Barred Justice
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Abstract:

Tort law can provide crucial redress for victims of intimate partner violence (IPV). While most jurisdictions, including Texas, have abolished the doctrine of interspousal immunity, there remains an issue of timing. When should an interspousal tort action be brought? The Texas Supreme Court in *Twyman v. Twyman* claimed to navigate between the extreme approaches of required and prohibited joinder and instead allowed for permissive joinder subject to the principles of *res judicata.* The principle of *res judicata* prohibits tort actions that are based on matters litigated in a divorce. It is unclear if any matter litigated based on IPV, be it custody, a protective order, or property division, will have *res judicata* effect on tort actions, or just those matters litigated in the divorce that go to property division. Furthermore, following the transactional test of *res judicata,* a divorce decree will bar tort action arising from the marriage that could have been brought during the divorce. Thus, despite being a "permissive" jurisdiction, Texas presents only one option for individuals facing a divorce with claims of interspousal torts: bring it or lose it. Texas needs to clarify which litigated matters based on IPV will have a *res judicata* effect on subsequent tort actions. In addition, to avoid an unjust *res judicata* effect for matters that could, but were not, litigated in a divorce, Texas should create a unique public policy exception to the normal *res judicata* rule. Finally, before these changes are adopted, Texas attorneys must understand the implications of *Twyman* and modify their practice and trial strategy to ensure that their clients recover fully.

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I. INTRODUCTION

Texas has abolished the doctrine of interspousal immunity for both intentional and negligent torts.[1] While spouses can sue each other in tort, there remains the issue of timing. When can a tort action between spouses commence? Can and should it be brought during or after a divorce?

The Texas Supreme Court addressed the issue of timing in *Twyman v. Twyman.*[2] The Court held that a spouse may, but is not required to, bring a tort action during a divorce. However, this "permissive joinder" rule is subject to the principles of *res judicata.*[3]

This Article will address the implication the Texas rule for *res judicata* has on joinder of torts in divorce actions. Part II and Part III provide a background of interspousal tort law in Texas and why a Intimate Partner Violence (IPV) victim may

[1] *Bounds v. Caudle,* 560 S.W.2d 925, 925-927 (Tex. 1977); *Price v. Price,* 732 S.W.2d 316, 319 (Tex. 1987).
[2] *Twyman v. Twyman,* 855 S.W.2d 619, 625 (Tex. 1993).
[3] *Id.* fn 17.

chose tort law for recovery from an abuser rather than a divorce. Part IV will provide a brief overview of jurisdictions that prohibit and those that require joinder of tort claims with a divorce. Part IV will also introduce the Texas position on joinder through *Twyman*. Part V will show two effects the *Twyman* rule has adverse to IPV victims. This section will also argue that following the Texas transactional approach to *res judicata,* Texas is not a permissive jurisdiction at all. Part VI will compare other permissive jurisdictions to Texas to demonstrate the un-permissive nature of the *Twyman* rule. Finally, Part VII will discuss why an IPV victim may not want to bring a tort action with a divorce, and Part VIII will offer recommendations of how to deal with the negative implications *Twyman* has for IPV victims.

II. MARITAL TORTS IN TEXAS

Prior to 1977, spouses were barred by the doctrine of interspousal immunity from suing one another in tort.[4] In 1977, the Texas Supreme Court abolished the doctrine of interspousal immunity for intentional or willful torts.[5] Ten years later in 1987, the Texas Supreme Court did the same "as to any cause of action."[6] As a result, both intentional and negligently committed torts can be brought during a divorce action.[7] Causes of action stemming from the marital relationship can range from economic and negligent torts to intentional, physical and nonphysical torts.[8]

III. WHY TORT LAW FOR VICTIMS OF IPV?

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[4] *Bounds* 560 S.W.2d at 925-927.
[5] *Id.* at 927 ("We concur and accordingly we abolish the [interspousal immunity] rule established in Nickerson to the extent that it would bar all claims for willful or intentional torts.").
[6] *Price,* 732 S.W.2d at 319.
[7] *Mogford v. Mogford,* 616 S.W.2d 936, 940 (Tex.Civ.App.–San Antonio 1981, writ ref'd n.r.e.).
[8] *See, e.g., Schlueter v. Shlueter,* 975 S.W.2d 584, 589 (Tex. 1998) (constructive fraud on the community estate); *Stafford v. Stafford,* 726 S.W.2d 14 (Tex. 1987) (negligent transmission of a sexually transmitted disease); *Mogford v. Mogford,* 616 S.W.2d 936, 940 (Tex.Civ.App.–San Antonio 1981, writ ref'd n.r.e.) (assault and battery); *Twyman v. Twyman,* 855 S.W.2d 619 (Tex. 1993) (intentional infliction of emotional distress).

For an IPV victim wanting to bring a tort action against her[9] spouse the question why not just recover in divorce? Divorce obviously provides for important issues such as termination of the marital relationship determination of custody, and the division of the marital estate. However, in a divorce action recovery for abuse is different, inadequate, or even unavailable compared to recovery in a tort action. For example:

- *Tort law provides monetary recovery that may not be available even in a fault divorce action.* A victim may be abused by an individual with substantial separate property yet the marital estate may be minimal. However, regardless of the severity of fault, a Texas district court does not have the authority to divest an individual of her separate property in a divorce action.[10] In contrast, most interspousal tort actions[11] allow for recovery from the other spouse's separate estate.
- *In a divorce action, whether or not to even consider recovery for abuse is subject to the discretion of a district judge.* In a divorce action a trial court has broad authority to divide the marital estate in a manner it deems just and right.[12] However, even if the trial court grants a divorce on a finding of fault such as cruelty, the trial court is not required to weigh the fault in the division of community property.[13] Thus, a court may find cruelty yet may still within its discretion not award a disproportionate share of the community estate. In tort law, there is no authority for a trial court to simply refuse to consider a cause of action for a tort, other than summary judgment and direct verdict

