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The Law of Alienation of Affections After McCutchen v. McCutchen: In North Carolina, Breaking Up Just Got Harder To Do*

In February 2001, Patricia McCutchen’s husband, Byron McCutchen, informed her that their marriage of nearly thirty-three years was over and that he wanted a divorce. The decision did not come lightly; the couple had separated nearly three and a half years earlier and had been attending counseling throughout their separation in an effort to repair the marriage. For Patricia, however, the loss of the battle for her marriage heralded the beginning of another, uglier battle—not against her ex-husband, but against his second wife, Deborah McCutchen. Patricia maintained that Deborah had maliciously and intentionally alienated the affections of Patricia’s husband, Byron, and, in the process, destroyed their marriage.

The lawsuit that followed could have been a simple case for the defense. The statute of limitations for an alienation of affections claim is three years. The undisputed evidence showed that Deborah and Byron McCutchen commenced an extramarital relationship before Byron’s separation from Patricia, and that Patricia did not bring her alienation of affections claim for nearly four and a half years after she and Byron separated. The North Carolina Court of Appeals quickly dispensed with Patricia’s alienation claim, agreeing with the trial court that the statute of limitations barred her claim.

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2. Id.
3. Id. Patricia McCutchen also asserted a claim for criminal conversation against Deborah. The trial court granted summary judgment for Patricia on the criminal conversation claim. Id. Criminal conversation is simply when the plaintiff “seeks recovery for the defendant’s sexual intercourse with [his or her] spouse.” 1 SUZANNE REYNOLDS, LEE’S NORTH CAROLINA FAMILY LAW § 5.45 (5th ed. 1993). The only thing a spouse must prove to win a criminal conversation claim is “1) marriage between the spouses and 2) sexual intercourse between defendant and plaintiff’s spouse during the marriage.” Coachman v. Gould, 122 N.C. App. 443, 446, 470 S.E.2d 560, 563 (1996) (quoting Chappell v. Redding, 67 N.C. App. 397, 401, 313 S.E.2d 239, 241 (1984)).
4. See N.C. GEN. STAT. § 1-52(5) (2005). The statute reads, “Within three years an action . . . [f]or criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.” Id.
5. McCutchen, 360 N.C. at 281, 624 S.E.2d at 622. Deborah admitted to having had “actual knowledge of Byron’s marriage when she entered the relationship.” Id.
because the "plaintiff has conceded the acts complained of occurred pre-separation more than three years prior to filing her complaint." On appeal, however, the Supreme Court of North Carolina reversed the court of appeals’ summary judgment for Deborah McCutchen and remanded the case for trial.

The story of how the Supreme Court of North Carolina came to overrule the court of appeals in McCutchen is only the most recent chapter in the long, embattled history of the tort of alienation of affections, not only in North Carolina, but in the nation as a whole. Alienation of affections claims have generated scorn from judges, legislators, and academics virtually since their inception. Indeed, the claim has been abolished or limited in state after state by either the legislature or the judiciary; North Carolina remains one of only five states in the country that still permits plaintiffs to bring an unrestricted action for alienation of affections.

And yet, against this backdrop of sentiment critical of allowing a spouse to sue a third party for interference with marital relations, in McCutchen the Supreme Court of North Carolina expanded the parameters under which a plaintiff could bring a claim against a third party for alienation of affections. Although in a technical sense a plaintiff could state a claim for alienation based on an affair that commenced after the couple’s separation, for several years prior to McCutchen the North Carolina courts had interpreted an alienation of affections claim as necessarily accruing on or before the date of a

8. McCutchen, 360 N.C. at 286, 624 S.E.2d at 625.
9. For an overview of the history of alienation of affections and criminal conversation claims in North Carolina and in other states, concluding that the actions must be eliminated in North Carolina, see generally Jennifer E. McDougal, Comment, Legislating Morality: The Actions For Alienation of Affections and Criminal Conversation in North Carolina, 33 WAKE FOREST L. REV. 163 (1998).
11. See I. REYNOLDS, supra note 3, § 5.45, at 387 n.663 (5th ed. 1993) (citing James Leonard, Note, Cannon v. Miller: The Brief Death of Alienation of Affections and Criminal Conversation in North Carolina, 63 N.C. L. REV. 1317, 1326–27 n.57 (1985)). Of the states that limit the action, “statutes or decisional law may restrict the available damages,” or the statute of limitations may be shortened. Id. § 5.45. Although alienation of affections and other heart balm torts have declined in importance nationally, the continued presence of the actions in a few states, and especially the huge awards for damages that are periodically made, make the actions the source of much popular fascination. See Julie Scelfo, Heartbreak’s Revenge: Some States Allow Suits for Alienation of Affection, NEWSWEEK, Dec. 4, 2006, at 57.
married couple’s separation. In *McCutchen*, however, the supreme court swept aside this rationale, ruling that an alienation “claim accrues whenever alienation is complete, regardless of the date of separation, and that the determination of when alienation occurs is generally a question of fact for the jury.” The court went on to decide that as long as a couple was still married and possessed some love and affection for one another—regardless of whether the couple had separated—a third party’s interference with that marriage could still give rise to an alienation claim.

This Recent Development examines the Supreme Court of North Carolina’s treatment of the tort of alienation of affections in *McCutchen v. McCutchen*. After a brief overview of the elements of the tort, it then highlights some of the major arguments for and against the tort of alienation of affections and describes the recent attempts of both the North Carolina General Assembly and the North Carolina Court of Appeals to limit or abolish the tort. Next, this Recent Development argues that, although the supreme court

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12. See *Pharr v. Beck*, 147 N.C. App. 268, 273, 554 S.E.2d 851, 855 (2001). The *Pharr* court’s rationale centered on the fact that, because section 50-16.1A(3) of the North Carolina General Statutes does not permit evidence of post-separation marital misconduct during consideration of a spouse’s alimony claim except as corroborative of pre-separation misconduct, it would be incompatible with North Carolina law to permit a spouse to introduce post-separation marital interference in an alienation of affections claim against a third party to the marriage. *Id.* The *McCutchen* court disagreed with this aspect of *Pharr*, noting that “the holding in *Pharr* appears inconsistent with both prior and subsequent decisions of the Court of Appeals.” *McCutchen*, 360 N.C. at 285, 624 S.E.2d at 624–25. In support of the proposition that the *Pharr* holding had not been followed in subsequent court of appeals decisions, however, the *McCutchen* court cited a 2001 criminal conversation case, *see id.* at 285, S.E.2d at 625, in which the court of appeals expressly distinguished its case from *Pharr*:

> We are aware that this Court recently relied on the 1995 amendments to G.S. §§ 50-16.1A(3) and 50-16.3A(b)(1) in holding that “an alienation of affection claim must be based on pre-separation conduct, and post-separation conduct is admissible only to the extent it corroborates pre-separation activities resulting in alienation of affection.” However, since *Pharr* dealt solely with alienation of affections, we are not bound by that panel’s *dicta* stating that “the same principles would apply in a criminal conversation case.”

