early common law, damages recovered from wrongs done to the wife belonged not to her, but to her husband. Duffies v. Duffies, 76 Wis. 374, ____, 45 N.W. 522, 523 (1890).

54. Giltner v. Stark, 219 N.W.2d 700 (Iowa 1974) (award of $60,000); Turner v. Turner, 369 S.W.2d 675 (Tex. Civ. App. 1963) (award of $179,000).

55. Morey v. Keller, 77 S.D. 49, 85 N.W.2d 57 (1957).

56. Donnell v. Donnell, 220 Tenn. 169, 179, 415 S.W.2d 127, 132 (1967).

57. *See, e.g.*, Giltner v. Stark, 219 N.W.2d 700, 708 (Iowa 1974). For an example of a state statute that precludes recovery of punitive damages *see* ILL. REV. STAT. ch. 68 §§ 34-44 (Smith-Hurd 1959).

58. N.D.R.C. § 2718 (1895). The recent codification is found in N.D. CENT. CODE § 14-02-06 (1971).

59. *See* Tice v. Mandel, 76 N.W.2d 124 (N.D. 1956). *See also* King v. Hanson, 13 N.D. 85, 99 N.W. 1085 (1904), in which the court discusses the meaning of abduction but at the same time makes clear that the suit is for alienation of affections. Although a merger of the two actions may simplify this area of tort law, it must be remembered that the proof requirements are slightly different in that a suit for abduction requires proof that the spouses have separated while an action for alienation does not. Higham v. Vanasdal, 101 Ind. 160 (1884); Alaimo v. Schwanz, 56 Wis. 2d 198, 201, 201 N.W.2d 604, 606 (1972).

60. 76 N.W.2d at 129.

61. *Id.* at 126.

62. Rott v. Goehring, 33 N.D. 413, 422, 157 N.W. 294, 296 (1916).

exemplary damages can be awarded.[63]

It is significant to note that the North Dakota statute gives a cause of action for alienation of affections to a child for the alienation of his parent, and to a parent for the alienation of his child.[64] The parent's cause of action was derived from the common law which held liable anyone who abducted a child, enticed a child away, or harbored a child who had left home against the wishes of the parent.[65] The child's right to bring suit has received less approval from the courts, due in part to the denial of the child's right to bring the action at common law.[66] North Dakota is one of the few states that statutorily recognizes the child's right of action today. The action can be brought by a child against one who intentionally alienates the parent from the child. In an action by a parent or a child the proof requirements are the same as those in the action between adults. The interest to be protected is the loss of love, affection, and companionship, and damages may be recovered for mental anguish and distress.[67]

The tort of alienation of affections has been well received in this country as a redress for marital disruption. The action has been brought frequently in many states, due perhaps to the relative ease with which a plaintiff can sustain his burden of proof, the presumptions available to him, and the tendency towards liberality in fixing compensation. Yet, the popularity of the action and the meritorious interests the action purports to protect do not overshadow the harm caused by the action. This conclusion is best reflected by the trend toward abolishment in other states.

IV. NATIONAL TREND

Despite its initial positive reception in this country, the action for alienation of affections has come under scathing attack in this

63. 76 N.W.2d at 135. Plaintiff recovered $5,000 compensatory damages and $10,000 exemplary damages — later reduced to $7,500. Damages covered loss of love and consortium, physical pain, mental agony, lacerated feelings, wounded sensibilities, humiliation, blow to honor, hurt to family life, and suspicion cast on off-spring. *Id.* at 128.

64. N.D. CENT. CODE § 14-02-06 (1971).

65. *See* Strode v. Gleason, 9 Wash. App. 13, 510 P.2d 250 (1973). The plaintiff must generally show loss of the services and custody of the child in order to recover. *Id.* at ____, 510 P.2d at 252.

