

# **Marriage, Separation, Divorce & Other Torts**

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## **Abstract**

Marriage is a status being husband and wife that enables the couple privileges not offered to unmarried persons. Modern privileges of marriage allow a spouse to do tasks such as sign legal documents for the other spouse, be granted tax breaks, and have a right to inherit from their deceased spouse. At first glance these spousal privileges seem to be the product of convenience, however they are instead the fruits of history. Another product of the history of marriage is the doctrine of interspousal tort immunity which bars tort claims between spouses. This article discusses the origin of interspousal tort immunity and its survival from ancient times to present day. Rationales for the abolition of the doctrine are presented, and a trend showing its ignorance to public policy in light of the separation and subsequent divorce of spouses is outlined by recent case law.

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## Introduction

In 2004, after practicing law for 32 years, I tried my first “jury” trial in a divorce case against a well-know divorce lawyer from Macon. That same year, in concert with some other trial lawyers, I also helped to try the largest personal injury case in my career for some local clients in Cordele. The personal injury trial was settled in the middle of the trial for eight figures, but absolutely no one, outside the jurors, bailiffs and family, heard about the results of our three and one-half year, sixty-five deposition and \$450,000 out-of-pocket investment. To my knowledge, I have never received a case referral for the results in that case. After the divorce trial, however, an explosion of information occurred in the “divorce network” causing multitudes of high asset cases from all over the state to come pouring into my firm. This ultimately dictated a shift in my practice. I learned an important lesson: Do a credible job in a domestic case and you have a client, their family, their friends and acquaints who forever will tell anyone, with time to listen, how “their lawyer” got justice for their daughter, relative or friend. As a small town litigator, domestic cases were what I did in between everything else. I never gave much value to them or realized their importance.

Since most of my background had been in torts, I began to add counts for assault, battery, fraud and other intentional injury claims to my domestic cases. I also began looking at domestic cases, structurally, the same way I did with tort matters. I wanted to make sure all the interests and burden of proofs were properly aligned, as in any declaratory judgment/tort case, and to maximize my jury verdict form to expand the case to allow additional recoveries when authorized by the evidence and the law. I wanted as many chances as possible for my clients to receive an award, in addition to the standard “alimony, child support and equitable division” blanks on the verdict form. A recovery in an intentional personal injury or fraud action is similar to alimony in that both types of awards are non-dischargeable under bankruptcy laws.<sup>1</sup> In fact, I discovered that the tort portion of the case seemed to help garner higher portions of the assets in the equitable division portion of the verdict, and rightly so. The battered spouse deserved more

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<sup>1</sup> 11 U.S.C. § 523 (a) (6).

for enduring such conduct, if presented within the appropriate statute of limitations period.<sup>2</sup> This article is to offer both the history and current law of torts within a marriage and subsequent divorce, in hopes that the bar will realize all issues which should/could be litigated and resolved within a domestic matter.

## **I. Inter-spousal Tort Immunity Within a Divorce**

The general purpose of tort law is to compensate an injured party from acts or omissions by a tortfeasor which are the cause of injury. Property division divorce cases in Georgia are based on the concept of “equitable division” with the cause of the separation being a relevant matter in making the division. Many of the causes may constitute torts. However legal fiction within the law of torts created by common law hundreds of years ago, provided certain exceptions, defenses and immunities to parties of a marriage from compensating the injured spouse despite the fact that such injury was intentionally or maliciously inflicted. One such exception is the doctrine of inter-spousal tort immunity. Inter-spousal tort immunity is based on the common law theory of coverture, in which a legal fiction was developed to consider a husband and wife as one entity. Under the doctrine, a spouse is barred from receiving compensation for injuries merely because the tort which created the injury was privileged due to the tortfeasor’s status.

