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Right of Children for Enticing Away Parent

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RECENT CASES

RIGHT OF CHILDREN FOR ENTICING AWAY PARENT

Plaintiffs, five minor children, by their mother, sought damages alleging that the defendant woman, professedly a family friend, alienated the affections of the father and deprived the plaintiffs of his support and society. The defendant had induced and enticed the father of the plaintiffs to desert his wife and children and remain apart from the family without making financial contribution to the support of the children, except as compelled to do so under the terms of a court order in another cause. The county circuit court dismissed the complaint. *Held*, that the plaintiffs have a right to protect their relationship with their parents and are properly entitled to seek damages from one who has destroyed their family unit. Reversed and remanded. *Johnson v. Luhman*, 330 Ill. App. 598, 71 N. E. (2d) 810 (1947).

The child was given no protection against injuries to the parental relation by the common law.¹ This situation has continued to the present day virtually unchanged.² Recognition of the fact that the child has an interest in the parental relation has not been lacking,³ but only through the enforcement of statutes as to child welfare has much affirmative aid been given.⁴ Recovery has been denied on the ground that no definite cause of action was set forth,⁵ and on the ground that to uphold the complaint would open the courts to a flood of litigation that would inundate them.⁶ In one Colorado case, the court did refuse to say that an adult plaintiff could not have had a cause of action if he had alleged loss of support; the Court declined to answer the question, saying that the cause of action was defective for other reasons.⁷

1. 3 B1. Comm. *143.

2. "The child is given little or no protection against interference with the parental relation." Prosser, *Torts* 936 (1941). "For an injury suffered by the child in that relation no action will lie at the common law." Cooley, *Torts* 492 (3rd ed. 1906).

3. "As against the world at large a child has an interest in the relation because of the support he may expect by virtue thereof while in infancy or, after majority, circumstances precluding self-support render it improper or impossible for him to be left to himself. Also he has an interest in the society and affection of the parent, at least while he remains in the household. But the law has done little to secure these interests. At common law there are no legal rights which protect them." Pound, *Individual Interests in the Domestic Relations*, 14 *Mich. L. Rev.* 177, 185 (1916).

4. "The obligation of the parent to support him is only enforced by proceedings on behalf of the public, and not by suit in the name of or on behalf of the child." Cooley, *Torts* 492 (3rd ed. 1906).

5. *Cole v. Cole*, 277 *Mass.* 50, 177 *N.E.* 810 (1931).

6. *Morrow v. Yannantuono*, 152 *Misc.* 134, 273 *N. Y. S.* 912 (1934).

7. *Coulter v. Coulter*, 73 *Colo.* 144, 214 *Pac.* 400 (1923) (Plaintiff sued on two counts, one based on alienation of the affections of his mother; the other based on malicious prosecution in wrongfully having him committed to the insane asylum. The court upheld the second cause of action; and said as to the first cause that, "we are not to be understood as holding that an adult may not have a cause of action thereunder when, as a result of a conspiracy or otherwise he has been deprived of support by his mother or other relatives, to which he is thereby entitled. We more readily reach the conclusion that the first cause of action is defective because every element of damage which the plaintiff has sustained, if any, may be recovered under the second cause of action.")

It is because of a background of this nature, therefore, that the case of *Daily v. Parker*,⁸ decided by the Seventh Circuit Court of Appeals in 1945, stands out. In that case a similar right of action, in a similar fact situation to that of the instant case, was recognized, apparently for the first time.⁹ It has been said that this decision established a new cause of action previously unrecognized in the case of a child.¹⁰ In reaching its decision, the court in the instant case relies heavily upon the *Daily* case.¹¹ It appears that the possibility of a new trend in the law as to the subject of child's rights may be indicated by the decisions of these two cases.

In the *Daily* case, the federal court ignored any mention of the Illinois "Heart Balm" act,¹² which was in full force at that time, although later declared unconstitutional by the Illinois Supreme Court in *Heck v. Schupp*.¹³ In doing this the court apparently considered this cause to be different than the common law action of alienation of affections,¹⁴ which the husband has for interference, and the similar action now allowed the wife by statute or by decision.¹⁵ The cause of action in the case does not mention the term alienation of affections,¹⁶ nor does the court use it in its decision. Instead the court speaks in terms of invasion of family rights and deprivation of support and society. Nevertheless, it has been said that the *Daily* decision suggests a reaction against the recently marked legislative policy of abolishing the right of action for alienation.¹⁷

In the instant case, the cause of action is described in terms of alienation of affections,¹⁸ and the court in reaching its decision uses this term.¹⁹ It can do so freely because of the aforementioned *Heck* decision, declaring the "Heart Balm" act unconstitutional. The Court in the instant case refers to the *Heck* case, in which it is said by way of dictum as to criminal conversation and alienation of

8. 152 F. (2d) 174, 162 A. L. R. 819 (C. C. A. 7th Cir. 1945). Notes, 59 Harv. L. 297 (1945), 41 Ill. L. Rev. 444 (1946), 32 Va. L. Rev. 420 (1946), 30 Minn. L. Rev. 310 (1946), 13 U. of Chi. L. Rev. 375 (1946), 14 Kan. City L. Rev. 59 (1945), 46 Col. L. Rev. 464 (1946), 15 Ford. L. Rev. 126 (1946), 18 Rocky Mtn. L. Rev. 435 (1946).