66. Nash v. Baker, 522 P.2d 1335 (Okla. 1974).

67. Wrangham v. Tebelius, 231 N.W.2d 753 (N.D. 1975). *Wrangham* involved an appeal from a trial court decision allowing two minor daughters to collect compensatory and punitive damages for the alienation of their mother's affections. The North Dakota Supreme Court granted the defendant a new trial because there was no direct testimony of damage to the daughters. *Id.* at 757. The right of a child to sue has been denied in many jurisdictions. For an excellent discussion of whether this right should exist *see* Comment, *Torts: Alienation of Affections: A Child's Right to Seek Damages for Alienation of His Parents' Affection*, 28 OKLA. L. REV. 198 (1975). *See also* Whitcomb v. Huffington, 180 Kan. 340, 304 P.2d 465 (1956) (holding that the action on behalf of a child should not exist). *Contra*, Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949).

century. The apparent failure of the action to strengthen the marital relationship, along with its ever present potential for abuse,[68] prompted Indiana to become the first state to legislatively abolish the action.[69] That same year New York also legislatively abolished the tort.[70] Prior to these enactments, Louisiana had become the first state to judicially refuse to recognize the action. In *Moulin v. Monteleone,*[71] the Louisiana court reasoned that since marriage was a civil contract and since the Louisiana Civil Code did not recognize a right of action arising out of breach of that contract, there could be no recovery.[72] The court further rejected the action by reasoning that the damages are mainly punitive and that the action should thus fall within the realm of criminal rather than civil law.[73]

After the initial wave of reform in the 1930's, the crusade against the action lost its momentum temporarily. Momentum was regained in the last two decades, aided by adverse publicity concerning alienation actions and a recognition of the serious abuses produced by the suit.[74] To date, twenty-five states have abolished the action for alienation of affections.[75] Twenty of these enactments have taken place within the last fifteen years.

The policy statement in the preamble to Florida's statute is indicative of the current general antipathy towards the action:

> Whereas, the remedies provided for by law for the enforcement of action based upon alleged alienation of affections have been subjected to grave abuses, causing

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68. IND. CODE ANN. § 34-4-4-1 (Burns Supp. 1973) These criticisms were mentioned in the preamble of the statute.

69. 1935 IND. ACTS ch. 208.

70. 1935 N.Y. LAWS ch. 263. The New York law was signed only ten days after the Indiana law.

71. 165 La. 169, 115 So. 447 (1927).

72. Moulin v. Monteleone, 165 La. 169, 178, 115 So. 447, 451 (1927).

73. *Id.* at 171, 115 So. at 448. The court also failed to find a cause of action based on natural law as opposed to positive law. *Id.* at 194, 115 So. at 456.

74. Bearbower v. Merry, 266 N.W.2d 128, 132 (Iowa 1978).

75. ALA. CODE § 6-5-311 (1975); ARIZ. REV. STAT. ANN. § 25-341 (Supp. 1979); CAL. CIV. CODE § 43.5 (West 1954); COLO. REV. STAT. § 13-20-202 (1973); CONN. GEN. STAT. ANN. § 52-572f (West Supp. 1979); DEL. CODE ANN. tit. 10, § 3924 (1974); FLA. STAT. ANN. § 771.01 (West 1964); GA. CODE ANN. § 30-109.1 (Cum. Supp. 1979); IND. CODE ANN. § 34-4-4-1 (Burns Supp. 1973); ME. REV. STAT. ANN. tit. 19§ 167 (Supp. 1979); MD. CTS. & JUD. PROC. CODE ANN. § 5-301 (1974); MICH. COMP. LAWS ANN. § 600.2901 (1968); MINN. STAT. ANN. § 553.01 (West 1980); MONT. REV. CODES ANN. § 17-1201 (1947); NEV. REV. STAT. § 41.380 (1973); 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 Supp. 1979); OKLA. STAT. ANN. tit. 76, § 8.1 (West Supp. 1979); OR. REV. STAT. § 30.840 (1977); VT. STAT. ANN. tit. 15, § 1001 (Supp. 1979); VA. CODE § 8.01-220 (1977); W. VA. CODE § 56-3-2A (Supp. 1979); WIS. STAT. ANN. 248.01 (West Supp. 1979); and WYO. STAT. § 1-23-101 (1977).

Five states restrict the action in some way. ARK. STAT. ANN. § 37-201 (Supp. 1979) (one year statute of limitations); ILL. ANN. STAT. ch. 68, §§ 34-44 (Smith-Hurd 1959) (only actual damages can be recovered); PA. STAT. ANN. tit. 48, § 170 (Purdon 1965) (action abolished only against strangers); R. I. GEN. LAWS § 9-1-14 (Supp. 1978) (one year statute of limitations); TENN. CODE ANN. § 28-305 (1956) (three year statute of limitations).

> extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victim 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.[76]

Despite such reasoning, the remedy of abolition is not always a popular one, and criticisms have been loud. Statutes such as Florida's have been found objectionable on the grounds that they are unconstitutional in that a marriage is a contract, and that denying the action impairs the obligation of contracts.[77] It has further been claimed that marital rights are property rights which cannot be abrogated without denying due process.[78] These arguments have been rejected by several state courts.[79] Furthermore, the United States Supreme Court has held that marriage is not defined as a contract within the constitutional prohibition preventing states from impairing the obligation of contracts.[80] Modern thought also dismisses the idea that either spouse has a property interest in the other through the marital bond.[81]

Although judicial abolition of the action has been infrequent, a partial step recently has been taken by a Washington appellate

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76. FLA. STAT. ANN. § 771.01 (West 1964).

77. *See, e.g.*, Hanfgarn v. Mark, 274 N.Y. 22, 8 N.E.2d 47 (1937). The court upheld the constitutionality of the New York statute which abolished the action for alienation of affections reasoning that a marriage resembled an institution more than it did a contract, and that the husband's rights to the wife's affections were not "property" within the due process clause of the fifth amendment.

78. *Id.* at 25, 8 N.E.2d at 48. This argument is based on the common-law concept that the rights which a husband had in the affection and society of his wife were frequently considered a property right. *See* Foot v. Card, 58 Conn. 1, 18 A. 1027 (1889).

79. *See, e.g.*, Bunten v. Bunten, 15 N.J. Misc. 532, 192 A. 727 (1937) (statute abolishing action constitutional); Nicholson v. Han, 12 Mich. App. 35, 162 N.W.2d 313 (1968). *Contra*, Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946) (invalidated the original Illinois statute abolishing actions for alienation of affections, criminal conversation, and breach of promise to marry because such repeal was in violation of a state constitutional provision which provided that every person should have a remedy at law for all personal injuries).

80. Maynard v. Hill, 125 U.S. 190 (1888).

81. Hanfgarn v. Mark, 274 N.Y. 22, 25, 8 N.E.2d 47, 48 (1937).

court.[82] In *Wyman v. Wallace,*[83] the court eliminated the action in cases of extra-marital sexual relations.[84] The court justified its usurpation of legislative power on the ground that it had a duty to examine and change concepts that were not in line with current conditions and thinking.[85] The court reasoned that the action was based on the outdated idea that the wife was one of the husband's chattels, and that her loss was a property loss to him.[86] The court was also distressed by the humiliation and general negative impact the action has on young children.[87] The court further asserted that the suit diminished human dignity and fails in its general attempt to prevent human misconduct.[88]

On appeal, the action was reinstated by the Washington Supreme Court in a five to four decision.[89] The supreme court felt that the legislature was better equipped to evaluate such a policy change.[90] While the supreme court refused to recognize the abuse potential in the action, it reasoned that even if abuse did exist, the remedy should not be abolition, but should rather be aimed at the particular evil which arises.[91] In making this statement, the court created an excellent opportunity for itself to examine the action in depth, to analyze these implied evils, and to suggest remedies other than abolition. Unfortunately, this opportunity was bypassed. The court was also weak in its criticism of the lower court's action, stating merely that the reasoning behind the lower court's decision lacked evidentiary support.[92] In light of the narrow decision, and the failure of the higher court to delineate policy reasons for retention of the action, the decision can be seen as a suggestion to the legislative body to eliminate this facet of the common law in Washington.

V. EVALUATION OF THE ACTION

The issue concerning the retention or elimination of the action

82. Wyman v. Wallace, 15 Wash. App. 395, 549 P.2d 71 (1976). For a discussion of this case *see* Comment, *Action for Alienation of Affections of a Spouse Abolished in Washington,* 12 GONZ. L. REV. 545 (1976-77); *see also* Comment, *Alienation of Affections: Flourishing Anachronism,* 13 WAKE FOREST L. REV. 585 (1977). One lower state court has recently suggested abolition of the action. *See* Thompson v. Chapman, 5 F.L.R. 2558, *cert. denied,* 593 P.2d 1078 (1979).

83. 15 Wash. App. 395, 549 P.2d 71 (1976).

84. *Id.* at 396, 549 P.2d 71 (1976).

85. *Id.*

86. *Id.* at 397-98, 549 P.2d at 72 (citing Moulin v. Monteleone, 165 La. 169, 177, 115 So. 447, 450 (1927)).

87. *Id.* at 400, 549 P.2d at 74.