[9] This article will use female pronouns, although it should be stressed that IPV affects both males and females.
[10] *Cameron v. Cameron*, 641 S.W.2d 210, 219-20 (Tex. 1982).
[11] Torts that are not "independent" from the marriage can only lead to compensation from the community estate. *See Schlueter v. Schlueter,* 975 S.W.2d 584, 589 (Tex. 1998) (Holding that the recovery from the community estate is the appropriate remedy for fraud, both constructive and actual, on the community.).
[12] Tex. Fam. Code § 7.001; *In re Marriage of Edwards,* 79 S.W.3d 88, 96 (Tex. App.–Texarkana 2002, no pet.) (Holding "Section 7.001 gives the trial court broad authority to divide the marital estate in a manner it seems just and right.").
[13] *Young v. Young,* 609 S.W.2d 758, 762 (Tex. 1980).

rulings. In fact, it would seem that a refusal of access to the courts would be a violation of the Texas Bill of Rights.[14]

- *A single assault may be sufficient for tort recovery but not sufficient for a finding of cruelty.* In Texas, cruelty as a basis for divorce is shown when the "conduct complained of consists of the willful, persistent infliction of unnecessary suffering…to such extent as to render cohabitation dangerous and unendurable."[15] A single assault may not be found to constitute "persistent infliction of unnecessary suffering" that renders cohabitation "dangerous and unendurable." However, the single assault will lead to tort liability.
- *Punitive damages are not available in divorce proceedings.* Texas allows for punitive damages if there is a finding of gross negligence, actual fraud[16] or actual malice.[17] However, an individual cannot recover punitive damages in a divorce proceeding or from a tort not independent to the marriage.[18] In contrast, an individual can recover punitive damages in an independent tort action if the tort is found to be committed with gross negligence, actual fraud or actual malice.[19]
- *Torts are designed to punish while divorce designed to be "just and equitable."* Historically, the rationale for fault-based divorce has been to reward the innocent and punish the guilty.[20] However, in Texas, the division of the community estate should not be a punishment for the spouse at fault.[21] In fact, such an action would be an abuse of the trial court's discretion.[22] Tort

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[14] *See* TEX. CONST. ART. I § 13.
[15] 39 Tex. Jur. 3d Family Law § 364; *see also Gentry v. Gentry,* 394 S.W.2d 544 (Tex. Civ. App.–Corpus Christi 1965, no writ).
[16] Although Tex. Civ. Prac. & Rem. Code § 41.003 lists "fraud" as a basis for recovery of punitive damages, Tex. Civ. Prac. & Rem. Code § 41.001(6) defines "fraud" as "fraud other than constructive fraud."
[17] Tex. Civ. Prac. & Rem. Code § 41.003.
[18] *Schlueter,* 975 S.W.2d at 589 (Holding that fraud on the community, either actual or construction, is not an independent tort and thus cannot lead to a recovery of punitive damages.).
[19] *See, e.g., Parker v Parker,* 897 S.W.2d 918, 929 (Tex. App.–Fort Worth 1995, writ denied) (Upholding punitive damages awarded to the wife after it was discovered the husband wiretapped the wife's attorneys' offices.).
[20] Barbara Young, *Note: Interspousal Torts and Divorce: Problems, Policies, Procedures,* 27 J. FAM. L. 489, fn 128 (1988/1989); *see also Brown v. Brown,* 281 S.W.2d 492, 498 (Tenn. 1955).
[21] *Young v. Young,* 609 S.W.2d 758, 762 (Tex. 1980).
[22] *Id.*

law, in contrast, focuses on fault. While the recovery may be the same[23] the end goal of punishment rather than equity may be more emotionally appropriate for the victim IPV.

IV. JOINDER OF TORT CLAIMS WITH A DIVORCE

Although tort law may provide many important remedies for IPV victims, the issue of timing provides a substantial roadblock to recovery. While very few states still recognize interspousal tort immunity,[24] there are varying standards as to when an action in tort can or must be brought. If the tort action is not brought at the appropriate time in the victim's jurisdiction, then the tort action will be barred.

A. Jurisdictions that Require Joinder of Tort Claims With a Divorce

Some states require joinder of tort claims with a divorce action.[25] Of the states that require joinder, some require joinder in all cases and others have suggested a case-by case application of *res judicata*.[26] Generally, when courts have held a strict requirement of joinder under all circumstances, they based the rule on a broad interpretation of what constitutes a "claim" or "transaction" for purposes of *res judicata*.[27]

For example, in *Tevis v. Tevis*,[28] subsequent to a divorce between the parties, Ms. Tevis filed suit for damages for injuries received as a result of a physical beating administered by Mr. Tevis.[29] Mr. Tevis moved for summary judgment based on statute

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[23] Barbara Young, *Note: Interspousal Torts and Divorce: Problems, Policies, Procedures,* 27 J. FAM. L. 489, fn 128 (1988/1989).
[24] *Boone v. Boone,* 345 S.C. 8, 13, 546 S.E.2d 191, 193 (S.C. 2001); *see also* 41 C.J.S. Husband and Wife § 204.
[25] *See, e.g., Tevis v. Tevis,* 79 N.J. 422, 400 A.2d 1189, 1196 (1979); *Weil v. Lammon,* 503 So.2d 830, 832 (Ala. 1987).
[26] Barbara Glesner Fines, *Joinder of Tort Claims in Divorce Actions,* 12 J. AM. ACAD. MATRIM. L. 285, 292 (1994).
[27] *Id.* at 293.
[28] 79 N.J. 422, 400 A.2d 1189 (N.J. 1979).
[29] *Id.* at 1191.

of limitations.[30] In discussing whether or not the statute of limitations should be tolled, the New Jersey Supreme Court said that Ms. Tevis's claim should not have been held in abeyance during the divorce.[31] Rather "it should, under the 'single controversy' doctrine, have been presented in conjunction with that action as part of the overall dispute between the parties in order to lay at rest all their legal differences in one proceeding and avoid the prolongation and fractionalization of litigation."[32]

B. Jurisdictions that Prohibit Joinder of Tort Claims with a Divorce

Other jurisdictions prohibit the joinder of tort claims with a divorce proceeding.[33] These courts argue that the divorce and tort actions lack the sameness of cause of action and objects of suit.[34] This view holds that the purpose of the divorce action is to dissolve the marital relationship and effect the legal separation of husband and wife, while a tort action is brought to recover damages suffered from a civil wrong.[35]

For example, in *Lord v. Shaw,*[36] nearly two years after a divorce, Ms. Lord brought six causes of action against her former husband, Mr. Shaw.[37] Rather than addressing the trial courts using the doctrine of *res judicata* as additional grounds for summary judgment, the Supreme Court of Utah simply observed, "actionable torts between married persons should not be litigated in a divorce proceeding. We believe that divorce actions will become unduly complicated in their trial and dispositions if torts can be or must be litigated in the same action. A divorce action is highly equitable in nature,

