CRITCAL CASES IN MASSACHUSETTS FAMILY LAW FOR E&F GUARDIANS AD LITEM:

A mental health professional's perspective on how appellate law informs GAL investigations and evaluations.

Robert A. Zibbell, Ph.D.©

"…nothing between human beings isn't complicated and there's no way to speak of human beings without simplifying and misrepresenting them."

Joyce Carol Oates, *We Were the Mulvaneys*.

"…present-day knowledge about human behavior provides no basis for the kind of individualized predictions required of the best-interests standard."

Robert Mnookin,(1975), "Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy"

INDEX OF TOPICS AND CASES[1]

[1] Some cases are listed under more than one category, as the decision applies to multiple issues.

FOREWARD

The inspiration for this casebook began in 1991, when I had the privilege of attending a series of seminars led by Thomas Grisso, Ph.D. and Alexander Greer, J.D. at Worcester State Hospital-UMASS Memorial Medical Center's post-doctoral program in forensic psychology (I was a mid-career, post-doctoral fellow in the Child and Family Forensic Program). One of the tasks of the students was to read the significant case law, both federal and state (Massachusetts) that pertained to issues that (adult) forensic psychologists would be expected to evaluate. These included such topics as criminal responsibility and competence to stand trial, *inter alia*, as well as cases related to the assessment of youths in the juvenile court. That program led to an appreciation of the factual issues that judges consider in making decisions and how legal thinking had evolved (or not) in relationship to the development of social science research. It also allowed me, as a mental health professional, to begin to understand the language of the law and the reasoning that lawyers applied to issues that existed at the juncture of mental health and the law.

Since I was primarily concerned with the interface of psychology and family law, I began reading Massachusetts cases (and a few Federal decisions) that pertained to those issues, such as in the areas of child custody, parental access, removal, termination of parental rights and the like. Over the next decade other issues emerged in the law. Some were new (e.g. *de facto* parenting, same sex parenting, domestic violence), while others reflected an evolution in previous law (e.g. removal, role of religious differences in parenting, privileged communication). It became clear that any professional who was assigned the task of assessing families in family or juvenile court, whether through an investigation (Category F) or evaluation (Category E), needed to know the relevant case law and statutes. New training requirements for investigators and anticipated ones for evaluators mandate knowledge of the relevant laws and cases.[2] The recent revision of the AFCC standards for child custody evaluations also requires knowledge of relevant case law.[3] I believe that a collection of significant case summaries and statutes in one volume would serve to educate and guide the family investigator or evaluator in the fulfillment of his or her role as the "eyes and ears" of the court. The structure of the project would also permit the addition of new cases as they arise. The casebook is intended to serve as an adjunct to the Category F training materials, and eventually, for Category E, but should be useful to those who have already undergone those trainings. It is not an exhaustive collection, as I chose the cases I considered to be most relevant with respect to the general experience of GALs.

The plan of the casebook is to group the cases by topic, although a few cases relate to more than one legal issue. Pertinent statutes are referenced in the body of the casebook and can be found in the last chapter. Each case contains a summary of the important facts, the decision of

[2] Medeiros, L., Elsen, S., Winchester, M, & O'Leary, S. Guardian ad Litem Case Summaries, in *GAL Training for Category F Matters*, presented in Springfield, MA, May 5, 2005. Handbook published by Massachusetts Continuing Legal Education, Inc., Boston. Standard 7B, at 22.

[3] Association of Family and Conciliation Courts (2005). *AFCC Model Standards of Practice for Child Custody Evaluations*, draft copy #3. at 4. Available at www.afccnet.org

the Appeals or Supreme Judicial Court, and a commentary at the end. The goal of the commentary is to highlight those issues most important for GALs, so that attorneys looking for specific legal arguments will need to look to the cases themselves. Some comments relate to commonalities in thinking or logic between apparently disparate cases. In these ways, the casebook is different from that which Richard Packenham authored for MCLE, and which he has updated annually.[4] However, where it is relevant I cite his work and reference it in the text. The casebook is more selective and more detailed than the cases compiled for the Category F training[5], although I have referenced some of the same cases. In addition, the book is unbound and in loose-leaf form, so that readers can remove cases as they wish and new relevant cases can be added as the Courts decide them. I completed the initial summaries of the cases and then several consultant attorneys edited many of the summaries (see acknowledgments), although I made the final edit. Lastly, in the Afterword, I summarize my impressions about some of the larger issues in the case law and the differences in clinical and legal perspectives and language, and I present some thoughts about GALs' addressing ultimate legal questions. While many others (see below) have shared their thoughts about parts of this work, I assume responsibility for its contents and ideas.

A note on some of the abbreviations and legal citation for non-lawyers. SJC stands for the Massachusetts Supreme Judicial Court, Mass. App. Ct. is the Massachusetts Appeals Court, G.L. is shorthand for the Massachusetts General Laws, and TPR is termination of parental rights, or petition to dispense with consent to adoption. I refer to the "SJC" for a Supreme Judicial Court decision, to the "Court" for an Appeals Court case, and to the "court" when referring to the trial court. For those not familiar with legal citation, a case listed as *Smith v. Jones*, 527 Mass. App. Ct. 200, means volume 527 of Massachusetts Appeals Court decisions starting at page 200 and is a Massachusetts Appeals Court case. A cite of simply "Mass." instead of "Mass. App. Ct." reflects a Massachusetts Supreme Judicial Court decision. One might see citations, such as *Smith v. Jones*, 527 Mass. App. Court 200, 205, which signifies that the case begins at page 200 in volume 527, but the specific reference is to be found on page 205. The writer has referenced certain lengthier case quotes by noting the page number as "(*case name*, at 205)." All case names are italicized. Moreover, appellate cases are usually reported in three cited publications, but for the sake of simplicity in this volume, only one cite - the first one - is listed. Many of these cases are available on-line through www.Findlaw.com, although their publication starts in 1998. Other sources, such as the Social Law Library, Lawyer's Weekly, or Lexis-Nexis requires a subscription or, as in the case of the last company, a relationship to an academic institution. Lexis-Nexis publishes its case reports with page numbers as they existed in the original publications.

Finally, I wish to thank AFCC-Massachusetts Chapter and the Massachusetts Association of Guardians ad Litem, Inc. for its support in completing this project. I particularly want to add a note of appreciation for the late attorney, Richard Packenham, who generously permitted me to cite his work where appropriate. Lastly, special thanks to those attorneys or lawyer-mental health professionals who reviewed various cases and offered their comments and suggestions. They include: Beth Aarons, Roberta Benjamin, Susan Elsen, Linda Fidnick, Julie Ginsberg,

[4] Packenham, R. (2004). *Family Law Citator 2004*, Boston: MCLE, Inc. "Packy," as he was known, passed away during the writing of this manual. His contributions to the Boston legal community will be sorely missed.
[5] Medeiros, L. et al., op. cit.

Steven Nisenbaum, Rita Pollak, Laurie Raphaelson, and in particular, Henry Bock, Jr., whose extensive comments have increased my understanding of legal thought in many of these cases. Thanks to Linda Cavallero and some anonymous reviewers for their comments on the final chapter. Lastly, I appreciate that Henry Bock, Jr. for MAGAL and Alex Jones for AFCC-Mass. Chapter reviewed the work in its entirety, each of them bringing their legal as well as mental health knowledge to the task. I am also grateful for the tolerant customer policies of *Starbucks* in Framingham, *Bakery on the Common* in Natick, and *The Daily Brew* in Cataumet for permitting me to spend many hours in their cafés for writing.

Previously, with the help of MAGAL and the Massachusetts Chapter of AFCC, this casebook was sold and the proceeds distributed to the two organizations. In donating this work to MAGAL, I hope that all those doing this work will have the chance to review cases relevant to the issues they are dealing with in their evaluations and investigations. I would also be interested in any feedback you have about these cases as they apply to GAL work. You can contact me at razibbell@comcast.net

Robert A. Zibbell, Ph.D.
January 1, 2006

CUSTODY AND VISITATION

ALEXANDRA K. **ROLDE v.** EDWARD J. **ROLDE**[6]

Massachusetts Appeals Court

12 Mass. App. Ct. 398 (1981)

Keywords: Divorce and Separation, Custody of child.

Background: This is a case that is often cited where issues of custody are contested, although there were also financial issues that were litigated. The background involved the marriage of two psychiatrists in May, 1966, their separation in December, 1977 and their three children (ages 10, 7, and 3 respectively at the time of separation). After separation, Father initially moved to Brookline and then purchased a home in Weston, the same town in which Mother lived. He saw the children on alternating weekends, one midweek overnight a week, every other holiday, and for six weeks during the summer. Following eight days of trial, the major portion of which was devoted to the question of custody, the judge concluded that, even though the wife "may be irrational in perceiving joint custody as a vehicle whereby her husband can continue to impose his will upon her," in the instant circumstances joint custody would be entirely inappropriate and injurious to the children. The husband does not claim that such "irrational" fears of the wife could cause her to become a "non-functional" parent and thus render her unfit.[7] See *Stevens v. Stevens*, 337 Mass. at 627-628; *McMahon v. McMahon*, 1 Mass. App. Ct. 647, 649 (1973). Nor did he present any evidence showing that the wife's perception caused "'deleterious effect[s]' on the children and an 'undermining' of the custodial relationship," *Felton v. Felton*, 383 Mass. 232, 240 (1981), or that sole custody in him would be in the children's best interests." (at 404). The acrimony was "such that the trial court's reasoning that was affirmed by the Appeals Court was that both parties had such a bitter relationship that it was better to preclude all financial transactions and personal interactions between the parties." (Packenham, 2004 at 41). The court awarded the marital home to Mother and released the Father from alimony or child support payments. Both parties were capable of supporting themselves by virtue of their professions.

In its subsequent opinion, the Appeals Court cited G.L. 208 §30, "in determining custody the rights of the parents shall be equal"…but "the overriding concern of the court is the best interest of the children and their general welfare." (*Rolde*, at 402). Citing *Jenkins v. Jenkins* 304 Mass. 248, 250 (1939), it wrote, "In providing for the custody of a minor child, while the feelings and wishes of the parents should not be disregarded, the happiness and the welfare of the child[ren] should be the controlling consideration. It is the duty of the judge to consider the welfare of the child[ren] in reference not merely to the present, but also to the probable future, and it is a subject peculiarly within the discretion of the judge." (at 403).

---

[6] There are discussions of joint v. sole legal custody in all the cases under the heading of religious issues.

[7] A determination that the wife was unfit for this reason alone would be dubious as "the comparative emotional health of the parents is only one of several factors which can affect the well being of their children." *Angelone v. Angelone*, 9 Mass. App.Ct. at 730. See also Annot., Mental Health of Contesting Parent as Factor in Award of Child Custody, 74 *A.L.R.2d* 1073 (1960).

Father objected on the grounds that this reflected a maternal preference on the part of the court. The Father argued that joint legal custody or continuing contact and joint decision-making is preferable.[8] Citing *Felton*, the Appeals Court agreed, but it supported the trial judge's opinion that for joint legal custody (or shared responsibility) to work, both parents must be able to agree on basic issues in child-rearing and want to cooperate in making decisions for their children. The opinion then shifted into a discussion of joint legal custody (at 405-406) and is included here because of its significance.

> Although complete agreement between parents to implement joint custody may not be necessary," in order to be effective "joint custody requires two capable parents with some degree of respect for one another's abilities as parents, together with a willingness and ability to work together to reach results on major decisions in a manner similar to the way married couples make decisions." Taussig & Carpenter, Joint Custody, *56 N.D.L. Rev*. 223, 234 (1980). See also Foster & Freed, Joint Custody: A Viable Alternative? 15 *Trial* 26 (No 5, 1979). It is difficult, as in the present case, to award joint custody following a divorce traumatized by personal and emotional conflict. The judge had the benefit of testimony from expert witnesses, reports from experts, and proposed findings from a court appointed counsel representing the children and their separate interests. The judge concluded…"joint custody or shared responsibility is an invitation to continued warfare and conflict."[9] The judge found the wife has been the "primary nurturing parent" and "primary caretaker" and that the children have the "strongest bond" with their mother. These factors are highly significant for the welfare of the children, and are thus critical considerations for the judge in deciding on a custodial arrangement, which minimizes disruption and fosters a healthy environment for the growth and development of the children. Although the husband had had involvement with the child rearing functions and responsibilities, the judge concluded that because the parties have basic fundamental differences in the major areas of child rearing, such as health care, religion and education, as well as in day-to-day decision making and philosophy of discipline, an order providing joint custody would run contrary to the children's happiness and welfare. That determination has ample support in the record.

Comment: This case is highly relevant because so many cases that need a GAL are of the high conflict variety that typically results in a joint legal custody determination. *Rolde* is often cited in appellate decisions involving custody. In this instance, there was no domestic abuse alleged, although the judge characterized the divorce as "traumatized by personal and emotional conflict." This case pre-dated *Vaughn v. Vaughn*, 422 Mass. 590 (1996),[10] which involved physical as well as emotional abuse. In many high conflict cases that have temporary

[8] M.G.L. c. 208 § 30 states, ""Shared legal custody", (means) "continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development.""

[9] The Court cited *Braiman v. Braiman*, 44 N.Y.2d 584, 590 (1978) "As a court ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, [joint custody] can only enhance familial chaos."

[10] See case on page 49 for description of the types of violence in that case.

joint legal custody, an argument can be made that this form of custody is an invitation to "continued warfare and conflict." So, this case begs the question for the GAL as to what kind of conflict and what level of intensity of conflict is necessary to approach the threshold of a sole legal custody solution. How much cooperation or agreement over what kinds of child-rearing issues is sufficient to recommend joint legal custody? Here, it seemed that the level of hostility was so great that the court went to the extent of ending any financial relationship that Father might otherwise have had with Mother. The Court specified the areas of child-rearing in which there was no cooperation or mutual agreement between the parents. For an interesting contrasting decision in a very high conflict case, see *Kendall v. Kendall* 426 Mass. 238 (1997), where the judge awarded joint legal custody, since there was only one (but a major one) area of parenting disagreement between the parties, that being a pattern of dramatically different religious beliefs and practices. In that case, Mother was raising the children in one religion, while the father, because of his own different religious beliefs, was undermining their religious adherence. Often one of the questions asked by the court is what kind of custody would the GAL recommend (if recommendations are sought) for the parents? Is it reasonable to recommend the appointment of a parenting coordinator with arbitration power (with consent of the parents) as one basis for supporting a joint legal custody solution, or does the need for that type of intermediary simply reinforce the idea that cooperative parenting is impossible?

In the opinion, while the Court did not discuss in detail what parental roles each parent played during the marriage, it did determine that Mother had been the primary caretaker. Such a determination depends on facts specific to that issue. Despite noting that Father was involved in the responsibilities of child-rearing, designating Mother as the primary caretaker appeared to bolster its award of sole legal custody to her. Contrast that with *Freedman* v. *Freedman* 49 Mass. App. Ct. 519 (2000), p. 23 this casebook, where the trial judge (affirmed by the Appeals Court) decided clearly not to designate one parent as primary, but ordered a year on-year off schedule for the children (i.e. every other year the children with mother during school week and with father on weekends, and then flipped the following year). As noted in that above report, the Freedmans had worked out a shared time parenting plan after their separation, in which the child was doing well. The Court could have awarded a similar schedule in *Rolde*, but it appeared that the parents' inability to cooperate over any issue was the primary consideration in this case. *Freedman* was decided 19 years after *Rolde*, so that legal thinking about parental roles had changed consistent with the changes in society. In addition, this decision emerged just about the time Wallerstein and Kelly published their first report of research on divorce, *Beyond the Breakup*, so social science data on the process and effects of divorce was in its infancy.

SONJA I. **BAK** v. ANTHONY **BAK** (and a companion case[11])

Massachusetts Appeals Court

24 Mass. App. Ct. 608 (1987)

Keywords: Divorce and Separation, Custody of child, Foreign determination as to custody of child, Child's preference, Sibling issues.

Background: When the Baks married in 1967, Mother was a secretary and Father was a graduate student. Mother worked until Father earned his doctorate, but did not work out of the home thereafter. After Father got his Ph.D., they "traveled the world" as his academic positions required regular changes of residence (e.g. Paris, Princeton, NJ, SUNY-Stony Brook, Geneva, and Bonn). Their first child, Linnea, was born in Sweden in 1969 and Rosemary was born in Bonn in 1974. Their third child, Tony, was born in Bielefeld, Germany in 1976, where Father was working in a tenured academic position. During the course of the marriage, there were relationship problems, but mother had been the primary caretaker. Father spent a fellowship year in Oxford, Great Britain and began an affair with another woman, telling Mother that he would not longer live with her. In August, 1979. Mother took the children and came to Northampton, where her mother-in-law resided, and she filed for divorce in September, 1980. She then moved to Amherst, where the children entered school. She also started taking college courses toward a degree in Art Education. Father came to visit often and some trust re-developed between the parents. Linnea spent one summer in Bielefeld, and then Tony spent a whole academic year there the following year, 1983-84, because he did not know his Father well, as he had been so young at the separation. Father reneged on his promise to return Tony at the end of the school year and kept him in Germany. He obtained custody from a Bielefeld court in August, 1984.

Litigation over jurisdiction ensued. Despite court orders not to remove any other child from the Commonwealth (and to return Tony), Father removed Linnea to Germany without permission of Mother or the court. Father rarely visited Northampton thereafter to see Rosemary, who lived with Mother. At a trial in Massachusetts on the merits in November, 1983 he filed no papers on his own behalf. He also refused to cooperate with a court-ordered investigation by a family service officer. He sent no child support between 1979 and 1983, paying less than required to the DOR thereafter. In 1984, he made up the arrearages and then asked the court to re-open the custody issues. When Mother visited the children in Germany in 1984, the local court required supervision and the Father ejected her from his home. In 1986, Mother re-abducted Tony, 10 at the time, and returned him to the United States, leaving Linneas with Father. Father petitioned the Hampshire County court to reopen the evidence and gained a hearing in January, 1985, which he did not attend. The family court granted custody of Tony and Rosemary to Mother, who waived any contest over Linnea, since, at 16, she wanted to remain with her Father in Bielefeld.

[11] Sonja I. Bak vs. Anthony Bak and Esther Bak.

While there were issues of alimony and property, the trial court's findings regarding the children were that Rosemary had lived with her mother since the separation, was in good health, had attended Amherst schools for seven years, had substantial roots in the community, and had a good relationship with her maternal grandmother. Mother was "clearly fit to be the custodial parent." (*Bak*, at 617). The court determined that both children should be in their mother's custody, since "it would be in the best interest of Rosemary and Tony to have a continuing relationship with both parents," which result was best achieved through Mother's custody, since Father had greater freedom to travel.

Custody of Tony was "a closer question." Father "appears to have indoctrinated him with some dislike for his mother" (*Bak*, at 617) and Tony expressed a desire to live with his Father and was familiar with life in Bielefeld. "The preference of someone Tony's age (ten at the time of the proceedings) is not given decisive weight, although it is a factor to be considered." (*Bak*, at 617). The Family Service Officer found that Tony suffered no harm from having been in Germany, that he was intelligent and had adapted well to the Amherst school system. Like his sister, he had spent most of his life in Amherst, had done well there, had a support system in place in Amherst, and a close relationship with Rosemary, to which the court "gave a good deal of weight." (*Bak*, at 618). The judge decided the siblings were "better off together, all other factors being equal." Tony was closer to Rosemary than he was to Linnea in Germany. Father had closer ties to Massachusetts, where his mother lived (and she was close to the children), than Mother did to Bielefeld. He also had a vacation home in Truro, Massachusetts and could visit during the summer and at holiday time. The court noted that mother had provided several cultural activities to the children "at some sacrifice to herself," such as dance, music, etc. While Father "and his companion" could provide greater material comfort, the judge found that Mother's current and prospective income was sufficient to allow a reasonable standard of living, which an adjustment of alimony from Father would ensure. It said, "Material advantage alone should not be determinative of custody…Material advantage and successful child rearing do not necessarily go hand-in-hand." (*Bak*, at 618). The judge also intended to contact the Bielefeld court to arrange for visitation there and for oversight when the children again visited their Father. The court noted, in somewhat optimistic fashion, "Careful oversight of any such order should eventually overcome the present distrust that exists between the parents." (*Bak*, at 619)

Comment: This case contained two instances of "abduction." The first, while not literally an abduction, was Father's refusal to return Tony to Mother and the German court's affirmation of that act by giving him custody. Mother had sent him for a year to Father and assumed Father would act in good faith and return him, which proved a false expectation. Then, two years later, in the second "abduction," Mother removed Tony from Germany without Father's or the Bielefeld court's permission and obtained custody of the two younger children in Northampton. The Massachusetts courts took jurisdiction (there was a discussion of that in the decision) and awarded custody to Mother. From a GAL's perspective, the case itself was not unusual (although one sees it cited often in subsequent cases over the years). It referenced issues such as a 10-year old child's custodial preference (later explained further in *Ardizoni v. Raymond* 40 Mass. App. Ct. 734 (1996), p. 19 this volume, and discussed some of the factors it considered in awarding custody to Mother. It also commented on the role that "material advantage" might play in these determinations, although one wonders what weight that would

have had, if mother were significantly under-financed. There was also the problem the court would have had if it awarded custody to Father, since he had thumbed his nose at court orders (e.g. removed Tony without mother's or court permission) and had "indoctrinated" the son (today we would have called it "alienation") against Mother. To have granted him custody would have been to reinforce his behavior and would not have been a good precedent to set. In some instances, the Court has indicated that its role is not to punish misconduct by a parent if that behavior caused no demonstrable harm to a child, but rather to determine what would be in the child's best interest. If Tony had been older, say 12 or 13, and determined to stay with Father, that would have been an "even closer" decision. It is clear that a minor child's preference is never absolute in Massachusetts' case law, although there is a clear relationship between age and the weight given to a child's preference.

The other issue that pre-dated *Ardizoni* was the question of keeping siblings together post-divorce. In *Bak*, the court gave greater weight to maintaining that sibling relationship, "other things being equal," and later, in *Ardizoni*, it suggested there was a strong preference for keeping siblings together (those siblings were twin girls), absent factors rebutting that presumption.

JEANNE M. **ARDIZONI** VS. DANA M. **RAYMOND.**

Massachusetts Appeals Court

40 Mass. App. Ct. 734 (1996)

Keywords: Divorce and Separation, Child custody, Modification of judgment, Parent and Child, Custody, Custody, Children's Preference, Sibling issues.

Background: J. Jeanne M. Ardizoni (Mother) and Dana M. Raymond (Father) were married in 1984, and, in the same year, became the parents of identical twin girls, Rebecca and Mary (pseudonyms). They separated in March, 1993, because of serious problems in the marriage, and the husband filed a complaint for divorce in April. However, after the separation in March, 1993, DSS removed the children from Mother's care (she had substance abuse problems) and Father obtained temporary custody. The girls had supervised visits with Mother. In the divorce judgment of February, 1994, there was a stipulation for joint legal custody, physical custody to Father for three months, visitation to Mother, and a plan to shift to joint physical custody "if visits had gone well." In April, 1994, Mother filed a modification seeking sole physical custody. The claimed change in circumstances was alleged danger from the Father's oldest son (from a previous marriage) who lived in Father's home and had a mental disorder (recent commitment) and an arrest for a firearms violation. In December, 1994, the parents stipulated to alternating two-week periods of custody, and the oldest son would not be in the Father's home when Father had the girls. This arrangement prevailed until the hearing in February, 1995 on the mother's complaint for modification of the previous April. At the hearing, the judge interviewed the 11-year old girls in chambers with parties' permission. He then allowed their testimony on the record in open court. Rebecca stated she wanted to try living with Mother, while Mary wanted to remain with Father. The judge's order coincided with the girls' wishes, while they continued to attend the same school and be together on visits. This order was temporary until a hearing in June, 1995, and a guardian *ad litem* was appointed to evaluate the situation.

