

Margaret TREIBER v. Joan Edmiston HESS

89-125

782 S.W.2d 43

Supreme Court of Arkansas
Opinion delivered January 8, 1990

1. ACTIONS — JUDICIALLY CREATED ACTIONS MAY BE JUDICIALLY ABOLISHED. — The action for alienation of affection is a judicially created action in this state, and judicially created actions can be judicially abolished.
2. ACTION — ALIENATION OF AFFECTION ACTION NOT JUDICIALLY ABOLISHED. — Although the court had the power to judicially abolish the alienation of affection action, it chose not to do so since such an action had become a matter of public policy to be decided by the legislature, and the legislature had already abolished the action, but had specifically exempted pending litigation from its action.

Appeal from Washington Circuit Court; *Mahlon Gibson*, Judge; affirmed.

Davis, Cox & Wright, by: *Kelly Carithers* and *Wm. Jackson Butt II*, for appellant.

The Niblock Law Firm, by: *Katherine C. Gay*, for appellee.

ROBERT H. DUDLEY, Justice. Appellee obtained a \$100,000 judgment against appellant for alienation of affection. After the judgment was rendered, appeal taken, and transcript lodged in this Court, the General Assembly abolished alienation of affection as a cause of action. Act 46 of 1989 § 6 (effective Nov. 14, 1989). Section 8 of Act 46 provides that abolishment of the action does “*not apply to litigation pending before the effective date of this act.*” [Emphasis supplied.] In spite of this italicized language, appellant asks us to judicially abolish the cause of action back to the time this case was pending and reverse and dismiss the judgment. We decline to do so.

[1] The action for alienation of affection is a judicially

created action in this state. Judicially created actions can be judicially abolished. *O'Neil v. Schuckardt*, 112 Idaho 472, 733 P.2d 693 (1986); *Wyman v. Wallace*, 94 Wash. 2d 99, 615 P.2d 452 (1980). Even though we have the power to judicially abolish the action as of the time this suit was pending, it is a power we choose not to exercise.

[2] Thirty (30) states have legislatively abolished the action for alienation of affection while three (3) have abolished it judicially. It has become an issue of public policy and public policy ordinarily should be decided by the legislature, although we sometimes do decide such matters. *See Lewis v. Roland*, 287 Ark. 474, 70 S.W.2d 122 (1985). The legislature has acted on the matter. The fact that its action came during the pendency of this appeal does not prevent us from observing its force upon our decision of the case. *Van Hook v. McNeil Monument Co.*, 107 Ark. 292, 155 S.W. 110 (1913). We choose to follow the legislative enactment.

Affirmed.

NEWBERN and TURNER, JJ., not participating.
