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THE UNINTENDED CONSEQUENCES OF *WYATT V. MCDERMOTT*: ITS USE AS A SWORD AGAINST PROFESSIONALS IN CUSTODY CASES

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In recent years, Virginia courts have observed an increasing number of cases in which parents and guardians, frustrated with the outcomes of their custody cases, seek to expand the tort of intentional interference with parental rights (IIPR) to encompass tortious interference with *custodial* rights under the ambit of IIPR. Who are the targets of these claims? Court-appointed guardians ad litem (GAL), psychologists, counselors, and other individuals and entities involved in assessing and making recommendations based upon the needs of children and families in Virginia. The crux of these attacks is, essentially, *but for the professionals' involvement and interference with my efforts to seek custody of my child(ren), I would have been successful in the underlying custody matter*. Even a cursory reading of the case law reveals that such a theory is beyond the scope of IIPR. Nonetheless, plaintiffs' allegations in this subset of IIPR cases range from contentions of undue influence from out-of-court statements that may have influenced judge's decision making, to defamation, conspiracy, collusion, fraud, malice, and negligence. Fortunately, the law and common sense provide protection from plaintiffs' efforts to exploit IIPR and *Wyatt*.

I. *WYATT V. MCDERMOTT*[1]

Wyatt is the seminal case regarding IIPR in Virginia. The *Wyatt* suit was initiated by an unwed father against an adoption agency, two attorneys, and others who went to great lengths to facilitate an out-of-state adoption of his newborn child without his knowledge. The plaintiff sought compensatory and punitive damages against those defendants for the tortious interference with his parental rights in federal district court in Virginia. The district court denied his claim, and certified questions of law to the Supreme Court of Virginia regarding whether Virginia recognizes tortious interference with parental rights as a cause of action and, if so, what elements constitute that tort.[2] Ultimately, the Court recognized a cause of action for IIPR and remanded the case for further consideration of

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1 283 Va. 685, 725 S.E.2d 555 (2012).

2 *Id.* at 689–90, 725 S.E.2d at 556–57.

the factual issues in light of the creation of the tort.[3] Unlike many of the cases in which *Wyatt* has been used as a sword, parental fitness of the complaining parent was not at issue.

In *Wyatt*, the Supreme Court of Virginia traced the most primitive origins of custodial interference back to seventeenth century English common law. The Court reviewed *Stone v. Wall*,[4] a Florida Supreme Court case considering a certified question of law from the United States Court of Appeals for the Eleventh Circuit. Ultimately, the *Stone* court "recognized the common law tort of custodial interference in Florida as a modern iteration of the English common law writ."[5]

> As indicated, the tort of intentional interference with the custodial parent-child relationship has its origins in English common law and is derived from a cause of action for the abduction of the father's heir. The tort has evolved significantly since 1600 so that in its contemporary version either custodial parent may recover, the child does not have to be the heir, and recovery is not predicated on loss of services but on the sanctity of the parent-child relationship.
>
> It would be violative of constitutional equal protection issues not to recognize the equal rights of both parents in allowing either a cause of action or an element of damages. Additionally, outdated common law principles based on the view that children are nothing more than the economic assets of their parents have likewise been replaced with a more enlightened and realistic view of the role of children in their parents' lives. Thus, the cause of action for interference with a custodial parent-child relationship is a natural progression of the common law with due regard for constitutional principles, changes in our social and economic customs, and present day conceptions of right and justice.[6]

The Virginia high court's analysis of *Stone* and attention to equal protection considerations that were wholly absent from the English common law,[7] along

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[3] *Id.*

[4] 734 So. 2d 1038 (Fla. 1999).

[5] *See Wyatt*, 283 Va. at 695, 725 S.E.2d at 560.

[6] *Id.* (citing *Stone*, 734 So. 2d at 1044) (internal citations and quotation marks omitted).

