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## DOMESTIC RELATIONS

### EFFECT OF HEART BALM ACTS ON INFANT'S RIGHT TO SUE FOR THE ENTICEMENT OF HIS PARENT

The mother of infant children was enticed away from the children and family home by Hicks. By their father as next friend, the children sued for damages resulting from the enticement. The Federal District Court allowed the action although a Michigan heart-balm statute had abolished actions for alienation of affections. The court reasoned that a cause of action should be recognized in favor of the children and that the heart-balm statute, being intended to abolish only the traditional alienation-of-affections suit, did not bar the children's action. *Russick v. Hicks*, 85 F. Supp. 281, (W. D. Mich. 1949).

In allowing the action the court surmounted two barriers: it first recognized a new cause of action to protect the children's interest in the parental relation and then determined the action to be outside the purview of an existing heart-balm statute.<sup>1</sup> There are indications of a trend to liberalize tort law in favor of the infant.<sup>2</sup> Three appellate courts, faced with facts similar to those in this case, have upheld the infant's action for injury to his interest in the security of the parental relation.<sup>3</sup> But the action has been

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20. The UNIFORM REVISED SALES ACT and UNIFORM COMMERCIAL CODE which presumably will soon be in effect in many jurisdictions are excellent examples of this trend. See Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L. J. 1341 (1948); Comment, 57 YALE L. J. 1360, 1360-1366 (1948).

1. "All civil causes of action for alienation of affections, criminal conversation, and seduction of any person of the age of 18 years or more, and all causes of action for breach of contract to marry are hereby abolished.. MICH. COMP. LAWS (1948) § 551.301.

2. Note, 35 VA. L. REV. 618 (1949).

3. *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945). This decision was the first to recognize a cause of action in the minor child where the father was enticed from the home. The decision provoked wide comment, and is noted in 13 U. OF CHI. L. REV. 375 (1946); 41 ILL. L. REV. 444 (1946); 25 CHI-KENT REV. 90 (1946); 59 HARV. L. REV. 297 (1945); 46 COL. L. REV. 464 (1946); 15 FORD. L. REV. 126 (1946); 30 MINN. L. REV. 310

denied by other courts on various grounds of public policy,<sup>4</sup> contrary legislative intent,<sup>5</sup> and the absence of precedent.<sup>6</sup>

Some suggested theories<sup>7</sup> upon which liability might be predicated are: the doctrine of *Lumley v. Gye*,<sup>8</sup> that a third party inducing breach of contract is liable in tort to the promisee—here the defendant has induced the mother to neglect her duty (founded on status rather than the traditional contract) to her child; the broad principle of *Wilkinson v. Downton*,<sup>9</sup> that unjustifiable wilfull conduct which results in harm to the plaintiff is actionable; the appropriation of the child's parental relation—a distinct "relational interest"<sup>10</sup>; the loss of an expectancy.<sup>11</sup>

Courts have displayed their usual reluctance to recognize a new cause of action and have raised the usual objections thereto: the possibility of multiplicity of actions by "everyone whose cheek is tinged by the blush of shame,"<sup>12</sup> the possibility of extortionary litigation, the inability of judges

(1946); 32 CORNELL L. Q. 432 (1947); 19 SO. CALIF. L. REV. 455 (1946); 32 VA. L. REV. 420 (1946).

*Johnson v. Luhman*, 330 Ill. App. 598, 71 N. E.2d 810 (1947). Here the action was allowed despite the fact that the enticed father was furnishing support for the children under a court order, thus indicating that the basis for the action was something other than loss of support. This decision is commented on in 15 U. OF CHI. L. REV. 400 (1948); 25 CHI-KENT L. REV. 260 (1947); 1 WYO. L. J. 194 (1947).

*Miller v. Monsen*, 228 Minn. 400, 37 N. W.2d 543 (1949). Here a minor child recovered damages for the enticement of her mother from the family home. The decision has been commented upon as having established a definite minority view that a minor child has a cause of action against an outsider for injuries resulting from the enticement of the parent from the family home. See notes in 28 N. C. L. REV. 113 (1949); 63 HARV. L. REV. 541 (1950); 38 GEO. L. J. 1606 (1949); 29 B. U. L. REV. 538 (1949); 48 MICH. L. REV. 242 (1949); 34 MINN. L. REV. 63 (1949).