88. *Id.* at 401, 549 P.2d at 74.

89. Wyman v. Wallace, 91 Wash. 2d 317, 588 P.2d 1133 (1979).

90. *Id.* at 321, 588 P.2d at 1135.

91. *Id.* at 320, 588 P.2d at 1134.

92. *Id.*

is delicate since social and moral questions are attached to the larger legal one. Involved in the debate are questions relating to the protection of marriage through legal means, the significance of marriage as a cornerstone of our society today, contemporary philosophical attitudes, and questions concerning an individual's right to seek redress for personal wrongs. All of these factors are crucial to an adequate discussion of the controversy. Part of the problem in reaching a viable answer to the utility of the action is that the issue cannot be stated too narrowly. To phrase the issue in terms of whether a family member's interest in the harmony of his or her home is of sufficient magnitude to warrant judicial protection appears to beg the question. The more relevant inquiry is to determine the utility of the action based on a consideration of all the major factors. This can best be accomplished through the use of a balancing test. This analysis will entail a balancing approach set up in the framework of three main considerations: the marriage relation, personal equities, and the right of privacy. Arguments on both sides will be weighed, and a resolution will be suggested concerning the utility of the action.

A. SUPPORT OF THE MARRIAGE RELATION

Marriage is, without question, one of the most treasured institutions in our society. It has been declared as "one of the basic civil rights of man, fundamental to our existence and survival."[93] The importance of marriage is most apparent in the social functions it serves, such as a secure and orderly setting for sexual activity, procreation, and the socialization of children. As a result of its exalted position in society, the institution of marriage has always found favor in the law.[94] One law propagated to secure the marriage is the suit for alienation of affections. The interests of the state in maintaining the action arise essentially from the state's interest in protecting the home and in preserving the marriage, with the goal of stabilizing family relationships.[95] Although marriage is valued highly in our society, the action for alienation of affections unrealistically defines the extent of that value, and the relationship of the marital partners. The marriage, as a union of individuals, will inevitably encounter discordant moments. Yet,

93. Loving v. Virginia, 388 U.S. 1, 12 (1967). *See also* Zablocki v. Redhail, 434 U.S. 374, 383 (1978).

94. *See* Board of Dirs. v. Green, 259 Iowa 1260, 1269, 147 N.W.2d 854, 859 (1967).

95. *See* Comment, *"Anti-Heart Balm" Legislation Revisited*, 56 N.W.L. REV. 538, 545 (1961).

the tort proceeds on the fictitious presumption of a perfectly harmonious spousal relationship destroyed by the thoughtless intruder. This presumption is misleading in two respects. First, though the defendant may not be totally blameless, he would ordinarily not be in such a position had the marriage been as strong and viable as the presumption suggests. As one judge recently stated, "any third person who kicks at the cornerstone of a shaky marriage will not bring it down without active support from one or both of the parties."[96] The second reason why the presumption is false is that it proceeds from the premise that the enticed spouse has no individual mind or will, but has allowed himself or herself to be led astray, to the detriment of the existing marriage. It has been argued that since all marriages will have rough spots, the marriage partners should be left alone to work out their problems and that those who intervene should be liable.[97] This argument, however, erroneously assumes the total guilt of the third party and the total innocence of the enticed spouse.

Granting, nevertheless, that the marriage relationship is deserving of society's protection, the question remains whether the action actually protects the marriage. The premise that the existence of the action does help preserve the marital relationship has never been documented. To the contrary, an analysis of the action reveals that the suit has just the opposite result. First, public notice of the action destroys the reputation of both spouses. Even when there is no sexual misconduct, or when the action is between relatives, the bringing of the action serves as a public acknowledgment that the marriage has gone awry. It is unlikely that this personal embarrassment will strengthen or preserve the marital bond. Second, the very nature of the action serves as a destructive influence on the marriage. The action tends to bring out the worst in people. As stated by one judge, "[a] prime motivation for bringing the action is often the need of the plaintiff to vindicate his or her position and justify one's own past shortcomings."[98] Greed, revenge, spite, and a desire to humiliate others in sacrifice of one's own dignity seem inherent in the suit. The plaintiff appears as an individual engaging in self-degradation by translating marital values into monetary terms.[99] This situation

