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## ARTICLES

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### BREAKING UP IS HARD TO DO: NORTH CAROLINA REFUSES TO END ITS RELATIONSHIP WITH HEART BALM TORTS

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JEAN M. CARY\* AND SHARON SCUDDER\*\*

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\* Professor of Law, Campbell University School of Law. J.D., Georgetown University Law Center; B.A., Duke University. The Author wishes to thank Paula Etheridge Murray for excellent research assistance and insightful comments. The author also wishes to thank Mary Aiken Barrow for her helpful editing assistance.

\*\* Sharon Scudder, J.D., Campbell University School of Law. M.A., Radford University, B.A. and B.S., North Carolina State University.

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*Sexual sins have always intrigued and incited the righteous, yet history records that religious and legal attempts to control, limit, and proscribe human sexuality inevitably fail.<sup>1</sup>*

I. INTRODUCTION

The North Carolina General Assembly’s 2009 enactment of a statute of limitations for the torts of alienation of affection and criminal conversation eviscerated two North Carolina Supreme Court cases and revived the debate over the legitimacy of North Carolina’s common law alienation of affection and criminal conversation torts.<sup>2</sup> Although North Carolina has not eliminated either tort, the 2009 legislature severely narrowed the window of time during which these two causes of action may be brought. This article describes these two torts and North Carolina’s tortured twenty-five year history of attempts to eliminate them through legislative acts and court decisions.

Despite the efforts of the Family Law Council of the North Carolina Bar Association to eliminate these causes of action,<sup>3</sup> these two torts are alive and well in the North Carolina courts, as illustrated by several million dollar verdicts in the last decade.<sup>4</sup> Indeed, there are quite a few notorious cases arising out of North Carolina that have received national attention because of the millions of dollars awarded by juries

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<sup>1</sup> Barbara Holmes & Susan Winfield, *Sex, Stones and Power Games: A Woman Caught at the Intersection of Law and Religion (John 7:53-8:11)*, in PREGNANT PASSION: GENDER, SEX, AND VIOLENCE IN THE BIBLE 143, 149 (Cheryl A. Kirk-Duggan ed., 2003) (analyzing the significance of Jesus forgiving the woman caught in adultery in John 7:53-8:11).

<sup>2</sup> N.C. GEN. STAT. § 52-13 (2009).

<sup>3</sup> See *Misenheimer v. Burris*, 637 S.E.2d 173 (N.C. 2006); *McCutchen v. McCutchen*, 624 S.E.2d 620 (N.C. 2006); H.B. 681, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), available at <http://www.ncga.state.nc.us/Sessions/2007/Bills/House/HTML/H681v1.html>; S.B. 1503, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), available at <http://www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2007&BillID=S1503>. See also *infra* Appendices A & B.

<sup>4</sup> See, e.g., *Oddo v. Presser*, 592 S.E.2d 195 (N.C. 2004); *Cooper v. Shealy*, 537 S.E.2d 854 (N.C. 2000); Alice Gomstyn, *Wife Wins \$9 Million From Husband’s Alleged Mistress*, ABC NEWS, Mar. 22, 2010, <http://abcnews.go.com/Business/wife-wins-million-husband-alleged-mistress/story?id=10151957>; Paul Thompson, *Spurned Wife Sues Her Husband’s Mistress – And WINS \$5.8 Million*, DAILY MAIL, Sept. 9, 2010, <http://www.dailymail.co.uk/news/worldnews/article-1310322/Spurned-wife-Lynn-Arcara-sues-husbands-mistress-WINS-3-75m.html>.

to plaintiff-spouses.<sup>5</sup> The amount of recovery in these cases is shocking and baffling to family law attorneys in the rest of the country where these obsolete torts have been repealed. In one infamous case from 2000, which arose out of Greensboro, the plaintiff-spouse, Christine Cooper, was awarded \$2 million in her suit against her husband's lover for alienation of affection and criminal conversation.<sup>6</sup> North Carolina was in the news again in 2003 after a court in Charlotte awarded a Davidson College wrestling coach, Thomas Oddo, \$1.4 million in his suit against Mr. Jeffrey Presser, a Florida physician who Oddo claimed stole his wife's love.<sup>7</sup> Most recently, North Carolina has been the topic of national conversation for a \$9 million award to Cynthia Shackelford, a jilted spouse who sued her husband's paramour, claiming the mistress had ruined their marriage.<sup>8</sup> This 2010 case has received a great deal of national attention from some well-known media outlets that focused their stories on North Carolina's continued use of these "centuries-old"<sup>9</sup> heart balm torts. Alas, while these torts may be antiquated

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<sup>5</sup> See generally Jacob Appel, *Hate the Husband? Sue the Mistress*, THE HUFFINGTON POST, Oct. 6, 2009, [http://www.huffingtonpost.com/jacob-m-appel/hate-the-husband-sue-the\\_b\\_311419.html](http://www.huffingtonpost.com/jacob-m-appel/hate-the-husband-sue-the_b_311419.html) (citing *Cooper* and *Oddo*); *Man Awarded \$1.4 Million From Ex-Wife's Lover*, ABC NEWS, July 13, 2003, [www.abcnews.go.com/GMA/story?id=126853&page=1](http://www.abcnews.go.com/GMA/story?id=126853&page=1); Fred Taylor, *Wife Sues "Other Woman," Awarded \$9M*, CBS NEWS, Mar. 23, 2010, <http://www.cbsnews.com/stories/2010/03/23/earlyshow/main6325299.shtml>; *The Price of a Broken Heart* (Lifetime Movie Network television broadcast Aug. 25, 1999) (a made for television movie about Christine Cooper's lawsuit against her husband's mistress).

<sup>6</sup> *Cooper*, 537 S.E.2d 854. See also Fred Taylor, *Divorce Lawyers Want Alienation-Of-Affection Law Dropped*, WRAL NEWS, Apr. 23, 2004, <http://www.wral.com/news/local/story/105127/> ("In 2001, Christine Cooper of Greensboro won \$2 million when she sued after her husband said he had found another woman.").

<sup>7</sup> *Oddo*, 592 S.E.2d 195.

<sup>8</sup> Gomstyn, *supra* note 4. A jury in Greensboro awarded Mrs. Shackelford \$5 million in compensatory damages and \$4 million in punitive damages. At the time this article was written, this case before the Guilford County Superior Court, *Shackelford v. Lundquist*, No. 07 CvD 12047 (N.C. Dist. Mar. 19, 2010) (order granting damages), was the most recent case in which a large award for alienation of affection was given. However, in 2011, another alienation of affection case arose out of Wake County, North Carolina. In the case of *Puryear v. Devin*, No. 09 CvS 0825 (N.C. Super. Ct. Sept. 13, 2011) (order for entry of default), Judge Carl Fox awarded \$30 million dollars to Carol Puryear against her ex-husband's lover, Betty Devin. The judge found Ms. Puryear was entitled to \$10 million in compensatory damages and \$20 million in punitive damages. Mike Charbonneau, *Wake Judge Awards \$30 Million in Alienation of Affection Suit*, WRAL NEWS, Mar. 14, 2011, <http://www.wral.com/news/local/story/9270098/>.

<sup>9</sup> See generally Gomstyn, *supra* note 4 ("Under centuries-old North Carolina case law, Cynthia Shackelford sued her husband's alleged mistress . . ."); *Spurned Wife Sues Husband's Lover for \$9M*, N.Y. POST, Mar. 23, 2010, [http://www.nypost.com/p/news/national/spurned\\_wife\\_sues\\_husband\\_lover\\_1TMEWRbaVLQ7iuPWiaHvoI](http://www.nypost.com/p/news/national/spurned_wife_sues_husband_lover_1TMEWRbaVLQ7iuPWiaHvoI) ("Cynthia Shackelford used a centuries-old North Carolina law to sue her husband's lover . . .");

to the rest of the country, alienation of affection and criminal conversation are very much “alive and well” in North Carolina.<sup>10</sup>

In 2009, the North Carolina Bar Association’s Family Law Section finally had a small victory in its decade-long fight to repeal alienation of affection and criminal conversation when the North Carolina General Assembly passed legislation limiting the time frame during which resentful spouses may bring causes of action for these heart balm torts.<sup>11</sup> While a reduction in the time during which these torts may be brought does not abolish them in any way, this new legislation demonstrates that North Carolina has taken the first step towards eliminating these antiquated torts.

The new statute defines the statute of limitations for these two common law torts:

**§ 52-13. Procedures in causes of action for alienation of affection and criminal conversation.**

(a) No act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff’s spouse physically separate with the intent of either the plaintiff or plaintiff’s spouse that the physical separation remain permanent.

(b) An action for alienation of affection or criminal conversation shall not be commenced more than three years from the last act of the defendant giving rise to the cause of action.

(c) A person may commence a cause of action for alienation of affection or criminal conversation against a natural person only.<sup>12</sup>

The new statute’s time limitations, requiring that the actions giving rise to the torts must occur before the spouses have separated with the intent of one spouse to remain separate, should markedly reduce the number of claims for alienation of affection and criminal conversation.

