TRIAL OF DOMESTIC TORT MATTERS UNDER THE FAMILY COURT ACT

by

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The passage of House Bill 346 ("The Family Court Act") sheds little light upon the subject of the trial of domestic tort actions which have been consolidated with a divorce case. Assuming joinder has already occurred, the question in the past has been "How is the tort action to be tried? And when?" Unfortunately, while the question appears to be answered in part by the language of the Act, there is a great deal which remains unanswered. In those jurisdictions in which a family court is either mandated by the act, or established by local rule, the manner of trial of the consolidated cause will continue to be a troubling one.

Joinder - mandatory or permissive?

Although there is no Missouri statute or case which expressly addresses mandatory or permissive joinder in the domestic tort/divorce setting, it appears joinder should be considered mandatory. The all-encompassing scope of the dissolution of marriage statute, coupled with the legal rationales stated in the cases which favor joinder appear to require joinder for the following reasons:

1. ***Collateral Estoppel***. The bar of collateral estoppel is one reason to consider mandatory joinder. The Missouri Dissolution of Marriage Act allows the court to consider the conduct of the parties during the marriage to be considered in dividing the property and in awarding maintenance. §452.330 RSMo. Supp. 1991; §452.335 RSMo. Supp. 1991. In S.A.V. v. K.G.V., 708 S.W.2d 651 (Mo. banc 1986), our Supreme Court hinted about the possible estoppel which might occur where the tort case and the divorce case are never joined: "While there are distinct differences between the division of marital property between spouses and awards of damage for an injury, to the extent that conduct of the spouses is taken into account in division of marital property pursuant to §452.330.1(4) Supp. 1991, *the dissolution decree might be admissible in the subsequent tort action* subject to usual constraints of relevance, competence and with a careful eye to questions of causation and speculativeness of damages. The same may hold true for the dissolution proceeding if that action follows trial of the tort claim. S.A.V. v. K.G.V., 708 S.W.2d 651, 653 (Mo. banc 1986), emphasis added.

If, as the Court suggests, the dissolution decree was admitted in evidence in a subsequent tort action between the same parties, and if the decree contained a finding as to conduct which was relevant to the tort claim and divided the property

based on this finding, would the plaintiff not be barred by collateral estoppel? And how could the defendant defend on the issue of liability if a judicial determination as to the conduct already exists?

2. ***Rules 55.06 and 55.32 MRCP and the rule against splitting a cause of action.*** The civil rules on joinder of causes of action apply to divorce cases. Sturgis v. Sturgis, 663 S.W.2d 375 (Mo. App. 1983). The joinder rules appear by their plain language to be permissive when one reads them. Rule 55.06(a) says ". . .a party asserting a claim to relief as an original claim. . .*may* join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party." However, Rule 55.32(a) states a

". . .pleading shall state as a counterclaim any claim which . . .the pleader has against any opposing party, *if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties. . .* " The rule mandates that the respondent *must* plead the tort claim at the time of the divorce, if the claim exists. It makes little sense to require only the respondent to assert the tort claim during the divorce case or risk the bar of collateral estoppel. The same rule should apply to the party who files first.

In fact, the Missouri Supreme Court tells us the

"permissive"nature of the joinder rule is not necessarily so "permissive:"

> With respect to the joinder of claims, or causes of action,...the civil code of Missouri is permissive. . . despite the permissive character of the statute, however, a cause of action which is in fact single, as distinguished from a several cause of action, may not be split and filed or tried piecemeal, the penalty for which is that an adjudication of the suit first filed is a bar to a second suit. The rule against splitting a single cause of action is one of policy, the prevention of a vexatious multiplicity of suits.

Stoops v. Stoops, 256 S.W.2d 799, 801 (Mo. Sup. Ct. 1953).

The Stoops court established a rule for determining what constitutes a single cause of action: ". . .if the parties and subject matter are identical and the evidence necessary to sustain the claims are the same the actions are single and may not be split or separately tried." Stoops at 801. Since the conduct of the parties is in issue in Missouri's dissolution of marriage statute, and the same conduct would be the subject of the tort claim between the parties, it seems the two causes should be tried, or at least considered by the court, at the same time. At least one court of another state has considered the rule against splitting a cause of action in the specific context considered herein, and has determined the tort action must be brought at the time the divorce or be barred. See Tevis v. Tevis, 400 A.2d 1189 (N.J. Sup. Ct. 1979).