[7] Given that this gender bias existed throughout seventeenth century common law, the proper remedy is not to overlook the writ but rather to recognize the claim in a manner consistent with the Bill of Rights and the Constitution of the Commonwealth, providing equal rights to both genders and allowing the common-law claim to "continue in full force within [the Commonwealth]," by operation of the plain language of Code § 1–200. *See, e.g.,* Jenkins v. Mehra, 281 Va. 37, 44, 704 S.E.2d 577, 581 (2011) (concluding that "[a]brogation of the common law . . . occurs only when the legislative intent to do so is plainly manifested, as there is a presumption that no change was intended," and explaining that "[w]hen an enactment does not encompass the entire subject covered by the common law, it abrogates the common[ ] law rule only to the extent that its terms are directly and irreconcilably opposed to the rule" (second and third alterations in original) (internal quotation marks omitted)). Wyatt v. McDermott, 283 Va. 685, 697–98, 725 S.E.2d 555, 561 (2012).

with analysis of the opinions of high courts of Virginia's "sister-states," led it to recognize a cause of action for IIPR in Virginia.[8]

In outlining the elements of IIPR, the Supreme Court of Virginia leaned heavily upon *Kessel v. Leavitt*[9] due to its harmony with Virginia law. Accordingly, the elements of a cause of action for IIPR are

> (1) the complaining parent has a right to establish or maintain a parental or custodial relationship with his/her minor child; (2) a party outside of the relationship between the complaining parent and his/her child intentionally interfered with the complaining parent's parental or custodial relationship with his/her child by removing or detaining the child from returning to the complaining parent, without that parent's consent, or by otherwise preventing the complaining parent from exercising his/her parental or custodial rights; (3) the outside party's intentional interference caused harm to the complaining parent's parental or custodial relationship with his/her child; and (4) damages resulted from such interference.[10]

The Court further clarified its adherence to the ordinary burden of proof in civil actions—preponderance of the evidence.[11]

II. Attempts to Expand IIPR—The Sword

Since *Wyatt*, litigation-hungry parents and guardians continue to test the boundaries of IIPR, using it as a sword in civil litigation against guardians ad litem, psychologists, and counselors to challenge their recommendations to family court judges as the "cause" of adverse custody rulings.

For example, in *Nelson v. Green*,[12] a plaintiff (father) brought a § 1983 action against four county social services department employees and a social worker, alleging that defendants abused their official positions and government powers to coerce his daughter to falsely accuse him of sexual abuse. Defendants filed motions to dismiss. Ultimately, the United States District Court for the Western

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[8] *See Wyatt*, 283 Va. at 695, 725 S.E.2d at 560 (collecting cases). *See, e.g.,* Anonymous v. Anonymous, 672 So. 2d 787, 789 (Ala. 1995); Washburn v. Abram, 122 Ky. 53, 90 S.W. 997, 998 (1906); Khalifa v. Shannon, 404 Md. 107, 945 A.2d 1244, 1248–62 (2008); Plante v. Engel, 124 N.H. 213, 469 A.2d 1299, 1302 (1983); Silcott v. Oglesby, 721 S.W.2d 290, 293 (Tex. 1986); Kessel v. Leavitt, 204 W. Va. 95, 511 S.E.2d 720 (1998) ("*Kessel,* which likewise addressed an adoption dispute, provides a particularly helpful model for the elements of the tort.") *Wyatt*, 283 Va. at 696, 725 S.E. 2d at 560.

[9] The facts in *Kessel* involved egregious conduct that fell just short of kidnapping and abduction. *See Kessell,* 204 W. Va. at 111, 511 S.E.2d at 736.

[10] *Wyatt*, 283 Va. at 699, 725 S.E.2d at 562 (citing *Kessel*, 511 S.E.2d at 765–66).

[11] "We find no precedent to indicate that this writ required any heightened standard of proof. We require a heightened standard of clear and convincing evidence for intentional infliction of emotional distress, for instance, because it is an action not favored by this Court due to the inherent ambiguity in proving harm to one's emotions or mind." *Wyatt*, 283 Va. at 700–701, 725 S.E.2d at 563 (citing Russo v. White, 241 Va. 23, 26, 400 S.E.2d 160, 162 (1991)).

[12] Nelson v. Green, 965 F. Supp. 2d 732 (W.D. Va. 2013).