### **A. A Brief History of the Doctrine of Inter-Spousal Tort Immunity**

Modern law is a product of history. To gain a complete understanding of a law one must

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<sup>2</sup> In an action for personal injuries, the statute of limitations is two years from the date of the injury; fraud allows for four years after its discovery. The position this article takes in regards to tort actions within a marriage will advocate for the adding of tort claims with the divorce. A failure to do so may bar a plaintiff spouse due to the relatively short limitations period associated with intentional personal injury actions.

first understand where and why a law came into being. Laws regulating domestic relations are perhaps the earliest to arise and become societal standards. For this reason archaic conditions have been preserved for millennia.<sup>3</sup>

The earliest recognition of the idea of inter-spousal immunity was in the Code of Hammurabi<sup>4</sup> in 2250 B.C. which allowed a husband to have dominion over his wife.<sup>5</sup> Under the code husbands could exercise control and command their wife without punishment. This ancient concept was also recognized by the Roman Empire under the theory of *pater familias*, which allowed the husband nearly absolute control over his household including his wife without legal penalties.<sup>6</sup>

In the Middle Ages, Anglo-Saxon law continued this ideology. The Anglo-Saxon law would eventually be absorbed into the laws of England. In the 18<sup>th</sup> century, English law was still consistent with these ancient laws in regards to intermarital torts. Married women, as feme covert, had no legal status and their marriage relationship was analogous to a master-servant relationship.<sup>7</sup> In his Commentaries on the Laws of England, William Blackstone noted that English civil law gave a husband the right to severely beat his wife using whips and sticks with no significant threat of punishment.<sup>8</sup> During this time period, the United States of America declared their sovereign independence from Great Britain, yet the new nation was completely dependant upon their former nation's legal system. English common law was still followed by the United States' young judicial system with the English ideology of the relationship of married couples included.

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<sup>3</sup> Roscoe Pound, Individual Interests in the Domestic Relations, 14 MICH. L. REV. 177, 187 (1916).

<sup>4</sup> Hammurabi was the sixth king of the first Babylonian Dynasty.

<sup>5</sup> Simon A. Bahr, Intermarital Torts, NEWARK LAW REVIEW Vol. 4, Number 4 (1939).

<sup>6</sup> M. Radin, HANDBOOK OF ROMAN LAW §§ 38, 40 (1927).

<sup>7</sup> Paula Abrams, The Traditional of Reproduction, 37 ARIZ. L. REV. 453 (1995).

<sup>8</sup> William Blackstone, COMMENTARIES OF THE LAWS OF ENGLAND, Book 1, Ch. 15 (1769).

In early America, wives fared slightly better than their English counterparts. In America, women were allowed to enter into some commercial transactions without going through the status of their husband in transactions involving contracts and the sale of real property.<sup>9</sup> However, a married woman still could not bring a civil suit against her husband. The wife's legal status was deemed to have merged into that of the husband.<sup>10</sup> Despite their growing commercial freedom, married women were still subject, in most jurisdictions, to their husband's tortuous conduct without legal recourse under the law in early American jurisprudence.

Statutes also reflect the status of inter-marital relations. The Married Women's Acts were promulgated by most jurisdictions in the mid-19<sup>th</sup> century. The Acts aimed to make the status of women more equal to men in the eyes of the law, primarily in regards to property rights, testamentary rights and the control of their other assets without interference from their husbands.<sup>11</sup> Although some rights began to develop for women, not all areas of the law followed this pattern. Some jurisdictions gave wives the right to bring suit against her husband. South Carolina's Code Ann § 15-5-170 read, "A married woman may sue and be sued as if she were unmarried. When the action is between herself and her husband she may likewise sue or be sued alone." Still, not all state legislatures agreed on the issue. A 1985 Hawaii statute read, "A married woman may sue and be sued in the same manner as if she were sole; but this section shall not be construed to authorize suits between husband and wife."<sup>12</sup>

Even in jurisdictions that did enact Married Women's Acts in the mid-1800's, the judiciary would often invalidate the provisions of the Acts as such legislation often was at odds with prior judge-made common law.<sup>13</sup> This "judicial de-radicalization" was accepted at the

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<sup>9</sup> G. Lerner, *THE WOMAN IN AMERICAN HISTORY* 13-14 (1971).

