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Recent Decisions

PARENT AND CHILD — RIGHT OF CHILD TO SUE THIRD PARTY FOR LOSS OF PARENTAL AFFECTION

In *Gleitz v. Gleitz*,[1] the plaintiff, a minor, brought an action against his paternal grandparents for the loss of the "love, affection, society, guidance and companionship" of his father, alleging a willful and malicious breaking up of the plaintiff's home. The court of appeals affirmed the lower court's decision sustaining the defendant's demurrer on the ground that no cause of action was stated. The creation of such cause of action was held to be a matter for legislative rather than judicial concern.

This is the first Ohio case raising the question of a child's right to sue a third party for the alienation of affections of his parent.

When the question first came to the attention of an American court, in 1934, the right of action was denied the child.[2] Courts in six other jurisdictions, now including Ohio, have given this same answer.[3]

Four courts, however, have recognized a right of action by the child.[4] The courts in this latter group base their decisions on: (1) the concept of the family as an entity with mutual rights and duties among the members, one right being that of the child to the affection, guidance and society of his parents; (2) a recognition of a right of the child to the protection of the integrity of the home and to the maintenance intact of his relations with his parents against unwarranted interference by an outsider; and (3) the principle of the flexibility of the common law in recognizing and enforcing a right even when there is no precedent for the action.

The courts holding that the child has no cause of action arrive at this conclusion for a variety of reasons: that the gist of an action for alienation of affections where a spouse is plaintiff is the loss of consortium, and that there is no right of consortium between child and parent;[5] that, since the child has no right of action against his parents for loss of parental society

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[1] 88 Ohio App. 337, 98 N.E.2d 74 (1951)

[2] Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y. Supp. 912 (Sup. Ct. 1934) In Coulter v. Coulter, 73 Colo. 144, 214 Pac. 400 (1923) the issue was raised but not decided by the court. Also see Cole v. Cole, 277 Mass. 50, 177 N.E. 810 (1931).

[3] Edler v. MacAlpine-Downie, 180 F.2d 385 (D.C. Cir. 1950); McMillan v. Taylor, 160 F.2d 221 (D.C. Cir. 1946); Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947); Nelson v. Richwagen, 95 N.E.2d 545 (Mass. 1950); 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). In Rudley v. Tobias, 84 Cal. App.2d 454, 190 P.2d 984 (1948) and Katz v. Katz, 197 Misc. 412, 95 N.Y.S.2d 863 (Sup. Ct. 1950) the child's right of action was held barred by statute. Also *see* White v. Thomson, 324 Mass. 140, 143, 85 N.E.2d 246, 247 (1949)

[4] Daily v. Parker, 152 F.2d 174 (7th Cir. 1945); Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949); Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947); Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949).

and affection, he should have none against the third party;[6] that to recognize the right of action by the child would precipitate a flood of litigation;[7] that it would create a danger of fraudulent and extortionary suits;[8] that measuring damages in such a case would be too difficult to warrant allowing the action;[9] that permitting the suit would have no effect in deterring future home breakers;[10] that recent statutes barring alienation of affections actions against the third party by an injured spouse[11] indicate a public policy adverse to any extension of the action to children even in a state not having such statute;[12] and that to recognize the new cause of action would be a usurpation of a legislative prerogative.[13]

These reasons will not stand analysis.

The issue should not be whether any technical right to consortium exists, but whether the relational interest between child and parent is important enough to be protected legally against unwarranted interference by an outsider.[14]

Even if, because of policy considerations, the child's right to the affection of its parent cannot be enforced directly against the parent, the parent's

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[5] Morrow v. Yannantuono, 152 Misc. 134, 135, 273 N.Y. Supp. 912, 913 (Sup. Ct. 1934). Also see Madden, DOMESTIC RELATIONS, § 56 (1931). "Consortium means the companionship or society of a wife the duties and obligations which by marriage husband and wife take upon themselves towards each other conjugal affection, society, and companionship." Harris v. Kunkel, 227 Wis. 435, 437, 278 N.W 868, 869 (1938).

[6] Nelson v. Richwagen, 95 N.E.2d 545, 546 (Mass. 1950); Henson v. Thomas, 231 N.C. 173, 175, 56 S.E.2d 432, 434 (1949).

[7] Taylor v. Keefe, 134 Conn. 156, 161, 56 A.2d 768, 770 (1947); Nelson v. Richwagen, 95 N.E.2d 545, 546 (Mass. 1950); Morrow v. Yannantuono, 152 Misc. 134, 135, 273 N.Y. Supp. 912, 914 (Sup. Ct. 1934). See 83 U. OF PA. L. REV. 276, 277 (1934).

[8] Taylor v. Keefe, 134 Conn. 156, 161, 56 A.2d 768, 770 (1947); Nelson v. Richwagen, 95 N.E.2d 545, 546 (Mass. 1950). See 83 U. OF PA. L. REV. 276, 277 (1934).