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[30] *Id.*
[31] *Id.* at 1196.
[32] *Id.*
[33] *See, e.g., Walther v. Walther,* 709 P.2d 387, 388 (Utah 1985); *Windauer v. O'Connor,* 107 Ariz. 267, 485 P.2d 1157 (1971); *Simmons v. Simmons,* 773 P.2d 602, 605 (Colo. Ct. App. 1988).
[34] Steven Gaynor, Annotation, *Joinder of tort actions between spouses with proceeding for dissolution of marriage,* 4 A.L.R.5th 972 (1992).
[35] *Id.*
[36] 665 P.2d 1288 (Utah 1983).
[37] *Id.* at 1289.

whereas the trial of a tort claims is at law."[38] In *Walther v. Walther*,[39] the Supreme Court of Utah quoted *Lord* in explicitly holding that tort actions cannot be brought during the marriage.[40]

C. The Texas *Twyman* Position on Joinder

In *Twyman v. Twyman*,[41] Texas addressed the issue of whether or not joinder of a tort action with divorce is required. In *Twyman,* a wife filed for suit for both divorce and intentional infliction of emotional distress.[42] The Texas Supreme Court first held that a cause of action for intentional infliction of emotional stress may be brought in a divorce proceeding,[43] and then turned to "the more difficult issue" as to "when the tort claim must be brought."[44] The court first noted that several states have held that tort cases and divorce actions must be litigated separately while others required joinder of the two actions.[45] The Texas Supreme Court then held that "the best approach lies between the extremes" and held that "as in other civil actions, joinder of the tort cause of action should be permitted, but subject to the principles of *res judicata*."[46] The rule of *res judicata* in Texas bars litigation of all issues connected with a cause of action or defense, which, with the use of diligence, might have been tried in a former action as well as those which were actually tried.[47]

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[38] *Id.*
[39] 709 P.2d 387 (Utah 1985).
[40] *Id.* at 388.
[41] 855 S.W.2d 619.
[42] *Id.* at 620.
[43] *Id* at 624.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Abbott Labs. V. Gravis,* 470 S.W.2d 639, 642 (Tex. 1971); see also *Barr v. Resolution Trust Corp.,* 837 S.W.2d 627, 628 (Tex. 1992) (Holding that "*Res judicata,* or claims preclusion, prevents the relitigated of a claim or cause of action that has been finally adjucated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit.").

With *Twyman*, Texas placed itself in the "permissive" category of states that allow, but do not require joinder. However, the principle of *res judicata*, as defined by Texas, presents two possible bars to those who wish to bring a tort action at a different time than the divorce action. As will be shown, these two bars effectively require IPV victims to join their tort action with a divorce, despite the permissive claim of *Twyman.*

V. WHAT EFFECT *TWYMAN* HAS ON INTERSPOUSAL TORT ACTIONS

A. Prohibition of Actions Based on Issues Litigated in Divorce

If any issue is discussed in the divorce action that lays a foundation for a tort action, this discussion may have *res judicata* effect on tort actions subsequent to the divorce. For example, in *Kemp v. Kemp*,[48] during the marriage between Ms. Kemp and Mr. Kemp, Mr. Kemp struck Ms. Kemp with his fist, shattering her nose.[49] As Ms. Kemp attempted to stop the bleeding, Mr. Kemp shoved a washcloth into her face, aggravating her injuries.[50] The altercation ended when the police arrived, and Mr. Kemp later pled guilty to criminal charges.[51]

A week later, Ms. Kemp filed a complaint for divorce alleging cruel and inhuman conduct.[52] A divorce decree was subsequentially entered which ordered Mr. Kemp to pay Ms. Kemp's past and future medical bills arising form the injury.[53] Nearly six months later, Ms. Kemp filed a complaint for assault and battery seeking general compensatory and punitive damages.[54] The trial court dismissed on the basis of *res*

[48] 723 S.W.2d 138 (Tenn. App. 1986).
[49] *Id.* at 139.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*

judicata.[55] The Tennessee court of appeals upheld the trial court's decision that although the causes of action for divorce and for assault and battery are not identical, in the divorce "in effect [Ms. Kemp] prevailed on a tort claim" and thus was barred from subsequent recovery in a tort action.[56]

Texas addressed a similar situation in *Brinkman v. Brinkman*[57] in which a tort action was brought subsequent to a divorce which had alleged cruelty. In *Brinkman,* following divorce, a former wife brought a civil assault action against her former husband.[58] The defendant, Mr. Brinkman, moved for summary judgment based on the doctrine of *res judicata* and asserted four bases for this argument.[59] Mr. Brinkman contended that Ms. Brinkman should have litigated her personal injury claim during the divorce action because (1) she alleged in the divorce action that the marriage had become insupportable because of cruel treatment; (2) she sought an injunction during the divorce action prohibiting Mr. Brinkman from causing her bodily injury (3) Ms. Brinkman used the injury at issue in the tort action to support a claim for temporary spousal support during the divorce action; and (4) Ms. Brinkman alleged other tort causes of action in the divorce.[60] The court of appeals upheld the trial court's grant of summary judgment based on the doctrine of *res judicata*.[61]

Unfortunately, it is not entirely clear what was the determinative reasoning the court utilized in *Brinkman* used in holding that *res judicata* applied. The court held that "because Ms. Brinkman knew about her personal injury claim against Mr. Brinkman and

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[55] *Id.*
[56] *Id.* at 140
[57] 966 S.W.2d 780 (Tex. App.–San Antonio 1998, pet. denied).
[58] *Id.* at 781.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 783.

used it to her advantage in the divorce proceeding, the claim should have been joined with the divorce action."[62] The court also considered both the fact that the assault was discussed during the divorce proceeding and the fact that the assault claim could have been brought to justify its holding.[63]

B. Prohibition of Actions That "Might Have Been Brought" in Divorce

The rule of *res judicata* in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried.[64] The "might have been brought" standard of *res judicata* demonstrates the true teeth of *Twyman.* In *Barr v Resolution Trust Corp.,*[65] the Texas Supreme Court also adopted the transaction approach set forth in the RESTATMENT (SECOND) OF JUDGMENTS § 24 (1982).[66] The Restatement of Judgments states that a "final judgment on an action extinguishes the right to bring suit on the transaction, or series of connected transactions, out of which the action arose."[67] One could argue that the marriage is one transaction and thus every event that occurred during the marriage was part of the transaction of marriage.[68]

