

MARITAL TORTS: A PRIMER FOR THE FAMILY
LAW PRACTITIONER

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Section Two

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I. Introduction to Marital Torts

[U]nder the present status of the law in this state, with what appears to be a glaring inconsistency in that a wife is given the right to sue her husband for a broken promise involving property . . . but not for a broken arm nor a broken body. To make such a distinction renders the person of the wife in a marriage completely subjugated to the will of her husband, as far as civil liability is concerned, during marriage, and that such injuries are of no concern or value when placed in the scales of justice alongside property rights. This seems to be inconsistent, inhumane, and contrary to the true spirit and intent of the acts passed for the emancipation of women in an enlightened civilization.¹

Marital torts are civil suits used to compensate on spouse financially for torts inflicted during the marriage by the other spouse. As marital torts are becoming an emerging trend in family law across the states, the question arises - are these torts applicable to Indiana divorces? Specifically, the question in Indiana remains whether Indiana, as a no-fault divorce state, would allow a tort action to be joined with the divorce proceedings or whether Indiana would disallow such joinder on the theory that there is no room in a no-fault divorce action for fault-based remedies?

Marital tort law came into existence with the abrogation of the Doctrine of Interspousal Immunity, which barred all actions between husband and wife. In Indiana, this doctrine was abolished in 1972 in the case of *Brooks v. Robinson*² where the Court concluded that the doctrine could not be upheld “under the guise of maintaining the peace and harmony of the marriage.”³ The abolishment of this doctrine in Indiana and in almost every state⁴ has provided today’s divorce client with a range of potential tort causes of action.

¹ *Hunter v. Livingston*, 123 N.E.2d 912, 915 (Ind. App. 1955) (quoting Judge Bowen).

² 284 N.E.2d 794 (Ind. 1972).

³ *Id.* at 79.

⁴ Although Georgia and Louisiana still recognize interspousal immunity, they do so with exception in the domestic violence cases. See *Larkin v. Larkin*, 268 Ga. App. 127 (2004); *Myhre v. Erler*, 575 So.2d 519 (La. Ct. App. 1991).

Although Indiana case law is not clear as to whether tort actions may be joined with divorce proceedings, there are a number of marital torts cases in the Indiana appellate system. Many of these cases are discussed below.

II. Marital Tort Causes of Action in Indiana

A. Assault and Battery

Assault and battery claims are most prevalent in the area of domestic-violence. Assault and battery cases can include situations ranging from relatively minor incidents to the near killing of the victim. Indiana is no exception to these types of cases. However, as the following Indiana case shows, when assault and battery claims are brought with a dissolution action, other issues must be resolved.

In *McNevin v. McNevin*,⁵ after husband and wife separated, husband allegedly struck and injured wife. Husband then filed for divorce. After the decree of dissolution was entered, ex-wife brought a cause of action against ex-husband alleging she had sustained injuries as a result of the ex-husband's attack upon her while they were still married. Concluding that a personal injury claim is property subject to distribution at the time of dissolution, the trial court dismissed ex-wife's complaint, finding that a dissolution decree bars an independent action involving divisible property.

The Court of Appeals reversed the trial court and found that a tort claim by one spouse against the other which has not been reduced to judgment at the time of final separation was not divisible and therefore was not marital property. In finding that tort actions for personal injuries were generally not personal property, the court found that "an unliquidated tort claim has no present ascertainable value and any attempt at valuation would be based upon pure speculation . . .

⁵ 447 N.E.2d 611 (Ind. Ct. App. 1983).

. .⁶ Therefore, in Indiana, a party can sue for assault and battery after a dissolution decree has been entered.

B. Infliction of Emotional Distress and Invasion of Privacy

Although the most common domestic violence tort is assault and battery, the tort most litigated in appellate courts is infliction of emotional distress.

In *Pohle v. Cheatham*,⁷ plaintiff ex-wife sued defendant ex-husband for intentional invasion of privacy and intentional infliction of emotional distress after ex-husband distributed photocopies of Polaroid photographs taken of ex-wife in a state of nudity and performing a sex act while the two were estranged but still married. A year later the parties' marriage was dissolved. According to a catchall provision in the court-approved property settlement, each party was awarded any miscellaneous personal property in their respective possession. The pictures were in ex-husband's possession and therefore were awarded to him in the dissolution decree.

