Michigan Law Review

Volume 52 | Issue 2

1953

Torts - Child's Right to Recover for Alienation of Parent's Affection

Marvin O. Young S.Ed.
University of Michigan Law School

TORTS — CHILD'S RIGHT TO RECOVER FOR ALIENATION OF PARENT'S AFFECTION—Plaintiff's parents were divorced in 1934 when plaintiff was five years old. Custody of plaintiff was awarded to her mother, but plaintiff alleged that she received "usual paternal love, affection, maintenance, and support" from her father until 1941, when plaintiff's father took defendant as his mistress, keeping her until his death in 1952. Plaintiff brought this action for damages on the theory that defendant alienated the affections of her father, thereby depriving plaintiff of fatherly affection, guidance and support. Defendant's demurrer was overruled by the trial court. On appeal, *held,* reversed. In the absence of a statute, a child has no cause of action against a third party for the alienation of the affections of its parent. *Scholberg v. Itnyre,* (Wis. 1953) 58 N.W. (2d) 698.

Not until 1945 did any appellate court in the United States recognize that a child has a legally protectable interest in the love, society and support of his parent.[1] Previously, at least three courts had denied such relief.[2] Since then courts in thirteen jurisdictions have passed on this question; four decisions in three states have held that such a right exists,[3] while ten jurisdictions have rejected such a cause of action.[4] Various reasons have been advanced by the

[1] Daily v. Parker, (7th Cir.) 152 F. (2d) 174 (1945). In the absence of controlling Illinois law, the federal court felt free to decide the case as one of first impression. Extensive law review comment resulted. E.g., see 46 COL. L. REV. 464 (1946); 59 HARV. L. REV. 297 (1945); 32 VA. L. REV. 420 (1946); 32 CORN. L.Q. 432 (1947); 30 MINN. L. REV. 310 (1946); 94 UNIV. PA. L. REV. 437 (1946). See generally 12 A.L.R. (2d) 1178 (1950).

[2] Coulter v. Coulter, 73 Colo. 144, 214 P. 400 (1923); Cole v. Cole, 277 Mass. 50, 177 N.E. 810 (1931); Morrow v. Yannantuona, 152 Misc. 134, 273 N.Y.S. 912 (1934).

[3] *Illinois*: Daily v. Parker, note 1 supra; Johnson v. Luhman, 330 Ill. App. 598, 71 N.E. (2d) 810 (1947); *Minnesota*: Miller v. Monsen, 228 Minn. 400, 37 N.W. (2d) 543 (1949); *Michigan*: Russick v. Hicks, (D.C. Mich. 1949) 85 F. Supp. 281.

[4] McMillan v. Taylor, 81 App. D.C. 322, 160 F. (2d) 221 (1946), followed in Edler v. MacAlpine-Downie, 86 App. D.C. 97, 180 F. (2d) 385 (1950); Taylor v. Keefe, 134 Conn. 156, 56 A. (2d) 768 (1947); Rudley v. Tobias, 84 Cal. App. (2d) 454, 190 P. (2d) 984 (1948) (based on a statutory amendment); Garza v. Garza, (Tex. Civ. App. 1948) 209 S.W. (2d) 1012; Henson v. Thomas, 231 N.C. 173, 56 S.E. (2d) 432 (1949); Nelson v. Richwagen, 326 Mass. 485, 95 N.E. (2d) 545 (1950); Katz v. Katz, 197 Misc.

courts for denying relief to a child in this kind of case. It is said that there is no loss of "consortium,"[5] the basis of a suit for alienation of affections,[6] or that such actions are either prohibited by or contrary to the spirit of so-called "heart balm" statutes which abolish, inter alia, suits for alienation of affections.[7] Practical considerations, such as the prospect of fostering a multiplicity of actions and creating new opportunities for extortion, the difficulty of assessing damages, and the fear of causing a flood of litigation, are thought to stand in the way of allowing such actions.[8] Other courts have felt that the creation of such new rights is a matter for the legislature.[9] On the other hand, courts awarding relief have emphasized the sociological change in the concept of the family, resulting in relative equality for all members;[10] the capacity of the common law to adapt itself to changed circumstances and create new rights by a process of "judicial empiricism";[11] and the fact that so-called practical difficulties should not deprive an injured plaintiff of a remedy.[12] The most serious objection to recognizing this cause of action would seem to be the legislative policy abolishing such actions. A somewhat contrary policy, however, is evidenced by the strong tendency in the direction of liberalizing substantive and procedural rights of infants, e.g., permitting an unemancipated child to sue his parent in tort for negligence,[13] allowing an action by a child against his parent for support,[14] and recognizing a cause of action in a child for pre-natal injuries.[15] Moreover, the wisdom of the heart balm acts providing for the complete abolition of alienation of affections suits has been seriously questioned by many writers, who argue that they are in conflict with the policy of the law to give increased protection to the sanctity of the home, and that

412, 95 N.Y.S. (2d) 863 (1950) (based on statute); Gleitz v. Gleitz, 88 Ohio App. 337, 98 N.E. (2d) 74 (1951); Kleinow v. Ameika, 19 N.J. Super. 165, 88 A. (2d) 31 (1952); and the principal case.

