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Family/Tort Law - Through the Eyes and Ears of Children: A Significant Advance for Third Parties Exposed to Domestic Violence. Bevan v. Fix, 42 P.3d 1013 (Wyo. 2002)

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CASE NOTES

FAMILY/TORT LAW – Through the Eyes and Ears of Children: A Significant Advance for Third Parties Exposed to Domestic Violence. *Bevan v. Fix*, 42 P.3d 1013 (Wyo. 2002).

INTRODUCTION

While national awareness of the impact of domestic violence on women has been heightened for some time, the awareness of the impact on children who witness domestic violence has been largely overlooked until recently.[1] Over the past decade, researchers have compiled a significant amount of empirical data showing the negative effects of children's exposure to domestic violence on their psychological development and functioning.[2] Children exposed to domestic violence can develop detrimental social, emotional, behavioral, and academic problems that can affect their long-term functioning.[3] Studies have shown that children exposed to domestic violence as third parties exhibit symptoms very similar to children who are direct victims of domestic violence and abuse.[4] Because of this relatively new and growing awareness, the assessment of the needs of these children is in an early stage of development.[5] Researchers, social practitioners, and the

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1. Betsy McAllister Groves, *Mental Health Service for Children Who Witness Domestic Violence*, (2002), *available at* http://www.athealth.com/Practitioner/ceduc/dv_children.html (last visited Mar. 23, 2003). "[I]nterest in and concern about children who witness domestic violence appear to be growing in the private and public sectors." *Id.*

2. Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 4 (2001). The negative effects of children's exposure to domestic violence include "aggressive conduct, anxiety symptoms, emotional withdrawal, and serious difficulties in school." *Id.* at 6. Research indicates that children exposed to domestic violence are more likely than children from nonviolent homes to form emotional and adjustment problems as adults, as well as repeating the violent patterns they observed as children. *Id.*

3. *Id.*

> Generally . . . child witnesses of domestic violence . . . exhibit more aggressive and antisocial behaviors . . . as well as fearful and inhibited behaviors . . . and show lower social competence than other children. Children who witnessed violence were also found to show more anxiety, self-esteem, depression, anger, and temperament problems than children who did not witness violence at home. Children from homes where their mothers were being abused have shown less skill in understanding how others feel and examining situations from others' perspectives when compared to children from non-violent households.

Jeffrey Edleson, *Problems Associated with Children's Witnessing of Domestic Violence*, (April 1999), *available at* http://www.vaw.umn.edu/documents/vawnet/witness/witness.html (last visited Mar. 23, 2003).

4. Weithorn, *supra* note 2, at 6-7.

5. Groves, *supra* note 1.

legal system now face the question of how to prevent children's exposure to domestic violence and assist children who have already been exposed.[6]

Two children from Wyoming, Brittany and Steven Bevan, ages six and three respectively, were exposed to domestic violence when, in March 1998, they witnessed the physical and verbal assault of their mother by her boyfriend and former attorney.[7] As a result, Brittany and Steven sought recovery for intentional infliction of emotional distress.[8] In March 2002, the Wyoming Supreme Court evaluated Brittany's and Steven's claims for intentional infliction of emotional distress.[9] Their claims afforded the court the opportunity to further develop the tort of intentional infliction of emotional distress in Wyoming, and decide what it means to be "present at the time" for purposes of establishing a claim of third party intentional infliction of emotional distress.[10] More importantly, their claims are an example of the tort's availability to those psychologically impacted by exposure to domestic violence, and exemplifies the tort as one way to right the wrong of domestic violence.[11]

The story leading to Brittany's and Steven's claims for intentional infliction of emotional distress began in July 1992, when Steven Bevan, the children's father, hired William Fix, an attorney in Jackson, Wyoming, to represent him on a domestic violence charge of criminal battery against Jenni Jones, Bevan's then girlfriend.[12] The course of proceedings against Bevan ended in a plea agreement.[13] Bevan and Jones married in December 1994.[14] The couple had two biological children, Brittany and Steven Bevan.[15] Brittany was born in August 1991, and Steven in April 1994.[16] In January 1997, Jones hired Fix to represent her in an action for divorce against Bevan.[17] In June 1997, Fix terminated his representation of Jones because he had commenced a sexual relationship with her.[18]

On March 29, 1998, Jones and her children spent the evening at Fix's house.[19] Fix and Jones left the children in the care of two teenage

6. Weithorn, *supra* note 2, at 8.
7. Bevan v. Fix, 42 P.3d 1013, 1025 (Wyo. 2002).
8. *Id.* at 1018.
9. *Id.*
10. *Id.* at 1024.
11. The tort affords "one way of righting [the] grievous wrong [of domestic violence]." Twyman v. Twyman, 855 S.W.2d 619, 643 (Tex. 1993) (Spector, J., dissenting).
12. *Bevan,* 42 P.3d at 1017. William Fix is an attorney licensed to practice in Wyoming with an office in Jackson. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*

babysitters while they spent most of the evening drinking in a local bar.[20] Upon returning to Fix's home, Fix, Jones, and two other guests bathed in Fix's hot tub and continued drinking.[21] In the hot tub, Fix and Jones engaged in a verbal altercation that eventually led to physical confrontation.[22] These verbal and physical altercations continued over the next few hours and culminated in the violent physical confrontation that was the basis of Brittany's and Steven's claims.[23]

Early the next morning, Fix awakened Jones and attacked her with violent conduct that included kicking, punching, pushing, choking, and screaming that he was going to kill her.[24] Jones's children and the two babysitters observed parts of this violent altercation, although it is unclear from the record exactly what Brittany observed.[25] When Brittany was questioned as to what she remembered of the events, she stated:

> Well, I woke up early and heard screaming and shouting, and then I went back to sleep because I was kind of scared . . . . When I woke up I saw mom, I heard crying and I walked, I stepped down from the bed with the ladder, and I saw mom crying and Steven holding her and saying it's okay.[26]

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20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* Jones stated in her affidavit:

> In the early morning of March 30, 1998, I was awoken from my sleep by Bill Fix who was in the process of throwing me out of bed. I landed flat on my back on the floor. I tried to sit up several times and he kept pushing me to the floor. He then grabbed my head and started violently banging it against the wall. At the same time that he was kicking and punching me. Although I was barely conscious at this time, I could see my blood spattered on the wall. Fix . . . screamed he was going to 'kill' me several times. Fix then started punching and kicking me again. Fix . . . drug me by my hair . . . I believe that I lost consciousness briefly. The next thing I remember is Fix is holding me up in the air against the wall, at the top of the stairs, with his hands around my neck, choking me, banging my head against the wall, and him screaming incoherently. I thought I was going to die at that moment and as I turned my head to the side I saw my three year old son looking at me in absolute horror. I will never forget the fear and horror I saw in his face.

Id. at 1017-18.

25. *Id.* at 1023.
26. *Id.* at 1022.

In response to the question of what else she remembered, she replied: "Bill Fix slammed her against the wall or the floor. It was either one of those because I heard a bounce."[27]

Soon after these events, Brittany and Steven began to exhibit significant changes in their behaviors.[28] Brittany had trouble sleeping and began to experience nightmares.[29] Steven's behavior became violent at school and included swearing and choking classmates.[30] The children began seeing a counselor for their behavior.[31] Subsequently, Steven was diagnosed with post-traumatic stress disorder (PTSD).[32] After seeing a second counselor several months later, Brittany was diagnosed with a form of depression known as dysthmic disorder.[33] The second counselor also confirmed Steven's diagnosis of PTSD.[34] Both children continued to see the second counselor for therapy.[35] A clinical psychologist specializing in children also evaluated Brittany and Steven and concluded that the children were in significant distress, expressing her worry about both children.[36] She noted that Brittany was very depressed and had admitted continued suicidal feelings.[37]

In March 2000, Brittany and Steven brought suit against Fix for intentional infliction of emotional distress based on Fix's alleged assault on their mother.[38] Their father, Steven Bevan, also sued Fix for legal malpractice based on Fix's representation of Jones in the divorce proceeding against him after Fix had previously represented him in the domestic violence proceeding.[39] After a hearing on April 10, 2000, the district court in Teton County granted summary judgment to Fix on all claims. Bevan and the children appealed both claims to the Wyoming Supreme Court.[40] The court

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27. *Id.* at 1023.
28. *Id.* at 1018.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* Research has shown that symptoms associated with post-traumatic stress disorder have been diagnosed in 13% to 51% of children exposed to domestic violence. Weithorn, *supra* note 2, at 4. Symptoms associated with PTSD include emotional changes such as agitation or irritability, withdrawal from activities, problems in social or academic functioning, and "reexpereincing" of the traumatic event (such as nightmares, inability to stop thinking about it, or reenacting it through play). *Id.* Researchers have also observed that children with PTSD symptoms undergo physiological changes that "correlate with their psychological symptomology and may have long-term effects on their behavior and functioning." *Id.*
33. Bevan v. Fix, 42 P.3d 1013, 1018 (Wyo. 2002).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* The psychologist stated, "I think that these children are in significant distress. I'm quite worried about both of them." *Id.*
38. *Id.* Brittany and Steven brought suit through their father, Steven Bevan, as their next friend. *Id.*
39. *Id.*
40. *Id.*

concluded there was sufficient evidence to preclude summary judgment for Fix on the children's intentional infliction of emotional distress claims, and reversed the district court's grant of summary judgment in his favor.[41] The court also went on to decide exactly what it means to be present in order for a third party to bring a claim for intentional infliction of emotional distress.[42]

This case note examines the history, development, and current state of the tort of intentional infliction of emotional distress in Wyoming, and attempts to shed light on the future of this tort with respect to domestic violence and its impact on family law. This note evaluates the significance of the Wyoming Supreme Court's interpretation and expansion of the tort's requirements as to "presence," and emphasizes the tort's potential to positively affect the ability of third parties, especially children, to recover from exposure to domestic violence. This case note argues that *Bevan* was correctly decided and advances the law in the best interest of society. This note serves to open the eyes of the legal world to remedies for those indirectly affected by domestic violence, and encourages long overdue manifestation of general intolerance for domestic violence in our society by following the *Bevan* court's example.