At trial, ex-husband contended ex-wife impliedly waived her right to complain about his publication of the photographs as she voluntarily submitted to him taking the photographs without inquiring what he planned to do with them. The trial court entered partial summary judgment on his defense of waiver. the appellate court affirmed the trial court, holding that from such limited consent, it could not be inferred that ex-wife intended to waive her right to complain about the public distribution of the photographs.⁸ Wife was awarded \$100,000.00 compensatory and \$100,000.00 punitive damages.

⁶ *Id.* at 618.

⁷ 724 N.E.2d 655 (Ind. Ct. App. 2000).

⁸ *Id.* at 660.

The case centered on issues of waiver, specifically the causes of action ex-husband alleged wife had waived. Ex-wife's claim for invasion of privacy is based on the public disclosure of private facts. Such a claim requires proof of the following essential elements: 1) private information was publicly divulged; 2) to persons who had no legitimate interest in the information; 3) in a manner that was coercive and oppressive; and 4) such information would be highly offensive and objectionable to a reasonable person of ordinary sensibilities.⁹ Ex-wife's additional claim of intentional infliction of emotional distress applies "when one by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another."¹⁰ the court further noted that it is "the intent to harm someone emotionally that constitutes the basis for this tort."¹¹

Another very interesting case is *Landis v. Landis*¹² which dealt with post-dissolution torts of assault and battery, intentional interference with a business relationship and intentional infliction of emotional distress. In that case, the former husband's outrageous conduct relating to a jointly owned business venture resulted in a jury award of over 2.1 million dollars compensatory and \$50,000.00 punitive damages that was upheld on appeal. since the case essentially arose out of post-dissolution torts it is not directly on point with the main thrust of these materials but since most family law practitioners deal with post-dissolution issues it is an important case to review.

⁹ *Id.* at 659.

¹⁰ *Id.*

¹¹ *Id.*

¹² 664 N.E.2d 754 (Ind. Ct. App. 1996).

C. Fraud

Fraud within the marital context primarily arises in the division of property during the dissolution, where one spouse conceals property from another.¹³ As the following Indiana cases show, these cases are fact sensitive as to whether the court will reopen the case after the final decree of dissolution has been entered.

In *Ehle v. Ehle*,¹⁴ the Court found fraud where the husband failed to disclose all of the stock in his proposed net worth statement. This finding after the Decree of Dissolution was entered led to the reopening and modification of the property settlement.

On the other hand, in *Dean v. Dean*,¹⁵ divorced wife brought a fraud in the inducement claim against former husband, alleging that husband promised her \$2500 at a future time if she signed the marriage dissolution agreement. The Court held that wife could not have a claim of fraud in the inducement after the Decree of Dissolution because judgment of dissolution is a final judgment not subject to collateral attack. Upon review of Indiana case law there does not appear to be any support for allowing a separate cause of action for fraud in the context of a dissolution proceeding; rather the remedy is to reopen the dissolution under Indiana Trial Rule 60(B) by alleging fraud.

D. Illegal Wiretapping – Monitoring and Recording Telephone Conversations

Contested custody actions usually require each spouse to expose the worst in the other spouse, making the temptation on the part of one spouse to tape telephone conversation of an

¹³ See *Rocca v. Rocca*, 760 N.E.2d 677 (Ind. Ct. App. 2002); *In re Scahill*, 767 N.E.2d 976 (Ind. 2002).

¹⁴ 737 N.E.2d 429 (Ind. Ct. App. 2000).

¹⁵ 785 N.E.2d 309 (Ind. Ct. App. 2003).

opposing spouse irresistible.¹⁶ This issue has recently been addressed in two separate cases in the Indiana Court of Appeals.