<sup>10</sup> *Thompson v. Thompson*, 218 U.S. 611 (U.S. 1910).

<sup>11</sup> Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 *GEO. L.J.* 1359 (1983).

<sup>12</sup> Haw. Rev. Stat. § 573-5 (1985), repealed by L. 1987.

<sup>13</sup> J. Hurst, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 186-88* (1950).

time.<sup>14</sup> The field of torts was not firmly rooted in law until the late Nineteenth century, allowing traditional common law theories to trump many emerging theories of equality.<sup>15</sup> Court holdings of the time period reflected this philosophy. A Georgia court expressly ruled in *Heyman v. Heyman*, that the Georgia Married Woman's Act has not changed the common law rule that neither husband nor wife is liable to the other in a civil action for a personal tort.<sup>16</sup> In *Abbe v. Abbe*, the court ruled that a wife was barred from recovering damages after being battered and assaulted by her husband.<sup>17</sup> Similarly, in *Main v. Main* a judge acted properly when he held a husband was immune from liability for the false imprisonment of his wife under the doctrine inter-spousal tort immunity.<sup>18</sup> The Supreme Court of the United States gave their opinion on the doctrine in *Thompson v. Thompson*.<sup>19</sup> In that case, a wife brought suit against her husband for assault and battery. The Court considered the burden that coverture placed upon women and the Acts passed to emancipate women from a husband's control. The justices held the Act authorized a married woman to bring suit for torts committed against her as fully and freely as if she were unmarried, but added the Act was not intended to give a right of action as against the husband. Rationale for this clarification was based on the notion that a different holding would lead to a flood of litigation between spouses. The effect of this holding left women a severely inadequate legal remedy to protect themselves from violence within their homes.

In modern times legislatures and judiciaries have placed significant modifications on the doctrine of inter-spousal tort immunity. In 1914, every jurisdiction in the country recognized the doctrine.<sup>20</sup> The archaic rationales of privileged abuse and neglect without recourse, which

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<sup>14</sup> G. White, TORT LAW IN AMERICA 1 (1979).

<sup>15</sup> *Id.*

<sup>16</sup> *Heyman v. Heyman*, 19 Ga. App. 634 (Ga. Ct. App. 1917).

<sup>17</sup> *Abbe v. Abbe*, 48 N.Y.S. 25, 22 App. Div. 482 (1897).

<sup>18</sup> *Main v. Main*, 46 Ill. App. 106 (1891).

<sup>19</sup> *Thompson v. Thompson*, 218 U.S. 611 (U.S. 1910).

<sup>20</sup> Carl Tobias, The Imminent Demise of Interspousal Tort Immunity, 60 MONT. L. REV. 101 (1999).

contrast with justice and equity are now less prevalent. In the one-hundred years since, nearly every state has either abolished the doctrine or significantly limited its application. However, this relic of ancient times is still applied in some jurisdictions.

## **B. The Status of Inter-Spousal Tort Immunity in Georgia**

The majority of states no longer recognize the common law doctrine of inter-spousal tort immunity. Georgia is in a significant minority of states as it keeps the doctrine in its common law form as adopted in 1863.<sup>21</sup> Georgia courts have followed the code, barring suits and stating marriage extinguishes antenuptial rights of action between the husband and the wife, and after marriage, the wife cannot maintain an action against her husband based on a tortious injury to her person.<sup>22</sup> Although, the majority of the discussion in this article will deal with intentional torts arising during the dissolution of marriage, it is important to note that the doctrine also applies to negligence and other unintentional torts. However, in two situations, Georgia courts have not applied the doctrine. First, in extreme factual situations, courts will deviate from a strict application of the general rule.<sup>23</sup> Second, the doctrine will not be applied when there exist both a lack of marital harmony between the spouses and no possibility of collusion<sup>24</sup> between the spouses.<sup>25</sup> These exceptions to the general rule were recognized by the Georgia Supreme Court in *Harris v. Harris*.<sup>26</sup> In nearly each instance where a court states a need for inter-spousal tort immunity the primary justification is for public policy reasons. Unfortunately, the doctrine is overbroad. There are also countless public policy reasons to abolish the application of inter-spousal tort immunity. History appears to be the reason for the retention of the doctrine.