At trial, the judge again spoke alone to Rebecca in chambers regarding her preferences. He issued written findings at the end of June extending the split custody of the twins for another year. Father appealed to a single justice, who scheduled argument before the full appellate panel. In addition to the record being transferred to the appeals court, there were the judge's notes from his meetings with the children. At the time of oral argument, the children had been attending different schools in the same town and Mary was refusing to spend overnight with her mother. Father argued that the children should be together, that the judge gave too much weight to the children's preference, and that, since Mary has refused to stay overnight with Mother, "the only practical way of keeping the twins together" would be for him to have physical custody of both girls.

This was a modification of a judgment and the relevant statute was: "General Laws c. 208, § 28, as amended through St. 1993, c. 460, enables a Probate Court judge, upon finding that "a material and substantial change in the circumstances of the parties has occurred" to modify an earlier divorce judgment concerning the custody arrangements of minor children, where the

modification “is necessary in the best interests of the children.” See *Hartog v. Hartog*, 27 Mass. App. Ct. 124, 128 (1989), & cases cited. Also, “In determining whether there has been a material change in the parties' circumstances, the probate judge must weigh the relevant circumstances; the resolution of the various factors rests within the judge's sound discretion. . . . Unless there is no basis in the record for the judge's decision, we defer to the judge's evaluation of the evidence presented at trial.” *Bush v. Bush*, 402 Mass. 406, 411 (1988).” (*Ardizoni*, at 737)

The Court said that, since Mother had made progress in her recovery from drug addiction, the trial court’s decision that this reflected a “material change in circumstances” was not in error, as the evidence supported that finding. “When determining child custody awards in general, or modifications of custody awards based on changed circumstances, the guiding principle always has been the best interests of the children.” *Rolde v. Rolde*, 12 Mass. App. Ct. 398, 404 (1981). “The decision of which parent will promote a child's best interests 'is a subject peculiarly within the discretion of the judge.'“ *Bak v. Bak*, 24 Mass. App. Ct. 608 (1987), quoting from *Jenkins v. Jenkins*, 304 Mass. 248, 250 (1939). Discretion allows the judge, when determining the best interests of children, to consider the widest range of permissible evidence, including the reports and testimony of a court appointed investigator or G.A.L., evidence of the history of the relationship between the child and each parent, evidence of each parent's present home environment and over-all fitness to further the child's best interests, and the judge's own impressions upon interviewing the child privately in chambers. See Kindregan & Inker, *Family Law and Practice* § 1169 (1990) & cases cited.” (*Ardizoni*, at 738).

The Court went on to note that, among the list of factors a judge could consider, was the preference for siblings living under the same roof, as well as the child’s preference. “Statements of a particular preference, however, “must be treated with caution,” *Hale v. Hale*, 12 Mass. App. Ct. 812, 820, particularly where, as here, custody is hotly disputed. Kindregan & Inker § 1171, at 271 & n.54. Although one of the many permissible factors to be considered, the preference of a younger child “is not given decisive weight.” *Bak v. Bak*, supra at 617. See also *Custody of Vaughn*, 422 Mass. 590, 599 n.11 (1996) (“Preference of an eleven year old is not given decisive weight, although it is a factor to be considered.”).”(*Ardizoni*, at 738-39). The Court found no basis in the record or in the judge’s notes from which the judge could conclude that split custody could be in the children’s interest. In fact, the Court noted that the evidence was to the contrary, citing expert and non-expert testimony, as well as statements from the girls themselves. The Court opined that the judge’s reasoning “manifested an excessive reliance” on the stated preferences of two eleven-year-old girls. (*Ardizoni* at 741). It remanded the case for further hearing, but maintained the instant custody arrangement pending further review.

Comment: This was a very intense case, which made headlines when the trial judge temporarily placed the twins in foster care, because he believed that the actions of both parents were harmful to the children. Scenes of the children’s heart-rending crying and screaming appeared on television when they were separated from their parents outside the court. The issues relevant to investigations are the definition of a “material change of circumstances,” which also includes “best interest of the child” as a guiding principle.

Packenham (2004, at 298) noted that it was not error for the trial court to conclude that mother's success in recovery from substance abuse constituted a change in circumstances. *Delmolino v. Nance,* 14 Mass. App. Ct. 209 (1982), discussed later in this volume (p. 117), counsels the court, as well as a GAL, to understand when a "material change of circumstances" is necessary to make a recommendation for a requested modification in an earlier judgment. The writer's comment on that case raises questions about whether a GAL should make recommendations when a "change of circumstances" is the standard by which a decision is to be made. That issue is addressed more directly in the last chapter of the casebook.

Ardizoni is also important first, from the perspective of the Court's discussion of the significance of a child's stated preference and, second, in its own preference for keeping siblings together. In this case, those preferences were in conflict, since the Appeals Court gave greater weight to sibling solidarity. However, if the children were older, that decision might have gone the other way. In Massachusetts' case law with respect to divorce, there is no age for a minor when his or her preference for a certain outcome is absolutely followed by a court. Social science research in other areas of adolescents' competence to make decisions (health, legal, participation in research) suggests that somewhere between 14-15 is the age at which these decisions would be comparable to those of adults.[12] The law seems to balance such factors as chronological age, intelligence, and maturity in considering what weight to give a teenager's preference, as well as context issues, such as the influence of a parent in the child's or adolescent's assertion of a preference or the motivation in stating his/her choice.[13]

[12] Miller, Victoria A.; Drotar, Dennis; Kodish, Eric. Children's Competence for Assent and Consent: A Review of Empirical Findings. *Ethics & Behavior*. 14(3), 2004, 255-295; Melton, G. (1983). Decision making by children: Psychological risks and benefits. In G. B. Melton, G. P. Koocher, & M. J. Saks (Eds.), *Children's competence to consent*. New York: Plenum. Weithorn, L., & Campbell, S. (1982). The competency of children and adolescents to make informed treatment decisions. *Child Development*, 53, 1589-1598.

[13] One of the reviewers (Jones) asked whether a child of any age should ever be asked to state a preference. While this is an issue of professional practice, soliciting a preference when a child has not spontaneously offered one poses the risk that the GAL will inadvertently place the child in the middle, especially since any resulting statement is "on the record."

ROGER A. **FREEDMAN** vs. IPPOLITA S. **FREEDMAN**.

Massachusetts Appeals Court

49 Mass. App. Ct. 519 (2000)

Keywords: Divorce and Separation, Child custody, Parent and Child, Custody, Divorce, Custody of child.

Background: In this marriage, the husband was about 19 years older that the wife, having met her when he was 39 and she was a sophomore in college. They married in May, 1992, after having lived together for almost two years. They had a child in October, 1993 and were an affluent family, However, the marriage deteriorated quickly and, by March, 1994, each filed for divorce against the other.

In the judgment, the trial court ordered joint legal custody and an unusual parenting plan, reasoning that both parents were capable and caring. Father was to have custody on weekends and mother during the school week for a year, and they would reverse the arrangement for the following school year. The judge intended to give the child stability during each school year and to avoid the "today is Tuesday, I must be going to Mom's house" phenomenon. (*Freedman,* at 520). The custody orders also contained specifics as to location of school, among other issues. Mother appealed on the basis that the judge could not order a joint custody arrangement, since no "shared custody implementation plan" had been proposed to the court (*Freedman,* at 521), which mother claimed was required by G.L. c.208 §31, 11th paragraph.

The Appellate Court found that this was too narrow a reading of the statute. It stated that judges have broad discretion to order a joint legal custody plan that "the judge considers expedient to the care, custody, and maintenance of the minor children of the parties," (*Freedman*, at 521) even if the parties have not provided such a proposal to the court. Judges have broad discretion since they have "the opportunity to observe and appraise both parents in such matters." (*Freedman,* at 521). With respect to the joint custody order, the Court said that the judge wrote careful findings, basing her order on a *de facto* shared custody arrangement post-separation within which the child had adjusted well, and the fact that the parents were able to agree on pre-school placement "albeit with some rancor on the subject." The Court noted the potential practical problem that might arise were one parent to move away from the town in which they were both then living. However, the judge felt she had achieved consistency through the continuation of a sharing arrangement with which the child had become familiar, rather than the creation, by an order, of a 'predominant parent' and a 'visiting parent'. In the trial documents, the judge had criticized the GAL report for having a "maternal preference." The Court wrote, "The task of the Probate Judge is not to find the perfect custody solution, but to devise one that best accommodates to the difficulties and to the child's interest." (*Freedman,* at 522). The Court also noted that, while the judge devised her order to fit the facts of the case, this scenario should not be considered a model.[14] The

[14] Henry Bock, Jr. considered this statement important, since it underlies the Court's view of deciding each case on its particular merits in the context of the "varied characteristics of families."

Court further stated that, should the arrangement prove to create difficulties for the child, the trial court could reconsider the issue, since an adverse effect would "constitute a material change in circumstances." (citing *Ardizoni v. Raymond*, 40 Mass. App. Ct. 734, 737-38 [1996]).

Comment: This case highlights the broad discretion afforded probate judges in creating parenting plans and custodial arrangements, including ones that neither party proposed. In many appellate decisions, the courts have stressed that the trial judge is granted such discretion because of his/her unique position to observe the parents at the time of trial. As an extension of this idea, the GAL is the one other professional that has an opportunity to interview and observe both parents, including each of them with the children, although they are not under oath. However, the GAL observes the parents in a very different way than a judge, when the latter "hears the case." The GAL also interviews a variety of collateral sources of varying degrees of separation from the family. Typically, the judge does not see the parents with the children, or even interview the children. As the "eyes and ears" of the Court, the GAL is usually the only person besides the judge – in the rare event of a trial - who gets to hear the whole case. The GAL's particular vantage point is the foundation for how influential is the information he or she provides, whether or not recommendations are included in the report. However, per the Category F standards as currently written, a GAL investigator may not make such recommendations, absent a specific request in the order of appointment or a subsequent order permitting such recommendations.[15]

One other interesting twist in this case is that the judge ordered shared physical and legal custody despite the fact that neither parent suggested it, and despite conflict over something as important as choosing a pre-school.[16] The judge noted that the parents were able to finally make a united choice, but she added, "With some rancor." It appeared that what was most relevant was the post-separation parenting plan the parents had arranged that appeared to be working well for the child. That suggests that shared physical custody arrangements do not have to be devoid of inter-parental conflict, but the amount or quality of that conflict is not defined, except on a case-by-case basis. It is likely that the "tipping point" would be conflict that was adverse to the child's well-being, since the *welfare of the child* is a criterion often repeated in appellate cases,[17] and that welfare did not seem compromised by the conflicts. The converse of that in appellate law seems to be "demonstrable harm to the child," and perhaps a party opposing a proposed form of joint legal custody would have to show actual or potential harm, perhaps even substantial harm, to support his or her preferred form of parental responsibility. The parent opposed to joint legal custody might also have to demonstrate the impossibility of parental cooperation. In such an instance, the task for the GAL would be to do a time-line comparison of the child's adjustment patterns, taking account of the typical developmental changes that normally occur with age. The GAL would have to assess the adjustment problems if existing, to determine what connection, if any, there was to parental

[15] Alex Jones suggested that the GAL can discuss with the parties or counsel about making recommendations. If they are so inclined, they can ask the court to give permission to do so. The GAL can also file a motion with the court to clarify this issue, if there is doubt about the court's intent in the order.

[16] Packenham (2004), op. cit. at 382, noted, "Custody arrangements are not limited by a shared custody implementation plan submitted by the parties."

[17] In reading the appellate cases, this term is considered a factor in "best interests," but almost seems synonymous with it.

conflict, as well as to other factors in the family's life or the child's own development. This is no simple task, to be sure.

Other cases where legal custody has been at issue have shown the need for the GAL to parse out the areas of cooperation from those of disagreement, so that the court can decide what weight to give this balance of cooperation to non-cooperation in determining legal custody. The same dilemma exists in making recommendations about legal/physical custody as occurs in modification decisions. That is, by what measure can a GAL decide that the parents can cooperate on enough of the child health, education, and welfare issues to approach that undefined threshold of shared legal or physical custody? Some GALs will recommend a detailed distribution of parental responsibility where each parent would have authority to make decisions in areas in which they have shown particular ability. Thus, one parent might have the legal authority to make medical decisions, while the other manages educational ones. In each instance, the responsible parent would have the obligation to at least inform the other parent.

The other lesson from cases such as this is the court's pattern of avoiding absolutes in looking at parental behavior. That is, one parent is not all good or bad, but a combination of strengths and weaknesses in terms of his or her character, stability, and skills. The Court then explores how those skills impact child-rearing and tries to apportion the parents' respective abilities to further the welfare and best interests of the child, all, of course, within the limits of the law to affect such outcomes. The task of the GAL is to provide that kind of detailed information to the trial court so that, to the extent possible, the judge can individualize a decision to fit the needs of the children and the family. Most cases involving a GAL investigator or evaluator do not come to trial, so the GAL data is useful for parents and counsel in trying to devise an agreement that best meets the needs of the children in the context within which the parents live.

CUSTODY OF ZIA.

Massachusetts Appeals Court

50 Mass. App. Ct. 237 (2000)

Keywords: Parent and Child, Custody, Child custody proceeding, Custody of child.

Background: Zia was born in August, 1996 to unmarried parents, who (from the record) had never lived together.[18] Mother became the primary caregiver, while Father had substantial visitation. Father's family was well-educated; he had one year of college, was employed as a patient service representative, and was enrolled in a graphic design program at a local college. He also had a criminal record, including two convictions for A&B (not against Mother) and a drug offense. Two abuse prevention orders had been issued against him and an A&B charge was pending. Mother was born in Puerto Rico and was bilingual, living in New Bedford in public housing. She did not complete high school, but earned her GED and had held several blue collar-type jobs. She had been arrested for possession of drugs and placed on probation, and had one conviction for driving without a license.

The Court held:

> As a result of a stipulation in November, 1996, the parents agreed to share legal custody, while Mother had physical custody. Father had the child about 140 days/year, usually at his parents' home, although he had an apartment of his own in Brookline. The Court noted the amount of cultural and intellectual stimulation Zia received from the "society and companionship" of her paternal grandparents. Notwithstanding that involvement, Father was the primary caregiver for Zia at his parents' home. He intended to move into an apartment in the lower floor of their home, if he were awarded custody. The Court credited him with enhancing her development through interesting and educational activities, as well as providing her with books and other stimulating materials. Mother had lived with her mother in the past, but had her own apartment. When Mother was at work, Zia's 74-year old great-grandmother took care of her. Both parties agreed that Zia was well-adjusted, happy, and had met the appropriate developmental milestones for her age. In general, mother had taken good care of Zia, with the help of her family.
>
> "Notwithstanding the positive attributes of the mother's care of the child, the judge had serious concerns about the mother's judgment, parenting abilities, and interactions with the Father. The judge found that the mother has "dismissed the need of the child for a Father"[19] and has "thwarted his joint legal custody at every turn." "She has denied him information about and input into the most important decisions and events concerning the child: medical issues, hospitalizations,

[18] There is a discussion in the Afterword about statutory differences in approach to cases in which parents never married (M.G.L. c. 209C) and cases where they were married (M.G.L. c. 208)

[19] The judge noted also that the mother had made statements to the guardian *ad litem* "clearly indicating her opinion that a Father is not a necessary or important figure for a child."

attendance at pre-school, selection of pre-school educational programs, all to the detriment of the child." The judge found that the mother believes that she alone can make important decisions in the child's life. (*Zia*, at 240).

The Court also criticized Mother's judgment for a lack of structure in her home, for allowing Zia a very late bedtime, for letting the girl sleep with her and her boyfriend, or sleep with her alone, and for letting her watch television constantly. She had also come to pick Zia up at the home of a relative in a car without a car seat and with a driver who was drinking. Mother had done little to enhance the child's education and refused an offer by the father to pay for pre-school in Brookline. The judge faulted her for allowing so much TV watching, including adult-oriented talk shows. Lastly, Mother was criticized for failing to complete a court-ordered parenting class (as Father had done) and for attempting to thwart Father's legal custody.[20] Based on the above facts, the judge awarded sole legal and physical custody to the father. She noted that Father had always respected mother's role in Zia's life, whereas just the opposite was the case with mother. That, and mother's poor parenting decisions were the basis for the custody award.

Mother argued that the judge failed to afford "proper weight" to her role as primary caretaker, but the Court rejected that idea, stating that the quality of the care was an important qualifier to any direction established by the legislature as in G. L. c. 209C, § 10(a), as amended through St. 1998, c. 179, § 6, and where it established a judicial presumption, it clearly so stated. See, e.g., G. L. c. 208, § 31A, & G. L. c. 209C, § 10(e) (a judge's "finding by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody, or shared physical custody with the abusive parent"). In the 209C, § 10(a) statute, the Court stated the Legislature was not as specific.

The Court took note of the need to consider all the factors in determining custody, "Here, the judge's voluminous findings demonstrate consideration of myriad factors and circumstances relevant to the child's best interests, including the mother's refusal or inability to communicate with the father (in non-visitation matters) for the benefit of the child,[21] the mother's poor

---

[20] The judge also made findings concerning the reports and testimony of the guardian *ad litem* and the testimony of the mother's expert. The judge noted that the guardian *ad litem*, in her final report, had recommended that, although the parties sometimes had difficulty communicating, "joint legal and physical custody would be best because it would ensure that information is shared between the parties." The judge noted further that the mother's expert believed that the mother was a good parent and, although the mother was young and made some poor decisions, those decisions did not harm the child. In the expert's opinion, the mother's family could provide her with the guidance she needs to raise the child. The judge also found the expert's opinion to be flawed as she did not meet with the Father during her evaluation. [*Zia*, at 241]

[21] "Joint custody was not feasible in the circumstances presented here. As we have stated… G. L. c. 209C, § 10(a), provides that a judge may award the parents joint custody of a child where the parents have entered into an agreement or the court finds that they have successfully exercised joint responsibility for the child and have the ability to communicate and plan with each other concerning the child's best interests. See *Rolde v. Rolde*, 12 Mass. App. Ct. 398, 404 (1981); *Doe v. Doe*, 16 Mass. App. Ct. 499, 502 (1983); *K.J.M. v. M.C.*, 35 Mass. App. Ct. 456, (1993). Cf. *Williams v. Massa*, 431 Mass. 619, 636 (2000) ("If the judge felt that joint legal custody put the children at risk, or was not in their best interests, because of the wife's worrisome parenting behavior, then the judge should have ordered sole legal custody to the Father"*). Carr v. Carr*, 44 Mass. App. Ct. at 925 ("Where the judge . . . has found that the relationship of the parties has been dysfunctional, virtually nonexistent, and one

judgment and worrisome parenting decisions, the father's active, substantial, and constructive involvement in the child's life, and the father's willingness to respect the mother's role as a parent."[22] (*Zia,* at 244). The Court noted that Mother placed some value on education, but not to the degree that the father did, especially as she did not engage the child in stimulating activities or enroll the child in a day care program that would have advanced her learning.

Mother appealed the judge's finding of "no history of domestic abuse," but the Court found that "the judge had considered the question of abuse and was of the opinion that the present case presented no history or pattern of domestic violence that would preclude an award of custody to the father. Compare on page 49, *Custody of Vaughn*, 422 Mass. 590, 596-600 (1996)."[23] (*Zia,* at 246). The Court also defined the concept of "access to the child" not as interference with visitation, but as a refusal to allow Father to have access to relevant information about the child or to involve him in important decisions regarding Zia. Mother protested that Zia's sleeping in her bed was not an issue, but the judge referenced mother's own expert, who expressed concerns about that, suggesting "developmentally, it's appropriate to have a child begin to learn to stay in their own bed." (*Zia,* at 246). It was unclear how old Zia was at the time of trial, because she was just four when the appellate decision was issued. Mother had raised issues of class bias by the judge, but the Appeals Court found no basis to credit that objection, saying it was only an issue for Mother and neither the father nor his parents had ever used the differences in their education or home environments to the disadvantage of Mother. Mother had alleged that the judge had a cultural bias in criticizing her for sleeping with the child, but Mother had admitted that she did not sleep with her mother when she was a child, thus weakening her argument about a cultural issue.

Comment: This case provides discussion of several issues:

- In *Zia*, the Court determined that the qualities of Father's parenting, including his ability to provide greater opportunities in life for the child, outweighed the fact that Mother had been the primary caretaker. The Court appeared to have decided that Mother's parenting was sub par, even though it might not have declined to the level of unfitness. The primary caretaker preference, as later defined in *Custody of Kali*, 439 Mass. 834 (2003) and in law by M.G.L. c 209 § 10, is not absolute and requires evidence of the quality of the parenting itself. In *Kali,* the SJC considered what factors existed to affirm the preference for the primary caretaking mother, when the father might have been marginally more competent.
- The presence of restraining orders or even prior aggressive acts (A&B) is noteworthy, but the statute (or Vaughn itself) requires a showing of a history or pattern of abuse.
- Certain child-rearing practices, if not culturally normative (such as the "family bed"), may receive close scrutiny. The notion of a toddler sleeping in her own bed at a certain

---

of continuous conflict, he properly may determine that custody should be awarded only to one parent"). It is clear from the court's findings that the judge believed that the Father's participation in the major decisions in the child's life was important, if not essential, to the child's well-being." (*Zia,* at 244-245)

[22] "We note that our decision need not, and does not, turn on the "cultural" experiences (e.g., visits at an aquarium or a museum) that the Father or the paternal grandparents may have provided the child. Cf. *Guardianship of Yushiko*, 50 Mass. App. Ct. 157, 159 (2000)." (*Zia,*at 244)

[23] "While the Father's past conduct toward the mother, particularly in the light of his criminal history, gives us pause, we note that the Father participates in therapy for assistance in controlling his anger. The judge also found that the Father has matured as a result of his responsibilities as a parent." (*Zia,*at 246)

age may not have any normative data to support expert opinion, such as was given in this case. There were other poor parenting decisions by Mother in this case (such as Zia sleeping with her and her boyfriend), but sleeping alone with mother might not have been one of them. With this issue, it would be important for the GAL to inquire about the sleeping patterns in the parent's own family of origin.

- When considering whether one parent has permitted "access" to the child by the other parent, a GAL should include the extent to which parent A has shared important medical or educational information with parent B, as well as whether parent B was able to spend time with the child. It seems reasonable to add the degree to which either parent informs the other of the various activities of the child. In *Zia*, the Court appeared to say that Mother's goal was to "thwart Father's legal custody," suggesting his access to information and input, rather than actual parenting time. Yet, the Court did not appear to give as much weight to the withholding of that information from Father, as it did her resistance to permit him the opportunity to contribute to Zia's emotional, academic, and social development.
- The Court emphasized that the judge did not exhibit a class bias in her decision, noting that the parents had very different parenting behaviors, the Father's being more relevant to Zia's positive development than Mother's. That noted, the Court did not determine Mother to be unfit. The fact that there was such a difference in the economic and educational backgrounds of the parties and their respective families makes it imperative that the GAL be very aware of these factors when assessing cases with those kinds of socio-economic discrepancies. This kind of fact pattern behooves GALs to provide the Court with data regarding parental strengths and weaknesses, and some assessment of the relative costs and benefits of each to the child.
- Lastly, footnote 21 (10 in the original case) suggests how the Court considers parents' behaviors in balancing joint and sole legal custody. So many of the high conflict cases can fit into the category of "dysfunctional, virtually non-existent, and one of continuous conflict" that they could easily suggest a sole custody outcome. Given the somewhat vague standard for that decision, it might be best for GALs, both mental health and legal professionals, to avoid making specific legal custody recommendations. Presently, the category F standards prohibit GAL/investigators from offering recommendations, absent an affirmative court order to do so.[24] There is discussion earlier in this volume about the advisability of a detailed analysis of how the parents have behaved with respect to specific responsibilities usually included in joint legal custody, especially the children's medical, educational, and general welfare concerns.