BACKGROUND

Generally, before the 1930s, the law allowed recovery for mental anguish only if it was "parasitic" to another traditional tort and a physical injury.[43] Scholars began criticizing the state of the law and pushing for a new tort that would allow recovery for mental distress.[44] The tort of intentional infliction of emotional distress first appeared in the 1948 Supplement to the RESTATEMENT (SECOND) OF TORTS, and has been maintained in its current revised form in the 1965 RESTATEMENT (SECOND) OF TORTS § 46 (hereinafter section 46).[45] Section 46(1) sets forth the tort's elements: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily

41. *Id.* at 1025.

42. *Id.*

43. Merle H. Weiner, *Domestic Violence and the Per Se Standard of Outrage*, 54 MD. L. REV. 183, 198 (1995). One exception has always been for an action for assault. FOWLER V. HARPER ET AL., THE LAW OF TORTS 603, 606 (2d ed. 1986). *See also* Annotation, *Modern Status of Intentional Infliction of Emotional Distress as Independent Tort: "Outrage,"* 38 A.L.R. 4th 998 (1985).

44. *Id. See, e.g.*, Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874 (1939).

45. Weiner, *supra* note 43, at 197; Daniel Givelbar, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress By Outrageous Conduct*, 82 COLUM. L. REV. 42, 43 (1982). "[B]y 1948 the Restatement had reversed its position and 'restated' the law to be that one could recover for severe emotional injuries intentionally inflicted." *Id.*

harm."[46] Therefore, to state a claim, a plaintiff must establish four elements: Extreme and outrageous conduct, severe emotional distress, causation, and an intent or recklessness in causing severe emotional distress.[47] Intentional infliction of emotional distress is also recognized as a cause of action available to third parties who have been exposed to extreme and outrageous conduct. Third-party intentional infliction of emotional distress is set forth in section 46(2):

> Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress (a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or (b) to any other person who is present at the time, if such distress results in bodily harm.[48]

Almost all states have adopted the tort of intentional infliction of emotional distress, and there has been a consistent trend toward allowing recovery.[49] The limits of the tort, however, remain vaguely defined.[50]

Determining what constitutes "outrageous" conduct and "severe" distress is largely a subjective inquiry that has led to inconsistency in the tort's application.[51] Many scholars argue that outrageousness is the only real requirement for recovery under the tort.[52] "[D]espite its apparent abundance of elements, in practice [the tort] tends to reduce to a single element – the outrageousness of the defendant's conduct."[53] Thus, where extreme and outrageous conduct can be shown, courts will suppose that such conduct caused severe emotional distress.[54] Inversely, where the outrageousness element cannot be established, the action cannot be maintained, even if the

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46. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).
47. *Id.*
48. *Id.*
49. Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort: "Outrage,"* 38 A.L.R. 4th 998 (1985).
50. Leonard Karp & Cheryl L. Karp, *Beyond the Normal Ebb and Flow . . . Intentional Infliction of Emotional Distress in Domestic Violence Cases*, 28 FAM. L.Q. 389, 397 (1994) [hereinafter Karp & Karp].
51. *Id.*
52. David Crump, *Evaluating Independent Tort Based upon "Intentional" or "Negligent" Infliction of Emotional Distress: How Can We Keep the Baby from Dissolving in the Bath Water?*, 34 ARIZ. L. REV. 439, 450 (1992).
53. Givelbar, *supra* note 45, at 55. "Where intentional outrageous conduct is proven, courts readily assume that such conduct caused severe distress, and where outrage is not proven the tort fails, even if the defendant meant to cause the plaintiff severe emotional distress and succeeded." Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1280-81 (1996).
54. Givelbar, *supra* note 45, at 50.

actor intended and did successfully create emotional distress.[55] Difficulty arises because the concept of "outrageousness" is highly subjective, and section 46 does not provide meaningful guidance. As a result, courts have had difficulty formulating clear standards as to what constitutes outrageous conduct.[56]

Subjectivity has also caused difficulty when courts face the issue of whether the emotional distress in question is "severe." Section 46 suggests that the emotional distress be "so severe that no reasonable man could be expected to endure it."[57] Comment j to section 46 defines emotional distress as including "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."[58] Comment j offers that the intensity and duration of the distress are factors to be considered in determining its severity.[59] Comment j also makes clear that severe distress must be proved, but suggests that the extreme and outrageous character of the defendant's conduct is often in itself important evidence that the distress has existed.[60] Ultimately, the ability to recover under the tort seems to revolve around establishing outrageous conduct.

History of Intentional Infliction of Emotional Distress in Wyoming

Before adopting the tort of intentional infliction of emotional distress, the Wyoming Supreme Court recognized the tort of negligent infliction of emotional distress in *Gates v. Richardson*.[61] In *Gates,* the court noted that

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55. *Id.* at 46.

56. *Id. See* Bevan v. Fix, 42 P.3d 1013, 1020-21 (Wyo. 2002). "Unfortunately, as we noted in *Kanzler v. Renner,* disparities in application of the tort are prevalent due in large part to the vague, subjective, value-laden concept of 'outrageousness' and the highly fact-specific inquiry necessary to decide claims under it." *Id.* at 1021 n.7 (citing Kanzler v. Renner, 937 P.2d 1337, 1342 (Wyo. 1992). The Restatement provides vague guidance: "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). It also provides that, for purposes of claiming intentional infliction of emotional distress, outrageous conduct is that which is "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*

57. *Id.* at cmt. j.

58. *Id.*

59. *Id.*

60. *Id.*

61. Gates v. Richardson, 719 P.2d 193, 198 (Wyo. 1986).

> Given the relatively minor impact that recoveries in these cases would have on the defendants, the insurance industry, and the public, and given our general policy in favor of imposing the loss on the negligent tortfeasor rather then the innocent victim, we conclude that the tort of negligent infliction of emotional distress is actionable in Wyoming.

"compensation for emotional distress is not a new concept in Wyoming. We have permitted recovery for emotional harm caused by false imprisonment, malicious prosecution, and work-related stress."[62] The tort of negligent infliction of emotional distress allows plaintiffs to recover damages where they have suffered emotional distress as a result of witnessing the severe injury or death of another.[63] The court held that in order to bring an action for negligent infliction of emotional distress, a plaintiff must either witness the accident or soon come to the scene while the victim is still there, and prove that he suffered emotional distress as a result of observing the infliction of serious bodily injury or the death of a relative.[64] Additionally, the court placed significant limitations on the tort by restricting the class of plaintiffs allowed to bring an action for negligent infliction of emotional distress to those who are permitted to bring wrongful death actions in Wyoming.[65] In *Gates,* the family of a child who observed the child's injury after being struck by an automobile sued the driver for negligent infliction of emotional distress.[66] The district court refused to allow the family's claims for negligent infliction of emotional distress, expressing concerns of overbroad liability and asserting that legal causation must terminate somewhere.[67] In response to those concerns, the Wyoming Supreme Court reversed the district court's dismissal of the family's claims and stated that "the fact that legal causation must terminate somewhere does not mean it must terminate short of mental injuries."[68]

One month later, the Wyoming Supreme Court, in *Leithead v. American Colloid Co.,* adopted section 46's formulation of the tort of intentional infliction of emotional distress as a valid cause of action in Wyoming.[69] The *Leithead* court reasoned that if a person can recover damages for negligently inflicted emotional harm, then certainly he should have a

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Id.

62. *Id.* at 194. *See* Waters v. Brand, 497 P.2d 875, 877-78 (Wyo. 1972) (holding that recovery was permitted for emotional harm caused by false imprisonment); Cates v. Eddy, 669 P.2d 912, 921 (Wyo. 1983) (holding that recovery was permitted for emotional harm caused by malicious prosecution); Consol. Freightways v. Drake, 678 P.2d 874 (Wyo. 1984) (holding that recovery was permitted for emotional harm caused by work-related stress).

63. *Gates*, 719 P.2d at 197.

64. *Id.* at 199-201. The dissenting opinion argued that a plaintiff should be allowed to bring an action for negligent infliction of emotional distress only if the plaintiff was present at the location of the incident to witness its occurrence. *Id.* at 202 (Rooney, J., dissenting).

65. *Id.* at 199. In Wyoming's Wrongful Death Statute, the legislature expressed that a wrongful death action is limited to spouses, children, and siblings, due to community policy. WYO. STAT. ANN. § 1-38-102 (Cum. Supp. 1985). *See* Wetering v. Eisele, 682 P.2d 1055, 1061-62 (Wyo. 1984).

66. *Gates*, 719 P.2d at 194.

67. *Id.* at 197.

68. *Id.* "We are perfectly capable of fixing limits and applying them when necessary." *Id.* at 198. "

69. Leithead v. Am. Colloid Co., 721 P.2d 1059 (Wyo. 1986).

cause of action for harm intentionally inflicted.[70] In *Leithead,* an employee sued his former employer for intentional infliction of emotional distress after his employer discharged him for being suspected of leaking confidential information to competitors.[71] While the court concluded as a matter of law that the distress suffered by the employee was not severe enough to be compensable, it nonetheless joined the vast majority of jurisdictions and adopted the tort of intentional infliction of emotional distress.[72]

The *Leithead* court faced concerns that adopting the tort would flood the courts with fraudulent claims and create potentially unlimited liability for every type of mental disturbance.[73] The court addressed these concerns by submitting that such problems could be solved without entirely rejecting the action.[74] It also asserted that section 46 placed several limits on the action, and expressed its confidence that these limits, together with the common sense of the jury, should prove to be adequate protection against fraudulent or frivolous claims.[75]

Several years after *Leithead,* the Wyoming Supreme Court determined in *Wilder v. Cody County Chamber of Commerce* that the shame and humiliation alleged by a former executive director who sued a nonprofit corporation for intentional infliction of emotional distress after its board of directors, dissatisfied with his financial oversight, terminated him, was enough to create a jury question on the issue of liability.[76] The *Wilder* court held there was sufficient evidence of outrageous conduct by the defendant when, before and after the plaintiff's termination, the corporation's officials placed the plaintiff on probation, reduced his compensation, possibly altered his employment status, required that he publicly accept responsibility for the defendant's financial problems without having conducted any formal investigation, and actively tried to prevent the plaintiff from obtaining employment after his termination.[77] The decision in *Wilder* reinforced the court's willingness, initiated in *Leithead,* to allow plaintiffs who establish sufficient evidence of outrageous conduct by the defendant to maintain a cause of action for intentional infliction of emotional distress.

