

Key Threshold Issues: Domestic Tort Claims in the Context of Divorce

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With the partial or wholesale elimination of the doctrine of interspousal tort immunity in most states, divorce attorneys must now consider, in every divorce case, whether a tort claim exists and how to deal with it. “Domestic torts” arise within the context of family relationships and can include tort actions between people who were formerly spouses and people in nonmarital relationships. The substantive and procedural elements vary from state to state. Key threshold issues, however, must be addressed before proceeding on any domestic tort claim in your next divorce case.

The tort claim: prosecuted with the divorce or separately?

Upon determining that a tort claim exists, the practitioner must determine whether the claim should be pursued in a separate proceeding or in the divorce case itself. The answer turns upon whether joinder of the claim is mandatory or permissive; this, in turn, involves questions of claim and issue preclusion. If joinder of the tort claim is mandatory, one must decide now whether to join the claim in the divorce case or to essentially abandon it. However, if joinder is merely permissive, one has the discretion to make a strategic decision without risking losing the right to proceed on the tort at some future time.

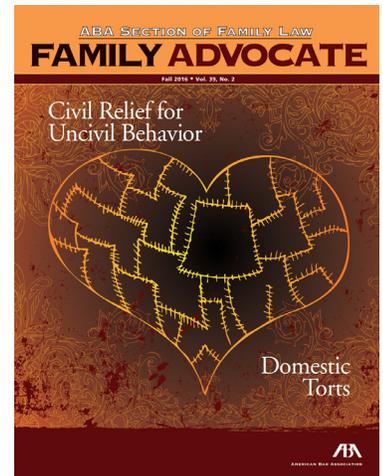
At first blush the issue seems solely procedural. The decision, however, depends upon the nature of the tort claim and its relationship to specific evidence to be raised in the particular divorce case at hand—issues of collateral estoppel (issue preclusion) and res judicata (claim preclusion). The decision to join the claim or not determines the viability of the claim.

• Mandatory joinder

In some states, joinder of a tort claim with the divorce proceeding is mandatory—failure to do so results in the claim being barred. These states adhere to the “single controversy” doctrine, which requires a plaintiff to assert all claims arising from a single controversy in one action. For example, in *Tevis v. Tevis*, 400 A.2d 1189 (N.J. Sup. Ct. 1979), the court held that a former wife’s tort claim of assault and its potential for monetary damages were relevant to the earlier divorce proceeding and should have been presented with the divorce as part of the overall dispute between the parties.

• Permissive joinder

In some states, joinder of a tort claim has been allowed, but there was no determination as to whether the joinder was mandatory or permissive. Missouri may be an example of such a state, if a case involving joinder of a contract claim provides a clue. In *Sturgis v. Sturgis*, 663 S.W.2d 375 (Mo. App. E. D. 1983), the court allowed a party to join a claim for breach of contract within the divorce proceeding. The court noted that the rules of civil procedure permit a party who asserts a claim for relief to join as many legal or equitable claims that that party has against the opposing party.



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The court relied on prior cases allowing claims for an accounting to be joined with a dissolution of marriage proceeding.

- **Prohibited joinder**

Other states have held that actionable torts between married persons should not be litigated within the divorce proceeding. *Walther v. Walther*, 709 P.2d 387 (Utah Sup. Ct. 1985); *Simmons v. Simmons*, 773 P.2d 602 (Colo. Ct. App. 1988) (tort action); *In Re Marriage of Lewis*, 66 P.3d 2014 (Colo. Ct. App. 2003) (although this involved a suit on a contract, not a tort). In *Simmons*, the court noted that “[s]ound policy considerations preclude either permissive or compulsory joinder of inter-spousal tort claims, or non-related contract claims, with dissolution of marriage proceedings.” Such considerations have been generally expressed as promoting judicial economy and avoiding undue complication of the process of dissolving a marriage; insulating an equitable proceeding (divorce) from the peculiarities of matters at law; extending a policy of the Uniform Dissolution of Marriage Act to promote the amicable settlement of disputes that have arisen between parties to a marriage; and avoiding the inherent tension between the acceptance of contingency fees in tort cases and a longstanding public policy against contingency fees in domestic cases. Courts in Vermont, *Ward v. Ward*, 583 A.2d 577 (Vt. 1990); New Hampshire, *Aubert v. Aubert*, 529 A.2d 909 (N.H. 1987); and Arizona, *Windauer v. O’Connor*, 485 P.2d 1157 (Ariz. 1971), have taken a similar view, and in Wisconsin, although joinder is technically allowed, it is discouraged. *Stuart v. Stuart*, 421 N.W.2d 505 (Wis. 1988).

If separate, which claim comes first?

The order of trial of the divorce case and the tort claim raise key issues of res judicata and collateral estoppel, as well as the possibility of double recovery for the same or related occurrences. There is no uniform rule, and each state’s precedents must be consulted.

- **Res judicata and collateral estoppel**

In jurisdictions where the behavior or conduct of the parties is a relevant factor in the divorce case and the existence of a divorce judgment does not bar a party from bringing a later tort action against a former spouse, collateral estoppel or issue preclusion may still apply. In determining which case should be tried first, practitioners should consider that findings in the first case may impact the subsequent proceeding. For example, if the dissolution of marriage case is tried first, the divorce court’s findings on the conduct of one of the spouses may be admissible and determinative as to such issues in the later tort proceeding. The reverse may also be true—findings of fact made in the tort case may be determinative on those issues in the later divorce case.