Manner of Trial -

Assuming the joinder requirement is indeed mandatory, and

further assuming joinder has been achieved, the procedural issue of utmost importance is the question of how to try the two petitions - the divorce case calling for trial by the court, and the tort claim creating entitlement to a jury. Rule 66.02 MRCP allows the court ". . .in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, [to] order a separate trial of any claim. . . or of any separate issue or of any number of claims, cross-claims, counterclaims. . .or issues." Rule 66.02 MRCP. Therefore, there is a basis in the rules for severance of the two causes for trial purposes.

H.B. 346, however, offers a rule especially for the joint divorce and tort cause:

> If a tort action is properly joined with any of the actions enumerated in subjection 1 of this section, the entire action shall not be within the jurisdiction of the family court but shall be assigned to and heard on a civil docket unless the parties stipulate and agree in writing that the matter may be retained in the family court.

H.B. 346, §4

Therefore, the Act at least contemplates the circumstance in which the tort claim and the divorce case are joined. However, language of the act is both ambiguous and troublesome. It provides that where joinder has occurred, "...*the entire action* shall not be within the jurisdiction of the family court *but*

shall be assigned to and heard on a civil docket..." H.B. 346 at §4. Thus, the strict language of the Act suggests the <u>entire</u> action, i.e. the divorce and the tort case with which it was joined, shall be assigned to and heard on a civil docket, thereby removing the entire matter from the jurisdiction of the family court. Does this mean the trial judge in the civil jury case shall do the fact finding in the divorce, and leave to the jury the factual issues presented by the evidence in the tort case? Is this a circumstance in which Supreme Court Rule 66.02 is intended to be used, and is the trial judge to bifurcate the two parts of the trial, the first one being before the court and the second one before the jury? And if so, which case is tried first, and how shall the factual findings in the first-tried matter effect the disposition of the second-tried matter?

A review of the Act and the publicity surrounding its enactment might also lead one to conclude that by their language, the drafters actually intended that only the *tort* case be assigned to and heard on the civil docket. The divorce case would remain within the family court. The tort case could only be disposed of within the family court if "...the parties stipulate and agree in writing that the matter may be retained in the family court." H.B. 346, §4. However, the language of the Act as it is presently enacted removes the entire action from the family court's penumbra, thereby removing it away from the very

court which was created to provide for consolidation of these matters, under the guiding legislative philosophy of "one family, one judge." The authors have discussed the language of Section 4 with both practicing lawyers and with trial judges; interestingly enough, several of the judges interpreted the language as providing for the removal of the tort action alone to the civil docket; the practitioners felt the statute required the removal of the entire action to the civil docket. One of the drafters of the Act has confirmed to the authors that the intent of the disputed language was indeed to remove the entire consolidated action from the family court. This was apparently the result of a legislative compromise necessary to accommodate the objections of one of the groups which helped write the bill.

Conclusion

Once the decision to attempt joinder has been made, the question of trial procedure must be resolved, and the trial courts of our state have not been presented with many stated alternatives within the Supreme Court Rules or the Family Court Act. Assuming the Act, in those jurisdictions in which it is applicable, requires removal of the entire consolidated action from the Family Court to the civil docket, the civil trial judge should bifurcate the trial of the two cases. The decision as to which case should be tried first should be left to the practitioners, and their strategy will most certainly vary

depending upon the facts of each case.

In any event, the careful practitioner should always attempt to join an existing marital tort claim with a related divorce case. Failure to do so may result in the client being forever barred from raising the claim at a later time. Cases from other states which did not bar the later filing of a tort case between the same parties did so primarily upon the theory that the conduct underlying the tort claim was not addressed or litigated within the divorce case. Our present divorce law places all such issues, including the assets and claims of either party, within the Court's jurisdiction during the divorce. Therefore, the rationale permitting pursuit of the later tort claim may not exist in Missouri.

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