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70. *Id.* at 1065. *See also* Sheltra v. Smith, 392 A.2d 431, 431-33 (1978) (discussing the evolution of judicial recognition of the "right to recover damages for mental distress and of an independent cause of action for intentional infliction of emotional distress," and exemplifying the logical sequence of recognizing the tort of intentional infliction of emotional distress after recognizing the tort of negligent infliction of emotional distress).

71. *Leithead,* 721 P.2d at 1066-67.

72. *Id.*

73. *Id.*

74. *Id.* at 1065-66. "While these problems are not to be dismissed lightly, they can certainly be solved without rejecting the action entirely. That would be the equivalent of 'employing a cannon to kill a flea.'" *See* Gates v. Richardson, 719 P.2d 193, 197 (Wyo. 1986) (quoting Nehring v. Russell, 582 P.2d 67, 79 (Wyo. 1978)).

75. *Leithead,* 721 P.2d at 1066.

76. Wilder v. Cody County Ch. of Commerce, 868 P.2d 211, 223-24 (Wyo. 1994).

77. *Id.*

In 1996, *Garcia v. Lawson* presented an example of conduct that the court was unwilling to characterize as outrageous in order to sustain an action for intentional infliction of emotional distress.[78] The plaintiff in *Garcia* brought an action for intentional infliction of emotional distress against a police officer who, when he responded to the plaintiff's sexual assault charges against her estranged boyfriend, failed to complete a quality investigation and made offensive remarks including discussing the size of a mutual acquaintance's breasts and inviting the plaintiff to have a beer with him.[79] The *Garcia* court concluded that the police officer's conduct was not sufficiently extreme and outrageous.[80] The court noted that the defendant could have been more considerate in his dealings with the plaintiff and that he did fail to conduct a quality investigation, but concluded that "his conduct was at most annoying, insulting and insensitive," and was not what the court would "characterize as being beyond all possible bounds of decency, atrocious, or utterly intolerable in a civilized community."[81] After concluding that the defendant's conduct was not outrageous, the court did not address whether the emotional distress suffered by the plaintiff was severe.[82]

Justice Golden wrote strong dissenting opinions in both *Wilder* and *Garcia*.[83] He asserted the majority used no legal standard of measurement in either case to characterize the alleged conduct of the defendant.[84] Justice Golden expressed his concern with the court's "establishment and principled application of standards" with respect to the nature of the defendant's alleged conduct and the level of severity of the plaintiff's alleged emotional reaction to that conduct.[85] "It seems to me we must establish useful and helpful standards against which to measure the conduct and emotional reaction to conduct because we strive to make principled decision-making in order to treat similarly situated citizens similarly."[86] Justice Golden asserted that the explanation of the result in *Wilder* must be better than to say that the employer's conduct was outrageous because the majority was sufficiently offended by it, and that the explanation of the result in *Garcia* must be better

78. Garcia v. Lawson, 928 P.2d 1164, 1167 (Wyo. 1996).
79. *Id.* at 1165-66.
80. *Id.* at 1167.
81. *Id.* The court was referring to comment d of the Restatement for its requirement that the conduct be "beyond all possible bounds of decency, atrocious, or utterly intolerable in a civilized society. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965). The court then quoted *Dreja v. Vaccaro*: "'The law does not afford a cause of action for bad taste, boorishness, condescension, or social ineptitude.'" Dreja v. Vaccaro, 650 A.2d 1308, 1311 (D.C. 1994).
82. *Garcia*, 928 P.2d at 1167.
83. Wilder v. Cody County Ch. of Commerce, 868 P.2d 211, 225 (Wyo. 1994) (Golden, J., dissenting); *Garcia*, 928 P.2d at 1168-69 (Golden, J., dissenting).
84. *Garcia*, 928 P.2d at 1169 (Golden, J., dissenting) ("I find no standard stated in the opinion. Is the standard objective or subjective? Is outrageousness in the eye of the beholder?").
85. *Id.* at 1168 (Golden, J., dissenting).
86. *Id.* at 1169 (Golden, J., dissenting).

than to say that the police officer's conduct was not outrageous because the majority was not sufficiently offended by it.[87] "We must have a rule of law, not a rule of man."[88]

A critical expansion of the tort took place in 1997 with *Kanzler v. Renner,* a case dealing with emotional injury resulting from sexual harassment in the workplace.[89] The decision in *Kanzler* was important because the court expressly recognized society's gradual intolerance of sexual harassment in the workplace, and joined numerous jurisdictions that had determined that such inappropriate conduct coupled with sufficient evidence could give rise to a claim for intentional infliction of emotional distress.[90] In *Kanzler,* a former police dispatcher brought an action for intentional infliction of emotional distress against a police officer as a result of alleged sexual misconduct by the police officer against the former dispatcher.[91] The *Kanzler* court struggled with issues of interpreting and applying the "outrageous" element.[92] The court acknowledged that courts have been inconsistent when trying to determine what constitutes outrageous conduct.[93] "Re-

87. *Id.* (Golden, J., dissenting). Justice Golden concluded in *Garcia* that reasonable persons could differ in their conclusion as to whether the police officer's conduct was extreme and outrageous. *Id.* (Golden, J., dissenting).

88. *Id.* (Golden, J., dissenting). "I fear what others have feared: '[T]he court embarks on what I predict will be an endless wandering over a sea of factual circumstances, meandering this way and that, blown about by bias and inclination, and guided by nothing steadier than the personal preferences of the helmsmen, who change with every watch.'" *Id.* (Golden, J., dissenting) (quoting Wornick Co v. Casas, 856 S.W.2d 732, 737 (Tex. 1993) (Hecht, J., concurring)). Justice Golden also noted several courts who have "risen to the task" with respect to establishing and applying standards in this area of the law to assist the court in determining whether the conduct in question is outrageous under the circumstances. *Id.* (Golden, J., dissenting). He noted two standards: (1) The actor is in a position of authority and trust; and (2) The plaintiff is peculiarly susceptible to emotional distress and the actor knows, or should know, of that condition. *Id.* (Golden, J., dissenting). As to the first standard, *see Crump v. P & C Food Markets, Inc.,* 576 A.2d 441, 448 (1990); *Drejza v. Vaccaro,* 650 A.2d 1308, 1312-17 (D.C. App. 1994); *Doe v. Calumet City,* 641 N.E.2d 498, 507-08 (1994). As to the second standard, *see Doe,* 641 N.E.2d at 507-08; *Drejza,* 650 A.2d at 1312-17; *Denton v. Chittenden Bank,* 655 A.2d 703, 707 (1994); *Pavilon v. Kaferly,* 561 N.E.2d 1245, 1252 (1990).

89. Kanzler v. Renner, 937 P.2d 1337, 1341-42 (Wyo. 1997).

90. *Id.* The court noted numerous jurisdictions that have also determined that inappropriate sexual conduct in the workplace can give rise to a claim for intentional infliction of emotional distress. *Id. See* Bennett v. CompUSA, Inc., 1997 WL 10028, at *10 (N.D. Tex. Jan. 7, 1997); DeShiro v. Branch, 1996 WL 663974, at *3 (M.D. Fla. Nov. 4, 1996); Howard v. Town of Jonesville, 935 F. Supp. 855, 861-62 (W.D. La. 1996); Bryant v. Better Bus. Bureau of Greater Md., Inc., 923 F. Supp. 720, 747-48 (D. Md. 1996); Lazarz v. Brush Wellman, Inc., 857 F. Supp. 417, 423 (E.D. Pa. 1994); Retherford v. AT & T Communications of Mountain States, Inc., 844 P.2d 949, 978 (Utah 1992); Collins v. Wilcox, 600 N.Y.S.2d 884, 885-86 (Sup. Ct. 1992); Fisher v. San Pedro Peninsula Hosp., 262 Cal.Rptr. 842, 858 (1989); Hogan v. Forsyth Country Club Co., 340 S.E.2d 116, 121 (1986); Howard Univ. v. Best, 484 A.2d 958, 985-86 (D.C. App. 1984); Valerio v. Dahlberg, 716 F. Supp. 1031, 1040 (S.D. Ohio 1988).

91. *Kanzler,* 937 P.2d at 1339.

92. *Id.* at 1342.