14. *Id.* at 284, 624 S.E.2d at 624.
couched its McCutchen rationale in deceptively simple procedural terms, the decision actually represented a significant procedural and substantive expansion of the tort that will result in an enlarged field of potential plaintiffs and a practically unlimited statute of limitations for alienation claims. Finally, this Recent Development argues that, faced with this portrait of the post-McCutchen legal landscape, the General Assembly and the Supreme Court of North Carolina should reconsider abolishing the tort of alienation of affections. This Recent Development concludes with the observation that the tort of intentional infliction of emotional distress ("IIED"), when properly viewed as a distinct tort that focuses on the relationship between the plaintiff and defendant as opposed to the interference with the marital relationship, could still provide redress for plaintiffs who are victims of the most egregious marital interference.

The past century of marriage and divorce law in the United States has been largely characterized by the steady deregulation of intimate relationships by the states.\(^5\) No-fault divorce statutes, which removed requirements that couples must make an evidentiary showing justifying a judicial divorce decree, have been a major hallmark of this trend.\(^6\) Since the passage of its own "no-fault" divorce law,\(^7\) which predicates divorce on a simple showing of

\(^{15}\) Much of this has been accomplished under the federal Constitution on equal protection and due process grounds. See, e.g., Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding unconstitutional a Virginia statute that prevented interracial couples from marrying); see also Zablocki v. Redhail, 434 U.S. 374, 399 (1978) (holding unconstitutional a Wisconsin statute that prevented residents who were delinquent in child support payments from marrying). In addition, the Supreme Court has also protected private, consensual homosexual conduct from state intrusion. See Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (striking down a Texas statute making homosexual sodomy a crime on grounds that individual liberty interest found in the Due Process Clause of the Fourteenth Amendment protected intimate consensual sexual contact from state intrusion).


\(^{17}\) N.C. GEN. STAT. § 50-6 (2005). For an overview of the passage of North Carolina’s no-fault divorce statute, see 2 REYNOLDS, supra note 3, § 7.4. Of course, marital fault is still relevant to other aspects in the dissolution of marriage in North Carolina, particularly in actions for divorce from bed and board, see N.C. GEN. STAT. § 50-7 (2005) (listing six separate forms of fault in an action for divorce from bed and board in North Carolina), and for alimony determinations, see N.C. GEN. STAT. § 50-16.1A(3) (2005) (listing nine separate forms of fault in an action for marital misconduct in North Carolina); see also Sally Burnett Sharp, Step by Step: The Development of the Distributive Consequences of Divorce in North Carolina, 76 N.C. L. REV. 2017, 2056–75 (1998) (comparing the role of fault in the 1995 amendments to the North Carolina alimony statute with the pre-1995 statute). The 1995 revisions to North Carolina’s alimony statute
separation for the statutory time period, North Carolina has recognized the view "that the State should end in law marriages that have ended in fact." 18

Flowing from the notion that matters of the heart are not conducive to state regulation, both state legislatures and state courts have steadily shrunk the availability of torts against third parties for interference with the marital relationship. 19 Many of the same issues that necessitated the move toward no-fault divorce are apparent simply from looking at the elements of an alienation of affections claim. To prove such a claim, a plaintiff must show that "(1) there was a marriage with love and affection existing between the husband and wife; (2) that love and affection was alienated; and (3) the malicious acts of the defendant produced the loss of that love and affection." 20 A typical problem that arises in alienation of affections cases is attempting to prove that love and affection existed in a marriage that has since become embroiled in a lawsuit. 21 Issues of causation are similarly problematic. In the context of a troubled marriage, there is rarely only one discrete problem between the couple, and the marriage itself may have deteriorated well before one spouse engages in an adulterous affair. In a 2002 alienation case, for example, there was ample evidence that the plaintiff had engaged in an extramarital affair over a year before his wife commenced an affair with the defendant, yet on appeal the court ruled that there was competent evidence that it was the defendant who was most responsible for alienating the plaintiff's spouse. 22

made clear, however, that marital fault occurring after the date of marital separation was not to be considered in awarding alimony, but could still be used as corroborative evidence that such misconduct had, in fact, occurred before the date of marital separation. Sharp, supra, at 2057. The application of this aspect of the 1995 alimony revision to North Carolina's heart balm torts was the heart of the Pharr court holding, see supra note 12, and the springboard for the ensuing appeals to the Supreme Court of North Carolina in McCutchen. 18

18. 2 REYNOLDS, supra note 3, § 7.8. This realistic view of the end of marriage is "common to no-fault divorce statutes." Id.

19. See 1 REYNOLDS, supra note 3, § 5.45 (noting that thirty-nine states and the District of Columbia have eliminated alienation of affections claims either judicially or legislatively).


21. See Warner v. Torrence, 2 N.C. App. 384, 386, 163 S.E.2d 90, 92 (1968) (concluding that, since the married couple had been constantly fighting before any third party interference in the marriage occurred, no genuine love and affection existed for the third party to alienate).

22. Nunn, 154 N.C. App. at 529, 574 S.E.2d at 39 (describing evidence that the plaintiff-husband had engaged in an extramarital relationship with a colleague a year before she had ever met the defendant in the case). The plaintiff's wife, attempting to
In some respects, courts have avoided confronting some of the trickier aspects of proving causation in alienation of affections cases, as they have consistently ruled that "[p]roximate cause does not require that defendant's acts be the sole cause of the alienation, as long as they were the 'controlling or effective cause.'"23 The inquiry into whether the defendant's actions were the controlling cause, however, is often messy and highly fact-specific, with the alienated spouse frequently taking the stand to insist that other factors caused him or her to cease possessing love and affection for the plaintiff. Asking the factfinder, who is a stranger to the marriage to begin with, to establish by a preponderance of the evidence that the defendant's actions were the "controlling or effective cause" of its destruction is, at the very least, a request fraught with problems, if not completely impossible.24

Scholars and commentators who criticize alienation of affections claims have focused on the tort's philosophical and historical legal underpinnings. A frequent criticism lies in one of the tort's most common justifications: the "common-law assumption that the married woman was her husband's chattel."25 When a third party's actions caused the woman to become alienated from the marriage, therefore, the husband had the right to sue that party based on the damage to or loss of his proprietary interest in his wife.26 As North Carolina's legislature and courts gradually removed married women's legal disabilities,27 courts had the opportunity to abolish the tort of
alienation of affections altogether. Because neither the husband nor the wife had a property interest in the other person, it would have stood to reason that no third party could henceforth be held accountable for essentially stealing a spouse away.

Instead, however, “most courts responded by recognizing that wives as well as husbands had the right to bring actions for alienation of affections and criminal conversation.” Currently, in the states that retain actions for alienation of affections, the interest of the protected spouse is generally perceived to be a bundle of rights and benefits springing from the marital relationship that includes “love, society, companionship, and comfort,” as opposed to a bundle of property rights.