District of Virginia held that the defendants were not liable under Virginia law for IIPR. The court limited the applicability of the tort given that Virginia law recognized IIPR as a cause of action only in the context of a custody battle but not in the adjudication of a child abuse petition. Despite the plaintiff's allegations of particularly egregious conduct, the court still declined to extend the tort to other situations.[13]

There are more recent examples of the attempted use of IIPR as a sword, as well. In *Padula-Wilson v. Landry*,[14] the plaintiff (mother) filed suit in the Circuit Court for the City of Richmond against the court-appointed GAL and four psychologists (and their practices) for tortious interference with parental rights, inter alia. The nub of plaintiff's claims, as is the norm for cases in this vein, was that she would have received custody of her children but for the defamatory statements, malice, bad faith, fraud, conspiracy, negligent infliction of emotional distress, and collusion of the GAL with the court. A close reading of the 267-paragraph complaint reveals that the claims against the GAL were based upon his alleged "misrepresentations" concerning the plaintiff and his recommendations in the underlying custody matter. The plaintiff's allegations of "misrepresentations" and "interference" included: the GAL's recommendations that the children be removed from the plaintiff's custody immediately and that the plaintiff have only supervised visitation; the psychologists' "removal" of the children from the plaintiff; and generalized allegations of interference that resulted in the mother having no contact with her children. It is significant that the plaintiff claimed that the GAL's recommendations were in retaliation for the plaintiff-mother's negative Internet comments published about the GAL, the psychologists, and counselors.

On December 14, 2018, Judge C.J. Maxfield ruled in favor of the GAL, psychologists, and therapists, sustaining all demurrers to the complaint and dismissing the action with prejudice. Judge Maxfield framed the issue presented as a question whether *Wyatt* can be extended to allow a person disappointed with a custody determination to sue opposing witnesses if the plaintiff can make a colorable case that those witnesses spoke falsely *outside* court and somehow caused harm, noting that the plaintiff conceded that anything said *inside* the custody proceedings is protected.

In entering judgment in favor of defendants, Judge Maxfield offered three primary reasons for striking down the use of IIPR in the post-custody judgment

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13 Going further, the *Nelson* court even upheld the social worker's qualified immunity despite allegations of intentional conduct, which included providing false information, making misrepresentations and omissions of critical facts, mischaracterizing the child's statements, and "coercing a false allegation of abuse" from the daughter against the father. *Nelson,* 965 F. Supp. 2d at 750. Part of the impetus behind the court's decision was its finding that the due process right in question had not yet been established at the time of the complained-of intentional misconduct. *Id.* Qualified immunity is "extended to acts that could not possibly have been done in good faith." *Id.* However, the *Nelson* court denied reporter-immunity to the extent that plaintiff's complaint sufficiently alleged "bad faith" by the social worker because of the severity of the allegations of misconduct. *Nelson*, 965 F. Supp. 2d at 755.

14 Richmond Cir. Ct., CL 17-3683 (2017).

context. First, due process considerations, in the form of cross-examination of witnesses, are served in custody proceedings. This eliminates the potentially harmful effect of alleged hearsay on custody determinations by the court. Second, the court recognized the existence of absolute immunity for statements made in the course of *judicial proceedings*.[15] This distinction is especially important given that many lawsuits of this type expressly point to out-of-court statements made by professionals involved in making custody recommendations. In fact, the plaintiff accused the psychologists and the guardian ad litem of conspiring together in making custody recommendations. Judge Maxfield drove home the point that judicial proceedings encompass more than in-court testimony. Finally, perhaps the most practical (and obvious) of Judge Maxfield's reasons for declining to extend IIPR is simply that the people involved in making the recommendations did not take away custodial rights; it is the judge who is tasked with making such a determination.

Judge Maxfield discussed other considerations involved in his decision not to expand IIPR, including avoiding a continuous cycle of post-custody hearing litigation and the difficulty of showing a causal relationship between the recommendation and the harm to the parental or custodial relationship. Although the plaintiff in *Padula-Wilson* did not plead evidence of harm so as to establish causation under IIPR, Judge Maxfield's ruling casts doubt on any plaintiff's ability to do so in this context, especially given that in all custodial decisions, the presiding judge makes the final custody determination.