93. *Id.*

cent decisions reveal widely varying and inconsistent attitudes regarding the severity of [sexual] misconduct required for a showing of outrageousness. This disparity is due in large part to the vague, subjective, and value-laden concept of 'outrageousness,' and the highly fact-specific inquiry required of the courts."[94] The court resolved its struggle by discerning factors such as repeated incidents of conduct and unwelcome touching, *i.e.* non-negligible physical contact, that could be used to assist the court's determination whether the particular conduct of the police officer was sufficiently outrageous.[95] The court held that the defendant's alleged conduct went beyond mere insults, indignities, and petty oppressions, and, if proved, could be considered outrageous.[96] The court concluded that in the least, reasonable persons could differ in their conclusions as to whether the defendant's conduct was outrageous and that it is for a jury to determine whether the conduct was sufficiently outrageous for liability.[97] It also held that the evidence presented by the former dispatcher as to her mental distress, including being diagnosed with post-traumatic stress disorder, anxiety, and depression, was sufficient to create a jury issue on the severity of her distress.[98]

In *Kanzler,* Justice Thomas wrote a specially concurring opinion expressing his concern that Wyoming's "law in this area is not developing in a particularly cohesive manner, noting that two members of the court dissented in *Garcia v. Lawson.*"[99] Justice Thomas viewed intentional infliction of emotional distress as a "potentially volatile" tort, and as such, he believed it was essential that its parameters be carefully crafted.[100] Justice Thomas expressed his fear that trial courts and the bar in Wyoming would read into the *Kanzler* decision a rule that in every case involving sexual misconduct, reasonable men could differ as to whether the conduct is so extreme and outrageous as to allow recovery.[101] Justice Thomas noted that after *Kanzler,* a trial court might perceive that summary judgment is full of risk when the basis for intentional infliction of emotional distress is sexual misconduct.[102] He advised, however, that trial courts should be careful not to abandon their important roles as gatekeepers.[103]

Beginning with *Leithead,* the Wyoming Supreme Court has approved the language of the comments to section 46 pertaining to evaluating

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94. *Id.*
95. *Id.* at 1343.
96. *Id.*
97. *Id.*
98. *Id.* at 1343-44.
99. *Id.* at 1345 (Thomas, J., concurring) (citation omitted). *See* Garcia v. Lawson, 928 P.2d 1164, 1167 (Wyo. 1996).
100. *Kanzler,* 937 P.2d at 1345 (Thomas, J., concurring).
101. *Id.* (Thomas, J., concurring).
102. *Id.* (Thomas, J., concurring). Justice Thomas referred to the Restatement's comment h dealing with "*Court and jury.*" *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965).
103. *Id.* (Thomas, J., concurring).

the elements of the tort of intentional infliction of emotional distress.[104] The court has consistently looked to these comments for assistance in determining what constitutes outrageous conduct, what constitutes severe emotional distress, and whether the record discloses facts sufficient to allow a jury to reasonably conclude that the defendant "intentionally" or "recklessly" caused the plaintiff severe emotional distress.[105] Also, beginning with *Leithead* the court has approved section 46's description of the roles of both judge and jury found in comment h, noting that these roles ensure that frivolous claims can be weeded out at the summary judgment stage.[106]

Third Party Intentional Infliction of Emotional Distress in Wyoming

In *R.D. v. W.H.*, the Wyoming Supreme Court expressly adopted the formulation in section 46(2) of third-party intentional infliction of emotional distress.[107] In order to establish liability under section 46's provision for third-party intentional infliction of emotional distress, a plaintiff must be "present at the time" the outrageous conduct occurred.[108] In *R.D. v. W.H.*, the court looked to section 46 for guidance as to how the presence element should be applied:

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104. *See Kanzler*, 937 P.2d at 1341; *Leithead*, 721 P.2d at 1066-67.

105. *See Kanzler*, 937 P.2d at 1341; *Leithead*, 721 P.2d at 1066-67; Davis v. Consol. Oil & Gas, Inc., 802 P.2d 840, 849 (Wyo. 1990). Comment i to the RESTATEMENT (SECOND) OF TORTS § 46 states:

> *Intention and recklessness.* The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly, as that term is defined in § 500, in deliberate disregard of a high degree of probability that the emotional distress will follow.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965).

106. *Leithead*, 721 P.2d at 1066. Comment h to the RESTATEMENT (SECOND) OF TORTS § 46 states:

> *Court and jury.* It is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery, or whether it is necessarily so. Where reasonable men may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. h (1965).

107. R.D. v. W.H., 875 P.2d 26, 31 (Wyo. 1994).

> It appears that, although we did not do so expressly, we intended in *Leithead* to adopt § 46 of the RESTATEMENT . . . in its entirety. In order to clarify the law, we hereby expressly adopt § 46(2) of the RESTATEMENT . . . as being the basis for third-party intentional infliction of emotional distress claims in Wyoming.

Id. at 32.

108. RESTATEMENT (SECOND) OF TORTS § 46(2) (1965).

> *Conduct directed at a third person.* Where the extreme and outrageous conduct is directed at a third person, as where, for example, a husband is murdered in the presence of his wife, the actor may know that it is substantially certain, or highly probable, that it will cause severe emotional distress to the plaintiff. In such cases the rule of this Section applies. The cases thus far decided, however, have limited such liability to plaintiffs who were present at the time, as distinguished from those who discover later what has occurred.[109]

Section 46 also includes this caveat: "The Institute expresses no opinion as to whether there may not be other circumstances under which the actors may be subject to liability for the intentional or reckless infliction of emotional distress."[110] The caveat is intended, according to comment l, "to leave open the possibility of situations in which presence at the time may not be required."[111]

In *R.D. v. W.H.*, the husband and minor child of the decedent sued the decedent's stepfather and his physician for conduct they claimed led to her suicide by drug overdose, claiming damages for negligent and intentional infliction of emotional distress.[112] The court noted these two mental distress torts allow for recovery when the plaintiff suffers from extreme shock, and do not allow recovery for the typical type of grief suffered by anyone who loses a loved one.[113] The husband and child were not present when the alleged sexual abuse of the decedent by the decedent's stepfather took place or when the decedent's stepfather presented the decedent with a loaded firearm that she later used to attempt suicide.[114] The husband and child were not present when the stepfather's physician, knowing of her psychiatric condition and suicidal tendencies, supplied the decedent with the prescription narcotics by which she eventually killed herself.[115] While the husband and minor child did not allege that they were "present," they did state that they had witnessed the immediate aftermath of the decedent's overdose.[116]

Because the court never expressly addressed a claim for third-party intentional infliction of emotional distress before *R.D. v. W.H.*, it looked to cases in other jurisdictions for guidance in interpreting the presence re-

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109. *R.D.*, 875 P.2d at 32 (quoting RESTATEMENT (SECOND) OF TORTS § 46(2) (1965)).
110. RESTATEMENT (SECOND) OF TORTS § 46 caveat (1965).
111. RESTATEMENT (SECOND) OF TORTS § 46 cmt. l (1965).
112. *R.D.*, 875 P.2d at 27.
113. *Id.* at 32.
114. *Id.*
115. *Id.*
116. *Id.*

quirement.[117] The court concluded that most of those cases held the plaintiff must be present when the extreme and outrageous conduct occurs.[118] The court also discovered that, pursuant to comment l and the caveat to section 46, courts have acknowledged that special circumstances might exist where presence at the time of the occurrence of the outrageous conduct will not be required.[119] The court discussed *Foster v. Trentham's, Inc.*, wherein a wife made a claim for intentional infliction of emotional distress under section 46(2) even though she was not present during the malicious prosecution of her husband.[120] The *Foster* court considered the fact that the outrageous conduct occurred in her home and refused to dismiss her claim, holding that the presence requirement was satisfied for the purposes of a motion to dismiss.[121]

In its discussion, the Wyoming Supreme Court admitted, "It is generally a better practice to limit recovery for intentional infliction of emotional distress to plaintiffs who were present when the outrageous conduct occurred."[122] The court recognized, however, that the case of *R.D. v. W.H.* presented factual circumstances with respect to the presence requirement that demanded special consideration.[123] The facts showed the husband and the minor child were not present when the defendant's outrageous conduct took place, but that they had witnessed the immediate aftermath of the resulting suicide.[124] The court concluded the suicide was the final result of a continuing course of conduct instigated by the defendant.[125] The court held that "the facts of this case place it in the narrow exception to the general rule that a plaintiff must be present when the outrageous conduct occurs in order to recover for intentional infliction of emotional distress directed at a third person."[126] The court concluded that the husband and child had sufficiently pleaded a cause of action for both intentional and negligent infliction of emotional distress, and reversed the trial court's dismissal of these claims.[127]

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117. *Id.*
118. *See* Lund v. Caple, 675 P.2d 226, 229 (1984); Bradshaw v. Nicolay 765 P.2d 630, 632 (Colo. Ct. App. 1988).
119. *See* H.L.O. by L.E.O. v. Hossle, 381 N.W.2d 641 (Iowa 1986); Nancy P. v. D'Amato, 517 N.E.2d 824, 827-28 (1988).
120. Foster v. Trentham's, Inc., 458 F. Supp. 1382 (E.D. Tenn. 1978).
121. *Id.* at 1384.
122. R.D. v. W.H., 875 P.2d 26, 33 (Wyo. 1994).
123. *Id.* Here, the court applied comment l and the caveat to section 46 to the presence requirement. *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. l, caveat (1965).
124. *R.D.*, 875 P.2d at 33-34.
125. *Id.* at 34.
126. *Id.* at 33.
127. *Id.* at 34-35.