[9] Taylor v. Keefe, 134 Conn. 156, 161, 56 A.2d 768, 770 (1947); Nelson v. Richwagen, 95 N.E.2d 545, 546 (Mass. 1950). See 83 U. OF PA. L. REV. 276, 277 (1934).

[10] Morrow v. Yannantuono, 152 Misc. 134, 135, 273 N.Y. Supp. 912, 914 (Sup. Ct. 1934).

[11] See for example: CAL. CIV. CODE, § 43.5 (1949); MICH. STAT. ANN., § 25.191 (1937); N.Y. CIV. PRAC. ACT, § 61-a. These so-called "heart balm" statutes have been interpreted to bar an action by the child as well as by the spouse. Rudley v. Tobias, 84 Cal. App.2d 454, 190 P.2d 984 (1948); Katz v. Katz, 197 Misc. 412, 95 N.Y.S.2d 863 (Sup. Ct. 1950). *Contra:* Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949). Ohio has no such statute although "heart balm" bills have been introduced several times in the legislature.

[12] Taylor v. Keefe, 134 Conn. 156, 163, 56 A.2d 768, 771 (1947).

[13] Henson v. Thomas, 231 N.C. 173, 176, 56 S.E.2d 432, 434 (1949); Gleitz v. Gleitz, 88 Ohio App. 337, 338, 98 N.E.2d 74 (1951); Garza v. Garza, 209 S.W.2d 1012, 1015 (Tex. Civ. App. 1948).

immunity from suit exists because of his relationship to the child, and there is no reason why the immunity should be extended to a person who is not a member of the family.[15] A husband cannot sue his wife for the loss of her affection, but his right of action against a third party for the alienation of affections of his wife is not barred for that reason. Another analogous situation can be found where a plaintiff has an unenforceable contract, but can sue a third person who interferes with that contractual relationship.[16]

The well-worn "flood of litigation" argument advanced by some courts denying a cause of action seems, as usual, unsound. If the child ought otherwise to have a right of action he should not be denied access to the courts merely because a number of similar suits may arise.[17] Likewise, the possibility of fraudulent and extortionary litigation, while always present, can be watched closely by the courts and should not bar plaintiffs with legitimate claims.[18]

Difficulty in ascertaining the extent of damages should not be a sufficient reason to bar completely a cause of action where the fact of injury is certain;[19] standards similar to those used in actions for alienation of affections where a spouse is plaintiff could be used to measure damages in an action by a child for the alienation of affections of his parent.[20]

Because the primary purpose of the action is to compensate the injured child for his loss, the recognition of the cause of action by the court should not depend upon its efficacy in deterring future defendants from the same conduct.[21]

Although a "heart balm" statute barring alienation of affections actions may indicate a public policy opposed to granting a right of action in the

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[14] Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934)

[15] Miller v. Monsen, 228 Minn. 400, 406, 37 N.W.2d 543, 547 (1949). *See* Henson v. Thomas, 231 N.C. 173, 179-180, 56 S.E.2d 432, 437 (1949) (dissenting opinion).

[16] Moran v. Dunphy, 177 Mass. 485, 59 N.E. 125 (1901); Aalfo Co. v. Kinney, 105 N.J.L. 345, 144 Atl. 715 (1929); Rich v. N.Y. Cent. & H.R.R., 87 N.Y. 382 (1882)

[17] Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947); Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949); Simone v. Rhode Island Co., 28 R.I. 186, 66 Atl. 202 (1907) *Cf.* Ashby v. White, 2 Ld. Raym. 938, 955 (1703). See 20 CORNELL L.Q. 255, 256 (1935)

[18] See Miller v. Levine, 130 Me. 153, 154 Atl. 174 (1931); 20 CORNELL L.Q. 255, 256 (1935)

[19] Brandon v. Capital Transit Co., 71 A.2d 621 (Mun. Ct. App. D.C. 1950); Stott v. Johnston, 36 Cal. 2d. 864, 229 P.2d 348 (1951); Brown v. Lindsay, 228 P.2d 262 (Nev. 1951); Hinish v. Meier & Frank Co., 166 Ore. 482, 113 P.2d 438 (1941)

[20] Mental anguish and injury to reputation are allowed as elements of damage in alienation of affection suits. Nevins v. Nevins, 68 Kan. 410, 75 Pac. 492 (1904); Adkins v. Kendrick, 131 Ky. 779, 115 S.W 814 (1909); Hartpence v. Rogers, 143 Mo. 623, 45 S.W 650 (1898) Inadequate or excessive verdicts are subject to review by appellate courts. Keezer, MARRIAGE AND DIVORCE, 204 (3rd ed. 1946)