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<sup>21</sup>O.C.G.A. § 19-3-8 (2013).

<sup>22</sup>*Gates v. Gates*, 277 Ga. 175 (Ga 2003).

<sup>23</sup> *Stanfield v. Stanfield*, 187 Ga. App. 722 (1988).

<sup>24</sup> *Shoemake v. Shoemake*, 200 Ga. App. 182 (1991).

<sup>25</sup> *Smith v. Rowell*, 176 Ga. App. 100 (1985).

<sup>26</sup> *Harris v. Harris*, 252 Ga. 387 (1984).



### C. The Dissolution of Marriage and Inter-Spousal Tort Immunity

Marriage creates the legal status of the husband and wife. The status of married couples allows interactions between the husband and wife to be viewed differently than interactions between the husband and wife and third parties. A spouse may recover for a third party's acts which deprive the spouse of their partners services, companionship, support and conjugal affections. Within the marriage, the status of husband and wife establishes various duties, privileges and obligations on the two under the law. For instance, in certain circumstances spouses cannot be compelled to testify against one another or may prevent one another from disclosing information communicated in confidence. The doctrine of inter-spousal tort immunity insulates a spouse from tort liability for injuries caused to the other spouse. Some states, including Georgia still recognize this doctrine when it does not violate public policy. An example of a court application of the doctrine can be seen in the holding in *Yates v. Lowe*. Here, the court found that despite the death of the husband a suit commenced by the surviving wife was barred by the doctrine of inter-spousal tort immunity.<sup>27</sup> The basis of this decision was to prevent the appearance of collusion between the wife and her deceased husband's estate, as the wife would have a friendly relationship from an economic perspective with the estate of her deceased husband.<sup>28</sup>

While the general rule is to apply inter-spousal tort immunity in suits under tort law between spouses, the doctrine will not be applied where public policy reasons are not present. For example, in *Trust Co. Bank v. Thornton*, a claim was brought against the deceased husband's estate by the deceased wife's parents. The distinguishing facts the facts from *Yates v. Lowe* is the deceased wife's parents had no interest in the estate of the deceased husband. Like *Yates v. Lowe*, there was no marital harmony to protect, but because the parent's of the deceased wife had no interest, this case does not create a reasonable apprehension of collusion between the plaintiffs and the defendant estate. For these reasons, there was no public policy concern

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<sup>27</sup> *Yates v. Lowe*, 179 Ga. App. 888 (Ga. Ct. App. 1986).

<sup>28</sup> *Id.*

supporting the application of inter-spousal tort immunity and the doctrine was not applied by the court.<sup>29</sup>

To obtain a divorce in Georgia, married couples may either file for a fault or no-fault based divorces. A fault based divorce may be granted to parties on the grounds of adultery, desertion, extreme cruelty, drug addition, habitual drunkenness, willful desertion for a period of over a year, insanity, conviction of crime of moral turpitude, incest, impotency at the time of marriage, force, duress, menace or fraud.<sup>30</sup> A party seeking a divorce may seek a no-fault divorce, in which the petitioner must show that the marriage is irretrievably broken and there is no possibility of reconciliation.<sup>31</sup>

Generally, a party may recover from a tortfeasor for any injuries inflicted. A spouse of a tortfeasor may be barred from recovering compensation from his/her wrongdoer under the inter-spousal immunity statute currently in place. There are approximately 2,096,000 marriages in the United States, and statistics show that around 53% of those marriages will end in divorce.<sup>32</sup> Of those divorces it is estimated that between 10-15% involve conflicts with severe abuse and physical violence.<sup>33</sup> Where still in effect, many of the victims of such abuse are barred from recovering from their injuries. The lack of a legal remedy for these victims is an egregious and blatant injustice and such deprivation is a vestigial concept left over from a sexist society.