Intentional Infliction of Emotional Distress in the Context of Domestic Violence

The law with respect to emotional distress is in a process of expansion.[128] Much commentary exists on what the next steps should be with regard to the evolution of the tort.[129] Especially in the area of domestic violence, so-called "domestic torts" gradually have escalated.[130] Intentional infliction of emotional distress is one of these "domestic torts," and thus provides a prolific arena in which to consider the possibilities of the tort's application to family law.[131]

Traditionally, courts and legislatures have remained largely uninvolved in regulating behavior with respect to the institution of marriage and household in efforts to preserve "domestic harmony" and privacy.[132] The "domestic harmony" policy argues that states should advocate for maintaining marital relationships and not provide means for unhappy spouses to blow "their domestic grievances out of all proportion."[133] The privacy argument asserts that the family should be protected from state intrusion.[134] Recently, however, courts have begun to recognize civil claims for relief in the context of marriage, based on reasoning that tort actions may provide better remedies than divorce actions.[135] A national trend of judicial acknowledgment of emotional distress claims in the marital relationship has taken place.[136]

Reflecting this trend, the Wyoming Supreme Court, in *McCulloh v. Drake,* held that there is an independent cause of action for intentional infliction of emotional distress in the marital setting:[137]

> We are convinced that extreme and outrageous conduct by one spouse which results in severe emotional distress to the other spouse should not be ignored by virtue of the marriage of the victim to the aggressor and hold that such behavior

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128. Dr. G. Steven Neeley, *The Psychological and Emotional Abuse of Children: Suing Parents in Tort for Intentional Infliction of Emotional Distress*, 27 N. KY. L. REV. 689, 705 (2000).
129. *Id.*
130. *Id.* at 700.
131. *Id.*
132. Meredith L. Taylor, *North Carolina's Recognition of Tort Liability for the Intentional Infliction of Emotional Distress During Marriage*, 32 WAKE FOREST L. REV. 1261, 1267 (1997).
133. Clare Dalton, *Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities*, 31 NEW ENG. L. REV. 319, 328 (1993).
134. *Id.*
135. Taylor, *supra* note 132, at 1267.
136. *Id.*
137. McCulloh v. Drake, 24 P.3d 1162, 1168-70 (Wyo. 2001). In 1987, the court invalidated interspousal immunity in *Tader v. Tader*, allowing a spouse to bring an action against his or her partner in marriage. Tader v. Tader, 737 P.2d 1065, 1069 (Wyo. 1987).

> can create an independent cause of action for intentional infliction of emotional distress.[138]

In so deciding, the court struggled with concerns that legal intrusion into marital behavior was inappropriate, and that legal relief for emotional distress in addition to divorce was not justified.[139] Ultimately, the court overcame such concerns and concluded, "Behavior which is truly outrageous and results in severe emotional distress should not be protected in some sort of misguided attempt to promote marital peace."[140] The court was also very careful about its responsibility to guard against frivolous litigation by emphasizing that only circumstances involving "atrocious" and "outrageous" conduct should be compensated.[141] This was a critical expansion of the tort of intentional infliction of emotional distress. More importantly, *McCulloh* demonstrates the tort's flexible state of development, and its ripeness for application with respect to domestic violence.

PRINCIPAL CASE

In *Bevan v. Fix*, the Wyoming Supreme Court evaluated Brittany and Steven Bevan's third party claim for intentional infliction of emotional distress in a domestic violence setting. This setting is significant because the court was able to make a solid determination that domestic violence shall not be automatically disqualified as extreme and outrageous conduct. The court concluded there was sufficient evidence to preclude summary judgment for William Fix on the children's intentional infliction of emotional distress claims and therefore reversed the district court's grant of summary judgment in Fix's favor.[142] In so concluding, the court stated that genuine issues of material fact existed on each element of Brittany's and Steven's claims for intentional infliction of emotional distress against Fix.[143] The court found a reasonable basis for concluding that Fix's conduct was "of such a nature as would ordinarily cause emotional injury to mere bystanders, even more so if they were the family members of the person being assaulted."[144] Therefore, the court determined that a reasonable jury could find that Fix, by his con-

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138. *McCulloh*, 24 P3d at 1170.
139. *Id.* at 1169.
140. *Id.* (citing Henriksen v. Cameron, 662 A.2d 1135, 1139 (Me. 1993)).
141. *Id.*
142. Bevan v. Fix, 42 P.3d 1013, 1017 (Wyo. 2002).
143. *Id.*
144. *Id.* at 1025. The court stated: "Additionally, the fact that the witnesses are the young children of the woman assaulted would certainly cause the average person to anticipate that those children may experience severe 'fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea' as a result of the witnessed conduct." *Id.*

duct, recklessly caused severe emotional distress to Brittany and Steven Bevan.[145]

In its analysis, the Wyoming Supreme Court in *Bevan* made a detailed outline of section 46(2)(a), showing exactly what the children, as third parties, must prove to claim injuries for emotional distress caused by outrageous conduct:

> 1) That the conduct was "extreme and outrageous;"
>
> 2) That such conduct was directed at a third person;
>
> 3) That the claimant is a member of the immediate family of the third person;
>
> 4) That the claimant was personally present when the extreme and outrageous conduct took place;
>
> 5) That the claimant sustained severe emotional distress as a result of that conduct (whether or not the claimant sustained bodily harm); and
>
> 6) That the person whose conduct is complained of "intentionally" or "recklessly" caused severe emotional distress to the claimant.[146]

The district court based its grant of summary judgment to Fix on the first element.[147] It concluded that Fix's conduct was not extreme and outrageous as a matter of law.[148] The district court reasoned that the case involved "one isolated altercation," that there was no "continuing course of abuse," and what the children saw was not sufficient to support their claims, although the conduct they observed was "deplorable."[149] The district court struggled with the difficult task of determining what constitutes outrageous conduct:

> Disputes over boundary lines, over the cause of motor vehicle collisions, or even over a multitude of real or imagined wrongs, are likely to cause tempers to flare; words (vulgar or otherwise) to be uttered in anger; fists – or anything else

145. *Id.*
146. *Id.* at 1019. In a footnote the court explained that the Wyoming Supreme Court in *R.D. v. W.H* recognized and applied comment l and the caveat to this requirement. *Id.* at 1019 n.5.
147. *Id.* at 1019.
148. *Id.*
149. *Id.*

> handy – to be shaken; and assaults to occur. Such happenings are wholly unplanned, spur-of-the-moment occurrences; unfortunately, they occur all too frequently. But we cannot say that the brief outbursts constitute 'extreme and outrageous' conduct. Such unfortunate occurrences occur all too often between intimates and are properly the subject of criminal and injunctive relief. However, not every domestic altercation constitutes extreme and outrageous conduct or results in sufficiently severe emotional distress to support a third party claim. Absent a showing of exceptional circumstances, such as a continuing course of abuse and facts showing severe emotional distress to those third party claimants as a result of what they witnessed, such an altercation will not support a claim for intentional infliction of emotional distress.[150]

The district court therefore thought it proper to grant summary judgment to Fix on the claims.[151]

The Wyoming Supreme Court, for four reasons, disagreed with the district court's reasoning and its application of section 46(2)(a) to the case, particularly with respect to the first element.[152] First, the court stated there was no language in section 46, or the illustrations that accompanied it, to suggest that a "continuing course of abuse" instead of a single "isolated altercation" was required to establish liability for intentional infliction of emotional distress.[153] The court pointed out that *all* of the twenty-two illustrations drawn from actual cases, utilized by the comments to section 46, involved isolated incidents.[154] The court also emphasized no rule of law was revealed in section 46 or ever announced by the court in its application of section 46 which requires that the alleged conduct be repetitive or recurrent in order to be considered extreme and outrageous.[155] "On the contrary, in *Kanzler v. Renner*, a case involving sexual harassment in the workplace, [the court] expressly recognized the inverse proposition: '[R]epeated harassment . . . may compound the outrageousness of incidents which, taken individually, might not be sufficiently extreme to warrant liability.'"[156]

Second, the Wyoming Supreme Court concluded that the district court erred in reasoning that because the alleged extreme and outrageous

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150. *Id.* at 1019-20.
151. *Id.*
152. *Id.* at 1020.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id. See also* Kanzler v. Renner, 937 P.2d 1337, 1343 (quoting Boyle v. Wenk, 392 N.E.2d 1053, 1056 (1979) (citation omitted)).

conduct amounted to domestic violence among intimates, it was necessary to make a "showing of exceptional circumstances," such as a "continuous course of abuse."[157] The court noted that agreement with such a conclusion would impose a greater burden on that particular class of plaintiffs than was set forth in section 46.[158] The court refused to impose this additional burden.[159] Additionally, the court reviewed its prior jurisprudence regarding whether conduct is "extreme and outrageous" for purposes of evaluating a claim of intentional infliction of emotional distress, and emphasized that it has consistently looked to the language in comments d and h to section 46 for guidance.[160] The court asserted the district court's role was one of gate keeping and consisted solely of the responsibility "to eliminate those frivolous and meritless claims in which no reasonable jury, composed of a fair cross-section of the community, could find the defendant's conduct sufficiently extreme and outrageous to permit recovery."[161]

Third, the Wyoming Supreme Court concluded that the district court erred when it reasoned that because Fix's conduct was "properly the subject of criminal or injunctive relief," it went against a determination that the behavior was "extreme or outrageous."[162] Instead the court emphasized that "the fact that the alleged conduct has been criminalized would appear to weigh in favor of recognition that society has determined the acts to be injurious as beyond 'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.'"[163]

Finally, the Wyoming Supreme Court concluded that although the extreme and outrageous conduct in question could be classified as a "domestic altercation," the fundamental analysis used to decide the case could not be modified to require a showing of exceptional circumstances.[164] The court generally agreed with the district court's statement that "not every domestic altercation constitutes extreme and outrageous conduct or results in suffi-

157. *Bevan*, 42 P.3d at 1020.
158. *Id.*
159. *Id.*
160. *Id.* at 1020-21.
161. *Id.* at 1021.
162. *Id.*
163. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)). The court also added:

> Lest any should misunderstand, this court is not holding, nor even implying, that all criminal conduct is per se "extreme and outrageous" for purposes of deciding an intentional infliction of emotional distress claim. Rather, we simply note that it is a factor that cannot be used logically to militate against a finding that the conduct is "extreme and outrageous" in the context of a summary judgment proceeding on an intentional infliction of emotional distress claim.

