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Domestic Relations—Alienation of Affections—Gorder v. Sims, ____ Minn. ____, 237 N.W.2d 67 (1975)

obligation which imposes a duty of care, loyalty, good faith, and full disclosure clearly attaches to the partnership relationship.[24] The latter duty requires full and frank disclosure of all matters affecting the partnership entity,[25] and it presumably was satisfied in this case because Heller discovered financial difficulties in April and notified his copartners of that fact in May.[26] In addition, Heller was entitled to do business with the firm and the trial court found no evidence indicating a breach of trust, fraud, or misconduct.[27] Consequently, Heller apparently did act in good faith and at arm's length and therefore could properly bring the bankruptcy action without breaching his duties to the partnership or his fellow shareholder-partners.

Domestic Relations—ALIENATION OF AFFECTIONS—*Gorder v. Sims*, ___ Minn. ___, 237 N.W.2d 67 (1975).

Some call it legalized "blackmail";[1] others find it to be an anachronism in contemporary society;[2] still others believe it prevents intrusion into the "special relationship which exists between a husband and wife."[3] This last view describes the recent posture of the Minnesota Supreme Court in affirming a $20,000 jury award for the tort of alienation of affections in *Gorder v. Sims*.[4] The court, by its dual acts of affirming a substantial jury award of damages and possibly lessening the proof required to establish the tort, has ripened this cause of action for renewed legislative attack.

In *Gorder*, a husband sued for the loss of his wife's affections which

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N.W.2d 708, 712 (1949) (partnership fiduciary duties), the *Heller* court could have reached the conclusion that the defendant did not breach his fiduciary duty without piercing the corporate veil.

24. *See* Lipinski v. Lipinski, 227 Minn. 511, 518, 35 N.W.2d 708, 712 (1949); Bloom v. Lofgren, 64 Minn. 1, 2, 65 N.W. 960, 961 (1896). *See generally* Note, *Fiduciary Duties of Partners*, 48 IOWA L. REV. 902 (1963).

25. *See, e.g.*, Crawford v. Lugoff, 175 Minn. 226, 228, 220 N.W. 822, 823 (1928). MINN. STAT. § 323.19 (1976) requires full disclosure "on demand." However, because the law of agency supplements the U.P.A., MINN. STAT. § 323.04 (1976), the disclosure requirement is not restricted to demand. *Accord*, Alexander v. Sims, 220 Ark. 643, 651, 249 S.W.2d 832, 836 (1952) (each partner has right to know all that others know and each is required to make full disclosure of all material facts within his knowledge).

26. ___ Minn. at ___, 235 N.W.2d at 826.

27. *Id.*

1. *See, e.g.*, ILL. STAT. ANN. ch. 68, § 34 (Smith-Hurd 1959) ("action for alienation of affections has been subjected to grave abuses and has been used as an instrument for blackmail by unscrupulous persons for their unjust enrichment").

2. *See, e.g.*, Moulin v. Monteleone, 165 La. 169, 176-78, 115 So. 447, 450 (1928) (court refused to recognize alienation of affections as a cause of action); Wyman v. Wallace, 15 Wash. App. 395, 549 P.2d 71 (1976) (per curiam) (judicial abolition of the tort).

3. *See* Gorder v. Sims, ___ Minn. ___, ___, 237 N.W.2d 67, 71 (1975).

4. ___ Minn. ___, 237 N.W.2d 67 (1975).

allegedly began during his convalescence from an operation. The defendant, a family friend, periodically met with the plaintiff's wife during this time for meals and for what the defendant termed "companionship." A subsequent confrontation between the parties about three years later led to the defendant's declaration that he would "win" the plaintiff's wife away from the plaintiff. This evidence prevailed over other evidence showing the plaintiff's own misconduct in the marriage and, in the view of the court, was sufficient to sustain the jury verdict that the defendant had alienated the affections of the plaintiff's wife.