[5] A bundle of legal rights consisting of services, society, and sexual intercourse. Winsmore v. Greenbank, Willes, 577, 125 Eng. Rep. 1330 (1745). The modern law has added a fourth element, conjugal affection. PROSSER, TORTS 917 (1941). See Holbrook, "The Change In The Meaning of Consortium," 22 MICH. L. REV. 1 (1923).

[6] Morrow v. Yannantuona, note 1 supra; Taylor v. Keefe, note 4 supra.

[7] Taylor v. Keefe, note 4 supra; Katz v. Katz, note 4 supra. *Contra*, Russick v. Hicks, note 3 supra. Recent comments on these statutes are found in 47 MICH. L. REV. 383 (1949); 33 VA. L. REV. 314 (1947); 52 COL. L. REV. 242 (1952).

[8] 83 UNIV. PA. L. REV. 276 (1934), accepted in Taylor v. Keefe, note 4 supra; Nelson v. Richwagen, note 4 supra.

[9] Gleitz v. Gleitz, note 4 supra; principal case.

[10] Johnson v. Luhman, note 3 supra.

[11] Daily v. Parker, note 1 supra.

[12] Miller v. Monsen, note 3 supra.

[13] Borst v. Borst, 41 Wash. (2d) 642, 251 P. (2d) 149 (1952); Signs v. Signs, 156 Ohio St. 566, 103 N.E. (2d) 743 (1952).

[14] Parker v. Parker, 335 Ill. App. 293, 81 N.E. (2d) 745 (1948); Simonds v. Simonds, (D.C. Cir. 1946) 154 F. (2d) 326.

[15] Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E. (2d) 334 (1949); Woods v. Lancet, 303 N.Y. 349, 102 N.E. (2d) 691 (1951).

they undoubtedly deny relief in many cases of serious and genuine wrong.[16] The opportunity for extortion is present in many types of tort litigation, and it is difficult to see how this justifies complete abolition of a cause of action. A much better solution would seem to be the one found in an Illinois statute passed after the Illinois heart balm act was held unconstitutional.[17] This act limits damages in any alienation of affections suit to actual damages, and prohibits punitive damages and relief based on mental anguish, leaving the punishment of the wrongdoer to the criminal laws.[18] Such provisions afford relief in genuine hardship cases, while at the same time avoiding the frequently voiced criticism that allowing punitive damages often leads to excessive verdicts. It may be that the loss of the society of the type of parent who deserts his home is de minimis damage-wise to a child. However, it does seem that an infant should be permitted to recover for loss of support and maintenance, and where a statutory action for support is unavailable or is inadequate for one reason or another,[19] compensatory damages ought to be awarded against the paramour who is in effect a joint tortfeasor with the derelict parent. The required joinder of all children who have a cause of action, and the permitted joinder of the transgressing parent and the third party prompting the dereliction would be desirable innovations. A new, definitive statutory solution is needed in this area.

Marvin O. Young, S.Ed.

[16] Feinsinger, "Legislative Attack on 'Heart Balm,'" 33 MICH. L. REV. 979 (1935); Kane, "Heart Balm and Public Policy," 5 FORDHAM L. REV. 63 (1935); PROSSER, TORTS 938 (1941); 30 ILL. L. REV. 764 (1936).

[17] Heck v. Schupp, 394 Ill. 296, 68 N.E. (2d) 464 (1946).

[18] Ill. Rev. Stat. (1951) c. 68, §34-40. Similar provisions appear as to actions for criminal conversation, c. 68, §41-47, and as to breach of promise, c. 89, §25-34.

[19] At common law an infant could not maintain a suit for support against his parent. MADDEN, DOMESTIC RELATIONS 392 (1931). Cf. cases cited in note 14 supra. The courts in Nelson v. Richwagen, note 4 supra, and Henson v. Thomas, note 4 supra, deemed statutes authorizing actions for support significant in denying relief in an alienation of affections action.