Id. at 1021 n.8.
164. *Id.* at 1022.

ciently severe emotional impact to support a third party claim," but emphasized that it had consistently rejected "floodgate of litigation" reasoning to support the denial of emotional distress claims, and was doing so again.[165] The court found that Fix's conduct was behavior beyond mere insults, indignities, and petty oppressions and that if proved, could be considered "outrageous, atrocious, and utterly intolerable in a civilized society."[166] Because reasonable minds could differ as to whether Fix's conduct was extreme and outrageous, it was for a jury to determine whether it was sufficiently outrageous to warrant imposing liability upon Fix.[167]

The district court based its grant of summary judgment on the first element of Brittany's and Steven's claims for intentional infliction of emotional distress. The Wyoming Supreme Court, however, for reasons of judicial economy, furthering the development of the law in this area, and because the children's failure to satisfy any single element of the tort would support affirmance, continued its analysis by addressing the remaining elements of the claims.[168] In addressing the remaining elements, the *Bevan* court summarily noted that the second and third elements of the tort were satisfied, as Fix's conduct was directed to a third person (Jones) and Brittany and Steven were members of Jones's immediate family.[169] As to the fourth element, whether the children were personally present at the time the outrageous conduct took place, Fix insisted that the court reject Brittany's claim because she was not an eyewitness to the outrageous conduct.[170] Because of this, the court analyzed at length the meaning of the "presence" element.[171]

The court revisited the conclusions it reached in *R.D. v. W.H.* regarding the presence element of a third party intentional infliction of emotional distress claim, and emphasized its reliance on comment l and the caveat to section 46.[172] Because the claim in *R.D. v. W.H.* was decided by putting it outside the general rule that the claimant must be "present at the time" of the alleged outrageous conduct, the court had not expressly addressed what it means to be "present." Thus, the *Bevan* court considered it as an issue of first impression in the state of Wyoming.[173]

In *R.D. v. W.H.*, the court engaged in a discussion of section 46's guidance in comment l and the Wyoming Supreme Court's prior treatment of the "presence" element.[174] The court concluded that a plaintiff need not

165. *Id.* at 1021.
166. *Id.* at 1022.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 1023.
171. *Id.* at 1022-23.
172. *Id.*
173. *Id.* at 1024.
174. *Id.*

necessarily visually observe the outrageous conduct to be considered "present at the time" the conduct occurs.[175] It discussed the definition of "present" as found in *Webster's Third New International Dictionary*: "being in one place and not elsewhere; being within reach, sight, or call or within contemplated limits; being in view or at hand; being before, beside, with, or in the same place as someone or something."[176] The court reached its holding that

> [I]n order for a plaintiff to be considered 'present at the time' of the outrageous conduct for purposes of an intentional infliction of emotional distress claim, he must simply show his 'sensory and contemporaneous observance' of the defendant's acts. Consequently, the claimant is not required to have seen the outrageous acts but may still recover, without resort to the Restatement caveat, if he gained personal and contemporaneous knowledge of them through the use of his remaining senses.[177]

After this review, the court then decided that the record before it disclosed sufficient facts to reveal Brittany's "sensory and contemporaneous" observance of Fix's conduct toward her mother to preclude summary judgment in Fix's favor on this element.[178]

The court also concluded that there was sufficient evidence of emotional distress in the record to preclude summary judgment for Fix.[179] These facts included alleged changes in Brittany and Steven's behavior, their deposition testimony, Jones's affidavit, and deposition testimony of two counselors and a psychologist that included diagnoses of the children with post-traumatic stress and dysthmic disorders.[180] This evidence was enough to give rise to a genuine issue of material fact with respect to severe emotional distress.[181]

Additionally, the court concluded that the record revealed facts sufficient to allow a jury to reasonably conclude that Fix "intentionally" or "recklessly" caused severe emotional distress to the children.[182]

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175. *Id.*
176. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1793 (3d ed. 1971).
177. *Bevan*, 42 P.3d at 1024.
178. *Id.*
179. *Id.* at 1025.
180. *Id.*
181. *Id.*
182. *Id.* Comment i to section 46 of the RESTATEMENT provides the following guidance as to what constitutes intention and recklessness:

> The assault in question was of a type and of such nature as would ordinarily cause emotional injury to mere bystanders, even more if they were the family members of the person being assaulted. Additionally, the fact that the witnesses are the young children of the woman assaulted would certainly cause the average person to anticipate that those children may experience 'fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea' as a result of the witnessed conduct.[183]

The court thus concluded that each element of the children's claims for intentional infliction of emotional distress against Fix contained genuine issues of material fact, and reversed and remanded the district court's grant of summary judgment to Fix.[184]

ANALYSIS

The result in *Bevan* powerfully impacts the area of family law by soundly interpreting domestic violence as the kind of outrageous conduct that, if proven, establishes liability under the tort of intentional infliction of emotional distress. This is important because history displays a long-standing habit of sweeping domestic violence under the rug and underestimating its effects. The *Bevan* court's interpretation of the tort's "presence" element clearly extends the remedy to third parties detrimentally affected by exposure to domestic violence, with special consideration given to children. With *Bevan* as precedent, family law practitioners will have a significant guidepost by which to evaluate and advance claims for third party victims of domestic violence. Lastly, *Bevan* made a positive advance at a ripe stage of development in the law by manifesting an increased societal intolerance for domestic violence.

> *Intention and recklessness.* The rule stated in this Section applies where the actor desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct. It applies also where he acts recklessly . . . in deliberate disregard of a high degree of probability that the emotional distress will follow.

RESTATEMENT (SECOND) OF TORTS § 46 cmt. i (1965).

183. *Bevan*, 42 P.3d at 1025 (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965)).

184. *Id.* In March 2004, the parties executed a settlement agreement with an order to seal the record as to information about that settlement, and an order of dismissal with prejudice was entered.

Intentional Infliction of Emotional Distress in a Domestic Violence Context

Recognition of the prevalence of domestic violence in our society has escalated in the past two decades, but there is still a tendency to de-emphasize or discount it as unworthy of being treated like other forms of societal violence.[185] The *Bevan* court moved in the right direction when it refused to accept the reasoning employed by the district court that absent a showing of exceptional circumstances a domestic altercation will not support a claim for intentional infliction of emotional distress.[186] In so concluding, the court sent a clear message that domestic violence is not to be set aside as a separate area of conduct that warrants more scrutinizing evaluation.

The court built on precedent it had recently established in *McCulloh v. Drake,* where it adopted the tort of intentional infliction of emotional distress in the marital setting.[187] The tort was then appropriately expanded in *Bevan* when the court clearly established domestic violence as conduct that can be sufficiently extreme and outrageous to establish liability to third party witnesses.[188] Because the term "outrageous" is highly subjective, some courts have concluded that domestic violence does not qualify as outrageous conduct. Since the success of claims for intentional infliction of emotional distress generally turns on whether the plaintiff can show that the defendant's conduct was "outrageous", the tort is inconsistently applied, especially in domestic violence cases.

> Courts that have addressed the tort of intentional infliction of emotional distress in the context of domestic violence have taken inconsistent approaches that have resulted in inconsistent outcomes. . . . [T]here is no consensus on at least one key issue: How to analyze the element of "outrageousness" in a domestic violence situation.[189]

In demonstration of such inconsistency, the district court in *Bevan* reasoned that since the extreme and outrageous conduct alleged in that case constituted domestic violence among intimates, it meant that these plaintiffs

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185. Joseph S. Volpe, *Effects of Domestic Violence on Children and Adolescents: An Overview,* (1996), *available at* http://www.aaets.org/arts/art8.htm (last visited Mar. 23, 2003).

186. *Bevan,* 42 P.3d at 1020.

187. *See* McCulloh v. Drake, 24 P.3d 1162, 1168-70 (Wyo. 2001).

188. *Bevan,* 42 P.3d at 1022.

> [W]e find that Fix's allege conduct, including beating, kicking, punching, dragging by the hair, and choking Jones while screaming that he wanted to kill her, is behavior beyond mere insults, indignities, and petty oppressions and which, if proved, could be construed as outrageous, atrocious, and utterly intolerable in a civilized community.

Id.

189. Weiner, *supra* note 43, at 213.

must make a showing of exceptional circumstances in order to subject the actor to liability for intentional infliction of emotional distress.[190] In rejecting the district court's reasoning, however, the Wyoming Supreme Court took a step in the right direction by refusing to allow domestic violence to be grounds alone for dismissing conduct as outrageous.[191]

The *Bevan* court insisted that courts should not be able to exclude a particular group of plaintiffs or make it especially difficult for them to bring the same cause of action as other plaintiffs.[192] Contrary reasoning eviscerates many of the purposes behind the tort of intentional infliction of emotional distress, including: (1) deterring extreme and outrageous conduct (regardless of the subject matter of such conduct) which causes severe emotional distress to others (either the object or witness of such conduct); (2) punishing the actor of such conduct; and (3) compensating those who have suffered severe emotional distress as a result of such conduct.[193] These purposes go to the heart of how tort law should function, not only punishing and discouraging conduct that causes severe emotional distress to others, but also serving as a means by which victims can be compensated for their suffering.[194]

In *Bevan,* the Wyoming Supreme Court correctly and fairly asserted that the subject matter of the complained conduct and the relationship of the parties should not change the requirements or impose an additional burden on any certain class of plaintiffs from that which is set forth in Section 46. If conduct that was sufficiently extreme and outrageous caused severe emotional distress to someone, it does not matter what the conduct was concerning or who the victim happened to be. For the court to distinguish between subject matter of conduct or class of plaintiffs would be for the court to abandon neutrality and operate a selective justice system of unfair bias and prejudice. "Clearly, [the court] rejected arguments to effectively close the courts to a class of plaintiffs in *Leithead* and *Gates*, [and] again [the court] do[es] so in the instant case."[195]

The holding in *Bevan* will undoubtedly encounter resistance and criticism, especially "floodgate of litigation" arguments concerned with courts being bombarded with litigation by victims of domestic altercations alleged to be outrageous conduct. Such arguments are likely to criticize the *Bevan* court for extending the tort too far, perhaps asserting that the decision makes the tort too easy to claim, too easy to apply, and too easy to distribute excessive verdicts, thus weighing the system down and flooding it with