4. *McMillan v. Taylor*, 160 F.2d 221 (App. D. C. 1946); *Taylor v. Keefe*, 134 Conn. 156, 56 A.2d 768 (1947).

5. *Rudley v. Tobias*, 84 Cal. App.2d 454, 190 P.2d 984 (1948). Upon enactment of the California heart-balm statute the legislature removed a section of the code which had allowed a child to sue for the abduction of its parent.

6. *Garza v. Garza*, 209 S. W.2d 1012 (Tex. Civ. App. 1948); *Henson v. Thomas*, 231 N. C. 173, 56 S. E.2d 432 (1949).

7. 13 U. OF CHI. L. REV. 375 (1946); 41 ILL. L. REV. 444 (1946); see *Johnson v. Luhman*, 330 Ill. App. 598, 71 N. E.2d 810, 812 (1947).

8. 2 E. & B. 216, 118 Eng. Rep. 749 (1853).

9. (1897) 2 Q. B. 57.

10. Green, *Relational Interests*, 29 ILL. L. REV. 460, 462 (1934):

*Relational interests* (interests in relations with other persons) are distinct interests. They extend beyond the personality, and are not symbolized by any tangible thing which can legitimately be called property. . . . The situation is this: plaintiff stands in some relation to some other person; defendant hurts plaintiff's relation with that person. Thus is a hurt done to a relational interest. Relational interests may be classified as (1) *family* relations; (2) *trade* relations; (3) *professional* relations; (4) *general social* relations; (5) *political* relations.

11. The inducement of a testator to alter his will created liability in *Bohannon v. Wachovia Bank & Trust Co.*, 210 N. C. 679, 188 S. E. 390 (1936).

12. *Morrow v. Yannantuono*, 152 Misc. 134, 273 N. Y. Supp. 912, 914 (Sup. Ct. 1934).

to define the child's rights and of juries to properly assess damages, and the lack of a common law precedent.<sup>13</sup> But other courts have reasoned that if the enticement constitutes a legal wrong, there should be a remedy to obtain redress,<sup>14</sup> and that to deny a remedy would contravene the remedy clause of a state constitution.<sup>15</sup> It has been pointed out that there has been no flood of litigation in cases of this kind though sufficient time has elapsed for a reasonable trial period.<sup>16</sup> And further, there are not enough such enticements to cause a burdensome increase in extortionary litigation<sup>17</sup>; but that even if some extortionary suits do result, "the very purpose of the courts is to separate the just from the unjust causes" and "in every kind of litigation some suits are brought in bad faith."<sup>18</sup>

Courts recognizing the cause of action have made surprisingly little use of legal fictions; they have preferred to recognize the modern family as "a cooperative enterprise with mutual rights and obligations among all its members,"<sup>19</sup> as opposed to Blackstone's concept, "The child hath no property in his father."<sup>20</sup> The rule most relied upon by way of analogy has been stated to be "that intentional interference with a relationship from which legally unenforceable benefits flow to a party is actionable . . ."<sup>21</sup> Justification for allowing the action has been found in the need for a remedy to protect the child's interest<sup>22</sup> in the family relationship and the power and duty of the courts to use the rule by which the common law expanded to provide such a remedy.<sup>23</sup>

A conflict between judicial empiricism and judicial legislation is involved. The difficulty of resolving this conflict is illustrated in *Henson v. Thomas*<sup>24</sup> where the majority felt that the advisability of protecting the

13. See *Miller v. Mosen*, 228 Minn. 400, 37 N. W.2d 543, 546 (1949); *Henson v. Thomas*, 231 N. C. 173, 56 S. E.2d 432, 434 (1949); 83 U. OF PA. L. REV. 276 (1934).

14. *Miller v. Mosen*, 228 Minn. 400, 37 N. W.2d 543, 546 (1949).