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*Woman Wins ‘Alienation of Affection’ Case*, UNITED PRESS INT’L, Mar. 22, 2010, [http://www.upi.com/Top\\_News/US/2010/03/22/Woman-wins-alienation-of-affection-case/UPI-83231269299182/](http://www.upi.com/Top_News/US/2010/03/22/Woman-wins-alienation-of-affection-case/UPI-83231269299182/) (“Cynthia Shackelford . . . suing under North Carolina’s centuries-old ‘alienation of affection’ law. . .”).

<sup>10</sup> 1 SUZANNE REYNOLDS, LEE’S NORTH CAROLINA FAMILY LAW § 5.44, at 386 (5th ed. 1993) (“The actions for alienation of affection and criminal conversation are alive and well in North Carolina, though they have not fared so well elsewhere.”).

<sup>11</sup> See N.C. GEN. STAT. § 52-13 (2009).

<sup>12</sup> *Id.*

## II. THE CURRENT STATUS OF NORTH CAROLINA LAW

### A. *Criminal Conversation*

Criminal conversation is a civil action in North Carolina which requires proof by the injured spouse of three elements: (1) an actual legal marriage between the plaintiff and the allegedly adulterous spouse, (2) sexual intercourse between that adulterous spouse and the defendant during the legal marriage,<sup>13</sup> and (3) the sexual intercourse must occur before the date of separation of the married spouses.<sup>14</sup> “The gravamen of the cause of action . . . is the defilement of plaintiff’s [spouse] by the defendant.”<sup>15</sup> The purpose of the tort of criminal conversation is to provide a remedy to protect a spouse’s interest in “the fundamental right of exclusive sexual intercourse between spouses and also on the loss of consortium.”<sup>16</sup>

In North Carolina, criminal conversation is aimed exclusively at the third party who has had sexual relations with a person still legally married, and the tort is essentially a strict liability tort.<sup>17</sup> The defendant third party cannot assert as defenses the willingness or initiation by the spouse who participated in the adultery, nor the fact that the injured plaintiff may have also been unfaithful.<sup>18</sup> The only possible defense to a claim of criminal conversation that has been suggested by North Carolina courts is the intentional “connivance of the husband in the adultery of the wife.”<sup>19</sup> In other words, the defendant would have a defense only in the very unusual and fraudulent circumstance of a husband colluding with the wife to extract money from a defendant by encouraging her to seduce and have sexual relations with the defen-

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<sup>13</sup> *E.g.*, *Misenheimer v. Burris*, 610 S.E.2d 271, 272 (N.C. Ct. App. 2005), *rev’d*, 637 S.E.2d 173 (N.C. 2006); *Nunn v. Allen*, 574 S.E.2d 35, 43 (N.C. Ct. App. 2002); *Brown v. Hurley*, 477 S.E.2d 234, 237 (N.C. Ct. App. 1996).

<sup>14</sup> N.C. GEN. STAT. § 52-13 (2009).

<sup>15</sup> *Johnson v. Pearce*, 557 S.E.2d 189, 190 (N.C. Ct. App. 2001) (quoting *Chestnut v. Sutton*, 176 S.E. 743, 743 (N.C. 1934)).

<sup>16</sup> *Sebastian v. Klutz*, 170 S.E.2d 104, 108 (N.C. Ct. App. 1969) (quotation omitted).

<sup>17</sup> *Misenheimer v. Burris*, 637 S.E.2d 173, 177 (N.C. 2006) (Parker, C.J., dissenting) (“Criminal conversation is frequently described as a strict liability tort in that a plaintiff may prevail even if the defendant was unaware of the marriage. A plaintiff is not required to prove love and affection in the marriage or any negative effect on the marriage by the sexual intercourse.”).

<sup>18</sup> *Cannon v. Miller*, 322 S.E.2d 780, 789-90 (N.C. Ct. App. 1984); *see also* *Bryant v. Carrier*, 198 S.E. 619, 621 (N.C. 1938); *Scott v. Kiker*, 297 S.E.2d 142, 146-47 (N.C. Ct. App. 1982).

<sup>19</sup> *Barker v. Dowdy*, 25 S.E.2d 404, 405 (N.C. 1943).

dant just so the husband could sue for criminal conversation.<sup>20</sup> The complete lack of defenses in situations where a third party has become sexually involved with someone she or he did not know was still legally married has earned criminal conversation a practical designation of “strict liability,” because generally the plaintiff only needs to prove that there were sexual relations and a legal marriage to prevail.<sup>21</sup>

The actual element of sexual intercourse in criminal conversation is rarely proved by direct evidence. Instead, under North Carolina law, the element can be presumed from the circumstances.<sup>22</sup> When attempting to prove sexual intercourse by circumstantial evidence, plaintiffs can use the “opportunity and inclination doctrine” in North Carolina, which presumes adultery when two conditions are proved.<sup>23</sup> First, the plaintiff must prove an adulterous disposition or inclination of the parties.<sup>24</sup> Second, the plaintiff must prove that there was an opportunity created to satisfy the parties’ mutual adulterous inclinations.<sup>25</sup>

In considering the monetary damages to award for a successful claim of criminal conversation, North Carolina juries may consider loss of companionship, loss of services, fear of sexually transmitted disease, injury to the family honor, mental anguish, and humiliation.<sup>26</sup> In the last ten years, criminal conversation cases in North Carolina have also resulted in relatively large punitive damages awards.<sup>27</sup> Even a nominal

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<sup>20</sup> *Id.*

<sup>21</sup> *Misenheimer*, 637 S.E.2d at 177.

<sup>22</sup> *In re Estate of Trogon*, 409 S.E.2d 897, 900 (N.C. 1991).

<sup>23</sup> *Coachman v. Gould*, 470 S.E.2d 560, 563 (N.C. Ct. App. 1996) (“[I]f a plaintiff can show opportunity and inclination, it follows that such evidence will tend to support a conclusion that more than ‘mere conjecture’ exists to prove sexual intercourse by the parties.”).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Am. Mfrs. Mut. Ins. Co. v. Morgan*, 556 S.E.2d 25, 28 (N.C. Ct. App. 2001).

<sup>27</sup> *See, e.g., Horner v. Byrnett*, 511 S.E.2d 342, 345 (N.C. Ct. App. 1999) (affirming the award of punitive damages because there was sufficient evidence to support that the conduct of the defendant was willful, aggravated, malicious, or of a wanton character in having sexual relations with plaintiff’s wife). *See also* Lee Rosen, *Alienation of Affection – Interference With Marriage Can Cost Big Bucks In North Carolina*, EZINE ARTICLES, Mar. 27, 2005, <http://ezinearticles.com/?Alienation-of-Affection—Interference-with-marriage-can-cost-big-bucks-in-North-Carolina&id=23649> (Discussing how, in 1997, a spouse in North Carolina was awarded \$1.2 million against a female paramour in Forsyth County, another wife \$1 million in Alamance County, and a deceived husband \$243,000 in Wake County. Moreover, “[i]n late 1999, a judge in Durham County valued compensatory damages in a case brought by a husband against his wife’s lover at less than \$3,000

damage award does not spare a defendant who was unaware or misled about a spouse's marital status from enduring public embarrassment and legal defense costs. The staggering amount of these monetary awards reflects the position that criminal conversation and alienation of affection torts are truly all about exacting revenge and not compensating harm.<sup>28</sup>

### B. *Alienation of Affection*

Alienation of affection is a civil action in North Carolina which requires the complaining spouse to prove three elements: (1) that the couple was married and genuine love and affection existed between them, (2) that this existing love and affection was alienated and destroyed, and (3) that the wrongful and malicious acts of the defendant produced and brought about the loss and alienation of such love and affection.<sup>29</sup> In addition, since the enactment of the 2009 legislation, this alienation of affection must have occurred before the date the spouses separated with the intent of at least one of them to remain permanently separated.<sup>30</sup> While the plaintiff is required to show evidence of a valid marriage and that marital love and affection existed, she or he does not have to “prove . . . that [the] marriage was previously one of ‘untroubled bliss.’”<sup>31</sup> Furthermore, unlike criminal conversation, this tort does not require sexual intercourse but only alienation of affection.<sup>32</sup> Therefore, the tort is not aimed solely at the alleged adulterous spouse's lover but can be brought against anyone who allegedly alienated and destroyed the married spouses' love and affection. Thus, not only is an extra-marital lover subject to the tort, but a spouse's mother, best friend, or co-worker, for example, may be subject to this heart balm tort if they “wrong” the plaintiff-spouse.<sup>33</sup>

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in compensatory damages but the judge still awarded \$40,000 in punitive damages on the criminal conversation claim.”).

<sup>28</sup> See William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking For a New Career*, 33 ARIZ. ST. L.J. 985, 1022 (2001) (“[R]evenge is a powerful, and indeed usually the most powerful, motivation for most criminal conversation and alienation of affections actions.”); Eryn Linkous, *Heart Balm or Heart Break: Alienation of Affection: Against Alienation of Affection*, CAMPBELL L. OBSERVER, Mar. 2007, at 7, 7.