190. *Bevan,* 42 P.3d at 1020.
191. *Id.*
192. *Id.*
193. Neeley, *supra* note 128, at 711.
194. Weiner, *supra* note 43, at 213.
195. *Bevan,* 42 P.3d at 1022.

feigned distress and meritless claims. The Wyoming Supreme Court effectively addressed these concerns starting with *R.D. v. W.H., McCulloh,* and now in *Bevan.*[196] The court has consistently renounced "floodgate of litigation" arguments advocating the denial of emotional distress claims, and has instead taken steps to fashion the law to effectively safeguard against such concerns.[197] Specifically, in *McCulloh,* the court stated:

> We emphasize that a high standard for recovery shall exist and direct trial courts to be especially cautious when handling such claims. The focus of such claims must be on the element of outrageousness, and the scrutiny must be stringent enough so that the social good which comes from recognizing the tort in a marital setting will not be undermined by an invasive flood of meritless litigation . . . . [W]e set the threshold of outrageousness high in hopes it will adequately defend against a flood of frivolous litigation."[198]

The court did not abandon this trend in *Bevan,* and provided no grounds for speculating that it intends to relax these standards in the future. The *Bevan* court insisted that the threshold of outrageousness be set high, and reminded district courts of their important gate keeping function by emphasizing its faith in the system and the role of court and jury to eliminate frivolous and meritless claims.[199] Having expressly adopted the Restatement's description of the roles of judge and jury with respect to the application of the "outrageous" element, the court trusted that the district courts' gate keeping function will effectively filter those claims "in which no reasonable jury, composed of a fair cross-section of the community, could find the defendant's conduct sufficiently extreme and outrageous to permit recovery."[200]

The court continued to address concerns of being flooded with litigation by declaring that even while it must recognize that unfortunately domestic violence is widespread, as well as society's tolerance of it, the court

> cannot allow judicial fear of an avalanche of cases due to the ubiquity of the conduct alleged as 'extreme and outrageous' to deny a remedy to those individual parties with legitimate claims. Instead, [the court] remain[s] confident that

196. *Id.* at 1025.
197. *Id.* at 1021.
198. McCulloh v. Drake, 24 P.3d 1162, 1169-70 (Wyo. 2001).
199. *Bevan,* 42 P.3d at 1021-22.
200. *Id. See also* RESTATEMENT (SECOND) OF TORTS § 46 cmts. h and j (1965).

> lower courts are capable of properly separating those cases with merit from those without.[201]

The court could not be clearer in its persistent determination not to allow "floodgate" of litigation arguments to hinder what the tort of intentional infliction of emotional distress was designed to do: Allow those severely emotionally injured by extreme and outrageous conduct to recover, and ensure that those who create such extreme and outrageous conduct are liable for their actions.

The Important Ability of Third Parties to Recover From Exposure to Domestic Violence

The Wyoming Supreme Court's analysis in *Bevan* is useful to the future of this tort's application to domestic violence, and changes the face of domestic law in Wyoming by solidly paving a way for third parties to recover when they have contemporaneously witnessed domestic violence. Recent studies have suggested that witnessing domestic violence results in traumatic effects distinct from the effects of direct physical abuse.[202] In *McCulloh,* the Wyoming Supreme Court expressly recognized the severity of emotional pain and the need to legally protect against it: "Emotional distress is as real and tormenting as physical pain, and psychological well-being deserves as much legal protection as physical well-being."[203] Therefore, third parties who are indirectly exposed to domestic violence, but who suffer severe emotional distress as a result, deserve as much legal protection as those directly victimized by domestic violence. Since inter-spousal tort actions for emotional distress were first allowed in *McCulloh*, the tort was ripe

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201. *Bevan,* 42 P.3d at 1022. Previously, when the court adopted the tort of negligent infliction of emotional distress in *Gates v. Richardson*, it addressed similar concerns that the new tort would overburden the judicial system. Gates v. Richardson, 719 P.2d 193, 197 (Wyo. 1986). The court concluded: "If the only purpose of our law was to unburden the court system, then we would reach the zenith of judicial achievement simply by closing the district courts to all litigants and allowing all wrongs to come to rest on innocent victims." *Id. See generally* Weiner, *supra* note 43, and cases cited therein (discussing the current law and its ripeness for application of the tort of intentional infliction of emotional distress in cases involving domestic violence); Karp & Karp, *supra* note 50, and cases cited therein (encouraging lawyers to keep pace with the developing body of new tort law in the area of domestic violence); Neeley, *supra* note 128, and cases cited therein (exploring the possibilities of children suing their parents for the intentional infliction of emotional distress, and the contention that emotional distress is at least as damaging as physical abuse, and is likely to be even more devastating than physical abuse).

202. Neeley, *supra* note 128, at 691. "[C]hid development experts and other professionals have identified these more covert forms of abuse as causing 'at least as much long term damage to the child as does a brutal physical battering.'" *Id.* "Traumatic stress is produced by exposure to events that are so extreme or severe and threatening, that they demand extraordinary coping efforts. Such events are often unpredicted and uncontrollable. They overwhelm a person's sense of safety and security." Volpe, *supra* note 185.

203. McCulloh v. Drake, 24 P.3d 1162, 1169 (Wyo. 2001) (citing Henriksen v. Cameron, 622 A.2d 1135, 1139 (Me. 1993)).

for expansion to third parties. The next logical step in the tort's evolution was to make clear that emotionally distressed third parties, specifically children, have a tort cause of action as well.[204] The *Bevan* court effectively took that next step.

The court followed the logic set forth in *McCulloh* and carefully evaluated what it means to be "present at the time" for purposes of bringing a third party intentional infliction of emotional distress claim. By expanding the "presence" element to require that a plaintiff need only show his sensory and contemporaneous observance of the defendant's outrageous acts, the *Bevan* court enabled third parties exposed to domestic violence to more easily obtain a tort remedy for suffering emotional distress.[205] The court acknowledged the significance and potential severity of indirect exposure to domestic violence by allowing those who have not visually seen the outrageous conduct, but who have contemporaneous and sensory knowledge of it, to satisfy the "presence" requirement of the tort. In so doing, the court clearly reinforced the importance of compensating injured parties, and sent a message that victims of domestic violence, directly or indirectly, are no exception.[206]

The decision in *Bevan* also effectively serves necessary goals, central to tort law, of punishing wrongdoers and deterring socially undesirable conduct.[207] Importantly, the scope of the tort remedy for third party victims of domestic violence clearly revolves around placing responsibility squarely on adults who use violent behavior. It maintains focus on the cause of the endless detrimental effects of domestic violence by holding violent adults responsible for their outrageous behavior and forcing them to answer directly to third party victims of their conduct. It is more desirable to hold violent adults responsible for ending the use of violence than to force society to ultimately bear the responsibility later on when many such children become dysfunctional, violent adults.[208]

Special Significance to Children Exposed to Domestic Violence

Children are perhaps the most common and vulnerable victims of indirect exposure to domestic violence, and are often severely emotionally scarred. It is estimated that over three million children are at risk of exposure to domestic violence every year.[209] "In a large percentage of families, children have been present when the abuse occurred . . . . Even if the child is not physically injured, he [or she] likely will suffer emotional trauma from

204. Neeley, *supra* note 128, at 705.
205. *Bevan*, 42 P.3d 1013, 1024 (Wyo. 2002).
206. *Id.* at 1022.
207. *Id.*
208. Edleson, *supra* note 3.
209. Volpe, *supra* note 185.

witnessing violence between his [or her] parents."[210] The various effects of domestic violence on children, however, include much more than immediate emotional trauma and have been the subject of much recent study.[211] In addition to adverse emotional and behavioral functioning, studies have revealed problems in cognitive functioning and development, especially with respect to the attitudes children develop about the use of violence and conflict resolution, including justifying their own use of violence.[212] Studies have also revealed longer-term problems that surface in adults who were witness to domestic violence as children, including depression, trauma-related symptoms, low self-esteem, poor anger management and problem solving skills, substance abuse, problems parenting their own children, and problems in their own adult intimate relationships.[213] These problems ultimately come to bear on society in many ways, including continued patterns of domestic and societal violence and abuse, increased need for social, behavioral, and substance abuse programs, and endless effects of various psychological problems manifested in school and at the workplace.[214] In an age of information and social awareness, it is time for the legal and political systems to harness the responsibility of society as a whole and integrate research results to arrive at the best possible remedies and accountability for the countless effects of domestic violence.

"Children are among the most vulnerable members of society and the state has an interest in ensuring their emotional well-being."[215] Unfortunately, while children are an obvious, substantial, and identifiable component in the domestic violence cycle, children indirectly impacted by domestic violence are often ignored with respect to civil liability.[216] Not nearly enough significance has been attached to compensating emotionally injured children exposed to domestic violence for the effects they will likely suffer

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210. State *ex rel* Williams v. Marsh, 626 S.W.2d 223, 229 (Mo. 1982) (en banc).

211. Edleson, *supra* note 3. "Children who witness violence between adults in their homes have become more visible in the spotlight of public attention." *Id.*

212. *Id.* A 1995 study's findings showed that "adolescent boys incarcerated for violent crimes who had been exposed to family violence believed more than others that 'acting aggressively enhances one's reputation or self-image.' Believing that aggression would enhance their self-image significantly predicted violent offending." *Id.*

213. *Id.* A 1995 "study of 550 undergraduate students found that witnessing violence as a child was associated with adult reports of depression, trauma-related symptoms and low self-esteem among women and trauma-related symptoms alone among men." *Id.* A 1996 study "found that among 123 adult women who had witnessed domestic violence as a child greater distress and lower social adjustment existed when compared to 494 non-witnesses." *Id. See also* C. McNeal & P.R. Amato, *Parents' Marital Violence: Long-term Consequences for Children,* 19 J. FAM. ISSUES 123, 123-39 (1998), *available at* 1998 WL 12555911.