[24] But see Alex Jones' suggestion in footnote 15 (this volume) for a possible solution to that issue.

REMOVAL FROM THE COMMONWEALTH

DAISY M. **HALE** V**.** NATHAN B. **HALE** JR.

Massachusetts Appeals Court

12 Mass. App. Ct. 812 (1981)

Keywords: Divorce and Separation, Child Custody, Removal from the Commonwealth.

Background: The parties married in 1961. The husband was a career serviceman in the Air Force, and he had accepted and completed assignments in New York, Oklahoma, Germany, and Vietnam. The wife lived with her aunt when the husband was in Viet Nam. Three girls were born during the marriage. In 1971, the family moved to Massachusetts because the Husband accepted an assignment here. The parents separated in 1972. Mother wanted to move to California to live near her sister and other family members, which she felt would be more advantageous to the children. She planned to rent her sister's home, as the sister was purchasing a new house in the same community.

Mother was a state employee in Massachusetts and was eligible for a Federal job in California, one with a greater potential for career advancement. Father had retired from the Air Force and had a good job in Massachusetts. He had an excellent relationship with his daughters, one of whom was 18 and had moved in with him after the separation, due to a strain in her relationship with Mother. None of the children wanted to leave this locale. After a trial on the merits, the trial judge denied Mother the right to take the two younger girls to California. The rationale was that the move would hinder Father and prevent him from continuing to have the excellent relationship he had with the children. Another reason was that the siblings had good relationships amongst themselves and the judge did not want them separated. The court determined that it was not in the best interest of the children to move.

The Appeals Court, in reversing the decision, stated that the judge's rulings pertained primarily to Father's relationship to the children and to the inter-sibling relations, but had little focus on 1) the relationship of Mother to the children, and 2) the effects on the children of the advantage or disadvantage of the move except as this affected the relationship with Father. The judge also said nothing about alternate visitation possibilities, if Mother were to take the children to California.

The trial judge also based his opinion on the need for "frequent and continuing contact" as cited in *Felton v. Felton*, 383 Mass. 232, 239 (1981),[25] but the Appeals Court said, "We consider that factor not in itself conclusive." (*Hale*, at 815). The Court cited the basis for removal in Ch. 208 § 30, noting that a child cannot move out of the state without consent of the other parent "unless the court *upon cause shown* otherwise orders." (emphasis added). It noted that *Felton* also cautioned that "best interests" might involve "some limitation of the liberties of one or the other of the parents (*Felton*, at 233). The Court required the trial judge

[25] *Felton*'s major issue was parental religious differences, nor removal.

to write comprehensive findings regarding issues of harm to the children and what is in their interests. The Court cited a New Jersey case, *D'Onofrio* v. *D'Onofrio*, 144 N.J. Super. 300 (1976), that declared, "the well-being of the custodial parent must be considered in determining the best interest of the child." The Court referenced the idea that the custodial parent and the children form a "new family unit" and what is advantageous to that unit as a whole, to each of its members individually, and to the way they relate to each other and function together is obviously in the best interest of the children. The Court noted the idea that the interests and well-being of children are closely interwoven with those of the custodial parent is consistent with psychological studies of children of divorced or separated parents. Tessman (1978) *Children of Parting Parents*, at 516 and Wallerstein & Kelly (1980), *Surviving the Breakup*, at 114, 224-225.

The case noted (*Hale*, at 818) the factors "which should be weighed in determining whether removal should be allowed." These included:

- "the prospective advantages of the move in terms of its likely capacity for improving the general quality of life for both the custodial parent and the children…
- the integrity of the motives of the custodial parent in seeking the move in order to determine whether the removal is inspired primarily by the desire to defeat or frustrate visitation by the noncustodial parent…
- whether the custodial parent is likely to comply with substitute visitation orders . . . which can provide an adequate basis for preserving and fostering the parental relationship with the noncustodial parent if removal is allowed."

The Court noted that, if there are advantages to the custodial parent that would improve the quality of life of the children, these should not be sacrificed solely to maintain the weekly visitation by the Father. The Court said that longer, but less frequent visits "may well serve the parental relationship better than the typical weekly visits." (*Hale*, at 819). The trial judge erred by considering only the impact on Father's weekly visitation, but did not consider (*Hale*, at 820):

- The advantages with respect to the emotional well-being of the family unit as a whole;
- The emotional costs of forcing a stressful family and career choice (if such be the case) on the parent with primary responsibility for the daily care of the children;
- Alternate visitation schedules that would preserve and foster the important relationship of the children with the Father;
- Decreasing child support to assist in the costs of visitation; and
- That the preferences of the children (ages 9 & 13) were to be viewed with caution (citing Wallerstein and Kelly (1980), *Surviving the Breakup* at 314-315)

Comment: This is really the first case in the line of cases related to removal from the Commonwealth. It highlights the legal advantage of being the custodial parent and characterizes the children and custodial parents as a "new family unit." While not labeling the "real advantage" standard as *Yannas* later did, it provided the basis for that standard by prioritizing the benefits of the proposed move to the custodial parent among the factors to be considered. It also suggested that alternate schedules for Father-children contact could be created to "preserve and foster" that "important relationship." That idea also was inconsistent

with the decision in *Felton* requiring "frequent and continuing contact" between non-custodial parent and children, reasoning the trial court used that the Appeals Court rejected.

One interesting aspect of this case was its use of social science research (e.g. Wallerstein, Tessman) to buttress its argument that the interests of the children of the custodial parent are related to the well-being of that parent, but failing to note that there was no data to support its opinion that alternate schedules could "preserve and foster" the "important relationship" of the children and the non-custodial parent. The appellate court seems to have an ambivalent relationship toward social science research. It uses what supports its decision and ignores what does not, despite the issue of whether the research it cites is good or not. As for the research itself, there has always been controversy about the extent to which the Wallerstein and Kelly study was generalizable. To be fair, this opinion was written in 1981, just a year after the book was published.

Another aspect of the decision suggests how complicated and case-specific these determinations are.[26] The Court indicated, as noted earlier, "the custodial parent and the children form a "new family unit" and what is advantageous to that unit as a whole, to each of its members individually, and to the way they relate to each other and function together is obviously in the best interest of the children." As counterpoint, around that time, Constance Ahrons was studying families in San Diego as they moved through the divorce process.[27] She coined the term "bi-nuclear family, which meant that, post-separation, the family consisted of not one but two new family subunits – the child(ren) and each parent. In favoring the children and the custodial parent, it made removal easier for one family unit at the expense of the other. Thus, While *Hale*, tries to parse out the individual factors in this complex "formula," it begs the question of how an investigator or evaluator would weigh the relative benefits and costs of any proposed move in making a recommendation to the Court.

[26] Alex Jones commented that a GAL could minimize some of the challenges in getting relevant evidence before the court by researching such issues as the quality of the target school district, opportunities for religious observance (if pertinent), and competent medical care, as needed, among other aspects of daily living in a new location. If a child has special needs, information about what school resources exist would be important to impart to the court.

[27] Ahrons, C. (1979). The binuclear family: Two households, one family. *Alternative Lifestyles*, 2, 499; Ahrons, C. (1980). Redefining the divorced family: A conceptual framework for postdivorce family systems reorganization. *Social Work*, 25, 437.

IONNIS V. **YANNAS** v. STAMATIA **FRONDISTOU-YANNAS**

Supreme Judicial Court of Massachusetts

395 Mass. 704 (1985)

Keywords: Custody, Visitation, Removal, Best Interests.

Background: The husband and wife were married in Athens, Greece, in 1968. The husband was born in Greece, came to this country as a student in 1953, and became a citizen of the United States in 1976. The husband studied in this country and was a world-renowned scientist. The wife was also born in Greece. She came to this country in 1969, following their marriage, and also became a citizen of this country in 1976. She studied first in Greece, but also received a degree in civil engineering from M.I.T. in 1970 and in 1973 received a master's degree from M.I.T.'s Sloan School of Industrial Management and a doctoral degree in civil engineering from M.I.T. She was an internationally recognized expert on the properties of concrete and construction economics. They had two children born in Massachusetts, a daughter in September, 1973, and a son Alexis in May, 1977. They maintained their Greek identity and culture; the children were bilingual in Greek and English and continue to attend Greek school. They traveled regularly to Greece between 1975-1981. The husband had traveled to Greece himself every summer between 1969 and 198, maintained an interest in an apartment and cemetery tomb in Athens, and had often lectured there. The Court recited the extensive history of the family in Greece, noting that the wife was licensed engineer in Greece, but not in the US. She had a job offer that would "provide her with opportunities for professional growth and with greater financial security than she could obtain in this country," (at 707), while her search for work in Massachusetts had not been successful. Mother also was entitled to a pension in Greece and could use property she owned there. The Greek court would likely enforce US custody orders. The children were accepted at an excellent school in Athens, which the daughter attended and did well when Father spent two sabbatical years in Greece between 1978-80. The children, who expressed their wishes to remain in Newton and vacation in Greece during summers, made friends easily and were familiar with Greek culture. Extended family from both parents lived in Greece.

The SJC wrote:

> From his basic findings and from his consideration of the evidence, the judge arrived at several more general conclusions. If the wife is unemployed, the parties' standard of living will fall when they attempt to set up two households. The husband and wife are responsible and can communicate in regard to the children. The wife feels an increased sense of personal security in her native land. A move to Greece will enhance the children's exposure to their Greek heritage and language. The children will not encounter a language barrier or "culture shock" from such a move. The continual stress on the wife and her unhappiness if she must stay here will probably have an adverse effect on the children. The wife has stated that she will make every effort to see that the children continue to be close to their Father. (*Yannas*, at 707)

The judge granted Mother physical custody of the minor children and joint legal custody to the parents. He further allowed her to take the children to live with her in Greece. Father received the right to six weeks in the summer, one week at Christmas and one week each Spring, cost of transportation shared equally. Father argued that the judge should have awarded shared *physical* custody (emphasis added), which (he asserted) was presumed in the law, but the Court rejected that argument.

With regard to the move, the judge applied the less strict standard[28] of *Hale v. Hale*, 12 Mass. App. Ct. (1981), which followed the New Jersey case of *D'Onofrio* v. *D'Onofrio*, 144 N.J. Super. 300 (1976). In contrast, New York at the time allowed a move only in exceptional circumstances. The SJC designated this as the "real advantage" standard and said it was "grounded on the realization that after divorce a child's subsequent relationship can never be the same as before the divorce ... and that the child's quality of life and style of life are provided by the custodial parent." Citing *Cooper* v. *Cooper*, 99 N.J. 42 (1984) at 53. If the parent showed a "good, sincere reason" for the move, all of the other relevant factors must be considered as a whole, but no single factor would be pre-eminent in the determination. "Every person, parent and child, had an interest to be considered." The SJC also cited *Cooper* at 54, "because the best interests of a child are so interwoven with the well-being of the custodial parent, a determination of the child's best interest requires that the interests of the custodial parent be taken into account."

The SJC listed the issues that must be evaluated in removal cases. They included consideration of the child, the custodial parent and the non-custodial parent's interests. As to the interest of the child, it delineated the following issues:

- Whether the quality of the child's life may be improved by the change (including any improvement flowing from the improvement in the quality of the custodial parent's life);
- The possible adverse effect of the elimination or curtailment of the child's association with the non-custodial parent; and
- The extent to which moving or not moving will effect the emotional, physical, or developmental needs of the child.

The following issues relate to the interest of the custodial parent:

- The relative advantages to the custodial parent from the move;
- The soundness of the reason for moving;

[28] That is, compared to the New York case law at the time. There is an extensive discussion about this in *Tropea v. Tropea*, and *Browner v. Kenward*, #1&2, Court of Appeals of New York, 87 N.Y.2d 727 (1996). In *Tropea*, the custodial parent wanted to move 2½ hours away within the state for apparently sincere reasons, but the Family Court denied the request. The justices noted that earlier case law held that, if there was a showing that a proposed relocation could result in a disruption of "regular and meaningful access" to the children by the non-custodial parent, then that would trigger a presumption that the move was not in the best interests of the children. The custodial parent then had to demonstrate that there were "exceptional circumstances" that necessitated the move to overcome that presumption. If the custodial parent could support the claim of "exceptional circumstances," the court would then consider the children's best interests. Reversing the Family Court in *Tropea* and *Browner*, the New York Appeals Court stated that the lower courts had not theretofore settled on a consistent definition of "meaningful access," such that distance or travel time for visitation was comparable from case to case. In dispensing with the threshold issue above, they held… "each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child." (*Tropea*, at 739).

.

- The presence or absence of a motive to deprive the non-custodial parent of reasonable visitation; and
- Whether the custodial parent is likely to comply with visitation orders.

The issue related to the non-custodial parent was:

- The reasonableness of the alternative arrangements. The fact that visitation by the custodial parent will be changed to his or her disadvantage cannot be controlling.

That the move might be to the advantage to the custodial parent, did not automatically mean it was in the child's best interests. However, the factual "formula" by which one weighed the child's best interest required consideration of the benefit of the proposed move to the custodial parent. While earlier decisions had denied removal for the "best interests of the children," the SJC referred also to *Felton v. Felton*, 383 Mass. 232 (1981) which stated that "when the parents are at odds," the attainment of "best interest" involves "some limitations of the liberties of one or other of the parents." (*Yannas*, at 781).

The SJC referred again to the New Jersey case of *D'Onofrio*, as the Appeals Court did in *Hale*, promoting the idea that the children and custodial parent comprise a "single family unit," and that "what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children."[29]

In the footnotes, as the Appeals Court had done in *Hale*, the SJC stated that its finding was consistent with research demonstrating the correlation of the mother's well being and the adjustment of the children after divorce (from Wallerstein and Kelly, *Surviving the Breakup*, 1980).

In its findings, the SJC said,

> The judge properly recognized the standard to be applied and made findings of fact consistent with that standard. Certainly the move to Greece would be to the advantage of the wife, financially, emotionally, and socially. The children should benefit from that advantage and can strengthen their ties to family and to Greek culture. They will receive excellent schooling in Greece. Additionally, the husband has large blocks of free time, and travels to Greece often. The children can visit this country every year. They will not lose their American citizenship or the opportunity to attend college in this country and to settle here permanently. In these circumstances, it was not an abuse of discretion or an error of law to authorize the wife to remove the children to Greece. (*Yannas*, at 712).

Comment: This was the second rung on the legal ladder of removal cases. It concretized the "real advantage" standard as the focus around which fact-finding must revolve. It solidified that idea, begun in *Hale* (above) that the children's interests are, to a great extent, derivative

[29] Packenham at 92 (2004) noted that this was a landmark case regarding custody issues. He stated that the SJC decision meant that G.L c. 208 §31 created no presumption favoring joint physical custody and applied the "less strict 'real advantage' standard in permitting removal."

of the custodial parent's interest, because they comprise the "new family unit." It seemed to this writer that, in order to "interweave" the interests of the children with that of the custodial parent, absent any supporting data, it continued a theory it started with *Hale* that alternate visitation plans can compensate for the regular contact between children and non-custodial parent. It also reinforced the idea that the parent with physical custody had a legal "advantage" vis-à-vis the non-custodial parent, if he or she wanted to move out-of-state.[30] There was more research by that time that affirmed the findings of earlier studies that the adjustment of children was correlated with the stability and well-being of the primary parent, typically the mother. Survey research was beginning to emerge, however, suggesting that distances of an hour or more between the residence of children and their non-custodial father was detrimental to ongoing contact between them and could damage those bonds.[31] This tended to weaken the assumption of the appellate courts that longer but less frequent visitation periods would compensate for the lack of regular and frequent contact. Those findings had little impact on removal cases, as far as could be determined. This raises an issue regarding the nature of the attachment of very young children to the non-custodial parent, if the custodial parent were to move away. It would seem that would create at least a psychological dilemma whereby a GAL would have to explore the balance between the emotional (and possibly economic) benefits to the minor child of moving with their custodial parent and the developmental significance of having a secure attachment to the other parent. That is a scenario that begs for a developmental cost/benefit analysis to the young child with respect to any proposed move.

Yannas brought about another change in the way removal cases are framed. Previously, the burden of proof was on the moving parent to show that the relocation was in his or her interest as well as that of the children. After *Yannas*, the burden shifted to the other parent to show why the proposed move was *not* in the interest of the children, particularly after the moving parent had demonstrated a sincere reason for the move. *Yannas* is the controlling case with respect to removal issues, while the next case, *Rosenthal*, provides an organizational framework to sort out the facts that are subject to a "real advantage" test.

[30] It is reasonable to believe that one "real advantage," in lay terms, to the parent with physical custody is that it would permit that parent to use the legal "real advantage," if he or she were to desire to move away. As a corollary, it is reasonable to believe that this would be one reason for the other parent to seek shared physical custody at the time of divorce, particularly if he or she had any basis for believing that the other parent might wish to relocate.

[31] Furstenburg, F. Jr., Nord, C., Peterson, J. & Zill, N. (1983). The life course of children of divorce. *American Sociological Review*, 48, 656; Maccoby, E. & Mnookin, R. (1992). Dividing the child: Social and legal dilemmas of custody. Cambridge: Harvard University Press. at 183-84.

AMY RAWSTRON **ROSENTHAL** v. PAUL **MANEY**

Massachusetts Appeals Court

51 Mass. App. Ct. 257 (2001)

Keywords: Divorce and Separation, Child custody, Modification of judgment, Custody, Removal from the Commonwealth.

Background: This was the third in a line of removal cases and the one that provided the most detailed method of analyzing fact patterns. Since it includes cites from earlier cases, it shows some of the historical reasoning. In this case, the parents had married in November, 1987 and had a boy, Caleb, in June, 1991. They resided in Northboro, where extended family on each side lived, including two sets of grandparents. They then separated in 1995 and divorced in January, 1997. Mother had been employed since 1990 by the Rhode Island Philharmonic Orchestra as a violinist, and commuted to her job in Providence from Northboro, but was still the primary caretaker. Father was a service manager in a business owned by his family. As a result of the divorce action, she had primary physical custody and the Father had time with Caleb on alternating weekends and two overnights during the week. Their schedule was such that Father had substantial time with their son, or six of every fourteen days (about 43% of the time). After the separation, mother moved into an apartment with Caleb in Shrewsbury and Father into an apartment in his parents' home. Caleb started pre-school in Shrewsbury. During the separation period, Mother met Mr. Rosenthal. On June 23, 1997, Mother filed a complaint for modification of the original divorce judgment, in which she sought leave to remove Caleb from Shrewsbury to Providence, Rhode Island. On July 4, 1997, she married Rosenthal. On July 8, Father filed a counterclaim, alleging that removal would limit visitation with his son, "disrupt the warm and close personal relationship between the [Father] and his son and is not in his son's best interests." On this basis he requested physical custody of Caleb. On July 28, 1997, the court appointed a guardian *ad litem* to act as an "investigator to review the matter and report to the Court."

In August, 1997 before the GAL had completed the investigation and before the court had issued any orders on the removal request, Mother moved with Caleb to Providence, where she and her new husband had bought a house. In late August, Father filed a Motion For Further Temporary Order, pleading that the court prohibit that move until the GAL had finished her report. At a hearing on that motion, the judge (who was also the trial judge) modified the existing divorce judgment that had given physical custody of Caleb to Mother, and ordered that the child "reside with the Father from Monday after school through Friday delivery to school," and with Mother on weekends. Without explanation, the judge also denied Mother's request for physical custody contingent on moving back to Northboro with her parents. The trial on these issues occurred over three days in October-November, 1998 (over a year since the custody change) and the judgment issued in January, 1999. In the judgment, the trial judge affirmed physical custody to Father in Northboro.

The appellate decision noted that the primary legal issue was one of modification of a previous judgment, not a removal one.[32] The Court said that this standard must be based on a "material change in circumstances," meaning new events or changes other than the move itself. This was based on G. L. c. 208, § 28 ("the court may make a judgment modifying its earlier judgment as to the care and custody of the minor children of the parties provided that the court finds that a material and substantial change in circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children"). The custody claim must be considered in light of established principles governing custody determinations. See, among others, *Yannas v Frondistou-Yannas*, 395 Mass. 704, 711. It also noted that the change in circumstances must be "of sufficient magnitude to satisfy the governing principle by which the court must be guided in these cases, namely, whether the transfer of custody will be conducive to the welfare of the [child]." *Fuller v. Fuller*, 2 Mass. App. Ct. 372, 376 (1974).

In reviewing the trial court's decision, the Appeals Court did not find that there had been a material change of circumstances. It found "first, that a parent who works outside the home, even one with a 'hectic' schedule, may still be the appropriate primary caretaker and that, by itself, such employment would not warrant a custody modification." (*Rosenthal*, at 263). Second, by the time of trial, the probate judge found that positive changes in Mother's work schedule "allowed her to spend more time with the minor child. For example, she began to drive Caleb to school in the mornings and became a volunteer classroom parent." Thus, to the extent that changes in Mother's work schedule did occur, they were not changes warranting a modification in the custody arrangement." The Court also found that Caleb had close relationships with both sets of grandparents before and after the separation, and that each parent had made efforts to maintain those connections. The Court did not find that awarding custody to the Father was necessary for Caleb to maintain those relationships. The Court further found, notwithstanding the move to Providence, that nothing of significance had changed in the life of Caleb that warranted a change in custody.

The Appeals Court then addressed issues of removal. It repeated statements from prior opinions (*Hale, Yannas*) that noted that divorce "inevitably" alters a child's life and that the quality and style of that child's life are provided by the custodial parent. It reiterated that the child(ren) and the custodial parent form "a new family unit," in which the "best interests" of the child are still paramount, but are "so interwoven with the well-being of the custodial parent" that the Court must consider his or her interests as well. The Court then delineated the issues that are part of the structure of a removal decision.

1. *Real advantage/good and sincere reason for the move*.
2. *Interest of the child*
    a. *Improvement in child's quality of life*. Citing *Yannas*, 315 Mass 711, the issue remains whether the quality of the child's life is improved secondary to the

[32] Packenham at 400-401 (2004) noted that there were two issues, depending upon whose complaint was under consideration. From mother's perspective, she wanted to remove the child, and therefore fell under the "real advantage" standard, whereas Father requested a change of custody, which required a "material change of circumstances." He also noted that in removal cases, the first threshold to clear is whether the moving parent has a "good, sincere reason for the move." (at 401) Then factors 2-4 above apply.

improvement in the quality or style of the custodial parent's life. The Court held that the trial judge had not considered this factor, but had instead focused on the harm to the Father-child relationship of the move.

   b. *Effect of move on child's association with non-custodial parent.* The Court held that the trial judge had made no findings on this issue and suggested that the effect of the move to Providence would be slight, since there was only a 55-mile distance between each home.
   c. *Effect of move on child's emotional, physical, or developmental needs*. The trial judge found that Caleb's care in both homes was more than adequate, which the Appeals Court held was not sufficient grounds upon which to change custody. While the child had done well while living with Father in Northboro, that was not sufficient reason to continue the custodial arrangement the trial judge had ordered, especially since any disruptive effect stemmed from the judge's decision to deny removal and change custody. The Father argued that the relationship with the extended family was important to maintain in Northboro, but the Appeals Court said that these relationships should not take primacy over Caleb's relationship with his mother, and that, in any event, mother had made good efforts to maintain those relationships on her own.