<sup>29</sup> *Litchfield v. Cox*, 146 S.E.2d 641, 641 (N.C. 1966).

<sup>30</sup> N.C. GEN. STAT. § 52-13 (2009).

<sup>31</sup> *Brown v. Hurley*, 477 S.E.2d 234, 237 (N.C. Ct. App. 1996).

<sup>32</sup> 1 REYNOLDS, *supra* note 10, § 5.46(A), at 396.

<sup>33</sup> See *McCutchen v. McCutchen*, 624 S.E.2d 620, 623 (N.C. 2006) (“The ‘wrong’ in an alienation of affections case is the actual alienation of the spouse's affections by a third party.”); 1 REYNOLDS, *supra* note 10, § 5.46(A), at 396 (noting that actions against third

Alienation generally involves “the destruction, or serious diminution, of the love and affection of the plaintiff’s spouse for the plaintiff.”<sup>34</sup>

The second element of this tort is rarely an issue for the plaintiff to prove; however, the first and third elements pose a more significant obstacle for the plaintiff to overcome.<sup>35</sup> The first element requires the plaintiff to show that a valid marriage existed and that love and affection were present within the marriage at the time of the alleged acts of the defendant. This demonstration of love and affection does not require proving that the marriage was a perfect one, but only that a good marriage did exist and that there was some degree of love and affection.<sup>36</sup>

The third element requires the plaintiff to prove two things: that the defendant acted with malice and that these acts were the proximate cause of the other spouse’s affections being alienated. Malice requires the plaintiff to prove the defendant intentionally completed some act that would likely cause the spouse to lose affection.<sup>37</sup> The plaintiff is not required to establish that the defendant intentionally destroyed the marriage but only that the defendant did some act intentionally that would almost certainly affect the marriage.<sup>38</sup> The other prong of the third element requires the plaintiff to prove that the defendant’s actions proximately caused the plaintiff’s injury. The plaintiff must show that the defendant participated in the alleged conduct and that the marital relationship would not have been injured but for this conduct.<sup>39</sup> It is important to understand that neither the consent of the plaintiff’s spouse nor his or her initiation of the alleged behav-

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party in-laws are surprisingly common in North Carolina, but that claims against relatives and close friends typically fail).

<sup>34</sup> CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS § 11.22.2, at 106 (2d ed. 1999).

<sup>35</sup> 1 REYNOLDS, *supra* note 10, § 5.46(A), at 393.

<sup>36</sup> *Id.* at 394-95 (“[P]laintiffs have satisfied their burden merely by their own testimony or the testimony of an interested witness that the marriage was a good one.” Also noting that North Carolina protects marital interests from certain conducts of the defendant, even in cases of unstable marriages, and that plaintiffs have been able to satisfy the element of love and affection with very little evidence that it existed).

<sup>37</sup> *Id.* at 395 (“The plaintiff, however, need not establish that the defendant intentionally destroyed the marriage: only that the defendant intentionally engaged in conduct that would probably affect the marital relationship.”).

<sup>38</sup> *Id.* (“This standard relieves the plaintiff of proving the defendant’s spite. Instead, the plaintiff need only prove that the defendant’s conduct was intentional.”).

<sup>39</sup> *Id.* at 399 (noting that the defendant’s behavior must be a “controlling” or “effective” cause of the alienation for the plaintiff to prevail, even though there might have been other contributing factors).



ior can be asserted as a defense to the element of proximate cause.<sup>40</sup> The plaintiff's consent, however, is treated differently, and as with criminal conversation, the general rule is that if the plaintiff connived or consented to the defendant's actions, the court will not allow the plaintiff to recover.<sup>41</sup>

Unlike criminal conversation, alienation of affection is not considered a "strict liability" tort, and the defendant has a range of defenses which may mitigate the amount of damages awarded to the plaintiff. For example, if the defendant has some evidence that the plaintiff-spouse had also engaged in an extramarital affair, the defendant could use this information to prove there was no love and affection between the spouses at the time of defendant's actions.<sup>42</sup> Other defenses or mitigating factors include evidence of marital unhappiness, as well as marital discord.<sup>43</sup>

Plaintiffs may recover both compensatory and punitive damages in their alienation of affection lawsuits. In assessing damages in a cause of action for this tort, the jury considers the alleged wrongful act(s) of the defendant, and whether this conduct deprived "a married person of the affection, love, society, companionship, and comfort of the spouse."<sup>44</sup> In addition, this tort "protects a spouse's interest in having a peaceful and uninterrupted marriage."<sup>45</sup> Thus, "damages may include recovery for emotional distress caused by an invasion of such interests."<sup>46</sup> Generally, for the plaintiff to recover compensatory damages, the plaintiff must establish a loss of support.<sup>47</sup> Punitive damages are conditioned upon the plaintiff showing that the defendant acted with

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 400 ("If the defendant can establish that the plaintiff tried to use the defendant to alienate the spouse or that the plaintiff consented to the alienation, the plaintiff should lose." Also noting that it is no defense that plaintiff forgave the spouse or continued to live with the spouse after discovering the relationship because that is not the equivalent of consent).

<sup>42</sup> See *Scott v. Kiker*, 297 S.E.2d 142, 146-47 (N.C. Ct. App. 1982); 1 REYNOLDS, *supra* note 10, § 5.48(D), at 418-19 (discussing a North Carolina appellate court case in which the defendant raised the plaintiff's infidelities to bar the plaintiff's actions, but the appellate court affirmed the trial court's instructions to consider the plaintiff's actions as a mitigating factor only).

<sup>43</sup> 1 REYNOLDS, *supra* note 10, § 5.48(D), at 419 ("The jury should consider other evidence of marital discord, like the plaintiff's mistreatment of the spouse.").

<sup>44</sup> *Am. Mfrs. Mut. Ins. Co. v. Morgan*, 556 S.E.2d 25, 28 (N.C. Ct. App. 2001) (citation omitted).

<sup>45</sup> *Id.* (quoting *Sebastian v. Kluttz*, 170 S.E.2d 104, 106 (N.C. Ct. App. 1969)).

<sup>46</sup> *Id.* (quoting RESTATEMENT (FIRST) OF TORTS § 690 cmt. b (1938)).

<sup>47</sup> 1 REYNOLDS, *supra* note 10, § 5.48(D), at 416.

malice, which is an element for alienation of affection; thus, if the plaintiff successfully establishes alienation of affection, punitive damages will follow.<sup>48</sup>

### III. HEART BALM TORTS: A LOOK AT THE HISTORICAL ROOTS OF ADULTERY LAW

Adultery is not a wrong that has been recently created or recognized by legislation, case law, or even modern-day Christian efforts to protect family values. Adultery has been forbidden and considered morally wrong for centuries. Adultery was specifically named in the Ten Commandments as a behavior forbidden by God.<sup>49</sup> In the Old Testament teachings, the crimes of murder and adultery were actually viewed equally in terms of severity and punishment.<sup>50</sup> In fact, while the penalty for murder could be mitigated by certain factors, adultery was punishable by death without mitigation (although many scholars debate how strictly the law was applied).<sup>51</sup> The overlay of different codes of law often saved the perpetrators from suffering the prescribed sentences for adultery.<sup>52</sup> While Hebrew law still called for death as a punishment for adultery, the Hebrew authorities had an elaborate network of proof and procedure to prevent most perpetrators from ever being found guilty.<sup>53</sup>

In biblical times, adultery was originally defined as sexual relations between a man, single or married, and a married or engaged woman.<sup>54</sup> A married man could actually have extramarital sexual relations with a single woman without committing adultery, but a married woman committed adultery if she had intercourse with anyone except her husband.<sup>55</sup> Adultery was a violation of the property rights of a husband and was therefore more than just an immoral, sexual act.<sup>56</sup> Property rights of a husband over his wife were considered absolutely sacrosanct, and the punishment for violation of those rights was stoning to

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<sup>48</sup> *Id.* § 5.48(C), at 418.

<sup>49</sup> *Exodus* 20:14; *Deuteronomy* 5:18.

<sup>50</sup> Pnina Galpaz-Feller, *Private Lives and Public Censure – Adultery in Ancient Egypt and Biblical Israel*, NEAR EASTERN ARCHAEOLOGY, Sept. 2004, at 153.

<sup>51</sup> *Id.* (citing *Leviticus* 20:10 and *Exodus* 21:12-13).

<sup>52</sup> See Holmes & Winfield, *supra* note 1, at 152.

<sup>53</sup> *Id.* Procedural requirements included requiring at least two male eyewitnesses whose stories matched. See *Numbers* 35:30; *Leviticus* 17:6; *Judges* 34:12-1, -2.

<sup>54</sup> *Leviticus* 18:20, 20:10.

<sup>55</sup> Holmes & Winfield, *supra* note 1, at 145.

