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Action By Minor Child For Alienation Of A Parent'S Affection

ACTION BY MINOR CHILD FOR ALIENATION OF A PARENT'S AFFECTION

A majority of the jurisdictions in the United States recognize that a husband or wife has a cause of action against a third party for alienating the affections of the other spouse.[1] It is only within recent years, however, that the question has been raised whether a child has a similar cause of action for the alienation of a parent's affection.[2]

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may be sustained in consequence thereof by the owners, charterers or operators of any vessel or craft or by any other person or persons interested therein.

2. Tug Services will be supplied upon the condition that all towing, moving, shifting, docking, undocking or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug Company is done at the sole risk of such vessel or craft and of the owners, charterers or operators thereof, and the Master and crew of such tug or tugs used in the said services become the servants of and identified with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.

3. The Tug Company will not be responsible for the acts or defaults of the Master or crew of such tug or tugs, or any of their servants or agents or else whosoever, nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, or property or persons on board thereof, or to any other ship or vessel or property of any kind whether fixed or movable, and the Tug Company shall be held harmless and indemnified by the Hirer against all such damages, injuries, losses and delays, and against all claims in respect thereof.

4. Such exemption from liability shall apply regardless of whether such vessel or craft assists in the services with its own steam or power or in any other way, and irrespective of whether any employee of the Tug Company or the Master or any of the crew of such tug or tugs is at the time of said services on board of such vessel or craft, or in command thereof.

5. The foregoing conditions shall apply to any damages, injuries or loss from whatsoever cause arising that may occur to the vessel or craft requiring the tug or tugs or to any other vessel or craft, or to any person or property on board thereof, or to any other property whether fixed or movable, while such tug or tugs is or are in attendance upon or fast to or engaged in any manoeuvre for the purpose of making fast to or disengaging from or proceeding clear from the vessel or craft requiring the tug or tugs, provided however that the said conditions shall not apply to loss of or damage to the tug or tugs or to property on board the tug or tugs or to damage for personal injuries to or loss of life of members of the crews of the tug or tugs or persons on board thereof, unless such loss or damage or such damages for personal injuries or loss of life shall have been caused or contributed to by the fault or negligence of the vessel or craft requiring the tug or tugs.

[1]Prosser, Torts § 118 (3d ed. 1964).

[2]See Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y. Supp. 912 (Sup. Ct. 1934). The case of Coulter v. Coulter, 73 Colo. 144, 214 Pac. 400 (1923), in which a son sixty-two years of age brought a joint suit for conspiracy for the alienation of his mother's affections resulting in loss of support and for malicious prosecution in having him committed to a state insane hospital, appears to be the first case to present this question. In this case the question whether a child has a right of action for the alienation of his parent's affection was discussed, but not decided, since the

This problem is illustrated in the recent Ohio case of *Kane v. Quigley*,[3] wherein the Supreme Court of Ohio held[4] that although in that state an action by a spouse against a third party may be maintained, a child does not have a comparable legal right, since the spouse's action is based upon a right of consortium,[5] which does not exist between a parent and child.[6]

Judge Gibson, in dissenting, stated that under the Ohio Constitution[7] and in the best interest of the child and society[8] such an action should be maintainable. He further noted that the common law was sufficiently flexible to encompass this cause of action.[9]

Although statutes have been passed which protect the infant's right

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court denied recovery on the ground that every element of damage which the plaintiff had allegedly sustained could be recovered in an action for malicious prosecution. In Cole v. Cole, 277 Mass. 50, 177 N.E. 810 (1931), the court affirmed the sustaining of a demurrer by a defendant-sister to her brother's charge of alienation of their mother's affection, on the ground that it failed to set forth concisely and with substantial certainty the substantive facts necessary to constitute a cause of action. In the Cole case, however, the court did not directly discuss the brother's right of a cause of action.

[3]1 Ohio St. 2d 1, 203 N.E.2d 338 (1964).

[4]The Ohio Supreme Court affirmed the decision of the Court of Appeals which had affirmed the trial court's sustaining of a demurrer.