In *Leisure v. Wheeler*,¹⁷ a case involving modification of custody, the Indiana Court of Appeals addressed a father's taping of telephone conversations between a mother and their child. The father claimed he had a right to tape the conversation, relying on the earlier Court of Appeals decision of *Apter v. Ross* that found no violation of the Federal Wiretap Act and allowed as evidence a transcript of a recorded telephone conversation between the mother and child where the purpose in taping the phone conversation was for the "parent's concern for a child's well-being."¹⁸ In addition, the *Apter* Court found the recording did not violate Indiana's Wiretap Act because a parent has the power to consent on behalf of his or her minor child to the recording of that child's phone conversation.¹⁹

In clarifying their earlier decision in *Apter*, the Court in *Leisure* held that if the trial court finds the recording was not done for the well-being of the child but instead as a way to interfere with the other parent's relationship with the child, the lower court may consider this as a factor in modifying custody.²⁰ "As the Parenting Time Guidelines indicate, children should generally be able to engage in telephone conversation with a parent without the other parent recording those conversations."²¹ Nevertheless, the Court found the trial court did not err by concluding that the

¹⁶ Ann B. Frick & Marjorie J. Long, *Interspousal Wiretapping and Eavesdropping: An Update—Part I*, 24 Colo. Law 2343, 2343 (1995).

¹⁷ 828 N.E.2d 409 (Ind. Ct. App. 2005).

¹⁸ *Apter v. Ross*, 791 N.E.2d 744, 754-55 (Ind. Ct. App. 2003).

¹⁹ *Id.* at 756.

²⁰ *Leisure*, 828 N.E.2d at 416.

²¹ *Id.*

Father's taping of the child's telephone conversation did not establish a substantial change in circumstances which required a modification of custody.²²

In another recent Indiana case, *Dommer v. Dommer*,²³ wife brought action against husband, alleging that he recorded her conversations and attempted to use that information gathered from the wrongful recordings in the later filed action for dissolution. The trial court granted summary judgment to husband on his wife's claim, finding that the Indiana Wiretapping Act has never been applied to prohibit wiretapping in the marital home.²⁴ The Court of Appeals reversed the trial court's decision, holding that there is no marital home exception in Indiana's Wiretap Act when the language of the statute does not suggest the legislature intended such an exception.²⁵ However, the Court in *Dommer* also emphasized that the intent of the person making the recordings will determine whether or not damages are appropriate in these cases. Therefore, tort suits brought under the wire tap statutes will be highly fact sensitive.

It is important to note that under the federal and Indiana statutes covering illegal wire tapping the wronged party can recover reasonable attorney fees. This is significant because the inability to recover attorney fees is often a huge deterrent to filing a tort action. It is also important to realize that there are several different remedies available to the wronged party under the statutes and this allows a practitioner to select the most appropriate remedy for a wronged party's particular fact scenario.

²² *Id.*

²³ 829 N.E.2d 125 (Ind. Ct. App. 2005).

²⁴ *Id.* at 128.

²⁵ *Id.* at 142.

E. Intentional Interference with a Business Opportunity

There is little case law on the tort of intentional interference with a business opportunity in the context of marital relationships with the exception of the *Landis* case mentioned above. However, this is a tort that family law practitioners likely encounter on a frequent basis. It is certainly not unusual to have a fact scenario where a spouse has an affair with a co-worker and then the other spouse, after discovering the affair, reports the affair to the offending spouse's superiors, resulting in that spouse's termination from employment. This type of fact pattern could subject the spouse who reported the activities to a suit for intentional interference with a business opportunity. However, the spouse who reported would possibly have some valid defenses and of course the cheating spouse would make for less than a sympathetic "victim" of tortious activity. This tort could arise under a number of fact scenarios and practitioners must be able to identify them when they arise.

F. Torts Involving Parents and Children

Like so many of the topics covered in this article it would be impossible to truly do justice to the topic of torts involving parents and children, but the topic will hopefully be covered in enough depth for practitioners to spot potential parent/child torts. The seminal case in this area is the Indiana Supreme Court case of *Barnes v. Barnes*.²⁶ *Barnes* involved a tort suit brought by a child against her father as a result of her father allegedly raping her as a child. The court in *Barnes* held, "we conclude that when, as here, a cause of action is predicated upon a claim of intentional felonious conduct, and there is no issue of parental privilege, the doctrine of parental tort immunity will not apply to preclude the action."²⁷

²⁶ 603 N.E.2d 1337 (Ind. 1992).