Other criticisms levied at alienation of affections claims include the unique potential for blackmail that the actions present, excessive damage awards, and the failure of the tort to deter third parties from behaviors that, in truth, are often uncontrollable. For all of the above reasons, both the North Carolina General Assembly and the North Carolina Court of Appeals have attempted to abolish alienation of affections as a common law cause of action. Indeed, on three separate occasions in the past five years, bills to abolish alienation of affections as a common law cause of action have been and the ability of spouses to recover against one another in both intentional and negligent tort action, N.C. GEN. STAT. § 52-5 (2005); see 1 REYNOLDS, supra note 3, § 5.35.

28. 1 REYNOLDS, supra note 3, § 5.45(A).

29. Id.


31. CHARLES E. DAYE & MARK W. MORRIS, NORTH CAROLINA LAW OF TORTS § 11.21 (2d ed. 1999); see also Cottle v. Johnson, 179 N.C. 426, 428, 102 S.E. 769, 770 (1920) (defining alienation of affections as “the deprivation of the husband of his conjugal right to the society, affection, and assistance of his wife . . . .”).

32. See 1 REYNOLDS, supra note 3, § 5.45(B) (claiming that “the mere filing of [an alienation of affections] action may destroy reputations or inflict devastating psychological harm . . . .”). But see Jill Jones, Comment, Fanning an Old Flame: Alienation of Affections and Criminal Conversation Revisited, 26 PEPP. L. REV. 61, 73-75 (1998) (arguing that the criticism that these torts are subject to abuse by plaintiffs who use them for blackmail and extortion are ill-founded).


34. See 1 REYNOLDS, supra note 3, § 5.45(B)-(D).
passed by the House of Representatives, only to die in the Senate chambers.\textsuperscript{35}

In 1984, the North Carolina Court of Appeals took its own swipe at the tort of alienation of affections. In \textit{Cannon v. Miller},\textsuperscript{36} the plaintiff appealed from a ruling of summary judgment for the defendant.\textsuperscript{37} The court of appeals determined that the trial court had erroneously granted summary judgment on the case’s merits; however, the court also decided that “there is no longer any legal or logical basis for the retention of the causes of action for alienation of affections and criminal conversation and . . . [that] these tort actions should, therefore, be abolished in this jurisdiction.”\textsuperscript{38} In reaching this conclusion, the court of appeals relied largely on evolving social norms as reflected in legislative and judicial decisions of other states.\textsuperscript{39} The court also grounded much of its reasoning in substantive attacks on the torts, finding that they were based on outmoded models of marriage and an unrealistic view of the cheating spouse as a party with no responsibility for his or her own choices.\textsuperscript{40}

The abolition, however, was short lived.\textsuperscript{41} The Supreme Court of North Carolina responded with a brief missive in which it chided the court of appeals for the decision, asserting that the court had “acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina and its responsibility to follow those decisions, until otherwise ordered by the Supreme Court.”\textsuperscript{42} The supreme court then vacated the portion of the opinion which purported to abolish claims for alienation of affections and criminal conversation.\textsuperscript{43} Subsequent defendants have attempted to persuade the court of appeals to try the tactic once more, but for the moment,

\textsuperscript{36} 71 N.C. App. 460, 322 S.E.2d 780 (1984).
\textsuperscript{37} \textit{Id.} at 462, 322 S.E.2d at 783.
\textsuperscript{38} \textit{Id.} at 463, 322 S.E.2d at 784.
\textsuperscript{39} See \textit{id.} at 478–96, 322 S.E.2d at 793–800 (detailing the legislative and court actions undertaken in other states to abolish actions for criminal conversation and/or alienation of affections).
\textsuperscript{40} \textit{Id.} at 478–80, 322 S.E.2d at 793–94.
\textsuperscript{43} \textit{Id.} The court also remanded the case back to the court of appeals, with orders to reverse the summary judgment on its merits and to further remand back to the Superior Court of Pitt County for trial. \textit{Id.}
at least, the court of appeals appears to have conceded the point, and post-
_Cannon_ arguments to the court to judicially abolish alienation of
affections have been met with polite refusal.\textsuperscript{44}

With the tort of alienation of affections bordering so precariously
on extinction, the real intrigue may lie in why North Carolina retains
the tort despite the attempts by the court of appeals and the General
Assembly to abolish it. As detailed above, the North Carolina House
of Representatives has repeatedly passed bills abolishing alienation
claims only to have them defeated in the Senate.\textsuperscript{45} The Supreme
Court of North Carolina, undoubtedly well-schooled in the flood of
academic and legal arguments opposing alienation of affections
claims, has steadfastly upheld them; in fact, the typical North
Carolina plaintiff in an alienation case against a spouse’s lover is
more likely than not to _prevail_ in appellate proceedings.\textsuperscript{46}

While there is not a single, overriding explanation for North
Carolina’s retention of the tort of alienation of affections, the most
frequently cited rationale is that the tort helps to protect families by
insulating them from third-party efforts to break apart a marriage.\textsuperscript{47}
Indeed, this was the supreme court’s rationale in _McCutchen:_ “We
recognize and adhere in this state to a policy which within reason
favors maintenance of the marriage.”\textsuperscript{48} In particular, the court feared
that a ticking statute of limitations would force separated couples who
may still reconcile to prematurely file a claim for alienation and
effectively “sever the marital relation before that spouse is really

\textsuperscript{44} See, e.g., Nunn v. Allen, 154 N.C. App. 523, 530, 374 S.E.2d 35, 40 (2002) (“This
Court has no authority to overrule decisions of the North Carolina Supreme Court.”); Hutelmyer v. Cox, 133 N.C. App. 364, 376, 514 S.E.2d 554, 562 (1999) (“[I]t is not our
prerogative to overrule or ignore clearly written decisions of our Supreme Court.”) (quoting Kinlaw v. Long Mfg. N.C., Inc., 40 N.C. App. 641, 643, 253 S.E.2d 629, 630
(1979)).

\textsuperscript{45} See supra text accompanying note 35.

\textsuperscript{46} See 1 _REYNOLDS_, supra note 3, § 5.46(A), at 398–99 n.721 (comparing the
respective success rates of plaintiffs and defendants in North Carolina alienation cases at
the appellate level and concluding that “in only a few of the appellate cases have the
defendants prevailed”).

\textsuperscript{47} See _JOHN RUSTIN & JERE ROYALL, N.C. FAMILY POLICY COUNCIL,
PROTECTING MARRIAGE: TEN GOOD REASONS TO PRESERVE MEANINGFUL TORT
LAWS_ 2 (2002), available at http://www.ncfpc.org/PolicyPapers.Findings%200206-
Alienation.pdf (listing ten reasons the authors would retain the torts, almost all of which
allude to protecting marriage in North Carolina from attacks by third parties); see also
William M. Kelly, Note, _The Case for Retention of Causes of Action for Intentional
Interference with the Marital Relationship_, 48 NOTRE DAME L. REV. 426, 433–34 (1972)
(suggesting that the law could be refined to deal with arguments against alienation torts
short of abolition of such torts, which are otherwise protective of the family institution).

