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lete."²¹ In view of the wife's rights against her husband at the present time in North Carolina, it seems that these common law principles as to the husband's rights against his wife are clearly antiquated. Our Court has said that the legislature in passing the Married Women's Act intended to equalize the legal status of husband and wife.²² If applying the common law as to the husband's rights gives the wife rights superior to those of her husband, the common law in this respect is obsolete and should not be the law. Further our court has long recognized that the common law unity of husband and wife no longer exists, having been changed by statute.²³ Since the wife by statute is no longer a part of the unit, but is separate enough even to sue her husband for personal tort, it is a mere fiction to say they are one for purposes of the husband's suit against his wife.

Since the court clearly indicated in the principal case that legislative action will be necessary to change the rule enunciated, it is urged that the Legislature of North Carolina enact a statute specifically enabling the husband to sue his wife for personal injuries caused by her during coverture.

MASON P. THOMAS, JR.

Domestic Relations—Child's Interest in the Parental Relation— Suit by Infant for Enticement of Mother

The authorities are recent and in conflict on the question of whether a minor child has a cause of action against an outsider for damages suffered as a result of the outsider's enticement of the child's parent from the family home.

The Supreme Court of North Carolina has no decision on this question. It is, however, in accord with the view that damage to relational interests¹ is the true basis of similar actions of alienation of affections²

²¹ N. C. GEN. STAT. §4-1 (1943). Italics added.

²² *Helmstetter v. Duke Power Co.*, 224 N. C. 821, 825, 32 S. E. 2d 611, 614 (1944) "The effect of the legislation on the subject is to equalize the legal status of husband and wife. . . . But if the legislative intent of equality is to prevail, the same cause of action which is denied to the wife may not be retained or preserved to the husband"; *Hipp v. Dupont*, 182 N. C. 9, 108 S. E. 318 (1921).

²³ *Roberts v. Roberts*, 185 N. C. 566, 569, 118 S. E. 9, 11 (1923) "The unity of person in the strict common-law sense no longer exists in this jurisdiction, because many of the common law disabilities have been removed. This change relates to remedies as well as rights."

¹ Green, *Relational Interests*, 29 ILL. L. REV. 461, 462 (1934). "Relational interests 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: the plaintiff stands in relation to some other person; defendant hurts plaintiff's relation with that person. This is a hurt done to a relational interest."

² *Chestnutt v. Sutton*, 207 N. C. 256, 176 S. E. 743 (1934); *Cottle v. Johnson*, 179 N. C. 426, 102 S. E. 759 (1920) (holding that the gravamen of the cause of action for alienation of affections of the plaintiff's wife is the deprivation of the plaintiff of his conjugal rights to the society, affection, and assistance of his wife).

and abduction and seduction of a minor child.³ It has recognized that a child has protectible rights in the parent-child relationship in allowing the child to sue its parent directly for support.⁴

The first suit reaching an appellate court for an outsider's enticement of the mother from the home⁵ was brought on the theory that the wrongful interference with the family unit gave the injured member a right of action. The cause of action was disallowed for the reasons that the crux of an action for alienation of affections was injury to *consortium*⁶ given only by the contract of marriage, that to uphold the cause would give a right of action to every family member resulting in a "flood of litigation," and in duplicated damages since the number and ages of the children are considered in awarding damages in the father's suit for alienation of his wife's affections.⁷

The first recognition of the cause of action was where the father was enticed from the home and the child was allowed to recover for the resulting loss of parental support and maintenance, "as well as other damages for the destruction of other rights which arise out of the family relationship. . . ."⁸

It was emphasized that the basis of the cause of action was the relational interests rather than support when it was allowed although the enticed father was already furnishing support under a court order.⁹ The concept of the family as a legal unit with correlative rights and duties¹⁰ entitling the child to the affection, moral support, and guidance of both parents, justified an action against an outsider who stopped these benefits by inducing the parent to leave the home.