3. *Interests of custodial parent.* The Appeals Court said that the trial judge made no reference to this issue, leaving Mother with the difficult choice of living with her new husband but not her son in Rhode Island, or with her son, but not her husband in Massachusetts.
4. *Interests of the non-custodial parent.* Citing *Yannas* at 711, the Appeals Court said the trial court must consider "the possible adverse effect of the elimination or curtailment of the child's association with the non-custodial parent…in this context, "[t]he reasonableness of alternative visitation arrangements should be assessed. The fact that visitation by the non-custodial parent will be changed to his or her disadvantage cannot be controlling." It noted that the record showed nothing that would have prevented Father from continuing to have a significant relationship with Caleb, especially (in this instance) given the 55-mile distance between homes. It further noted, "But the test is not whether there is no impact on the Father's association, but whether reasonable "alternative visitation arrangements" might achieve ongoing and meaningful contact appropriate to the circumstances." The trial judge's determination that the move would make visitation more difficult was "not conclusive."

As a result of the above analysis, the Appeals Court reversed the trial court and awarded custody back to Mother, ordering Caleb to again live with her as the custodial parent, although this time in Rhode Island. One significant question remains as to whether a greater distance between homes might have shifted the balance in the factors to be considered, since that would have had a far greater impact on the relationship between Caleb and his Father. It would have affected one aspect of the child's interest and certainly the interest of the non-custodial parent.

Comment: One interesting historical aspect of this case was its similarity to *Delmolino v. Nance*, 14 Mass. App. Ct., 209 (1982), page 115 this volume, where the custodial mother moved her child to Ohio for sincere reasons, but did not file a motion to request permission to move. Father then filed a motion for temporary custody and retrieved the child himself in Ohio. The Court subsequently awarded him physical custody, even though neither parent was unfit and the child had been doing well with her mother. While the final appellate decision returned the child to Mother (and required her to file a motion for removal in order to again leave with the child), it noted that simply removing a child from the state without approval was not, in itself, a relevant change in circumstances, and Mother's failure to gain permission did not permit the judge discretion to change custody.

In the instant case, the Court again referred to the idea that "reasonable 'alternative visitation arrangements' might achieve ongoing and meaningful contact appropriate to the circumstances." This decision came sixteen years after *Yannas* and after more research demonstrating how distance and the maintenance of contact by the non-custodial parent is related, but the Court appeared to continue with its notion that "meaningful" and "ongoing" contact can be preserved when relocation of the custodial parent and the children occurs. It would seem to stretch the meaning of those two adjectives to fit into the conclusion that a child's life is inevitably altered after separation and divorce, with his or her adjustment linked to the well-being of the custodial parent. Unfortunately, there is a minimal data to reveal what does happen to the relationships between non-custodial parents and relocated children to see how those connections are still meaningful to the children.

Important also for GALs was a footnote (1) regarding the guardian *ad litem* in the case. It read:

> The guardian ad litem filed her first report on September 30, 1997, and an updated report on September 11, 1998, shortly before the first day of trial. In her findings, the probate judge refers to the guardian ad litem's updated report as unauthorized. General Laws c. 215, § 56A, which authorizes the appointment of a guardian ad litem to undertake the kind of investigation here ordered, requires that, "[s]aid guardian ad litem shall, before final judgment or decree in such proceeding [relating to the care, custody, or maintenance of minor children], report in writing to the court the results of the investigation. . . ." Over a year had passed since the guardian ad litem was first appointed on July 28, 1997, to report to the court on the removal and custody issues. There is nothing in the order of appointment to suggest that the role of the guardian ad litem was limited to a single report, or limited to providing information to the probate judge in connection with any request for a temporary change in custody. Since both reports were filed subsequent to the judge's August 25, 1997, temporary order changing custody, neither was considered in connection with that order. Both reports of the guardian ad litem were correctly admitted in evidence.

Thus, the decision suggested that there was nothing that would prevent a GAL from updating a report on his or her own initiative. However, it would still be prudent practice to first consult with attorneys (if the client is not pro-se) and then seek a court order to do the update. That

eliminates any question of whether the updated report is admissible, and possibly any complaint to a professional board about overreaching one's authority.

D.C. vs. J.S.

Massachusetts Appeals Court

58 Mass. App. Ct. 351 (2003)

*Keywords***:** Divorce and Separation, Child custody, Modification of judgment, Custody.

Background: Married in 1989, the parents had two children, a girl in 1991, and a boy in 1994. In 1998, the parties divorced. Mother had primary physical custody of the children and shared legal custody with the Father, who had regular visitation. The marital home was in Norwell, where the Father worked. In April, 1999, mother notified Father by letter that she planned to move to the Springfield area. In June, Father filed a motion to modify the custody award to himself as primary custodial parent. The parents had been in "mediation" and, in July, mother filed a counterclaim. She sought permission to move to the Holyoke area with concomitant changes in visitation to Father and she wanted to end the mediation process. In a temporary order, the trial court required mother to live in or next to Norwell, if she wanted to retain custody. Mother then moved to Marshfield, an adjoining town, in September, 1999 (just before school began). The trial was held (on parts of nine days) between June and August, 2000 and the judge issued findings in November, 2000. She denied mother's request and changed custody to Father, with visitation to mother. Mother appealed the judgment.

The Court noted it was undisputed that each parent was capable and caring, and that each of them attested to the same about the other. However, animosities had developed between them, both prior to and after the divorce. The court had appointed a psychologist (who had worked with them pre-divorce) to mediate, because the parents had significant obstacles to communication and cooperation. The judge took special note that the anger between them was so great that a minor unintentional "mixup" between them over the children took on greater importance than it deserved. In addition, In October, 1998, and again in February, 1999, Mother put the home up for sale with a real estate broker, but failed to inform the Father, until she wrote the letter in April 1999.

The Court noted that mother had grown up in Holyoke and had members of her family living in the original neighborhood, including a sick and dying parent. However, most of her friends from that area had moved away. The children were familiar with that side of the family through visits there. Mother felt that she would improve the quality of her life by living with or near family, and her children's lives would be improved secondary to that. Mother found the schools to be satisfactory, and she was pursuing options for getting back into education, as she had been a teacher, but needed recertification. She also found the real estate market in Holyoke more favorable than in the metropolitan Boston area.

In her decision, the trial judge determined that mother's wish to move was motivated by a desire to distance herself from the Father and not to improve her own situation in life, especially since she had committed some surreptitious acts (placing house on market unbeknownst to Father). The judge indicated that such a move would also serve to diminish the children's relations with their Father. The move would be to the disadvantage of the

children since they "would be abruptly torn from their school and lifetime surroundings and friends." (*D.C.*, at 354). The judge found that mother failed to cooperate with the psychologist-mediator as she was obligated to do, particularly since the judge believed the mediation was "indispensable to the management of the split family."(*D.C.*, at 354). Mother was also characterized as "willful" in her testimony, in that she answered only the questions she chose.

The Court framed its analysis under two standards, one being a modification of a prior judgment that required a "material change of circumstances." The other related to the issue of removal, which ordinarily refers to an out-of-state move, but they wrote:

> We suppose the parties would agree that the consideration and evaluation of the visitation and other custodial conditions for the child that would result from relocation to a distant part of the State will resemble those applied to removal beyond the State boundaries. Applications for court decision in cases in which a parent seeks to relocate within the Commonwealth should not be routine but are proper only where the relocation would evidently involve significant disruption of the noncustodial parent's visitation rights and the parents cannot agree. (*D.C.*, at 355-56)

Absent the removal issues, the Court doubted that Father could have supported his claim of material change of circumstances to warrant a change of custody, mother's negative attitude toward him notwithstanding. The Court indicated that the judge interwove into the change of custody the manner in which mother secretively handled the sale of the house and her intention to put distance between her and the Father, with resulting weakening of the bonds between Father and children, intentional or not. That is, she linked issues of custody with those of removal. In reversing the judge on the custody issue, the Court referred to *Rosenthal v. Maney*, 51 Mass. App. Ct. 257 (2001) that – in fairness to the judge - had not been handed down at the time of trial. They noted that a request for modification of custody is independent of a request to remove a child from the Commonwealth and requires a material change of circumstances *other than the move* (emphasis added). The court then remanded the case back to the trial court for rehearing in light of *Rosenthal*.

Comment: In this case, the Court opened the door for the first time to considering in-state relocations to be similar to those out-of-the-Commonwealth, if the proposed move was of sufficient distance to create significant obstacles to the other parents' visitation with the children. The Court also left the determination of whether an in-state move was of sufficient distance to provide a barrier to the ongoing relationship between the non-custodial parent and the children (assuming a sincere reason for moving, not as in this case). Thus, the trial judge was to be a "gatekeeper" in this issue in determining how far is too far, where before the boundary (literally) was simpler – it was at the state lines. The Court reiterated the *Rosenthal* holding that a desired move with the children was not a sufficient basis to warrant a change of

custody, since that determination must stand independent of the removal issue and be based on its own standard, that being a material change of circumstances.[33]

This decision makes one wonder whether it reflects a conservative trend in appellate thinking about relocation cases, since it creates a barrier to removal that was not in the statute, leaving the determination of how far is too far to the trial judge's wisdom. In the instant case, the judge had other facts on which to base her denial of removal other than the disruption of Father-child relationships, since almost any relocation involves some form of disruption of a regular parenting plan. Apropos of this, Packenham (2004) at 471 notes, "Although the Appeals Court cautions that these complaints should not be routine, most non-custodial parent's visitation rights will be significantly disrupted when a custodial parent attempts to move within the state." The fact that the judge weighed in on an in-state relocation was innovative in itself. Packenham (2004), at 471 wrote that this case "creates a new complaint…to permit in-state relocation." It reminds the writer of an older New York State case – before it liberalized its case law – in which the Court refused to allow a custodial parent to move to upstate New York from the city, since it would interfere (not intentionally, as was the case in *D.C. v. J.S.*) with the non-custodial parent's regular contact with the children.

The relevance for GALs is that the Court will now be seeking information regarding the effect on the access to the children of the non-custodial parent and on how the proposed move would affect the quality of that relationship. The social science research is clear that a distance that requires a drive of an hour or more does affect the contact between the children and the non-custodial parent, so that Packenham's comment (above) is likely correct. Thus, the same framework that *Rosenthal* suggests for analyzing an out-of-state removal case will apply to an in-state relocation. *Rosenthal* involved a move from Central Massachusetts to Providence, a distance of about 50 miles, a distance not unlike that from Norwell to Springfield or Holyoke, but in that case the removal was permitted, even though that custodial mother had ignored court orders in taking the child to Providence without the court's or the father's knowledge. She also did that before the GAL investigation on the issues was completed. It seems to this writer that the material change in circumstances in this case was not the intended move itself, but the fact that it was clearly going to interfere with the relationship of the children and their Father, and that Mother's intent was to put some distance between her and the Father. It was just another roadblock that mother was placing in the way of the Father's relationship with the children. It suggests that in the context of a cooperative relationship with no intent to undermine the non-custodial parent's bond with the child bond, a move of similar distance might pass judicial muster, although, as always, these trial court decisions are case-specific.

[33] It seemed that this issue was decided 21 years' earlier in *Delmolino v. Nance*, 14 Mass. App. Ct. 209, (see case on page 117), where the circumstances were more egregious, as the mother moved to Ohio without court permission, although her reasons were deemed to be sincere.

DOMESTIC VIOLENCE

CUSTODY OF VAUGHN

Supreme Judicial Court of Massachusetts

422 Mass. 590 (1996)

Keywords: Parent and Child, Child Custody, Abuse Prevention, Battered Woman Syndrome.

Background: Mother had two children from a prior relationship, a 9-year old girl and 5-year old boy, when she met Father in 1977. He was abusive toward her, frightening for the children, and was verbally and physically abusive of them. Father had once beaten Mother into unconsciousness, requiring an ambulance to take her to the hospital. He also inflicted other injuries. Mother and Father never married. She had Vaughn in July, 1982. The domestic abuse continued, with the police being called about twelve times. Mother would flee the house during these violent episodes, while Father would take Vaughn and threaten to keep him as leverage for Mother to return to him. Vaughn witnessed multiple incidents of verbal and physical abuse of his mother and siblings. The daughter also alleged that Vaughn's father had been sexually inappropriate toward her when she was a teenager. Mother was also verbally and physically abusive to Father, including being sexually provocative toward him, all of which Vaughn witnessed or heard. It was noted by the court that there was a large disparity in the parents' respective size and weight, with Father significantly taller and stronger than Mother. Both parents drank heavily and used marijuana. In 1978, Mother stopped her heavy drinking after joining Al-Anon and was able to drink moderately or socially, while Father had stopped drinking in 1985.

Mother became successful in real estate, earning significantly more than Father. She had been the primary caregiver for Vaughn's first five years, but Father took more and more domestic responsibility in the five years before trial, becoming involved with his school and extra-curricular activates. The court had determined that Father had become the primary caregiver over the last five years before trial. In 1992, Mother obtained a 209A and Father sought custody of Vaughn, who was about eleven at the time. The court made a temporary order for them to share legal and physical custody as well as time during the week with their son. A GAL was appointed to evaluate and he recommended in February, 1993 that joint legal custody continue, but that Vaughn have his primary residence with his Father. The court made a new temporary order in line with the GAL recommendations and, after the trial in July, 1993, the judge affirmed that order in his judgment. The court also ordered mother to pay child support. She appealed.

In the initial appeal, *R.H. v. B.F.*, 39 Mass. App. Ct. 29 (1995), the Appeals Court found that the trial judge had failed to make findings regarding the issues of physical abuse. The SJC affirmed that. Moreover, the SJC held that the trial court also had failed to consider the "special risks to the child in awarding custody to a Father who had committed acts of violence against the mother," and had neglected to give sufficient weight to the effects of

domestic violence on women and their children. Its strong position on this issue is reflected by the statement (*Vaughn*, at 595-96):

> Quite simply, abuse by a family member inflicted on those who are weaker and less able to defend themselves - almost invariably a child or a woman - is a violation of the most basic human right, the most basic condition of civilized society: the right to live in physical security, free from the fear that brute force will determine the conditions of one's daily life. What our study and the growing movement against family violence and violence against women add to this fundamental insight is that, for those who are its victims, force within the family and in intimate relationships is not less but more of a threat to this basic condition of civilized security, for it destroys the security that all should enjoy in the very place and context which is supposed to be the refuge against the harshness encountered in a world of strangers. Particularly for children the sense that the place which is supposed to be the place of security is the place of greatest danger is the ultimate denial that this is a world of justice and restraint, where people have rights and are entitled to respect. The recent literature also exposes the sham and hypocrisy that condemns violence among strangers and turns a blind eye to it where its manifestations are most corrosive.

The SJC spent some time addressing the weight given to the expert witnesses in this case, a court-appointed GAL, who was a local psychologist, and Peter Jaffe, Ph.D., Mother's expert. It noted the impeccable credentials Dr. Jaffe had in the field of domestic abuse and commented that he attributed much or all of Mother's abusive or provocative behavior to her response to or self-defense against Father's abuse. The trial judge did not give great weight to Dr., Jaffe's testimony and did not state whether he found the testimony credible The judge did express concerns about awarding custody to a father who had been violent toward a mother. The trial court did give more weight to the GAL's recommendations. It said (*Vaughn*, at 598), "Dr. A, on the other hand, was an impartial witness whom the parties had consulted previously and who had been selected by their mutual agreement to serve as guardian ad litem. Like Dr. Jaffe, he has a doctorate in clinical psychology, though a much more recent one. His practice includes work with children, adolescents, and families."[34] The GAL had been a therapist for Vaughn in earlier years and had known a great deal about this family. He gave much consideration to the following factors: the relationship between Vaughn and his Father, Vaughn's good progress in school, Father's sobriety and AA attendance, and Vaughn's wish to spend more time with his Father.

In remanding the case to the Probate Court for explicit findings regarding the impact of domestic abuse and the appropriateness of the custody award, it said (*Vaughn*, at 599-600):

[34] "The mother complains that it was wrong to give such weight to the guardian's judgments because he was not a specialist in family violence or battered women's syndrome. At trial the mother's counsel sought to emphasize this point by eliciting testimony regarding the unique characteristics of a family in which battering has taken place. Although Dr. Jaffe certainly contributed valuable insights to the proceedings, we would hesitate a long time before suggesting that in cases such as these, not only must both sides produce expert witnesses, but they must be experts in family violence. A qualified clinical psychologist with experience in family matters will, as Dr. A indicated on cross-examination, have encountered this issue in his training and, unfortunately, all too frequently in his clinical practice. Dr. A also stated that he believed that 'family violence should be a factor in family litigation'." (Vaughn, at 598).

> Domestic violence is an issue too fundamental and frequently recurring to be dealt with only by implication. The very frequency of domestic violence in disputes about child custody may have the effect of inuring courts to it and thus minimizing its significance. Requiring the courts to make explicit findings about the effect of the violence on the child and the appropriateness of the custody award in light of that effect will serve to keep these matters well in the foreground of the judges' thinking.
>
> The Legislature reached a similar conclusion in respect to shared legal or physical custody. General Laws c. 208, § 31A, provides that "if, despite the prior or current issuance of a restraining order against one parent pursuant to chapter two hundred and nine A, the court orders shared legal or physical custody . . . the court shall provide written findings to support such shared custody order." A G. L. c. 209A order was outstanding in this case, and the judge made no explicit findings regarding the effect of shared custody on the child. We agree with the Appeals Court that such written findings should also be made attending specifically to the effects of domestic violence on the child and the appropriateness of the joint custody award in light of those effects. *R.H. v. B.F.* id at 41. (*Vaughn*, at 600).

Comment: The importance of this case can be compared to the period in the 1980's when the issue of sexual abuse in domestic relations cases arose. *Vaughn* is the decisive case relating to the weight given to issues of domestic violence in custody disputes. Previously, many GALs did not ask as a general rule about these issues. When sensitized to them, they began asking and learned that abuse existed more than was expected. Vaughn raised GALs' consciousness to the incidence of domestic abuse and made it imperative to inquire about its potential existence in all cases. Subsequent research has revealed that this issue is highly complex and requires thoughtful and detailed investigation when it seems that some form of partner abuse has existed. Vaughn and the subsequent statutes require, where some form of severe domestic violence or significant relationship control has existed, that the GAL must address these issues, consider the impact on the children, and give it significant weight in making recommendations. In particular, the GAL would have to demonstrate compelling reasons to recommend custody (if recommendations are made) to a perpetrator of severe abuse or control. If the GAL does not make a custody recommendation, then he or she could assist the court by describing in the report some of the implications of different custodial possibilities the court is likely to consider, as well as possible remedies for some of the problems of the family, such as therapy, anger management, and the like.

One other side issue relevant to this case is the greater weight the court granted to its own expert, the GAL, than to an expert for one side, even when that expert had remarkable credentials. It explained its opinion, as it did in other cases (*Adoption of Hugo*, 428 Mass. 219 (1998) that it is not mandatory for a GAL to have a specialty in the area at issue, but he/she should have had some experience with it as part of a general clinical or professional background. That said, that expert's testimony about the effects of domestic abuse – aside from any particular impact on Mother – seemed to affect the eventual decision of the SJC.

A third concern of this writer is an ethical one. While it might not have been an issue when the appeals courts heard these cases, the question of the multiple roles of the GAL in this case

is a current one. Dr. A had worked with Vaughn and the family earlier in Vaughn's life and then became the GAL. Current GAL standards (Category F and proposed Category E) would prohibit a professional from moving from a therapeutic role into an investigative/evaluative one.

ANDREA **MAALOUF v.** ELIE **SALIBA.**

Massachusetts Appeals Court

54 Mass. App. Ct. 547 (2002)

Keywords: Domestic Violence, Abuse, Prevention, Minor, Visitation rights. Divorce, Separation, Visitation.

Background: In this case, the parents married in June, 1994, and their triplets were born in July, 1996. Mother and Father separated on November 10, 1996, after an incident of abuse. The judge found that, after the marriage, Father swore at Mother and verbally abused her every day. Father engaged in occasional physical violence, once grabbing Mother by the throat in the car and threatening to eject her from it. On another occasion, while driving, he covered her mouth to stop her talking, and when she resisted, grabbed her by the throat and called her various obscenities. On two other occasions between the marriage and the separation, Father grabbed her or kicked her, or threatened to hit her or push her down the stairs. The judge found that Mother "had a strong and genuine fear of the Father." (*Maalouf*, at 548).

The judge found it in the interest of the children to maintain a bond with Father and his family, who "provide a safe, appropriate, and loving environment during visitations." (*Maalouf*, at 548). Father took good care of the children and they were responsive and affectionate with him. The judge found Father needed assistance with the children, to be obtained either from family members or an approved family service officer (the type of assistance was unclear).

After an eight-day trial, the judge granted a divorce on the basis of cruel and abusive behavior by the Father, ordered sole legal and physical custody of the children to Mother and unsupervised visitation to Father contingent on certain conditions. These included surrender of his passport and notice to the embassy of his native country, and the posting of a bond. Mother appealed that aspect of the judgment. She claimed that, until he had at least completed a batterer's treatment program, Father would be unsafe with the children because of his demonstrated abuse. She further claimed the judge did not make sufficient findings in the light of the abuse (in light of *Custody of Vaughn*, 422 Mass. 590 (1996)) to support his order of unsupervised visitation. The Court agreed and remanded for further findings.

The Court noted that G. L. c. 208, § 31A, requires the Probate and Family Court judge to "consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child" when issuing any temporary or permanent custody order (footnote 2 stated that identical language can be found as well in G. L. c. 209, § 38, and G. L. c. 209C, § 10). The statute, passed in July, 1998, and made effective October, 1998, codified the SJC decision in *Custody of Vaughn*, 422 Mass. 590, 599-600, instituting a rebuttable presumption against any form of custody to a parent who was found, by a preponderance of the evidence, to have engaged in a pattern of or serious incident of abuse. Having made such an order or judgment, the judge must make written findings of fact within 90 days as to the impact of that

abuse on the child(ren) that support his judgment that his order is in the children's best interest. The statute required that the judge consider the safety of the children when ordering visitation by the abusive parent, and provided nine options for the judge. This statute had not become effective until after the trial, but the judge's findings and order were still pending and should have taken the statute into account. In footnote 3, the Court delineated the statute, and then defined a "serious incident of abuse," all of which is included below for the sake of educational completeness (the entire statute is in the final chapter). The statute defines abuse as "the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child:

a) attempting to cause or causing bodily injury; or
b) (b) placing another in reasonable fear of imminent bodily injury." A "serious incident of abuse" is defined as
    a. "(a) attempting to cause or causing serious bodily injury;
    b. (b) placing another in reasonable fear of imminent serious bodily injury; or
    c. (c) causing another to engage involuntarily in sexual relations by force, threat or duress." Under the statutory scheme, the definition of "bodily injury" has the same meaning as provided in G. L. c. 265, § 13K, which defines bodily injury as "substantial impairment of the physical condition, including, but not limited to, any burn, fracture of any bone, subdural hematoma, injury to any internal organ, or any injury which occurs as the result of repeated harm to any bodily function or organ, including human skin."

In footnote 4, the Court delineated the nine statutory options available to a judge. They include:

> "(a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;
> (b) ordering visitation supervised by an appropriate third party, visitation center or agency;
> (c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;
> (d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;
> (e) ordering the abusive parent to pay the costs of supervised visitation;
> (f) prohibiting overnight visitation;
> (g) requiring a bond from the abusive parent for the return and safety of the child;
> (h) ordering an investigation or appointment of a guardian *ad litem* or attorney for the child; and
> (i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent."

The Court said that, while the judge made detailed findings about the abuse, he did not specify whether he considered the violence to have met the definition of a serious incident of abuse or a pattern of abuse, and he did not make a finding regarding the impact of such abuse

on the children. The judge appeared to consider safety issues in ordering conditions (e.g. bond, surrender of passport) around custody and prevention of Father removing the children from the country. However, it was unclear whether he considered safety issues in ordering unsupervised visitation, as the statute requires. The Court vacated the part of the order related to unsupervised visitation and sent it back to the trial court for further findings.