96. Bearbower v. Merry, 266 N.W.2d 128, 138 (Iowa 1978) (McCormick, J., dissenting in part).
97. *Id.* at 132.
98. Wyman v. Wallace, 15 Wash. App. 395, 397, 549 P.2d 71, 73 (1976).
99. 266 N.W.2d at 138 (McCormick, J., dissenting in part).

can hardly serve as a constructive influence on preserving a stable marital relationship between two mature adults.[100]

Even if it is argued that the action preserves the marriage, and that the social good to be derived from marriage outweighs the harm fostered by the action, it must then be argued that the presence of the action will deter potential defendants from interfering with the marriage. Of course, the reality is that the defendant in a case involving extra-marital sexual relations becomes enmeshed with the plaintiff's spouse, generally without preconceived design.[101] Certainly in the case of a defendant parent there may be a motivation to ruin the marriage. However, even in cases in which such a motive exists, it is unrealistic to argue that the possible deterrent effect of the action will overcome the defendant's intent to undermine the marriage.

B. PERSONAL RECOMPENSE

Whatever effect one concludes the action has on the marriage relationship, it must be remembered that in an action for alienation of affections a personal injury also has been suffered. It is a basic tort law tenet that this personal injury deserves to be redressed. In the tort of alienation of affections the injury suffered by the plaintiff is the loss of consortium along with the mental and physical anguish fostered by the marital disruption. Certainly, situations exist where a genuine wrong has been committed which deserves to be redressed. However, in examining whether the action furthers equity for individuals, it must be remembered that equity to the plaintiff is not the only consideration. Whether the action itself causes unfair and adverse results to defendants and third parties must also be examined.

One inequitable facet of the alienation tort is the inherent difficulty in determining liability. In the frequent case today in which the marriage has gone awry, due in part to the plaintiff's conduct, the jury in a case involving extramarital sexual relations has the task of determining the pursuer and the pursued. Such a decision would be difficult for a trained social scientist, much less for an impressionable jury in this emotional setting.[102] The

100. The action as based on the relational interest is also inconsistent with modern no-fault divorce laws. Under a no-fault system there is no longer a need to prove fault as a basis for terminating a marriage. If irreconcilable differences exist, the divorce will be granted. *See* N.D. CENT. CODE § 14-05-03 (1971). In contrast, the tort of alienation of affections specifically entails placing the fault for the marital disruption on another.

101. 15 Wash. App. at 398, 549 P.2d at 74. *See also* Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 995 (1935).

102. Because of the vagueness of the liability concept in an alienation of affections suit, it is not

unfairness of the situation is exemplified by cases in which the plaintiff's separation from the spouse and the spouse's willing participation in the illicit affair has not prevented the jury from finding for the plaintiff.[103] By their nature such lawsuits are susceptible to the inflammatory plea and attitude of the plaintiff directed toward the scheming defendant, while encouraging the sympathetic jury to reach a verdict on the basis of passion and prejudice. Such a scenario has a great potential for injustice.

The plaintiff's right of redress must also be balanced against the destructive influence of damages in the action. Damage awards in an alienation of affections suit are difficult to determine, since intangible injuries are involved. The jury must consider not only the loss of consortium in setting an award, but also the injuries done to the plaintiff's health, reputation and mental state. These damages must in turn be mitigated by the lack of affection between the spouses, and the unhappy marital relations before the interference. Because there is no standard of measurement by which the jury can value these intangible rights, jury verdicts in this area of the law are frequently arbitrary and excessive.[104] These excessive awards are especially unjust in the many cases where the plaintiff sues not out of a desire to mend the already torn marriage, but for vindictive and mercenary reasons.

Weighing heavily against the plaintiff's right of recompense is the potential for abuse in the action and the harmful effect the tort has on innocent people. The injuries suffered from the publicity of such a suit can frequently outweigh the injury that caused the action. Since there exists such potential to damage reputations, the threat to sue can easily become, in effect, an extortion scheme. These abuses are especially prevalent in divorce settlements where the threat of suit may serve as a powerful leverage for the potential plaintiff in obtaining a disproportionate share of the marital property. The action also leaves open the possibility of collusion between the husband and wife to trap a wealthy but unwary defendant. Naturally, in this situation there is immediate reconciliation of the spouses after the settlement. Finally, the effect of bringing an alienation of affections action can be detrimental to family har-

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difficult to visualize a scenario where two lawsuits arise from every romantic affair, with the romantically involved pair both having to defend in the suits.

103. *See, e.g.*, Sebastian v. Kluttz, 6 N.C. App. 201, 170 S.E.2d 104 (1969).

