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TORTIOUS INTERFERENCE WITH VISITATION RIGHTS: A NEW AND IMPORTANT REMEDY FOR NON-CUSTODIAL PARENTS

Approximately forty-five percent of all marriages in the United States end in divorce.¹ Because of this high divorce rate, the issues of child custody and visitation have assumed major importance.² The very nature of divorce disrupts the parent-child relationship. The reason for this disruption is that non-custodial parents are generally unable to retain as much contact with their children after the separation.³ As a result, courts usually grant noncustodial parents reasonable visitation rights so they can maintain a continuous relationship with their children.⁴ Custodial parents, however, frequently disrupt these visitation agreements.⁵ This interference with visitation creates a tremendous amount of litigation involving the legal rights and remedies available to noncustodial parents.⁶ It is appar-

1. According to one authority, forty to fifty percent of children born during the 1970's will spend at least some time living in a single parent home. Hetherington, *Divorce: A Child's Perspective*, 34 AM. PSYCHOLOGIST 851 (1979). See also Feldman, *Perspective on Five Years of Practice Under the Illinois Marriage and Dissolution Act*, 1983 ILL. FAM. L. REP. 4 (current projections by the United States National Center for Health Statistics suggest forty eight percent of marriages will end in divorce).

2. In 1979, 1,170,000 couples were divorced. This is an increase of 40,000 from the number of divorces in 1978 and 400,000 increase from the number of divorces in 1970. 1980 Statistical Abstract of the United States 83.

3. One parent's loss of custody seriously restricts the amount of time the non-custodial parent sees the child. This loss of time together often weakens the emotional bond between the noncustodial parent and his child. J. WALLERSTEIN & J. KELLEY, *SURVIVING THE MARITAL BREAKUP* 122-46 (1980).

4. Court ordered visitation may provide for reasonable or liberal visitation rights with details to be worked out by the parties. C. FOOTE, R. LEVY & F. SANDER, *CASES AND MATERIAL ON FAMILY LAW* 431 (2d ed. 1976). Illinois' policy is to grant liberal visitation rights. *In Re Marriage of Brophy*, 96 Ill. App. 3d 1108, 1112, 421 N.E.2d 1308, 1311 (1981). See generally Note, *Visitation Beyond the Traditional Limitations*, 60 IND. L.J. 190, 195 (1981) (discussion on various types of visitation agreements).

5. One way a custodial parent can violate a visitation agreement is to move out of state without informing the noncustodial parent. *Ciganovich v. Ciganovich*, 61 Cal. App. 3d 289, 293-94, 132 Cal. Rptr. 261, 263-64 (1976). A custodial parent's improper influence on the children often interferes with the other parent's visitation rights. For example, the custodial parent tells the child that the other parent does not love or care for him, thus creating a situation where the child then avoids seeing the noncustodial parent. J. WALLERSTEIN, *supra* note 3, at 233. See generally Note, *Visitation Rights: Providing Adequate Protection for the Noncustodial Parent*, 3 CARDOZO L. REV. 431, 436-37 (1982) (discussion on various ways noncustodial parents visitation rights are frustrated).

6. Frequently a custodial parent's unreasonable behavior will lead to violation

ent from this litigation that noncustodial parents often lack adequate legal remedies.⁷ To combat this problem, there is a trend developing among many jurisdictions to recognize a noncustodial parent's right to bring a tort action against an interfering custodial parent or another third party.⁸

The courts have taken two approaches in recognizing noncustodial parents' tort claims. Under the first approach courts allow noncustodial parents to bring a general claim for intentional infliction of emotional distress.⁹ The second approach is to recognize a specific cause of action for tortious interference with a noncustodial parent's visitation rights.¹⁰ These tort actions are significant because they enable noncustodial parents to recover damages for emotional distress sustained as a result of custodial parents unlawful conduct.¹¹

In recent years, a number of legal remedies have been established to deter a noncustodial parent from violating custodial parent's custody rights. These remedies include a custodial parent's right to file contempt charges, seek state and federal statutory relief, and assert tort actions for custodial interference.¹² The courts, how-

of the visitation agreement, requiring the noncustodial parent to seek legal action in order to restrain the interfering parent. *Chance v. Chance*, 400 N.E.2d 1207, 1210 (Ind. 1980).

7. See *infra* notes 26-36, 40-42 and accompanying text for discussion on inadequacy of contempt orders, custody modification, and withholding child support as legal remedies for visitation violations.

8. In *Ruffalo v. United States*, 590 F. Supp. 706, 709 (W.D. Mo. 1984), a noncustodial mother was awarded damages for the government's tortious interference with her visitation rights. A noncustodial father was awarded twenty-five thousand dollars for emotional distress which resulted from the custodial parent violating his visitation right. *Memmer v. Memmer*, No. 45503 (Cir. Ct. Fairfax Cty. Va. No. 30, 1979), cited in Note, *supra* note 5, at 461.

9. In *Sheltra v. Smith*, 136, Vt. 472, 392 A.2d 431 (1978), the court recognized the noncustodial mother's claim for intentional infliction of emotional distress against the custodial father for his violation of the visitation order.

10. In *Ruffalo*, 590 F. Supp. at 711, the court held that a noncustodial parent could bring a specific cause of action for tortious interference with visitation. In order for the noncustodial parent to sustain such a claim he had to establish the defendant's interference was intentional and that he suffered compensable damages. *Id.*

11. In *Johannes v. Sloan*, No. 79L0169 (Cir. Ct. Kankakee Cty. Ill. March 26, 1981), a noncustodial father was awarded \$150,000 in damages for the emotional distress he suffered as a result of being denied visitation with his daughter.

12. The Uniform Child Custody Jurisdiction Act (UCCJA) 1-28, 9 U.L.A. Ill (1979), was largely established to deter noncustodial parents from abducting their children from custodial parents. This law establishes one jurisdictional forum, thus preventing the abducting parent from seeking a more favorable forum in another state. The UCCJA has been adopted by forty-seven states. The only states that have not adopted the UCCJA, are Massachusetts, Mississippi, and Texas. See Note, *The Tort of Custodial Interference — Toward a More Complete Remedy for Parental Kidnapping*, 1983 U. ILL. L.F. 229, 236 (1983). The RESTATEMENT (SECOND) OF TORTS § 700 (1977), recognizes a tort for interference with custody rights. This tort has been recognized in a number of jurisdictions where parents' custody rights have been violated. *Wood v. Wood*, 338 N.W.2d 123, 125 (Iowa 1983). See generally Note, *Abduc-*

ever, have been generally less enthusiastic in establishing viable remedies for a noncustodial parent.¹³ Nevertheless, recent decisions which acknowledge noncustodial parent's tort claims are an important step in affording both natural parents the same protections for maintaining an interference free relationship with their children.¹⁴

This comment first examines the inadequacies of traditional remedies available to noncustodial parents whose visitation rights have been obstructed. Next the analysis considers the benefits of new and developing tort actions available to noncustodial parents. The comment then examines current trends in Illinois regarding noncustodial parents claims for intentional infliction of emotional distress when denied their visitation privileges. Finally, this comment proposes that Illinois should recognize noncustodial parents' right to bring a specific cause of action for tortious interference with visitation.