Comment: The Court, in reporting the judge's findings about the abuse, made no determination as to whether those findings met the criteria of a serious incident of abuse or pattern of abuse. It would seem reasonable to believe that the documented abuse was consistent with placing Mother in fear of imminent harm and the fact of four frightening incidents in merely two years would appear to constitute a "pattern of abuse," particularly in the context of daily verbal/emotional abuse. This case, coming on the heels of Vaughn and G.L. c. 208 § 31A, reminds investigators to ask questions about conflict management and potential/actual abuse during the time the parties lived together as spouses or as significant others, the nature of the abuse, if any, and the impact of each party and the children. It is useful for the GAL to have a structured or semi-structured interview format with which to explore how the parties handled the ever-present dynamics of power and control with respect to relationship issues such as money, sex, family, friends, and parenting, among others. These details will provide the basis for any recommendations, if permissible under the order of appointment, regarding custody and visitation, since they will assist the court in knowing whether domestic abuse could be a factor. The nine options listed in the statute (and the case) frame the possible alternatives available when making recommendations that would protect children (and a victim spouse), should the court find that domestic abuse had occurred. M.G.L. c. 208 § 31A, *Maalouf*, and the primary case, *Vaughn*, really frame the kind of fact-finding and analysis a GAL should do when allegations of abuse occur in domestic relations or state intervention cases.

CARE AND PROTECTION OF LILITH

Massachusetts Appeals Court

61 Mass. App. Ct. 132 (2004)

Keywords: Domestic violence, Parenting, Parental fitness.

Background: This child protection case in juvenile court involved the state's intent to terminate Mother's parental rights. Lilith's parents had never married and Lilith, born in 1994, lived primarily with Mother. A 51A abuse and neglect complaint was filed against Mother in 2000 and she had been evicted from her home. The paternal aunt was given temporary custody, but Lilith returned to Mother within a few months under the condition that Mother remain drug free, submit urine screens to DSS, and complete a psychopharmacological evaluation and a neurological exam. Within a few months another 51A was filed and supported for neglect, but Mother fled the state with Lilith to New Hampshire. The court then again transferred custody to DSS. Father located Lilith and returned her to Massachusetts and DSS, who placed her in a foster home. Father then established his paternity and the court placed Lilith with him and his fiancée (and her teenage daughter) in Nashua, NH in June, 2002. There was a hearing in September, 2002, a judgment in December, 2002, and written findings in July, 2003. Mother appealed the judgment.

The Appeals Court noted, citing *Adoption of Mary*, 414 Mass. 705, 711 (1993).

> 'Parental unfitness must be determined by taking into consideration a parent's character, temperament, conduct, mental stability, home environment, and capacity to provide for the child in the same context with the child's particular needs, affections and age.' The Court noted that the judge's detailed and manifold findings listed a litany of behaviors consistent with serious psychological difficulties, particularly delusions of insects. She kept the child from school because she believed (falsely) that the child was infested with bugs, causing serious absenteeism. The findings included a determination that Mother was a substance abuser and did not comply with the court or DSS' service plans for drug screens. Mother and child had also moved frequently in a short period of time. (*Lilith*, at 134.

The Court determined the Father was a fit parent, provided a stable and supportive environment, used DSS services effectively, and complied with all service plans. Lilith also attended school regularly in her Father's care. Father was supportive of Mother's visitation. Father had a history of substance abuse, sought treatment, and abstained for four years. He relapsed when diagnosed with cancer, but had been "sober" since then.

The Court addressed the domestic violence issues. It stated the juvenile court findings amounted to a summary of conflicting testimony, essentially a 'he said-she said.' These contradictory reports included Father injuring Mother with his car after she tore off his license plate in 1996. Father denied awareness that Mother was behind him, although he pleaded guilty to A&B and served 30 days in jail. Mother also testified that, during that incident,

Father fractured her skull by smashing her head against a windshield, prior to backing into her, and that Lilith witnessed this assault. Mother claimed that Father threatened to kill her and Lilith. The judge did not resolve these conflicting claims or make findings about the credibility of the witnesses. In regard to other incidents of domestic violence, Mother and Father acknowledged that their relationship was acrimonious. There were other allegations of domestic assaults that were not substantiated by documentation, although that might have been due to the failure of DSS to follow up on certain claims. Father testified that the abuse was mutual and stopped when Lilith was born, while Mother asserted it continued after the birth. Mother's primary care physician did have reports in the records of bruises and claims by Mother of being beaten by her boyfriend. Mother was living with Father at the time, but the record did not specifically designate Father as the perpetrator.

Father admitted to a criminal record, including domestic A&B in September, 1995, which charge was dismissed. There was no further record of domestic abuse after 1996. In addition, Father's ex-wife told an investigator that he had not been abusive to her or to their children. Father responded to questions about his criminal history on direct and cross-examination. He was also charged with rape when he was eighteen in 1979, a crime for which he received three years of probation. The record of the trial revealed that Father was a volatile person. At one point he threatened opposing counsel, but the judge made no written findings about this, despite the fact that the record showed that the judge repeatedly had to remind him to settle down.

The Court then discussed the applicability of *Custody of Vaughn*, 422 Mass. 590 (1996) to the issues of domestic abuse in this case. It noted that counsel for the parties agreed that the "principle established in that case" that the judge "should make detailed and comprehensive findings on domestic violence when making custody determinations, applies in proceedings pursuant to G. L. c. 119 and G. L. c. 210." (*Lilith*, at 139). Despite DSS counsel's assertion that there was no credible evidence of domestic abuse, the Court disagreed. While it noted that it was difficult to make a judgment on the issue of abuse because the claims were several years old and disputed, certain acts were undisputed (e.g. Father backing car into Mother), which required careful consideration of domestic violence issues. The judge had not made findings on several significant claims, so the Court remanded the case for further review regarding the domestic violence and its impact on Lilith and Father's parenting ability. The Court affirmed the judge's finding of unfitness of Mother, but reversed the judgment of custody to Father, pending further review by the trial court. The Court permitted Father to continue caring for Lilith under temporary custody.

Comment: For those working with child protective cases, it is clear that the findings in *Vaughn* and the statutory sections in G.L. c. 209, § 38; and c. 209C, § 10(e), (rebuttable presumption that a finding of domestic abuse warrants determination that perpetrator should not have legal or physical custody) apply to care and protection/TPR cases. What was interesting was that the allegations of domestic violence involved acts that were several years old and disputed. However, the Court suggested that it was within the power of the trial judge to determine the credibility of some of the allegations, given the evidence available at trial,

including Father's own loss of control in the courtroom.[35] The other issue was that the finding of Mother's unfitness was independent of the Court's remand back to the trial court on the issues of domestic violence and the Father's ability to parent (even though in other testimony, he appeared to be functioning well in that role). The apparent lesson for the GAL is that, whenever allegations of domestic abuse arise, it is essential to investigate those claims with respect to the parenting abilities of the alleged perpetrator (sometimes more than one), the context of the alleged acts, and the impact on the child.[36] Given that this is the task set out for the court itself, the more data a GAL can provide on the issue, the more likely that any decision will have a solid factual foundation.

How would a GAL have framed recommendations in this case? If Father were an adequate parent, the domestic abuse notwithstanding, a GAL could suggest alternative soutions in which Lilith would remain with Father, while he sought treatment for his abusiveness (monitored through DSS or a GAL/court investigator). Alternately, Lilith could live with a third party until Father was no longer a threat, and could maintain regular contact with Father through protected visits. Whatever the choices, it would assist the court for the GAL to discuss the pros and cons of those alternative recommendations or suggestions.

The other issue this case raises relates to the challenge of suggesting or recommending solutions in families where each parent has significant dysfunctional behaviors. This was a state intervention case which discussed issues of mental illness, substance abuse, domestic violence, criminal behavior, as well as child abduction. Despite that, there were apparently enough positives for the trial court to award custody to the father, who had been supporting mother's visitation. It seemed amazing that Lilith, whose parents had such personal and moral challenges, managed to keep both of her biological parents in her life. Yet, as in so many instances, we do not know whether that proved to be beneficial to her over time.

[35] Alex Jones commented that the Appeals Court will often defer to the credibility assessment of the trial court, when they want to uphold a trial court's decision.

[36] Indeed, the Category F standards and the proposed E standards require the GAL to screen for and, if needed, to investigate issues of domestic abuse. The GAL must also be alert to safety issues and take no action that would threaten someone's security.

EXPERT TESTIMONY

COMMONWEALTH v. THOMAS J. **LANIGAN**.

Supreme Judicial Court of Massachusetts

419 Mass. 15 (1994)

Background: In *Commonwealth v. Lanigan***,** 413 Mass. 154 (1992) (Lanigan I), the SJC allowed the exclusion of a DNA test because the process used for matching-evidence-DNA and defendant's-DNA (in a rape trial) had not been generally accepted in the field of population genetics. At retrial, the Commonwealth immediately advanced a new and different process for determining the likelihood of a DNA match. On the basis of that new process, a judge in the Superior Court ruled that DNA evidence, which tended to incriminate the defendant, was admissible. At a subsequent bench trial, the defendant was found guilty of the charges and appealed on two grounds, the second of which was the basis of the admissibility of the DNA results. This time the SJC concluded the DNA evidence was admissible.

After discussing some of the details of the DNA matching process, the SJC noted that the defendant's argument was "that the process by which the probability of a random DNA match was determined is not generally accepted in the scientific community and thus lacks a necessary basis for its admission in evidence." (*Lanigan*, at 20). The Court had held in *Lanigan I* that the process used had not received general acceptance by population geneticists and upheld the pretrial ruling that the DNA evidence was not admissible. In this case (Lanigan II), the state used a process that provided the most conservative estimate of the probability that the evidence DNA belonged to someone other than the defendant.

The defendant cited various scientific opinions and studies that concluded that the method used by the state was not conservative. The Court then discussed "the standard for determining the admissibility of scientifically-based expert testimony." (*Lanigan*, at 17). The test that Massachusetts had used for admissibility of expert testimony based on scientific knowledge had been the Frye test, "that is, whether the community of scientists involved generally accepts the theory or process, citing *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923)." (*Lanigan*, at 21). They suggested that general acceptance in the relevant scientific community leads to the likelihood (but not the certainty) that the theory or process is reliable. They then wrote, "The ultimate test, however, is the reliability of the theory or process underlying the expert's testimony." (*Lanigan*, at 24). Were the Frye test the only standard, there would be a risk that reliable evidence might not reach the court. The Frye test was related the Rule 702 of the Federal Rules of Evidence (FRE), which stated, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." (*Lanigan*, at 26).

In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 113 S. Ct. 2786 (1993), the U.S. Supreme Court recognized that general acceptance, while relevant, was not the sole basis by which to determine admissibility. They listed other criteria, such as testability of the process or theory, peer review, and publication of the theory or process by the scientific community were relevant factors in determining the admissibility of expert testimony based on a scientific theory or technique. The U.S. Supreme Court found that reliability was implicit in the concept of helpfulness to the trier of fact found in FRE 702. After reporting some of the definitions of reliability and validity in *Daubert*, the SJC went on to say that the United States Supreme Court opinion was consistent with Massachusetts' "test of demonstrated reliability." (*Lanigan*, at 26). They added:

> We suspect that general acceptance in the relevant scientific community will continue to be the significant, and often the only, issue. We accept the idea, however, that a proponent of scientific opinion evidence may demonstrate the reliability or validity of the underlying scientific theory or process by some other means, that is, without establishing general acceptance. This consideration has some application to the issue in the case before us, but the parties' significant arguments bear on the acceptability of the ceiling principle by the relevant scientific community. (*Lanigan*, at 26)

It is also important to note that, in discussing the fact that there can be difference of opinion among experts, as there was in this DNA case, they wrote, "Unanimity of opinion among the relevant scientists is not essential even under the general acceptance test." (*Lanigan*, at 27).

Comment: Consider this quote from the opinion, "We suspect that general acceptance in the relevant scientific community will continue to be the significant, and often the only, issue." This writer suggests that standard evaluative or investigative methods would pass a *Daubert/Lanigan* test, unless there was some aspect of them that was novel and different from what the GAL community (both mental health and legal practitioners) had been generally using. For example, AFCC had advertised and featured in its newsletter a recent book and article related to the use of play therapy techniques in evaluations.[37] Such methodology is not generally accepted in a forensic evaluation and, this writer suspects, could not pass a *Lanigan* analysis. A novel methodology or theory (e.g. the notion that child's doll play accurately reflects a projection of her actual experiences) would likely require a higher threshold of proof, such as the other *Daubert/Lanigan* tests might require, since it would not meet the "general acceptance" test of Frye. In a later case (below, p. 63, *Adoption of Hugo*, 429 Mass 219 (1998), the Court focused on the methodology and opinion of an expert evaluator. It held that the judge was not in error in relying to some degree on the expert, even though she based her opinion on established and commonly used clinical/investigative methods that would be difficult to replicate and would be devoid of any demonstrable error rate, as one might have in a "hard science" model. While *Lanigan* and *Daubert* establish criteria for the admissibility of expert opinion, the courts seem willing to distinguish between the physical and social sciences.

[37] AFCC *News*, Spring 2005, Practice Tips: "The incorporation of play therapy modalities in a comprehensive child custody evaluation," by Anita Trubitt, LCSW, p. 6. Her book is entitled, "Play Therapy Goes to Court, 2nd Edition: Implications and Application for Contested Child Custody Cases," and is self-published.

ADOPTION OF HUGO

Supreme Judicial Court of Massachusetts

429 Mass. 219 (1998)

Keywords: Child Custody, Best Interest Standard, General Expertise of Evaluator, Specific Expertise of Evaluator, Evaluator Methodology, Adoption, Dispensing with parent's consent. Parent and Child.

Background: The Department of Social Services and a minor child, Hugo, appealed from the rulings and judgment of a judge in the Boston Division of the Juvenile Court in a care and protection proceeding under G. L. c. 119, § 24-29, and G. L. c. 210, § 3. DSS proposed that Hugo, then four years old, be adopted by his foster mother, with whom he had lived from the age of two. The judge, in what he described as a "heart-wrenching" decision, concluded that Hugo's best interests would be served by an alternative plan proposed by the parents. In this plan, he would be adopted by his paternal aunt, who lived in New Jersey. The Appeals Court heard the first appeal and reversed the trial court, ruling that the parents' "risk-laden" plan could not be supported, when DSS had recommended an "advantageous, reasonable, and attainable plan of adoption." *Adoption of Hugo*, 44 Mass. App. Ct. 863, 868 (1998). (*Hugo*, 429 Mass. 219 (1998) at 220). The SJC then granted the parents' applications for further appellate review and affirmed the judgment of the Juvenile Court.

Hugo, a child with significant special needs, lived in a foster home. When adoption was possible, he was moved to a second home, where that pre-adoptive, foster mother had adopted his sister. Mrs. L., the foster mother, was aware of Hugo's special needs, but did not do everything she could to address them, even though Hugo lived with her almost for two years. Mrs. J., Hugo's paternal aunt, had a child of her own with special needs and was prepared to address Hugo's needs in a significant manner. She was also a stable, wage-earning parent. One expert said that Hugo's shift to a third home would be damaging to him, while the expert for the paternal aunt said that Hugo had made a good attachment to the pre-adoptive, foster mother and, after a period of adjustment, would do so again to the paternal aunt, with whatever help he needed to do so. The SJC ruled… "trauma of his removal from the current (foster) home is outweighed by the long term benefit of moving to a family better able to help him address his developmental challenges." (*Hugo*, at 224).

In supporting his decision, the trial judge:

> 'credited the paternal aunt's expert (i.e. Beardslee), who said that Hugo "is attached to Ms. L. (foster mother) and to Gloria (his sister), that these attachments are predictive of his ability to form future attachments, and that where such an attachment is disrupted, a child typically will go through a period of adjustment and might display behavioral disturbances, but that steps could be taken to assist a child through this process." The judge also credited the expert's testimony that, as Hugo advances to the age of formal schooling, it will be important to minimize his

> developmental deficits so that he can interact with peers and teachers to optimize his continuing growth and development. (*Hugo*, at 224).

The SJC wrote:

> Once the judge concluded that parental unfitness was established, he correctly determined that the central question was whether it was in Hugo's best interests to remain with his foster mother or to be transferred to the care and custody of his aunt. G. L. c. 210, § 3 (c). The "best interests of a child" is a question that presents the trial judge "with a classic example of a discretionary decision." *Adoption of a Minor* (No. 2), 367 Mass. 684, 688 (1975). We recognize that in this field it is neither possible nor desirable to make decisions with precision, and that "much must be left to the trial judge's experience and judgment." Id., quoting *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 646 (1975). (*Hugo*, at 225).

In considering the admissibility of the paternal aunt's expert's testimony, the SJC wrote:

> Hugo (objecting to the ruling via his attorney) ignores Beardslee's extensive experience in working with children and families, and focuses too narrowly on the specific facts of this case. There is no requirement that testimony on a question of discrete knowledge come from an expert qualified in [a] subspecialty rather than from an expert more generally qualified." *Commonwealth v. Mahoney*, 406 Mass. 843, 852 (1990), citing *Letch v. Daniels*, 401 Mass. 65, 68 (1987). (*Hugo*, at 233).
>
> Experience with adoptive and foster children might have been helpful, but it was not essential. The dispute here concerns two prospective adoptive parents. Beardslee's extensive experience evaluating beneficial placements for children in custody and visitation disputes seems particularly appropriate. The trial judge concluded that Beardslee had sufficient education, training, experience, and familiarity with the relevant issues in this case to be qualified as an expert witness. We see no basis on which to conclude that he abused his discretion. See *Murphy v. Chichetto*, 323 Mass. 11, 15 (1948), and cases cited (decision regarding expert's qualification rests largely in discretion of trial judge). (*Hugo*, at 233-34).
>
> Hugo also challenge(d) the reliability of Beardslee's methodology, urging us to require that an expert establish reliability in one of only five ways: (1) by proving it is generally accepted in the professional or scientific community; (2) by testing; (3) by peer review and publication; (4) by showing that the analytical process has established validity; or (5) by the use of an accepted, standard methodology. See *Commonwealth v. Lanigan*, 419 Mass. 15 at 24-26 (1994). There is no such requirement. Beardslee testified that, in addition to the knowledge gained from her own training and experience, she had reviewed the case file, interviewed the parties, and gathered information from service providers, a methodology strikingly similar to that used by DSS's and Hugo's own experts. *There is adequate support in the record*

for the judge's conclusion that Beardslee's testimony was based on a reliable methodology. (*Hugo*, at 234-35). (emphasis added).

Comment: The relevant issues in this case involve several:

1. The impossibility of predicting the outcome of decisions.
2. The Court's decision in the child's best interest to remove him from his pre-adoptive foster family, to whom he was securely attached, and place him with a family member in another state who was a stable person and who could better meet Hugo's special needs. There was an assumption that the child would re-attach to his adoptive parent (aunt) and that he would have potentially more opportunities for a better life, despite the probable disruption in his stability. This decision contrasts to *Custody of Kali* (p. 119, this volume), a dispute between two biological parents, where a child's interest is presumably served by maintaining attachment to a primary caretaker despite the likelihood that another parent is marginally more capable.
    a. The logic of the court's use of attachment theory is confusing and seems to turn attachment theory on its head. They noted the expert's claim that the fact that Hugo was securely attached to his pre-adoptive foster mother of two years was the reason that she could recommend breaking that bond and developing a new bond with a new adoptive parent, albeit one who might better attend to his special needs. The rationale was that, since Hugo was securely attached, he was by definition "attachable," and could, although with some distress or trauma, re-attach to a new parent. No one made the argument that breaking a secure attachment might thereby create a less "attachable" child by virtue of the new bond being less secure, because this would have been the third "parent" to have taken care of Hugo. One could see a scenario in which an insecurely attached child would be moved to another "parent," in the hope that he/she would better meet the child's needs and create a more secure bond. The court believed (and so stated) that the new adoptive parent was so superior (and that therapy could mitigate the potential damage) it was worth the risk – a risk in other cases that they are resistant to take – to Hugo's growth and development, because they were tinkering with his ability to attach to a caregiver. The Court noted they had refused in the past and again in this case to recognize a presumption that a child who was "bonded" to a foster parent pre-adoptively must of necessity then be adopted by that parent, if an alternative placement is not with a biological parent.
3. Lastly, the SJC spent some time considering the admissibility of the expert's testimony. It was interesting that, while the evaluator was not a specialized expert, her background, training and experience were very relevant. Moreover, the SJC took note that the standard investigation process she used - reviewing the case file, interviewing the parties, and gathering information from service providers - was a methodology strikingly similar to that used by DSS and Hugo's own experts. They decided there was "adequate support in the record for the judge's conclusion that (the evaluator's) testimony was based on a reliable methodology." (*Hugo*, at 234). This case was post-*Daubert* and *Lanigan* and involved standard investigative/evaluative methods in a scenario involving a significant impact on a child's life. The manner in which the

Court dealt with this issue seemed more consistent with the concurring opinion in *Canavan's Case* (p. 67, this volume), where Justice Greaney questioned whether a strict *Lanigan* analysis would be appropriate for the admissibility of expert testimony in the "soft sciences," as well as the opinion in *Lanigan*, where the Court "suspected" that "general acceptance" would continue to be the significant standard for admissibility. Both of those ideas seemed relevant to admitting the expert's testimony in *Hugo*. It would seem logical, then, that the generally accepted and methodology employed in family evaluations and investigations– interviewing parties, children, and collaterals, observations of family interaction, and reading relevant documents – should pass constitutional muster in domestic relations cases, too.

THERESE A. CANAVAN'S CASE

423 Mass. 304 (2000)

Supreme Judicial Court.

Keywords: Expert opinion, Evidence, Scientific test, Reliability, Witness, Expert.

Background: The plaintiff, an operating room nurse, claimed that chemicals in the OR caused her to become sick and disabled. The industrial accident board (IAB) determined that she was temporarily unable to work and that her treatment was reasonable and necessary. The hospital appealed that decision and the Appeals Court agreed with the IAB, holding the evidence was properly admitted. The hospital sought further appellate review to the SJC, which reversed the decision of the Appeals Court.

When Canavan sought diagnosis and treatment, the hospital accepted the diagnosis of chronic sinusitis. She sought treatment with Dr. LaCava, a pediatrician and specialist in Environmental Medicine, a specialty not recognized by the American Board of Medical Specialties. After testing her, he diagnosed her as suffering from several disorders and Multiple Chemical Sensitivities (MCS) due to exposure to chemicals at her job. According to the diagnosis, these disorders were responsible for her being totally disabled.

Dr. Acella, a hospital expert in Allergy and Immunology, disagreed with LaCava's diagnosis, instead asserting that some symptoms arose from non-specific stimuli and were of psychogenic origin, not MCS. He noted that mainstream allergists and immunologists or occupational medicine physicians did not recognize MCS. The issue for the SJC was whether the judge "properly admitted Dr. LaCava's testimony…on which he relied for the ultimate determination." (*Canavan*, at 308.

In its ruling, the SJC noted that, whether evidence is properly admitted depends on the rules of expert testimony. They stated that the Court had relied on the *Frye*, or "general acceptance in the field of interest or the relevant scientific community" standard before *Commonwealth v. Lanigan*, 419 Mass. 15 (1994). It noted that an advocate could establish scientific validity without general acceptance, but in most cases general acceptance would suffice (*Lanigan* at 26).

The opinion then shifted to the question of whether the appellate court could use the then current *de novo* standard or the "abuse of discretion" standard, the second of which was suggested by the U.S. Supreme Court in *General Electric v. Joiner*, 522 US 136 (1997). In his concurring opinion, Greaney, J. stated, "The goal of Lanigan, as was the goal of the preceding tests, is to keep unreliable (or so-called "junk") science from fact finders, thereby reducing the prospect of the return of verdicts or the rendition of decisions of dubious validity." (*Lanigan*, at 29). Thus, novel scientific theories could be validated through a *Lanigan/Daubert* analysis, if they were too new to have gained scientific acceptance. The SJC cited *Commonwealth v. Sands*, 424 Mass 184, 185-86 (1997), where the court said, "A party seeking to introduce scientific evidence may lay an adequate foundation *either* by establishing general acceptance

in the relevant scientific community or by showing that the evidence is reliable through other means."