\textsuperscript{48} _McCutchen v. McCutchen_, 360 N.C. 280, 284, 624 S.E.2d 620, 624 (2006) (quoting
Gardner v. Gardner, 294 N.C. 172, 180–81, 240 S.E.2d 399, 405 (1978)).
desirous" of doing so. Other commentators have argued that, in fact, amidst a national resurgence of interest in protecting marriage in this country, it is erroneous to conclude that the tort of alienation of affections is "outdated." In North Carolina, one of the most vocal proponents of retaining the tort is the North Carolina Family Policy Council, a "nonpartisan, nonprofit organization serving to provide research and education on public policy issues that affect the family." This group argues that without these actions for torts against persons who interfere with the marital relationship, "no other legal remedy exists for an aggrieved spouse to seek justice." Whether or not this is the case, the torts are firmly entrenched in the jurisprudence of North Carolina and are likely to remain there, at least for the short term.

In 2005, the North Carolina Court of Appeals faced a novel scenario for an alienation of affections claim in McCutchen v. McCutchen. Following the discovery of her husband's extramarital affair, Patricia McCutchen continued to try to work things out with her husband, despite the fact that the couple had separated from each other. There followed nearly three years of counseling and various stages of reconciliation talks between the pair; however, Byron decided to end his marriage and ultimately married the defendant. When the court of appeals upheld the trial court's decision that the statute of limitations had run on Patricia's alienation claim, it relied heavily on the 2001 case of Pharr v. Beck, in which the court of appeals held that no post-separation conduct could give rise to an alienation of affections claim. When faced with Patricia McCutchen's claim, the court therefore determined that as a matter of law it needed to look no further than the fact that the plaintiff filed her case four and a half years after she separated from her husband, thus barring the case under the relevant statute of limitations.

49. Id.

50. Jones, supra note 32, at 78-79 (providing as an example a recent Louisiana law that allows couples to elect a "covenant marriage," which requires a showing of fault by one of the parties in the marriage before allowing them to obtain a divorce).


52. RUSTIN & ROYALL, supra note 47, at 2.


54. McCutchen, 360 N.C. at 281, 624 S.E.2d at 622.

55. See McCutchen, 170 N.C. App. at 4-7, 612 S.E.2d at 164-66.

56. See supra note 12.

57. McCutchen, 170 N.C. App. at 6-7, 612 S.E.2d at 166.

The seeds of the supreme court's decision to overturn the court of appeals, however, are found in Judge Tyson's dissent in the court of appeals. He argued that the majority's view of the scope of Pharr was incorrect, stating that Pharr merely addressed whether events occurring after the date of separation may be used as evidence to support a claim of alienation of affections. In contrast, the issue before us involves the date of accrual of the tort. The majority's opinion extends Pharr to hold the date of separation is the per se date of accrual to assert an alienation of affections claim. While Pharr controls the evidentiary basis for the cause of action, it does not support the majority's notion that the statute of limitations period begins to run from the date of separation per se.

Judge Tyson went on to conclude that the time of accrual for a tort of alienation of affections occurs when there is a complete loss of the spouse's affections, regardless of the date of separation, and that the time when this occurs is a question of fact for the jury to decide.

Judge Tyson's dissent, which was subsequently adopted in large part by the supreme court when it reversed the court of appeals' decision, quickly did away with the procedural limitation setting the bright-line date of separation as the last possible point of accrual for an alienation claim. However, neither Judge Tyson's dissent nor the supreme court's opinion stopped there. Having eliminated the date of marital separation as the per se last possible date of accrual for alienation claims, the court had to grapple with issues that had not, except for the procedural limitation in Pharr, been starkly defined in North Carolina alienation cases: At what point was the injury in an alienation claim complete? And if, as the court ultimately decided, the only case directly on point regarding the accrual of an alienation claim for statute of limitations purposes was Pharr v. Beck, 147 N.C. App. 268, 554 S.E.2d 851 (2001), which had not addressed the substantive date of accrual but rather merely delineated a per se barrier for other reasons. See Defendant-Appellee's New Brief at 7-8, McCutchen, 360 N.C. 280, 624 S.E.2d 620 (No. 308A05). Other cases had detailed the difficulty of defining the place of accrual for alienation claims due to the transitory nature of the tort, see Darnell v. Rupplin, 91 N.C. App. 349, 354, 371 S.E.2d 743, 747 (1988) ("We recognize that the injury attributable to the alienation of another's affections is a nebulous concept, which, unlike a broken bone, is not a readily identifiable event.")

59. See McCutchen, 170 N.C. App. at 7-16, 612 S.E.2d at 166-72 (Tyson, J., dissenting).
60. Id. at 12, 612 S.E.2d at 169 (internal citations omitted).
61. Id. at 16, 612 S.E.2d at 171.
63. The only case directly on point regarding the accrual of an alienation claim for statute of limitations purposes was Pharr v. Beck, 147 N.C. App. 268, 554 S.E.2d 851 (2001), which had not addressed the substantive date of accrual but rather merely delineated a per se barrier for other reasons. See Defendant-Appellee's New Brief at 7-8, McCutchen, 360 N.C. 280, 624 S.E.2d 620 (No. 308A05). Other cases had detailed the difficulty of defining the place of accrual for alienation claims due to the transitory nature of the tort, see Darnell v. Rupplin, 91 N.C. App. 349, 354, 371 S.E.2d 743, 747 (1988) ("We recognize that the injury attributable to the alienation of another's affections is a nebulous concept, which, unlike a broken bone, is not a readily identifiable event.")
64. And if, as the court ultimately decided,
the injury was not per se complete at the date of marital separation, what, if any, impact did a separation have on an alienation claim?

Ultimately, the supreme court did not provide a specific answer to those questions and held simply that the cause of action in an alienation claim accrues at the point when alienation is complete. As long as a couple was "married with genuine love and affection at the time of the defendant's interference," a claim could accrue regardless of whether or not the couple was legally separated. Put another way, even if a defendant's actions leading to the alienation occurred after the separation commenced, the defendant could still be liable for the plaintiff's damages if the plaintiff could prove that the defendant brought about the destruction of any love and affection that was still present between the spouses. Hence, the court effected not just a procedural expansion of a plaintiff's ability to bring an alienation claim by removing the Pharr per se barrier, but it also worked a significant expansion of the substance of an alienation claim by expanding the scope of the relationship ostensibly protected by the tort of alienation of affections. After McCutchen, not only is the traditional marriage shielded from a third party's interventions in North Carolina, but the court will also extend the buffer zone to a married couple that has separated from the marital relationship. This substantive change in the tort law of alienation of affections could result in an increased field of potential plaintiffs in alienation claims. In addition, since the supreme court clarified that an alienation claim does not accrue until the alienation is complete, the presence of any love and affection—even between a separated couple—could have the practical effect of indefinitely tolling the statute of limitations for alienation claims.

