

New Jersey Law Journal

Select '**Print**' in your browser menu to print this document.

Copyright 2009. Incisive Media US Properties, LLC. All rights reserved. New Jersey Law Journal
Page printed from: <http://www.njlj.com>

[Back to Article](#)

Exes Can Sue Over Ruined Ties to Couple's Children

Henry Gottlieb
11-26-2008

For the first time in New Jersey, a judge has recognized the right of parents to collect damages for intentional infliction of emotional distress when their relationships with their children are poisoned by former spouses.

Superior Court Judge Maurice Gallipoli ruled on Nov. 21 that a man can sue his ex-wife and her parents for allegedly turning his children against him by making false accusations that he had committed sexual misconduct.

The central legal issue in the Hudson County case was whether the emotional distress claim was a disguised complaint for alienation of affections, a cause of action New Jersey abolished in 1935.

By then, America no longer believed cuckolded husbands deserved damages from their wives' lovers or that the father of the bride should be able to sue the scoundrel who jilted his daughter.

As recently as two months ago, defendants have invoked the law that abolished such actions — the Heart Balm Act — to win summary dismissal of tort claims alleging that parents and their children had been alienated by ex-spouses or other individuals.

But Gallipoli said an emotional distress claim is separate and distinct from the abolished claim of alienation of affection. "Here, plaintiff is alleging that defendants' alienating conduct has caused him emotional distress," he wrote in *Smith v. Smith*, Hud-L-1837-08. "Thus emotional distress, not alienation of affections, is the predicate cause of action."

The decision creates the potential for a showdown in the Appellate Division, because Morris County Superior Court Judge David Rand made the opposite ruling in August in a case with similar facts, *Segal v. Lynch*, MRS-L-3076-07.

The plaintiff's lawyer in both cases, Steven Resnick of Budd Larner in Short Hills, is appealing Rand's decision, and a defense lawyer in *Smith*, Nutley solo Marc Raso, said Tuesday that he might appeal,

too.

The split among trial judges was made clear when Gallipoli wrote, "In my opinion, the *Segal* decision disregards the common-law interpretation of the cause of action for alienation of affections," and he noted, "I am not obligated to adhere to its holding."

Vincent and Rose Marie Smith were divorced in 2007 and though their two children live primarily with her in Guilford, Conn., he is entitled to parenting time at his home in Hoboken.

The damage suit alleges that the ex-wife and her parents, Daniel and Barbara Marese, began alienating the children from the father during the predivorce separation in 2006. The defendants falsely told the children, court-appointed psychiatrists and law enforcement officials that the father was a sex addict and had molested the children in the past, the suit says.

And it says the children are afraid to sleep at their father's house because they have been told they are in danger of being sexually abused.

The wife and her parents denied the allegations and argued in motions to dismiss the suit for failure to state a claim that the Heart Balm Act had eliminated the cause of action. Indeed, they pointed out, the term "alienating the children" is what the complaint calls the alleged wrong.

The defense supported its motion by citing three rulings in which courts had relied on the Heart Balm Act to throw out damage claims involving children.

Gallipoli brushed aside two of the precedents as irrelevant from a factual or legal standpoint. The third, Rand's decision in *Segal*, was on point but wrong, Gallipoli said.

In dismissing the father's claim in *Segal*, Rand wrote, "To sustain a claim for such damages would result in a revival of evils not unlike those banned in 1935 and would be an exceptionally ineffective technique for resolving matrimonial differences or custody disputes."

In recognition of the family court's role, Gallipoli ruled that if Smith wants to seek damages from his ex-wife he must do it in a post-judgment proceeding in family court. It would still be a damage claim and the family court has the power to arrange jury trials. Because the grandparents were not parties to the divorce action, the case against them can continue in the civil court, the judge ruled.

Plaintiff's lawyer Resnick says suits like his have been rare because parents and their lawyers have been content to fight for equitable relief in custody battles.

"They feel the ultimate sanction of a transfer of custody is enough," he says.

"But it's not enough because they still do it," he says of parents who make false accusations to get the edge in custody battles. "They are never afraid of losing custody, so the only other thing to do is hit them in the pocketbook or the wallet."