104. *See, e.g.*, Castner v. Wright, 256 Iowa 638, 128 N.W.2d 885 (1964) (award of $45,000 ruled excessive); Roach v. Keane, 73 Wis. 2d 524, 243 N.W.2d 508 (1976) (award of $10,000 ruled excessive); Alaimo v. Schwanz, 56 Wis. 2d 198, 201 N.W.2d 604 (1972) (award of $15,000 ruled excessive).

mony when an intra-family suit is involved. Ironically, one of the purported goals of the action is the stabilization of family relationships. The long run cost of bringing the action can also be devastating in terms of the resulting emotional injury to innocent children of the marriage. Not only are children exposed to the parent's extramarital conduct and to turbulent intra-family suits, but children may also be forced to testify to these matters in court. This is a psychological cost that must ultimately be shouldered by society.

C. RIGHT OF PRIVACY

The third factor to consider in evaluating the action is an individual's interest in his privacy rights. These privacy rights consist of an individual's interest in avoiding unwarranted intrusion into his or her personal activities.[105] This includes a person's right to make fundamental choices involving himself, his family, and his relationship with others.[106] The importance of this privacy interest is best evidenced by the legal protections afforded this interest in our society. By intruding on an individual's privacy, one may find himself liable in tort for invasion of privacy[107] under any one of four general classes.[108] This privacy interest has constitutional significance as well. As a means of individual protection from governmental intrusion, the interest has been recognized as a fundamental right in the last fifteen years.[109] The right to freedom of choice in marriage and family relationships lies at the heart of this fundamental right of privacy.[110] This privacy right found fruition in the United States Supreme Court's opinion in *Griswold v. Connecticut*,[111] in which the Court found a right of marital privacy inherent in the fourth, fifth, and ninth amendments. The Court, in *Eisenstadt v. Baird*[112] construed *this right of sexual privacy* to inhere not only in the marriage relationship,

105. Shorter v. Retail Credit Co., 251 F. Supp. 329, 330 (1966).
106. Industrial Found. v. Texas Indus. Acc. Bd., 540 S.W.2d 668, 679 (Tex. 1976).
107. W. PROSSER, THE LAW OF TORTS § 117 (4th. ed. 1971).
108. The first class is "appropriation," which consists of appropriating plaintiff's name or likeness for the defendant's benefit. Carlisle v. Fawcett Pub., 201 Cal. App. 2d 733, 20 Cal. Rptr. 405 (1962); the second category is "intrusion," which consists of invasion of the plaintiff's solitude or seclusion. Ford Motor Co. v. Williams, 108 Ga. App. 21, 132 S.E.2d 206 (1963), *rev'd on other grounds*, 134 S.E.2d 32 (1963); third is "public disclosure of private facts," consisting of harmful publicity about a plaintiff's personal activities even though true. Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); the final class is self-explanatory, entitled "false light in the public eye." Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905).
109. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972).
110. Griswold v. Connecticut, 381 U.S. 479 (1965).
111. 381 U.S. 479 (1965).
112. 405 U.S. 438 (1972).

but to individuals as well.[113] Since the privacy right inheres both in the marriage relationship and in the individual, whether married or not, it follows that there may also be a privacy right to be protected when extramarital sexual conduct is the subject of an alienation of affections suit.[114]

Regardless of its constitutional dimensions or its basis in tort law, the privacy interest in freedom of choice as to emotional and sexual issues in one's life is important, and the question whether the alienation of affections action promotes or hinders protection of that interest is another factor to weigh in determining the utility of the action.[115] The question is almost rhetorical, since even a cursory evaluation of the tort makes it apparent that the action interferes with this interest. The tort undeniably allows society's intrusion into the emotional and sexual realm of another's life. Thus, the third factor in the balancing approach applied in this note, the privacy interest in one's emotional and sexual affairs, is clearly contravened by the action.

VI. CONCLUSION

The question whether the common law action for alienation of affections serves a constructive purpose today deserves careful thought in light of the important personal and societal interests at stake. These interests, analyzed in a balancing approach, accurately reflect the utility of the alienation action. While the marriage relation and the family unit certainly deserve protection, the social harm engendered by the tort, and the actual counterproductive effect of the action on the marriage overshadow these meritorious goals. Further, the interest in personal redress is outweighed by the inequitable nature of the action to those involved, the tremendous potential for unscrupulous schemes, and

113. *Id. See also* State v. Pilcher, 242 N.W.2d 348 (Iowa 1976). This construction of the right to individual sexual privacy has been strengthened by the abortion decisions. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1976); Roe v. Wade, 410 U.S. 113 (1973). *Cf.* Pontes v. Pontes, 135 N.J. Super. 50, 342 A.2d 574 (1975).