15. *Johnson v. Luhman*, 330 Ill. App. 598, 71 N. E.2d 810, 814 (1947); see IND. CONST. Art. I, § 12.

16. *Miller v. Mosen*, 228 Minn. 400, 37 N. W.2d 543, 546 (1949).

17. *Ibid.*

18. *Wilder v. Reno*, 43 F. Supp. 727, 729 (M. D. Pa. 1942).

19. *Russick v. Hicks*, 85 F. Supp. 281, 284 (W. D. Mich. 1949).

20. 3 BL. COMM. \*143.

21. *Miller v. Mosen*, 228 Minn. 400, 37 N. W.2d 543, 548 (1949); see note 10 *supra*.

22. See Note, 162 A. L. R. 824, 825 (1946):

No one doubts that a child has an interest in his parents' affection and company and that the courts, under the Anglo-American system of law, have the power to "legalize" such interest by recognizing a right of action for its protection.

23. See *Daily v. Parker*, 152 F.2d 174, 177 (7th Cir. 1945); *Russick v. Hicks*, 85 F. Supp. 281, 285-286 (W. D. Mich. 1949); *Johnson v. Luhman*, 330 Ill. App. 598, 71 N. E.2d 810, 814 (1947).

24. *Henson v. Thomas*, 231 N. C. 173, 56 S. E.2d 432, 424 (1949). It is significant that neither the majority nor the dissenting opinions in this case mention the case of *Miller v. Mosen*, 228 Minn. 400, 37 N. W.2d 543 (1949) which had been decided more

family relation through an action by the child for the wrongful interference therewith should be decided only by the legislature. Two dissenting judges, however, took the position that the action satisfied every definition of actionable tort and warranted recognition through judicial empiricism. In states such as Indiana, where the question has not been decided, it is impossible to predict accurately which view the appellate courts will take.<sup>25</sup> It can only be observed that there is now substantial authority from other jurisdictions for either view.<sup>26</sup>

In hurdling the Michigan heart-balm statute the court relied primarily on the rule of construction that a statute in derogation of common law rights should be strictly construed<sup>27</sup> and advanced the argument that the Michigan legislature could not have intended to abolish a cause of action which was neither known nor recognized under Michigan law at the time the statute was enacted. With equal logic the court could have applied the general rule of statutory construction that a statute will operate prospectively so as to include new circumstances, rights, or legal relationships unknown at the time of enactment.<sup>28</sup>

Indiana's heart-balm statute,<sup>29</sup> like Michigan's, abolishes all civil causes of action for alienation of affections. Unlike the Indiana statute, however, the Michigan statute contains a proviso allowing suits against a "parent, brother, sister, or person in loco parentis of the *plaintiff's spouse*" (italics supplied) for alienation of affections.<sup>30</sup> From this proviso the court inferred that the pertinent provisions of the whole statute referred only to suits by a spouse. Since the Indiana statute makes no exceptions, and legislation is intended to operate prospectively, any action for alienation of affections would seem to be barred in Indiana. But if the child's action is not one for alienation of affections and is not barred by the policy of the heart-balm statute, it could be allowed.

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than six months prior to this decision, and is probably the best reasoned case supporting the cause of action. *Miller v. Mosen* is approved in a recent law review note which apparently was being prepared almost simultaneously with the North Carolina Supreme Court's opinion in *Henson v. Thomas*. See 28 N. C. L. REV. 113 (1949).

25. See note 24 *supra* for an illustration of such an attempt.

26. See notes 3 to 6 *supra* and the *Russick* case.

27. This rule of statutory interpretation is applicable in Indiana. *Universal Discount Corp. v. Brooks*, 115 Ind. App. 591, 594, 58 N. E.2d 369, 371 (1944); *Helms v. American Security Co.*, 216 Ind. 1, 6, 22 N. E.2d 822, 824 (1939); 3 SUTHERLAND, STATUTORY CONSTRUCTION § 6201 (3d ed., Horack, 1943).