They also indicated, "Even observation informed by experience" can be considered "but one type of scientific technique" that is no less susceptible to a *Lanigan* analysis than other types of scientific methodology."[38] (*Canavan*, at 313). Later in the opinion, in footnote 5, they cite *Lanigan* at 24-26, "Application of the Lanigan test requires flexibility. Differing types of methodology may require judges to apply differing evaluative criteria to determine whether scientific methodology is reliable. In the *Lanigan* case, we established various guideposts for determining admissibility including general acceptance, peer review, and testing. Establishing the reliability of personal observations may in some circumstances require examining other criteria. Observations by a specialist, such as the tire expert-engineer in *Kumho* are subject to a *Daubert* analysis in order to determine if the observations were sufficiently reliable to support the expert's opinion. In *Commonwealth v. Sands* at 185-86, the SJC wrote, "If the proponent can show that the method of personal observation is either generally accepted by the relevant scientific community or otherwise reliable to support a conclusion relevant to the case, such testimony is admissible."

In a concurring opinion, Justice Greaney wrote,

> "Query whether a strict *Lanigan* analysis is applicable to soft science expert-testimony." He suggested, "I expect that Lanigan will have little application to expert testimony in the so-called "soft" sciences, such as psychology and sociology, which are highly dependent on information derived from such sources as personal observations, clinical assessments, and statistical data. It is here, more than anywhere else, that an appellate court will defer to a trial judge's exercise of discretion, once the judge makes a decision as to the reliability of the process or theory underlying the proffered opinions and the relevance of the opinion to a matter in issue." (*Canavan*, at 30-31.

Comment: Packenham (2004) has suggested that anyone who engages in expert testimony should review this case, because an attorney might raise questions about methodology or reliability during expert testimony. This case and its predecessor, *Lanigan*, beg the question as to the nature of the processes involved in GAL investigations in family and juvenile court. If personal or clinical observation informed by experience is susceptible to a *Lanigan* analysis, then it does not matter whether one labels that process as scientific or not, as long as the process itself is reliable and has general acceptance in the field. There are components of an investigation that have scientific qualities, such as taking a family history, since that is a tried and true method of determining possible diagnoses or understandings of family problems. Observations of parents and children is another method that has scientific aspects, since one might make comparisons of family interaction to determine where on the "bell curve" of family functioning this family might be, as well as where on the developmental curve any

[38] Packenham at 385 (2004) notes, "The admissibility of expert testimony based on observations and clinical experience is subject to a *Lanigan* analysis, which applied the *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) scrutiny regarding reliability." The purpose is to assure that the expert provides opinions "based on reliable methodology." Packenham, (at 386), notes that this case is important to review "several times as a summary of the standards for admission of expert testimony."

particular child might be. That assumes some clinical/ developmental database or repository of clinical data by which one could compare the family or child under investigation or observation. We are usually seeking evidence of parenting abilities or deficits, information about the nature of parent-child relationships, and data about the development and personality of the children in the family. The above methods, as well as other possible ones, such as psychological testing, are time-tested, logical means of gathering relevant data to speak to those larger family patterns or individual functioning within those patterns. There are writers who would argue that custody evaluations, as well as assessments pursuant to other family law disputes, should be scientifically informed.[39] Thus, the assessment process relies on a knowledge base of science and the clinical or investigative skills (or art) to use that knowledge. This knowledge first contributes to the reliability (in legal terms) of the process because it produces data that can logically support the resulting conclusions and is relevant to the questions posed by the court. Second, it adds to the repeatability of an investigational method in that others should be able to use the same procedures to obtain reasonably similar results, with the flexibility to know when to vary procedures to deal with the demands of the individual case. To paraphrase an analogy offered by Henry Bock,[40] a surgeon uses scientific knowledge of the body in his or her surgical methods, but needs to respond to individual situations as they arise during surgery itself. A surgeon does not know with absolute certainty what he or she will find until the procedure is underway. Similarly, a family evaluator or investigator does not know what data he or she will find (or what individualized methods are needed) until the assessment has begun. In either case, reliable methodology or practice is at the foundation of the skill necessary to perform the relevant procedures.

[39] Gould, J (1999). Scientifically crafted child custody evaluations. Part Two: A paradigm for forensic evaluation of child custody determination, *Family and Conciliation Courts Review*, 37(2), 159-178. He wrote that a custody evaluation is a scientific means of evaluating variables relevant to parenting and how those factors contribute to best interests. It requires "a standard set of methods and procedures" to both generate and analyze relevant information. (at 165).

[40] Personal communication (9/25/05).

RELIGIOUS ISSUES

DIANE CAROL PALMER **FELTON** v. WAYNE FRASER **FELTON** (1981)

Supreme Judicial Court of Massachusetts

383 Mass. 232

Keywords: Divorce, Child Custody, Modification, Religious issues.

Background: The Felton's had two children, five and two years old, respectively, at the time of divorce. Custody was awarded to Mother and visitation to Father. Mother, a member of the Congregational Church, complained that Father, who had changed his faith to that of a Jehovah's Witness, was teaching his beliefs to the children. She claimed this confused them and, to some extent, alienated them from her. A Probate Court judge modified the judgment to prohibit Father's access to the children, unless he refrained from teaching the children about his faith.

Mother knew about Father's religious interests during the separation, but became concerned about the effects of his instruction of them. She tried to discourage this practice by him and they tried to meet and negotiate the issue. After Father and his new wife took the children to a 'family' convention of Jehovah's Witnesses, mother decided to suspend his visitation, allowing Father only weekly telephone contact with the children. Father filed a contempt motion, while mother attempted to modify the divorce judgment. After a hearing on the issues, the trial judge ordered a limitation on Father's visits, in that they could continue as long as he did not indoctrinate the children in beliefs that were contrary to those of Mother.

In its decision, the SJC discussed the idea that exposure to different religious practices or beliefs was usually a positive value, as it could be a "sound stimulant" for a child (*Felton,* at 235) in the context of promoting regular contact between a child and his parents. However, "in all events, the question that comes to the courts is whether, in particular circumstances, such exposures are disturbing to a child to its substantial injury, physical or emotional, and will have a like harmful tendency for the future." (*Felton,* at 235). The Court warned against overvaluing the parents' constitutional rights at the expense of the child's physical or emotional health.

As to the case itself, the SJC said that there was little of substance in the trial record about demonstrable harm to the children, including minimal testimony about the alleged literalness of the Biblical interpretations themselves. Mother objected to the Father's practice of not celebrating Halloween or birthdays, and his discouragement of belief in Santa Claus, the Easter Bunny, or the Tooth Fairy, all of which she allowed the children to believe. Mother was not intensely religious, but did encourage Sunday school and the Bible reading that occurred there. The SJC suggested that some of the children's reported distress derived from their knowledge of their mother's feelings about their Father's practices, and not from the beliefs or practices themselves. Father said that church practice frowned upon the above celebrations and stressed literal interpretations of the Bible. He asserted that those who did not

believe as he did were in error, but, the Court said, he did not think less of them because of those mistaken beliefs. He also noted that the children's visits were not all taken up with religious activities, but included more typical family things, such as movies, etc. The stepmother also had told the children that, if they were concerned about their mother's reaction to the religious activities, they need not tell their mother. The Court said that made it more difficult to assess the children's state of mind about these activities.

The SJC held that this case was a modification of an earlier judgment, and required a substantial or "material change in circumstances" since the earlier decision. In reviewing the constitutional issues related to such a case, the SJC opinion stressed that other courts had held they would not interfere with non-custodial parents, when they exposed the children to their faith or beliefs, "absent a clear, affirmative showing that these religious activities will be harmful to the child." (*Felton,* at 233). The decisions from other states indicated that "harm from conflicting religious instructions or practices, which would justify such a limitation, should not be simply assumed or surmised; it must be demonstrated in detail." (*Felton,* at 234). The SJC noted the lack of clear evidence linking the children's physical or emotional reactions with their visits to their Father. "General testimony (by mother) that the child was upset or confused (opposing testimony given by Father) will not suffice." (*Felton,* at 239). It noted, "There are few ground-level facts to be found in the record in this entire matter." (*Felton,* at 240). The SJC added that the judge erred in limiting visitation because of a lack of foundation in fact for the decision. The SJC attributed the trial court judgment to personal bias on the part of the judge, based on interjections he made during the trial.

In the final paragraph, the SJC offered suggestions as to the kind of evidence necessary to support a modification in cases such as this. They indicated such factors as "the (child's) general demeanor, attitude, schoolwork, appetite, health, or outlook," and recommended information from "church, school, medical or psychiatric authorities…(child's) associates in or out of school." (*Felton,* at 242). The SJC suggested that the court might appoint a guardian *ad litem* to assess the facts, to correct "possibly self-serving testimonies" of either parent." (*Felton,* at 242). In a final comment, the SJC noted that two years had elapsed between the appellate decision and the trial court judgment, and it suggested some interim visitation plan be considered in the interim before any formal hearings begin.

Comment: *Felton* is an oft-cited case in appellate decisions, and is the primary case with respect to contested religious issues. It has two important messages for GALs. One is that there has to be a compelling state interest before the state will interfere with a parent's religious practices or beliefs as they affect children, and that state interest is in the welfare of the children themselves. That said, when this religious issue arises, it is essential that the court become aware of very specific facts. These "facts" bear on the question of possible harm to the children from exposure to the particular religion or set of beliefs and should come from sources independent of the parents, such as school personnel, medical professionals, therapists, etc. In addition, the court needs to know what was the nature of the parents' religious practices before they separated and the impact of those practices on the children. *Kendall v. Kendall*, 426 Mass. 238 (1997) below, is probably the best demonstration of how the GAL assessed the facts and applied them to the questions asked by the court. The task of the GAL is to help describe the links between the religious beliefs or practices and changes in

the children's behavior, as well as consider other explanations that might relate to reasons for the children's behavior. It is clear from *Felton* that a modification will not succeed, if it is based on the fact that the children are primarily distressed in reaction to one parent's concerns about the religious practices of the other. The "harm," such as it is, must stem from the impact of the practices or beliefs themselves on the children. In *Kendall*, Father's beliefs (i.e. fundamentalist Protestantism) not only differed from Mother's and children's practice (in the religion in which they were being raised – Orthodox Judaism), his beliefs foretold serious eternal consequences to the children for not believing the way he did, which put them in significant psychological conflict between two sets of disparate religious beliefs. His behavior was also totally antithetical to the everyday behavior of the children related to their faith, in that he allowed or encouraged lifestyle practices (diet, clothing) that were antithetical to the rules of the Orthodox faith in which they were being raised. In *Kendall*, there was clear evidence of present harm and of likely future emotional damage to the children created by the imposition of the father's beliefs and acts.

BARBARA ZEITLER **KENDALL** vs. JEFFREY P. **KENDALL**

Supreme Judicial Court of Massachusetts.

426 Mass. 238 (1997)

Keywords: Religion, Freedom of religion, Establishment of religion, Divorce and Separation, Child custody, Joint custody, GAL records.

Background: This is a lengthy case, but well worth the time it takes to read it. The parties were married in 1988. Mother was Jewish and Father was Catholic. Prior to marriage, they agreed that the children would be raised as Jews. Three children were born from this union, the youngest in 1993. The judge found that the children had a solid Jewish identity through their education and home practices. In 1991, Father became a member of the Boston Church of Christ, a "fundamentalist Christian faith." In 1994, Mother shifted her religious beliefs to Orthodox Judaism and Ariel, the eldest child, began to study Orthodox Judaism. Shortly after mother's shift to greater orthodoxy, the parties filed for divorce. Mother wanted to limit the children's exposure to Father's religion, to which the Father objected. The probate court appointed a guardian *ad litem* to consider the religious differences of the parties and its effect on the children. Mother was required to show in detail how exposure to the Father's religious practices would be emotionally damaging to the children or would have a clear potential to be harmful. The judge cited *Felton v. Felton***,** 383 Mass. 232, 233 (1981), and noted that some limitation on the religious practice of a parent is allowable, if it serves the best interest of the children.

In her judgment, the trial judge placed some restrictions on Father's practice. She prohibited Father from taking the children to his church or from engaging in prayer with the children, if it would alienate them from their mother or their own Jewish identity. He could not share his religious beliefs, if these would cause the children emotional distress or anxiety about themselves or their mother. The judge particularly focused on one belief of the Boston Church that consigned to burn in hell anyone who did not believe that Christ was the Lord, which, of course, was not a belief of his children or their mother. Father was permitted to have pictures of Christ on his wall, but could not in any way engage in a practice that undermined the children's Jewish faith or identity. The judge also continued the appointment of the GAL, but changed the role into one that permitted intervention in disputes between the parents around these issues.

The SJC discussed the usual liberty interest that a parent has in his or her religious observances and in exposing his/her children to those beliefs or practices. It indicated that any limitation on those practices would require a showing of harm so substantial that it would be in the children's best interest to prohibit them. The SJC noted that many states have dealt with this issue, but few have ruled on what constituted "substantial harm." The SJC noted the conflict in limiting certain types of contact between the children and their Father, because the countervailing value of "frequent and continuous contact" was also usually in the children's best interest, citing *Felton* at 234. The SJC cited a sampling of cases from other states. The trial judge decided to include the information in the GAL report almost in its

entirety as the evidence of substantial harm, and the case cited many statements from that report regarding incidents in which Father undermined or otherwise showed disrespect for the children's (and their mother's) religion. The tenet that was most highlighted was the Father's belief that, if his children did not accept Christ as Lord, they "are damned to go to hell where there will be 'weeping and gnashing of teeth." (*Kendall*, at 240).

The SJC also struggled with the value of children having exposure to both parent's religious beliefs and practices, calling that, in many cases, a "sound stimulant," but they then said, "...the question that comes to the courts is whether, in particular circumstances, such exposures are disturbing a child (sic) to its substantial injury, physical or emotional, and will have a like harmful tendency for the future. (*Felton*, at 234-235). Applying that standard to the facts of this particular case, I see substantial evidence of current and imminent harm, to these 7, 5, and 3-year-old children." (*Kendall*, at 248). The SJC acknowledged that the GAL found only a few current instances of emotional harm to the children, but it noted that the data he compiled clearly pointed to the potential for future harm in terms of the children's self-worth, self-identity, and alienation from their mother. They trial judge found that as well, and the SJC affirmed the judge's decision. The SJC did not accept the Father's argument that the judge's decision unduly burdened him in his practice of religion, noting instead that it just limited how he could expose his children to that religion.

Another interesting aspect of this case was the trial judge's decision to award joint legal custody, despite the intense religious conflict between the parents, a decision that Mother appealed, citing *Rolde v Rolde*, 12 Mass. App. Ct. 398. The SJC, crediting the judge with the fact that she had the opportunity to observe the parties during trial, affirmed her decision. The SJC pointed to the fact that judge noted that the plaintiff- mother did not claim any other area of disagreement about parenting except for the religious differences. The conflict in the religious area alone was not sufficient to grant sole legal custody to mother, for which she had pleaded. In a footnote (21) the SJC indicated the judge heard testimony for five days of trial and felt the parents were able to cooperate on other issues.

Comment: Father filed an appeal with the U.S. Supreme Court, which declined to review the matter. The case reflects the fine line that courts walk in permitting the greatest freedom of religious expression to parents, but not without considering the impact of those beliefs or practices on children, where religious beliefs are in conflict. One important message for GALs who investigate this kind of dispute is the need to do a detailed exploration of the impact of the different messages each religion and its practices gives to children and how each parent handles what can be opposing ideas. The SJC provided direct quotes from the GAL report, documenting the behaviors that he used to affirm current as well as potential harm to the children.

The decision over legal custody also has some lessons for GALs, particularly those who are asked, as often is the case, to make recommendations about physical and legal custody. This case, as the writer knows from personal experience, was a very intense one. It was sort of a domestic relations version of a holy war. Yet, the fact that the dispute over the children was limited to this area, in the court's eyes, permitted the judge to award joint legal custody nonetheless. That suggests that family courts will go to some lengths to find reasons to allow

joint legal custody at a minimum, unless the facts are compelling enough that disagreements exist over a sufficient number of parenting issues to warrant an award of sole legal custody. It reminds GALs to be mindful of the areas of parental agreement as well as conflict when considering this question in an investigation.

An interesting side issue in this case was that the Father had objected to the GAL's refusal to release his records for Father to review in preparation for trial. The GAL withheld those records with the permission of the court. The SJC, in footnote 17, said that did not constitute error because, "The defendant was not denied an opportunity to rebut the GAL's report or cross-examine the GAL. See *Gilmore v. Gilmore*, 369 Mass. 598, 605 (1976) (finding error where judge refused to allow GAL to testify at trial). The defendant had a copy of the GAL's report and took advantage of his opportunity to cross-examine the GAL at trial." (*Kendall*, at 248). This is often a concern of a GAL. This writer has typically released all records to both parties when asked to bring them to a deposition. However, if a GAL does not wish to release records, he or she should file a motion to quash for the court to determine whether it will allow the GAL to protect the records, perhaps even citing this case as precedent for such a plea. One wonders whether, under cross-examination, a GAL would be allowed to refer to notes (to refresh memory), if the examining attorney had been prevented from seeing those notes before trial.

SEJAL M. **SAGAR** vs. MAHENDRA K. **SAGAR**

Massachusetts Appeals Court

57 Mass. App. Ct. 71 (2003)

Keywords: Divorce, Separation, Child Custody, Freedom of Religion.

Background: Amidst a high-conflict divorce between two devout Hindus, Father sought permission to perform a Hindu ritual upon their daughter, who was just over five years old at the time of the appeal. He also appealed the previous judgment of physical custody to Mother and joint legal custody to them both. The parents had an arranged marriage in India in 1990 and were barely familiar with each other at the time of the wedding. Shortly thereafter, they immigrated to the United States, where, in June 1998, their daughter was born. They separated five months later. They were observant in their religion during the marriage, including performing religious ceremonies attendant to special occasions, such as their daughter's birth. They attended a Hindu temple weekly and had an altar in their home at which they worshipped. They had a volatile relationship, and the trial court found that the husband had been physically and verbally abusive toward the wife (e.g. threw things at her, hit her with a rolling pin, pulled her hair, and burned her with a cigarette, among other aggressive/abusive acts). He was also very controlling, managing his wife's contacts with friends and family, and he threatened to stop supporting his wife's college education, if she did not get all As. He also made questionable transfers of marital assets and did not comply with court orders to put funds in escrow. In the findings, the judge determined that everything to which Father testified about his financial issues was not credible.

The parents disagreed over the necessity of the ceremonial rite, which involved ritual cutting of pieces of the child's hair while offering prayers, and then shaving of the child's head and placing an "auspicious mark" on the head. Father said that it was necessary to perform this rite prior to the child's third birthday, which it was essential to the daughter's longevity and health, and was a requirement for a Hindu marriage. Mother disagreed, noting she had not gone through that ceremony as a child, and it had never been an issue for her wedding. The trial court denied permission for the ceremony, finding that the Father's motivation for performing this ceremony was not purely religious, but was also a means of his control over Mother, and the Appeals Court noted that the record supported the judge's finding. The judge also found that the Father's religious beliefs were sincerely held. The Court then analyzed the case in terms of competing rights, that of his free exercise of religion and both parents' right to direct a child's education and upbringing. For Father, even though his motivation was not "purely religious," his sincerely held belief was sufficient to warrant the Court's consideration of his request. As for the constitutionally protected right for a competent parent to raise a child in the way he or she sees fit unfettered by state interference, it was clear that Father's interest in performing the ceremony competed directly with Mother's interest in not doing so.

For a court to intervene where a parent's fundamental right to practice his or her religion is at issue, there has to be a compelling state interest, such as preventing demonstrable physical or psychological harm to a child. Where religious views or practices cannot co-exist, the state

may not intervene to choose one parent's practice over another without the existence of a compelling state interest, such as the welfare of a child. Such was the issue in *Kendall v. Kendall*, 426 Mass. 238 (1997), where Father's fundamentalist Christian beliefs competed with mother's orthodox Jewish practices, and where the children had been raised in the Jewish faith. The Court cited *Felton v. Felton*, 383 Mass. 232 (1981) at 233, where it stated that, when the best interests of the child are at issue, the Court can limit one parent's practice of religion. Where competing religious interests occur, as in this case, it was Father's burden to show that failure to perform the ceremony would harm the daughter, so that the state would intervene on his behalf and order it to occur. The Court decided that Father had failed to meet that threshold issue, because he had not demonstrated in detail how the failure to undergo that ceremony would harm the child. It said the neither parent showed that harm would befall the child, regardless of whether the rite was performed or not. Since the evidence was not strong either way, the Court decided that the most limited intervention in the life of this family was not to order the ceremony performed, since it could occur later. Moreover, the lack of such an order did not otherwise restrict either parent from his or her own individual religious observance. It also permitted the child some control, long term, over her own religious preferences, while still being open to her parents' respective teachings.

The Father also appealed the trial court's order on physical custody to Mother. The trial judge found that the child was at ease with each parent and that, in turn, each of them loved her. The judge also found that the parents "are willing to meet the child's needs and work together to comply with the parenting plan." (*Sagar*, at 79)**.** The Appeals Court noted that the parenting plan allowed regular contact between Father and child, and that there was no error in ordering physical custody to Mother and joint legal custody to both parents.

Comment: This is an interesting case for several reasons. What was important was what was not ordered, or to put it another way, what was ordered in the context of the findings the court made. This case was post-*Vaughn*, but there was no analysis of the impact of the domestic abuse against Mother either on the child or on Mother herself, and the rebuttable presumption (against joint legal custody to an aggressor in the context of domestic violence) aside, the Court upheld the joint legal custody order of the trial judge. The Court noted that the parents "are willing to meet the child's needs and work together to comply with the parenting plan." (*Sagar*, at 79). Mother did not raise the *Vaughn* issue during the trial, and therefore could not do so during the appeal. Had she done so at trial, the judge's findings of fact might easily have supported a sole legal custody order.

Another aspect of the legal custody issue is that it is not a categorical, either-or issue, as noted in the commentary on *Rolde* and *Kendall* earlier. It seems to this writer that, if just one or two issues exist about which parents can agree or cooperate, such as education or health, the Court leans toward awarding joint legal custody, absent a finding of domestic abuse such that shared legal custody is inappropriate. Thus, when the Court poses the question of "legal and physical custody" in its orders of appointment, it behooves the GAL to do a detailed analysis of those issues around which the parties have cooperated and those around which they have not. There may be areas of childcare in which one parent has taken the lead, while the other parent has simply accommodated to that, without active participation. This raises again the thorny question of whether the type of custody is a determination a GAL should make in his/her

recommendations (when recommendations are permitted), given that there is no specific degree of cooperation or formula for types of cooperation suggested by the appellate law. In *Rolde v. Rolde*, 12 Mass. App. 398 (1981), the Court said, "Although complete agreement between parents to implement joint custody may not be necessary," in order to be effective "joint custody requires two capable parents with some degree of respect for one another's abilities as parents, together with a willingness and ability to work together to reach results on major decisions in a manner similar to the way married couples make decisions." (*Rolde*, at 405-06). There is, of course, an assumption in that statement regarding the existence of some body of knowledge beyond common sense about how married couples make childcare decisions. Clinical experience has taught that high conflict separated or divorced parents' decision-making is likely to be similar to married parents in high conflict. High conflict appears to be high conflict, regardless of marital status. Each is detrimental to a child's development.[41]

According to the trial judge in *Rolde*, those parents agreed on virtually nothing with respect to rearing their children, in addition to maintaining their intense mutual antagonism. In *Kendall*, it seemed that the critical factor in awarding joint legal custody was the lack of disagreement (note the double negative) over certain areas of childcare, despite the intense antagonism generated by the religious conflicts. In dealing with this issue in high conflict families, some GAL's in their recommendations designate areas of childrearing over which each parent should have authority, when neither one can work with the other in several areas.