<sup>56</sup> *Id.*

death.<sup>57</sup> Adultery was a crime that was made public in biblical Old Testament Israel, because as a violation of one of the Ten Commandments, it was deemed a violation of the covenant between the people and God.<sup>58</sup>

In contrast, earlier laws in the Babylonian codes provided for the death of the adulterous wife and her paramour but left the enforcement of the penalty to the discretion of the betrayed husband.<sup>59</sup> The emphasis was on the harm to the betrayed spouse and not on any breach to the public.<sup>60</sup> Babylonian law also sought to compensate the betrayed husband monetarily and allowed him to decide to either forgive or send the adulterous couple to death.<sup>61</sup>

In the early Mediterranean culture, “men were invested with power simply because they were men.”<sup>62</sup> What is now called domestic violence was at that time “merely the right of the patriarch to govern and control his family.”<sup>63</sup> It was the “prerogative and civic duty of the dominant male to . . . maintain control and to keep the peace within his family.”<sup>64</sup> Ancient law also did not legally recognize a sexual offense against a woman herself, and even rape was not seen as a violation of the woman directly.<sup>65</sup> Rather, if a woman were violated, the man in control of her sexuality (either her father or her husband) would be compensated for the loss.<sup>66</sup> The man involved in an act of adultery with another man’s wife was put to death; this punishment was not for violating the woman but for misappropriating the male spouse’s wife.<sup>67</sup> If a man had intercourse with an unattached woman, the punishment was not death but rather marriage with no possibility of divorce.<sup>68</sup> This marriage would compensate the father of the woman

<sup>57</sup> *Id.*; see also *Deuteronomy* 22:22.

<sup>58</sup> Galpaz-Feller, *supra* note 50, at 153, 154, 158 (citing *Hosea* 2, 4:10; *Jeremiah* 5:7-9, 7:9-16, 29:23).

<sup>59</sup> *Id.* at 154.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Holmes & Winfield, *supra* note 1, at 156.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 157.

<sup>65</sup> Deborah W. Rooke, *Wayward Women and Broken Promises: Marriage, Adultery and Mercy in Old and New Testaments*, in *CIPHERS IN THE SAND: INTERPRETATIONS OF THE WOMAN TAKEN IN ADULTERY* (JOHN 7.53-8.11) 17, 45 (Larty J. Kreitzer & Deborah W. Rooke eds., 2000).

<sup>66</sup> *Id.* at 18-19.

<sup>67</sup> *Id.* at 19; see also *Deuteronomy* 22:22-23.

<sup>68</sup> Rooke, *supra* note 65, at 19.

for the fact that no one else would marry her and pay the bride price.<sup>69</sup> If a man who had sexual relations with a virgin was already married, he still had to marry the woman whose virginity he took (male polygamy was also within the bounds of the law of the time).<sup>70</sup>

#### IV. THE HISTORY OF CIVIL ACTIONS TO ADDRESS ADULTERY

The historical roots of the common law torts of criminal conversation and alienation of affection highlight their antiquated nature. Some authors have suggested that the torts were replacements for the civil practices of primitive European tribes to brutally punish an adulterous couple in public.<sup>71</sup> The initial concerns were protecting the property rights of the husband, because the husband had a property interest not only in exclusive sexual relations with his wife but also in protecting the unchallenged maintenance of his pure blood line for inheritance purposes.<sup>72</sup> During early English common law, only the husband was able to recover because the wife had no property rights or exclusive sexual rights to her husband.<sup>73</sup>

Early common law also considered the wife as a chattel of her husband. In fact, Chief Justice Clark described that at early common law a wife was analogous to a horse, in that both she and the services she provided were the property of the husband.<sup>74</sup> While criminal conversa-

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<sup>69</sup> *Id.* at 19-20; see also *Deuteronomy* 22:28-29; *Exodus* 22:16-17. Rooke notes that it did not matter how undesirable the marriage may have been to the woman. *Exodus* 22:16-17 allowed the father of the woman to refuse the marriage, but the law was intended to compensate the father's needs and was not centered upon addressing the harm to the woman.

<sup>70</sup> Rooke, *supra* note 65, at 20.

<sup>71</sup> See Jacob Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651 (1930); Paul D. Schoonover, Comment, *Piracy on the Matrimonial Seas—the Law and the Marital Interloper*, 25 Sw. L.J. 594 (1971).

<sup>72</sup> *Tinker v. Colwell*, 193 U.S. 473, 485 (1904) (“[T]he act of the defendant is a violation of the marital rights of the husband in the person of his wife, to the exclusion of all others, and so the act of the defendant is an injury to the person and also to the property rights of the husband.”). See also Lippman, *supra* note 71.

<sup>73</sup> *Cottle v. Johnson*, 102 S.E. 769, 770 (N.C. 1920) (“[T]he husband has certain personal and exclusive rights with regard to the person of his wife, which are interfered with and invaded by Criminal conversation with her; that such an act on the part of another man constitutes an assault even when, as is almost universally the case as proved, the wife in fact consents to the act . . . .” (quoting *Tinker*, 193 U.S. at 481)).

<sup>74</sup> *Hipp v. E.I. Dupont De Nemours & Co.*, 108 S.E. 318, 319 (N.C. 1921) (“At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse, his slave or any other property; that is to say by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that ‘by reason of the unity of marriage’ such

tion and alienation of affection were initially used in England only to establish the necessary grounds for dissolving a marriage, over time they grew into separate actions to derive compensation from or to seek revenge upon the marital interloper.<sup>75</sup> While the civil actions of criminal conversation and alienation of affection originated in English law, these torts were actually abolished in England more than 150 years ago.<sup>76</sup>

Instead of abolishing these torts in this country as well, the legislatures and courts in the United States extended access to these torts to wives as well as husbands. When Married Women's Property Acts were passed in the late nineteenth and early twentieth centuries in the United States (granting wives equal rights to own property and to sue in their own names to recover damages for their own personal injuries),<sup>77</sup> the majority of courts, including the North Carolina Supreme Court, extended the existing torts of criminal conversation and alienation of affection to the wife on the theory of her equal interest in the marriage relation.<sup>78</sup> The courts extended to women the right to bring these causes of action without altering the underlying elements of the action, which had been derived from the notion of a woman being property of a man.<sup>79</sup>

The nature of marriage and the role of women have changed significantly in the past two centuries, but the torts of criminal conversation and alienation of affection do not reflect those changes. If wives were still analogous to a property interest in farm animals, then the strict liability of criminal conversation might be more rational. How-

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actions could be maintained by the husband. But singularly enough this was not correlative and the wife could not maintain an action for injuries sustained by her husband.”).

<sup>75</sup> Jeremy D. Weinstein, Note, *Adultery, Law, and the State: A History*, 38 HASTINGS L.J. 195, 218-19 (1986).

<sup>76</sup> See Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85, sch. 59 (Eng.) (“After this Act shall have come into operation no Action shall be maintainable in England for Criminal Conversation.”).

<sup>77</sup> See, e.g., N.C. CONST. art. X, § 4.

<sup>78</sup> Cannon v. Miller, 322 S.E.2d 780, 791 (N.C. Ct. App. 1984). See also Thomas K. Leeper, Comment, *Alienation of Affections: Flourishing Anachronism*, 13 WAKE FOREST L. REV. 585, 588 (1977).

<sup>79</sup> See, e.g., Knighten v. McClain, 44 S.E.2d 79,79 (N.C. 1947); Hinnant v. Power Co., 126 S.E. 307 (N.C. 1925), *overruled on other grounds by* Nicholson v. Hugh Chatham Mem'l Hosp., Inc., 266 S.E.2d 818, 819-21 (N.C. 1980); Johnson v. Ruark Obstetrics and Gynecology Assocs., P.A., 395 S.E.2d 85 (N.C. 1990); Brown v. Brown, 32 S.E. 320, 321 (N.C. 1899).

ever, as neither wives nor husbands are property, as noted by the South Dakota Supreme Court,<sup>80</sup> the promise of sexual fidelity is simply not a possession that can be taken away by a third party without the permission of the participating spouse.<sup>81</sup>

The majority of states in our country do not recognize actions for alienation of affection or criminal conversation. In fact, forty-five American states and the District of Columbia have abolished or severely limited the cause of action for alienation of affection.<sup>82</sup> Similarly, forty-two states and the District of Columbia have repealed or restricted criminal conversation.<sup>83</sup> While many states have abolished these causes of action through state legislative procedures, there are also a vast amount of state supreme court decisions that strike down state heart balm torts.<sup>84</sup> These rulings typically cite the antiquated “women-as-property” rationale as the reasoning for eradicating state heart balm torts; one state court noted persuasively:

[The adultery torts] are outmoded archaic holdovers from an era when wives were considered the chattel of their spouse rather than distinct legal entities. Wives are not property. Neither are husbands. The love and affection of a human being who is devoted to another human being is not susceptible to theft.<sup>85</sup>

Other courts and legislatures have also cited the serious potential for abuse, fraud, and intimidation resulting from the adultery torts, primarily because the actions have been used to extract money in divorce settlements from the adulterous spouse who wants to avoid the embarrassment of alleged paramours and misdirect blame to a third party, regardless of the conduct of either spouse.<sup>86</sup> In fact, blackmail in divorce settlements is one of the main arguments for abolishing both torts.<sup>87</sup> While North Carolina’s legislature and courts have addressed

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<sup>80</sup> *Hunt v. Hunt*, 309 N.W.2d 818, 821 (S.D. 1981).