²⁷ *Id.* at 1342.

Barnes can be contrasted with *Cooley v. Hosier*²⁸ wherein the Court of Appeals upheld summary judgment for a father who was being sued by his son (through son's mother as next friend) after he negligently allowed the son to swallow drain cleaner. The court in *Cooley* held that parental immunity survives the *Barnes* decision as it relates to negligent care of a child since *Barnes* dealt only with intentional acts of a parent against a child. Therefore, the key factor in whether or not parental immunity will apply in Indiana centers on whether the actions of the parent were intentional or merely negligent.

III. Marital Torts – Other Jurisdictions

Because of the emerging trend of marital torts among the states, there have been a variety of potential causes of action that should be mentioned. Although there does not appear to be Indiana appellate decisions regarding some of the torts that follow, it does not mean that the torts could not be pursued in Indiana if the appropriate fact scenario arises. Indiana practitioners should be aware of the trends in other jurisdictions so that they can spot potential causes of action on behalf of their clients.

A. Fraudulent Inducement to Marry

In *Miller v. Miller*,²⁹ ex-husband sued ex-wife and her parents for damages on the theory of fraudulent inducement to marry. Ex-husband alleged that for the purpose of inducing him to marry ex-wife, defendants knowingly misrepresented to him that she was pregnant with his child, and continued to perpetrate this fraud against him for the next fifteen years for the purpose of causing him to perform the duties of husband and father. Ex-husband further alleged that after fifteen years, ex-wife revealed to the child that he was not in fact her father.

²⁸ 659 N.E.2d 1127 (Ind. Ct. App. 1996).

²⁹ 956 P.2d 887 (Okla. 1998).

A claim for fraudulent inducement to marry must allege all the elements of common law fraud: 1) a false material representation, 2) made as a positive assertion which is either known to be false, or made recklessly without knowledge of the truth, 3) with the intention that it be acted upon, and 4) which is relied upon by a party to that party's detriment.³⁰ In addition, this Court held that a necessary restriction to this tort is that "a misrepresentation inducing one to enter into a valid marriage must go to the essential ingredients of the marriage in order to sustain a finding of materiality sufficient to support a cause of action for fraudulent inducement to marry."³¹ The Court reasoned that "[l]imiting materiality to those representations which go to the essence of the marital relationship will avoid misuse of the judicial system to avenge hurt feelings and disappointed dreams."³²

In this case the Court found that the true claim of the existing pregnancy coupled with the false representation that the child is that of the prospective spouse goes to the essentials of the marital relationship and therefore supports an action based on fraud.³³

B. Intentional Infliction of Emotional Distress

While recovery of emotional distress damages is permitted by most jurisdictions in cases of intentional torts, a number of these cases involving intentional infliction of emotional distress have arisen in the marital context.

In *G.A.W., III v. D.M.W.*,³⁴ the court held that former husband was entitled to bring action of intentional infliction of emotional distress against former wife for her misrepresentations concerning paternity of children born during marriage.

³⁰ *Id.* at 902.

³¹ *Id.* at 903.

³² *Id.*

³³ *Id.*

A federal circuit court in *Raftery v. Scott*³⁵ found the facts surrounding a former wife's continuing and successful effort to destroy and prevent the rehabilitation of a relationship between the former husband and the parties' son supported a claim for intentional infliction of emotional distress.

Many of the distress claims related to a dispute involving an assault and battery claim. In *Simmons v. Simmons*,³⁶ a Colorado Court held that former wife could sue former husband for damages for personal injuries during the marriage where husband assaulted wife by throwing coffee on her, and on another occasion without provocation, intentionally kicked, slapped, hit her and tore her ear, and where this outrageous assaultive conduct caused the wife to suffer emotional distress.