Whether a divorce is being sought for fault or no-fault reasons under Georgia law, there is a persuasive argument that there is no longer marital harmony or possibility of a collusive or “friendly” lawsuit between the parties. Policy arguments in support of marital harmony just do not exist in a divorce setting. Further, a party seeking to receive the benefits of inter-spousal

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<sup>29</sup> *Trust Co. Bank v. Thornton*, 186 Ga. App. 706, 708 (Ga. Ct. App. 1988).

<sup>30</sup> O.C.G.A. 19-5-3 (2013).

<sup>31</sup> O.C.G.A. 19-5-4 (2013).

<sup>32</sup> Centers for Disease Control and Prevention, *Marriage and Divorce: FastStats*, (Aug. 8, 2013 5:16 PM), <http://www.cdc.gov/nchs/fastats/divorce.htm>.

<sup>33</sup> William C. Spohn, *The American Myth of Divorce*, (Aug. 12, 2013, 7:57 AM), <http://www.scu.edu/ethics/publications/iie/v9n2/divorce.html>.

immunity, based on their status as husband and wife, should not be allowed to use those benefits when they abused their marital status. When they abuse the status they should lose the ability to assert any privileges that were fruits of such status.

In *Wallach v. Wallach*, where the parties were married at the time of the automobile collision but divorced before the subsequent lawsuit was filed, this court followed the general rule that after divorce one of the former spouses cannot maintain an action against the other for a personal tort committed during coverture.<sup>34</sup> Coverture is the status and relationship of a wife arising out of a marital relationship.<sup>35</sup> As discussed in the previous paragraph, if a divorce is being sought the marital relationship has equitably ended. Furthermore, the Middle Aged term of coverture used by the *Wallach v. Wallach* court is presently of little significance. Women no longer require the protection and status of a man to exercise their rights as an adult in the United States, making the theory of coverture inapplicable.

## **II. Torts and Marriage**

A tort is a breach of a private duty owed to an individual which results in the injury of either the individual's person or property.<sup>36</sup> An act may be both a tort and a crime, however torts are distinguished from crimes because torts are private in nature as opposed to a crime's public nature. A central tenet of tort law is the ability of the wronged party to recover compensation from the tortfeasor for damages caused to person or property. Without the possibility of the tortfeasor having to pay damages, there is little if any reason for tort law to exist.

### **A. Torts During the Dissolution**

When a failing marriage is reaching its final days, emotions often escalate causing more

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<sup>34</sup> *Wallach v. Wallach*, 94 Ga. App. 576, 578 (1956).

<sup>35</sup> BALLENTINE'S LAW DICTIONARY 117 (1994).

<sup>36</sup> BALLENTINE'S LAW DICTIONARY 551 (1994).

than a mere exchange of unhappy words. Actions and words by one spouse may create a reasonable apprehension of immediate harmful or offensive contact with another, and may eventually result in such contact. Conduct between spouses may be outrageous and have an intention to harm the other which transcends all bounds of decency found in society. A spouse may, out of malice or spite, deprive the other of their possessions, or substantially interfere with the other's possessions to render the object valueless. If the two parties did not have the status of being married, these instances would be causes of action for assault, battery, intentional infliction of emotional distress, trespass to chattels and conversion. However, common law would likely prevent a recovery in these instances in light of their status as a married couple and the application of inter-spousal tort immunity. Instead, in these situations a court should consider the tort as the end of the marriage relationship if it was material to the dissolution of the marriage. Therefore, at the time of the commission of the tort, courts should view marital harmony as non-existent, especially if a divorce is filed in light of the tortuous conduct.