28. 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5102 (3d ed., Horack, 1943).

29. IND. STAT. ANN. (Burns Repl. 1946) § 2-508:

All civil causes of action for breach of promise to marry, for alienation of affections, for criminal conversation, and for the seduction of any female person of the age of twenty-one years or more are hereby abolished, provided that this section shall not affect any such cause of action heretofore accrued.

30. MICH. COMP. LAWS (1948) § 551.302.

In determining whether the child's action is one for alienation of affections a comparison must be made between the interests protected by the child's action and the interests protected by the action for alienation of affections. The child's action is designed to protect the child's interest in benefits which normally flow from the parental relation. The three leading duties of parents to their children are support, protection, and education.<sup>31</sup>

Primarily, the duty to support a child rests upon the father; but the mother, also, may be made liable for the child's support.<sup>32</sup> In most jurisdictions the child cannot sue the parent directly to enforce the duty of support, but the state or a third party furnishing necessaries must bring the action.<sup>33</sup>

The duty to protect his child creates a privilege in the parent, when acting for the child's protection, which may justify assault and battery or even homicide.<sup>34</sup>

Blackstone pronounced the duty to educate to be far the greatest of all the parental duties.<sup>35</sup> This duty plus the natural desire of the normal parent to educate his child results in a benefit which has been assigned pecuniary value in actions by a child for the death of a parent.<sup>36</sup> The courts have taken the view that the nurture and training—physical, intellectual, and moral—normally provided by a parent are usually major factors in the welfare of the child during its entire life. As stated in the instant case, the children are entitled to "the intangible, although equally important, elements of affection, companionship, moral support, and guidance from both the father and mother."<sup>37</sup> It should be noted that the term "educate," as used here, denotes much more than formal classroom training. The nurture, guidance, emotional stability, and training received by the child at the family home are, perhaps, the most important elements of the child's education in a broad sense and constitute the basis for his cause of action against a stranger who intentionally deprives him of such benefits.

The action for alienation of affections is designed to protect the marital relation from invasion by third persons. The interest protected is said to be the *consortium*—that is, the society, companionship, conjugal affections, fel-

31. SCHOULER, DOMESTIC RELATIONS § 772 (6th ed., Blakemore, 1921).

32. *State v. Troxler*, 202 Ind. 268, 271, 173 N. E.2d 321, 323 (1930).

33. MADDEN, DOMESTIC RELATIONS § 112 (1931).

34. *Id.* § 116.

35. 1 BL. COMM. \*450.

36. *Board of Commissioners v. Legg*, 93 Ind. 523, 530-531 (1884):

The care, training and education which a father can give his children may justly be regarded as increasing their capacity to make their way in the world, and this capacity, surely, may be valuable even in a pecuniary sense.

See Note, 74 A. L. R. 95 (1931).

37. *Russick v. Hicks*, 85 F. Supp. 281, 284 (W. D. Mich. 1949).

lowship and assistance of the spouse.<sup>38</sup> The action is restricted to spouses, and the existence of a marriage relation is essential to recovery.<sup>39</sup> One spouse may recover for the mere loss of the other's affections, without more; neither separation, adultery, seduction, or loss of services is essential to recovery.<sup>40</sup> A parent cannot maintain an action for the mere loss of affections of the child,<sup>41</sup> however, and no decision has allowed a child to recover for the mere loss of its parent's affections, without actual separation.

It appears that the primary basis for the alienation-of-affections action is the protection of each spouse's interest in the conjugal affections of the other; whereas, the basis for the child's action for the enticing away of its parent is the protection of the child's interest in the parental relation. The elements of companionship, society, fellowship, and assistance are common to both the parental and marital relations. The element of education in the broad sense, including nurture and guidance, is peculiar to the parental relation; and the element of conjugal affections is peculiar to the marital relation.