Similarly, the court in *Feltmeier v. Feltmeier*,³⁷ held that a cause of action for intentional infliction of emotional distress was sufficiently made out by a showing of extreme and outrageous behavior where the husband in a divorce case beat the wife at least eleven times in the course of their eleven-year marriage, and where wife proved she had been diagnosed with post-traumatic stress disorder, depression, loss of self-esteem, and fear of men and of forming relations with them.

Claims for intentional infliction of emotional distress have also been supported by threatening or harassing behavior. In *Behringer v. Behringer*,³⁸ the court held that a claim of intentional infliction of emotional distress was supported by evidence where the wife told the

³⁴ 596 N.W.2d 284 (Minn. App. 1999).

³⁵ 756 F.2d 335 (4th Cir. 1985).

³⁶ 773 P.2d 602 (Colo. App. 1988).

³⁷ 777 N.E.2d 1032 (Ill. App. Ct. 2002).

³⁸ 884 S.W.2d 839 (Tex. Ct. App. 1994).

husband that she would call a hit man to kill him and where the wife pointed a pistol at the husband and pulled the trigger several times.

C. Tortious Infliction of Venereal Disease

In *McPherson v. McPherson*,³⁹ an ex-wife sued ex-husband, who transmitted Human Papilloma Virus to her when they engaged in sexual relations prior to their divorce. The Maine Court found that a cause of action exists for negligent transmission of sexually transmitted disease. The Court following other recent negligent transmission of sexually transmitted disease cases held that “one who knows or should know that he or she is infected with a sexually transmitted disease is under a duty to protect sexual partners from infection.”⁴⁰

In *Hamblin v. Davidson*,⁴¹ ex-wife sued ex-husband, alleging he negligently infected her with the genital herpes virus. The Court further clarified the duty rule from existing case law including *McPherson*, finding “the duty to prevent transmission ‘may arise where a person does not have medical confirmation that the disease has been contracted.’”⁴² In determining that at the very least, a genuine issue of material fact existed as to whether ex-husband knew or should have known he had a sexually transmitted disease, the Court relied on evidence that the ex-husband had engaged in at least one extramarital sexual relationship and had unprotected sex.⁴³ In addition, the ex-husband had symptoms of a sexually transmitted disease at various times after he began having extramarital sex.⁴⁴

³⁹ 712 A.2d 1043 (Me. 1998).

⁴⁰ *Id.* at 1046.

⁴¹ 50 S.W.3d 433 (Tenn. Ct. App. 2000).

⁴² *Id.* at 439.

⁴³ *Id.*

⁴⁴ *Id.*

D. Racketeer Influenced and Corrupt Organizations Act (RICO)

Within the field of family law, civil RICO is making an appearance in the aftermath of divorce cases with money as the motivating factor.⁴⁵

In *Perlberger v. Perlberger*,⁴⁶ a wife brought civil RICO charges against her former husband, a prominent divorce attorney, alleging that he misrepresented his true income by means of a fraudulent scheme to both her and the court during divorce proceedings.

This ongoing case has survived many motions for summary judgment, but only time will tell if it passes the test of litigation. This case represents a small, but growing, handful of cases that are using civil RICO in the divorce context.⁴⁷ Although no ex-spouse has prevailed on the merits for RICO violation to date, the possibility of treble damages and attorneys' fees assures that there will be more RICO accusations in the marital context in the future.⁴⁸

E. Wrongful Death

A common theme in wrongful death cases between ex-spouses involves the death of a child from the marriage. Wrongful death cases are brought between ex-spouses when it is alleged that the intentional, reckless, or negligent acts of a spouse led to the death of a child. In *Spears v. Spears*,⁴⁹ ex-husband brought a wrongful death action for negligence against his ex-wife, who was driving the car in which the couple's child, who was a passenger, was killed.

⁴⁵ Erin Alexander, *The Honeymoon is Definitely Over: The Use of Civil RICO in Divorce*, 73 San Diego L. Rev. 541, 542 (2000).

