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in the *Cloke* and *Lindsay* cases, no great criticism could be justifiably directed at a decision holding such publication to be immune from injunctions.

IV.

To summarize, the following conclusions are repeated: Peaceful picketing has been recognized as a form of speech entitled to the broad protection of Article II, Section 10 of the Montana Constitution for over thirty years. The fact that such picketing is done in connection with a secondary boycott is immaterial under present law. Even in cases where the picketing is used to further an illegal purpose, it should be free from injunctions, with possible exceptions arising from situations where the right is abused beyond all reason. These conclusions should not be weakened by federal cases taking a narrower view of the matter, due to differences between the pertinent provisions of the two constitutions concerned. The Montana Court, unlike some other tribunals, has refused to employ a double standard in determining when free speech doctrines are to be applied. From the beginning, it has been held that labor, as well as other segments of society, is entitled to free speech, and it is thought that such fairness should prevail whenever the matter is tested in this state.

DAVID WILLIAMS.

## WRONGFUL DEATH OF MINOR—PROPER PARTY PLAINTIFF

The Revised Code of Montana, 1947, Section 93-2809 (9075) provides:

> "A father, or in the case of his death or desertion of his family, the mother, may maintain an action for the injury or death or a minor child, and a guardian for injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another . . . ."

We are here concerned with the ability of the mother to bring suit under this section.

The Montana Supreme Court has indicated a necessity for strict compliance with the terms of this statute in the parties it qualifies as plaintiffs. Thus, the mother must affirmatively allege the death or desertion of the father or ". . . the complaint

does not state a cause of action in favor of the mother of the child.'"[1] Similar holdings are common to most other jurisdictions.[2]

In all Montana cases decided to date such application of the statute has apparently produced conscionable results. There has as yet been no occasion for close scrutiny of the statute in light of the legislative policy declared in other sections of the code. Such an occasion would arise if, at the time of the death or injury of the minor child, the father and mother were divorced, or separated with consent, and the actual custody of the minor were in the mother. The terms of Section 93-2809 (9075) compel suit to be brought by the father. Apparently no judicial cognizance can be taken of the practical difficulties which may exist. If the father is living many miles away, or is antagonistic toward the mother, or takes no interest because he can see no benefit for himself, the mother's remedy becomes unnecessarily difficult and, perhaps, impossible. Being preferred by the statute, the father can lawfully compromise the claim without the mother's knowledge or consent. Even if he prosecutes he may do so with such a lack of interest, or with such delay, that the cause will be mishandled or lost and the mother left with little or no recourse. None of these difficulties, however, alter the effect of the statute. The father remains the only possible plaintiff.

Another objection arises from a consideration of the measure of damages available to a father who does not have custody of the child. Recovery is for loss of services, earnings, and contributions.[3] As to these, has the father suffered any loss? Realistically, such benefits belong to the mother.[4] If any recovery is had at all it must be predicated upon this loss suffered by the mother. Thus, one person suffers the loss; another collects the remedy. If the father is treated as trustee for the mother there is still the practical objection that the jury, having free discretion in the amount of damages,[5] may be influenced by the presence of the non-suffering father as plaintiff to the detriment of the amount recovered for the mother. In spite of all objections,

[1]Martin v. City of Butte (1906) 34 Mont. 281, 81 P. 264.
[2]Davis v. Southern Arizona Freight Lines (1939) 30 Cal. App. 2d 48, 85 P.2d 897, Benton v. Associated Indemnity Corp., (1938) 195 Wash. 446, 81 P.2d 507, Nordlund v. Lewis & C. R. Co., (1932) 141 Or. 83, 15 P.2d 980, also see 16 AM. JUR., §§262, 271 and cases cited.
[3]Gilman v. C. W. Dart Hardware Co. (1910) 42 Mont. 96, 111 P. 550. Burns v. Eminger (1929) 84 Mont. 397, 276 P. 437.
[4]R.C.M. 1947 §36-115 (5796) is express as to separation.
[5]R.C.M. 1947 §93-2810 (9076), Gilman v. C. W. Dart Hardware Co. (1910) 42 Mont. 96, 111 P. 550.

however, the language of Section 93-2809 (9075) is specific and controlling.

