North Dakota Law Review

Volume 41 | Number 4 Article 10

1964

Torts - Invasion of Privacy - Infants' Right to a Cause of Action for Enticing Parent

Bruce E. Coleman

devise that had been destroyed during his incompetency would be considered adeemed by the testator's intention.[15] This does not conflict with the holding in the instant case as it is a well settled rule that there is an ademption when the testator knows and does nothing to remedy the destruction of an object of a specific devise.[16]

The decision in this case gives a just and well-reasoned result in the first situation and does nothing to hinder a just result in the second situation. By applying the foregoing reasoning to similar cases, the courts can provide an equitable solution to this small but confused area of the law.

JAMES BAILEY

TORTS—INVASION OF PRIVACY—INFANTS' RIGHT TO A CAUSE OF ACTION FOR ENTICING PARENT—By invoking the invasion of privacy principle,[1] the minor plaintiffs alleged that the female defendant disrupted the family circle by enticing the father to leave the home. The children claimed they were deprived of their father's affection, companionship and guidance and subjected to unwanted notoriety. The Supreme Court of Ohio, with one justice dissenting,[2] *held* that this action arose out of the marital contract in which the spouse was the sole beneficiary. Thus the action could not be upheld due to a lack of common law precedent or statutory authorization. *Kane v. Quigley*, 1 Ohio St. 2d 1, 203 N.E.2d 338 (1964).

Except where prohibited by statute,[3] the gist of the action by a minor seems to be related to the common law concept of alienation of affection which allows recovery for loss of consortium by a spouse.[4] Decisions allowing recovery by a minor against a third person have been based on the theories of *ubi jus ibi remedium*[5] and invasion of privacy.[6] While some state constitutions

15. See, *In re* Bierstedt's Estate, *supra* note 1.
16. See *e.g.*, *In re* Ireland's Estate, 257 N.Y. 155, 177 N.E. 405 (1931); *In re* Brann, *supra* note 8.

1. Miller v. Monsen, 228 Minn. 400, 37 N.W.2d 543 (1949).
2. The dissenting justice believed there was an injury to the minor plaintiffs and based recovery upon the OHIO CONST. art. I, § 16, which allows a remedy for a wrong done to a person.
3. Seven states have abolished the cause of action for alienation of affection by adopting "Heart Balm Statutes." See: Alabama, Colorado, Indiana, Nevada, New Jersey, New York and Wyoming. Maine, Massachusetts and New Hampshire have abolished the action only for breach of promise to marry. Michigan and Pennsylvania passed the statute with the exception that it does not apply to suits by a husband or wife against a defendant who is a parent, brother, sister or person in loco parentis of the plaintiff's spouse. Illinois repealed the "Heart Balm Statute" because it violated their state constitution which provides a remedy for a wrong done to a person. Heck v. Schupp, 394 Ill. 296, 68 N.E.2d 464 (1946).
4. Taylor v. Keefe, 134 Conn. 156, 56 A.2d 768 (1947).
5. Daily v. Parker, 152 F.2d 174 (7th Cir. 1945). See Johnson v. Luhman, 330 Ill. App. 598, 71 N.E.2d 810 (1947), which based recovery on the state constitution, and Russick v. Hicks, 85 F. Supp. 281 (W.D. Mich. 1949), which held that if a wrong has been committed there should be a remedy.
6. Miller v. Monsen, *supra* note 1.

provide that there must be a remedy for a wrong, as the dissent pointed out in the instant case, other courts have interpreted similar statutes to have a different meaning.[7] Some jurisdictions have disregarded the allegation of "judicial empiricism"[8] and found the common law to be flexible.[9] It appears that courts have used this subterfuge of flexibility to establish a cause of action for a minor against the paramour, but this extension is justified by fairness and justice to the injured child. One decision allowing recovery draws an analogy to intentional interference with a legal relationship causing loss to the injured party.[10] At least thirty-one jurisdictions recognize the right of p r i v a c y,[11] while only four have expressly denied this right.[12] The better reasoning seems to allow each child a separate cause of action with a joinder of parties for the trial.[13]

Theories advanced in denying recovery by a minor are: (1) the action cannot be supported under the marriage contract,[14] (2) lack of statutory authority allowing recovery, coupled with the feeling that courts should not engage in judicial empiricism,[15] (3) multiplicity of suits,[16] (4) flood of litigation,[17] (5) policy considerations[18] and (6) difficulty in measuring damages.[19] Two jurisdictions opposing recovery have held there is no loss of consortium by the

---

7. Taylor v. Keefe, *supra* note 4, circumvented the provision of the state constitution guaranteeing redress "for injury done" by holding there must be a legal injury, and an action by a minor against the paramour did not involve a legal injury. Illinois has placed emphasis on this provision; see Daily v. Parker and Johnson v. Luhman, *supra* note 5. Although Massachusetts has a similar provision it expressly denies a minor a cause of action in this form of action by statute; Nelson v. Richwagen, 326 Mass. 485, 95 N.E.2d 545 (1950). In Wisconsin such a provision applies only where the injury results from legal infringement in denying a cause of action by a minor; *Cf.* Scholberg v. Itnyre, 264 Wis. 211, 58 N.W.2d 698 (1953). North Dakota has a similar provision in meaning but different in wording which seems to provide a remedy for a wrong. No attempt has been made, however, to apply it to this form of action. N.D. CONST. art. I, § 22: "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. . . ."