State statutes prohibiting unnatural sexual conduct such as sodomy, however, have consistently been upheld on the ground that the state's compelling interest in the promotion of moral decency and crime prevention overrides the privacy interest. Doe v. Commonwealth's Atty., 403 F. Supp. 1199 (1975), *aff'd*, 425 U.S. 901 (1976). *See also* People v. Hurd, 5 Cal. App.2d 865, 85 Cal. Rptr. 718 (1970).

114. Such a conclusion was reached in Kyle v. Albert, No. 75-10871-05-2 (Ct. C.P. Bucks County Pa., Mar. 16, 1976), in which a Pennsylvania trial court abolished the action of criminal conversation. The court held that the tort of criminal conversation violated an individual's right to engage in natural consensual sexual relations, and thus violated an individual's constitutional right of privacy. *Id.* Although such reasoning has never been applied to cases of extramarital affairs in alienation suits, the analysis should be identical since similar interests and conduct are involved.

115. This right of privacy analysis is restricted to alienation of affections cases involving extramarital affairs.

the psychological harm to children when the action is brought. Finally, even if one argues that the prior interests are balanced, because the alienation tort has a detrimental effect on privacy interests, on balance the action cannot be justified. Some change is necessary in this area of law. One alternative is revision of the action in a manner that alleviates the destructive aspects of the tort while still protecting the interests involved.[116] A statute that eliminates punitive damages and restricts compensatory damages to actual pecuniary loss would go far towards reducing the normally exorbitant awards recovered.[117] A statute which also makes proof of sexual intercourse a necessary element would have the salutory effect of eliminating some destructive intra-family suits. Unfortunately, such remedial measures will not significantly alter the harm fostered by the action. Extortionate demands will not be reduced, the prejudice to the defendant will not be lessened, and the determination of liability will not be made easier. Further, the psychological harm to children will not be lessened. Most important, the action's destructive impact on the marriage and the intrusion on privacy rights will not be ameliorated.

The position of advocating abolition is an unpopular one, but is clearly the most tenable option.[118] The marriage relation and the family unit will rest on a more stable foundation without the existence of the action. Although a plaintiff will lose his forum in the case in which there is a genuine wrong, the ultimate impact of this loss will be insignificant, since "[t]here is good reason to believe that even genuine actions of this type are brought more frequently than not with purely mercenary or vindictive motives."[119] The trend is perceptible in favor of abolition. Five state legislatures eliminated this outdated action last session alone.[120] The North Dakota Legislature would be wise to follow suit during the next session. Such a move would enhance the goal of

116. *See* Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935). *See also* Note, *The Case for Retention of Causes of Action for Intentional Interference with the Marital Relationship*, 48 NOTRE DAME LAW. 426 (1972).

117. For an example of this type of statute, *see* ILL. REV. STAT. ch. 68 §§ 35 & 36 (Smith-Hurd (1959).

118. Repeal of statutes allowing the action should include repeal of the child's right of action and elimination of the parent's action for the alienation of their children also. Such suits are susceptible to the same injustices that exist in the action between adults. There is little justification for retaining the child's cause of action if the adult's cause of action is abolished, since the child may be used as a pawn for the vengeful parent who may bring an action as the child's next friend. For an interesting discussion of this issue, see Note, *Torts: Alienation of Affections: A Child's Right to Seek Damages for Alienation of His Parent's Affection*, 28 OKLA. L. REV. 198 (1975).

119. W. PROSSER, THE LAW OF TORTS § 124 at 887 (4th ed. 1971).

120. ARIZ. REV. STAT. ANN. § 25-341 (Supp. 1979); GA. CODE ANN. § 30-109.1 (Cum. Supp. 1979); MINN. STAT. ANN. § 553.01 (West 1978); OHIO REV. CODE ANN. § 2305.29 (Page Supp. 1979); OKLA. STAT. ANN. tit. 76, § 8.1 (Supp. 1979).

flexibility in our legal system by confronting changing conditions while meeting the objective of justice.

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