The mother must show fulfillment of the statutory contingencies before she can be a party to the suit. Can divorce or separation with consent be construed as "desertion of his family" within the meaning of the statute? Desertion denotes willful abandonment of a relation in which one owes duties.[6] The court in decreeing a divorce terminates the very relation with which such desertion is concerned as between the mother and the father, and, once terminated, there is nothing left to be willfully abandoned. Further, it must be remembered that the desertion must involve the entire family, and not the wife alone. Clearly, divorce itself, when on grounds other than desertion,[7] does not constitute desertion as contemplated by the statute in question. There must be something more than a mere cessation of the marriage relation,[8] such as subsequent failure to comply with the provisions of the decree relating to support or custody so as to amount to abandonment of the new, divorced relationship. Likewise, a separation consented to cannot be desertion because of the element of consent.[9] The result is that the mother in spite of her loss, simply cannot sue either by herself or by joinder with the father.

The possibility of finding a declared legislative policy which would avoid these results has not been concluded by any Montana cases, nor by any decisions in other jurisdictions having identical statutes. In no case has the inconsistency of Section 93-2809 (9075) with other sections been asserted and thus decided.[10] Those cases which have considered the mother's right to sue are relevant only to show that the problem has not been squarely met.

[6]Stoneburner v. Theodoratos (1934) (Cal.) 30 P.2d 1001, see also WORDS & PHRASES, Vol. 12, Permanent Edition.

[7]See Frazzini v. Cable (1931) 114 Cal. App. 444, 300 P. 121 for case where even divorce on grounds of desertion did not give mother a right to sue.

[8]Clark v. Northern Pac. Ry. Co. (1902) 29 Wash. 139, 69 P. 636, 59 L.R.A. 508.

[9]R.C.M. 1947 §21-109 (5741) codifies this truth as related to desertion as grounds for divorce.

[10]House v. Pacific Greyhound Lines (1939) 35 Cal. App. 2d, 366, 95 P.2d 465, gives casual support to contentions of this comment in discussing the case of Abos v. Martyn (1935) 10 Cal. App. 2d 698, 52 P.2d 987. The court said, ". . . we find justification in the laws of Oregon for her being joined as party plaintiff. In section 33-304, Oregon Code, it is provided that equal rights and responsibilities are given both parents, not only in the custody and earnings of the children, but also as to inheritance from an unmarried minor and an equal right of support. Oregon Code, 27-1402."

In some respects, the California statutory picture is not the same as that in Montana, even though our Section 93-2809 (9075) is, word for word, an exact duplication of California Code Civil Procedure, Section 376. The California Supreme Court recently pointed this out when it stated:[11]

> "Except in certain circumstances not here present, the father alone is authorized to bring an action for the death of a minor child. Code Civil Procedure, Section 376. This provision is in accord with the general rule in California that the husband has the management and control of community property and ordinarily must bring an action concerning it. Civil Code, Sections 172, 172a."[12]

Montana does not have a community property law,[13] so the very ground relied upon for this decision is not available to Montana courts. Previous California decisions which had given a different effect to the element of community property, and which this case overruled on that basis, indicated an inclination to allow the mother to join as plaintiff,[14] suggesting perhaps that except for this one difference the California rulings would tend to support the thesis of this comment.

Divorce dissolves the community and the property is divided by the court[15] so that after divorce the factor preventing California decisions from exercising controlling effect in Montana is no longer in existence. Therefore, as to those cases involving divorce, California rulings have been made in the same statutory atmosphere that prevails in Montana, but none have directly posed and decided the issue here involved.[16] The same is true of other jurisdictions.[17] Thus, the question remains an open one.

It is settled in Montana that a cause of action in the parents for the death of a minor child did not exist at the common law, but is purely statutory.[18] Even though a new right is thereby

[11]Fuentes v. Tucker (1947) 31 Cal. App. 2d 1, 187 P.2d 752.

[12]This comment is not extended to a consideration of whether the inconsistency might not still exist even in the presence of California community property law.

[13]R.C.M. 1947 §36-104 (5785).

[14]House v. Pacific Greyhound Lines (1939) 35 Cal. App. 2d 366, 95 P.2d 465; Keena v. United Railroads of S. F. (1922) 57 Cal. App. 124, 207 P. 34; Abos v. Martyn (1935) 10 Cal. App. 2d 698, 52 P.2d 987.

[15]California Civil Code (1937) §§146, 147.

[16]Frazzini v. Cable (1931) 114 Cal. App. 444, 300 P. 121; Espinosa v. Haslam (1935) 8 Cal. App. 2d 213, 47 P.2d 479.

