
Family Law

Tortious interference with parental rights

by Heather Wheelock Winter

Many practitioners don't recognize that family law litigation occasionally intersects with tort law. Although Virginia does not recognize a cause of action for alienation of affection, seduction, or intentional infliction of emotional distress when the conduct causes harm to the marriage, there may be other civil tort remedies available in the family law arena.

Understanding the historical development of the law can help us counsel clients as they determine options to pursue. Virginia Code §8.01-220 abolished the tort of alienation of affection and states that "no civil action shall lie or be maintained in this Commonwealth for alienation of affection, breach of promise to marry, or criminal conversation upon which a cause of action arose or occurred on or after June 28, 1968." Va. Code Ann. §8.01-220(A) (2014). This code section also prohibits a civil action for seduction where the cause of action accrued after July 1, 1974. §8.01-220(B). Prior to the enactment of §8.01-220, a married party could sue a third party for money damages based upon willful or malicious interference with the marital relationship. Such suits were typically brought by one spouse against the other spouse's paramour. This news is not received easily by some clients who are dealing with infidelity. Being able to point to the law can sometimes help them see that even if they want to fight that battle, we are not permitted to by statute.

Previously, the law was unclear whether a spouse could sue a third party for intentional infliction of emotional distress instead. A 1985

case from the U.S. Court of Appeals for the Fourth Circuit ruled that a former husband could sue his ex-wife for intentional infliction of emotional distress for psychological damages stemming from the ex-wife's enforced separation of the ex-husband from their child. *Raftery v. Scott*, 756 F.2d 335 (4th Cir. 1985). Thus, the Fourth Circuit concluded that even though there were undertones of alienation of affection, the facts in that case independently supported a claim for intentional infliction of emotional distress. *Id.* at 339.

The Court reasoned that intentional infliction of emotional distress and alienation of affection are two separate causes of action. Under intentional infliction of emotional distress, "a plaintiff must establish that the tort is intentional or reckless, the tortfeasor's conduct is outrageous and intolerable, the wrongful conduct and the emotional distress are causally connected and the emotional distress is severe." *Raftery*, 756 F.2d at 339 n.4 (quoting *Womack v. Eldridge*, 215 Va. 338, 210 S.E.2d 145 (1974)). In order to recover for the tort of alienation of affection before its abolition by the legislature, a party did not need to prove outrageous and intolerable conduct leading to severe emotional distress. Instead, a plaintiff needed only to show a lower level of interference, a 'malicious' (meaning unjustifiable) interference, or an intention that such interference result in the loss of affection. *Raftery*, 756 F.2d at 339 n. 4. Alienation of affection was also unique because it required an existing family relationship and the tort of intentional infliction of emotional distress did not.

Therefore, the Court reasoned that not only did the two torts require different elements of proof, but also intentional infliction of emotional distress implied a higher burden of proof.

Even though *Raferly* was not binding on Virginia courts or legislature, the law prior to 2000 was that a spouse could recover against a third person for interference with a marriage under a theory of intentional infliction of emotional distress, despite Virginia's abolition of alienation of affection. In 2000, however, and unfortunately for some family law litigants, the Supreme Court of Virginia eventually disagreed with *Raferly* and ruled that Virginia Code §8.01-220 also abolishes claims for intentional infliction of emotional distress when the conduct causes harm to the marriage. *McDermott v. Reynolds*, 260 Va. 98, 530 S.E.2d 902 (2000). The basis for the tort of intentional infliction of emotional distress in *McDermott* was that the defendant had an adulterous affair with the plaintiff's wife, which he continued to flaunt after being confronted by plaintiff. *McDermott*, 260 Va. at 102, 530 S.E.2d at 904.

While aggrieved spouses currently may not be able to recover against a third party under either alienation of affection or intentional infliction of emotional distress when the alleged conduct causes harm to the marriage, Virginia common law apparently does recognize the tort of tortious interference with parental rights. *Wyatt v. McDermott*, 283 Va. 685, 725 S.E.2d 555 (2012). Wrongful custodial interference has been codified in Virginia Code at §18.2-49.1 as a criminal offense, but there is no civil remedy in that code section.