[5]Supra note 3, at 340. The majority implied that its decision also might be based on the ground that the child does not have a legal right of action against the father for love and affection, and therefore a third party could not be liable for depriving the child of something to which he had no legal right. The court, at 339, stated: "A child may indeed expect that his parent will have affection for him. This may be a moral obligation, but no legal obligation exists." It is interesting to note that the court did not follow the reasoning of the earlier Ohio case of Gleitz v. Gleitz, 88 Ohio App. 337, 98 N.E.2d 74 (1951), in which the court, in denying a minor child a right of action against his paternal grandparent for alienation of his father's affection, stated: "[W]e do not feel constrained to encroach upon the prerogatives of the legislative branch of the government." 98 N.E.2d at 74.

[6]203 N.E.2d at 339.

[7]Id. at 344. Judge Gibson states: "Section 16, Article 1 of the Ohio Constitution, provides that 'All courts shall be open, and *every person, for an injury done him in his* lands, goods, *person,* or reputation, *shall have remedy* by due course of law, and shall have justice administered without denial or delay.'... In my opinion, a child is injured in his person when a third person intentionally and maliciously destroys that child's relationship with his parent which is so necessary for the welfare of the child and society. The Constitution gives such a child a remedy." See also Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946).

[8]203 N.E.2d at 343. Judge Gibson, in questioning the reasoning of the majority's statement that the child had no legal right for affection from his parent, stated: "The fact is that, unless interfered with, service, care and affection flow as a matter of course from the relationship of a parent and child." 203 N.E.2d at 342. He also noted that a child was allowed to recover for parental care and training in wrongful death actions and in actions under Federal Employees' Liability Act.

[9]Judge Gibson stated: "The principles of the common law are determined by the needs of society and are changed with changes in such needs." 203 N.E.2d at 343.

of support, little has been done to secure his interest in the society and affection of his parent.[10] It was not until 1934, in the case of *Morrow v. Yannantuono*,[11] that a court squarely faced the question whether a child should have a right of action against a third party for depriving him of his parent's society and affection. In that case the plaintiff child alleged that the defendant had maliciously and wrongfully deprived the plaintiff of the affection, comfort, and love of his mother by enticing her away and harboring her.[12] The court, in rejecting the plaintiff's contention that each member of a family unit has a cause of action against one who wrongfully interferes with that unit, held that the child did not have a right to loss of consortium, which is the basis of a spouse's action for alienation of affection;[13] and that recognition of such an action would open the courts to a flood of litigation.[14]

This problem was not presented to a court again until 1945, in the case of *Daily v. Parker*.[15] In this case, four minor children brought an action in a federal district court in Illinois, on the basis of diversity of citizenship, against a woman who had allegedly enticed their father to leave their home, thereby depriving them of their father's support, society, and companionship. The District Court's ruling, which sustained the defendant's demurrer, was reversed by the Circuit Court, which held that the plaintiffs had stated a sufficient cause of action.[16]

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[10]Pound, Individual Interests in the Domestic Relations, 14 Mich. L. Rev. 177, 185 (1916).

[11]152 Misc. 134, 273 N.Y. Supp. 912 (Sup. Ct. 1934).

[12]The plaintiff also alleged loss of support which the court considered separately from the question presented here.

[13]Supra note 11, at 913. This is one of the basic arguments for denying the action in the principal case.

[14]Morrow v. Yannantuono, supra note 11, at 913. Justice Close stated: "I am convinced that to uphold this complaint would open our courts to a flood of litigation that would inundate them. It would mean that everyone whose cheek is tinged by the blush of shame would rush into court to ask punitive damages to compensate them for their distress of body and mind and the damage that their reputation suffered in the community." 273 N.Y. Supp. at 914. In rejecting the deterrent aspect of allowing the action, the court, at 914 held: "Behavior such as accredited to the defendant here springs from motives that seldom if ever count the financial cost."

[15]152 F.2d 174 (7th Cir. 1945).

[16]The court remanded the case, however, on the ground that the question of the amount of damages was one for the jury. The court in expressing some doubt as to damages, stated: "There is, we must confess, weight to the argument that no loss was suffered when the children were deprived of the society of a father who deserted them to run away with a married woman and who left his wife and children to struggle as best they could with the task of making a livelihood.... And a father should have at least a shadow of character before his loss can be said to create a claim for damages in his children." 152 F.2d at 177.

In considering the recognition of the action, the Circuit Court divided the children's rights into two groups.[17] Firstly, the right to recover for injuries which arise from their right to support and maintenance; and secondly, the right to recover for injuries to feelings which arise from their rights to the comfort, protection, and society of the father.