The four decisions allowing the child's action have not considered it to be an alienation-of-affections action. Two<sup>42</sup> of the decisions do not mention the term alienation of affections, while the instant opinion refers to the term only to refute the contention that the action is barred by the heart-balm statute and proceeds to distinguish the child's action as follows:

Theirs is not the traditional alienation-of-affections suit—it is an action to recover damages for a direct wrong to the infant plaintiffs, that is, the wrongful invasion of their family relationships and the loss of the benefits therefrom. . . . Their right of action arose when defendant enticed and induced their mother to desert them and the family home. . . .<sup>43</sup>

Though the Illinois court<sup>44</sup> has used the term alienation of affections, it could

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38. *Gregg v. Gregg*, 37 Ind. App. 210, 216, 75 N. E. 674, 676 (1905); KEEZER, *MARRIAGE AND DIVORCE* § 190 (3d ed., Moreland, 1946).

39. See *Pennington v. Stewart*, 212 Ind. 553, 556, 10 N. E.2d 619, 621 (1937) (upholding the constitutionality of the Indiana heart-balm act); *Young v. Young*, 236 Ala. 627, 184 So. 187 (1938); *RESTATEMENT, TORTS* § 683, comment *j* (1938).

40. *HARPER, TORTS* § 256 (1933); *MADDEN, DOMESTIC RELATIONS* § 56 (1931); *Adams v. Main*, 3 Ind. App. 232, 235, 29 N. E. 792, 793 (1892).

41. *Montgomery v. Crum*, 199 Ind. 660, 682, 161 N. E. 251, 260 (1928):

But the relationship between a husband and wife is different from that between a parent and child. The foundation of an action for the alienation of affections brought by a husband or wife and an action by a parent for the abduction of his minor child is not the same. The former action is grounded upon the loss of consortium or conjugal relations. . . .

See Note 49 A. L. R. 562 (1927).

42. *Daily v. Parker*, 152 F.2d 174 (7th Cir. 1945); *Miller v. Monsen*, 228 Minn. 400, 37 N. W.2d 543 (1949).

43. *Russick v. Hicks*, 85 F. Supp. 281, 286-287 (W. D. Mich. 1949).

44. *Johnson v. Luhman*, 330 Ill. App. 598, 71 N. E.2d 810 (1947).

do so freely because the Illinois heart-balm statute had been declared unconstitutional<sup>45</sup> and the cause of action was described in the complaint as one for alienation of affections. Nowhere does the Illinois court indicate that the child could sue for mere loss of the parent's affections. The defendant had induced the father to leave his five children, and this was the harm which concerned the court.<sup>46</sup> Throughout the opinion the court indicates that it is seeking to protect the children's interest in the security of their family unit. The term alienation of affections appears to have been a misnomer of the cause of action.

The policy reason for heart-balm statutes is the prevention of extortionary litigation.<sup>47</sup> However, the action for alienation of affections has been characterized as the least objectionable of the actions abolished<sup>48</sup>; and its retention has been urged as a matter of policy to preserve the home.<sup>49</sup> The flurry of heart-balm legislation appears to have passed with only ten states<sup>50</sup> now prohibiting the alienation-of-affections action. The Illinois act has been held unconstitutional,<sup>51</sup> and the Pennsylvania act has been criticized in a

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

46. Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810, 814 (1947):

Defendant's conduct resulted in the destruction of the children's family unit—that fortress within which they should find comfort and protection at least until they reach maturity—and deprived them of the unstinting financial support heretofore contributed by their father, as well as of the security afforded by his affection and presence.

47. The policy section of the New York statute is a typical expression of legislative policy:

The remedies heretofore provided by law for the enforcement of actions based upon alleged alienation of affections, criminal conversation, seduction and breach of contract to marry, having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination.

N. Y. CIV. PRAC. ACT § 61-a.

48. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979, 1008 (1935).

49. Brown, *The Action for Alienation of Affections*, 82 U. OF PA. L. REV. 472, 505 (1934).

50. ALA. CODE ANN., tit. 7, § 115 (1940); IND. STAT. ANN. § 2-508 (Burns Repl. 1946); N. J. STAT. ANN. § 2.39A (1939); N. Y. CIV. PRAC. ACT § 61-a; PA. STAT. ANN., tit. 48, § 170 (Purdon Supp. 1949); COLO. STAT. ANN., c. 24A, § 1 (Supp. 1947); CAL. CIV. CODE § 43.5 (Deering 1941); MICH. COMP. LAWS § 551.301 (1948); WYO. COMP. STAT. ANN. § 3-512 (1945); NEV. COMP. LAWS ANN. § 4071.01 (Supp. 1949).