### **B. Statutory Indications of a Lack of Marital Harmony**

As previously outlined, cruel treatment is ground for a fault based divorce in Georgia. A tort such as an assault or battery by the wife upon the husband or vice-versa, constitutes cruel treatment for the purposes of a fault-based divorce.<sup>37</sup> An inter-spousal tort leads to an end of marital harmony. The occurrence of the statutory permitted grounds for divorce in the form of a tort also ends marital harmony as the injured party has a right to end the marriage.

Insanity as a legal term is most often associated as a defense to unreasonable actions. However, insanity is also grounds for divorce in Georgia. Insanity is defined in two ways in Georgia; the first is the inability to distinguish between right and wrong,<sup>38</sup> and the other is a delusional compulsion.<sup>39</sup> The second situation occurs when at the time of an act a delusional

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<sup>37</sup> *Smith v. Smith*, 167 Ga. 98, 104 (Ga. 1928).

<sup>38</sup> O.C.G.A § 16-3-2 (2013).

<sup>39</sup> O.C.G.A § 16-13-3 (2013).

compulsion to do such an act overmastered his will to resist doing it. Such an event, if it leads to a petition to divorce, is an end to marital harmony. For this reason, any tortious conduct between spouses after this delusional compulsion, should not be barred by the doctrine of inter-spousal tort immunity.

### **C. Immunity Removed**

The commission of a tort or existence of a fault-based grounds for divorce which leads to a petition for divorce being filed or separation of the parties is an end to marital harmony. This is one of the two public policy reasons in favor of the application of the doctrine. The other policy consideration, discussed in *Robeson v. International Indem. Co.*, holds that without the existence of such harmony, it is highly unlikely that collusion will occur between the parties unless there is some evidence of potential fraud on an associated insurance claim or to the court. In lawsuits in which the judgment would be paid by an insurance company courts hold that a collusive or friendly relationship exists.<sup>40</sup> Without insurance, the public policy arguments in favor of inter-spousal immunity evaporate and there is no support for application of the interspousal tort immunity provisions of O.C.G.A. § 19-3-8.<sup>41</sup> All injuries in tort which are the cause for separation and/or filing a divorce petition and those subsequent should not be barred by this doctrine, so long as they are within the appropriate statute of limitations, and are not covered by insurance. Removing this defense will allow injured spouses the ability to seek appropriate legal redress from tortfeasor spouses, for loss of income, medical damages and even punitive damages, where appropriate. In cases involving a specific intent to harm, the \$250,000 cap can be removed.

### **III. Fraud**

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<sup>40</sup> *Robeson v. International Indem. Co.*, 248 Ga. 306, 309 (Ga. 1981).

<sup>41</sup> *See Smith v. Rowell*, 176 Ga. App. 100 (1985); *Shoemake v. Shoemake*, 200 Ga. App. 182 (1991).

In Georgia, for a prima facie case of fraud, one must show that there was a misrepresentation of a material fact, made willfully to deceive or recklessly without knowledge and acted upon by the opposite party causing damages thereto.<sup>42</sup> If proven, a party who relied on fraudulent statements may recover punitive damages to deter and punish the wrongdoer. Georgia courts have recognized fraud in several situations involving marital relations.

### **A. Child Support**

A party to divorce may be able to recover tort damages for fraud in regards to their child's father's misrepresentation of their income for child support determination. In *Butler v. Turner*, the Court found that a father's misrepresentation of income to determine child support payments to be a valid basis for a suit based on fraud. The court noted the suit was proper because the plaintiff brought her claim for damages she personally sustained from the fraud. The loss of the difference in the amount of child support awarded from the amount that should have been awarded but for the misrepresentation, would constitute the actual damages required. Punitive damages may be appropriate, pursuant to O.C.G.A. §51-12-5.1.