[17]American R. Co. of Puerto Rico v. Santiago, (1926) 9 F.2d 753; Clark v. Northern Pac. Ry. Co. (1902) 29 Wash. 139, 69 P. 636, 59 L.R.A. 508.

[18]Melzner v. Northern Pac. Ry. Co. (1912) 46 Mont. 162, 127 P. 147;

created, a liberal interpretation is to be given the statute to effect its object "... and to promote justice."[19]

The object of the legislation, patterned after Lord Campbell's Act of 1846, was to correct a shortcoming of the common law by providing a remedy wherever a loss had been suffered through the wrongful death of a minor. The obvious injustice of allowing recompense for injury and denying it for death prompted many strongly worded discussions,[20] so that an enactment of some sort has been passed in every United States jurisdiction, with the purpose of ending the discussion and establishing the law. In view of this, it would not appear inconsistent with the object of the statute and the promotion of justice, as stated by R.C.M. 1947 Section 12-202 (4), to attempt a construction of Section 93-2809 (9075) which grants the remedy to the party who has suffered the wrong.

The guideposts for our construction are found in the code. The Revised Code of Montana, 1947, Section 61-105 (5834) states:

> "The father and mother of a legitimate unmarried minor child are equally entitled to its custody, services and earnings. If either party be dead, or unable, or refuse to take the custody, or has abandoned his or her family, the other is entitled to its custody, services and earnings."

This section shows that at the outset, regardless of the marital standing of the parties, each has an equal right to the custody, services and earnings.[21] But these rights are not absolute,[22] and either or both parties may be deprived of their rights in accord with certain statutory methods, aside from those included in the section itself,[23] such as exercise of judicial

Batchoff v. Butte Pacific Copper Co. (1921) 60 Mont. 179, 198 P. 132; Maronen v. Anaconda Copper Mining Co. (1913) 48 Mont. 249, 136 P. 968.

[19]R.C.M. 1947 §12-202 (4): "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the code or other statutes of the state of Montana. The codes establish the law of this state respecting the subjects to which they relate and their provisions and all proceedings under them are to be liberally construed with a view to effect their objects and to promote justice."

[20]PROSSER ON TORTS p. 955, notes 91, 92 and 93.

[21]This equality is emphasized further by R.C.M. 1947 §61-106 (5835): "The husband and father, as such, has no rights superior to those of the wife and mother, in regard to the care, custody, education, and control of the children of the marriage, while such husband and wife live separate and apart from each other."

[22]Ex parte Bourquin (1930) 88 Mont. 118, 290 P. 250.

[23]Ex parte Reinhardt (1930) 88 Mont. 282, 292 P. 582.

discretion under Section 21-138 (5770) relating to custody in divorce,[24] or by coming within the coverage of a section such as R.C.M. 1947, 36-115 (5796) which provides:

> "The earnings and accumulations of the wife, and of her minor children, living with her or in her custody, while she is living separate from her husband, are the separate property of the wife."

This section deprives the father of any right to the earnings of his child in a special set of circumstances. The same result has been reached in divorce cases without the aid of a specific statute, and even though a parent has no control over the child's property,[25] as is the case in Montana.[26]

Thus it is quite apparent that the property rights of the father under the substantive law provisions of the code are not as absolute as his right to sue under the procedure afforded in Section 93-2809 (9075). There are situations in which the mother and not the father is the owner of the rights which the statute is designed to protect. Realizing this, and granting further that the mother, even in marriage, is entitled to bring suit in the protection of her property or enforcement of any legal or equitable right,[27] the inconsistency of Section 93-2809 (9075) in restricting her rights as a plaintiff becomes apparent. The father has the right to sue and nothing to protect; the mother has the rights to protect and no power to sue.[28]

There is no necessity for allowing the mother to be a plaintiff when, as in most cases, the marriage is a normally happy one, in spite of the fact that even then her rights to custody, services and earnings of the children are no less than those of the father. As was once pointed out,[29] an obvious purpose behind the particularity of the statute in qualifying plainiffs, is whether originally intended so or not, to avoid multiplicity of suits and assure a finality of the litigation. No contention is made, in light of this observation, that the terms of the statute ought to be so liberalized either in language or construction as

[24]Haynes v. Fillner (1937) 106 Mont. 59, 75 P.2d 802.
[25]Watkins v. Clemmer (1933) 19 P.2d 303, 129 Cal. App. 567.
[26]R.C.M. 1947 §61-110 (5839).
[27]R.C.M. 1947 §36-110 (5791). This statute does not exist in California.
[28]Another example: The terms of R.C.M. 1947 §61-105 (5834) give the mother a whole right to custody, services and earnings if the father is "unable, or refuses to take the custody . . ." yet R.C.M. 1947 §93-2809 (9075) in this situation denies her the right to sue for such services and earnings.
[29]House v. Pacific Greyhound Lines (1939) 35 Cal App. 2d 366, 95 P.2d 465.

to allow either the mother or father to sue in equal right under all circumstances. It is only when the happy unity of the marriage is broken that the rights of the mother demand formal recognition.