⁴⁶ See *Perlberger v. Perlberger (Perlberger I)*, No. CIV.A.97-4105, 1997 WL 597955 (E.D. Pa. Sept. 16, 1997); *Perlberger v. Perlberger (Perlberger II)*, No. CIV.A.97-4105, 1998 WL 76310 (E.D. Pa. Feb. 24, 1998); *Perlberger v. Perlberger (Perlberger III)*, No. CIV.A.97-4105, 1998 WL 964182 (E.D. Pa. Nov. 4, 1998); *Perlberger v. Perlberger (Perlberger IV)*, 32 F. Supp. 2d 197 (E.D. Pa. 1998); *Perlberger v. Perlberger (Perlberger V)*, 34 F. Supp. 2d 282 (E.D. Pa. 1998); *Perlberger v. Perlberger (Perlberger VI)*, No. CIV.A.97-4105, 1999 WL 79503 (E.D. Pa. Feb. 12, 1999).

⁴⁷ Alexander, *supra* note 41, at 545.

⁴⁸ *Id.*

⁴⁹ 3 S.W.3d 691 (Ark. 1999).

However, because Arkansas recognizes the doctrine of parental immunity, the Court barred the ex-husband's claims.⁵⁰ Many jurisdictions have now limited or rejected parental tort immunity, so Arkansas contravenes the current trend on this issue.

IV. Legal Obstacles and Considerations for Marital Torts in Indiana

With the abrogation of Interspousal Immunity, there are two primary legal defenses to tort actions, which must be carefully addressed before proceeding with a claim: the statute of limitations and *res judicata*.

A. Statutes of Limitation

In Indiana, the statutes of limitation require that civil actions for injury to a person or character must be brought within two years after the cause of action accrues.⁵¹ This would include the marital torts of assault and battery, the infliction of emotional distress, and possibly the tortious infliction of venereal disease. In the case of domestic violence, even if a victim had endured many years of abuse, she will only be able to bring a tort action for injuries that occurred in the most recent two years.

In actions for relief against marital fraud, the action must be commenced within six years after the cause of action accrues.⁵² This limitation appears to also apply to the marital tort of fraudulent inducement to marry.

B. *Res Judicata* and Joinder

Res judicata and the related defenses of collateral estoppel and joinder may arise when seeking a marital tort after the final entry of a Decree of Dissolution.

⁵⁰ *Id.* at 692.

⁵¹ Ind. Code § 34-11-2-4.

⁵² Ind. Code § 34-11-2-7.

Joinder becomes an issue when the tort causes of action are joined with divorce proceedings. There are several states such as Texas and Tennessee that “encourage” joinder of all actions in the interest of judicial economy.⁵³ Other states, such as Arizona and Colorado, bar joinder of tort and divorce actions, because one is legal in nature and the other is equitable.

Even if joinder is allowed in Indiana, if the client fails to assert the tort claim, the doctrine of *res judicata* will prevent the future prosecution of the tort cause of action. *Res judicata* and collateral estoppel prevent the relitigation of certain claims or issues which were already litigated in a previous matter. *Res judicata* may also occur because of a separation agreement, which typically includes language stating that the provisions constitute a settlement of all rights, claims, and obligations between the parties. This may be interpreted to preclude litigation of tort claims that arose during the marriage before the settlement agreement was final.

C. Punitive Damages for Marital Torts

Indiana permits juries to award punitive damages and thereby inflict punishment on the defendant, but places restrictions on the amount the plaintiff may benefit from the award.⁵⁴ Whether punitive damages may be awarded in a case of marital torts would be a question of fact that must be established by clear and convincing evidence.⁵⁵ However, in Indiana, it has consistently been held that civil plaintiffs have no right to receive punitive damages.⁵⁶ Because punitive damages do not compensate the plaintiff, the plaintiff has no right or entitlement to an award of punitive damages in any amount.⁵⁷ Unlike a claim for compensatory damages, the trier

⁵³ *Twyman v. Twyman*, 855 S.W.2d 619, 625 (Tex. 1993).

⁵⁴ *Cheatham*, 789 N.E.2d at 472.