VISITATION: A FUNDAMENTAL RIGHT

One of the most important liberties afforded constitutional protection is the freedom of parents and children to maintain and develop their relationship.¹⁵ This protection continues even in post-divorce situations.¹⁶ Courts, therefore, generally grant noncustodial parents reasonable visitation rights so they can maintain an ongoing

tion of Child by Noncustodial Parent: Damages for Custodial Parent's Mental Distress, 46 Mo. L. Rev. 829, 830 (1981) (discussion of parents' tort action for custodial interference).

13. The Uniform Child Custody Jurisdiction Act 1.28, 9 U.L.A. Ill (1979) has been applied almost exclusively to cases involving the protection of custodial parents' rights. See Note, *supra* note 12, at 236. The RESTATEMENT (SECOND) OF TORTS § 700 (1977) was created to protect the custody interest of custodial parents.

14. BLACK'S LAW DICTIONARY 347 (5th ed. 1979), defines visitation as a form of custody. The United States Supreme Court held that the law should not differentiate between custodial and noncustodial parents' rights when deciding which rights are constitutionally protected. *Quillon v. Walcott*, 434 U.S. 251, 255 (1978).

15. In *Franz v. United States*, 707 F.2d 582, 595 (D.C. Cir. 1983) the court held that noncustodial parents' visitation rights are constitutionally protected. The court specifically found that the parent child relationship is a "liberty interest" protected under U.S. CONST. amend. XIV, 1, which specifically states:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Id. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982), where the court held the U.S. CONST. amend. XIV 1, protects the fundamental liberty interest of natural parents in the care, custody and management of their children. See also *Stanley v. Illinois*, 405 U.S. 636, 651 (1977) (unwed father constitutionally protected in retaining custody rights of his children after custodial mother died).

16. *Franz*, 707 F.2d at 595, *cf.* *Armstrong v. Manzo*, 380 U.S. 545 (1965) (court held noncustodial parent's right to maintain legal relationship with child constitutionally protected so that when custodial mother remarried her new spouse could not adopt child).

relationship with their children.¹⁷

Courts and experts agree that providing reasonable visitation rights in divorce decrees is in the best interest of both the children and the noncustodial parents.¹⁸ Children are more secure, confident and psychologically at ease when they are able to maintain a regular relationship with both natural parents.¹⁹ Furthermore, noncustodial parents are less likely to suffer emotional distress or interfere with the other parent's legal custody rights when provided easy access to the children.²⁰ Courts as a consequence have logically concluded that visitation agreements are necessary in order to preserve the parent-child relationship.²¹ Thus, any party that wrongfully interferes with a visitation order is subject to various legal actions.²²

TRADITIONAL LEGAL REMEDIES

Contempt Order

The action most often taken against a party that violates a court's visitation order is a suit for civil contempt.²³ A contempt ac-

17. See *supra* note 4 for discussion of various types of visitation agreements.

18. Note, *Post Divorce Visitation: Study in Deprivation of Rights*, 27 DEPAUL L. REV. 113, 123 (1979) (author suggests that the harmful impact of divorce upon parent and child is greatly reduced when noncustodial parent maintains regular contact with children). See also *Weiss v. Weiss*, 52 N.Y.2d 170, 175, 418 N.E.2d 377, 380, 436 N.Y.S.2d 862, 865 (1981) (noncustodial parent still psychological guardian to children).

19. When a child is prevented from seeing one of his parents the child suffers a deep personal loss. Additionally, this loss of contact severely effects the child's opportunity to learn about himself. Bishop, *Child Custody: An Overview*, 53 CONN. B.J. 269, 277 (1979). See also Note, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUSE L. REV. 55, 83 (1969) (to increase mental development and self understanding children should have continual contact with noncustodial parent regardless of this person's inadequacies as a parent).

20. Custodial parents often seek to relocate in order to frustrate the noncustodial parents' visitation rights. Consequently noncustodial parents will sometimes abduct their own children from those custodial parents in an effort to maintain their parental relationship. Note, *A Proposed "Best Interests" Test for Removing A Child From the Jurisdiction of the Noncustodial Parent*, 51 FORDHAM L. REV. 489, 493 (1982).

21. *Frail v. Frail*, 54 Ill. App. 3d 1013, 1015, 370 N.E.2d 303, 304 (1977) (liberal visitation in children's best interest), *Porter v. Porter*, 25 Ohio St.2d 123, 128, 267 N.E.2d 299, 303 (1971) (parent has right to maintain relationship with children free of custodial parent's interference).

22. A party that interferes with a legal visitation order is subject to civil contempt. *People ex. rel. Argo v. Henderson*, 97 Ill. App. 3d 425, 428, 422 N.E.2d 1005, 1008 (1981). The court can order a custody change if the custodial parent continually violates a visitation agreement. *Ciganovich v. Ciganovich*, 61 Cal. App. 3d 289, 291, 132 Cal. Rptr. 261, 264 (1976). A noncustodial parent can withhold child support when wrongfully denied visitation. *Mossey v. Mossey*, 471 S.W.2d 770 (Ark. 1970). Similarly, a custodial parent may forfeit alimony if she violates the visitation order. *Briggs v. Briggs*, 65 N.E.2d 9, 11 (Mass. 1946).

23. Most courts hold that a noncustodial parent's proper remedy for a violation of a visitation agreement is a contempt order. *People ex. rel. Winger v. Young*, 78 Ill.

tion seeks to compel the offender to comply with the court order.²⁴ A party found in contempt may be subject to fines and repeated refusals to obey the court order could lead to imprisonment.²⁵

Nevertheless, a civil contempt action is an inadequate remedy for noncustodial parents seeking to have their visitation rights upheld. A number of reasons support this conclusion. First, a motion for a civil contempt order is frequently denied by the courts.²⁶ The most common reason for this denial is the divorce decree usually fails to adequately define the visitation terms.²⁷ Additionally, contempt proceedings are frequently time consuming, costly, and often negatively impact the children.²⁸

Furthermore contempt orders are difficult to enforce. This problem frequently arises when the custodial parent takes the children out of state in order to avoid compliance with the visitation agreement. Once the parent enters another jurisdiction, the enforceability of the contempt order is greatly diminished.²⁹ A final reason contempt orders are an inadequate remedy is that they fail to compensate the noncustodial parent for injuries resulting from the defendant's wrongful interference.³⁰

App. 3d 512, 513, 397 N.E.2d 253, 254 (1979). See also *McGrady v. Rosenbaum*, 62 Misc.2d 182, 188, 308 N.Y.S.2d 181, 188 (1970), *aff'd*, 37 A.D.2d 917, 324 N.Y.S.2d 876 (1971) (court held proper remedy was civil contempt action when custodial parent frustrated noncustodial parent's visitation rights).

24. Judicial sanctions for civil contempt are employed for the purpose of coercing the defendant into compliance and compensating the complainant for losses sustained. *United States v. United Mine Workers*, 330 U.S. 303, 305 (1947).