9. Notes, 59 Harv. L. Rev. 297 (1945), 32 Va. L. Rev. 420 (1946).

10. See Note, 162 A. L. R. 825 (1946).

11. "It is the opinion of this court, however, that the frank recognition by the Circuit Court of Appeals that the cause was without precedent, but that nevertheless, the common law was sufficiently flexible to protect what are presently regarded as family rights under our social standards and conceptions of the family unit, is more conducive to the development of unambiguous legal precepts than if the court had invoked some legal fiction to accomplish what it deemed to be desirable result." 71 N.E. (2d) 810, 812.

12. Ill. Rev. Stat. Ann. (Smith Hurd) 1945 c. 38, pars. 246. 1, 2. For the critical article on "Heart Balm" legislation, see Note, 1 Wyoming Law Journal 75 (1947).

13. 394 Ill. 296, 68 N.E. (2d) 464 (1946).

14. Note, 32 Va. L. Rev. 420, 421 (1946).

15. Madden, Domestic Relations 165 (1931).

16. "Action by . . . for damages for causing plaintiffs' father to leave them, their mother, and their home and to refuse to further contribute to their maintenance and support." 152 F. (2d) 174, 175.

17. Bradway, Recent Developments in Domestic Relations, 44 Mich. L. Rev. 1052, 1088 (1946).

18. 71 N.E. (2d) 810.

19. "It is apparent from the uncontroverted facts appearing in the pleadings of the instant case that defendant while posing as a friend of the family, did alienate the affections of plaintiffs' father . . ." Id. at 814.

affections, that they involve the rights which all members of the family have a right to protect.²⁰

It appears immaterial what name is given this new action; whether it is called deprivation of support and society or alienation, it is new and is based on the most modern reasoning as to the family relationship. In the instant case, the court outlines the development of the family from a unit where the father was the lord and master, to the present day family as a cooperative enterprise, in which the members have correlative rights and duties.²¹ As has been mentioned, there is authority for the contention that our law as to the rights of children in domestic relations is badly outmoded. The courts in the instant case and its predecessor, the *Daily* case, recognize that these children's family rights have been violated and proceed to give them their day in court.

Prior to 1941, when the Wyoming "Heart Balm" act²² was enacted, there would have been no question as to the right to bring this new action, and consequently, a possible liberal decision by the Wyoming courts, favoring recognition of the cause. Whether the action, even the filing of it, is now barred by our act is a vexatious problem. At first thought, it may seem clearly to be barred; and yet the question of legislative intent arises. Could the legislature have had this new action, then unrecognized, in mind when the act was drafted and then passed? It hardly seems so. The action which is the subject of the act would seem necessarily to be that of the husband or wife, based on loss of consortium of the spouse. Here the action is based on the damage to the family relationship, the wrongful deprivation of support and society.²³ No conclusion to this problem is possible in the limited scope of this article. However, it can be said with propriety that, with the Wyoming "Heart Balm" act untested either as to constitutionality or as to scope, it does seem possible to bring this action, avoiding the use of the label of "alienation", and stressing the wrongful deprivation of support and society. Thus the court might handle the action as new and not affected by the "Heart Balm" act, as apparently was done by the court in the *Daily* case.

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20. 68 N.E. (2d) 464, 466.

21. "Legal history reveals that the ancient Roman doctrine of *Pater Familias*, whereby the father was the lord and master of the household, infiltrated, in fact dominated, the early common law of family relations. (Fisher, "Pater Familias—A Cooperative Enterprise", 41 Ill. L. Rev. 27) The father spoke and acted for the family unit and the individual members thereof had no distinct identity. . . . It is common knowledge, however, that a transition has taken place in our conception of the family, and in the law which reflects, in a measure, our social standards. The family is now a cooperative enterprise with correlative rights and duties among all members thereof. . . . The children, in turn, are presently regarded more as responsible individuals than as subservient charges, and there are both criminal and civil statutes protecting them from physical abuse and neglect . . . they are entitled to both the tangible incidents of family life, such as food, clothing, and shelter, and to the intangible, though equally significant elements of affection, moral support, and guidance from both of the parents." 71 N.E. (2d) 810, 813.

22. Wyo. Comp. Stat. 1945 secs. 3-512 to 3-516.

23. See Note, 32 Va. L. Rev. 420 (1946) for a similar discussion.