Prior to McCutchen, for a plaintiff to prevail in an alienation case, the factfinder had to determine that genuine love and affection existed between the spouses when the defendant's interference began. After Pharr, however, factfinders were allowed to presume that, for practical purposes, the date of marital separation rendered a

an action necessarily accrued prior to the time she hired an attorney to represent her in divorce-related matters because the claim accrues at the time of the loss of affection). In McCutchen, the Court cited a string of muddled and conflicting references to when alienation actually occurs before concluding that "[t]he question of when alienation occurs is ordinarily one for the factfinder." McCutchen, 360 N.C. at 283–84, 624 S.E.2d at 623–24.

64. McCutchen, 360 N.C. at 283, 624 S.E.2d at 623.
65. Id. at 284, 624 S.E.2d at 624.
66. Id.
67. Id. at 283, 624 S.E.2d at 623.
68. See supra notes 20–21 and accompanying text.
post-separation analysis on the point of love and affection unnecessary. McCutchen now opens a new field of potentially confusing and uncertain factual scenarios for juries to consider before deciding whether alienation was complete.

Even before McCutchen, North Carolina appellate courts had allowed the plaintiff to “satisfy the element of love and affection with very little evidence that it existed.” In Litchfield v. Cox, for example, the Supreme Court of North Carolina reversed an earlier dismissal of the plaintiff’s case for nonsuit which had been granted, in part, because the only evidence of love and affection between the couple was the testimony of the plaintiff’s mother “that her son and his wife seemed to be fond of each other and it was just a happy family” and the plaintiff’s testimony that he and his wife “had a happy home.” Similarly, in Gray v. Hoover, the court of appeals reinstated a plaintiff’s complaint that had been dismissed by the trial court because he, as the single witness to the case, offered as his only evidence that genuine love and affection existed in the marriage the fact that he “thought [he and his wife] had a wonderful marriage.” The court of appeals conceded that the evidence presented by the plaintiff in Gray was “marginal,” but concluded that whether genuine love and affection in fact existed was for the jury to decide.

Now that the supreme court has held that the post-separation conduct of a defendant can lead to liability for alienation claims, it follows that the courts will allow similarly sparse evidence to prove the existence of love and affection in the marriage after the couple has separated. For example, the couple could maintain an amicable—or even loving—relationship as parents. Or, as in the cases of Litchfield and Gray, the court may hold the unilateral testimony of a plaintiff that love and affection existed as sufficient to

69. See supra note 12.
70. 1 REYNOLDS supra note 3, § 5.46(A).
72. Id. at 623, 146 S.E.2d at 642.
73. Id.
74. 94 N.C. App. 724, 381 S.E.2d 472 (1989).
75. Id. at 727, 381 S.E.2d at 473–74.
76. Id. at 727, 381 S.E.2d at 474.
77. The defendant cited this concern in her brief to the court. See Defendant-Appellee’s New Brief at 16, McCutchen v. McCutchen, 360 N.C. 280, 624 S.E.2d 620 (2006) (No. 308A05) (“It follows from [the plaintiff’s] argument that, if spouses continue to have any affection for each other (for the sake of their children, perhaps, or simply because of their shared memories or history together), then the statute of limitations might never begin to run.”).
78. Id.
get to a jury." In McCutchen, the supreme court found it significant when determining whether there was any love and affection remaining in the McCutchen's marriage that Byron and Patricia had purchased a car using joint funds after the date of their marital separation.\textsuperscript{80} That joint property ownership in North Carolina has been held to be potentially demonstrative of existing love and affection after separation is significant in that many couples maintain joint property ownership for some time after they have separated. The simple fact of joint ownership, therefore, could be enough to disqualify any court from substituting its own judgment of the significance of such ownership for that of a jury.

The McCutchen court did find other substantial evidence of love and affection remaining between Patricia and Byron following their separation. Byron himself attended counseling with Patricia and stated that he wanted to work on repairing his marriage before ultimately requesting a divorce.\textsuperscript{81} Such clear-cut evidence of love and affection, however, will certainly not be present in all cases.\textsuperscript{82} Separation is often a messy and confusing ordeal for both spouses, and an inquiry into the presence of love and affection throughout the separation on a case-by-case basis would likely prove extremely difficult and time consuming.\textsuperscript{83} Furthermore, the McCutchen court did not give any specific guidance on this point in rendering its decision. Rather, in addressing whether there was love and affection between the pair, the court remarked simply that the jury "could determine alienation did not occur until as late as February 2001" when Patricia's husband ultimately informed her he wanted a divorce.\textsuperscript{84}

79. See supra notes 71–76 and accompanying text.
80. \textit{McCutchen}, 360 N.C. at 281, 624 S.E.2d at 622.
81. \textit{Id.} at 286, 624 S.E.2d at 625.
82. See infra notes 86–89 and accompanying text (discussing a second consequence that a finding of any love and affection in the relationship could have on subsequent litigation, that of an indeterminate tolling of the statute of limitations for alienation claims).
83. In fact, discerning whether actual marital separation has occurred or is occurring can contribute to the complicated nature of the inquiry as well. In North Carolina, it is not necessary that both parties are aware that the separation is with the intent to end the marriage. See Smith v. Smith, 151 N.C. App. 130, 132–33, 564 S.E.2d 591, 592–93 (2002). Hypothetically, a separation could start for reasons unrelated to the demise of the marriage, for example, for work-related reasons. If one spouse meets someone and begins an affair during the separation, and if that spouse separately forms the intent to end marital cohabitation as a result of the affair, the various issues of timing, intent, and diminishing love and affection would prove difficult, if not impossible, to reliably discern during a resulting alienation case.
84. \textit{McCutchen}, 360 N.C. at 286, 624 S.E.2d at 625 (emphasis added).
Given the highly fact-specific nature of alienation claims, it seems unlikely that clear guiding principles as to what constitutes “love and affection” will emerge. The net result of the McCutchen court’s decision regarding the requirement of “actual alienation” before the wrong is complete could mean an expanded field of potential plaintiffs with only a patchwork collection of law for courts and juries to use in deciding these cases. Until the law is refined, and more definite standards evolve for determining whether love and affection exists, the McCutchen decision likely opened the door for nearly any person whose spouse begins dating someone else during a period of marital separation to get his or her case before a jury.

Another potential consequence of the McCutchen decision is that the existence of any love and affection throughout the separation will have the practical effect of indefinitely tolling the statute of limitations. Thus, as in Patricia McCutchen’s case, if a plaintiff can point to the existence of love and affection during the separation, the statute will not begin to run until the point at which there is no more love and affection in existence.

