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DOES A RIGHT OF ACTION BY A CHILD FOR ENTICEMENT OF ITS PARENT EXIST IN KENTUCKY?

The right of action for enticement has long been recognized in the law. In its legal significance, the wrong included enticing or persuading either spouse to desert the other, or enticing or persuading a child to desert the parent. Recently there has been a recognition of the extension of the action for enticement to a child to recover for the enticement of a parent.

The purpose of this note is to make a brief historical survey of the development of family rights, to examine the right of a child to protect the family relationship from outside interference, and attempt to determine whether the Kentucky Court of Appeals would acknowledge a right of action by a child against a third person for enticing one of its parents from the family circle.

Under the early common law, the family, as such, was not recognized as a legal entity, or as having the rights of an association of persons. This was largely because of the barbarous conditions that existed in society during this period. The members of the family looked to the husband and father for protection against the wrongs committed by others, and he, in turn, considered both wife and children as servants rather than equals. The man represented the family and the protection of the rights of the family were borne entirely by him. ¹

At an early date it was recognized that the husband might maintain an action for a wrong committed by a third party against the wife if such wrong resulted in a loss of services to the husband. ² In such an action services were restricted so as to mean the duties of a servant only. The law later developed so as to expand this right of the husband to include society, sexual intercourse and conjugal affection, all of which, including services, were referred to as consortium.³ The protection of this right of consortium is today the basis of the right to recover for criminal conversation, enticement and alienation of affection.⁴

The wife at common law had no legal rights analogous to those of her husband for outside interference with the domestic relation. The husband and wife were considered as one person, and the wife was without any individual capacity to sue. ⁵ However, as society progressed, modern social changes and statutory authority belatedly gave the wife similar rights and remedies as the husband. ⁶

In like manner, the courts were slow to protect rights arising from the relationship of parent and child. ⁷ Here again the first recognized right of action was based upon the loss by the parent of the child's services. From this phase, the law moved forward, finding in the parent-child relationship a right similar to that of consortium existing in the case of husband and wife. ⁸ Now it is generally

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¹ COOLEY, TORTS 464 (3rd ed. 1906).
² PROSSER, TORTS 917 (1941).
³ Ibid.
⁴ Id. at 917-921.
⁶ Id. at 4.
⁷ PROSSER, TORTS 929 (1941).
⁸ Id. at 930.
recognized that the parent may recover for wrongs suffered through the forceful abduction of the child, enticement, harboring, seduction and other similar offenses.

Until recently, the child was given little, if any, protection against interference with the family relation. Although it had been suggested that the child's interest in an undisturbed family life was equally as important as that of the parent, the court had for various reasons refused to protect such an interest.

Five states have refused to recognize that a child has a cause of action for enticement of a parent. The earliest and perhaps the landmark opinion in refusing the right was rendered by the New York Court in Morrow v. Yannantuono. In this case the court held that the right to recover for enticement was based upon the right of consortium, and as the child had no right of consortium, it had no right of action. Furthermore, it was believed that recognition of the action would cause a flood of litigation upon the courts.

No further litigation arose involving the right of a child to recover for enticement until Daily v. Parker, in which case a federal court recognized the right although the state court had not previously decided the question. It was expressed that the change in the family relationship resulting from present-day society, which recognizes the child's growing participation in moral, intellectual, and financial matters of the family, justified the right of the child to maintain the action. Instead of holding that there was no remedy because there was no precedent, the court relied upon Dean Pound's "judicial empiricism" and held that if the right existed, the court had the power to provide the remedy.

Immediately subsequent to this 1945 Federal Court decision, this cause of action was tested in other state courts. The right was refused recognition in the District of Columbia because of lack of precedent. This was the only reasoning specified except the court stated it followed the Morrow case.