In deciding that minor children should also be entitled to recover for interference with this second group of rights, the court engaged in what is called "judicial empiricism", or lawmaking by judicial decision.[18] The court reasoned that under the modern conception of the family unit such a right should be recognized.[19]

Since the *Morrow* and *Daily* decisions, the courts of fourteen other jurisdictions have considered the question whether a child has a cause of action for alienation of his parent's affection. Three of these jurisdictions have followed the *Daily* decision,[20] while eleven have followed the *Morrow* case.[21]

Although it appears that a majority of courts has denied the child's right of action, the reasons for doing so have not been consistent. The

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[17]Supra note 15, at 176.

[18]Supra note 15, at 177. The court stated: "And even in the common law, in 1945, if no precedents be found, courts can hardly be advisedly called radical if they in *lawmaking by decisions*, or in a word, engage in judicial empiricism." (Emphasis added.) The coinage of the term "judicial empiricism" is generally thought to have originated with Justice Pound. In Pound, The Spirit of the Common Law 181 (1921), Dean Pound, in referring to this "judicial empiricism," says, "Anglo-American law is fortunate indeed in entering upon a new period of growth with a well-established doctrine of lawmaking by judicial decision."

[19]Supra note 15, at 176.

[20]Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949) (loss of mother); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1948) (loss of father); Miller v. Monsen, 288 Minn. 400, 37 N.W.2d 543 (1949) (loss of mother). See also Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849, 856 (1963), in which the court denied an adulterine bastard a cause of action against his father for subjecting him to an embarrassing status and, in dictum, reaffirmed the Johnson v. Luhman decision.

[21]Elder v. MacAlpine-Downie, 180 F.2d 385 (D.C. Cir. 1950) (loss of father); McMillan v. Taylor, 160 F.2d 221 (D.C. Cir. 1946) (loss of mother); Mode v. Barnett, 235 Ark. 641, 361 S.W.2d 525 (1962) (loss of mother); Lucas v. Bishop, 224 Ark. 353, 273 S.W.2d 397 (1954) (loss of mother); Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P.2d 948 (Dist. Ct. App. 1948) (loss of father); Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947) (loss of mother); Whitcomb v. Huffington, 180 Kan. 340, 304 P.2d 465 (1956) (loss of mother); Nelson v. Richwagen, 326 Mass. 485, 95 N.E.2d 545 (1950) (loss of mother); White v. Thomson, 324 Mass. 140, 85 N.E.2d 246 (1949) (here the child was denied injunctive relief against the enticer of his parent); Kleinow v. Ameika, 19 N.J. Super. 165, 88 A.2d 31 (1952) (loss of father); Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432 (1949) (loss of mother); Gleitz v. Gleitz, 88 Ohio App. 337, 98 N.E.2d 74 (1951) (loss of father); Garza v. Garza, 209 S.W.2d 1012 (Tex. Civ. App. 1948) (loss of father); Scholberg v. Itnyre, 264 Wis. 211, 58 N.W.2d 698 (1953) (loss of father). For a New York case following the Morrow decision, see Katz v. Katz, 197 Misc. 412, 95 N.Y.S.2d 863 (Sup. Ct. 1950) (loss of mother).

earliest reason given by a court for denying the child's right of action was that such recognition would lead to a flood of litigation.[22] This argument, however, was severely criticized in the Minnesota case of *Miller v. Monsen*,[23] which recognized the child's right of action. The *Miller* case, in refuting this argument, noted that in the jurisdictions which allowed this action,[24] there had not been any flooding of the courts by this type of litigation.[25] The court reasoned "that there are not enough such enticements to cause even a burdensome increase of such litigation, much less a *flood* of it."[26] The court also pointed out that even it there were an increase of such litigation, this in itself was not a sufficient ground for denying recovery for the wrongfully inflicted injury.[27]

The major reason given by the courts which have denied the child's right of action appears to be that since there is no common law precedent, it is basically a policy matter for the legislature.[28] *Taylor v. Keefe*,[29] rejected the contention that the maxim *ubi jus ibi remedium* entitled the child to recover. In the *Taylor* case, the court reasoned that the Connecticut constitutional provision guaranteeing redress for an injury only applied to a "legal injury", that is, one violative of *established law* of which a court can properly take cognizance. The lack of a common law precedent, however, was not impressive to the court in *Daily v. Parker*.[30] There the court said that the mere fact that rights had not theretofore been recognized was not a conclusive reason for denying them and the courts could recognize the action through their judicial lawmaking function. The case of *Russick v. Hicks*,[31] which also recognized the child's action, reasoned that the common law recognized this cause of action, since its principles have

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[22]Supra note 11.