25. *Ex Parte McManus*, 589 S.W.2d 790, 791 (Tex. 1977) (noncustodial husband imprisoned for violating contempt order when he failed to make court ordered child support payments).

26. *Kranis v. Kranis*, 313 So.2d 135, 139 (Fla. 1975) (courts should be cautious in recognizing contempt actions in domestic relations cases).

27. Provisions in divorce decrees concerning custody or visitation rights should be definite. When such provisions in a decree are vague the courts will dismiss the contempt charge. *Clark v. Clark*, 404 N.E.2d 23, 37 (Ind. 1980). See generally Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modifications*, 65 CALIF. L. REV. 978, 997 (1977) (courts require visitation orders to be specific in order to be enforceable).

28. Courts are reluctant to find a custodial mother in contempt because of the harmful effect it would have on her children. *Bessette v. Bessette*, 137 Vt. 227, 228, 401 A.2d 911, 912 (1979).

29. *E.g.*, *Rosin v. Superior Ct.*, 181 Cal. App. 2d 497, 499, 5 Cal. Rptr. 429, 431 (1969) (court unable to enforce contempt order against custodial mother that moved out of state with children therefore father could not exercise visitation rights).

30. A contempt order will not provide compensation to a parent for emotional distress. *Wood v. Wood*, 338 N.W.2d 120, 123 (Iowa 1983). See generally Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103 (1981) (contempt actions do not adequately deter parental interference, nor do they compensate the injured parent).

Modification of Custody Decrees

Another remedy available to noncustodial parents denied their legal visitation rights is to seek a modification of the custody decree.³¹ Generally, a modification requires the moving party to demonstrate that a substantial change in circumstances has occurred and that a modification will be in the child's best interest.³² In cases where a custodial parent neglected the child's health and well-being or where a parent willfully violated visitation orders, courts have occasionally ruled in favor of a custody change.³³

Courts, however, are usually reluctant to order custody changes, even where the custodial parent knowingly violates a visitation order.³⁴ The courts' rationale is that modification orders seriously disrupt the child's life, and therefore, the child should not be punished for the custodial parent's wrongful conduct.³⁵ Unless a noncustodial parent can prove that the child will be benefitted by a change in custody, the courts will generally not grant such a change.³⁶

There is a trend among several jurisdictions to relax the custody modification standards.³⁷ These courts have abolished the require-

31. The law in every state permits the courts to modify orders directing the custody of a child upon the divorce of his parents. H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 17.7 (1968). In *Ciganovich v. Ciganovich*, 61 Cal. App. 3d 289, 290, 132 Cal. Rptr. 261, 262 (1976), the custodial mother intentionally concealed the whereabouts of her children, thus sabotaging the father's visitation rights. The court granted the father a motion for custody modifications. *Id.*

32. In *Nabors v. Nabors*, 418 So.2d 143 (Ala. 1982), the court held that a party seeking to modify a child custody decree must prove that a material change of circumstances had occurred since the initial custody judgment. See generally Foster & Freed, *Child Custody*, 39 N.Y.U. L. REV. 615, 623 (1964) (court considerations in granting custody modifications).

33. It is clearly inconsistent with children's best interests when custodial mothers prevent the children from seeing their natural father. Such conduct raises a strong probability that the mother is an unfit custodial parent. *Enwistle v. Enwistle*, 61 A.D.2d 380, 402 N.Y.S.2d 213 (1978). See also *Newsome v. Newsome*, 256 S.E.2d 847, 849 (Ga. 1976) (court granted modification in favor of father when custodial mother's homosexual living partner engaged in sexual play with the daughter).

34. In *re Marriage of Milkelson*, 299 N.W.2d 670, 671 (Iowa 1980) the court held that "[o]nce custody of children has been fixed it should be disturbed only for the most cogent reasons." See also *Pamela v. Roger*, 419 A.2d 1301, 1309 (Pa. 1980) (court held custodial father's deliberate obstruction of mother's right to visit child not of sufficient magnitude to justify custody change).

35. "It is usually in best interest of child to avoid shifting custody from one parent to another whenever possible." *DeFrancesco v. MacNary*, 74 A.D.2d 966, 967, 425 N.Y.S.2d 885, 886 (1980). See also *In re Custody of Potts*, 83 Ill. App. 3d 518, 522, 404 N.E.2d 446, 449 (1980) (court denied noncustodial mother's motion for custody change even though father violated visitation order because children would be taken out of healthy family environment and likely suffer if modification granted).

36. The parent seeking a custody change must show a superior claim based on an ability to minister the child's needs more effectively than the custodial parent. *Ivins v. Jennings*, 308 N.W.2d 75, 78 (Iowa 1981).

37. For discussion of the various standards courts use for determining custody modifications see *Wexler, Rethinking The Modification of Child Custody Decrees*, 94

ment that the moving party show a substantial change in circumstances. Instead, the party is only required to show that a modification would clearly be in the child's best interest.³⁸ This trend, however, has had no apparent effect on the courts' willingness to grant custody changes in cases where the custodial parent has intentionally violated a visitation order.³⁹ Thus, custodial modification is still so infrequently granted that it fails to represent a viable remedy for noncustodial parents denied their visitation rights.

Withholding Child Support

Withholding child support payments is another remedy occasionally granted to noncustodial parents for visitation violations. Courts, however, generally hold that noncustodial parents' visitation rights are independent from their duty to make child support payments.⁴⁰ Therefore, noncustodial parents are usually not allowed to withhold child support payments even when the custodial parent intentionally violates the visitation agreement.⁴¹ The courts' rationale is that the child would suffer if support payments were withheld, and that they should not be victimized for the custodial parent's unlawful behavior.⁴²

Nevertheless, courts have found that under exceptional circumstances, a noncustodial parent can withhold support payments until

YALE L.J. 757 (1985).

38. In *Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982), the court held that the child's best interest was the only consideration in determining whether a custodial decree should be modified. Similarly, in *Hill v. Hill*, 228 Kan. 680, 620 P.2d 1114 (1980), the Kansas Supreme Court rejected the requirement that the moving party show a change in circumstances in order to establish a claim for custodial modification. Illinois, however, applies a traditional standard for modifying a custody decree, requiring the plaintiff show a change in material circumstances since the decree was issued and that a custody change would be in the children's best interest. *Kraft v. Kraft*, 108 Ill. App. 3d 590, 597, 439 N.E.2d 491, 496 (1982).

39. See *Wexler*, *supra* note 38, at 816 for discussion on how traditional and new standards for custody modification effect the rights of noncustodial parents. There are currently no cases that suggest these standards will effect a noncustodial parent's right to be granted a custody modification in the event a custodial parent violates an established visitation agreement. *Id.*

40. *People, ex. rel. Winger v. Young*, 78 Ill. App. 3d 512, 397 N.E.2d 253 (1979) (noncustodial parent not allowed to withhold child support payments when denied legal visitation rights).