<sup>81</sup> *See Cannon*, 322 S.E.2d at 792.

<sup>82</sup> 1 REYNOLDS, *supra* note 10, § 5.45, at 387 n.663.

<sup>83</sup> *Id.* at 387-88 n.666.

<sup>84</sup> *See id.* at 387 n.663.

<sup>85</sup> *See Hunt*, 309 N.W.2d at 821.

<sup>86</sup> *See* MINN. STAT. §§ 553.01 (public policy statement), 553.02 (1994) (abolishing actions for breach of promise to marry, alienation of affections, criminal conversation, and seduction); *see also* Schoenecke v. Ronningen, 315 N.W.2d 612, 614 (Minn. 1982) (noting such claims are “particularly susceptible to inflated awards”).

<sup>87</sup> 1 REYNOLDS, *supra* note 10, §5.45(B), at 391 (“The next most frequent argument lodged against recognizing alienation of affections and criminal conversation focuses on the potential for blackmail. Because the mere filing of the action may destroy reputations or inflict devastating psychological harm, they have disproportionate settlement value for unscrupulous plaintiffs.”).

both of these outdated torts, the state has refused to follow in the footsteps of the majority of the rest of the country and continues to recognize both actions.

V. NORTH CAROLINA'S TWENTY-FIVE YEAR STRUGGLE TO REPEAL  
ALIENATION OF AFFECTION AND CRIMINAL CONVERSATION.

A. *The Brief Death and Resurrection of N.C.'s Heart Balm Torts*

The North Carolina Court of Appeals attempted to abolish the causes of action for alienation of affection and criminal conversation over twenty-five years ago in *Cannon v. Miller*.<sup>88</sup> The case involved Mr. and Mrs. Cannon, who were married for a few years before Mrs. Cannon met another man, Mr. Jeffrey Miller, with whom she allegedly began having an extramarital affair.<sup>89</sup> The Cannons divorced in 1981, and Mr. Cannon sued Miller for alienation of affection and criminal conversation.<sup>90</sup> Miller denied that he had been involved with Mrs. Cannon, and on cross appeal, he argued that these heart balm torts were outdated and should be repealed.<sup>91</sup> The court, after examining the history of these torts and the theoretical basis for these actions, agreed with Miller and eliminated both causes of action.<sup>92</sup> The court stated:

A review of the historical and theoretical bases of the actions, and the largely unsuccessful attempts to articulate a convincing modern basis for the "heart balm" torts lead us to conclude that there is no continuing legal basis for the retention of these tort actions today. They protect no interests and further no public policies not better served by other means, and the potentialities for abuse posed by their existence outweigh any possible benefits to be obtained by their retention in contemporary society. While the historical remedies allowed by these causes of action have undergone some progressive changes through the years, the actions remain permeated with the uncultivated and obsolete ideas which marked their origin. We hold that the causes of actions of alienation of affection and criminal conversation are hereby abolished in this jurisdiction.<sup>93</sup>

Unfortunately, the N.C. Court of Appeals' ruling did not endure. The North Carolina Supreme Court reversed the decision in 1985.<sup>94</sup> The N.C. Supreme Court, in a brief but stern opinion, stated that the N.C. Court of Appeals "acted under a misapprehension of its authority to

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<sup>88</sup> *Cannon v. Miller*, 322 S.E.2d 780, 800 (N.C. Ct. App. 1984).

<sup>89</sup> *Id.* at 783.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 803-04.

<sup>93</sup> *Id.*

<sup>94</sup> *Cannon v. Miller*, 327 S.E.2d 888, 888 (N.C. 1985).

overrule decisions of the Supreme Court of North Carolina.”<sup>95</sup> Consequently, the N.C. Supreme Court vacated the N.C. Court of Appeals’ decision to eliminate alienation of affection and criminal conversation and firmly reinstated both causes of action.<sup>96</sup> It is notable that the N.C. Supreme Court did not provide any justification for why these torts should continue.<sup>97</sup>

Since the N.C. Supreme Court vacated the N.C. Court of Appeals decision in *Cannon*, North Carolina has seen a multitude of both causes of action within its courts. Moreover, twenty years after its *Cannon* decision, the N.C. Supreme Court even went so far as to further expand alienation of affection and criminal conversation by increasing the time period during which these torts could be instituted.<sup>98</sup> The N.C. Supreme Court decisions which enlarged these causes of action were the final straw that broke the legislature’s back, causing it to agree to place limited heart balm tort reform of time restrictions on both causes of action.<sup>99</sup>

### B. *Heart Balm Torts Continue to Defy Legislative Repeal*

For over a decade, the Family Law Section of the North Carolina Bar Association has been the leader in state efforts to repeal alienation of affection and criminal conversation.<sup>100</sup> The North Carolina General Assembly has considered various bills to abolish these outdated torts in the past years. These attempts to persuade the legislature to revoke the torts have been constantly frustrated by state representatives, legis-

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Caroline L. Batchelor, Comment, *Falling out of Love with an Outdated Tort: An Argument for the Abolition of Criminal Conversation in North Carolina*, 87 N.C. L. REV. 1910, 1919 (2009) (also noting that the purpose of the opinion seemed to be directed at correcting the N.C. Court of Appeals’ misunderstanding of its authority, and not reinstating the torts).

<sup>98</sup> *Misenheimer v. Burris*, 637 S.E.2d 173 (N.C. 2006) (expanding the time in which a plaintiff may bring a criminal conversation action); *McCutchen v. McCutchen*, 624 S.E.2d 620 (N.C. 2006) (increasing the time for bringing alienation of affection causes of action).

<sup>99</sup> See N.C. GEN. STAT. § 52-13 (2009). These torts may be subject to time limitations now, but both actions are still alive and well in North Carolina courts, as evidenced by the most outstanding damages case yet, a \$9 million dollar award which was just handed down in 2010. See Gomstyn, *supra* note 4.

<sup>100</sup> John W. Nafon, *Chair’s Comments*, FAMILY FORUM (N.C. Bar Ass’n Family Law Section, Cary, N.C.), Apr. 2007, at 1, *available at* [www.ncbar.org](http://www.ncbar.org) (discussing the Family Law Council’s effort to revoke alienation of affection and criminal conversation has been going on for at least ten years).



lative committees, and socially conservative organizations.<sup>101</sup> In fact, legislation entitled “Abolish Alienation of Affection/Criminal Conversation” has been presented to the N.C. General Assembly six times since 1999;<sup>102</sup> unfortunately, each introduction has resulted in either outright rejection or has failed to pass for some other reason.

In 1999, House Bill 493, sponsored primarily by Representative Milton Fitch, Jr., and co-sponsored by Representatives Howard Hunter, Jr., Mary E. McAllister, Mickey Michaux, Jr., and Martin Nesbitt, Jr., was introduced in the House, passed its first reading, but failed in its second reading.<sup>103</sup> In the next session year, 2001-2002, there were actually two editions of bills entitled “Abolish Alienation of Affection/Criminal Conversation.”<sup>104</sup> The first edition, House Bill 548, was sponsored primarily by Representative Fitch and co-sponsored by Representatives Verla Insko, McAllister, and Michaux.<sup>105</sup> This edition was never voted on and was postponed indefinitely in the House.<sup>106</sup> The second edition was more vigorous than the first; its primary sponsor was Representative Joe Hackney and its co-sponsor was Representative Insko.<sup>107</sup> This second edition actually passed in the House but failed in the Senate, where it was eventually re-referred to the Committee on Judiciary II.<sup>108</sup> In 2003, Representatives Hackney and Insko tried once more with House Bill 1047, which, not surprisingly, passed in the House but

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<sup>101</sup> Charles Montgomery, *Legislature Limits Heartbalm Torts for First Time*, FAMILY FORUM (N.C. Bar Ass’n Family Law Section, Cary, N.C.), Sept. 2009, at 3, *available at* [www.ncbar.org](http://www.ncbar.org) (“Some socially conservative organizations lobbied vigorously against the abolition bills.”).

<sup>102</sup> H.B. 1123, 2009 Gen. Assem., Reg. Sess. (N.C. 2009); H.B. 681, 2007 Gen. Assem., Reg. Sess. (N.C. 2007); S.B. 1503, 2007 Gen. Assem., Reg. Sess. (N.C. 2007); H.B. 1047, 2003 Gen. Assem., Reg. Sess. (N.C. 2003); H.B. 576, 2001 Gen. Assem., Reg. Sess. (N.C. 2001); H.B. 548, 2001 Gen. Assem., Reg. Sess. (N.C. 2001); H.B. 493, 1999 Gen. Assem., Reg. Sess. (N.C. 1999).