Typically, statutes of limitations on tort claims in North Carolina begin to run “at the time the right to institute and maintain a suit arises . . .”. If the action of the defendant alone is not sufficient to give rise to a cause of action, then the “cause of action accrues at the time ‘actual damage ensues.’” The difficulty in an alienation case is that often the harm done to the plaintiff arises not from a single, easily identifiable action by the defendant, but rather from a series of actions which may take place across a long span of time and in multiple locations. Prior to McCutchen, the elements of an alienation of affections claim made clear that there had to be, at minimum, significant damage done to the marriage before a cause of action for alienation would lie; however, it was not clear which

85. Indeed, alienation claims are already highly fact-specific and time consuming. It seems likely that, although some of the guiding principles that have already developed in alienation claims can be “imported” into litigation on post-separation alienation claims, the cases will also prove fertile ground for parties to distinguish cases to establish or refute their liability in alienation claims.


87. DAYE & MORRIS, supra note 31, § 19.32.

88. See, e.g., Darnell v. Rupplin, 91 N.C. App. 349, 354, 371 S.E.2d 743, 747 (1988) (remanding to superior court for determination of where the cause of action for alienation of affections accrued where actions giving rise to the action occurred across a span of four states, the only one of which recognized alienation of affections as a cause of action being North Carolina).
precise circumstances and what degree of damage were necessary to satisfy this element. 89

In their briefs to the supreme court, the plaintiff and defendant in McCutchen each made a different case for when an alienation claim accrued. The plaintiff argued that the claim accrued when “the affections of one spouse . . . for the other spouse . . . have been completely alienated by the acts of a third party.” 90 The defendant, on the other hand, responded that “there simply are no North Carolina cases in which the court holds that affections must be completely and fully alienated before a cause of action accrues,” 91 and instead asserted that under North Carolina precedent, a partial loss of affections was sufficient. 92 The court avoided the question, holding that “[t]he ‘wrong’ in an alienation of affections case is the actual alienation of the spouse’s affections by a third party,” 93 which it then went on to define as “‘the destruction, or serious diminution, of the love and affection of the plaintiff’s spouse for the plaintiff.’” 94 Put another way, in response to the parties’ question, “Does the alienation occur upon partial loss or complete loss of the alienated spouse’s affection?” the court apparently responded, “Yes!”

More light is shed on the question, however, when looking to the court’s holding as to the sufficiency of evidence that “actual alienation” had occurred. In deciding whether summary judgment on the claim was appropriate, for example, it seemed irrelevant to the court that the plaintiff’s spouse had engaged in an ongoing and long-term adulterous sexual relationship with the defendant, or that the plaintiff’s spouse had moved out of the household. 95 Rather, the court held that a jury could have found that actual alienation occurred only when, in February of 2001, the plaintiff’s husband

89. The confusion is reflected in various secondary texts describing the elements of harm in divergent ways. Compare 1 REYNOLDS, supra note 3, § 5.46(A), at 393 (noting that the plaintiff must establish “that the love and affection was alienated and destroyed”) (emphasis added) with DAYE & MORRIS, supra note 31, § 11.22.2, at 106 (“Alienation connotes the destruction, or serious diminution, of the love and affection of the plaintiff’s spouse for the plaintiff.”) (emphasis added).
91. Defendant-Appellee’s New Brief at 7, McCutchen, 360 N.C. 280, 624 S.E.2d 620 (No. 308A05).
92. Id. at 4–5 (quoting Darnell, 91 N.C. App. at 350, 371 S.E.2d at 745).
93. McCutchen, 360 N.C. at 283, 624 S.E.2d at 623.
94. Id. at 283–84, 624 S.E.2d at 623 (quoting DAYE & MORRIS, supra note 31, § 11.22.2, at 106).
95. Id. at 281, 624 S.E.2d at 622.
informed her that he wanted a divorce. Thus, the court remanded the case so that a jury determination could be made as to whether this was, indeed, the case.

One could extrapolate from McCutchen that in North Carolina actual alienation of a spouse's affections does not occur until that spouse has declared that he or she desires a divorce, as long as some love and affection is also found to exist between the couple. This could be problematic, as there is no statute of limitations on a divorce action based on the time period of separation in North Carolina. The confluence of these factors means that, at least in theory, a third party could incur liability for alienation of affections for having a romantic relationship with a spouse even though that spouse has been separated from his or her spouse for years, provided the other elements of the tort have been met. Although courts might call into question whether any genuine love or affection still exists between a couple that has been separated for so long, the Supreme Court of North Carolina made it a point to emphasize that “[a]lthough separation may be strong evidence of alienation and may affect the damages available to the plaintiff, we have never held that plaintiff and spouse must live together at the time the cause of action arises.”

Together with many of the traditional arguments against the tort of alienation of affections, the substantive and procedural changes in alienation claims resulting from the supreme court’s decision in McCutchen will bring with them their own unique set of problems. For their own reasons, the Supreme Court of North Carolina and the North Carolina General Assembly have both previously declined to abolish the tort of alienation of affections. Considering the plummeting national popularity and availability of alienation of affections claims, together with the undesirable consequences that McCutchen could bring, the General Assembly and the Supreme

96. Id. at 286, 624 S.E.2d at 625.
97. Id. Of course, if this was the finding of the jury, then the plaintiff’s case would have been brought within an acceptable time frame under the relevant statute of limitations. See supra note 4 and accompanying text.
98. See, e.g., Bruce v. Bruce, 79 N.C. App. 579, 583, 339 S.E.2d 855, 858 (1986) (holding that North Carolina’s residual ten-year statute of limitations did not apply in an action for absolute divorce based on separation of one year).
99. The defendant raised this concern in her brief. See Defendant-Appellee’s New Brief at 16, McCutchen, 360 N.C. 280, 624 S.E.2d 620 (No. 308A05).
100. McCutchen, 360 N.C. at 284, 624 S.E.2d at 624.
101. See supra notes 25–34 and accompanying text.
102. See supra notes 45–49 and accompanying text.
Court of North Carolina should reconsider abolishing the tort and take a fresh look at alternatives to allowing wholesale suits against third parties for alienation of affections.  