Other cases provide further examples of plaintiffs' efforts to use *Wyatt* combatively. In one instance, a GAL was accused of making false accusations to the commonwealth's attorney, a therapist, and a psychologist involved in this case. The plaintiff-mother used this rationale to allege collusion, fraud, conspiracy, intentional interference, bad faith, and malice by and among the GAL, therapist, and psychologist. In this instance, the plaintiff's allegations focused upon out-of-court actions as the alleged proximate cause of the ultimate custody determination. The plaintiff referred to the in-court actions as evidence of intent, bad faith, malice, and willfulness, in apparent belief that only in-court actions are protected by applicable privileges. Although this issue seems to be steadily

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[15] Judge Maxfield cited a Supreme Court of the United States case and a Virginia case as supporting this principle. *See* Briscoe v. LaHue, 460 U.S. 325, 330–32 (1983) ("The immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings was well established in English common law. Some American decisions required a showing that the witness's allegedly defamatory statements were relevant to the judicial proceeding, but once this threshold showing had been made, the witness had an absolute privilege. The * plaintiff could not recover even if the witness knew the statements were false and made them with malice.") *Id.* (internal citations omitted). *See also* Watt v. McKelvie, 219 Va. 645, 651, 248 S.E.2d 826, 829 (1978) ("We hold that third-party statements made during the course of a judicial proceeding, which are relevant to the subject matter of the litigation, are absolutely privileged and may not be used to impose civil liability upon the originator of the statements. The rule which we now adopt is based on the policy, already alluded to underlying the privilege which attaches to judicial proceedings generally. We believe the public interest is best served when individuals who participate in law suits are allowed to conduct the proceeding with freedom to speak fully on the issues relating to the controversy.") *Id.* (internal citations omitted).

ripening for review by the Supreme Court of Virginia, the question remains: What defenses may professionals making recommendations in custody litigation assert to protect themselves in post-custody determination litigation?

III. Defenses for Professionals Involved in Custody Matters—The Shield

While Virginia courts continue to rebuff the efforts of parents and custodians to expand IIPR in subsequent civil litigation, professionals involved in underlying custody proceedings can arm themselves with a veritable shield of tested defenses.

The first and most practical of the defenses is a focus on causation: the position that the professional is not empowered to remove or effect the removal of a child from his or her parents. Put another way, a court's authority to make custody determinations is nondelegable. Not only is this clear from Judge Maxfield's comments (and often from the facts of individual post-custodial suits against professionals), but it is also supported by the plain language of the statutes governing custody determinations. Virginia Code section 20-124.2 gives district and circuit court judges the authority to determine custody and visitation of minor children. In *Reilly v. Reilly*, an unpublished opinion of the Court of Appeals of Virginia reviewing a decision from the Circuit Court of Chesterfield County, the court reiterated the ultimate power and duty of the judiciary to make and review custody determinations.

> A court of equity cannot abdicate its authority or powers, nor confide nor surrender absolutely to anyone the performance of any of its judicial functions. It may rightfully avail itself of the eyes and arms of its assistants in the proper preparation for judicial determination of the many complicated, difficult, and intricate matters upon which its judgment is invoked, but in it resides the authority, and to it solely belongs the responsibility, to adjudicate them.[16]

This argument is especially effective where the plaintiff argues that out-of-court statements or conspiracy with the other professionals involved in a custody case convinced a judge to rule against the plaintiff.

Going further, Virginia law unequivocally provides immunity to individuals who participate in a reporting capacity or otherwise participate in judicial proceedings that arise from complaints of abuse or custody proceedings resulting therefrom.

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[16] Reilly v. Reilly, No. 1369-15-2, 2016 WL 7209850, at *6 (Va. Ct. App. Dec. 13, 2016) (unpublished opinion) (holding "it was error for the circuit court to approve such language allowing a third party . . . total discretion to decide mother's visitation") (citing Raiford v. Raiford, 193 Va. 221, 230, 68 S.E.2d 888, 894 (1952) (quoting Shipman v. Fletcher, 91 Va. 473, 476, 22 S.E. 458, 460 (1895)); *see also* Padula-Wilson v. Wilson, No. 1203-14-2, 2015 Va. App. Lexis 123, at *38, 2015 WL 1640934 (Va. Ct. App. Apr. 14, 2015) (finding "it was error for the circuit court to order third parties to have complete discretion to decide the mother's visitation without providing for any judicial review of their decisions").