41. *Id.* See also *Hess v. Hess*, 87 Ill. App. 3d 947, 952, 409 N.E.2d 497, 500 (1980) (court held custodial mother's violation of visitation order did not give father right to withhold support payments). See generally H. CLARK, *LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 504 (1968) (most courts deny noncustodial parent's request to stop making support payments even if parent denied visitation).

42. *Cooper v. Cooper*, 59 Ill. App. 3d 457, 375 N.E.2d 925, 926 (1978) (court would not relieve father from support payment when welfare of children would be adversely affected).

the other parent complies with the visitation order.⁴³ For example, in cases where the custodial parent continually violates the contempt order, non-payment is allowed.⁴⁴ Moreover, courts occasionally permit the noncustodial parent to withhold child support for visitation violations, provided that non-payment would not adversely affect the child.⁴⁵ In these cases where the custodial parent can maintain the household without child support payments, the courts should be more willing to permit non-payment. The threat of potentially losing child support may act to deter a custodial parent with a modest income from interfering with the visitation agreement.

NEW TORT REMEDIES FOR INTERFERENCE WITH VISITATION

One serious flaw with these traditional remedies is that they fail to adequately compensate noncustodial parents. Noncustodial parents frequently suffer an assortment of injuries when denied access to their children. These parents often suffer severe depression, anxiety, nervousness and various other forms of emotional distress when they are prevented from communicating with or visiting their children.⁴⁶ In addition, noncustodial parents often suffer physical disorders and significant financial losses as a result of being denied their visitation rights.⁴⁷ These financial losses include all the necessary legal fees to enforce the visitation order, loss of earnings and medical

43. See *Slaughter, Refusal to Pay Child Support in Response to Visitation Interference*, 13 Mich. B.J. 1147 (1984) (for discussion on nonpayment of support as a defense when noncustodial parent is wrongfully denied visitation rights).

44. In *Chazen v. Chazen*, 107 Mich. App. 485, 309 N.W.2d 612 (1981) for years the noncustodial father consistently made his child support payment. When the custodial mother deliberately interfered with the father's right to see his children, he withheld support payments. The court upheld the father's right to withhold support because of the custodial mother's continuous misconduct. *Id.* Similarly, in *Massey v. Massey*, 471 S.W.2d 770, 772 (Ark. 1970), the court allowed the noncustodial parent to terminate support payments when denied visitation.

45. In *Barker v. Barker*, 366 Mich. 624, 115 N.W.2d 367 (1962), the custodial mother remarried and the children were adequately provided for. The court held that the noncustodial father was not required to continue support payments, when the mother blocked his visitation rights. See also *Pronesti v. Pronesti*, 360 Mich. 453, 118 N.E.2d 254 (1962) (custodial mother concealed children from father violating visitation order, court cancelled payments since mother's conduct indicated no child need).

46. The interfering parties will sometimes take the children out of state without informing the noncustodial parent. Consequently, the noncustodial parent can suffer tremendous anxiety worrying about the safety of his children. Additionally, this parent may suffer severe depression because he is unable to spend time with his children. *McGrady v. Rosenbaum*, 62 Misc.2d 182, 308 N.Y.S.2d 181 (1970), *aff'd*, 37 A.D.2d 917, 324 N.Y.S.2d 876 (1971).

47. A noncustodial father suffered severe emotional distress, and resulting physical complications when denied access to his own children for a number of years. *Johannes v. Sloan*, No. 79L0169 (Cir. Ct. Kankakee Cty. Ill., March 26, 1981); *McGrady*, 62 Misc. 2d 182, 308 N.Y.S.2d 181 (1970), *aff'd* 37 A.D.2d 917, 324 N.Y.S.2d 876 (1971) (noncustodial father spent over five thousand dollars to locate children).

expenses.⁴⁸ Noncustodial parents can, however, only be compensated for these losses in jurisdictions that recognize their right to bring a specific cause of action for tortious interference with visitation.⁴⁹

There are several compelling reasons why all jurisdictions should recognize a noncustodial parent's specific cause of action for tortious interference with visitation. First, the traditional remedies previously discussed are inadequate.⁵⁰ This is especially true of a civil contempt action which, in many jurisdictions, is the only remedy available.⁵¹ A contempt finding will not order the offending party to compensate the injured parent for the financial losses and emotional distress resulting from the visitation violations.⁵²

Another important reason noncustodial parents should be entitled to recover under this tort theory is that such a remedy is already available to custodial parents.⁵³ According to the Restatement (Second) of Torts section 700, a custodial parent can bring a cause of action against any party that abducts or intentionally induces the child to leave home.⁵⁴ The custodial parent can recover damages from the interfering party for emotional distress and other reasonable expenses resulting from the offense.⁵⁵ The tort's general aim is to protect the parent-child relationship and the Restatement specifi-

48. Noncustodial father suffered twenty-five thousand dollars in damages as a result of custodial mother denying him a right to visit his daughter. *Memmer v. Memmer*, No. 45503 (Cir. Ct. Fairfax Cty. Va., Nov. 30, 1979), *Cited in*, Note, *supra* note 5, at 461. *Id.*

49. A tort remedy grants an injured parent a means of recovering out of pocket expenses. Katz, *Legal Remedies for Child Snatching*, 15 *FAM. L.Q.* 103, 117 (1981). In addition, the major advantage of a tort remedy is that it is the most effective means for making an injured parent emotionally and financially whole. *Id.*

50. See *supra* notes 21-43 and accompanying text for discussion on inadequacy of traditional remedies.

51. *Clark v. Clark*, 1 Ill. App. 3d 69, 273 N.E.2d 26 (1974) (noncustodial father's only remedy when denied visitation is filing contempt action against custodial mother). See also, *McGrady*, 62 Misc. 2d 182, 308, N.Y.S.2d 181, 184 (1970), *aff'd*, 37 A.D.2d 917, 324 N.Y.S.2d 876 (1971) (parent denied visitation could not bring action for damages, could only seek contempt order).

52. The remedy against a spouse who violates a court order respecting custody or visitation is a motion for contempt not an action for damages. *In re Dillon*, 278 A.D. 735, 103 N.Y.S.2d 261 (1951).

53. RESTATEMENT (SECOND) OF TORTS § 700 comment d (1977). Under this tort a party is liable to the custodial parent if the wrongdoer abducts a minor child, induces the child to leave home without the custodial parent's consent, or prevents a child from returning home. See also W. PROSSER & W.P. KEATON, PROSSER AND KEATON ON TORTS § 124 (5th ed. 1984) (for further discussion on development and application of tort for custodial interference. See generally Note, *Abduction of Child by Noncustodial Parent: Damages for Custodial Parent's Mental Distress*, 46 *MO. L. REV.* 829 (1981) (discussion on cases where custodial parents recovered under this tort remedy).