The other aspect of the case was the obvious one, which is what level of analysis does a GAL do when faced with a conflict of competing religious beliefs or practices, even if, as in this case, both parents were of the same faith? It would seem the issue is not whether the beliefs are part of a specific religious doctrine (absent predictable harm to a child from certain religious practices), but whether the beliefs are sincerely held. Parents contesting custody in the context of religious differences will often raise questions about the specific content of one religion or another, especially if one of them is not a mainstream religion, such as the Jehovah's Witnesses in *Rolde*, or, the Boston Church of Christ in *Kendall*. In such an instance, to provide the information most useful for the court requires the GAL to tease out what physical or psychological harm, if any, did or likely could result either from a certain practice being engaged in (as what Father did in *Kendall*), as well as from the failure to engage in that practice (as in the ceremony Father wanted to perform in *Sagar*). That would require detailed information about the child's developmental status, the specific nature of the beliefs or practices at issue, and how the interaction of those factors affects a child's thinking, emotions, or behavior.

[41] Cummings, E.; Iannotti, R. & Zahn-Waxler, C. (1985). Influence of conflict between adults on the emotions and aggression of young children. *Developmental Psychology*, 21, 495; and Davies, P. & Cummings, E. (1994). Marital conflict and child adjustment: An emotional security hypothesis. *Psychological Bulletin*, 116, 387.

JUDICIAL IMMUNITY FOR GALS

VIRGINIA **LALONDE** & another[42] vs. BRUCE **EISSNER** & others.[43]

Supreme Judicial Court of Massachusetts

405 Mass. 207 (1989)

Keywords: Judicial immunity, Evaluation, Malpractice.

Background: LaLonde sued Dr. Bruce Eissner in Superior Court, seeking damages arising from his allegedly negligent psychiatric evaluation of the LaLondes and their child. The Superior Court dismissed her suit on a motion for summary judgment. She then appealed that dismissal. In a highly contested and high-profile case (in terms of news media) involving sexual abuse allegations in the context of a custody dispute, LaLonde had sought damages from Dr. Eissner and other mental health professionals, who had performed various court-ordered evaluations. The Superior Court, where Mother's complaint was heard, dismissed the complaint based on the legal principle of absolute judicial immunity. By granting direct appellate review, the SJC assumed responsibility for the case from the Appeals Court.

The essence of LaLonde's complaint against Dr. Eissner was that he was negligent in his evaluation duties. His alleged negligence harmed to the child, because it permitted continued visitation with Father. Dr. Eissner's defense was that he was entitled to quasi-judicial immunity, as the Probate Court appointed him to do the evaluation and report to the Court. The facts showed that the Probation Department asked Dr. Eissner to evaluate the parties.

Dr. Eissner's deposition testimony, the parties' affidavits, and the relevant Probate Court documents were all before the motion judge. The record showed that, in the context of a visitation dispute, a Probate Court judge ordered the Probation Department to conduct a visitation investigation and to arrange for a psychiatric evaluation of the LaLonde family. Pursuant to that order, Probation Department personnel asked Dr. Eissner to conduct the evaluation. Prior to the summary judgment, LaLonde had tried to impugn Eissner's reputation and ability to practice through a complaint to his professional licensing board. A state medical tribunal had heard the malpractice complaint filed by LaLonde and found insufficient evidence to raise the question of liability.

Mother did not dispute that the Probate Court had ordered the Probation Department to evaluate the family nor that the Probation Department had asked Dr. Eissner to perform a psychiatric assessment as part of that court-ordered evaluation. The court had issued an order for a psychiatric evaluation "to be arranged by the Probation Department." The Probation Department had recommended to the court that LaLonde attend these evaluation sessions with Dr. Eissner, and the court incorporated that recommendation into its original order. The SJC,

[42] Her minor child.
[43] Stephen LaLonde, Anita Mehlman, Barry Elkin, George Lordan, and Frances Goldfield. Only Eissner is involved in the present appeal.

noting no disagreement on the facts, said, "…the issue before us is whether a psychiatrist chosen by the probation department to conduct a court-ordered psychiatric evaluation is entitled to quasi judicial immunity." (*Lalonde*, at 210). Citing various sources, including case law from other jurisdictions, the SJC noted the historical grant of immunity given to judges in the performance of their duties. It indicated that this immunity has been granted to other persons whose work "is an integral part of the judicial process" (*Lalonde*, at 211) and who "must be able to act freely without threat of a law suit." (*Lalonde*, at 211). They said that when these other judicial officers act at a judge's discretion, they are entitled to the same absolute immunity as the judge. The Court went on to assert that various quasi-judicial professionals, including psychologists and psychiatrists, would be very reluctant to serve the court, if they were threatened with liability for providing evaluations and offering expert opinions.[44] The public is also protected by virtue of the fact that the results of these evaluations are open to the parties and the evaluator is subject to cross-examination, as Dr. Eissner was in this case. They concluded, "…persons appointed to perform essential judicial functions are entitled to absolute immunity." (*Lalonde*, at 213)

Comment: As is apparent from the above, Dr. Eissner was also subject to a complaint to his professional medical board, which rejected Lalonde's argument. This case does not offer protection from that kind of action against a court-appointed professional. However, it was a critical case for GALs, whose role is typically consistent with that of Dr. Eissner, and who are often appointed directly by the judge. The SJC was correct in noting that few, if any, professionals would accept appointments if they had to worry about having to defend themselves in a civil suit for liability with the potential for enormously high money damages. This work, as most who do it will attest, is difficult enough without having to worry about that possibility.

[44] By extension, anyone appointed as a guardian ad litem or performing such a role should be covered by quasi-judicial immunity. Per example, see the next case, *Benjamin v. Sarkisian*.

JACK NICHOLAS **SARKISIAN** V. ROBERTA F. **BENJAMIN**

Massachusetts Appeals Court

62 Mass. App. Ct. 741 (2005)

Keywords: Malpractice, Legal malpractice, Judicial Immunity, Guardian *ad litem*.

Background: In a domestic dispute, the trial court determined that the child required an attorney. The order read in relevant part: "the attorney for the child(ren) shall represent the child(ren) in all hearings wherein the interests of the child(ren) are involved, including trial, and shall have the same rights of any other attorney in the action, including, but not limited to, discovery proceedings, cross-examination, and requiring attendance of witnesses…The attorney for the child(ren) shall file an initial written report and recommendation with [the probate judge on or before December 6, 1996. When the attorney for the child(ren) has completed his/her preparation and initial report and recommendation, he/she shall provide copies of same to the attorneys for the parties and to the court." (*Sarkisian*, at 742).

The Court delineated a list of eleven factors that the attorney should address in her report. The attorney, Benjamin, performed what, in essence, was her own investigation, including interviewing the children and both parents in their respective homes, reviewing documents, depositions, and spoke with therapists and an DSS investigator.[45] In her report she made various recommendations, including those relevant to custody, visitation, alimony, and child support. The parties accepted most of the recommendations and the court incorporated them into the Judgment in January, 1997. The court also appointed Benjamin to monitor Mother's subsequent visitation (Father was awarded physical custody) and to make further recommendations after Mother had obtained suitable housing for herself. Benjamin filed a follow-up report in June, 1997, and recommended increased visitation time for Mother. In August, 1997 she wrote to the parents to inform them that she still functioned as attorney for the child and expected to be copied on any correspondence between them or motions to the court. That was the last she heard from them.

In December, 1997, in order to meet his financial obligations, including the payment of the attorney's fee and his alimony obligations, Father sold the residence in which he and his son lived. In April, 1999, almost one and a half years later, Mother and Father entered into an agreement giving the Father sole legal and physical custody of the child in consideration of a lump sum payment of $7,500 in lieu of any further alimony. Then, in November, 1999, on behalf of himself and the child, Father sued Benjamin for legal malpractice. Benjamin filed a motion to dismiss on the grounds that her work was performed in a quasi-judicial capacity entitling her to immunity from damage claims. A judge of the Superior Court allowed the

[45] As a side note, Benjamin's procedure was consistent with the investigational method used by Beardslee, one of the experts in *Adoption of Hugo* 429 Mass. 219 (1998), in which the Court deemed that her methodology was reliable and her testimony, therefore, was admissible. That further reinforces the idea that Benjamin functioned like a guardian *ad litem*. The message seems to be, "If it walks like a GAL and talks like a GAL, it must be a GAL."

motion to dismiss as to Father's claim based on her ruling that the Benjamin owed him no duty (that is, she did not represent Father). As for the child's claim, the judge denied the motion to dismiss, disqualified Father from continuing to represent his son in this matter, and appointed a guardian *ad litem* to investigate the merits of the claim. The guardian *ad litem* reported that the claim did not appear to have sufficient merit and that she did not believe that the pursuit of the claim was in the child's best interests. Notwithstanding the guardian *ad litem's* recommendation, the child's new attorney continued to pursue this action and filed an amended complaint in which he alleged that Benjamin was negligent in having made recommendations regarding fiscal and visitation matters resulting in harm to the child by virtue of the boy's displacement from his home and erratic visitation by Mother. The Superior Court dismissed the claim through summary judgment for Benjamin, and the child appealed the dismissal of his claim. The child argued that Benjamin was not protected by judicial immunity because she was appointed to act as the child's attorney and, in that role, she owed the same duty to him that a privately retained attorney would owe to his or her client.

The Court stated that Benjamin's vulnerability to her client's claim did not depend on the label that the court assigned her, that is, attorney for the child, but rather depended on the functions she performed in that role. They referenced *LaLonde v. Eissner*, 405 Mass. 207 (1989) in this regard. While she was appointed to represent the child at any hearing or trial, Benjamin was also asked to make a report and recommendations to the court, duties ordinarily relevant to the functions of a guardian *ad litem* pursuant to G.L. c. 215 § 56A. Citing *Gilmore v. Gilmore*, 369 Mass. 598 (1976), the Court noted that the attorney in her role was acting as an arm of the court and was integral to the judicial process. As such, they said, she was entitled to absolute immunity, so that she, like any guardian *ad litem*, could act freely without fear of liability. The Court referenced similar decisions from other states regarding the role of the guardian *ad litem*.

The child argued that Benjamin was negligent in her filing of the report and in her recommendations, because she should have foreseen that those recommendations would lead to the eventual outcome of Father having to sell his house. The recommendations included financial issues (alimony) and visitation ones. The child claimed that Benjamin should have foreseen that Mother's past psychiatric history and behavior would negatively impact the visitation and would cause harm to the child. The child claimed that Benjamin did not properly monitor the visitation, as was ordered. In the end, the Court decided that, as the visitation monitor, Benjamin was also acting in a quasi-judicial capacity, and was entitled to immunity.

Comment: Extending the 1989 SJC decision in *LaLonde (*above), the Appeals court in this case considered what Benjamin had done to have fallen under the umbrella of services ordinarily performed by a GAL, and was thus entitled to absolute immunity from liability. What was interesting about this case was that Benjamin, in her role as attorney for the child, was deemed to have functioned as a GAL (and she performed many of those investigative services, including filing a report). Yet, nowhere in the case was there any mention of whether she would have had to be available for testimony, either at deposition or trial. In fact, in the event of trial or a hearing, she was given the power to examine witnesses. Yet, in her function as a GAL, even under *Gilmore* (which the Court cited), she would have been required to be a

witness herself. Could she have cross-examined herself? It was a little surprising that the Court had invested such a broad range of power to her, but apparently not the requirement to testify, if called as a witness. How else would she defend her report and recommendation without cross-examination? That is one check on the immense power of the GAL and a condition for admitting a report into evidence. It appeared, in this case, that her opinion carried much weight. Since the parties settled, that answer remains unknown.

This case reinforces the issue of the importance of the GAL knowing the scope of his/her authority and keeping within the bounds of that charge from the court. For example, the Court stated, "The role evolved out of the defendant's duties as a guardian *ad litem* in which she continued to perform a service for the court in investigating the facts, mediating the visitation problems in the first instance, and making recommendations pertaining to the same. In monitoring visitation, the defendant continued to act in a quasi-judicial capacity, performing a service for the court analogous to her duties as a guardian *ad litem*." (*Sarkisian*, at 746). What is important here is that Benjamin's duties may have been akin to her being in a dual role, perhaps even a triple role, in that (1) she was acting as a GAL – reporting and making recommendations, (2) mediating (or monitoring) visitation problems – acting as a mediator or parenting coordinator, and (3) having the ability to cross-examine witnesses at a hearing or trial – acting as an advocate. Mental health professionals are not likely to be able to have so many role conflicts, but attorneys or attorney-GALs could be. For most professions, two roles are one too many, let alone three. In terms of professional vulnerability, it is reasonable to think a GAL could be open to a complaint to his or her professional board, because of multiple roles, even though protected from liability because of quasi-judicial immunity. It does not follow that multiple roles are acceptable, simply because the court gives a GAL the power to function in that manner. While the 2005 Category F standards prohibit multiple roles, that applies to mental health professionals and attorneys appointed as GALs. It would appear, logically – given the reasoning in this case - that it should apply to anyone who *functions* as a GAL, as did Benjamin in her role as attorney for the child, even though the court might not designate the professional as a GAL.[46]

Another form of protection afforded by the umbrella of the court appointment was that of "visitation monitor," according to the decision. While there is no case law directly on point, it would appear by extension that a parenting coordinator appointment (a 'rose by any other name'?) would have immunity from liability, because he or she would be acting in a "quasi-judicial capacity." The message appears to be, at the very least, "Don't take on a parenting coordinator role without a court appointment. Some attorneys have suggested that if the PC role is incorporated into an approved Judgment, it is tantamount to a court appointment. That reasoning is arguable and untested, and might place a PC at greater risk.

[46] Courtesy of the defendant herself, the *Standards for Attorneys and Guardians ad Litem in Custody or Visitation Proceedings*, promulgated by the American Academy of Matrimonial Attorneys, Chicago (1995) states (standard 3.7) that an attorney GAL "uses all appropriate procedures to develop facts which the decision-maker should consider." Standard 3.8 requires the GAL to "make the decision-maker aware of all the facts which the decision-maker should consider." Standard 3.8a adds, "If the GAL offers evidence or submits a report, the guardian should be duly sworn as a witness and be subject to cross-examination," and 3.8b, "At the conclusion of the trial or hearing, the guardian shall not make a closing argument or submit a memorandum to the court." The standards are different if the attorney is appointed as counsel for the child and not as guardian *ad litem.*

PRIVILEGED COMMUNICATION

ADOPTION OF DIANE

Supreme Judicial Court of Massachusetts

400 Mass 196 (1987)

Keywords: Minor, Custody, Evidence, Communication with social worker, Child custody proceeding, Communication between patient and psychotherapist, Privileged communication.

Background: In January, 1985, the trial court allowed a petition by DSS to dispense with consent to adoption (TPR). The biological mother appealed the petition and argued that, among other issues, the judge improperly admitted and considered testimony of social workers and psychotherapists during the trial. Mother contended the social worker testimony should have been excluded under the privilege created by M.G.L. c. 112 § 135. The SJC ruled that the testimony was admissible under exception (d), which provides that social workers may disclose otherwise privileged information "to initiate a proceeding under . . . section three of chapter two hundred and ten and give testimony in connection therewith." (at 198). They reasoned that the exception reflected a legislative intent "to balance the goal of protecting confidential relationships with the need to protect the well-being of children…" (at 198). They further noted that a c. 210 §3 petition involves "a drastic intervention in family life" and that the "information to justify such an intrusion necessarily involves a detailed and searching examination of the entire parent-child relationship." (*Diane,* at 199). Thus, restricting the interpretation of exception (d) "would render unlikely if not impossible the appropriate resolution of such proceedings pursuant to MGL 210 §3." (*Diane,* at 199). They noted that when cases reach the level of a TPR, children have already been in the care of DSS, and social workers are likely to have been involved for some time. Restricting the data available from such social workers "would often deny extremely valuable and relevant information to judges who must determine questions of a factual and most sensitive nature." (*Diane,* at 200). The Court decided the social work testimony was admissible in this case.

Mother objected to the testimony of three other therapists, claiming their testimony should have been excluded under the patient-psychotherapist privilege created by M.G.L. c. 233 §20B.[47] One therapist had an M.Ed. and did not meet the statutory definition of a psychotherapist that would warrant the privilege. One therapist was a psychiatrist and the other a psychologist, who testified at trial. The SJC wrote: "The mother is not entitled to challenge such testimony. General Laws c. 233, § 20B, makes clear that the privilege may be asserted only by the patient, or, if the patient is incompetent, by a guardian appointed to act on his or her behalf. See *Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption*, 399 Mass. 279, 290 n.21 (1987) ("Because the privilege belongs to the patient, it

[47] Referring to the statute, the SJC indicated the following definition: "'Communications' includes conversations, correspondence, actions and occurrences relating to diagnosis or treatment before, during or after institutionalization, regardless of the patient's awareness of such conversations, correspondence, actions and occurrences, and any records, memoranda or notes of the foregoing."

appears that the burden should be on the patient to assert the privilege").[48] *In a case such as this, where the parent and child may well have conflicting interests, and where the nature of the proceeding itself implies uncertainty concerning the parent's ability to further the child's best interests, it would be anomalous to allow the parent to exercise the privilege on the child's behalf* (emphasis added). The anomaly is magnified when, as here, neither the child's attorney nor the guardian *ad litem* chose to exercise the privilege." (*Diane,* at 201-202).

The court found: "At the hearing on a petition by the Department of Social Services to dispense with the need for a mother's consent to the adoption of her minor child,

1. the judge properly admitted, under exception (*d*) to the social worker privilege created by G. L. c. 112, § 135, testimony by three social workers concerning information acquired in conversations between them and Mother or the child; (*Diane,* at 198-200)
2. the judge properly admitted testimony by a certain witness concerning information allegedly acquired in contravention of the patient-psychotherapist privilege created by G. L. c. 233, § 20B, where the witness was not a "psychotherapist" as defined in § 20B; (*Diane,* at 201)
3. there was no error in admitting the testimony of a psychiatrist and a child psychologist concerning their conversations with the child, who was their patient, where neither the child's attorney nor the child's guardian *ad litem* chose to exercise the privilege, and where the child's mother, who was not their patient, was not entitled to challenge the admissibility of such testimony." (*Diane,* at 201-202)

Comment: This is the most relevant case on point regarding the necessity to have a special, separate GAL to waive the testimonial privilege of a child patient in therapy, whose parents are involved in litigation in family or juvenile court. One has to extend the reasoning in this case of TPR, in which the parent and child might have competing interests, to domestic relations cases in which each parent's interests compete with one another, and either one might have different interests than the children.[49] Since one of the basic needs of a child in divorce is to be free from inter-parental conflict, by their very nature these domestic disputes (i.e. custody, visitation, etc) highlight how adverse to the child's interest is the litigation itself, absent inadequate parenting by one parent. There had been discussion on a local listserv (MAGAL) about how much one could generalize this finding to other cases where non-litigating, divorced parents wish to waive a child's therapeutic privilege. It would appear that *Diane's* finding might apply where there is a foreseeable likelihood of litigation, otherwise

[48] "It does not appear that a guardian was appointed for the specific purpose of waiving or exercising the child's patient-psychotherapist privilege. See G. L. c. 233, § 20B. A previously appointed guardian *ad litem* was allowed to waive the privilege with respect to Dr. Vodvarka's testimony. We note, without deciding the question, that waiver by the guardian *ad litem* was probably an appropriate procedure. See G. L. c. 233, § 20B ["A previously appointed guardian shall be authorized to [exercise or waive the privilege on behalf of an incompetent patient]"]. We need not discuss the propriety of the procedures in this case, however, because the mother is not entitled to challenge the procedures relating to waiver any more than she is entitled to challenge the admission and consideration of the psychotherapists' testimony." (*Diane,* at 202).

[49] In the domestic relations case of *Rolde v. Rolde*, 12 Mass. App. Ct. 398 (1981) the Court stated, "The "best interests" principle requires that the narrow focus be on the interests of the child. "[P]arents [too often] cannot be relied upon to assert the best interests of the child[ren] adequately because of their conflicting economic and psychological stakes in the outcome." (*Rolde,* at 404).

Diane could easily constitute state interference in typical parental functioning,[50] which would ordinarily include releasing information from a child's therapist to other caregivers, such as school personnel or pediatricians, among others. In starting an assessment, a GAL could ask the attorneys to file a motion for the court to appoint a guardian to waive the privilege, if the GAL believed the otherwise privileged information to be essential to understanding the case, and he or she could not obtain that data in any other fashion (such as from interviewing the child). Ideally, such a motion should be filed at the outset of a case so that the determination occurs in a timely fashion.

While this casebook rarely cites out-of-state cases, a recent one from the Supreme Court of our sister state of New Hampshire is particularly instructive, since it addresses the issue in the context of a custody dispute. In that case, the father wanted to review the children's therapy records, as he believed they would provide evidence of the children's alienation from him by the mother.[51] The Court held that, when a child is in the midst of a custody dispute, the "parents do not have the exclusive right to assert or waive the privilege on their child's behalf." That process requires fact-finding by the trial court as to whether the waiver is in the child's best interest. They cited, *inter alia,* the Massachusetts case, *Adoption of Diane,* in noting, "The weight of authority in other jurisdictions supports protection for the therapy records of children who are at the center of a custody dispute or whose interests may be in conflict with their natural guardians." This case is worth reading, because it is on point with respect to custody disputes and because it provides a rationale for public policy that supports the value of child patient – therapist confidentiality. There is also a discussion in that case about regulations contained in the Health Insurance Privacy and Portability Act (HIPPA), in which health care providers may not release information to a minor's personal representative (parent or guardian), if that release is prohibited by statute or case law, or if, in the health care professional's judgment, such disclosure would not be in the interest of his or her patient.

[50] The U.S. Supreme Court in the grandparents' rights case of *Troxel v. Granville,* 530 U.S. 57, 66 (2000) reiterates the principle, 'the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."

[51] *In the matter of Kathleen Quigley Berg and Eugene E. Berg,* 2005 N.H. Lexis 152, available at http://www.courts.state.nh.us/supreme/opinions/2005/berg/112.htm. I thank Adam Rosen for alerting me (and MAGAL) to this case.

ADOPTION OF SAUL

Massachusetts Appeals Court

441 Mass. 257 (2004)

Keywords: Dispensing with parent's consent, Visitation rights, Adoption, Privileged communication, Communication between patient and therapist, Medical record.

Background: Mother had been hospitalized in 2000 for psychiatric problems (she had a long history of schizophrenia with multiple hospitalizations), but refused to take her medication upon discharge. When she was transferred to a public mental hospital, during that inpatient admission she gave birth to Saul at a local general hospital. At that hospital, mother had been court-ordered to take her medication. She also had diabetes and was non-compliant with her medication for that disorder. DSS assumed custody of Saul and placed him in foster care. Upon discharge from the public mental hospital, mother then moved back into her former group home, but still refused medication. Saul had been placed in foster care, but mother visited him there for an hour every other week for 17 months, although DSS offered weekly hour-long visits. Mother was often late to those visits and also refused parenting training that DSS provided. During the visits, social workers often had to intervene to help Mother with ordinary childcare tasks (e.g. diapering, comforting). Mother did not interact with Saul during visits and was reluctant to hold him close to her. She also had difficulty in understanding directions of any degree of complexity. The trial judge found that her limitations, both cognitive and psychiatric, made it unlikely that she would be able to appropriately parent Saul.