It is axiomatic that the relationship between a parent and child is a constitutionally protected liberty interest under the Due Process Clause of the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Wyatt v. McDermott*, 283 Va. at 692, 725 S.E.2d at 558 ("We recognize the essential value of protecting a parent's right to form a relationship with his or her child.") Therefore, the cause of action against third parties who seek to interfere with a parent's right to raise his or her child necessarily follows. *Wyatt*, 283 Va. at 692, 725 S.E.2d at 558.

The *Wyatt* court recognized that alienation of affection and tortious interference with parental or custodial relationships are two distinct causes of action with separate elements. The court noted:

Tortious interference with parental or custodial relationship' intimates that the complaining parent has been deprived of his/her parental or custodial rights; in other words, but for the tortious interference, the complaining parent would be able to exercise some measure of control over his/her child's care, rearing, safety, well-being, etc. By contrast, 'alienation of affections' connotes only that the par-

ent is not able to enjoy the company of his/her child; this cause of action does not suggest that the offending party has removed parental or custodial authority from the complaining parent.

Wyatt, 283 Va. at 698, 725 S.E.2d at 562 (quoting *Kessel v. Leavitt*, 511 S.E.2d 720, 761 n. 44 (W.Va. 1998)).

Consistent with Virginia law, the *Wyatt* court borrowed the elements of the tort of tortious interference with parental or custodial relationship from *Kessel*. The elements of the tort in Virginia are

(1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference.

Wyatt, 283 Va. at 699, 725 S.E.2d at 562 (quoting *Kessel*, 511 S.E.2d at 765-66).

Both tangible and intangible damages may be claimed, including compensatory damages for the expenses incurred in seeking the recovery of the child, lost services, lost companionship, and mental anguish. The cause of action precludes the award of equitable remedies. *Wyatt*, 283 Va. at 700, 725 S.E.2d at 563. However, "if a tortfeasor's tort was intentional rather than negligent, i.e., deliberately committed with intent to harm the victim . . . and if the evidence is sufficient to support an award of compensatory damages, the victim's right to punitive damages and the quantum thereof are jury questions." *Smith v. Litten*, 256 Va. 573, 579, 507 S.E.2d 77, 80 (1988). The burden of proof in this action is preponderance of the evidence; thus, there is no heightened standard of proof. *Wyatt*, 283 Va. at 701, 725 S.E.2d at 563.

The *Wyatt* court had reservations about the tort action fueling intra-familial warfare, and accordingly, barred the cause of action between parents. Therefore, a parent may raise an affirmative defense of "equal rights" or "substantially equal rights." The situation of substantially equal rights arises in the case of a child born outside of a marriage where the putative¹ father wishes to establish a parent-child relationship with his child, and until such a relationship has been established, may not have equal rights to the rights of the biological mother.

A second affirmative defense that a party can raise to not be held liable for the tort is if he or she possessed a reasonable, good faith belief that interference with the parent's parental or custodial relationship was necessary to protect the child from physical, mental, or emotional harm[; or] possessed a reasonable, good faith belief that the interference was proper . . . or reasonably and in good faith believed that the complaining parent did not have a right to establish or maintain a parental or custodial relationship with the minor child.

Id. at 702, 725 S.E.2d at 564 (quoting *Kessel*, 511 S.E.2d at 766).

The two defenses described are not an exhaustive list of defenses and courts may recognize other defenses as well.

Based on the law stated herein, family law clients do have some civil remedies available to them to pursue in litigation. Practitioners understand that clients in family law matters are often in a state of crisis, emotionally and financially. They seek justice from as many sources as possible. It is important in working with such clients that they understand the elements, the damages, and the limitations of courses of action in Virginia so that they can protect their rights and interests as permitted by our Commonwealth.

Endnote

1. A putative father is a man who is not yet considered the parent of the child under the law because he is not married to the child's mother, a court has not determined that he is the child's father, the man has not signed a written agreement acknowledging that he is the child's father, or he has not adopted the child.



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