[23]228 Minn. 400, 37 N.W.2d 543 (1949).

[24]Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947). Russick v. Hicks, supra note 20, was decided in the same year as the Miller case.

[25]Supra note 23, at 546.

[26]Ibid.

[27]Ibid.

[28]Elder v. MacAlpine-Downie, 180 F.2d 385 (D.C. Cir. 1950); Lucas v. Bishop, 224 Ark. 353, 273 S.W.2d 397 (1954); Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P.2d 984 (Dist. Ct. App. 1948); Whitcomb v. Huffington, 180 Kan. 340, 304 P.2d 465 (1956); Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432 (1949); Gleitz v. Gleitz, 88 Ohio App. 337, 98 N.E.2d 74 (1951); Garza v. Garza, 209 S.W.2d 1012 (Tex. Civ. App. 1948); Scholberg v. Itnyre, 264 Wis. 211, 58 N.W.2d 698 (1953).

[29]134 Conn. 156, 56 A.2d 768 (1947).

[30]Supra note 15, at 175.

[31]85 F. Supp. 281 (W.D. Mich. 1949).

been determined by the needs of society and are ever susceptible to changes which the progress of civilization dictates.[32]

The North Carolina case of *Henson v. Thomas*,[33] in denying the child's action, held that the parental immunity from a suit by their children inures to a third person. The court felt that since the parent had committed no legal wrong from which redress could be had in a court of law, one who induced the parent to be remiss did not incur any greater liability than that of the parent. The court in *Miller v. Monsen*,[34] however, rejected this argument by saying the child's action was asserted not against the parent, but against the parent's enticer; and that where the family relationship has been destroyed, the rule does not apply.[35] The court also noted that recovery for loss of expectancies should be allowed even though the benefits did not result as a consequence of enforceable legal rights.[36]

As in the *Kane* case, at least one other court has refused the child's action on the ground that the child does not have a contract right that is similar to that of the husband and wife for loss of consortium, which is the basis for the spouse's cause of action.[37] The *Miller* case, however, appears to reject this contention on the basis that although the child's right to services and affection from the parent is not based on legal contract rights, such affections and services flow ordinarily as a matter of course unless interfered with; and that no contract right is necessary for bringing an action for the intentional interference with this "natural flow."[38]

Some courts have also reasoned that in reality it is the parent, not the child, bringing the action.[39] At least one court, however, appears to have given little weight to this argument. In *Russick v. Hicks*,[40] two infants were allowed to bring the action through their father as next friend, notwithstanding the fact that the father was barred by statute from bringing a similar action in his own behalf.

The court in *Scholberg v. Itnyre*,[41] expressed concern that allowing the child's action would create a whole new field of litigation, making

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[32]Id. at 286.

[33]231 N.C. 173, 56 S.E.2d 432, 434 (1949).

[34]Supra note 23.

[35]Supra note 23, at 547.

[36]Supra note 23, at 548.

[37]Supra note 11.

[38]Supra note 3, at 548.

[39]Whitcomb v. Huffington, 180 Kan. 340, 304 P.2d 465 (1956); Katz v. Katz, 197 Misc. 412, 95 N.Y.S.2d 863 (Sup. Ct. 1950).

[40]85 F. Supp. 2 (W.D. Mich 1949).

[41]264 Wis. 211, 58 N.W.2d 698, 699 (1953). See Whitcomb v. Huffington, 180 Kan. 340, 304 P.2d 465, 467 (1956).

grandparents, business companions, and other acquaintances easy prey to a jealous child. Although there does not appear to be any cases clearly rejecting this argument, it would seem that it might be used with equal force against the spouse's right of action.