⁵⁵ *Id.*

⁵⁶ See *Durham v. U-Haul Int'l*, 745 N.E.2d 755, 762 (Ind. 2001); *Reed v. Central Soya Co.*, 621 NE.2d 1069, 1076 (Ind. 1993); *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349, 362-63 (Ind. 1982).

of fact is not required to award punitive damages even if the facts of the case support such an award.⁵⁸ If punitive damages are awarded, Indiana legislature has enacted a cap on punitive damages, so that they cannot exceed three times the compensatory damages or \$50,000, whichever is greater.⁵⁹

V. Practice Tips – the Do’s and Don’ts of Marital Torts

Do familiarize yourself with marital torts so that you can properly advise your clients of the possibility of potential tort claims. Don’t think that just because your fee agreement specifically limits your representation to a “Dissolution of Marriage Proceeding” that you are immune from a malpractice suit when you fail to notify the client of a potential tort suit.

Do make certain that the client is advised of the statute of limitations for their potential tort claims. Two years is a relatively short period of time especially since the tort often will have occurred long before you were retained. Don’t assume that because you discuss the potential tort claim and statute of limitations deadline with your client and they decide not to pursue it that you are “off the hook.” Rather you should always document any client’s decision not to pursue a tort claim with a minimum of a memo to the file and a letter to the client confirming the decision.

Do make certain to engage co-counsel or refer the client out for tort claims unless you have extensive background and experience in handling tort claims. Don’t assume that you can handle the matter because it is civil law and as a family law practitioner you do civil law on a daily basis. Tort claims are complex litigation. If you decide to handle a tort claim without extensive knowledge and experience with tort suits then make certain your malpractice premiums have been paid as a malpractice suit is likely.

⁵⁷ *Cheatham*, 789 N.E.2d at 472.

⁵⁸ *Id.*

⁵⁹ Ind. Code § 34-51-3-4.

Do make certain that the client understand the enormous cost of a civil tort suit but don't try and estimate the cost yourself; again, leave that to an experienced tort law attorney.

Do make certain that if you represent a potential tortfeasor that you place very strong language in any dissolution settlement agreement that effectively waives any claims their spouse may have against them. Conversely, if you are representing a potential tort victim, be certain that you don't allow language to be placed in a dissolution settlement agreement that could be construed in any way to cut-off your client's right to sue the tortfeasor.

VI. Conclusion

The question remains: would Indiana allow a tort action to be joined with the divorce proceedings or would Indiana disallow such a joinder because there is no room in a no-fault divorce action for fault-based remedies? In dicta, the Indiana Court of Appeals gave us a hint to the position Indiana might take in the case of *McNevin v. McNevin* when it stated that “a dissolution court’s consideration of personal injury claims may well contravene the intent of the legislature in enacting a ‘no-fault’ system of divorce.”⁶⁰

In addition, the Court of Appeals, in *Dusenberry v. Dusenberry*,⁶¹ stated, “[A] tort claim for personal injury which has not been reduced to a judgment has no readily ascertainable value and is not marital property capable of division at time of dissolution.”⁶²

But contrast the Indiana Supreme Court in *Leisure v. Leisure*,⁶³ where the Court implied that “an award of damages for pain and suffering may be included as a part of the marital pot.”⁶⁴

⁶⁰ 447 N.E.2d at 618 n.7.

⁶¹ 625 N.E.2d 458 (Ind. Ct. App. 1993).

⁶² *Id.* at 462.

⁶³ 605 N.E.2d 755 (Ind. 1993).

⁶⁴ *Beckley v. Beckley*, 822 N.E.2d 158, 161 (Ind. 2005).

In conclusion, marital torts are an expanding area of law that is fraught with peril for unwary family law attorneys. Family law attorneys must have a basic understanding of marital torts to be able to advise their clients of potential claims and then direct those clients to attorneys who specialize in that area for assistance.

APPENDIX

DEVELOPMENTS IN MARITAL TORT LAW – NATIONALLY

I. Tortious Invasion of Privacy – *In re Marriage of Tigges*⁶⁵

A husband installed video surveillance equipment inside the marital home and during his separation from his wife was using the equipment to record her activities. The husband filed for divorce and the wife filed a counterclaim for tortious invasion of privacy. The court found that the wife did not, simply by virtue of marriage, surrender her reasonable expectation in privacy, specifically applied to her activities while alone in the bedroom. The husband contended that the wife's claim could not succeed because the recording did not capture anything of a highly offensive, private, or sexual nature. The Iowa Supreme Court held that the wife had established a prima facie case for tortious invasion of privacy because the husband's intentional intrusion upon her seclusion was highly offensive to a reasonable person. The Court also held that the content of the recording was not determinative. The wrongfulness of the conduct did not depend upon the nature of the recorded acts but upon the fact that the wife's activities were recorded without her knowledge and consent.