More recently the cause of action for loss of these benefits has been

³ *Little v. Holmes*, 181 N. C. 413, 107 S. E. 577 (1921); *Howell v. Howell*, 162 N. C. 283, 78 S. E. 22 (1913) ("The real ground of action is compensation for the expense and injury and 'punitive damages for the wrong done him in his affections and the destruction of his household,' [cases cited]."). For an historical account of the basis of this action from the feudal incident of marriage to parent's right to child's services see Note, 13 AM. DEC. 715 (1879).

⁴ *Pickelsimer v. Critcher*, 210 N. C. 779, 188 S. E. 313 (1936); *Green v. Green*, 210 N. C. 147, 185 S. E. 651 (1936), 15 N. C. L. REV. 67 (1937).

⁵ The issue of whether an adult son could recover against another member of the family for interference with his mother's affections was presented collaterally in *Coulter v. Coulter*, 73 Colo. 144, 214 P. 400 (1923) and in *Cole v. Cole*, 277 Mass. 50, 177 N. E. 810 (1931). Opinion on the issue was withheld and dismissals in both cases were sustained on other grounds.

⁶ The right of the husband and wife respectively to the conjugal fellowship, company, cooperation and aid of the other. BOUVIER, LAW DICTIONARY 621 (Rawle's 3d ed. 1914).

⁷ *Morrow v. Yannantuono*, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934).

⁸ *Daily v. Parker*, 152 F. 2d 174 (7th Cir. 1945). This decision provoked national comment. *E.g.*, Notes, 46 COL. L. REV. 464 (1946), 32 CORN. L. Q. 432 (1947), 59 HARV. L. REV. 297 (1946), 30 MINN. L. REV. 310 (1946), 19 So. CAL. L. REV. 455 (1946).

⁹ *Johnson v. Luhman*, 330 Ill. App. 598, 71 N. E. 2d 810 (1947).

¹⁰ *Id.* at 605, 71 N. E. 2d at 813.

denied for reasons of policy,¹¹ prohibitive statute,¹² and lack of a prior legal provision to support the cause.¹³

The decision in the recent case of *Miller v. Monsen*¹⁴ establishes the wrongful interference with a beneficial relationship as the true basis of this cause of action. In that case the plaintiff, a minor child, sued by her guardian ad litem to recover damages allegedly sustained as a result of defendant's enticing her mother from the family home. Prior to the date of the mother's departure plaintiff lived with her father, mother, brother, and sister as a family, receiving the mother's love, affection, care, and services. As a result of defendant's enticement the then existing relationship between the plaintiff and her mother was destroyed, causing her the loss of those benefits flowing from that relationship. Verdict was for the plaintiff and on appeal by the defendant the court held that a child has legally protected rights in the maintenance of the family relationship against interference by outsiders, and enticement by an outsider of the parent from the family home constitutes an invasion of the child's rights for which it may maintain an action for damages.

An evaluation of the soundness and desirability of recognizing this cause of action allowing a child to recover damages for loss of parental guidance, companionship, care and counsel necessitates consideration of its legal basis and its material effects on society.

The doctrinal objections to this cause of action have come from the common law concept of the family unit—wherein all actions for the protection of the family belonged to the father.¹⁵ The concept of the modern family as "a cooperative enterprise with correlative rights and duties among all the members"¹⁶ seems more realistic.

It is obvious that a child has interests in the parental relationship.¹⁷ The child's interest in the pecuniary benefits have been recognized by allowing it to enforce support by proceeding directly against the parent,¹⁸ to recover from a third person for injury to its means of support resulting from that person's sale of liquor to parent, or to another who injured

¹¹ *McMillan v. Taylor*, 160 F. 2d 221 (D. C. Cir. 1946); *Taylor v. Keefe*, 134 Conn. 156, 56 A. 2d 768 (1947).

