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# Verdict

DECEMBER 23, 2014

JOANNA L. GROSSMAN

## Collateral Damage: Children Cannot Sue the Paramour Who Broke Up Their Parents' Marriage

Love can blossom anywhere. For Nicole Mathis, a married mother of two small children, it grew out of a discectomy, an operation to remove a damaged disc from her cervical spine. The surgery was performed by Dr. Charles Brent, and Nicole attended follow-up visits for two months afterwards. But when Nicole missed an appointment, Dr. Brent found her cellular number in the file and called to find out why. One thing led to another, and Nicole and Charles engaged in a brief sexual relationship.



Nicole and her husband, Vennit, divorced following his discovery of the affair. In addition to the usual disputes that accompany divorce, the end of this marriage led to a separate lawsuit—a suit by Nicole’s husband and children against Dr. Brent for “alienation of affections.” This type of “heartbalm” action has all but disappeared from American law, but remains alive and well in a small number of states, including Mississippi, where the Mathis family lived. But whether this type of suit could be brought by children of a failed marriage, rather than the spouse who lost his or her partner’s affections to a third party, raised a question of first impression for the state’s highest court.

### Heartbalm Actions, Including Alienation of Affections

In an earlier time, there were several civil causes of action that a state might have recognized to protect broken hearts, failed marriages, and damaged reputations. “Breach of promise to marry,” for example, was a cause of action that a woman might bring against a fiancé who jilted her, often after convincing her to engage in premarital sex that

might or might not have led to an out-of-wedlock pregnancy. “Criminal conversation” was a euphemism for adultery and gave the cheated-on spouse a cause of action against the paramour. “Alienation of affections” was a cause of action that could be adapted to a wider variety of situations. The core was the alienation of one spouse’s affections for the other (there had to be genuine love and affection in the first place), but the cause could be a paramour, a friend, or even an overbearing mother- or father-in-law. When successful, these suits resulted in an award of damages—the paramour or jilter had to literally pay for the harm he or she caused.

These causes of action, collectively known as “heartbalm” actions, were never universally recognized and fell out of favor in most states by the middle of the twentieth century. They got the reputation of rewarding gold diggers and frauds, rather than truly aggrieved parties. Moreover, as the boundaries that purported to confine sex to marriage eroded, these lawsuits fit less and less with prevailing social norms. These common-law claims were abolished by statute in many states, and by judicial decision in others. By the end of the twentieth century, there were only a handful of states left that recognized even a single one of these actions, and even some of those states have abolished them in the last few years. (A discussion of recent decisions eliminating heartbalm actions in North Carolina and West Virginia is available [here](https://verdict.justia.com/2014/06/24/legal-price-adultery-goes) (<https://verdict.justia.com/2014/06/24/legal-price-adultery-goes>).

### Mississippi Hangs on to the Balmy Past

In a 1992 case challenging the continuing vitality of heartbalm actions, the Mississippi Supreme Court abolished the cause of action for criminal conversation but reserved judgment on alienation of affections. In that case, *Saunders v. Alford* (<http://law.justia.com/cases/mississippi/supreme-court/1992/89-ca-185-1.html>), a woman married to a farmer had an affair with her boss at the Billups Petroleum Company. He was “forty-years old and wealthy” (she was “twenty-four years old and unhappy”). Divorce followed, as did a lawsuit by the ex-husband against the boss. The jury, for some reason, said no to the claim for alienation of affections, but awarded damages for criminal conversation. But on appeal, the state’s highest court held that criminal conversation went too far and had to be abolished. It did not decide—because it did not need to—whether alienation of affections was still a cognizable cause of action.

That answer came fifteen years later, when the same court, in *Fitch v. Valentine* (<http://law.justia.com/cases/mississippi/supreme-court/2007/co41063.html>) (2007), upheld a jury verdict of \$642,000 (plus an additional \$112,000 in punitive damages) for alienation of affections. *Fitch* involved another situation in which a woman slept with her boss—and gave birth to his child. Her husband, Johnny Valentine, sued the boss, Jerry

Fitch, for alienating his wife's affections. Fitch invited the court to eliminate this cause of action, as it had done with criminal conversation. But the court declined, preferring to protect "the marriage relationship and its sanctity" against someone who "through persuasion, enticement, or inducement" had brought about the end of a marriage, and the loss of a spouse's affection. Distinguishing the abolished tort of criminal conversation, which could expose a participant to even the most ordinary act of adultery to liability, the court focused on the more stringent elements of alienation of affections.