54. RESTATEMENT (SECOND) OF TORTS § 700 comment d (1977).

55. The parent can recover damages for loss of society of his child, for emotional distress and for the reasonable expenses incurred in regaining custody. Traditionally the injured parent could also recover for a loss of the child's service. W. PROSSER & W.P. KEATON, PROSSER AND KEATON ON TORTS § 124 (5th ed. 1984).

cally notes the importance of protecting the custody rights of custodial parents.⁵⁶

A cause of action for tortious interference with visitation rights also protects the parent-child relationship. This remedy, however, protects the rights of noncustodial parents to continue a relationship with their children free from interference.⁵⁷ The rationale for applying the Restatement (Second) of Torts section 700 to include noncustodial parents is that both natural parents are equally entitled to maintain ongoing relations with their children.⁵⁸

An additional reason for recognizing parent's tort claim is that it will deter some parties from obstructing established visitation orders.⁵⁹ Custodial parents often ignore contempt orders for visitation violations because courts are reluctant to imprison violators.⁶⁰ A court, however, is considerably more likely to enforce a judgment for damages against a liable defendant.⁶¹ Therefore, this increased risk of pecuniary liability would deter parties from deliberately violating visitation agreements.

Despite the sound reasons for recognizing a claim for tortious interference with visitation, several arguments have been made as to the impracticality of such a remedy. First, tort actions are often costly and time consuming.⁶² Moreover, the interfering party is usually a custodial mother, and statistics indicate that many of these women earn modest salaries and have limited financial resources.⁶³

56. RESTATEMENT (SECOND) OF TORTS § 700 comment d (1977).

57. A custodial parent who violates a visitation order is indistinguishable from a noncustodial parent who ignores a court order awarding custody. *Pamela J.K. v. Rodger D.J.*, 277 Pa. Super. 579, 594, 419 A.2d 1301, 1309 (1980). In *Ruffalo v. United States*, 590 F. Supp. 706, 711 (W.D. Mo. 1984), the court found the government liable for interfering with the noncustodial mother's visitation rights.

58. Courts generally grant one parent legal custody of the children while the other parent receives reasonable visitation rights. The purpose of this arrangement is to enable parents and children to maintain their relationship. R. MOONKIN, CHILD, FAMILY AND STATE 643 (1978). A parent's custodial and visitation rights are constitutionally protected. *Franz v. United States*, 707 F.2d 582, 584 (D.C. Cir. 1983).

59. There are specialists in family law who view damage suits as a useful means for deterring parents from violating visitation and custody agreements. *Ruffalo v. United States*, 590 F. Supp. 706, 712 (W.D. Mo. 1984). See also Katz, *Legal Remedies for Child Snatching*, 15 FAM. L.Q. 103, 105 (1981) (for discussion on the deterrent effect a tort for custodial interference can have on parental kidnapping).

60. *Bessette v. Bessette*, 137 Vt. 227, 228, 401 A.2d 911, 912 (1979) (custodial parent found in contempt for violating visitation order, however, no punishment ordered because it could harm children). See also News Note, 6 FAM. L. REP. (BNA) 2650 (1980) (for first time judge jailed custodial parent for willfully violating visitation order).

61. See Hoff, *Interstate Child Custody Disputes and Parental Kidnapping*, POLICY PRACTICE AND LAW 14-1, 14-5 (1982) (courts are increasingly recognizing tort claims for parental interference).

62. Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L.F. 121, 191 (1983).

63. Mothers obtain custody over 80% of the time in divorce cases. J. WALLER-

Thus, the plaintiff's cost of litigation is not likely to produce a significant judgment for damages. Finally, a judgment for damages against the custodial parent may adversely effect the economic well-being of the children.⁶⁴

LEGAL TREND FAVORING TORT REMEDY

Despite these arguments there is a recent trend in several jurisdictions allowing a noncustodial parent to bring tort actions for interference with visitation rights.⁶⁵ These courts have taken two approaches in recognizing a tort action for visitation violations. The first approach recognizes a noncustodial parent's claim based on the tort of intentional infliction of emotional distress.⁶⁶ The court's second approach is to recognize an independent cause of action for tortious interference with visitation.⁶⁷ Unlike a general claim for intentional infliction of emotional distress, this cause of action applies only to cases involving interference with a noncustodial parent's visitation rights.⁶⁸

First Approach: Intentional Infliction of Emotional Distress

The first case that recognized a noncustodial parent's cause of action based on the tort of intentional infliction of emotional dis-

STEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 121 (1980). One third of these women are in a struggle for survival, while another half live modestly. *Id.* at 185-6.

64. The courts' primary consideration in child custody and visitation cases is the best interest of the child. *Jarrett v. Jarrett*, 78 Ill. 2d 337, 339, 400 N.E.2d 421, 423 (1980). Allowing damages against a custodial mother for interference can substantially impair the custodian's ability to support her children. *McGrady*, 62 Misc.2d 182, 185, 308 N.Y.S.2d 181, 186 (1970), *aff'd*, 37 A.D.2d 917, 324 N.Y.S.2d 876 (1971).

65. *Ruffalo*, 590 F. Supp. 706 (W.D. Mo. 1984) (noncustodial mother recovered damages for tortious interference with her visitation rights), *Sheltra v. Smith*, 136 Vt. 472, 392 A.2d 431 (1978) (noncustodial mother whose visitation rights obstructed stated cause of action for intentional infliction of emotional distress). For a discussion on noncustodial parents bringing an action for intentional infliction of emotional distress see generally, Note, *Visitation Rights: Providing Adequate Protection for the Noncustodial Parent*, 3 CARDOZO L. REV. 431, 455 (1982).

66. *Sheltra*, 136 Vt. 472, 392 A.2d 431 (noncustodial mother suffered severe emotional distress when denied access to daughter), *Rodgers v. Rodgers*, No. 82L010593 (Cir. Ct. Cook Cty. Ill., July 15, 1983) (noncustodial father wrongfully deprived visitation rights sustained action for intentional infliction of emotional distress).

67. In *Ruffalo*, 590 F. Supp. at 706, the court found that the liability for violating a custody agreement should be virtually the same as interfering with a visitation order. *Id.* at 711.

68. In *Ruffalo*, 590 F. Supp. at 711, the court relied on similar cases involving custodial interference in order to establish a cause of action for tortious interference with visitation. See also *Kramer v. Leinweber*, 642 S.W.2d 364 (Mo. 1982) (mother recovered damages from noncustodial father for interference with her custody right); *Lloyd v. Loeffler*, 694 F.2d 489, 495 (7th Cir. 1982) (Wisconsin law recognizes tort action for unlawful intentional interference with parent's custody right).

tress was *Shetra v. Smith*.⁶⁹ In *Shetra*, the custodial father rendered it impossible for the noncustodial mother to visit or communicate with her daughter.⁷⁰ As a result, the mother suffered severe emotional distress and subsequently filed a suit for damages against the custodial father.⁷¹ The court held that according to the Restatement (Second) of Torts section 46,⁷² the plaintiff stated a cause of action for intentional infliction of emotional distress.⁷³

The legal ramifications of the *Shetra* decision are significant. According to *Shetra*, any jurisdiction that recognizes the tort for intentional infliction of emotional distress should acknowledge a noncustodial parent's claim provided a prima facie case is established.⁷⁴ The Restatement defines the elements for intentional infliction of emotional distress as: 1) outrageous conduct by the defendant, 2) done intentionally or with reckless disregard, 3) severe emotional distress to the plaintiff, and 4) that the defendant's conduct was the proximate cause of plaintiff's injury.⁷⁵ In cases where noncustodial parent's visitation rights have been obstructed, a cause of action for intentional emotional distress should be brought because most jurisdictions recognize this tort.⁷⁶ The problem with a cause of action for intentional infliction of emotional distress, however, is that it is frequently difficult to sustain.⁷⁷ The plaintiff is often unable to prove

69. 136 Vt. 472, 392 A.2d 431 (1978).