In its review of the evidence, the court avoided discussion of what previously has been a key element of the tort—controlling cause.[5] In an alienation of affections suit, the Minnesota court has long required proof that the defendant's acts were the controlling cause of the tort in addition to showing four other elements: the existence of affections between the spouses, the loss of those affections, defendant's active part in causing the loss, and the willfullness and intentional nature of defendant's acts.[6] Controlling cause has also been called by the court the moving cause,[7] the inducing[8] or procuring cause,[9] but more than a substantial factor or proximate cause[10] in the loss of affections. In short, enticement has been the gravamen of this intentional tort.[11]

Although the *Gorder* court found that the plaintiff had established the four elements of the tort, it was silent regarding the element of controlling cause. The failure to discuss this traditional element of the tort cannot be viewed with any certainty as a judicial rejection of the element.[12] However, if proof of controlling cause is in fact no longer necessary to the establishment of the tort, defendants will find it more difficult to defend successfully[13] by showing circumstances, other than their

5. *See, e.g.*, Pedersen v. Jirsa, 267 Minn. 48, 52, 125 N.W.2d 38, 42 (1963); Johnson v. Lindquist, 177 Minn. 270, 271, 224 N.W. 839, 839 (1929); Kleber v. Allin, 153 Minn. 433, 434, 190 N.W. 786, 787 (1922).

6. *See, e.g.*, Pedersen v. Jirsa, 267 Minn. 48, 52, 125 N.W.2d 38, 41-42 (1963).

7. *See* Spangenberg v. Christian, 151 Minn. 356, 359, 186 N.W. 700, 701 (1922).

8. *See* Bathke v. Krassin, 78 Minn. 272, 274-75, 80 N.W. 950, 951-52 (1899). In reversing an award of damages against a defendant for lack of evidence, the court distinguishes generally between indirect and direct inducement. The implication is that only direct inducement would be actionable.

9. *See* Gjesdahl v. Harmon, 175 Minn. 414, 419, 221 N.W. 639, 640 (1928).

10. *See* Pedersen v. Jirsa, 267 Minn. 48, 54-55, 125 N.W.2d 38, 43 (1963).

11. *See id. See also* Lockwood v. Lockwood, 67 Minn. 476, 490, 70 N.W. 784, 789 (1897).

12. On appeal, the defendant stated that the plaintiff "would have the Minnesota court disregard the requirements of *enticement* and *controlling cause* which are essential under Minnesota law." Appellant's Reply Brief at 3 (emphasis in original).

13. Even prior to *Gorder*, the court observed that alienation of affections suits were "notoriously difficult to defend against," especially when the husband-wife privilege was invoked. *See* Pedersen v. Jirsa, 267 Minn. 48, 53, 125 N.W.2d 38, 42 (1963). MINN. STAT. § 595.02(1) (1976) sets forth the statutory husband-wife privilege. The exceptions to the

own conduct, which may have caused the loss in no lesser degree.[14] Thus, this possible increased potential for success, when combined with the court's allowance of generous punitive damages, would add teeth to a relatively dormant cause of action.

After holding that the evidence supported a jury finding that the tort had been committed, the court addressed the issue of damages. The majority in *Gorder* considered the damage award of $20,000 reasonable, relying on evidence of the wife's voluntary contribution of $10,000 toward the purchase of the family residence two years before the tortious conduct occurred. However, the court conceded the difficulty of ascertaining damages in cases of this kind.[15] The subjectivity of measuring damages and the inflammatory nature of the tort combined to invite an attack on the award by two dissenting justices. In his dissent, Justice Otis argued that because damages awarded for this tort are in truth punitive, the award should not exceed "an amount which is commensurate with the gravity of the defendant's intrusion into plaintiff's marital relation."[16] This position is consistent with previous reductions of jury awards in "heart balm" cases on the ground that the jury was influenced by passion and prejudice.[17] The nature of the action increases the likeli-

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privilege include situations where the spouses are opposing parties in civil litigation, which is not the case in an alienation of affections suit.

14. Evidence of plaintiff's conduct toward his spouse and the spouse's feelings toward the plaintiff are admissible to show that the defendant was not the cause of the loss of affections. *See, e.g.*, Spangenberg v. Christian, 151 Minn. 356, 358, 186 N.W. 700, 700-01 (1922). However, *Spangenberg* did not consider it error to fail to instruct the jury that plaintiff's misconduct mitigates damages. *Id.* at 359-60, 186 N.W. at 701.

In Pedersen v. Jirsa, 267 Minn. 48, 54-55, 125 N.W.2d 38, 43 (1963), the court implied that kindliness, attractiveness, desirability, financial superiority, and merely being a good friend did not of themselves provide actionable conduct. The acts complained of must be "calculated to entice the affections of one spouse away from the other." *Id.* at 55, 125 N.W.2d at 43.