<sup>103</sup> H.B. 493, 1999 Gen. Assem., Reg. Sess. (N.C. 1999), *available at* <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=1999&BillID=H493&submitButton=Go>.

<sup>104</sup> House Bills 548 and 576, both introduced during the 2001-2002 session.

<sup>105</sup> H.B. 548, 2001 Gen. Assem., Reg. Sess. (N.C. 2001), *available at* <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2001&BillID=H548&submitButton=Go>.

<sup>106</sup> *Id.*

<sup>107</sup> H.B. 576, 2001 Gen. Assem., Reg. Sess. (N.C. 2001), *available at* <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2001&BillID=H576&submitButton=Go>.

<sup>108</sup> *Id.*

was lost in the Senate, never making it out of the Committee on Rules and Operations of the Senate.<sup>109</sup>

In the 2005-2006 legislative session, the sponsors of the bills addressing the torts took a break but returned to the task the next session in both the House and the Senate. House Bill 681 was introduced by Representatives Insko, Michael Wray, and Michaux. Senate Bill 1503 was filed primarily by Senator Eleanor Kinnaird, and its co-sponsors included Stan Bingham, Kay Hagan, Martin Nesbitt, Jr., and David Weinstein.<sup>110</sup> The House's version passed its first reading, but it was then referred to the Committee on Judiciary I and never reappeared for a second reading. The Senate's version did not have any better luck because immediately after it was filed, the bill was referred to the Committee on Judiciary I (Civil) and was never read.

In the 2009-2010 session, something unexpected happened at the General Assembly in regards to alienation of affection and criminal conversation. There were two bills introduced which dealt with the torts. The first of these, House Bill 1123, was similar to the ones previously mentioned and was sponsored by Representatives Insko, Wray, Pricey Harrison, and Darren Jackson.<sup>111</sup> This legislation sought to abolish the torts, and as usual, the bill passed its first reading in the House but was "lost" in Committee. The second bill, House Bill 1110, was different. Instead of abolishing the torts, this legislation focused on reforming the torts and was entitled "Clarify Alienation of affection/Criminal conversation"; it was primarily sponsored by Representative Melanie Goodwin and co-sponsored by Representatives Harrison and Jackson.<sup>112</sup> This bill, which placed time limitations on both causes of action, passed in both the House and Senate and became N.C. Gen. Stat. § 52-13.

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<sup>109</sup> H.B. 1047, 2003 Gen. Assem., Reg. Sess. (N.C. 2003), *available at* <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2003&BillID=H1047&submitButton=Go>.

<sup>110</sup> H.B. 681, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), *available at* <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2007&BillID=H681&submitButton=Go>; S.B. 1503, 2007 Gen. Assem., Reg. Sess. (N.C. 2007), *available at* <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2007&BillID=S1503&submitButton=Go>.

<sup>111</sup> H.B. 1123, 2009 Gen. Assem., Reg. Sess. (N.C. 2009), *available at* <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2009&BillID=H1123&submitButton=Go>.

<sup>112</sup> H.B. 1110, 2009 Gen. Assem., Reg. Sess. (N.C. 2009), *available at* <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2009&BillID=H1110&submitButton=Go>.

As stated before, the passage of House Bill 1110 in no way abolishes alienation of affection or criminal conversation. The main argument for the passage of the bill was that citizens were wrongly assuming that these heart balm torts could not arise after the date of the separation of the married couple.<sup>113</sup> Members of the Family Law Section of the North Carolina Bar Association argued that this confusion came from the fact that the state's alimony statute cuts off claims of adultery and other marital misconduct, in support of an alimony claim, occurring after the date of separation.<sup>114</sup> Under this new statute, the procedures for filing both torts are now consistent with the alimony statute, and the date of separation with the intent to remain separate serves as the last date on which the claims may arise.<sup>115</sup>

#### VI. NORTH CAROLINA SHOULD ABOLISH ALIENATION OF AFFECTION AND CRIMINAL CONVERSATION

Our marital relationships help define who we are, and betrayals within the bond of marriage can be devastating to everyone involved. For most people, human nature dictates that much of our emotional and psychological well-being depend upon the support and intimacy we receive within our committed relationships with our spouses, but many marriages end or face years of turmoil due to the infidelity of one or more partners.<sup>116</sup> According to one study, after infidelity has been revealed, about 34% of cases in that report ended in divorce, while an additional 50% reported intact marriages that continued to be in significant distress.<sup>117</sup> Infidelity has also been shown to double the likelihood of divorce and is the most frequently cited cause of divorce.<sup>118</sup> This doesn't even begin to acknowledge the impact of the infidelity on children, other family members, friends (some of whom have harbored guilty confessions), and the community as a whole.<sup>119</sup>

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<sup>113</sup> Montgomery, *supra* note 101, at 3.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Brock A. Boekhout, Susan Hendrick & Clyde Hendrick, *Relationship Infidelity: A Loss Perspective*, 4 J. PERSONAL AND INTERPERSONAL LOSS 97, 98-99 (1999).

<sup>117</sup> Israel W. Charney & Sivan Parnass, *The Impact of Extramarital Relationships on the Continuation of Marriages*, 21 J. SEX & MARITAL THERAPY 100, 100 (1995).

<sup>118</sup> See Paul R. Amato & Stacy J. Rogers, *A Longitudinal Study of Marital Problems and Subsequent Divorce*, 59 J. MARRIAGE & FAM. 612 (1997); David C. Atkins, Donald H. Baucom & Neil S. Jacobsen, *Understanding Infidelity: Correlates in a National Random Sample*, 15 J. FAM. PSYCHOL. 735 (2001).

<sup>119</sup> See Dolores Puterbaugh, *When Love Goes Missing*, USA TODAY MAGAZINE, Mar. 2007, at 54.

While it may be more comfortable for those involved in infidelity to view it as a personal, isolated choice, the reality is that even though sexual conduct is a personal choice, the effects of adultery are not confined to the personal realm. As pointed out by one author, in our “culture of relativity, the assertion often is made that infidelity strictly is a personal choice.”<sup>120</sup> Infidelity is also seen in the media as self-fulfillment or an expression of sexual sophistication and independence.<sup>121</sup> Though some individuals view infidelity in this way, the real sense of loss experienced by a person betrayed by sexual or emotional infidelity is significant and painful. However, this sense of loss is difficult to explain in legal terms.<sup>122</sup> Injured partners report intense rage, depression, and feelings of victimization and abandonment.<sup>123</sup> Among the worst losses experienced by someone betrayed by infidelity is the “loss of illusions,” which impacts the foundation of our perceived role and place in the world around us.<sup>124</sup> A violation of basic assumptions about the world and about the emotional safety of the relationship can lead to devastating effects when an affair is discovered, because it can impact a person’s core beliefs about trust.<sup>125</sup> Learning that a trusted partner has betrayed that trust can change a person’s perspective on all people and themselves.<sup>126</sup> Many of these individuals have a loss of self-respect and can be motivated to seek revenge.<sup>127</sup> The negative impact of adultery is clear and is not at issue in the debate over whether to abolish torts which punish adultery.

#### A. *Heart Balm Torts Do Not Deter Adultery*

Our culture promotes an unsettling hypocrisy with infidelity that an emphasis on family values and tort remedies has failed to address. While the vast majority of people will report that they strongly disapprove of extramarital relationships, close to a majority of the population will still report secretly participating in this type of relationship, regardless of the risks. One analysis reported that up to 85% of Ameri-

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Boekhout, *supra* note 116, at 98.

<sup>123</sup> Donald H. Baucom et al., *Treating Affair Couples: Clinical Considerations and Initial Findings*, 20 J. COGNITIVE PSYCHOTHERAPY 375, 376 (2006).

<sup>124</sup> Boekhout, *supra* note 116, at 98.

<sup>125</sup> Baucom, *supra* note 123, at 376.

<sup>126</sup> Boekhout, *supra* note 116, at 98.

<sup>127</sup> *Id.* at 101.

cans think that extramarital sex is wrong.<sup>128</sup> Close to the same time, however, another study found that 45.8% of men and 42.2% of women surveyed were willing to confess to participating in illicit extramarital sexual intercourse, and these percentages are believed to reflect a very conservative estimate of reality.<sup>129</sup> In other words, people participate in infidelity even though they believe that adultery is wrong. Following the completion of a divorce, 40% of divorced women and 45% of divorced men reported more than one hidden extramarital sexual contact during the course of their marriages.<sup>130</sup> While many people will discourage adulterous behavior in public, they are secretly participating in the same behaviors in private. The widespread belief that adultery is wrong does suggest that laws on adultery are not needed for the purpose of educating on the harm caused by adultery, because the majority of people already know and choose to ignore that knowledge.