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

dictum<sup>52</sup> as an improper use of police power. The heart-balm acts have been described recently as having been "conceived in a rash of newspaper publicity and ballyhoo. . . ."<sup>53</sup> The acts have been vigorously criticized by legal writers.<sup>54</sup>

Policy reasons given for abolishing alienation-of-affections actions might well be less applicable to the child's cause of action for the reasons that greater injury to society and the family normally results where the spouse enticed away is a parent and that there would be relatively few such suits.<sup>55</sup> Professor Brown<sup>56</sup> believes that more suits for alienation of affections are brought against parents and other very close relatives of the alienated spouse than against any other class of persons. Suits of this type would seldom, if ever, be brought by children. Also, sociologists seem to agree that divorce and separation are less frequent among couples with children.<sup>57</sup> Admitting that the good faith and pure motives of a spouse may be questioned in many instances, there should be ample opportunity to avoid extortionary suits by the children if they are required to show a real loss of parental benefits caused directly by the defendant's act.<sup>58</sup>

The parent is generally allowed to sue for the enticement, abduction, or seduction of his child<sup>59</sup>; and the more recent cases hold that proof of loss of the child's services is not essential to recovery.<sup>60</sup> These decisions dispensing with the fiction of loss of services indicate a recognition of the parent-child relation as a distinct interest. The Indiana heart-balm statute does not abolish actions for the seduction of females under twenty-one or actions for the enticement or abduction of a child.<sup>61</sup> It would seem reasonable to grant the child a reciprocal right to sue for the enticement of the parent.

Care should be exercised to avoid the use of the term alienation of affections in pleadings and arguments seeking recognition of the child's cause of action; rather, the action should be treated as one for the wrongful

52. See *Wilder v. Reno*, 43 F. Supp. 727, 729 (M. D. Pa. 1942).

53. Note, 33 VA. L. REV. 314 (1947).

54. Kane, *Heart Balm and Public Policy*, 5 FORD. L. REV. 63 (1936); Feinsinger, *Current Legislation Affecting Breach of Promise to Marry, Alienation of Affections, and Related Actions*, 10 WIS. L. REV. 417 (1935).

55. *Miller v. Monsen*, 228 Minn. 400, 37 N. W.2d 543, 546 (1949).

56. Brown, *The Action for Alienation of Affections*, 82 U. OF PA. L. REV. 472, 483 (1934).

57. Ogburn, *Marital Separations*, 49 AM. J. SOCIOLOGY 316, 319 (1944).

58. *Daily v. Parker*, 152 F.2d 174, 177-178 (7th Cir. 1945). The question of whether the child suffered any real loss by the enticement from him of a worthless parent is a question of damages for the jury. See Note, 20 CORNELL L. Q. 255, 256-257 (1935).

59. *Montgomery v. Crum*, 199 Ind. 660, 161 N. E. 251 (1928); *Bundy v. Dodson*, 28 Ind. 295 (1867); *Bolton v. Miller*, 6 Ind. 262 (1855); HARPER, TORTS §§ 263, 264 (1933); MADDEN, DOMESTIC RELATIONS §§ 130, 131 (1931).

60. *Montgomery v. Crum*, 199 Ind. 660, 161 N. E. 251 (1928); see Note, 72 A. L. R. 847, 849 (1931).

61. IND. STAT. ANN. (Burns Repl. 1946) § 2-508 *et seq.*

interference with a relational interest enjoyed by the child. If the courts can be convinced that distinctions amounting to more than mere words do exist between the child's action for the enticement of his parent from the family home and the spouse's action for alienation of affections, the legislative policy of the heart-balm acts would not seem to be a compelling reason for denying the child's action.