The Texas Supreme Court is *Twyman* seemed to approve the transactional interpretation of a marriage in footnote 17 when it stated, "We anticipate that most tort cases between spouses will be joined with the divorce proceeding, however, situations

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[62] *Id.*
[63] *Id.*
[64] *Abbott Labs. V. Gravis,* 470 S.W.2d 639, 642 (Tex. 1971); see also *Barr v. Resolution Trust Corp.,* 837 S.W.2d 627, 628 (Tex. 1992) (Holding that "*Res judicata,* or claims preclusion, prevents the relitigated of a claim or cause of action that has been finally adjucated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit.").
[65] 837 S.W.2d 627 (Tex. 1992).
[66] *Id.* at 627.
[67] RESTATEMENT (SECOND) OF JUDGMENTS §24(1) (1982).
[68] Barbara Young, *Note: Interspousal Torts and Divorce: Problems, Policies, Procedures,* 27 J. FAM. L. 489, fn 128 (1988/1989); *see also Nash v. Overholser,* 757 P.2d 1180,1184 (1988).

may exist in which the facts supporting the tort action will be different from those supporting a petition for divorce."[69] By focusing on "the facts supporting the tort action," the Texas Supreme Court seems to be focusing on the marriage as one "transaction." Thus, if a tort arises from the "transaction" of the marriage, following *Twyman* coupled with the "transactional test," any tort action must therefore be brought during the divorce.

VI. A LOOK AT OTHER PERMISSIVE JURISDICTIONS

How is Texas a permissive jurisdiction? Despite claims to the contrary by the Texas Supreme Court, following the logic of *Twyman,* Texas requires joinder of a tort action in a divorce. To truly appreciate the un-permissive nature of Texas' joinder rule, it is helpful to look at other permissive jurisdictions.

A. *Stuart v. Stuart*

The leading case on permissive joinder comes from the Supreme Court of Wisconsin in *Stuart v. Stuart.*[70] In *Stuart,* after a stipulated no fault divorce, Ms. Stuart attempted to sue her former husband for assault, battery, and intentional infliction of mental distress arising from incidents during the marriage.[71] Mr. Stuart moved for summary judgment arguing that because Ms. Stuart failed to either litigate or even disclose the possible tort action against Mr. Stuart during the divorce proceedings, her claim was barred.[72] Because the circuit court concluded that Ms. Stuart's action was barred by the doctrines of *res judicata,* equitable estoppel and waiver, it dismissed Ms. Stuart's action as frivolous and awarded Mr. Stuart costs and attorney fees.[73] In doing so, the circuit court stated that "it seems absolutely unconscionable that a party could

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[69] *Twyman,* 855 S.W.2d at 652, fn17.
[70] 143 Wis.2d 347, 421 N.W.2d 505 (Wis. 1988).
[71] *Id.* at 506.
[72] *Id.* at 507.
[73] *Id.*

negotiate all aspects of a stipulated divorce…knowing at that time that as soon as the divorce is granted a civil lawsuit such as this is going to be filed."[74]

Ms. Stuart appealed. The Wisconsin court of appeals held that the doctrine of *res judicata* did not bar subsequent tort action.[75] In reaching this conclusion, the court of appeals first recognized "under the doctrine of *res judicata,* a final judgment on the merits in a prior action is conclusive and bars all subsequent actions between the same parties, or their privies as to all matters that were or that might have been litigated in the prior action."[76] The court also held that for *res judicata* to act as a bar to subsequent action, there must be not only an identity of the parties but also an identity of the cause of action or claims in the two actions.[77] The court then reasoned that "the issues litigated were the termination of the marriage and the equitable division of the marital estate and "under Wisconsin's no-fault divorce code, these determinations are made by the court without regard to fault of the parties."[78] In contrast, the court pointed out, tort actions rest in an allegation of wrongful conduct. Thus, "in the two actions, there is not an identity of causes of action or claims."[79] The court of appeals continued on to hold that the doctrine of equitable estoppel could not bar the wife's action.[80]

The Wisconsin Supreme court agreed with the court of appeals analysis of *res judicata* and did not repeat the court's discussion.[81] The Wisconsin Supreme Court then turned to whether public policy requires the wife to join her tort action in the divorce. The court of appeals had held that while joinder of an interspousal tort action is

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[74] *Id.*
[75] *Stuart v. Stuart,* 143 Wis.2d 455, 460-461, 410 N.W.2d 632 (Ct. App. 1987).
[76] *Id.* at 460.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 461.
[80] *Id.* at 462-463.
[81] *Stuart,* 421 N.W.2d at 507.

permissible, it is contrary to public policy to require joinder.[82] The Wisconsin Supreme Court agreed and quoted the court of appeal's reasoning at length:

> If an abused spouse cannot commence a tort action subsequent to a divorce, the spouse will be forced to elect between three equally unacceptable alternatives: (1) Commence a tort action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or (3) commence an action to terminate the marriage, forego the tort claim, and surrender the right to recover damages arising from spousal abuse…This law will not do.[83]

B. ***Nash v. Overholser***

Idaho addressed permissive joinder in *Nash v. Overholser.*[84] In *Nash,* Ms. Nash, sued for assault and battery after a stipulated no fault divorce.[85] Mr. Overholser moved for summary judgment based on the doctrine of *res judicata.*[86] Mr. Overholser argued that although the assault and battery was not addressed in the divorce, it was within the scope of matters which could have been addressed by the divorce court.[87] The trial court denied summary judgment.[88]

The Supreme Court of Idaho recognized that Ms. Nash's allegations could have been litigated during the divorce proceedings and that "ordinarily, the doctrine of *res judicata* requires that all claims or issues which were, *or could have been,* litigated in a previous action between the same parties, are barred from later prosecution."[89] However, the Idaho Supreme Court affirmed the trial court noting that "the instant case falls under a limited and unique exception to this Court's traditional interpretation of the concept of