II. Intentional Infliction of Emotional Distress – *Segal v. Lynch*⁶⁶

A father brought a claim against the mother of his children for having moved the children away from him, enrolling them in a school under her surname, and preventing him from seeing or communicating with his children for three months. Upon appeal his claim was dismissed as not being in the best interest of the children. However, the court recognized that a father could bring a claim simply for emotional distress. This holding has led some to speculate that this case opens the door for a parent to bring a claim against the other parent for "poisoning his [or her] relationship with their children."⁶⁷

III. Marital Tort Exception to Marital Privilege – *Braxton v. Commonwealth*⁶⁸

Marital privilege is a privilege by which one spouse cannot be compelled, or at times permitted, to testify against the other spouse. Forms of the marital privilege vary by state.⁶⁹ A Pennsylvania court recently produced a holding that demonstrates that facts giving rise to an

⁶⁵ 758 N.W.2d 824 (Iowa 2008).

⁶⁶ 2010 N.J. Super. LEXIS 74, 2010 WL 1740483 (App. Div. 2010) (cert denied).

⁶⁷ Mary Pat Gallagher, "Parent Can Sue Ex for Turning Children Against Him", *New Jersey Law Journal* (May 6, 2010).

⁶⁸ 2006 Va. App. LEXIS 313, *6 (Va. Ct. App. 2006).

⁶⁹ This is covered in Indiana by I.C. § 34-46-3-1.

action in marital tort can erode the marital privilege.⁷⁰ An estranged husband, against whom the wife had a protective order, broke into the wife's home and vandalized her property. While the police were at the house the wife received a call from her husband. During the call the husband admitted that he was the one who had vandalized her property. The wife did not tell her husband that the police were present nor did she advise the police that her husband was on the phone. The court found, in a criminal case arising out of the vandalism, that the call by the husband to his wife and their subsequent conversation "was plainly a 'communication privately made' by him to her."⁷¹ However, the court also found that because the wife had several rights of action against her husband based upon his vandalism that the applicable Virginia Code sections did not bar her testimony.

IV. Paternity by Fraud - *N.C. v. M.H.*⁷²

Husband and wife were married and had two children. After the birth of the second child the husband and wife were divorced. During the marriage the wife, unbeknownst to the husband, had been having an extramarital affair. The first child was a product of this affair. As such, the husband was not the biological father of the child. After discovering this information, the husband sought to terminate his child support obligations to the first child, alleging that the child was not his biological child. The court held that there was no intact family or marriage to preserve. Absent this finding, the presumption of paternity was not applicable. The wife conceded that at the time of conception, she had sexual relations with another man and that she never told her husband about the affair. The court found that the wife's omission of materially relevant facts induced the husband into acknowledging the child as his. Therefore, the husband made out a case of fraud and the husband was not estopped from denying paternity.

V. Sexually Transmitted Disease – *Endres v. Endres*⁷³

A husband had an affair in which he contracted HPV. Through sexual contact with his wife after contracting HPV the wife was infected. She brought an action against her husband for negligently transmitting an STD to her, battery, and Intentional Infliction of Emotional Distress (IIED), all arising from her infection. The court held that her claim of negligence could survive but because there was no showing that the husband either knew of his infection or engaged in outrageous conduct, done intentionally or with reckless disregard of the probability of causing emotional distress, that the battery and IIED claims could not survive and were properly dismissed by the trial court.

⁷⁰ Also referred to as "spousal immunity."

⁷¹ *Braxton*, 2006 Va. App. LEXIS at *6 (Va. Ct. App. 2006).

⁷² 2007 PA Super 123 (Pa. Super. Ct. 2007).

⁷³ 2006 VT 108 (Vt. 2006).