In 1947, the Illinois Court followed the pattern set forth in the Daily v. Parker decision and held the right was maintainable in that state. In this same year, Connecticut denied an action instituted by a minor son against a stranger to the

9 Id. at 931, 932.
10 PROSSER, TORTS 937 (1941).
11 152 Misc. 134, 273 N. Y. Supp. 912 (1934). The pleading in this case was for alienation of affection. However, Prosser states that there is insufficient reason to distinguish between criminal conversation, enticement and alienation of affection, and that the tendency is to group them under the general designation of alienation of affection. PROSSER, TORTS 921 (1941).
12 152 F. 2d 174 (C.C.A. 7th 1945).
15 Taylor v. Keefe, 134 Conn. 556, 56 A. 2d 768 (1947). California has denied the action because of statutory provision prohibiting this type of action. Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P. 2d 984 (1948). Twelve states have abolished the actions of enticement, alienation of affection, seduction, criminal conversation and breach of promise to marry. Keezer, MARRIAGE AND DIVORCE sec. 191 (3rd ed. 1946). Kentucky is not one of these jurisdictions, but these statutes indicate a tendency by some jurisdictions disfavoring this type of action. These statutes have been criticized as denying relief in many cases of serious wrongs. PROSSER, TORTS 938 (1941). For articles contending that these actions perform a desirable social function: Brown, The Action for Alienation of Affection, 82 U. of PA. L. REV. 472, 506 (1934); 30 ILL. L. REV. 764, 773, 782 (1936).
family relation for the alienation of his mother's affection. It was held that the
child had an interest in his parent's affection, but that it was unwise to protect
this interest. Although specifying the "flood of litigation" reasoning, the court
relied on further argument against allowing the cause of action. Other reasons
given were: (1) the possibility of multiplicity of suits; (2) the possibility of
extortionary litigation; (3) the inability to define the point at which the child's
right would cease, inasmuch as the status itself hypothesizes mutability, for
although a spouse is, barring extraordinary circumstances, always a spouse, the very
nature of childhood implies an eventual change to adulthood; and (4) the inability
of a jury adequately to cope with the question of damages, particularly because
damages thus assessed are apt to overlap, in view of the number and different
ages of the children.

Shortly after Connecticut's denial of the right, the Texas Court refused
recovery where the children instituted an action against their father and a third
party as joint defendants for enticement and alienation of affection. The action
against the father was dismissed, and the evidence was held insufficient to support
a finding that the woman had enticed the father from the family home. However,
by dictum, the court stated they were inclined to the view followed in the Morrow
case where the action was denied. Whether the Texas Court will follow this
dictum if the problem arises again remains to be decided.

The most recent opinion regarding this legal right authorized recovery. The
Minnesota Court considered the protection of family rights as essential to the
preservation of society. Due stress was placed upon the effect of the parent's
care, society, and services on the child's character, disposition, and abilities. As a
child's personality has a direct effect upon society, the right to receive affection,
education and support from a parent are pecuniary in nature and entitle the child
to damage as a result of their loss. A review of the cases denying recovery was
made. The court felt that the "flood of litigation" argument was without merit
for two reasons: (1) Denying recovery because of increased litigation could not
be construed as a justifiable stand because if the enticement constitutes a legal
wrong, there should be a remedy to right the wrong; (2) it was observed, in fact,
that recognition of the right had not increased litigation as sufficient time had
elapsed since the first decision allowing recovery to provide a fair testing period
during which no unreasonable amount of litigation had occurred. The scarcity
of litigation was attributed to the fact that there are not enough enticement
situations to cause even a burdensome increase, much less a flood of it. It was held
that this same reasoning applied to the "increased extortionary litigation" argu-
ment. Concerning the contention that the courts are incapable of defining the
rights of the child, and that the court would be incapable of assessing damages,
it was noted that courts and juries are required to execute these precise duties in
other difficult cases and do so with complete success. The novelty of the right
and the lack of common law precedent were also held to be insufficient causes for
denying the action. It was pointed out that the common law consists of broad
and comprehensive principles based on justice, reason and common sense. There-
fore, these principles are susceptible of adoption to such usages as the progress of
society may require.

17 Miller v. Monsen, -- Minn. -- 37 N. W. 2d 543 (1949).
After reviewing the cases of other jurisdictions concerning this problem, the question arises as to whether Kentucky would recognize the action by the child. It should be emphasized that any answer to this question must be merely speculative. However, a review of the development of family rights in Kentucky should be indicative as to whether the right of action could be recognized.