The private nature of adultery makes it conduct that is difficult to deter by state involvement. One author recently added to the debate regarding North Carolina's abolition of alienation of affection, suggesting that the tort does have an important deterrent effect.<sup>131</sup> She argued that "unless there are some repercussions"<sup>132</sup> a third party contemplating involvement with a married partner "has no reason not to enter into the affair, other than their own moral compass."<sup>133</sup> Perhaps the biggest problem with this perspective is that many people in North Carolina do not know that they can be sued for having intercourse with a person who is married, and even if they do know, they may not be aware of the true marital status of the person they are seducing. The Rosen Law Firm reports that people who are not lawyers are "often surprised" to find out that spouses can sue the third party for monetary damages as a result of an extramarital affair.<sup>134</sup> When people are unaware of a law, it cannot deter their behavior. Furthermore, the idea of deterrence assumes that people who enter into adulterous relationships do so with some significant forethought about the potential

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<sup>128</sup> Victor A. Pestrak, Don Martin & Maggie Martin, *Extramarital Sex: An Examination of the Literature*, 7 INT'L J. FAM. THEORY 107 (1985).

<sup>129</sup> Anthony Peter Thompson, *Emotional and Sexual Components of Extramarital Relations*, 46 J. MARRIAGE & FAM. 35, 37 (1984).

<sup>130</sup> SAMUEL S. JANUS & CYNTHIA L. JANUS, THE JANUS REPORT ON SEXUAL BEHAVIOR 196 (1993).

<sup>131</sup> Maaïke Mulders, *Heart Balm or Heart Break: Alienation of Affection: Pro Alienation of Affection*, CAMPBELL L. OBSERVER, Mar. 2007, at 1, 7.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Rosen, *supra* note 27.

consequences of acting on passionate desires. In order to have a deterrent effect, a consequence must actually be known and intellectually considered.

Even when the penalty for adultery is much higher than civil liability, people still commit adultery. Throughout history, men and women have disregarded the deterrent effect of laws that punished adultery and have followed sexual passion in the apparent hope or arrogance of believing they will not be caught.<sup>135</sup> For example, the punishment for adultery is the death penalty under Shari'ah within Islamic law, and yet this punishment still does not eliminate adulterous behavior.<sup>136</sup> International attention focused sharply upon northern Nigeria in 2002, when the stoning of two women caught in adultery was brought to the attention of the media.<sup>137</sup> Other countries with a large Muslim population also apply capital punishment for adultery, including Afghanistan under the Taliban regime, Iran, Pakistan, United Arab Emirates, Parti Islam Se Malaysia (PAS) party in Malaysia, Saudi Arabia, and the Sudanese government.<sup>138</sup> Although the penalty is death, adultery still occurs in these regions.<sup>139</sup> If the threat of being stoned to death will not deter adultery, then North Carolina tort law is unlikely to be a significant factor in deterring two people from involvement in an illicit affair.

One of the reasons cited by the Family Law Section of the North Carolina Bar Association for repealing the torts is that in the view of the majority of the 1,040 practicing family law attorneys who belong to

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<sup>135</sup> See JOYCE TYLDESLEY, JUDGMENT OF THE PHARAOH: CRIME AND PUNISHMENT IN ANCIENT EGYPT 160 (2001) (telling a story of adultery from ancient Egypt. A civil lawsuit was filed by a male fiancé against a man who had sexual relations with his bride-to-be. The betrayed fiancé failed to prevail, because the paramour was of a higher socioeconomic class than the betrayed man and used his influence to avoid responsibility. The court accepted instead the male paramour's solemn vow not to see the woman again or to face having his nose and ears cut off. He did not keep the vow, however, and later made the woman pregnant. He again vowed not to see her again, and through his influence he managed to keep his ears and nose). See also Ezekiel 23:25 (referencing the traditional "ear and nose punishment").

<sup>136</sup> Ogechi E. Anyanwu, *Crime and Justice in Postcolonial Nigeria: The Justifications and Challenges of Islamic Law of Shari'ah*, 21 J.L. & RELIGION 315, 332 (2005).

<sup>137</sup> See *id.* at 336.

<sup>138</sup> *Id.* at 335.

<sup>139</sup> See *id.*; see also Azam Kamgouian et al., *Defending Human Rights in Islamic Countries*, INT'L HUMANIST NEWS 10, 14 (Aug. 2003) ("Islamic law, the Sharia, should be opposed for its imposition of theocracy over democracy, its abuse of human rights, its institutionalized discrimination, its denial of human dignity and individual autonomy, its punishment of alternative lifestyle choices, and for the severity of its punishments . . . . The principles of the Sharia are inimical to moral progress, humanity and civilized values.").

the section, the torts do not protect marriage or deter adultery.<sup>140</sup> In fact, when viewed nationally, the states that have retained the torts “are in the top half of the states with the highest divorce rates.”<sup>141</sup> These North Carolina family law attorneys have the benefit of the experience gained working in the trenches of divorce and adultery disputes, representing people on both sides of adulterous relationships. These family law attorneys have taken the position based on their experiences with families that the adultery torts of criminal conversation and alienation of affection are more destructive than constructive and should be abolished.<sup>142</sup>

The adultery torts, as enforced in North Carolina, do not focus any protective effort or deterrence upon the individuals in the marriage but instead misdirect the focus and the blame to the third party. Even if criminal conversation and alienation of affection deterred a third party from participating in sexual relations with a married person, these torts do nothing to deter or address the behavior of the cheating spouse on the prowl, who actually made the vow to be faithful in the first place.<sup>143</sup> The emphasis of adultery torts is completely misguided because it provides a civil penalty against the third party who participated in the infidelity, but it provides no penalty against the spouse who actually broke the solemn promise of fidelity to the victimized spouse.<sup>144</sup>

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<sup>140</sup> Narron, *supra* note 100, at 1-2 (suggesting that the majority of the North Carolina Bar Association’s Family Law Section hold this belief because “the four states that have retained the [Alienation of Affection and Criminal Conversation] torts like North Carolina are in the top half of the states with the highest divorce rates”).

<sup>141</sup> *Id.* at 2. According to statistics gathered and maintained by the Division of Vital Statistics, North Carolina had a divorce rate of 4.0 in 2007. In comparison to forty-four other states and the District of Columbia, North Carolina was the eighteenth state with the highest divorce rate. Mississippi, a state which actively recognizes both heart balm torts, also had an above average divorce rate at 4.5, and was the state with the tenth highest divorce rate in 2007. The average divorce rate among the states in 2007 was 3.793. States not considered include California, Georgia, Hawaii, Indiana, Minnesota, and Louisiana. Centers for Disease Control and Prevention, *Divorce Rates by State*, <http://www.cdc.gov/nchs/data/nvss/Divorce%20Rates%2090%2095%20and%2099-07.pdf> (last visited Apr. 2, 2011).

<sup>142</sup> See Narron, *supra* note 100, at 2.

<sup>143</sup> See *Misenheimer v. Burris*, 610 S.E.2d 271, 275-76 (N.C. Ct. App. 2005) (Tyson, J., dissenting); *Nunn v. Allen*, 574 S.E.2d 35, 43 (N.C. Ct. App. 2002); *Brown v. Hurley*, 477 S.E.2d 234, 237 (N.C. Ct. App. 1996) (stating that criminal conversation plaintiffs must prove only two elements: (1) an actual legal marriage between the plaintiff and the allegedly adulterous spouse, and (2) sexual intercourse between the defendant and that spouse during the legal marriage).

<sup>144</sup> See *Misenheimer*, 610 S.E.2d 271; *Nunn*, 574 S.E.2d 35; *Brown*, 477 S.E.2d 237.

Ironically, current North Carolina tort law would penalize the cheating spouse only if she or he eventually divorced the first spouse and married the person with whom she or he had an affair. In other words, if the cheating spouse remains in the marriage, only the third party defendant is liable for the damages, but if the cheating spouse divorces his or her spouse and marries the person he or she had an affair with, then, and only then, would he or she suffer damages, when the new couple together attempts to pay the tort award. At that point the new marriage would suffer the financial penalty and defense costs related to the prior infidelity. When a cheating spouse's initial marriage dissolves into divorce, and then he or she marries the former adulterous partner, the idea of "moral protection of the family" becomes much more confused. From that point forward there are two families in crisis. Both families will incur the financial burden of legal fees incurred for prosecuting and defending the adultery torts.

B. *Heart Balm Torts Interfere with a Family's Ability to Heal*

In addition to not providing the desired deterrent effect, criminal conversation and alienation of affection lawsuits interfere with the healing process by prolonging litigation and intensifying anger and resentment. These actions also burden and prevent adjustment of the families involved in the adulterous relationships. To attempt to save a marriage, or to heal from marital infidelity even when the marriage dissolves, psychologists and marriage counseling practitioners emphasize the importance of gaining a more balanced view of the offender and the event, decreasing negative affect toward the offender while trying to redevelop compassion, and most notably, giving up the right to punish the offender further.<sup>145</sup> Forgiveness at some level is required in order for a betrayed spouse to move forward into healthy relationships.<sup>146</sup> Experts on the human ability to move past pain through forgiveness explain that the true key to forgiveness is *giving up the right to punish* the wrongdoer(s).<sup>147</sup> A spouse injured from adultery who pursues tort litigation against the third party has not and cannot give up the right to punish and will prolong the personal agony of the betrayal for himself and any children involved.