### **B. Antenuptial Agreements**

Antenuptial agreements must not be the result of fraud, duress, mistake, misrepresentation, or non-disclosure of material facts. A party seeking to enforce an antenuptial agreement must show there was a full and fair disclosure of the assets of the parties prior to the execution of the agreement.<sup>43</sup> This standard creates a lesser burden as now a party seeking to void the agreement must show only there was either no full disclosure of all material facts or any material misrepresentation. A showing of either of these prevents the enforcement of an antenuptial agreement on public policy grounds.

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<sup>42</sup> O.C.G.A. 23-2-52 (2013).

<sup>43</sup> *Blige v. Blige*, 283 Ga. 65, 68-69 (Ga. 2008).

### **C. Fraudulent Inducement into Marriage**

Fraudulent actions before the marriage may lead to a recovery. One who is induced to enter into a marital relationship under false pretenses has a common law tort action for fraud and may recover damages incurred.<sup>44</sup> Furthermore, a claim that such an action is barred by the doctrine of inter-spousal immunity is without merit because the fraud creates an invalid marriage and there is nothing to protect.<sup>45</sup>

### **D. Fraud Damages**

Georgia courts have awarded damages for fraudulent transfers of property incident to divorce proceedings. If such a fraudulent transfer occurs, the injured party may seek to set aside the transfer and seek damages from grantor.<sup>46</sup> Damages may also be sought in an action separate from the divorce action from the grantee if the grantee acted in bad faith, with fraud, or in a conspiracy as against the creditor-party.<sup>47</sup> A petition seeking a decree of alimony or child support between former spouses creates a creditor-debtor relationship creating the potential for fraud. Georgia courts have enjoined fraudulent conveyances done to defeat a claim of alimony since 1880.<sup>48</sup> Additionally, the victim of a fraudulent conveyance may be awarded general and punitive damages.<sup>49</sup> Since general damages are those which the law presumes to flow from any

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<sup>44</sup> *Morgan v. Morgan*, 193 Ga. App. 302, 304 (Ga. Ct. App. 1989).

<sup>45</sup> *Id.*

<sup>46</sup> *Shah v. Shah*, 270 Ga. 649, 651 (1999).

<sup>47</sup> *Kesler v. Veal*, 257 Ga. 677, 678-679 (1987).

<sup>48</sup> *Gray Bros. v. Gray*, 65 Ga. 193 (Ga. 1880).

<sup>49</sup> *Cavin v. Brown*, 246 Ga. App. 40 (Ga. Ct. App. 2000).

tortuous act, they may be recovered without proof of any specificity.<sup>50</sup>

Fraud is considered a tort, but it also has contract law principles intertwined within its elements. For this reason, damages for fraud are based on restitution in the measure of the benefit of the bargain to the non-wrongdoer. However, in a fraud claim, restitution alone is not a sufficient deterrent to prevent fraud. For this reason oftentimes a court will award punitive damages and/or attorney's fees to an injured party. A successful fraud claim in other areas of domestic relations law may allow a plaintiff to be awarded these damages which would normally not be available without a claim of fraud or an intentional tort.<sup>51</sup>

Further, a divorce case with fraud and /or intentional torts intertwined within may produce the opportunity to ask for attorney fees pursuant to O.C.G.A. §13-6-11 as opposed to O.C.G.A. §19-6-2. Under the later, when determining the amount to award, if any, the judge must consider the financial circumstances of both parties.<sup>52</sup> An award of attorney's fees is not predicated on a finding of misconduct or wrongdoing of the parties.<sup>53</sup> Under O.C.G.A. §13-6-11, the standard is not ability to pay, but is the amount the fact finder determines was cause as a result of the bad faith.