At least two courts have rejected the child's action on the ground that it was forbidden by state statute. In *Rudley v. Tobias*,[42] the California District Court of Appeals concluded that its "Heart Balm" statute, which prohibited actions for "alienation of affections," prevented a nine-month-old infant from bringing an action for alienation of his father's affection. In that case, however, the court clearly based its decision upon its interpretation of the legislative intent and did not consider the matter of policy. The New York case of *Katz v. Katz*,[43] in denying the child's right of action, clearly relied upon the state's "Heart Balm" statute, which prohibited the spouse's action. The court reasoned that the safeguards provided by the "Heart Balm" statute would be seriously violated by allowing the spouse to sue under the guise of *guardian ad litem*. In *Russick v. Hicks*,[44] however, a federal district court in Michigan recognized the child's right of action despite a similar statute which barred the spouse's action. The court in the *Russick* case reasoned that the spouse's action was the only type of alienation-of-affections action recognized in Michigan prior to the enactment of this statute, and therefore, the spouse's action was the only action which the legislature had intended to abolish.[45] When the *Daily v. Parker*[46] decision was rendered, a similar statute was in effect in Illinois, but the federal court did not find it controlling since the state courts had not construed it.

On the other hand, the reasons generally given by the courts which have recognized the child's right of action are: (1) the doctrine of "judicial empiricism" allows the court to recognize the child's rights

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[42]84 Cal. App. 2d 454, 190 P.2d 984 (Dist. Ct. App. 1948).

[43]197 Misc. 412, 95 N.Y.S.2d 863 (Sup. Ct. 1950). The court in Kleinow v. Ameika, 19 N.J. Super. 165, 88 A.2d 31 (1952), also appears to have been influenced by the New Jersey "Heart Balm" statute which barred the spouse's cause of action. The court, at 33, said: "No New Jersey case has come to my attention holding that a child may have such a cause of action where the parent, as here, is barred from asserting such a claim."

[44]85 F. Supp. 281 (W.D. Mich. 1949).

[45]Id. at 286.

[46]152 F.2d 174 (7th Cir. 1945). It is interesting to note, however, that Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946), later declared the Illinois "Heart Balm Act" to be in violation of the state constitution. The court, at 466, said: "We are of the opinion that this act violates section 19 of article II of our state constitution and is invalid." This section provides in part: "Every person ought to find a certain remedy in the laws for all injuries and wrongs which he may receive in his person, property, or reputation. . . ." Ill. Const. art. 2 § 19.

under the modern conception of the family unit;[47] (2) the child should have a right of action based on the maxim *ubi jus ibi remedium,*[48] (3) affording protection to the rights of the child is in the best interest of both the child and society;[49] (4) the child has a right of action by analogy to wrongful interference with expectancies under contract law;[50] and (5) the child has a right of action by analogy to the parents' right of actions for enticement of the child.[51]

A majority of the courts which have considered this question have held that a child does not have a cause of action against an intentionally interfering third party for the loss of the affection and society of his parent. The reason generally given for denying the action is that this is a question for the legislature. It is submitted, however, that under the well-established doctrine of "judicial empiricism,"[52] the courts could and should recognize the child's action against a third party who has intentionally and maliciously deprived him of a normal and happy childhood. It is not doubted that recognition of the child's action would present some difficulties. When weighted against the injury[53] to the child and society, however, these difficulties should not be so insurmountable as to be prohibitive. Since there should be no more impediments encountered here than in the well-established spouse's action, it would seem, at least in jurisdictions which recognize the spouse's action, that an infant should be entitled to equal consideration and redress when his injury is equally as great.

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[47]Daily v. Parker, 152 F.2d 174 (7th Cir. 1945).

[48]Cases adopting the reasoning of this judicial principle are: Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947), and Miller v. Monsen, supra note 23. In Russick v. Hicks, 85 Supp. 281 (W.D. Mich. 1949), the court, at 286, stated: "It is elementary that if a wrong has been committed, there should be a remedy.... The common law is sufficiently board and comprehensive to afford redress to the plaintiffs in the present case." Contra, Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946).

[49]Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543, 545 (1949).

[50]Id., 37 N.W.2d at 549.

[51]Id. Although there does not appear to be any decision turning on whether the child is suing for the loss of his mother or for the loss of his father, Miller v. Monsen, supra note 49, seems to emphasize the mother's importance, for the court states: "There can be no doubt that benefits of the greatest value flow to the child from its mother's love, society, care, and service.... [and] it is of the highest importance to the child and society that its rights to receive the benefits derived from its mother be protected." 37 N.W.2d at 545. The court also rejected the inability of the jury to decide the damages, for it states: "Such a right has pecuniary value capable of measurement." 37 N.W.2d at 545.

[52]See Pound, The Spirit of the Common Law 181 (1921).

[53]28 N.C.L. Rev. 397 (1950).