15. Gorder v. Sims, ___ Minn. ___, ___, 237 N.W.2d 67, 71 (1975).

16. *See id.* at ___, 237 N.W.2d at 73 (Otis, J., dissenting). Justice Otis wrote that "plaintiff's own misconduct played a substantial role in alienating his wife's affections." *Id.* In Kleber v. Allin, 153 Minn. 433, 436, 190 N.W. 786, 787 (1922), the court listed the factors to be considered in determining the amount of damages: the existing state of affections, the attending circumstances, the motive of the intervening party, and the wantonness of the intervener's acts. Although he does not so state, Justice Otis's proposed reduction may have been influenced by balancing these factors. The majority of the court avoided a judicial balancing by adhering to the principle, enunciated in Spangenberg v. Christian, 151 Minn. 356, 359, 186 N.W. 700, 701 (1922), that the award of damages should "rest largely in the sound common sense of the jury," and should not be disturbed on appeal. It may be argued that the *Spangenberg* court's reliance on the jury's common sense was re-examined by the *Kleber* court and was found to be an unsatisfactory principle. While both cases were decided the same year, *Kleber* was the later of the two opinions. In any case, the issue, as the *Gorder* court indicates, was not strenuously argued by counsel on appeal. *See* ___ Minn. ___, ___, 237 N.W.2d 67, 71 (1975).

17. *Compare* Bathke v. Krassin, 78 Minn. 272, 274, 80 N.W. 950, 952 (1899) *with* Spangenberg v. Christian, 151 Minn. 356, 359, 186 N.W. 700, 701 (1922) (court specifically

hood that passion and prejudice will affect the jury's subjective findings. In the "interests of justice,"[18] the two dissenting justices would have reduced the jury award from $20,000 to $5,000, observing that this tort, not a favorite of the law, has been abolished in other jurisdictions.[19]

Abolition of the tort was then considered but rejected by the majority[20] of the *Gorder* court. The defendant argued that the tort was contrary to public policy in light of increased sexual freedom accepted by the married as well as the unmarried. Conceding this fact, the court relied on the trial court's instruction to the jury that the parties' behavior be judged by contemporary social standards.

The *Gorder* court referred advocates of abolition to the legislature for relief.[21] In fourteen states, "anti-heart balm" statutes have been enacted abolishing the torts of alienation of affections, breach of promise, criminal conversation, and seduction.[22] These statutes have been upheld

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found no passion or prejudice). The excessive damage award was the major issue in Bathke v. Krassin, 82 Minn. 226, 84 N.W. 796 (1901) and Bathke v. Krassin, 78 Minn. 272, 80 N.W. 950 (1899). The first appeal followed two trials, the first trial resulting in a new trial on the issue of excessive damages. On appeal from the second trial, the court remanded for a third trial, finding damages excessive. After this trial, defendants appealed again from an excessive award of damages and the court on review agreed. The court said that unless plaintiff agreed to a reduction of damages to $1500, a new trial would be ordered. 82 Minn. 226, 229, 84 N.W. 796, 797 (1901).

18. *See* Gorder v. Sims, ___ Minn. ___, ___, 237 N.W.2d 67, 73 (1975).

19. *Id.* at ___, 237 N.W.2d at 72.

20. *See id.* at ___, 237 N.W.2d at 71.

21. *See id.* The *Gorder* court chose not to abolish the tort judicially. However, both Louisiana and Washington courts have done so, relying heavily on state law which does not allow the recovery of punitive damages in civil suits. *See* Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1928); Wyman v. Wallace, 15 Wash. App. 395, 549 P.2d 71 (1976) (per curiam).

22. *See* ALA. CODE tit. 7, § 115 (1958) (no causes of action for alienation of affections, criminal conversation, or seduction of females age 21 or older); CAL. CIV. CODE § 43.5 (West 1954) (abolishes all four causes of action); COLO. REV. STAT. ANN. § 13-20-202 (1973) (abolishes all four causes of action); CONN. GEN. STAT. ANN. § 52-572b (West Supp. 1976) (abolishes alienation of affections and breach of promise to marry); FLA. STAT. ANN. § 771.01 (West 1964) (abolishes all four causes of action); ILL. ANN. STAT. ch. 68, §§ 34-40 (Smith-Hurd 1959) (actual damages only recoverable in alienation of affections suit); IND. CODE ANN. § 34-4-4-1 (Burns Supp. 1976) (abolishes all four causes of action); MD. CTS. & JUD. PROC. CODE ANN. § 5-301 (1974) (abolishes alienation of affections and breach of promise); MICH. COMP. LAWS § 600-2901 (1968) (abolishes all four causes of action); NEV. REV. STAT. § 41.380 (1973) (abolishes breach of promise and alienation of affections); N.J. STAT. ANN. § 2A:23-1 (West 1952) (abolishes all four causes of action); N.Y. CIV. RIGHTS LAW § 80-a (McKinney 1976) (abolishes all four causes of action); PA. STAT. ANN. tit. 48, §§ 170-171 (Purdon 1965) (abolishes breach of promise and alienation of affections); WYO. STAT. § 1-728 (1959) (abolishes all four causes of action). *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 10.2, at 267-68 (1968) (reasons for adoption of such statutes); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 124, at 887-88 (4th ed. 1971) (questioning desirability of such statutes and discussing the courts' construction of them).