8. Daily v. Parker, *supra* note 5: "[I]f no precedents be found, courts can hardly be advisely called radical if they indulge in lawmaking by decisions, or in a word, engage in judicial empiricism." *Contra,* Scholberg v. Itnyre, *supra* note 7.

9. Miller v. Monsen, *supra* note 1; Russick v. Hicks, *supra* note 5 (any derogation from the common law must be strictly construed in referring to the "Heart Balm Statutes," but the court seemed to justify this statement with its flexibility concept by holding that the "Heart Balm Statute" did not apply to a minor).

10. Miller v. Monsen, *supra* note 1.

11. PROSSER, LAW OF TORTS 831, 32 (3rd ed. 1964). These jurisdictions recognizing the right to be let alone could conceivably follow the doctrine announced in the Minnesota decision of Miller v. Monsen, *supra* note 1, and allow a cause of action by a minor for interference with the family unit by a paramour.

12. Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W.2d 803 (1955); Henry v. Cherry, 30 R.I. 13, 73 Atl. 97 (1909); Milner v. Red River Valley Pub. Co., 249 S.W.2d 227 (Tex. Civ. App. 1952); Yoeckel v. Samonig, 272 Wis. 430, 75 N.W.2d 925 (1956).

13. See Johnson v. Luhman and Russick v. Hicks, *supra* note 5; Henson v. Thomas, 231 N.C. 173, 56 S.E.2d 432 (1949).

14. Coulter v. Coulter, 73 Colo. 144, 214 Pac. 400 (1923); Morrow v. Yannantuono, 152 Misc. 134, 273 N.Y.S. 912 (1934).

15. Scholberg v. Itnyre, *supra* note 7.

16. Taylor v. Keefe, *supra* note 4; Nelson v. Richwagen, *supra* note 7; Morrow v. Yannantuono, *supra* note 14.

17. Morrow v. Yannantuono, *supra* note 14; Garza v. Garza, 209 S.W.2d 1012 (Tex. Civ. App. 1948).

18. It has been inferred that the threat of publicity is used to force settlement and this has been advanced as the underlying reason for the passage of the "Heart Balm Statutes." It is felt by some that we have a growing trend toward greater sexual freedom and should adjust our laws in accordance with this trend. See Heck v. Schupp, *supra* note 3.

19. Taylor v. Keefe, *supra* note 4; Nelson v. Richwagen, *supra* note 7.

minor in the departure of the parent.[20] One jurisdiction felt that if recovery were allowed the family relationship would be commercialized.[21]

North Dakota is liberal in allowing recovery by a spouse for alienation of affection,[22] but has not been faced with the question of an action by a minor against an enticer of his parent. This writer feels that North Dakota would allow recovery by a minor under the existing statute[23] or, barring statutory recovery, would adopt the invasion of privacy principle expressed in Minnesota.[24] Allowing recovery, either under statute or expansion of the common law, raises problems similar to those discussed in the instant case.

Although a novel contention, it might be asserted that the minor is a third party beneficiary under the marital contract and therefore subject to recovery for a wrong committed by a paramour. It is suggested that North Dakota allow each child a cause of action with a guardian ad litem appointed for minors bringing the action. The jury should be allowed discretion in awarding compensatory and punitive damages, placing such award in trust for the child. A minor's right of action should arise when a paramour entices the parent to leave the home. The court should carefully scrutinize this form of action to prevent fraud and collusion, but should not deny recovery merely because the assessment of damages is burdensome or difficult. The action should become moot when the child reaches legal age or is capable of self-support.

It is this author's opinion that this sociological and legal problem should be dealt with by the legislature, but in the absence of legislative action the courts should act to do substantial justice.

BRUCE E. COLEMAN

ZONING—PARTICULAR USES—REGULATION OF AGRICULTURAL LAND ADJACENT TO CITY LIMITS—Plaintiffs purchased a home in a

20. Morrow v. Yannantuono, *supra* not 14; Garza v. Garza, *supra* note 17. *Contra,* Johnson v. Luhman, *supra* note 5; Miller v. Monsen, *supra* note 1. The latter two decisions attacked the previous reasoning as not viewing the changes which have taken place in viewing the family as a unit. Daily v. Parker, *supra* note 5, has suggested that a parent leaving home is not worth anything because he was virtually valueless prior to his departure, and that the value of a parent goes to the question of damages.

21. Henson v. Thomas, *supra* note 13.

22. See Tice v. Mandel, 76 N.W.2d 124 (N.D. 1956); Rott v. Goehring, 33 N.D. 413, 157 N.W. 294 (1916).

23. N.D. CENT. CODE § 14-02-06 (1960): "The rights of personal relation forbid: 1. The abduction or enticement of a husband from his wife, or of a parent from his child; . . ." This statute should be considered in conjunction with the N.D. CONST. art. I, § 22. North Dakota's statute relating to personal relations is derived from the CAL. CIV. CODE § 49, which formerly read the same as that now found in North Dakota. California amended the statute in 1939 so it now reads: "The rights of personal relations forbid: (a) The abduction or enticement of a child from a parent, or from a guardian entitled to its custody; . . ." The amendment omitted "or of a parent from his child," and a California decision, Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P.2d 984 (1948), held that the legislature expressed the necessary intent to deny a cause of action by a minor for the enticement of a parent from the home.

24. Miller v. Monsen, *supra* note 1.