70. *Id.*

71. *Id.*

72. RESTATEMENT (SECOND) OF TORTS 46 (1965). A plaintiff that suffers severe emotional distress may recover damages if the defendant's wrongful conduct was outrageous. For discussion of what constitutes outrageous conduct see *Savage v. Boies*, 77 Ariz., 77 Ariz. 355, 272 P.2d 349 (1954) (court found defendant's conduct outrageous, exceeding all bounds tolerated by society when he lied, convincing plaintiff that her child and husband were seriously injured).

73. *Shetra*, 136 Vt. 472, 392 A.2d 432. Court found that noncustodial mother's complaint adequately stated a prima facie case for intentional infliction of emotional distress. The complaint stated that the custodial father's conduct was intentional and outrageous, and that it was the proximate cause of plaintiff's severe emotional distress. *Id.*

74. *Johannes v. Sloan*, No. 79L0169 (Cir. Ct. Kankakee Cty., Ill., March 26, 1981) (noncustodial parent denied visitation rights recovered damages under tort for intentional infliction of emotional distress) Cf. *Wasserman v. Wasserman*, 671 F.2d 832, 834 (4th Cir. 1982) (court heard custodial parent's claim for intentional infliction of emotional distress against noncustodial parent that removed children from home).

75. RESTATEMENT (SECOND) OF TORTS § 46 (1965). See also W. PROSSER & W.P. KEATON, PROSSER AND KEATON ON TORTS § 12 (5th ed. 1984) (discussion on elements for intentional infliction of emotional distress).

76. Practically every jurisdiction in the United States currently recognizes the tort for intentional infliction of mental distress. Handford, *Intentional Infliction of Mental Distress: Analysis of the Growth of a Tort*, 8 ANGLO-AM. L. REV. (1979). See also Note, *Minnesota's "New Tort": Intentional Infliction of Emotional Distress-Hubbard v. United Press International, Inc.*, 330 N.W.2d 428 (Minn. 1983), 10 WM. MITCHELL L. REV. 349 (1984), for discussion on Minnesota's recent recognition of intentional infliction of emotional distress.

77. Several reasons have been advanced for the court's reluctance to redress mental injuries. One is the difficulty of proving damages for mental distress. Second,

that the defendant's conduct was outrageous.⁷⁸ Additionally, it is difficult to establish that the plaintiff has suffered severe emotional distress.⁷⁹ Thus, a court that is reluctant to recognize this cause of action for violations of visitation agreements may easily reject the noncustodial parent's claim. The court can simply find that the interfering party's conduct was less than outrageous, or that the non-custodial parent's emotional injury was not sufficiently severe.

*Second Approach: Independent Tort for Interference
With Visitation*

*Ruffalo v. United States*⁸⁰ is the first case to expand the tort for custodial interference so that noncustodial parents could bring a similar suit when their visitation rights were wrongfully obstructed.⁸¹ The court established a distinct cause of action for tor-

the tort opens the door to numerous fictitious claims because plaintiffs are likely to file suits based on the defendant's mere bad manners. W. PROSSER & W.P. KEATON, PROSSER & KEATON ON TORTS § 12 (5th ed. 1984). See also *Wallace v. Shoreham Hotel Corp.*, 49 A.2d 81 (D.C. 1946) (court refused to recognize cause of action based on allegations that defendant's employee publicly insulted plaintiff).

78. The outrageousness requirement substantially limits those who can recover. Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42,54 (1982). See also *Public Fin. Corp. v. Davis*, 66 Ill. 2d 85, 94-5, 360 N.E.2d 765, 769 (1976) (although it was clear defendant's employees disturbed plaintiff and possibly caused her emotional distress, complaint failed to stated claim since it contained insufficient allegations of extreme or outrageous conduct).

79. In order to be actionable, the plaintiff's emotional distress must be of such intensity and duration that no reasonable person could be expected to endure it. It is not enough that plaintiff experience nervousness, fright or worry. *Farnor v. Irmco Corp.*, 73 Ill. App. 3d 851, 392 N.E.2d 591 (1979).

80. 590 F. Supp. 706 (W.D. Mo. 1984).

81. The *Ruffalo* court relied on earlier decisions that recognized custodial parents' claims for tortious interference in order to establish a tort remedy for noncustodial parents whose visitation rights have been obstructed. *Id.* at 711. A claim for tortious interference with custody has already been recognized in almost every jurisdiction that has addressed the issue. See *Fenslage v. Dawkins*, 629 F.2d 1107, 1109 (5th Cir. 1980) (applying Texas law); *Hinton v. Hinton*, 436 F.2d 211, 213 (D.C. Cir. 1970) (court recognized action for custodial interference); *Lloyd v. Loeffler*, 539 F. Supp. 998 (E.D. Wis. 1982) (applying Wisconsin law); *Kajtazi v. Kajtazi*, 488 F. Supp. 15, 18 (E.D.N.Y. 1978) (applying New York law); *Rosefield v. Rosefield*, 221 Cal. App. 2d 431, 435-37, 34 Cal. Rptr. 479, 483 (1963) (court recognized custodial parents tort claim); *Wood v. Wood*, 338 N.W.2d 123 (Iowa 1983) (court ruled to follow overwhelming trend in recognizing tort for custodial interference); *Brown v. Brown*, 338 Mich. 492, 498, 61 N.W.2d 656, 659 (1953) (one of earliest cases to recognize tort for custodial interference); *Kipper v. Vokolek*, 546 S.W.2d 521 (Mo. 1977) (noncustodial parent liable for damages); *LaGrenade v. Gordon*, 46 N.C. App. 329, 331-32, 264 S.E.2d 757, 758-59 (1980) (custodial mother sued noncustodial father and his parents for damages for conspiracy to abduct children); *McBride v. Magnuson*, 282 Or. 433, 436, 578 P.2d 1259, 1260 (1978) (mother established cause of action against police officer for custodial interference). *But see* *Friedman v. Friedman*, 79 Misc.2d 646, 647, 361 N.Y.S.2d 108, 110 (1974) (court refused to entertain action between parents for mental anguish resulting from interference with custody of child).

tious interference with visitation rights.⁸² This cause of action as defined in *Ruffalo*, removes some of the difficulties posed in an action for intentional infliction of emotional distress.⁸³ Therefore, under this new tort an injured parent has a greater likelihood of being compensated for visitation violations.