214. *See* Neeley, *supra* note 128, at 690-97. "A child's exposure to the father abusing the mother is the strongest risk fact for transmitting violent behavior from one generation to the next." American Psychological Association, *Violence and the Family: Report of the APA Presidential Task Force on Violence in the Family,* (1996), *available at* http://www.acadv.org/children.html (last visited Mar. 23, 2003).

215. Neeley, *supra* note 128, at 710.

216. *Id.* at 702.

throughout their lives. There are clear policy reasons for extending the tort remedy of intentional infliction of emotional distress to children so impacted by domestic violence. Perhaps the strongest reason is that emotionally injured children need to be directly compensated early on, or the loss will ultimately come to bear on society in other forms, such as social programs or a continuation of the type of conduct that caused their emotional injury.[217] The result of directly compensating children already exposed to domestic violence is at least two-fold. First, it provides them with means to seek appropriate psychological care. The reality is that the cost of mental health care is exorbitant and goes beyond the financial reach of most social classes. One source of paying for mental health care is health insurance, but it is estimated that 11.3 million children are uninsured in this country, and many insurance policies do not cover mental health services anyway.[218] Second, it serves to deter future violent domestic conduct by punishing adults found to be responsible for such conduct. Directly compensating those injured by domestic violence serves as a demonstration to children and adults that such conduct is unacceptable and is not without consequences in our society.

The holding in *Bevan* as to the "presence" requirement for third party intentional infliction of emotional distress significantly advances tort law in the state of Wyoming. Even if the child has not visually observed the conduct, but has contemporaneous and sensory observance of the conduct, he or she can still recover. This carries special significance in its large potential effect on children who witness domestic violence, and helps the state move soundly in the direction of ensuring their emotional well being by insisting that these kinds of injuries are worthy of compensation.

Significance to Family Law Practitioners

In recent years, society and the legal system have considered more seriously the issue of domestic violence.[219] Consequently, there has been an emergence of so-called "domestic torts" that provide new legal standards of

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217. Judith G. McMullen, *The Inherent Limitations of After-the-Fact Statutes Dealing with the Emotional and Sexual Maltreatment of Children*, 41 DRAKE L. REV. 483, 499 (1992) (citing ELIANA GIL, TREATMENT OF ADULT SURVIVORS OF CHILDHOOD ABUSE 52-54 (1988)). *See also* Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 584-96 (1992). Dr. G. Steven Neeley also asserts, "An essential tenet of tort law is that injured parties should be compensated for their loss, and the maltreated child's only means of compensation may well come from a judgment against the abusive parent." Neeley, *supra* note 128, at 703. "Social learning theory would suggest that children who witness violence may also learn to use it." Edleson, *supra* note 3. A study of 2,245 children and teenagers "found that recent exposure to violence in the home was a significant factor in predicting a child's violent behavior." *Id.*

218. Betsy McAllister Groves, *Mental Health Service for Children Who Witness Domestic Violence*, (2002), *available at* http://www.athealth.com/Practioner/ceduc/dv_children.html (last visited Mar. 23, 2003).

219. Weiner, *supra* note 43, at 197.

accountability, mostly among spouses.[220] These domestic torts include assault and battery, wrongful death, false imprisonment, use of excessive force, and intentional infliction of emotional distress.[221] Most of the focus of the increase in problem recognition, remedies, and legal standards, however, has been on the marital relationship.[222] These domestic torts have been ripe for expansion to become applicable to the same types of physical and emotional injury that are inflicted upon children and other third parties affected in domestic violence situations. *Bevan* initiated such an expansion in Wyoming, providing a useful interpretation and application of intentional infliction of emotional distress against a backdrop of domestic violence. The court's analysis in *Bevan* is a helpful perspective from which to evaluate the use of this tort in the arena of domestic violence.

The result in *Bevan* brought essential definition to the previously hazy silhouette of the tort's required elements. Although still in a stage of major development, *Bevan* is a good start toward establishing and solidifying definite guidelines and limitations for the tort. While the elements still contain problematic key word requirements such as "outrageous," "severe," and "present," the *Bevan* court took the risk of doing more than merely reflecting "the practical necessity of drawing the line somewhere," as comment l to section 46 suggests.[223] Especially with respect to the "presence" element, the court drew new lines and evaluated numerous possible limitations that might be placed on the tort's application. Thus, *Bevan* will be of great significance to family law practitioners in Wyoming by providing a foundation upon which to meaningfully evaluate and utilize the tort of intentional infliction of emotional distress in domestic violence situations.

Manifestation of Intolerance for Domestic Violence

Tort law generally frames society's interests and values and administers how human beings, as members of society, should treat each other.[224] "Law is a language of power, a particularly authoritative discourse. Law can pronounce definitively what something is or is not and how a situation or event is to be understood . . . . Legal language does more than express thoughts. It reinforces certain world views and understandings of events."[225] The law needs to be flexible enough to move with the ebb and flow of society's interests and values. Following the *Bevan* court's model, if lawmakers can successfully listen to society's increasing intolerance of domestic vio-

220. Karp & Karp, *supra* note 50, at 389.
221. *Id.*
222. Weiner, *supra* note 43, at 196.
223. Bevan v. Fix, 42 P.3d 1013, 1024 (Wyo. 2002).
224. Neeley, *supra* note 128, at 711. "One function of tort law is to moralize." *Id.*
225. Weiner, *supra* note 43, at 195 (citing Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 888 (1989)).

lence and echo such intolerance by not allowing the subject matter surrounding a tort claim to alter the nature of its requirements, then the law is functioning as it should.[226] In *Bevan,* the Wyoming Supreme Court sent a significant message of intolerance for domestic violence by reflecting an increased societal awareness and intolerance in the legal system.

Also, with respect to the court's recognition of society's gradually increasing intolerance of domestic violence, a reasonable analogy can be drawn from the manner in which the court reacted to emotional distress resulting from sexual harassment in *Kanzler.* Referring to its conclusion that inappropriate sexual conduct in the workplace can give rise to a claim of intentional infliction of emotional distress, the *Kanzler* court declared the following pronouncement of the Utah Supreme Court persuasive:

> It is worth stating forcefully that any other conclusion would amount to an intolerable refusal to recognize that our society has ceased seeing sexual harassment in the work place as a playful inevitability that should be taken in good spirits and has awakened to the fact that sexual harassment has a corrosive effect on those who engage in it as well as those who are subjected to it and that such harassment has far more to do with the abusive exercise of one person's power over another than it does with sex.[227]

While the court in *Bevan* did not expressly say so, the same reasoning can be effectively applied to domestic violence. While there is still an unacceptable prevalence of domestic violence in society, the view of domestic violence as the norm and as something with which members of society must live has significantly decreased.[228] Realization of the widespread destructive effects of domestic violence has escalated, along with a reactionary

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226. *Id.* The Wyoming Supreme Court in *Bevan* concluded:

> The district court was in error by reasoning that simply because the alleged extreme and outrageous conduct of this case constitutes domestic violence among intimates it somehow necessitates that the plaintiffs make a "showing of exceptional circumstances" such as a "continuing course of abuse" by the defendant. Our affirmance of this conclusion would, as a consequence, impose on a certain class of plaintiffs a burden greater than that set forth in the general rules of Restatement § 46 based solely on the subject matter of the complained conduct an the relationship of the parties. We decline to impose such an additional burden.

Bevan, 42 P.3d at 1020.

227. Kanzler v. Renner, 937 P.2d 1337, 1341-42 (quoting Retherford v. AT & T Communications of Mountain States, Inc., 844 P.2d 949, 978 (Utah 1992)). *See e.g.,* Louise F. Fitzgerald, *Science v. Myth: The Failure of Reason in the Clarence Thomas Hearings,* 65 S. CAL. L. REV. 1399, 1399 (1992); Carol Sanger, *The Reasonable Woman and the Ordinary Man,* 65 S. CAL. L. REV. 1411, 1415 (1992).

228. Weiner, *supra* note 43, at 195.

consideration of such conduct as intolerable in a civilized society.[229] For the law to ensure that indirect as well as direct victims of domestic violence can seek remedies through such independent civil actions as intentional infliction of emotional distress is for the law to function as it was established to function.[230]

Domestic violence is a monstrous problem that has no single immediate, readily apparent solution. Thus, constant smaller advances like that set forth in *Bevan* are the best way to successfully "fight the battle" against domestic violence. In the words of Charles Caleb Colton, "Where we cannot invent, we may at least improve."[231] Without preaching, the *Bevan* court took a step in the right direction by moving with society closer to a general recognition that all domestic violence is outrageous.[232]

CONCLUSION

The decision in *Bevan v. Fix* reveals a promising new path upon which third party victims of domestic violence can embark to recover under tort remedy. *Bevan* provides a helpful perspective for recognizing that the effects of indirect exposure to domestic violence can be as devastating as direct exposure, especially upon children. The *Bevan* court sets a good example of how the tort of intentional infliction of emotional distress should be interpreted, evaluated, and applied – a solid stepping-stone from which to continue seeking appropriate justice for all victims of domestic violence. In Wyoming, *Bevan* should serve as a key in the hands of legal practitioners to open doors to possibilities in family law to aggressively seek recovery not only for those directly victimized by domestic violence, but also for those indirectly affected. Courts most likely will continue to struggle with the interpretation and application of such vague requirements as "outrageous," but if courts follow *Bevan's* example of exercising practical necessity when defining the tort's standards and limits, while allowing the tort enough flexibility to accommodate the devastating effects of third party exposure to domestic violence, then the law will function in its best capacity. *Bevan* should serve as a guiding light to lower courts for overcoming common reluctance to classify domestic violence as outrageous conduct. *Bevan* demonstrates how the tort of intentional infliction of emotional distress can be utilized as one way to effectively combat domestic violence, in both prevention and remedy.

NATALIE KAY FOX

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229. *Id.*
230. *Id.*
231. Charles Caleb Colton was an English author and clergyman (1780-1832).
232. Weiner, *supra* note 43, at 197.