Although the Supreme Court of North Carolina has retained alienation of affections because it feels the continued availability of the claim protects marriages and families, other courts have eliminated alienation of affections and criminal conversation claims without resorting to wholesale extinction of all redress in the courts if a third party's conduct results in the destruction of a marriage. A claim for IIED could allow relief for spouses who have been the victims of the most egregious behaviors by third parties where the conduct resulted in the destruction of a marriage. Such plaintiffs would be required to state a claim that fulfills the elements of a separate claim for IIED, which sets a higher threshold for extreme conduct than an alienation of affections claim. And unlike the question of whether or not a defendant caused the alienation of a spouse's love and affection, which is a jury question, North Carolina

103. Although this Recent Development urges the abolition of alienation of affections claims, and argues that intentional infliction of emotional distress ("IIED") would provide redress for victims of the most egregious behavior that damages marriages, others have put forth other alternatives short of outright abolition. For example, an amendment proposed in the North Carolina Senate called for a retention of the tort, with the consent of the adulterous spouse as an affirmative defense to alienation lawsuits against a third party. See Rustin & Royall, supra note 47, at 3. Such a limitation, however, would have the practical effect of abolishing alienation claims, as those claims already presume a consensual relationship between the defendant and the adulterous spouse. See supra text accompanying note 20 for the elements of a claim for alienation of affections. At least one other commentator has suggested that criminal conversation and alienation of affections claims could be amalgamated and modified into an "interference with marriage" tort, and that this could serve to better protect marriages and families. 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, 1053–54 (2001) (proposing an "interference with marriage tort" which would impose liability on a party who knowingly committed adultery). It seems likely that this tort would remain open to many of the same substantive criticisms as alienation of affections and criminal conversation claims in their traditional forms.  

104. See supra text accompanying note 48.  

105. The argument remains, of course, that the American judicial system should not get involved in the marital love triangle. See Jeffrey Brian Greenstein, Sex, Lies, and American Tort Law: The Love Triangle in Context, 5 Geo. J. Gender & L. 723, 750–57 (2004) (providing an overview of legal arguments as to whether American tort law should address the love triangle at all). That argument is beyond the scope of this Recent Development. Instead, this paper seeks only to observe that some courts have recognized the fact that a plaintiff's claim for IIED, if he makes a prima facie case for each of the given elements, is not identical to that of alienation of affections. Id. at 747.  

106. For an overview of IIED claims in North Carolina, see Daye & Morris, supra note 31, §§ 5.10–5.40.  

107. See infra notes 122–27 and accompanying text.
courts have held that the issue of whether conduct is extreme enough to state a claim for IIED is a question of law for the court to decide.\textsuperscript{108} Some jurisdictions have allowed such claims in certain circumstances,\textsuperscript{109} while others have held that abolition of alienation claims precludes bringing an IIED action against a third party for actions resulting in the destruction of a marriage.\textsuperscript{110} Judicially or legislatively abolishing alienation claims while reserving potential liability and societal condemnation under IIED for those whose behavior might warrant it could strike an effective compromise between evolving societal mores and traditional desires to protect families.\textsuperscript{111} In addition, requiring the clear and extreme level of wrongdoing inherent in an IIED claim would limit the field of available plaintiffs to those who could state a claim for IIED. This should be an important consideration for both the General Assembly and the supreme court, given the expanded parameters and availability of alienation claims, post-McCutchen.\textsuperscript{112}

The elements of IIED are that 1) the defendant's conduct is intentional or reckless; 2) the conduct can be characterized as extreme and outrageous; and 3) the conduct thereby results in emotional distress done to the plaintiff.\textsuperscript{113} The interests of the plaintiff that IIED seeks to protect are his or her "freedom from severe distress, regardless of whether the distress results from physical injury, or conversely, whether physical injury is caused by or results from the distress."\textsuperscript{114} As a matter of public policy, states that have abolished alienation of affections as a cause of action do not, and should not, allow such claims to reappear disguised as IIED claims.\textsuperscript{115} If, however, the complaint does not seek to replicate the

\begin{itemize}
  \item \textsuperscript{108} See Guthrie v. Conroy, 152 N.C. App. 15, 22, 567 S.E.2d 403, 408–09 (2002).
  \item \textsuperscript{109} See generally Marjorie A. Shields, Annotation, Action for Intentional Infliction of Emotional Distress Against Paramours, 99 A.L.R.5th 445 (2002) (providing an overview of jurisdictions allowing IIED claims against third parties who have interfered in marital relationships).
  \item \textsuperscript{110} See Greenstein, supra note 105, at 737-41 (describing cases in Virginia and Wisconsin in which courts held that allowing IIED claims where alienation claims had been abolished would undermine public policy opposing such claims).
  \item \textsuperscript{111} But see RUSTIN & ROYALL, supra note 47, at 2 (arguing that abolition of alienation claims would adversely affect the institution of marriage).
  \item \textsuperscript{112} See supra notes 68–100 and accompanying text.
  \item \textsuperscript{113} See DAYE & MORRIS, supra note 31, §§ 5.31–5.33.
  \item \textsuperscript{114} Id. § 5.31.
  \item \textsuperscript{115} See, e.g., Quinn v. Walsh, 732 N.E.2d 330, 337–38 (Mass. App. Ct. 2000) (affirming a trial court order granting the defendant's motion to dismiss an alienation of affections claim brought by paramour's former husband and son, holding that the claim was essentially an attempt to recover for alienation of affections which had been previously statutorily abolished); see also Cherepski v. Walker, 913 S.W.2d 761, 767 (Ark. 1996)
tort of alienation of affections, but rather seeks to redress wrongs for
infliction of emotional distress between the parties, courts have
allowed the action.116

Claims for IIED between a spouse and a third party would focus
on whether the third party, in the conduct at issue, behaved in an
extreme and outrageous manner toward the plaintiff and whether
that conduct caused the marital breakdown.117 As with all intentional
torts, the duty is that owed by the defendant to the world at large to
refrain from engaging in the intentional conduct118 that causes the
harm.119 A traditional criticism levied at alienation claims relies on
the idea that the grounds for liability rest on antiquated notions of
one spouse’s proprietary interest in the marriage to the other
spouse.120 Claims for IIED, however, focus on an evaluation of how
the defendant conducted her behavior toward the plaintiff, as
opposed to whether there was an interference with the plaintiff’s
proprietary interest.121

Although alienation of affections claims in North Carolina have
traditionally required a showing of “malice” as between the plaintiff

(holding that the plaintiff’s claim for IIED was barred because the real character of the
claim was more like an alienation claim, which had been statutorily abolished); Strock v.
Pressnell, 527 N.E.2d 1235, 1242 (Ohio 1988) (holding that the plaintiff’s claim for IIED
was barred because it was identical to abolished alienation and criminal conversation
claims).

(finding that husband’s claim against a paramour based on serious emotional distress
experienced upon finding out that a child born during his marriage was the defendant’s
and not his own was not precluded by a statutory abolition of alienation claims); see also
Recent Development, Heiner v. Simpson—Nothing in a Claim for Alienation of Affections
Precludes a Claim for Intentional or Negligent Infliction of Emotional Distress, 2001
UTAH L. REV. 1084, 1089 (analyzing a Utah Supreme Court decision establishing that alienation
and emotional distress are two distinct claims, and that they could both be alleged in the
same lawsuit under the same facts).

117. See Koestler v. Pollard, 471 N.W.2d 7, 13 (Wis. 1991) (Abramson, J., dissenting)
(“[I]ntentional infliction of emotional distress is a tort action arising from interference
with the person, for injury to the plaintiff’s well-being.”). The Koestler majority ruled that
the plaintiff’s IIED claim was barred because it was, essentially, a claim for criminal
conversation in disguise. Id. at 9.