against constitutional challenge.[23] In Illinois, however, a successful challenge was based on the state constitutional provision which guarantees a legal remedy for every injury suffered.[24] The Minnesota Constitution contains a similar clause.[25] Relying on that clause, one of the earliest Minnesota alienation of affections cases extended the remedy to a woman.[26] Abrogation of the remedy may conflict with the constitutional guarantee unless both a reasonable substitute and a permissible objective are found.[27] The objective might be simply to prevent vexatious litigation,[28] which is not unforeseeable if alienation of affections has been made more attractive to the litigant. However, discovery of a reasonable substitute for the tort requires greater imagination.

The Minnesota Legislature has failed on at least two occasions to pass bills which would have abolished the tort.[29] Possibly the belief prevails that abolition of alienation of affections might "reverse abruptly the entire tendency of the law to give increased protection to family interests and the sanctity of the home."[30] Although it is unlikely that the threat of substantial jury awards will strengthen the family interest, the *Gorder* award may provide a basis for legislative reconsideration of abolition of the tort.

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23. *See, e.g.*, Bunten v. Bunten, 15 N.J. Misc. 532, 192 A. 727 (Sup. Ct. 1937); Hanfgarn v. Mark, 274 N.Y. 22, 8 N.E.2d 47 (1937) (sustained statutory abolition of alienation of affections); Fearon v. Treanor, 272 N.Y. 268, 5 N.E.2d 815 (1936) (sustained statutory abolition of breach of promise).

24. *See* Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946). The amended Illinois statute, ILL. STAT. ANN. ch. 68, §§ 34-40 (Smith-Hurd 1959), permits recovery of actual damages only and does not permit the financial status of the defendant, the plaintiff's mental anguish or reputation, and other elements to be considered in the award of damages. The amended statute as it relates to breach of promise was found constitutional in Smith v. Hill, 12 Ill.2d 588, 147 N.E.2d 327 (1958). What the amended statute does, in effect, is to make possible recovery so minimal as to discourage all but truly injured parties from bringing suit.

25. *Compare* MINN. CONST. art. I, § 8 *with* ILL. CONST. art. I, § 12.

26. *See* Lockwood v. Lockwood, 67 Minn. 476, 481-82, 70 N.W. 784, 785 (1897).

27. *Cf.* Carlson v. Smogard, 298 Minn. 362, 215 N.W.2d 615 (1974) (third party's right of indemnity unconstitutionally extinguished by workers' compensation laws because no reasonable substitute and no legitimate legislative objective). *But see* Haney v. International Harvester Co., 294 Minn. 375, 384-85, 201 N.W.2d 140, 145-46 (1972) (dictum). The *Haney* court cites Hanfgarn v. Mark, 274 N.Y. 22, 8 N.E.2d 47 (1937), observing that the New York statute which abolished the tort of alienation of affections was found constitutional because it furthered a "legitimate legislative objective in correcting an evil growing out of the marriage relationship." 294 Minn. at 385, 201 N.W.2d at 146. The *Haney* court implies that common-law rights may be abrogated without a reasonable substitute if a legitimate legislative objective is fostered. *See id.* at 384-85, 201 N.W.2d at 145-46. *See also* Allen v. Pioneer Press Co., 40 Minn. 117, 122-23, 41 N.W. 936, 938 (1889).

28. *See, e.g.*, Haney v. International Harvester Co., 294 Minn. 375, 385, 201 N.W.2d 140, 146 (1972).

29. Bills were introduced in 1977, H.F. 302, 70th Minn. Legis., 1st Sess. (1977), and in 1974, S. 2947, 68th Minn. Legis., 2d Sess. (1974).

30. *See* W. PROSSER, *supra* note 22, at 887.