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[82] *Stuart,* 410 N.W.2d at 637-638.
[83] *Stuart,* 421 N.W.2d at 508.
[84] 114 Idaho 461, 757 P.2d 1180.
[85] *Id.* at 1180.
[86] *Id.* at 1180-1181.
[87] *Id.* at 1181.
[88] *Id.*
[89] *Id.* (emph. in original).

res judicata."[90] The Court then when on to quote the above cited reasoning in *Stuart,* and explained that these are "considerations unique to cases such as this which compel us to acknowledge a narrow exception to our traditional exception to the doctrine of *res judicata.*"[91] The Court also added its own commentary that "divorce proceedings should be handled expeditiously and with a view toward minimizing emotional trauma; such proceedings certainly should not serve as a catalyst for additional spousal abuse."[92]

C. *Nelson v. Jones*

The Supreme Court of Alaska was also faced with a similar situation in *Nelson v. Jones.*[93] In *Nelson,* a father brought action against a mother alleging abuse of process, malicious prosecution, and defamation based upon the mother's allegations of sexual abuse of their child.[94] The mother argued that the issue of sexual abuse had been litigated in the divorce proceedings.[95] In holding that *res judicata* did not bar the former husband's claims, the Supreme Court of Alaska quoted the above sections from both *Stuart* and *Nash* with approval.[96]

D. Texas Compared

Texas clearly does not fall into line with other "permissive" jurisdictions. No Texas court has recognized any "unique" public policy exceptions to the doctrine of *res judicata.* Instead, following *Twyman,* Texas seems to follow a strict "transactional" interpretation of the marriage that essentially requires all claims arising from the divorce to be brought in one action. The "transactional" approach to *res judicata* puts Texas out

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[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] 787 P.2d 1031.
[94] *Id.* at 1032.
[95] *Id.* 1033.
[96] *Id.*

of step with other "permissive joinder" jurisdictions. Wisconsin, Idaho, and Alaska have all recognized the equitable nature of a divorce compared to the legal nature of a divorce in holding that joinder should be permissive. These courts have focused on the subject matter of the suit, rather than the "transaction" of the lawsuit. Yet Texas has yet to discuss the different nature and different subject matter of a divorce action and tort action. Rather, footnote 19 in *Twyman* simply focuses on the facts from the marriage, rather than the types claims arising from the facts.[97] As a result, IPV victims in Texas appear to be left with the choice of either filing any tort claim arising from the marriage with the divorce or losing the action and the remedy.

1. *In re J.G.W.*

To demonstrate how a different interpretation of the "transactional" approach would play out in family law, a good example is a child custody suit in which a claim of interference with child custody is brought after a modification or enforcement action. In *In re J.G.W.*,[98] during the pendency of a divorce between Mr. Walker and Ms. Carter, Mr. Walker was granted temporary custody of the couple's two children.[99] However, before the divorce was final, Ms. Walker and her boyfriend absconded with the children.[100] The couple was located in Flagstaff, Arizona one week later and subsequentially pled guilty to felony interference with child custody.[101] In the final decree in 1997, Mr. Walker was granted sole managing conservatorship of the children with restricted possession and access to Pamela.[102] In July of 1998, after Ms. Carter filed a second petition to modify

[97] *Twyman,* 855 S.W.2d at 625, fn17.
[98] 54 S.W.3d 826 (Tex. App.–Texarkana 2001, no writ).
[99] *Id.* at 829.
[100] *Id.*
[101] *Id.*
[102] *Id.*

the parent child relationship, Mr. Walker counter-petitioned against Ms. Carter and her boyfriend alleging intentional infliction of emotional distress, interference with child custody, and civil conspiracy.[103] In December of that year, an agreed order was entered in regards to custody but was silent concerning the tort claims.[104] In January 2000, Ms. Carter again sought to modify, and Mr. Walker reasserted his tort claims.[105] Ms. Carter moved for summary judgment based, among other things, on *res judicata.*[106] The trial court granted summary judgment and Mr. Walker appealed.[107]

After concluding that the agreed order had not adjudicated all claims, the court of appeals in Texarkana turned to whether the tort claims in the prior suit could have been litigated during the prior suit.[108] The court held that "it is clear that [Mr. Walker's] claims could have been litigated during the prior suit."[109] However, the court reasoned that Mr. Walker's tort claims "would only be ancillary to the proceeding because they deal with his personal injury and would only be incidental to the best interests of the children. This conforms with the transactional approach to *res judicata*."[110]

In re J.G.W. seems to be more concerned with the "subject matter" of the suit, such as *Stuart*, *Nash,* and *Nelson* were concerned by the subject matter of the divorce action compared to that of the tort action. Yet, Texas has explicitly overruled the subject matter test for *res judicata* in *Barr.*[111] Thus, although *In re J.G.W.* was not appealed to

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[103] *Id.*
[104] *Id.*
[105] *Id.* at 829-830.
[106] *Id.* at 830.
[107] *Id.*
[108] *Id* at 833.
[109] *Id.*
[110] *Id.*
[111] 837 S.W.2d at 630-631.

the Texas Supreme Court, it appears that if it had, the Texas Supreme Court would have overruled the court of appeals decision based on *Barr* and *Twyman.*

2. Inequitable results

Through *In re J.G.W.* one can see the inequity of a transactional test in family law. Family law often calls for expedited action. For example, if a mother absconds with the children and refuses to return them, the father's immediate concern is the return of the children, and he will likely be only interested in this outcome. However, what the father may not realize is that by seeking an immediate return of his children through an enforcement and/or a modification action, his suit brought without tort claims precludes subsequent recovery based in the tort of interference with child custody. The father is thus faced with a choice: seek the most efficient means of returning your children, or complicate the litigation, delay the enforcement of his possessory interests, and preserve your tort claim. Such a choice is inequitable.

The same concerns arise in divorce. Divorce for IPV victims is often not merely a chance for divvying up of assets and determining custody, but a chance for escape. There is motivation for a quick, simple, and even safe divorce. Yet the IPV victim is faced with the same inequitable choice: pursue your immediate concerns in the most expeditious fashion and surrender any other recovery, or complicate the litigation and preserve your tort claims. As the Wisconsin Supreme Court in *Stuart* pointed out, such a choice is inequitable.[112] Yet this is exactly the choice that *Twyman* offers IPV victims.

VII. WHY AN IPV VICTIM MAY CHOOSE NOT TO BRING A TORT ACTION WITH A DIVORCE

[112] *Stuart,* 421 N.W.2d at 508.