118. In North Carolina, reckless conduct can also be grounds for an IIED claim. See
IIED in North Carolina and specifically recognizing that reckless conduct may serve as a
basis for liability).

119. See PROSSER AND KEETON ON THE LAW OF TORTS 35 (W. Page Keeton ed., 5th
ed. 1984) (“[I]ntent is broader than a desire or purpose to bring about physical results. It
extends not only to those consequences which are desired, but also to those which the
actor believes are substantially certain to follow from what the actor does.”).

120. See supra note 25–26 and accompanying text.

121. See Koestler, 471 N.W.2d at 13.
and the defendant, this requirement is functionally different from the extreme and outrageous behavior which must be exhibited to establish an IIED claim. In a claim for alienation of affections, the behavior of the defendant toward the plaintiff does not necessarily have to be a result of ill will or hatred. Rather, the malice required in alienation claims needs only be a showing that the defendant "intentionally engaged in conduct that would probably affect the marital relationship." Because the malice requirement in alienation claims needs not rise to the level of outrageous or extreme conduct required in IIED claims, as a practical matter, it does not present much of an obstacle for a plaintiff seeking to bring an alienation claim. In *Litchfield v. Cox*, for example, a plaintiff made a sufficient showing of malice in stating an alienation claim to sustain a motion for nonsuit when he merely presented evidence that the defendant had written letters to his wife and given her liquor. Because liability in an alienation claim is not predicated on the fact that a third party has done anything directly to the plaintiff, but rather on the fact that the actions of a third party have interfered with the plaintiff's proprietary interest in the marriage, the requisite showing of malice is not very strong.

122. See 1 REYNOLDS, supra note 3, § 5.46(A).
123. See, e.g., Poston v. Poston, 112 N.C. App. 849, 851, 436 S.E.2d 854, 856 (1993) ("Appellant contends [his wife's adultery] caused him 'extreme mental anguish, distress, anxiety, physical damage, emotional damage, and financial losses and damage.' Appellant asserts he met the requirements to establish a claim for intentional infliction of emotional distress . . . . We find that appellant's allegation of adultery does not evidence the extreme and outrageous conduct which is essential to this cause of action."). North Carolina's courts have made clear that actions which result in hurt feelings or emotional injury, without egregious behavior needed to state an IIED claim, will not survive a motion to dismiss. See Johnson v. Bollinger, 86 N.C. App. 1, 6, 356 S.E.2d 378, 382 (1987) ("The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime, plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." (internal citations omitted)). One example of the kind of behavior that is sufficient to state a claim for IIED in North Carolina is that of a plaintiff who attended a party where the defendant drugged the plaintiff's beverage, then removed her clothing and videotaped her in front of other guests. See Zenobile v. McKecuen, 144 N.C. App. 104, 110-11, 548 S.E.2d 756, 760 (2001).
124. See 1 REYNOLDS, supra note 3, § 5.46(A).
125. Id.
127. See Koestler v. Pollard, 471 N.W.2d 7, 13 (Wis. 1991) ("In an alienation of affections or criminal conversation action the plaintiff seeks compensation for disruption of the marital relationship . . . .").
The focused inquiry on the defendant's intentional behavior toward the plaintiff in an IIED claim could have the practical effect of eliminating many of the more marginal claims for alienation of affections. The Supreme Court of North Carolina has already held that a showing of adultery, without more, does not rise to the level of extreme and outrageous conduct required for an IIED claim. In states where spouses have been allowed to bring IIED claims against a third party despite the state's elimination of the tort of alienation of affections, a frequent similarity among defendants is that they were often acting in a caretaking or fiduciary role toward the plaintiff, his spouse, or the married couple at the time the relationship began. In Figueiredo-Torres v. Nickel, for example, the Maryland Court of Appeals reversed the district court's dismissal of a plaintiff's claim where the plaintiff and his wife had engaged the defendant for marital counseling only to have the defendant begin a sexual relationship with the plaintiff's wife during the course of treatment.

If the facts in McCutchen had been applied to an IIED claim, the focal point of the discussion in the case would have been whether the behavior of the defendant toward the plaintiff, taken as a whole and including consideration of damages that the plaintiff had suffered, was extreme and outrageous enough to incur liability for the plaintiff's damages. Under this analysis, much of the factual inquiry in the case would have been the same as in the alienation claim; that is, the plaintiff would still have presented evidence on the status of her relationship with her husband from the point at which the defendant met him onward. However, the inquiry would then have

128. See supra note 76 and accompanying text.

129. See Poston v. Poston, 112 N.C. App. 849, 851, 436 S.E.2d 854, 856 (1993) ("We find that appellant's allegation of adultery does not evidence the extreme and outrageous conduct which is essential to this cause of action."). This, of course, is a large concern on the part of those who would retain the tort of alienation of affections. See RUSTIN & ROYALL, supra note 47, at 2 ("No other legal remedy exists for an aggrieved spouse to seek justice from an individual who has ... had a sexual relationship with their [sic] husband or wife.")

130. See generally Shields, supra note 109 (providing an overview of jurisdictions allowing IIED claims against third parties who have interfered in marital relationships).

131. 584 A.2d 69 (Md. 1991).

132. Id. at 75 ("[A] jury may find extreme and outrageous conduct where a psychologist who is retained to improve a marital relationship implements a course of extreme conduct which is injurious to the patient and designed to facilitate a romantic, sexual relationship between the therapist and the patient's spouse."). But see Smith v. Teunis, 16 Va. Cir. 135, 137 (1989) (holding that although defendant was the plaintiff's spouse's doctor at the time he began an affair with the plaintiff's spouse, the claim was barred as it essentially restated a claim for alienation of affections which had been statutorily abolished in Virginia).
become more focused on the facts specific to the actions and relationship between the plaintiff and defendant, and the extent to which these actions may or may not be classified as "extreme and outrageous." Although the defendant's behavior in McCutchen may not have been laudable, it seems unlikely that the supreme court would have found that the defendant's behavior rose to the extreme and outrageous threshold necessary to state a claim for IIED, particularly since the plaintiff and her husband had already ceased marital cohabitation.

Given the possible consequences that could flow from the supreme court's decision in McCutchen, and in light of how little remaining vitality alienation of affections claims retain in jurisdictions across the country, it seems an appropriate time for both the Supreme Court of North Carolina and the North Carolina General Assembly to reconsider abolishing the claim permanently. Patricia McCutchen and her husband divorced nearly seven years ago, and her ex-husband has since married the defendant. Yet the supreme court's decision in this case means that the three of them could be headed back to court once more, and that the resulting fallout from this affair must continue hashing its way through North Carolina's courts for perhaps years to come.

SHERRY HONEYCUTT EVERETT

133. See supra text accompanying note 113.
134. See supra note 129 and accompanying text.
135. See supra notes 68–100 and accompanying text.
136. See supra notes 11, 19 and accompanying text.