In those states recognizing the right of a child to sue, the progress of society which necessitated a change in the legal position of the wife was noted. The wife’s legal capacity is recognized in Kentucky. Statutory provisions permit her to own and control her own property interests. Furthermore, the right of the wife to sue for enticement and alienation of her husband’s affections has long been recognized. In the first Kentucky case allowing this right of the wife, the court readily took cognizance of the progress and development of society as affecting the marital relation. In speaking of the early denial of the action by the wife, the court stated: “Since such barbarous times generations have succeeded generations, and each one has increased in enlightened thought, before which the harsh doctrines and unreasonable rules of the common law have fallen. Relics of barbarism in the forms of law can not stand before the progress of enlightened ages.” Thus, as the child’s relative rights and duties in the family have changed, the court might well give legal significance to this change.

In Kentucky the right of a parent to recover for enticement or interference with the parent-child relationship is recognized. The court has stated that the parent has the duty to maintain, support and educate the child. The Minnesota court has used these rights as a basis for allowing the child to recover. The court held that if the parent has a right to recover for the enticement of the child, conversely, the child should have a reciprocal right.

The courts refusing to maintain the action have placed important emphasis upon the lack of precedent to afford relief. In the past, this has been insufficient reason for the Kentucky Court to refuse recovery. The Court of Appeals has stated: “The law is both a progressive and resourceful science, and is ever alert to accommodate itself to the constant changing circumstances and conditions of society. Its reservoir of remedial relief has by no means become exhausted, and when it is necessary to apply old principles to new facts, or to employ a remedy to fit altered situations and conditions, it is not only proper, but it is the duty of courts to do so to the end that justice may be administered.” The foremost example of the application of this doctrine was applied in the right of privacy cases. In the first case upholding the right of privacy in Kentucky, the court followed an early Georgia case where it was noted: “The novelty of the complaint is no objection, where an injury cognizable by law is shown to have been inflicted on the plaintiff although there be no precedent, the common law will judge according to the law of nature and the public good.”

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18 Ky. R. S. 1041.010, 1041.020 (1948).
21 See Coshen v. Riney, 239 Ky. 779, 40 S. W. 2d 339 (1931); Tanner v. Skinner, 74 Ky. (11 Bush) 120 (1874).
22 Graham v. John R. Watts & Son, 238 Ky. 96, 105, 36 S. W. 2d 859, 863 (1931).
The right of privacy cases also reveal the attitude of the Kentucky Court toward the contention that a right should not be recognized because of the difficulty of ascertaining damages. The difficulty in these cases results from the fact that the injury is caused from mental anguish and is limited primarily to the feelings. Nevertheless, the court has stated in a right of privacy case that, "The fact that the damages cannot be measured by a pecunary standard is not a bar to his recovery." It might well be argued that the loss to the child resulting from the enticement of a parent is as capable of measurement, if not more so, than the injury to a person resulting from an invasion of privacy. In any case where damages are asked for mental pain and suffering, a difficult problem for the jury is presented but to such objection this court has said, "The difficulty in making the estimate of damages affords no good reason for failing to make it." The court has further stated: "The rule which precludes the recovery of uncertain damages is applied and limited to uncertainty as to the fact of damage, and has no relevancy to mere uncertainty as to the extent or measure of damages actually and certainly suffered." It would thus seem that the difficulty in ascertaining damages would be insufficient argument to prevent the action in Kentucky. Further, the various reasons against allowing an action by a child in other states, when applied to analogous situations in Kentucky, do not appear to be of sufficient strength to prevent the right of action.

In conclusion, the action by a child to recover for the enticement of a parent has been recognized as a right existing in the law. The permissibility of this action has been affirmed by the courts in Illinois, Minnesota and the Seventh Circuit of the Federal Circuit Courts on the basis that the child has the same mutual rights and obligations as any other member of the family, and as such, has a right pecuniary in nature, the loss of which entitles him to recovery. However, the action has been denied by New York, District of Columbia, Connecticut, California, and in Texas by dictum. This denial seems to be based upon the lack of precedent, the difficulty of ascertaining damages, the possibility of the multiplicity of suits, and the fear that to allow the action would cause a vast amount of litigation. Experience reveals that these reasons have been insufficient to deny recovery in other analogous situations considered by the Court of Appeals and that the action could and probably would be allowed in Kentucky.

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26 Warfield Natural Gas Co. v. Wright, 246 Ky. 208, 220, 54 S. W. 2d 666, 671 (1932).
27 Shields v. Booles, 238 Ky. 673, 680, 38 S. W. 2d 677 680 (1931). The cases allowing recovery emphasize the loss of love, care, society and services of the parent as being a definite injury to the child which should entitle it to damages.