¹² *Rudley v. Tobias*, 84 Cal. App. 2d 454, 190 P. 2d 984 (1948) (statute listing rights of personal relations was amended to omit prohibition of abduction of parent from child).

¹³ *Garza v. Garza*, 209 S. W. 2d 1012 (Tex. Civ. App. 1948).

¹⁴ — Minn. —, 37 N. W. 2d 543 (1949).

¹⁵ COOLEY, *TORTS* 464 (3d ed. 1906).

¹⁶ See note 10 *supra*.

¹⁷ Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 185 (1916).

¹⁸ *Green v. Green*, 210 N. C. 147, 185 S. E. 651 (1936), 15 N. C. L. REV. 67 (1937); cf. *Paxton v. Paxton*, 150 Cal. 667, 89 P. 1083 (1937) (duty imposed by poor person's statute enforced in equity by adult child); *Meyers v. Meyers*, 169 Misc. 860, 8 N. Y. Supp. 2d 262 (Sup. Ct. 1938) (statute allowing child to petition for enforcement of support).

parent as result of intoxication,¹⁹ and in some states to sue for the wrongful death of the parent.²⁰

The child's interests in the intangible benefits of the parental society, affection, and comfort are similar to those protected in a spouse's action for alienation of affections. The basis of that cause is *consortium* arising from the marriage contract. It does not follow that such interests arise only from the marital relationship, or that they are protected only by a *consortium* action.

The child has been allowed recovery of damages for violation of intangible interests growing out of the parent-child relationship whose benefits are less substantial than those of the instant cause of action. A child, after it has reached maturity, has recovered damages for offenses to his sensibilities through improper treatment of the dead body of his parent,²¹ and for belated delivery of a death telegram preventing his attending the parent's funeral.²² In actions for the wrongful death of a parent the jury, in fixing damages, may consider the child's loss of parental care, nurture, and moral education which it probably would have received.²³

Indeed, the modern view is that in closely analagous actions protection of the relationship is the true basis of the cause. Thus in a parent's action for the abduction or seduction of a minor child, the fictional basis of loss of services is eliminated.²⁴ And the effect of Married Women's legislation,²⁵ securing to the wife the right to her earnings and services,

¹⁹ *Horan v. Cooke Brewing Co.*, 178 Ill. App. 652 (1913); *Taylor v. Carroll*, 145 Mass. 95, 13 N. E. 348 (1887); Note, 14 NOTRE DAME LAW. 295 (1939).

²⁰ 4 VERNIER, AMERICAN FAMILY LAWS §266 (1931).

²¹ *Spiegel v. Evergreen Cemetery Co.*, 117 N. J. Law 90, 186 A. 585 (1936); *Finley v. Atlantic Transport Co.*, 220 N. Y. 249, 115 N. E. 715 (1917); *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40 (1905); *accord*, *Brownlee v. Pratt*, 77 Ohio App. 533, 68 N. E. 2d 798 (1948) (plaintiff recovered from defendant stepmother who placed body of her second husband in vault constructed by plaintiff's father for the bodies of the plaintiff, father, and mother); *see* *Hamilton v. Individual Mausoleum Co.*, 149 Kan. 216, 220, 86 P. 2d 501, 504 (1939); *cf.* *Crenshaw v. O'Connell*, 235 Mo. App. 1085, 150 S. W. 2d 489 (1941) (plaintiff recovered from defendant coroner who performed illegal autopsy on body of plaintiff's husband).