The harsh result of *Twyman* is that Texas simply does not recognize the unique nature of litigation brought by IPV victims. There are many reasons why an IPV victim may not wish to bring a tort action for recovery in her divorce. Examples of such reasons are:

- *An IPV victim may fear that joinder of a tort claim will spur further abuse.* Studies have indicated that the most dangerous time for an abused wife is when she attempts to leave her husband.[113] The delay and increased animosity resulting form a joined tort claim would presumably only escalate violence.[114] The Supreme Courts of Wisconsin seemed to recognize this presumption in *Stuart* when it held that required joinder presents a victim with the unacceptable choice of "commence[ing] a tort action during the marriage and possibly endure additional spousal abuse."[115]
- *An IPV victim may not even realize for some time that she is a victim of domestic abuse.* Studies have shown that an abuser has psychological control over the victim which can increase to the point where the abuser literally determines reality for the victim.[116] This could often prevent discovery of the abuse until after the divorce has been finalized
- *An IPV victim may not believe that she can affect or remedy abusive behavior.* In "The Battered Woman" Dr. Lenore Walker argued that abuse victims suffered from "learned helplessness."[117] Dr. Walker explained that repeated abuse, like electrical shocks, diminish the woman's motivation to respond. As a result, the victim becomes passive and does not believe she can alter her situation."[118],[119]

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[113] *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation,* 90 MICH. L. REV. 1, 65-71 (1991).
[114] *See* Lori L. Yamauchi, *Note: Guissin v. Guissin: Appellate Courts Powerless to Mandate Uniform Starting Points in Divorce Proceedings*, 15 HAWAII L. REV. 423, 450 (1993).
[115] *Stuart,* 421 N.W.2d at 506.
[116] Catherin F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTA L. REV. 801, 872 n. 427.
[117] Lenore E. Walker, The Battered Woman 55-70 (1979).
[118] *Id.*

- *An IPV victim may not be in a psychological state to endure protracted litigation.* A "no-fault" divorce offers a simpler exit to an abusive relationship. An IPV victim's primary concern may be a quick escape from the abusive relationship, and the victim may not have even considered remedy for the wrong done.[120]
- *An IPV victim may not be in a financial position to endure protracted litigation.* Attorney's fees aside, an IPV victim may need immediate financial assistance that would be available in a divorce. A divorce may grant an IPV victim community property and assets to which the victim did not have access prior to the marriage, spousal maintenance in instances in which it is available,[121] and child support for the IPV victim's children. A victim may need these resources immediately, and cannot afford to complicate the divorce and delay final adjudication of the divorce.[122]
- *Seeking a quick escape from an abusive relationship and unable to afford an attorney, a victim may file a divorce* pro se*.* With increasing resources for litigants who cannot afford an attorney,[123] more and more divorces will are and will be done *pro se.* In a *pro se* divorce it is unlikely that a petitioner will even know of tort actions, let alone know to bring any tort actions with her divorce. Much more disturbing, but also likely, a victim may be represented

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[119] There is considerable debate as to the validity of the "learned helplessness" theory. Many studies show that IPV victims actively seek help from people and institutions that are helpless to provide. *See, e.g.,* Edward W. Gondolf & Ellen R. Fisher, Battered Women as Survivors 11-25 (1988).

[120] From this author's own experience, most IPV victims seek legal advice and/or representation only pertaining to a termination of the marriage relationship and have not considered recovery for the abuse through the divorce or tort action.

[121] Texas has strict requirements for an award of maintenance. *See* Tex. Fam. Code § 8.051.

[122] Again in this author's own experience, most clients need a quick divorce in order to gain immediate access to the resources, such as access to divided community funds. For example, the author is currently representing an IPV victim staying in a women's shelter. The victim is undocumented and cannot work. The shelter cannot keep the victim for an extended period of time, yet the victim has no access to community funds that are controlled by her husband. This victim needs an immediate divorce so she can either support herself with her share of the community estate or can use the funds to move out of state with family.

[123] For example, in Travis County, Texas, the Travis County Law Library located in the courthouse supplies free forms and a reference attorney to assist *pro se* litigants in family law matters. *See* http://www.co.travis.tx.us/records_communication/law_library/default.asp; http://www.co.travis.tx.us/records_communication/law_library/ref_attorney.asp.

by an attorney who is either unaware of the abuse or unaware of the available tort claims and when such claims should be brought.

Despite all of these reasons why an IPV victim may not bring a tort action with her divorce, following *Twyman,* the IPV victim has one choice regarding tort action: bring it or lose it.

VIII. RECOMMENDATIONS

A. Overrule or Clarify *Brinkman*

As shown in *Brinkman, res judicata* prevents the relitigation of issues that were addressed in the divorce.[124] Unfortunately, it is not clear to what extent the court of appeals accepted the basis of Mr. Brinkman's arguments. If the court accepted all of Mr. Brinkman's assertions, this could be extremely problematic for IPV victims who wish to pursue a cause of action after the divorce. For instance Mr. Brinkman asserted that *res judicata* was in play because Ms. Brinkman sought an injunction during the divorce action prohibiting Mr. Brinkman from causing her bodily injury.[125] If this argument was accepted, then an application for a protective order in a no fault divorce may be enough to have a *res judicata* effect on subsequent tort action. Furthermore, in Texas a trial court is required to consider evidence of intentional physical abuse two years prior to a custody suit in determining child conservatorship.[126] Taking Mr. Brinkman's argument to it's natural end, evidence of IPV in the divorce during a custody argument, even if brought during a no-fault divorce, will have *res judicata* effect on any subsequent tort claim based on the IPV.

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[124] *Brinkman,* 966 S.W.2d at 783.
[125] *Id.* at 781.
[126] Tex. Fam. Code § 153.004

If these arguments were accepted, an IPV victim in Texas forced to choose between her safety or children and her tort claim. Surely this is not sound public policy. However, following *Brinkman,* it is not entirely clear if this is the status of case law in Texas, at least in the San Antonio court of appeals jurisdiction. *Brinkman* needs to be overruled or clarified.