Our statute is a product of the common law rule denying the mother any legal right to the services and earnings of her legitimate child so long as the father is alive and not guilty of abandonment. But, as already pointed out, that common law basis no longer exists, and lacking the reason for the restriction, the restriction itself should disappear.

An analysis of the cases shows, and the other code sections would support, a natural disposition upon the part of the courts to observe rather closely the element of actual custody of the child. Where the custody lies, so has followed the right to sue in every case where to do so was not a direct violation of the terms of the statute.

In *Frazzini* v. *Cable*[30] the mother secured a divorce on grounds of desertion. Custody of the children was granted to her. The father, with the mother's permission, secured actual custody of the child and upon the child's death the court upheld the father's right to sue on the ground that the time of death was the controlling time and that then the father was not in desertion of his family. The right to sue followed the actual custody.

In the case of *Espinosa* v. *Haslam*[31] the father was convicted of assault and battery against his wife, who then left him. For fifteen years he maintained and educated the children. The deceased, a boy of eighteen years, left the father and moved in with the mother because the father objected to his nocturnal wanderings. The mother, after the boy's death a year later, filed suit and collected a $1500 settlement. Five months later the father sued and the mother's settlement was pleaded in bar. The court was faced with a perplexing problem. If it found a right of suit in the mother and none in the father, the latter would be without remedy though he had supported the child for fifteen years, the mother profiting at the father's expense. If, on the other hand, the father was the proper plaintiff, the defendant would be subjected to double damages. The court satisfied both objections by upholding the father's right to sue, but found such a lack of damages that suit was dismissed. This left the father in a position to proceed against the mother if he so desired, and protected the defendant from having to pay twice.

[30](1931) 114 Cal. App. 444, 300 P. 121.
[31](1935) 8 Cal. App. 2d 213, 47 P.2d 479.

The decision does not say that actual custody is not an important consideration, even though the right to sue was not given to the spouse having actual custody at the time of the death. Custody was the controlling factor in finding a lack of abandonment on the part of the father and was therefore the key to the decision.

In another case,[32] where the mother had secured a divorce and legal custody, but left the children with the father, never to return and take actual custody, there is little wonder that the court denied suit by the mother.

The same principle produced opposite results in the case of *Clark* v. *Northern Pac. Ry. Co.*[33] where it was held the mother was a proper plaintiff when the divorced husband, who was given legal custody of the child, left the child with the mother promising to pay $10 per month, but neither paid nor returned.

It is admitted that in all of these cases the terms of the statute and not the element of actual custody, were controlling in the results reached. The contention of this comment is that the element of actual custody was, however, the most important factor in determining the applicability of the terms of the statute. For that reason, the suggestion is made that the construction placed upon the statute be made more consistent with the realistic element of actual custody, or the terms of the code section be amended for that purpose. A survey of all cases in which Section 93-2809 (9075) is concerned will support this comment by showing that a rule based upon the actual custody principle would not have been violated by the results reached.

The terms of Section 93-2809 (9075) were drafted to bring justice out of common law complacency at a time when the rights of married women were more stringently restricted. The changed legal status of women in our present day[34] gives birth to possibilities which were not within any possible legislative contemplation at the time the statute was originally adopted. As a result, the circumstances of a divorced or separated mother as herein described make a just solution impossible under this section; an end directly contrary to the purpose for which it was adopted. Only keeping the terms or interpretation of the statute in pace with other and more modern statutory advances can satisfy the motive which prompted the enactment of Section 93-2809 (9075).

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[32]American R. Co. of Puerto Rico v. Santiago (1926) 9 F.2d 753.
[33](1902) 29 Wash. 139, 69 P. 636, 59 L.R.A. 508.
[34]The relevant sections are contained in Titles 36 and 61, R.C.M. 1947, and were enacted subsequent to §93-2809 (9075).