²² *Medlin v. Western Union Tel. Co.*, 169 N. C. 495, 86 S. E. 366 (1915); *Western Union Tel. Co. v. Mang*, 100 S. W. 2d 158 (Tex. Civ. App. 1937); *Western Union Tel. Co. v. Mobley*, 220 S. W. 611 (Tex. Civ. App. 1923); *Western Union Tel. Co. v. Fulton*, 211 S. W. 285 (Tex. Civ. App. 1919); *cf.* *Russ v. Western Union Tel. Co.*, 222 N. C. 504, 23 S. E. 2d 681 (1943) (death of plaintiff's brother). *Contra*: *Vaigneur v. Western Union Tel. Co.*, 34 F. Supp. 92 (D. C. E. D. Tenn. 1940) (applying federal rule to interstate telegram); *Western Union Tel. Co. v. Conway*, 57 Ariz. 208, 112 P. 2d 857 (1941) (state court applying federal rule to interstate telegram); *see* *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 22 S. W. 345 (1893) (death of plaintiff's child).

²³ *See* Note, 74 A. L. R. 11, 95 (1931).

²⁴ *See, e.g.*, *Montgomery v. Crum*, 199 Ind. 660, 161 N. E. 251 (1928); *Tavlinisky v. Ringling Bros. Circus*, 113 Neb. 632, 204 N. W. 388 (1925); *Pickle v. Page*, 252 N. Y. 474, 169 N. E. 650 (1930); *Howell v. Howell*, 162 N. C. 283, 78 S. E. 222 (1913); *Idleman v. Groves*, 89 W. Va. 91, 108 S. E. 485 (1921); *see* *Soper v. Igo*, 121 Ky. 550, 553, 89 S. W. 538, 539 (1905).

²⁵ 3 VERNIER, *op. cit. supra* note 22, §167.

is that in a *consortium* action by either spouse the recovery is for injuries to the relationship.²⁶

Wrongful interference with a beneficial relationship as the basis of the child's cause of action for the enticement of its parent has an appealing simplicity and avoids the possible difficulties of *consortium* and support.²⁷ Giving legal protection on this basis does no violence to similar domestic actions nor to the law of reasonable expectancy.²⁸

Those courts denying the cause of action admit their power to recognize it but refuse to do so as a matter of policy and because of practical objections.²⁹ These reasons range from the fear that upholding the cause would open the courts to "a flood of litigation that would inundate them"³⁰ to the feeling that the fewness of cases indicates the absence of need for such relief.³¹

The validity of the objections is not settled,³² but their persistence is evidence of a genuine concern beyond traditional caution of the courts. This concern is rooted in the necessity of protecting society from spurious litigation. It underlies the objections that recognizing the validity of the cause would: (1) give a right of action to every member of the family causing multiple suits; (2) result in duplicated damages since the age and number of children are considered in the father's action for alienation of affections;³³ (3) result in extortionary litigation because of the tenuousness of the relationship. Further objections are that: (1) the court is unable to define at what point the child's right

²⁶ *Hinnant v. Tidewater Power Co.*, 189 N. C. 120, 126 S. E. 309 (1925); 3 N. C. L. REV. 98 (1925) (by implication in refusing recovery for loss of husband's services by negligent injury); *Holcomb, The Change in the Meaning of Consortium*, 22 MICH. L. REV. 1 (1923); *Lippman, The Breakdown of Consortium*, 20 COL. L. REV. 651 (1930).

²⁷ *Johnston v. Johnston*, 213 N. C. 255, 195 S. E. 807 (1938) held that loss of support was a proper element of damages in wife's suit for the alienation of her husband's affections. Should not the same rule apply in the child's action when the legal duty of support is on the enticed parent?

²⁸ *See, e.g., Deon v. Kirby Lumber Co.*, 162 La. 671, 111 So. 55 (1926) (plaintiff had cause of action for defendant's acts depriving plaintiff of the society of friends and neighbors); *Schechter v. Friedman*, 141 N. J. Eq. 318, 57 A. 2d 251 (1948) (third person interferor held liable even though the contract might have been unenforceable); *Silva v. Bonafide Mills, Inc.*, ___ Misc. ___, 182 N. Y. Supp. 2d 155 (Sup. Ct. 1948) (plaintiff had cause of action for interference even though the contract with the party induced to breach contained a cancellation clause).