It is clear that the concern of the Texas Supreme Court in *Twyman* is the danger of double recovery in both a divorce and tort action. Immediately after announcing the permissive joinder rule in Texas subject to *res judicata,* the warned, "When a tort action is tried with the divorce, however, it is imperative that the court avoid awarding a double recovery."[127] The courts concern about tort claims and divorce, thus, is that a litigant could possibly recover both in a fault divorce and in a tort action. The purpose of the *res judicata* standard in *Twyman* is to prohibit a party from bring a subsequent tort action based on facts from which she used to recover in a fault divorce.

In a divorce a protective order, injunction for safety, or arguments for a determination of child custody do not go to recovery. Thus, evidence put on for these purposes should not have a *res judicata* effect on subsequent tort actions, as these purposes do not raise double recovery concerns. *Brinkman* needs to be either overruled or clarified to make this clear.

B. Create a Unique Public Policy Exception for IPV Victims

Even if *Brinkman* is overruled or clarify as suggested above, *Twyman* still has teeth. As shown, *res judicata* requires joinder of claims that could have been brought in the divorce. Yet as shown, there are many reasons why an IPV victim may not wish to bring her tort claims with a divorce.

[127] *Twyman,* 855 S.W.2d at 625.

Texas should create a public policy exception to the usual *res judicata* rule defined by the Restatement. The RESTATMENT (SECOND) OF JUDGMENTS § 24 (1982) defines a transaction as being determine "pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage."[128] This approach to *res judicata* focuses views litigants as economic game players.[129] However it has been pointed out that IPV victims are not economic players and their litigation choices are not based on economic decisions.[130] Rather, IPV victims have many uneconomical concerns that are based in emotion and safety. Because of this, it is inequitable and harsh to treat IPV victims as economical actors making economical choices in their litigation. Rather, for IPV victims Texas should recognize, as *Nash* did,[131] "a unique policy exception" to the usual doctrine of *res judicata.*

The Supreme Courts of Wisconsin, Idaho, and Utah have recognized unique exceptions to their *res judicata* rule.[132] These courts have pointed out that required joinder forces an IPV victim to be forced to elect between three unacceptable alternatives: "(1) Commence a tort action during the marriage and possibly endure additional abuse; (2) join a tort claim in a divorce action and waive the right to a jury trial on the tort claim; or (3) commence an action to terminate the marriage, [and] forego the tort claim."[133] Although the alternative of waiving a jury trial is not a threat in Texas,[134]

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[128] RESTATEMENT (SECOND) OF JUDGMENTS §24(2) (1982).
[129] Barbara Fines, *Joinder of Tort Claims in Divorce Actions,* 12 J. AM. ACAD. MATRIM. LAW 285, 286 (1994).
[130] *Id.*
[131] *Nash,* 757 P.2d 1181.
[132] *Stuart,* 421 N.W.2d 505, *Nash,* 757 P.2d 1180, *Nelson,* 787 P.2d 1031.
[133] *Stuart,* 421 N.W. 2d at 508, *Nash,* 757 P.2d at 1181, *Nelson,* 787 P.2d at 1034-1035.

the unique concerns facing IPV victims of eliciting additional abuse or the threat of surrendering the rights to recover are very real alternatives in Texas. Texas IPV victims should not be forced to choose between these alternatives.

Texas can maintain a traditional view of *res judicata,* while recognizing unique exceptions to the traditional view. As the Supreme Court of Idaho pointed out, "divorce…should not serve as a catalyst for additional spousal abuse."[135] The same should be true in Texas.

C. Attorneys Must Deal with the Reality of *Twyman*

Tort compensation combined with divorce action presents a difficult situation for attorneys. First, many family law attorneys are unfamiliar and uncomfortable with personal injury or other tort related work. Second, an IPV victim seeking a divorce is a unique client. In most instances, a client enters a lawyer's office because she has reached a point where she is ready to bring litigation. For example, a client who has been in a car wreck goes to a personal injury attorney when she is ready to sue the insurance company. Or a divorce client will walk into a divorce attorney's office when she is ready to get a divorce. In contrast, an IPV victim often walks into a family law attorney's office ready for a divorce, but either unaware of or unprepared for the possibility of bringing a tort action with the divorce.

If a family lawyer fails to bring the action, as shown the client will sacrifice tort compensation that cannot be sought after the divorce. Until Texas overrules or modifies *Twyman,* attorneys need to learn how to adapt their practice and trial strategy to the

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[134] Texas allows a party to demand a jury trial in a divorce suit. Tex. Fam. Code § 6.703.
[135] *Nash,* 757 P.2d at 1181.

requirements of *res judicata.* Attorneys must be prepared to approach a case involving IPV with additional steps that may not be common to a divorce not involving IPV.

1. Screen for IPV and Additional Tort Claims

Lawyers should be prepared to safety plan with clients who have suffered from IPV.[136] In addition to safety planning, a lawyer should delve deeper into the client's story to determine if there are additional claims about which the client is not telling her attorney. Furthermore, the attorney should explore thee possibility that there are motivations preventing a client from bringing a tort action. Some important questions for attorneys to ask in any divorce case are:

- *Was there any abuse of any type in your relationship?*
- *Do you feel that you were abused in your relationship?*
- *Do you feel that what happened to you was wrong?*
- *Do you feel that your spouse should have to pay a price for the suffering he caused?*
- *Do you feel that you and your children deserve compensation for the abuse you suffered?*
- *Do you still fear your spouse?*
- *Do you fear that bringing additional claims against your spouse will cause more abuse?*

By not asking these questions, not only does a lawyer only get half of the story, but also the lawyer may only bring half the claims for her client.

2. Be Prepared to Deal with Skepticism and Emotional Obstacles

Once the lawyer determines that there are additional tort claims that may be brought, the attorney may encounter skepticism and emotional obstacles from her client.

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[136] John Burman, *Lawyers and Domestic Violence: Raising the Standard of Practice,* 9 MICH. J. GENDER & L. 207, 234 (2003).