#### **IV. Realignment**

If you have ever been in a personal injury case with a coverage issue claimed by the insurance company, you find your injured client a defendant, along with the tortfeasor. To keep from sharing jury strikes with your adversary, you normally would ask the court to realign the parties so that parties with the same interest are on the same side of the vee. But you can go one step further in a divorce case, if your client has the burden the greater burden of proof and you lost the race to the courthouse. At any stage of the action and on such terms as are just, a trial

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<sup>50</sup> *Id.*

<sup>52</sup> O.C.G.A. 19-6-2(A)(1) (2013).

<sup>53</sup> *Williams v. Cooper*, 625 S.E.2d 754 (Ga. 2006); *Moon v. Moon*, 277 Ga. 375(2003).



court has the discretion to realign parties, as by changing the status of a party from defendant to plaintiff.<sup>54</sup> This could occur as a result of a directed verdict or the abandonment of a claim during the trial itself. Make the motion to realign immediately, before, during or after the evidence is presented or during the pendency of the case when such permitted reason becomes apparent.

In *Moore v. Moore, et al*, the Supreme Court pointed out that the wife had a significantly heavier burden of proof regarding alimony, adultery and attorney fee's, along with the added tort of fraud. It is pointed out in *Moore v. Moore*, the procedural rights which a plaintiff typically exercises at trial, including the important right to opening and concluding arguments, actually belong to whichever party bears the burden of proof. These rights are neither allocated on the basis of the denomination of the parties, nor logically deferred upon a defendant only when the defendant bears the entire burden of proof.<sup>55</sup> The Supreme Court concluded in *Moore v. Moore* that the trial court has the discretion to realign a plaintiff as a defendant when the defendant has a more extensive burden of proof.

In light of the previously discussed tort implications during a divorce, a party claiming tort injuries will have a significantly greater burden of proof than one defending such claims. Where these claims are being brought and your client is not the plaintiff, you should make this motion and the court should use its discretion to realign the parties in a manner which allows the more heavily burdened party to have the procedural rights of a plaintiff.

## **V. Jury Verdict Form**

Empower the jury to right the wrong that has incurred during the marriage. Argue that it does that not matter if their judgment is ever paid; only that their finding is just and represents a fair appraisal or assessment of the damages inflicted. Actually, intentional torts and judgments for fraudulent activity, just like child support, alimony and most property awards are non-

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<sup>54</sup> *Moore v. Moore, et al*, 281 Ga 81 (2006); *Cawthon v. Waco Fire and Casualty Ins. Co.*, 259 Ga 632, 633 (1989).

<sup>55</sup> *Moore*, at 109.

dischargeable in bankruptcy.<sup>56</sup> Your verdict form will expand with the following favorable “blanks” added for the jury to show and use their power of justice.

### **Personal Injury**

We the jury find for Plaintiff as follows:

- A. For the medical bills: \_\_\_\_\_
- B. For lost wages: \_\_\_\_\_
- C. For pain and suffering of plaintiff: \_\_\_\_\_

OR

We the jury find for Defendant.

- D. Punitive damages

We the jury find, by clear and convincing evidence, that an award of punitive damages: Should be made against Defendant.

OR

Should not be made against Defendant.

This \_\_\_\_\_ day of September, 2013.

\_\_\_\_\_  
(signature)Foreperson

Your divorce trial has now expanded to a tort case. The divorce case which includes an intentional tort claim, particularly fraud, are concepts which jurors understand and are willing to issue awards to compensate the injured party.

## **VI. Conclusion**

As a lawyer that has chosen to litigate domestic matters, we must have the courage and stamina to take the case all the way to its natural conclusion, including a complete recovery for all issues. If that case involves abusive elements of intentional torts and fraud, include those claims and their damage elements as part of the divorce petition. Juries hate fraud and those who perpetrate such. It is easier to prove than adultery and the additional damages are real and non-

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<sup>56</sup> 11 U.S.C. § 523 (c)

dischargeable.

## Table of Authorities

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