Successfully negotiating forgiveness can allow couples to develop a better understanding of themselves and the marriage and potentially

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<sup>145</sup> Baucom, *supra* note 123, at 377.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*



work to actually rebuild the marriage or, if not possible, to dissolve the marriage without intense resentment and anger that will further damage themselves and their children.<sup>148</sup> If children are involved in a marriage that ends in the shadow of adultery, then protecting the emotional stability of the children also provides a strong reason why criminal conversation and alienation of affection should be abolished.<sup>149</sup>

One author argues that the civil adversarial system in family law already greatly increases harm to children who are subjected to divorce by encouraging competition and power struggles between parents at the expense of the child, and that the time for litigation must be limited for the benefit of the children.<sup>150</sup>

To minimize the negative impact upon children involved in divorce, parents must minimize the involvement of the legal system and lengthy litigation following divorce, rather than increase the causes of action filed against the spouse or an alleged paramour.<sup>151</sup> In working out the details of ending a marriage, “families are better served by avoiding a situation where one spouse is pitted against the other” because children suffer greater harm when they are expected to choose sides between two parents.<sup>152</sup>

Forgiveness and healing are not about blame, revenge, or monetary compensation. In contemplating the intentional harm a spouse does when he or she enters an adulterous relationship, of course, an injured spouse must determine personally and individually if forgiveness is possible with time and reflection (or meditation or prayer). Forgiveness that enables healing does not imply allowing the spouse to get away with the action, or even necessarily staying in the marriage, but rather *giving up the right to punish* the wrongdoers.<sup>153</sup>

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<sup>148</sup> *Id.* at 383.

<sup>149</sup> See Jennifer E. McDougal, Comment, *Legislating Morality: The Actions for Alienation of Affections and Criminal Conversation in North Carolina*, 33 WAKE FOREST L. REV. 163, 183 (1998); see also *O’Neil v. Schuckardt*, 733 P.2d 693, 697 (Idaho 1986) (noting that the Washington Supreme Court abolished alienation of affection partly because the lawsuits have a “harmful effect on the children of the marriage”).

<sup>150</sup> SUSAN ALLISON, CONSCIOUS DIVORCE: ENDING A MARRIAGE WITH INTEGRITY: A PRACTICAL AND SPIRITUAL GUIDE FOR MOVING ON 144 (2001) (arguing that litigation in divorce leads directly to “further antagonism and increased stress for couples and families”).

<sup>151</sup> ELISSA P. BENEDEK & CATHERINE F. BROWN, HOW TO HELP YOUR CHILD OVERCOME YOUR DIVORCE: A SUPPORT GUIDE FOR FAMILIES 36-37 (1998).

<sup>152</sup> *Id.*

<sup>153</sup> Baucom, *supra* note 123, at 377.

Criminal conversation and alienation of affection also artificially heighten the relevance of sexual sin at the expense of potentially promoting other sins or evils. In considering the laws of our state, we must honestly and thoughtfully consider whether family values are truly served by torts that seek to financially punish those caught in adultery. While the act of adultery is painful, harmful, and wrong, allowing a betrayed spouse to publicly embarrass and seek monetary revenge on someone who may not have even known that his sexual partner was married is also wrong.

#### VII. CONCLUSION

North Carolina should take the next step in its journey by abolishing criminal conversation and alienation of affection because they are antiquated, do not protect marriage or deter adultery, and in fact defeat forgiveness, thereby prolonging the healing process after infidelity. While adultery is recognized as a painful and emotional circumstance for the spouse who has been betrayed, our legal system should not be a tool for the injured spouse to seek revenge on a third party to the marriage. When a couple's marriage ends, our legal system should get involved only to assure that the division of the couple's assets is equitable, needy spouses are supported, and that children are cared for and provided for. Our legal system should not continue to allow scorned spouses to rehash the details of an affair in our courts and permit monetary damages for hurt feelings.

North Carolina should follow in the path of the majority of our sister states that have recognized these torts as an unsuitable remedy in the legal system. We need to reform our tort law and update our court system by ridding both of criminal conversation and alienation of affection.

APPENDIX A:  
CURRENT BILL UNDER CONSIDERATION IN THE  
NORTH CAROLINA HOUSE  
  
GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2007  
HD  
HOUSE DRH70068-LB-114 (02/13)

Short Title: Abolish Alienation of affection/Crim. Conv. (Public)

Sponsors: Representatives Insko and Wray  
(Primary Sponsors).

Referred to: \_\_\_\_\_

A BILL TO BE ENTITLED  
AN ACT TO ABOLISH THE CIVIL ACTIONS OF  
ALIENATION OF AFFECTION AND  
CRIMINAL CONVERSATION.

The General Assembly of North Carolina enacts:

**SECTION 1.** Chapter 52 of the General Statutes is amended by adding a new section to read:

**“§ 52-13. Abolition of alienation of affection cause of action.**

The common-law cause of action for alienation of affection of a spouse is abolished.”

**SECTION 2.** Chapter 52 of the General Statutes is amended by adding a new section to read:

**“§ 52-14. Abolition of Criminal conversation cause of action.**

The common-law cause of action for Criminal conversation is abolished.”

**SECTION 3.** This act is effective when it becomes law. This act does not affect cases pending when the act becomes law.

APPENDIX B:  
 CURRENT FORM OF BILL UNDER CONSIDERATION  
**GENERAL ASSEMBLY OF NORTH CAROLINA**  
**SESSION 2007**  
**H1**  
**HOUSE BILL 681**

Short Title: Abolish Alienation of affection/Crim. Conv. (Public)

Sponsors: Representatives Insko, Wray, and Michaux  
 (Primary Sponsors).

Referred to: Judiciary I.

MARCH 15, 2007

A BILL TO BE ENTITLED  
 AN ACT TO ABOLISH THE CIVIL ACTIONS OF  
 ALIENATION OF AFFECTION AND  
 CRIMINAL CONVERSATION.

The General Assembly of North Carolina enacts:

**SECTION 1.** Chapter 52 of the General Statutes is amended by adding a new section to read:

**“§ 52-13. Abolition of alienation of affection cause of action.**

The common-law cause of action for alienation of affection of a spouse is abolished.”

**SECTION 2.** Chapter 52 of the General Statutes is amended by adding a new section to read:

**“§ 52-14. Abolition of Criminal conversation cause of action.**

The common-law cause of action for Criminal conversation is abolished.”

**SECTION 3.** This act is effective when it becomes law. This act does not affect cases pending when the act becomes law.

APPENDIX C:  
CURRENT BILL UNDER CONSIDERATION IN THE  
NORTH CAROLINA SENATE

**GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2007  
SD  
SENATE DRS85278-LD-136 (03/13)**

Short Title: Abolish Alienation of affection/Crim. Conv. (Public)

Sponsors: Senator Kinnaird.

Referred to: \_\_\_\_\_

A BILL TO BE ENTITLED  
AN ACT TO ABOLISH THE CIVIL ACTIONS OF  
ALIENATION OF AFFECTION AND  
CRIMINAL CONVERSATION.

The General Assembly of North Carolina enacts:

**SECTION 1.** Chapter 52 of the General Statutes is amended by adding two new sections to read:

**“§ 52-13. Abolition of alienation of affection cause of action.**

The common-law cause of action for alienation of affection of a spouse is abolished.”

**“§ 52-14. Abolition of criminal conversation cause of action.**

The common-law cause of action for criminal conversation is abolished.”

**SECTION 2.** This act is effective when it becomes law and applies to actions filed on or after that date. This act does not affect cases pending when the act becomes law.

APPENDIX D:  
PREVIOUS BILL THAT PASSED NORTH CAROLINA HOUSE BUT  
DID NOT PASS THE SENATE

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2003  
H 1  
HOUSE BILL 1047

Short Title: Abolish Alienation of affection/Crim. Conv. (Public)  
Sponsors: Representatives Hackney; and Insko.  
Referred to: Judiciary I.

APRIL 10, 2003

1 A BILL TO BE ENTITLED  
2 AN ACT TO ABOLISH THE CIVIL ACTIONS OF ALIENATION OF  
3 AFFECTION  
4 AND CRIMINAL CONVERSATION.  
5 The General Assembly of North Carolina enacts:  
6 **SECTION 1.** Chapter 52 of the General Statutes is amended by adding a  
7 new section to read:  
8 “§ 52-13. **Abolition of alienation of affection cause of action.**  
9 The common-law cause of action for alienation of affection of a  
10 spouse is  
11 abolished.”  
12 **SECTION 2.** Chapter 52 of the General Statutes is amended by adding a  
13 new section to read:  
14 “§ 52-14. **Abolition of criminal conversation cause of action.**  
15 The common-law cause of action for criminal conversation is  
16 abolished.”  
17 **SECTION 3.** This act is effective when it becomes law. This act does  
18 not  
19 affect cases pending when the act becomes law.