Consider the nature of a divorce proceeding and the distinct differences between a division of marital property and an award of damages. In contrast to a court presiding over a suit for damages, a divorce court has considerable discretion. While a tort may indeed be considered marital misconduct, the divorce court may not be required to fashion a remedy. Marital misconduct is generally only one of a number of factors a dissolution court must consider, and the court may not give undue weight to one factor. Accordingly, even if a dissolution court were to make a disproportionate division of property relying in part upon evidence of misconduct that might also constitute a tort, the relationship between the tort claim and the division of property will likely be inexact and imprecise. Further, the marital estate may not be sufficient to compensate a spouse for tort damages sustained, and so the tort damage may not be recoverable.

Additionally, "fault" and "misconduct" are general terms; issue preclusion typically turns upon the specificity of the claim and the related evidence. For example, a Missouri court allowed a former wife to pursue a tort suit for personal injuries stemming from a series of assaults allegedly inflicted upon her during the course of their marriage, which ended in divorce prior to the resolution of the tort case. *Sotirescu v. Sotirescu*, 52 S.W. 3d 1 (Mo. App. 2001). In *Sotirescu*, the divorce judgment found no marital misconduct, and the tort court granted summary judgment to the former husband. The Missouri Court of Appeals stated that

[i]n determining whether a claim is barred by collateral estoppel... we consider four factors: (1) whether the issue decided in the prior adjudication was identical with the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

Finding the claimant's cause of action sounding in tort to be separate and distinct from the trial court's more general findings in the dissolution proceeding and that the wife's claims were not barred by *res judicata* merely because she chose to proceed with her dissolution first, the grant of summary judgment on the tort was reversed. *Sotirescu*, 52 S.W.3d at 6.

However, a dissenting opinion pointed out that in the divorce trial, the wife testified that her husband struck her, producing the injury to her elbow for which she sought compensation in the tort case, and the trial court found that neither engaged in marital misconduct, suggesting that a tort had not been committed. "The purpose of the doctrine of collateral estoppel is to ensure that, regardless of the order in which claims are tried, factual determinations made as a result of the first trial may not be litigated in the second." *Id.* at 9.

Double-recovery concerns

A related issue is the concern that a litigant could receive double recovery for the same misconduct by a disproportionate division in the dissolution proceeding and damages in the tort proceeding. Bifurcation and related requirements address this concern.

• Bifurcation, separate trials, and order of trial

Noble v. Noble, 761 P.2d 1369 (Utah 1988) suggests the actions should be bifurcated and the tort case tried first because such an approach would avoid the problem arising when a fact question for which a party has requested and is entitled to a jury verdict is first decided by a judge in an equitable proceeding. Some of the other states following this approach are Minnesota, *R.A.P. v. B.J.P.*, 428 N.W.2d 103 (Minn. App. 1983), and Missouri as represented by *State ex rel. M.D.K. v. Dolan*, 968 S.W.2d 740,747 (Mo. Ct. App. 1998). The Missouri case cites *Noble* with approval and suggests that, although there would be separate trials, the same judge should hear both.

A litigant has a right to request a jury in a tort case, but, save for the notable exceptions of Texas and Georgia, to the authors' knowledge, in most states, juries do not hear divorce cases. Pursuing a tort claim prior to a dissolution matter may be advantageous because the task of fact-finding in the tort claim could fall first to a jury, rather than a solitary judge. A divorce court would then be able to weigh the jury's findings in its more general finding of marital misconduct.

It has been suggested that the tort claim may be an item of marital or community property in and of itself. One divorce court was reversed on appeal for awarding to the husband, as an asset of the marriage, his tort claim against his wife. However, the

court also required the husband to indemnify his wife for any sums he might recover against her! *Purk v. Purk*, 817 S.W.2d 915 (Mo. App. E.D. 1991). This aspect of the award was reversed; the appellate court found that the indemnification provision deprived the husband of his property rights without due process of law.

- **Release and Waiver**

If the divorce and tort claims are prosecuted separately, coming to an agreement on one or waiving one by failing to pursue it could bar pursuit of important elements of the other. In *Overberg v. Lusby*, 921 F.2d 90 (6th Cir. 1990), the court held that a release of claims contained in a marital settlement agreement barred all subsequent actions for tort claims against the prior spouse if the plaintiff had notice of the tort prior to the divorce. See also *Dahn v. Dahn*, 346 S.W. 3d 325 (Mo. Ct. App. 2011), in which a spouse, in testifying about the terms of the divorce settlement, acknowledged she waived any claim to monies previously disputed and now awarded by stipulation to the other spouse. This waiver barred her later suit for damages for the misappropriation of such funds and for breach of fiduciary duty.

Conclusion

When the basis of a potential tort claim presents itself, the practitioner must, in consultation with the client and in reliance upon the law of that state, promptly and thoughtfully evaluate whether it should be pursued and in what form and in what sequence. Only by understanding the current state of the law in your jurisdiction on these key threshold issues can you and your client agree upon a course of action that adequately preserves his or her rights. **FA**

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