In *Ruffalo*, a noncustodial mother filed suit against the United States government for interfering with her right to communicate and visit with her children.⁸⁴ The plaintiff's former spouse was admitted into the federal government's witness protection program.⁸⁵ The government relocated the plaintiff's former spouse and his children and provided them with new identities.⁸⁶ The plaintiff was not informed of the whereabouts of her children.⁸⁷ The government also prevented the plaintiff from communicating with or seeing her children for over four years.⁸⁸ The court found that the government had intentionally interfered with the plaintiff's visitation rights and

82. *Ruffalo*, 590 F. Supp. at 711.

83. *Id.* at 709. The plaintiff stated a cause of action when she established that the defendant intentionally interfered with her visitation rights and that the defendant's wrongful conduct caused her injuries. *Id.* See *supra* notes 73, 78 and accompanying text for discussion on plaintiff's difficulty in establishing a *prima facie* case for intentional infliction of emotional distress.

84. The Federal Torts Claim Act (FICA), 28 U.S.C. 1346(6) (1983), states under what circumstances an individual citizen can bring an action against the United States government. Specifically, 28 U.S.C. 1346(b) (1983) states:

The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States for money damages . . . for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. The court in *Ruffalo*, 590 F. Supp. at 707, held that the FTCA the plaintiff was entitled to bring her action against the government agents for tortious interference with her visitation rights.

85. *Id.* Congress established the Witness Protection Program under title V of the Organized Crime Control Act of 1970. 18 U.S.C. 3481 (1983). Under the Witness Protection Program a witness that testifies against members of organized crime is granted protection. The United States Marshall's Service relocates the witness and his family, and provides them with new identities. *Id.* In *Ruffalo*, 590 F. Supp. at 707, the Marshalls did not inform the plaintiff that here children had been relocated with their father under the Witness Protection Program. See also *Franz v. United States*, 707 F.2d 582, 585 (D.C. Cir. 1983) (noncustodial father prevented from seeing children when custodial mother relocated under Witness Protection Plan). See generally Comment, *The Witness Protection Program: Investigating the Right to Companionship, Due Process and Presumption*, 59 NOTRE DAME L. REV. 431 (1984) (discussion on government's obligations to parents and children effected by Witness Protection Program).

86. *Ruffalo*, 509 F. Supp. at 707.

87. *Id.*

88. *Id.* The court held that the government Marshall's failure to persuade the custodial father to comply with the visitation agreement constituted intentionally wrongful conduct. *Id.* at 709.

awarded her damages for emotional distress and financial losses.⁸⁹

The *Ruffalo* court applied Missouri law in reaching its decision.⁹⁰ The court found, however, that Missouri had never previously considered whether a noncustodial parent could recover damages for tortious interference.⁹¹ Nevertheless, Missouri did recognize the tort for custodial interference.⁹² The court, therefore, reasoned that a defendant is just as liable for interfering with a visitation agreement as he is for violating a custody decree.⁹³ Thus, the court concluded that Missouri recognizes a cause of action for tortious interference with visitation.⁹⁴

The *Ruffalo* decision is bold and innovative. The tort remedy established in *Ruffalo* offers much greater protection to noncustodial parents than a claim for intentional infliction of emotional distress.⁹⁵ In order to establish liability under *Ruffalo*, the defendant's wrongful conduct had to be intentional and the plaintiff had to suffer compensable damages.⁹⁶ These elements are reflective of those required for establishing a cause of action for interference with full custody.⁹⁷ Thus, a noncustodial parent should be able to establish a cause of action under the *Ruffalo* approach far easier than establishing a *prima facie* case for intentional infliction of emotional distress.

89. *Id.* at 714. Plaintiff asserted a claim in excess of one million dollars for destruction of her right to custody, denial of due process and interference with her visitation rights. The court, however, viewed the plaintiff's claim more narrowly in awarding damages only for the period of time the plaintiff was prevented from visiting and orally communicating with her children. *Id.* at 708.

90. *Id.* at 711. Under the Federal Tort Claims Act, 28 U.S.C. 1346(b) (1983), ". . . the law of the state where the government's wrongful act occurred shall apply. . . ." Since the marshalls violated Mrs. Ruffalo's visitation rights in Missouri, its law applies. *Ruffalo*, 590 F. Supp. at 711.

91. *Id.*

92. *Id.* See *Kramer v. Leinweber*, 642 S.W.2d 364 (Mo. 1982) (custodial mother awarded damages in action against former spouse and his mother for interfering with plaintiff's custody rights).

93. *Ruffalo*, 590 F. Supp. at 711.

94. *Id.* at 713. The court, in reaching its decision, stated "[w]hile I must necessarily make an educated guess as to state law, I conclude that most state courts would now recognize a damage suit for interference with visitation rights." *Id.*

95. See *supra* notes 80-82 and accompanying text for discussion on advantages of specific claim for tortious interference. See also Novinson, *supra* note 62, at 191 (discussion on problems noncustodial parents encounter in establishing claim for intentional infliction of emotional distress).

96. *Ruffalo*, 590 F. Supp. at 709. The court held that defendant's relocating plaintiff's children without informing her was intentional and wrongful conduct. As a result of defendant's unlawful conduct, the plaintiff was awarded damages for emotional distress. *Id.* See *Franz v. United States*, 707 F.2d 582, 590 (D.C. Cir. 1983) (court held government marshalls' conduct was wrongful when they failed to insist that custodial parent in Witness Protection Program provide noncustodial parent with access to children).

97. In *Wood v. Wood*, 338 N.W.2d 123, 127 (Iowa 1983), the court found the noncustodial parent acted wrongfully when he intentionally failed to return the children under the terms of the dissolution agreement and, therefore, the custodial parent was entitled damages for her resulting emotional distress.

Another advantage to a tort claim under the *Ruffalo* approach is that the noncustodial parent has a greater range of recoverable damages. Under intentional infliction of emotional distress, the usual damages only compensate the plaintiff's severe emotional distress.⁹⁸ A specific cause of action for tortious interference with visitation, however, enables a noncustodial parent to recover damages for emotional distress as well as the legal fees and other costs for reestablishing the visitation order.⁹⁹

ILLINOIS SHOULD ADOPT A SPECIFIC TORT FOR INTERFERENCE WITH VISITATION

It is the sound policy of Illinois to encourage parents and children to retain a strong relationship in post divorce situations.¹⁰⁰ Illinois has adopted liberal visitation rights in order to preserve and protect the relationship between noncustodial parents and their children.¹⁰¹ Illinois' policy of protecting the parent-child relationship would be furthered even more by adopting a distinct cause of action for tortious interference with visitation rights.

In Illinois, the usual remedy available to a noncustodial parent seeking to enforce a visitation order is a petition for a rule to show cause why the non-complying party should not be held in contempt.¹⁰² Illinois, however, also recognizes the tort for intentional infliction of emotional distress.¹⁰³ Therefore, in cases where a noncustodial parent's visitation rights have been intentionally violated, a cause of action for intentional infliction of emotional distress should be brought.

98. See W. PROSSER & W.P. KEATON, PROSSER AND KEATON ON TORTS § 124 (5th ed. 1984) for discussion on the severe emotional distress a plaintiff must suffer to be entitled compensation.