> Any person making a report pursuant to § 63.2-1509, a complaint pursuant to § 63.2-1510, or who takes a child into custody pursuant to § 63.2-1517, or who participates in a judicial proceeding resulting therefrom shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent.[17]

As discussed in *Nelson*, the threshold for truly malicious conduct, especially when applied to professionals, seems to require especially egregious conduct for the immunity to be deemed inapplicable.

In that vein, absolute immunity is another crucial defense for professionals involved in making recommendations to judges in custody matters. As set forth above, this immunity extends to all actions of participants in the custody proceedings. In addition and from a public policy standpoint, this particular form of "freedom of speech" is critical to allow professionals to speak freely to judges and others involved in custody determinations.[18] Likewise, it is balanced by the due process mechanism of cross-examination that prevents or at least presents an adequate opportunity for the parties to challenge recommendations or alleged misrepresentations in court.

There is also a compelling argument to be made in favor of applying *quasi*-judicial immunity to professionals involved in custody cases who are later sued for their actions related to the underlying custody case. Although judicial immunity, in its strictest sense, is limited to judges, quasi-judicial immunity may extend to other public officials performing judicial functions in good faith within their jurisdiction.[19] At least one Virginia court has held unequivocally that a GAL's duties are judicial: "Furthermore, it must be remembered that a guardian's duties are judicial, rather than caretaking."[20] It follows logically that quasi-judicial privilege may apply to actions taken by other professionals—court-appointed or not—who act in similar advice and recommendation roles in custody proceedings.

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17 VA. CODE ANN. § 63.2-1512 (West 2019).

18 Serdah v. Edwards, No. 7:11-CV-00023, 2011 WL 3849703, at *3 (W.D. Va. Aug. 30, 2011) (citing Fleming v. Asbill, 42 F.3d 886, 889 (4th Cir.1994)) ("Even if [the guardian ad litem] lied to the judge in open court, she was still acting as the guardian, and is immune from § 1983 liability."); Smith v. Smith, 7:07cv117, 2007 U.S. Dist. LEXIS 76087, at *19, 2007 WL 3025097 (W.D. Va. Oct. 12, 2007). This immunity would extend to "functions such as testifying in court, prosecuting custody or neglect petitions, and making reports and recommendations to the court in which the guardian acts as an actual functionary or arm of the court, not only in status or denomination but in reality." *Serdah*, 2011 WL 3849703, at *3 (citing Gardner v. Parson, 874 F.2d 131, 144–46 (3d Cir. 1989)).

19 Harlow v. Clatterbuck, 230 Va. 490, 493, 339 S.E.2d 181, 184 (1986) (adopting the "functional comparability" test established by the United States Supreme Court in *Butz v. Economou*, 438 U.S. 478, 98 S. Ct. 2894, 57 L. Ed. 2d 895 (1978), to determine where the procedure in question "shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages"). *Id. See* Yates v. Ley, 121 Va. 265, 270, 92 S.E. 837, 839 (1917).

20 Ferguson v. Grubb, 39 Va. App. 549, 559–60, 574 S.E.2d 769, 774 (2003).

In sum, it appears increasingly likely that the Supreme Court of Virginia will receive an opportunity to address the use of *Wyatt* as a sword by dissatisfied custody litigants in the coming years. One can hope that the Court will seize the opportunity to reinforce other Virginia courts' unwillingness to weaponize *Wyatt* in light of long-standing and wholly justifiable privileges, immunity, and genuine public policy concerns, along with practical safeguards built in to the judicial process. For the present, professionals involved in custody disputes must guard against efforts to chip away at their defenses until the Supreme Court of Virginia is able to rule conclusively against misuse of the narrow form of tort liability recognized in *Wyatt*.