### **The Claim in *Brent v. Mathis*: Children are Damaged by Interlopers to Marriage, Too**

The alienation of affections claim in this case was unusual. Nicole's husband brought the claim not only on his own behalf, but also on behalf of his children, ages 2 and 3 at the time. Their claim, in essence, was that Dr. Brent alienated their mother's "familial" affection—causing her to divorce their father, and rendering them children of a broken home. Dr. Brent moved for summary judgment on the children's claims, arguing that they did not have standing to bring an alienation of affections claim. The trial court denied his motion, but he appealed, leaving this question of first impression to the Mississippi Supreme Court.

For sound reasons, the court ruled against the children, holding that only a spouse can sue for the alienation of spousal affections. (An even sounder ruling might have abandoned the claim of alienation of affections for spouses, too, but that question wasn't yet ripe for review.)

The essence of the children's claim on appeal is that the doctrine of alienation of affections is broad enough to protect against harm to the family unit, not just harm to one spouse of a destroyed marital relationship. The biggest obstacle to this claim is that the doctrine had never been used in this way in prior cases. But could it logically be extended in this way? The state's highest court said no.

The court first looked to statements in prior cases about the nature of the tort. There, it found the emphasis to be on using the doctrine to protect the marriage relationship by punishing those who seek to destroy it. Indeed, in the *Fitch* case, mentioned above, the court refused to abolish the tort on public policy grounds "in the interest of protecting the marriage relationship and providing a remedy for intentional conduct which causes a loss of consortium." The roots of these causes of action probably lay in the ancient right of a man to his wife's "consortium." This is a legal term of art, used in a variety of contexts to mean a spouse's right of custody, affection (including sex) and services. This tort is, the court explained, "the only available avenue to provide redress for a spouse who has suffered loss and injury to his or her marital relationship against the third party who,

through persuasion, enticement, or inducement, cause or contributed to the abandonment of the marriage and/or the loss of affections by active interference.” And only spouses have brought these claims.

Although Nicole’s ex-husband correctly noted that alienation of affections has been used in cases not involving extramarital affairs—say, for example, to remedy harm caused by a mother-in-law who has poisoned her son’s relationship with his wife—the court did not agree that these cases support the notion that the doctrine is broad enough to encompass “family intrusion.” In each cited case, it was a spouse who sued, complaining that a third party’s intentional conduct, even if not sexual in nature, ruined a marriage. And the cases were heavily reliant on the importance of the marriage relationship—and the harm of its destruction.

The court also rejected Vennit’s analogy to wrongful death claims, which accrue to surviving children as well as spouses. For a spouse, the analogy might work—both death and divorce end marriages, and the loss from divorce can be as bad or worse than from death. But for children, while divorce may wreak havoc on their lives, it does not inherently deprive them of the relationship with either parent. As the cliché, pre-divorce conversation with children goes, “Daddy and I don’t love each other any more, but we still love you just as much.” As the court in this case reasoned, “while divorce means that a child must interact with each parent at separate times and in separate homes, the parents are still available for affection, care, and society.”

The court also rejected Vennit’s argument that courts have a duty to protect minors from harm in any context. The implications of such a broad view would be impractical at best. For example, if divorce is harmful to some or all children, should they have a cause of action against any parent who seeks a divorce—or causes one to be sought? Why limit the protection to conduct by third-party interlopers? Moreover, doesn’t granting children the right to sue simply encourage them to take sides in the divorce? Or, perhaps worse yet, to stake out a position against a potential future stepparent that will make a loving relationship impossible? In Vennit’s case, his children were toddlers when the affair took place, and only slightly older when this case was litigated. Is there any chance the harm asserted in the complaint was more than a vicarious claim by Vennit himself? And if the harm was imposed on them directly, how would damages be measured?

Because of concerns about the impracticality and dangers of extending the doctrine, every other state to consider whether children could be protected under the alienation of affections rubric has said no. The *Mathis* court thus joined the crowd in concluding that a cause of action for alienation of affections is “personal to the aggrieved spouse.”

## Conclusion

The court in this case was surely right to cabin the doctrine of alienation of affections. Its historical roots, squarely focused on the value of a marriage relationship to its participants, do not support the extension of the cause of action to children. But modern social mores, including a high rate of both adultery and the widespread availability of unilateral, no-fault divorce, don't seem to support the doctrine at all. Marriage is not like a convenience store waiting to be robbed. It can fail without a wicked interloper—and succeed in spite of one. Most of the time, its path will be determined by a complex interplay of factors that make a search for unitary blame futile. Alienation of affections represents a sort of quaint, but artificial notion about the decline of a marriage.



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