A lawyer should be prepared to discuss the importance of tort action. Not only does the action demonstrate to the abuser that IPV is unacceptable in our society, but it demonstrates to the victim that what was done to her was wrong. The lawyer should also discuss what for what use the recovery could be used. Such a recovery can be used for:

- *Counseling for the client*
- *Counseling for the client's children*
- *Medical bills*
- *Attorneys' fees*[137]
- *Money for the client's children*
- *Financial stability that will help the victim remain out of the abusive relationship.*[138]

Even after these two discussions, the client may still be reluctant, for various legitimate reasons, to bring a tort action with the divorce. The attorney may want to consider and discuss other creative options

- *The attorney should give the victim time to consider her options.* A divorce is a traumatic experience, and a litigious divorce is even more traumatic. A client should be given adequate time to weigh her options. Absent any statute of limitations problem, the attorney should recognize the unique position in which a marital tort claimant is positioned. A normal tort claimant has little to no relationship to the person she is suing, be it a stranger who rear-ended the client, an insurance company, a debt collector. In contrast a marital tort claimant has married and agreed to spend her life with the defendant. A lawyer, whether a personal injury lawyer, a family lawyer, or both, must keep this in mind at all times

[137] Texas does not authorize contingent fee arrangements in family law matters. *See* TEX. DISCIPLINARY R. PROF. CONDUCT 1.04 & cmt. 9 (1989). However, attorneys may enter into two separate fee arrangements, one for the divorce and the other for the tort claim. *Twyman,* 855 S.W.2d at 625, fn 18.

[138] It has been pointed out that many domestic abuse victims cannot leave or return to their abusers due to financial dependency on their abusers. *See* Sarah Buel, *Fifty Obstacles to Leaving, A.K.A., Why Abuse Victims Stay,* 28-OCT COLO. LAW 19 (1999).

- *The attorney may have the client talk to a counselor.* An attorney may also have a former client who is willing to talk with the potential client about her experience
- *The attorney may discuss with the client about the possibility of filing for the divorce and then revisiting the tort issue later.* In Texas, a party cannot set a final hearing for divorce until the sixtieth day after the divorce was filed.[139] Texas also allows for an amended petition up to seven days before trial as long as such an amendment does not "operate as a surprise to the opposing party."[140] Combining these rules, the attorney may file for the divorce to start the clock on the sixty-day waiting period, but use this time to allow the victim to weigh her options, to seek counseling, to find a safer environment, or other steps unique to a marital tort claimant.
- *An attorney should still discuss the option of preserving the clients rights by filing a divorce petition with the tort claims and then severing the tort claims out to be litigated at a later time.*[141] Even with the additional sixty days, it may be months even years before the client feels emotionally stable or even safe enough to bring a tort action yet desperately needs a divorce. In Texas, any claim against a party may be severed and proceeded with separately.[142] The will not only give the client more time to consider bringing a tort claim, but it will give the client the divorce she needs, and stop the statute of limitations from running on any tort claim. Subject to a dismissal for want of prosecution, the claimant can then chose to bring the tort action when she is ready.
- *If a trial judge is resistant to granting a severance, the attorney should be prepared to explain to the trial judge why her client is not ready to bring tort action*. In Texas, the severance is the within the broad discretion of a trial court[143] and public policy dictates finality in litigation.[144] The attorney may

[139] Tex. Fam. Code § 6.702.
[140] Tex. R. Civ. P. 63.
[141] *See, e.g., Mogford,* 616 S.W.2d at 941 (Holding that if a claimant did not want the divorce and tort claims held in the same trial, the proper remedy was to file a motion for severance).
[142] Tex. R. Civ. P. 41.
[143] *Cherokee Water Co. v. Forderhause,* 641 S.W.2d 522, 525 (Tex. 1982).

have to convince the judge the reasons a tort action should be severed. Expert testimony may be needed.

3. Be Prepared to Explore and Make Creative Legal Arguments

Finally, lawyers must be ready to address the situation of a client entering her office who wishes to bring a tort claim after a final decree of divorce. What will often be the case is a client has completed a divorce *pro se,* yet now realizes that she has additional claims. For this situation, the attorney must be prepared to make creative arguments to overcome the usual *res judicata* effect of a final decree of divorce.

- *Argue due diligence.* Texas has held that *res judicata "*prevents the relitigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit."[145] The attorney must be prepared to argue what is due diligence for a usual divorce petitioner, may be dramatically different for what due diligence means for a victim of IPV. The attorney must be prepared to offer psychological studies and perhaps expert testimony as to why an IPV victim can fail to bring a tort claims for many reasons other than a simple failure of due diligence.
- *Argue discovery rule.* In Texas, a cause of action does not accrue until the plaintiff knew or, exercising reasonable diligence, should have known of facts giving rise to a cause of action.[146] As mentioned, an IPV victim may not even realize that she was the victim of IPV. As a result, the victim may not even discover her cause of action until after a final decree of a divorce. Following the discovery rule, an IPV victim who does not discover the abuse until after the divorce, then the cause of action has not yet arisen and therefore can be brought after a final decree.

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[144] *Barr,* 837 S.W.2d at 629.
[145] *Id.* at 628.
[146] *Computer Associates Intern., Inc. v. Altai, Inc.,* 918 S.W.2d 453, 455 ("The discovery rule exception defers accrual of a cause of action until the plaintiff knew, or exercising reasonable diligence, should have known of the fats giving rise to the cause of action.").

- *Argue continuing tort.* Texas has recognized the concept of continuing tort for tolling the statute of limitations in an IPV situation.[147] A victim may still be stalked, harassed, or even physically abused by her spouse well past a final decree of divorce. If this is the case, then the cause of action will not accrue until after the continuous tort ends.

IX. CONCLUSION

The Texas *Twyman* rule clearly has effects adverse to IPV victims. It is unrealistic and unfair to treat IPV victims as business players who make rational litigation choices. Texas needs to recognize the unique nature of divorce actions, especially divorces from marriages in which IPV has occurred. Until this unique nature is recognized, IPV victims will never recover as fully as a victim who suffers from a tort-feasor who is not a spouse at the time of the abuse. In essence, in Texas we are punishing IPV victims for being married to their abusers. Such a situation is inequitable and must be remedied.

However, until the situation is remedied, attorneys in Texas need to both recognize and deal with the reality of *Twyman.* Situations in which an attorney either does not recognize the implications of IPV or the implications of *Twyman* or both are unacceptable. An IPV victim has just has much right to recover from her spouse as any victim has to recover from the tort-feasor. Sloppy and uninformed lawyering is inexcusable and will bar crucial remedies for IPV victims. Attorneys much understand *Twyman* and diligently pursue all available remedies for their client in order to recover for those who need it the most.

[147] *Franzetti v. Franzetti,* 120 S.W.2d 123 (Tex. Civ. App.–Austin 1938, no writ).