²⁹ *See Taylor v. Keefe*, 134 Conn. 156, 158, 56 A. 2d 768, 769 (1948); *Morrow v. Yannantuono*, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934); *cf. Rudley v. Tobias*, 84 Cal. App. 2d 454, 190 P. 2d 984, 987 (1948); *see Garza v. Garza*, 209 S. W. 2d 1012, 1015 (Tex. Civ. App. 1948).

³⁰ *Morrow v. Yannantuono*, 152 Misc. 134, 273 N. Y. Supp. 912, 913 (Sup. Ct. 1934).

³¹ *Taylor v. Keefe*, 134 Conn. 145, 163, 56 A. 2d 768, 771 (1948).

³² *Johnson v. Luhman*, 330 Ill. App. 598, 71 N. E. 2d 810 (1947); *Notes*, 20 CORN. L. Q. 255 (1945), 13 U. OF CHI. L. REV. 375 (1935).

³³ *Morrow v. Yannantuono*, 152 Misc. 134, 273 N. Y. Supp. 912 (Sup. Ct. 1934).

would cease;³⁴ (2) paucity of cases indicates the lack of need for such relief; and (3) heart balm legislation³⁵ indicates that the present trend is to disfavor such suits.³⁶

To the favorite objection that allowing the cause would produce a flood of litigation, the court in the instant case gives a dual answer:

"Assuming it to be true . . . that fact would be no valid reason for denying the right . . . if such enticement constitutes a legal wrong, there should be a remedy to obtain redress. But the contention lacks factual basis. . . . Sufficient time has elapsed since the decisions in the Daily and Johnson cases (which allowed the cause) for a reasonable trial period. There has been no *flood* of such litigation. This is true, for the obvious reason that there are not enough such enticements to cause even a burdensome increase of such litigation, much less a flood of it."³⁷ The court eliminates objections not inherent in the cause itself with the statement:

"We also deem the reason, sometimes given for denying liability . . . that courts are incapable of defining the child's rights and that juries are incapable of assessing its damages . . . to be without merit. . . . Courts and juries are required to do precisely those things in certain cases, and do so with complete success (cases cited)."³⁸

Social policy favors protecting and fostering the family unit. It is not to be supposed that this cause of action purports to give complete protection by its deterring effect on future enticements. It is a step toward that end to allow a cause of action for loss of intangible but real benefits which legal machinery is unable to secure in other ways.

In the last analysis the policy problem is one of balancing the interests of society against those of the individual member of the family. Certainly the court which allows the child to recover for the injuries from the destruction of its home and the enticement of its parent has likewise a grave responsibility to prevent abuse of the cause of action by looking to the worthiness of the individual case, since the very purpose of courts is "to separate the just from the unjust cause."³⁹

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³⁴ Note, 83 U. OF PA. L. REV. 276 (1935).

³⁵ This legislation, begun in 1935 and adopted in 12 states, generally forbids actions for breach of promise of marriage, alienation of affections, criminal conversation, and seduction. It has been criticized as "flurry" legislation promoted by newspaper sensationalism rather than by judicial need. Generally, see Heck v. Schupp, 394 Ill. App. 296, 68 N. E. 2d 464 (1946); (declaring the Illinois statute unconstitutional); KEEZER, MARRIAGE AND DIVORCE 1049 (3d ed. 1946); Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935); Kane, *Heart Balm and Public Policy*, 5 FORD. L. REV. 63 (1936); Note, G. M. W., *Twelve Years with the "Heart Balm Acts,"* 33 VA. L. REV. 314 (1947).

³⁶ Taylor v. Keefe, 134 Conn. 156, 158 A. 2d 768 (1948).

³⁷ Miller v. Monsen, — Minn. —, —, 37 N. W. 2d 543, 546 (1949).

³⁸ *Ibid.*

³⁹ Wilder v. Reno, 43 F. Supp. 727, 729 (M. D. Pa. 1942).