99. RESTATEMENT (SECOND) OF TORTS § 700 comment g (1977) states:

The parent can recover for the loss of society of his child and for his emotional distress. . . . He is also entitled to recover for any reasonable expenses incurred in regaining custody of the child and for any reasonable expenses incurred in treating the child if it has suffered illness or bodily harm as a result of defendant's tortious conduct.

Id. See *Ruffalo*, 590 F. Supp. at 714 (noncustodial mother recovered damages for loss of communication and visitation with children).

100. *Frail v. Frail*, 54 Ill. App. 3d 370, N.E.2d 303, 304 (1977) (court held noncustodial mother incarcerated for murder still entitled visitation rights).

101. *In re Marriage of Brophy*, 96 Ill. App. 3d 1108, 1112, 421 N.E.2d 1308, 1311 (1981). See *Novison*, *supra* note 62, at 131 (importance of courts granting liberal visitation).

102. *People ex. rel., Argo v. Henderson*, 97 Ill. App. 3d 425, 428, 422 N.E.2d 1005, 1008 (1981). See also *People ex. rel. Winger v. Young*, 78 Ill. App. 3d 512, 513, 397 N.E.2d 253, 254 (1979) (parent denied visitation could bring contempt action but not allowed to withhold child support).

103. *Knierim v. Izzo*, 22 Ill.2d 73, 174 N.E.2d 157 (1961) (Illinois Supreme Court recognizes tort for intentional infliction of emotional distress).

Several circuit courts have already ruled that a noncustodial parent denied his legal visitation rights may seek damages under the tort of intentional infliction of emotional distress.¹⁰⁴ In *Rodgers v. Rodgers*, the noncustodial father filed a suit against his former wife for loss of visitation and companionship with his children.¹⁰⁵ The custodial mother took the children out of state and concealed their whereabouts in order to prevent the plaintiff from seeing his children.¹⁰⁶ The judge held that the plaintiff stated a cause of action for intentional infliction of emotional distress.¹⁰⁷ Similarly in *Johannes v. Sloan*, a noncustodial father was prevented from visiting his daughter for several years.¹⁰⁸ He filed suit against his former wife seeking damages for intentional infliction of emotional distress.¹⁰⁹ Based on the defendant's outrageous conduct and the plaintiff's severe depression, the court recognized his claim and upheld the jury's \$150,000 damages award.¹¹⁰

These decisions reflect a willingness by the courts to go beyond the traditional contempt proceeding in order to compensate the noncustodial parent whose visitation rights have been obstructed. A finding of intentional infliction of emotional distress, however, is only possible if the interfering party's conduct was outrageous and the noncustodial parent suffered severe emotional distress.¹¹¹ The trend in circuit court cases suggest that the courts will consider, under certain circumstances, the custodial parent's conduct to be

104. *Rodgers v. Rodgers*, No.82L010593 (Cir. Ct. Cook Cty., Ill., July 15, 1983) (father wrongfully denied visitation rights stated claim for intentional infliction of emotional distress), *Johannes v. Sloan*, No. 79L0169 (Cir. Ct. Kankakee Cty., Ill. March 26, 1981) (noncustodial father denied access to daughter suffered severe emotional distress). See also *Violating Visitation Orders Ruled Actionable Tort*, 70 A.B.A. J. 135 (1984) (discussion on impact of *Rodgers v. Rodgers* on Illinois law).

105. *Rodgers v. Rodgers*, No. 82L010593 (Cir. Ct. Cook Cty., Ill. July 15, 1983).

106. *Id.*

107. The judge relied on three similar cases in reaching his decision. *Violating Visitation Orders Ruled Actionable Tort*, 70 A.B.A. J. 135 (1984). See *Sheltra v. Smith*, 136 Vt. 472, 392 A.2d 431 (1978) (noncustodial mother wrongfully denied access to daughter stated caused of action for intentional infliction of emotional distress); *LeGrenade v. Gordon*, 46 N.C. App. 329, 331-32, 264 S.E.2d 757, 758-59 (1978) (custodial mother recovered damages for intentional infliction of emotional distress when former spouse abducted child); *Kajtzai v. Kajtazi*, 488 F. Supp. 15, 18 (E.D.N.Y. 1978) (mother whose custody rights obstructed stated cause of action for intentional infliction of emotional distress).

108. *Johannes v. Sloan*, No. 79L0169 (Kankakee Cty. Cir. Ct., Ill. March 26, 1981).

109. *Id.*

110. *Id.* See Note, *supra* note 12, at 837 (discussion on *Johannes v. Sloan*).

111. Liability for intentional infliction of emotional distress has only been found where defendant's conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency. *Polcar v. Dunkin Donuts of America, Inc.*, 103 Ill. App. 3d 740, 431 N.E.2d 1175 (1981). See also *Debolt v. Mutual of Omaha*, 56 Ill. App. 3d 111 371 N.E.2d 373 (1978) (defendant's wrongful denial of insurance benefits to plaintiff not sufficiently outrageous conduct to sustain claim for intentional infliction of emotional distress).

outrageous when they willfully interfere with the visitation order.

While Illinois may recognize a noncustodial parent's right to bring a cause of action for intentional infliction of emotional distress, this remedy is still inadequate. In Illinois, unless the plaintiff can clearly establish the four elements for a *prima facie* case, the courts will dismiss the suit.¹¹² Thus, many parents will be unable to recover damages from the interfering party. An independent action for tortious interference will, however, provide a more complete remedy for noncustodial parents.¹¹³ A cause of action is sustained when the intentional conduct of an interfering party results in an injury to the noncustodial parent.¹¹⁴ Illinois' recognition of this specific cause of action will provide greater economic relief to noncustodial parents and discourage parties from interfering with court ordered visitation agreements.

CONCLUSION

Interference with noncustodial parents' visitation rights has been a serious problem for years.¹¹⁵ Until recently, however, the legal remedies for dealing with this problem have been grossly inadequate. Recent trends favoring tort actions by noncustodial parents are a significant development. Illinois should join this trend by recognizing a specific cause of action for tortious interference with visitation. This tort is the noncustodial parent's only adequate remedy for his mental suffering and financial loss and therefore, should be adopted by the courts. In addition, many custodial parents will be deterred from willfully violating court orders establishing visitation rights. Further, Illinois' recognition of a cause of action for tortious interference with visitation is fundamentally consistent with the state's policy of protecting the right of noncustodial parents to maintain and continue a relationship with their children.

Lawrence A. Goldman

112. *Palmateer v. International Harvester Co.*, 85 Ill. App. 3d 50, 406 N.E.2d 595, *aff'd in part reversed in part*, 85 Ill. App. 2d 124, 421 N.E.2d 876 (1980) (claim dismissed because plaintiff failed to establish four elements for intentional infliction of emotional distress).

113. See *supra* notes 82-84 and accompanying text for discussion on establishing claim for tortious interference with visitation.

114. See *supra* note 84.

115. See P. HOFF, *INTERSTATE CHILD CUSTODY DISPUTES AND PARENTAL KIDNAPING: POLICY PRACTICE AND LAW* 14-1 — 14-5 (1982) (tort actions deter parental interference with visitation and custody agreements).