During the trial, evidence from her psychiatric records was introduced. She objected, first, on the basis that she had not waived her privilege and, second because her diagnosis had been introduced into evidence from the records. She said the therapist had required communications on her part in order to determine the diagnosis, and therefore the diagnosis should have been excluded. In the discussion, the Court noted that "communications" between patient and therapist had to be made "relative to the diagnosis or treatment of a patient's mental or emotional condition," citing G.L. c.233 §20B. The statute defined the various terms, such as "patient" and "communications," and noted that the legislative intent was to protect such information for the purpose of effective treatment. It states that a "patient" is a "person who during the course of diagnosis or treatment, communicates with a psychotherapist," as applicable to marital therapy, family therapy, or consultation in contemplation of such therapy, but does not necessarily involve institutionalization. "Communication" includes "correspondence, actions, and occurrences," which relate to diagnosis or therapy, but do not include the diagnosis itself. Only the communications necessary to make the diagnosis are protected, but not the diagnostic label. The Court went on the state that a finding of unfitness could not be based solely on the diagnosis or on the conclusion that mother suffers from a mental illness. They noted this is "relevant only to the extent it affects a parent's capacity to assume parental responsibility and the ability to deal with a child' special needs," (*Adoption of Frederich*, 405 Mass. 109 (1989). In *Saul*, there was

a significant and demonstrable connection between Mother's mental illness and her inability to parent her child.

The Court struck from the record testimony by the psychotherapist about predictions of future behavior, which were based on confidential communications. This was information beyond testimony of simple diagnosis. In the course of mother's treatment, she was forced to take medication by court order and she signed a statement that she understood that her conversations with the medicating psychiatrist would not be protected (Lamb statement). Such information was thereby not privileged.

Comment:

- The case, among others, suggests that certain information might be accessible from a child's therapist with parental authorization and court appointment, such as the identity of the therapist, number and frequency of visits, diagnosis, or "general substance of communications."

- In the footnotes (6), there is an extensive discussion of the testimonial privilege for patients who have been hospitalized and where that begins and ends. It suggests that, when having a parent sign a release of information for psychiatric records, the authorization should clearly state that it includes therapy notes, and that this information thereby becomes discoverable (that is, no longer confidential), but only within the confines of the litigation.

    - The Court raised the question about whether certain diagnoses "so implicate a patient's confidential communication that the diagnosis ought to be privileged," referencing diagnoses such as fetishism or exhibitionism, among others. They decided to leave this for a case-by-case determination.

- Two questions that arise are whether Mother was having trouble understanding directions about parenting from social workers observing her visits, and if so, how was she competent to understand the Lamb statement? Understandably, these are two different cognitive functions and it did not appear that she raised the issue in court of her competence to understand the warning. When GALs are giving Lamb warnings to minors during investigations, it is arguable at what age these explanations are understood by the children receiving them. Comparable research in this area might be studies of adolescents' ability to understand the Miranda warning.

- Another logical question is how could a diagnosis be admissible if it derived in large part from the patient's conversations with the therapist? In most instances, the diagnosis would not be possible without the patient describing symptoms to the therapist. Obviously, there are other data upon which a diagnosis can be based, such as observable behavior (patient actions and verbalizations reported by ward staff or by family members) that would be admissible. However, using G.L. c. 233 § 20B, in *Diane* the Court defined 'Communications' as including "conversations, correspondence, actions and occurrences *relating to diagnosis* (emphasis added) or treatment before, during or after institutionalization, regardless of the patient's

awareness of such conversations, correspondence, actions and occurrences, and any records, memoranda or notes of the foregoing." (*Diane*, at 200). Thus, diagnosis seemed to this writer inextricably related to the patient's communications, but in this case (*Saul*), the diagnosis was admissible, while the communications were not.

GRANDPARENTS' RIGHTS

ELSA K. **JONES** V. ABIGAIL S. **JONES**

Supreme Judicial Court of Massachusetts

349 Mass. 259 (1965)

Keywords: Parent and Child, Modification of decree, Guardian *ad litem*, Divorce, Custody of child, Report of guardian *ad litem*.

Background: This is a case that heralded by 30+ years the 1999 *de facto* parenting case of *Youmans v. Ramos*, 429 Mass. 774 (1999). The biological parents of Wendolyn, Abigail and E. Thomas Jones married in New Hampshire in October 1959. They moved to California, where they had their daughter in April, 1960. They separated, and Mother and daughter returned to Massachusetts, where they lived for a time with her parents. Mother then went to the British Virgin Islands (BVI) to seek a divorce, temporarily placing Wendolyn with the paternal grandparents (Elsa Jones and husband). In the initial BVI divorce decree of December, 1961, Mother retained custody, while Father had visitation. After returning to Massachusetts that month, she agreed to leave her daughter with the paternal grandparents until she obtained the final decree. Wendolyn was about 20 months old at that time. She then moved back to BVI, despite pleas from both sets of grandparents, because she enjoyed her life there and had made friends. In November, 1962, almost a year later, she visited her daughter in Massachusetts for a few days. She was seeking work in New York, but was too "unsettled" to take Wendolyn. She left for New York, leaving no address, and did not come back at Christmas to see her daughter. She vacillated about whether she would keep custody, but then toyed with a plan in March, 1963 to take Wendolyn with her for six months to Hawaii, Florida, or San Francisco the following year. Shortly after that, the paternal grandmother filed a motion for temporary custody, which was granted. Wendolyn was just under three years old at that time and paternal grandmother had cared for her for about 15 months.

In May, 1963, Mother moved to Miami Beach, living at a hotel where she worked. She was living with a woman who had just had a baby out of wedlock. She told paternal grandmother she intended to take Wendolyn with her to Florida. However, her job as a cruise hostess would have required her to be away from her daughter for days or weeks at a time. Mother petitioned the court to revoke the temporary custody order, while paternal grandmother filed a motion to make the decree permanent. Despite Mother's motion for custody in May, 1963, when she visited the area in August, 1963, she failed to see Wendolyn, although the paternal grandparents had invited her to do so. When she was here a few months later in November, 1963, she again did not take the opportunity to see Wendolyn. That totaled about a year since she had last seen her daughter and almost two years during which time the paternal grandparents had raised Wendolyn. The paternal grandfather was a physician, he and his wife had a comfortable home and a summer residence on Cape Cod, and Wendolyn, according to the judge, was well-adjusted and happy in her home with her grandparents. Father, who lived and worked in Boston, had been seeing Wendolyn on weekends, was "devoted" to her, and

the girl loved him. The judge found that no one on Father's side of the family had made any attempt to alienate Wendolyn from Mother. Part of the basis for the decision was the history of the very cavalier attitude that Mother had, first, toward Wendolyn's needs for a mother-daughter relationship, and second, toward her daughter's need for stability.

The judge decided that the temporary order of custody to the grandparents should be permanent in the interest of the "happiness and welfare of Wendolyn." Wendolyn would have been living with her paternal grandmother for about two years. The SJC said that the governing issue was the welfare of the child "as a matter of law and of humanity." (*Saul*, at 264). The appellate case was heard in February, 1965, meaning almost another two years had passed.

A secondary issue that Mother appealed was the admission of GAL reports into evidence. The SJC dismissed this appeal with the explanation that the reports were available to counsel and the parties in accordance with G.L. c. 215 §56A. The fact that the report was hearsay was not unconstitutional. It was also acceptable for the GAL to have included recommendations, since it was clear from the findings that the responsibility for the decision in the case was that of the judge and not that of the GAL.

Comment: This is a relatively early domestic relations case in which the SJC awarded custody of a child to a non-biological parent. At that time, the SJC did not use the language common to later *de facto* parenting cases, but clearly understood, first, that the grandparents had been acting in the role of Wendolyn's parents, and second, that she was happy and had adjusted well to them and their caretaking. It was interesting that, while Father was involved, he did not seek custody. Lastly, it was evident that Mother's behavior showed a consistent lack of interest in caring for her daughter, and her personal life evidenced a pattern of instability. If that had been a state intervention case, she might not have been deemed a fit parent. This is also a case wherein the SJC clearly focused on the happiness and welfare of the child as the primary issue and not the interests or rights of the parents. Compare this with *Youmans*, where Father remained interested in his daughter's welfare, maintained some contact with her over years, and provided financial support, during the time the maternal aunt raised the child.

As for the GAL issue, one objection among some family forensic specialists, mental health professionals and attorneys alike, has been that offering a recommendation on the ultimate issue (e.g. custody) is a usurpation of the role of the fact-finder, or judge.[52] It is clear in this case that, *from the SJC's perspective*, that objection is irrelevant, at least on legal grounds,[53] since the judge can accept all, part, or none of a GAL's recommendations in forming his or her judgment of a case.[54] As long as the judge does not swallow whole the GAL's opinions without exercising his or her own critical judgment, (*Delmolino v. Nance*, 14 Mass. App. Ct. 209 [1982]), there is no risk of the GAL assuming the role of the fact-finder.

[52] For further discussion of this debate, see the Afterword in this casebook.
[53] As noted elsewhere in this casebook, at the time of this publication, Massachusetts' Category E GAL's (evaluators) may make recommendations in their reports, while recent court standards for Category F GAL's (investigators) prohibit recommendations, absent a specific instruction in the order of appointment to do so.
[54] Alex Jones cautioned that case law has evolved and new justices have assumed seats on the appellate courts, so it was possible that they could reach a different result today.

JOHN D. BLIXT vs. KRISTIN BLIXT & another.[55]

Supreme Judicial Court of Massachusetts

437 Mass. 649 (2002)

Keywords: Grandparent visitation, Grandparent, Parent and Child, Interference with parental rights, Minor, Visitation rights.

Background: This was a very long case – the footnotes are as interesting as the text - in which the SJC dealt with two important constitutional issues, due process and equal protection, that are not relevant for the purposes of this summary. The facts were that the biological parents had not married, but shared legal custody of the child, who lived with Mother. Paternity had been adjudicated. The maternal grandfather filed for grandparent visitation under G.L. 119 §39D, the grandparent visitation statute. Mother *and* biological Father, the latter being the plaintiff-grandfather's own son, opposed his desire to see the children. It was unclear from the case report what had been the extent of his actual relationship with the child. The trial court denied the maternal grandfather's motion on substantive due process grounds (supporting a competent parent's right to make decisions in the best interest of the child without state interference). The SJC quote was:

> A judge in the Probate and Family Court, with respect to the mother's due process challenge, concluded that the statute was unconstitutional because it infringed on the defendants' fundamental right to make decisions "concerning the care, custody, and control of their child." The trial judge reasoned that the statute "contains no presumption that [the defendants] are acting in [the child's] best interest in denying visitation, nor . . . contains a requirement that the plaintiff demonstrate how [the child] is harmed by the denial of visitation." The grandfather appealed, and we granted the mother's application for direct appellate review. (*Blixt*, at 651).

The SJC decided that the statute was constitutional in terms of due process and equal protection. It vacated the trial court judgment and remanded the case for further proceedings.

In clarifying the statute, however, the SJC referenced the US Supreme Court grandparent visitation rights case of *Troxel v. Granville*, 530 U.S. 57 (2000), which supported the rights of fit parents to make decisions for their children. The Massachusetts statute requires a showing of harm to the child due to the lack of grandparent contact, particularly in non-intact families. The same distinction does not apply to intact families. The statute in *Troxel* (Washington State statute) was overly broad, but the Massachusetts statute was more narrowly drawn and passed constitutional muster. The SJC held:

> To obtain visitation, the grandparents must rebut the presumption (that a fit parent is competent to make a decision for his or her children). The burden of proof will lie with them to establish, by a preponderance of the credible

[55] The biological father.

> evidence, that a decision by the judge to deny visitation is not in the best interests of the child. *More specifically, to succeed, the grandparents must allege and prove that the failure to grant visitation will cause the child significant harm by adversely affecting the child's health, safety, or welfare. The requirement of significant harm presupposes proof of a showing of a significant preexisting relationship between the grandparent and the child (emphasis added).* In the absence of such a relationship, the grandparent must prove that visitation between grandparent and child is nevertheless necessary to protect the child from significant harm, such that the state would then intrude into a non-intact family. Imposition of the standards just stated, as explained in specific written findings by the judge, ensures a careful balance between the possibly conflicting rights of parents in securing their parental autonomy, and the best interests of children in avoiding actual harm to their well-being." (*Blixt*, at 658). The SJC concluded that Massachusetts's statute was drawn narrowly enough to meet that criterion and was, therefore, constitutional. It also said that this "standard does not require *de facto* parent status on the part of the grandparents, but the standards are consistent with our cases concerning *de facto* parents." (*Blixt*, at 658).

The SJC decided that a grandparent would have to make an initial showing that he or she can meet the burden of proof to overcome the presumption that the competent parent, who denied visitation, was acting in the child's best interest. It would require a "detailed and verified affidavit setting out the factual basis relied upon by the plaintiffs (i.e. grandparent(s)) to justify relief." (*Blixt*, at 666). The grandparent would have to satisfy that burden of proof by a preponderance of the evidence.[56]

The dissent complained that the majority was reinterpreting the statute so that grandparents would not be legally capable of filing a motion for visitation, when otherwise fit parents are opposed to it. The majority held that *Troxel* eliminated a pure "best interest" test as the standard upon which to decide grandparent visitation. It stated that the requirement to simply file an affidavit claiming significant harm in the absence of visitation would result in protracted and stressful litigation. The dissent noted:

> Fit, competent parents will still be hauled into court, and required to pay legal fees, to explain to a judge their reasons for deciding not to let their child visit with a particular grandparent on particular terms. In order to defeat the request for visitation, they may have to "expose what can only be described as the family's 'dirty linen'." (*Blixt*, at 678-79).

The dissent suggested strongly that the intent of the statute was to further the interest of grandparents, who might not have influence in the lives of their grandchildren, rather than to serve the best interest of their grandchildren themselves. It suggested the statute was overly broad in that it included any child whose parents did not live together, married or otherwise, straight or gay, and overly narrow in that it does not include children of intact marriages who may have the need of close relationship with a grandparent.

[56] Packenham, (2004) at 445

Comment: The case focused almost exclusively on the two constitutional issues rather than on the human aspects of the case itself. That side of the story might have been interesting, if the decision had offered some detail about what relationship the grandfather actually had with the child before his contact was severed. Moreover, apparently the grandfather's relationship with both of the parents was negative (or perceived as negative with respect to the child), since even his own son – Father - who did not live with Mother, did not want him to visit the child.

The following are the important issues in this case for a GAL assessing a grandparent visitation case. It would appear, first, that the litigation would have passed the initial demonstration that the grandparent could meet his or her burden of proof, such that the court would appoint a GAL to investigate. That said, it seems:

- Unmarried, competent parents, who live apart from one another, are presumed to be acting in the child's interest when they deny a grandparent visits, but,
- One has to consider the impact on the parent-child relationship of any recommendation/order for grandparent-child visitation.[57]
- Grandparents who wish to visit against the parent's wishes should have had a significant relationship with the child(ren) before contact was denied, similar to a *de facto* parent. Alternately, they must show that, in the absence of their contact with the children, the latter will suffer *significant* harm (emphasis added). If such a pre-existing relationship did not exist, the grandparent would have to show their contact with the children is essential to prevent significant harm to the children. It is interesting to consider what the legal difference between significant and substantial harm would be, if any, since the SJC did not use the latter term. To this writer, significant harm means the children are not just upset or distressed at not being able to see their grandparent(s), but their stress is sufficient to impede their development in some way.

In *Youmans v. Ramos*, 429 Mass. 774 (1999), the *de facto* parenting case, the SJC noted that it was in the child's interest "to be protected from the trauma caused by (the severing of) that relationship." (*Youmans*, at 785). One could reasonably assume the need for some demonstration of trauma or potential trauma to reach the threshold of "significant harm."

  - A GAL should explore the before/after scenario, reviewing the developmental status of the children when they were seeing their grandparent(s) and their developmental path since the cessation of contact with grandparent(s). That means enough time has to have elapsed since the cessation of contacts for any behavioral changes to emerge.
  - If the grandparents' contacts prior to denial of contact were sporadic, it would seem impossible to support a claim of significant harm to the children. Without a pre-existing attachment, how could they argue that their contact was essential to forestall future harm, if the biological parents were competent?

This case begs comparison with *Adoption of Hugo*, 428 Mass. 219 (1998) in the context of state intervention cases. In that case, the SJC transferred the care of Hugo from one pre-adoptive parent, with whom he had lived for two years, to another pre-adoptive parent it

[57] Packenham, (2004) at 444

deemed better able to meet the special needs of Hugo. It reasoned that the "trauma of his removal from the current (foster) home is outweighed by the long term benefit of moving to a family better able to help him address his developmental challenges." (*Hugo*, at 224). Certainly, the first pre-adoptive parent, having cared for Hugo from ages two to four, could be said to have had a significant relationship with Hugo, and was likely a *de facto* parent, since DSS had placed the child there and supported Hugo's adoption by that parent. The Court was willing to sever that significant bond, admitting there would likely be some trauma, for the potential gain it foresaw to Hugo.

Returning to *Blixt*, without a demonstration of significant harm, would a two year, *de facto* parental relationship by a grandparent akin to Hugo's relationship with his first pre-adoptive parent be considered sufficient to override a competent parent's right to deny grandparental visitation? How much trauma or harm would be sufficient for the Court to order grandparent visitation over the protest of a competent biological parent in order to mitigate the effects of the trauma the Court foresaw due to the termination of such contact? Since *Blixt* referenced the *de facto* parenting case of *Youmans v. Ramos,* 429 Mass. 774 (1999), perhaps it used the relationship that Ramos, the maternal aunt, had with the child, Tamika, (Ramos raised her for several years, beginning in early childhood) as the yardstick against which to measure other parent-like relationships and the potential harm that might ensue from severing them.

ALLEN **DEARBORN** V. AMY **DEAUSAULT** & another

Massachusetts Appeals Court

61 Mass. App. Ct. 234 (2004)

Keywords: Grandparent visitation, visitation rights.

Background: Cohabiting until late 1998, the unmarried parents had a son, born in October, 1995, and a daughter, born in July, 1998. After separation, Father visited the children until summer, 2001, when his substance abuse problems motivated Mother to stop his visits. Pursuant to a modification, the court suspended his visits in October, 2001 and awarded Mother sole legal and physical custody. In July, 2002, Father was arrested and jailed for possession of an illegal substance. The paternal grandfather had a good relationship with Mother and the children until April, 2002, and he saw the children frequently during each month, took them to local fairs, and twice on camping trips. He also babysat occasionally for the children upon Mother's request. He provided them emotional support. The maternal grandparents, who lived nearby, also provided company and support for the children.

When Mother limited Father's access due to his substance abuse, she asked his father (i.e. the paternal grandfather) to likewise limit Father's contact with the children. Despite that, some contact continued through the paternal grandfather. The paternal grandfather and grandmother (they, too, were never married) were then placed in the position of having to control their son's contact with the grandchildren, when those children were with them. In April, 2002, the paternal grandfather, who had the children for the night, told Mother that Father was going to be coming by the house, but he would return the children beforehand. Mother and her fiancé drove to the paternal grandfather's house and picked up the children. She believed Father's visit was a violation of her understanding with the paternal grandfather.

The trial judge found that the children were happy and well-adjusted. Mother's fiancé intended to adopt the children after his marriage to her. Father, who had never paid child support, had surrendered his parental rights, negotiating a plan with Mother in which his parents would maintain some contact with the children. The judge determined that the paternal grandfather had a "substantial, meaningful relationship with the children," (*Dearborn*, at 236), similar to that with the maternal grandparents, and important because of their Father's absence/exclusion from their lives. The judge decided that Mother's decision in April 2002 was an overreaction to the situation and "may cause them (children) emotional harm by denying them reasonable access to one who had been a consistent caregiver." (*Dearborn*, at 236). The judge anticipated that this separation from the paternal grandfather "may harm their ability to form stable relationships." (*Dearborn*, at 237). The judge questioned the "genuineness of the mother's motives" in her exclusion of the paternal grandfather. He ordered one overnight visit with paternal grandfather per month, contingent on the Father not being present.

The Appeals Court took pains to cite the judge's findings in some detail. They reasoned that, while he had couched his decision in the language of *Blixt v Blixt*, 437 Mass. 649 (2002), they

determined that his findings were not enough to show that the importance of the paternal grandfather in the children's lives could overcome the presumption that the custodial mother had the right to deny visitation in the child's interests. *Blixt* stated that the custodial parent has a "fundamental liberty interest" to raise her own child in the ways she saw fit, and to protect them from "actual or potential harm." (*Blixt,* at 655-56). Blixt further required that the grandparent show "that the failure to grant visitation will cause the children significant harm by adversely affecting (their) health, safety, or welfare." (*Blixt*, at 658). There also has to be evidence of a "significant pre-existing relationship." (*Dearborn,* at 237) or one in which there is "close bonding." (*Dearborn*, at 238). However, there was no requirement that the relationship rise to the level of a *de facto* parent, just that the disruption of that connection would potentially cause significant harm to the children.

The Appeals Court decided that the instant relationship was a common grandparental one in which there was frequent contact, which "while meaningful and nurturing, is not the kind of relationship from which significant harm to the children can be inferred from disruption alone," (*Dearborn*, at 238) particularly since the findings showed the children to be doing very well. They did not consider the judge's designation of Mother's negative motivation as a factor in his decision, which, by itself, would not be enough to override the parent's decision to stop contact. They reversed the trial court, but allowed the paternal grandfather to re-file a motion within 30 days of receiving their decision, if he could show significant harm. In the final footnote (8), they said, "We also think it possible that had the judge been aware of the standard we have articulated, he might have appointed a guardian *ad litem* to evaluate the relationship between the grandfather and the children." (*Dearborn*, at 238).

Comment: This case was heard on March 19, 2002 and decided by the trial court on May 26, 2002.Thus, at the time the trial judge published his decision, *Blixt*, the controlling case, had not yet been decided (until September 9, 2002). *Blixt* was not law in May, 2002, although the U.S. Supreme Court case of *Troxel v. Granville,* 530 U.S. 57 (2000) had been published. While the trial judge pointed to the meaningful relationship between the children and their grandfather and the fact of *potential* harm, apparently that reasoning was insufficient, because he failed to show actual harm, since the children had been doing so well. For most of the time that they had done well, the paternal grandfather had been involved in their lives, according to the record. It is hard to understand this decision, since the visitation ended in April, 2002 and the court heard the case just three months later, hardly enough time to show actual harm. The Court characterized his relationship as typical for grandparents, which also seemed to be a factor, even though they also said that this form of relationship did not have to rise to the level of a *de facto* parent.

The other aspect of the decision that was relevant was the Appeals Court suggestion that this is the kind of case that could use the information gathered from a GAL. It raises a question of how does a GAL determine what is the normative kind of grandparent-grandchild relationship? Is there some data on how much time the "average" grandparent spends with the children or how close the children are to their grandparents? The Court seemed to know this answer, but it is not clear on what basis they came to that conclusion or on what basis a GAL would make some finding to a court. In the end, it seems to this writer that each grandparent-grandchild relationship is judged on its own merits and that any finding of how close or

"significant" this relationship is or what potential harm might ensue from its termination is case-specific. Like many other aspects of family law, the absence of any group data leaves decisions open to the "common-sense" and personal values of the court (in the context of precedent, of course), which is not to say that GALs do not have to cope with those same limitations.

Another aspect of this case suggests a broader idea. The court seems to be saying more often that the critical relationships in a child's life – the one to which they will give the greatest weight – is that of the biological parents (or one in which a non-biological parent has fulfilled the same function, a *de facto* parent). Those relationships will receive far more judicial "credit" than those of extended family, including grandparents. Moreover, a parent's decision to include or exclude whomever he or she wishes is within the parent's liberty interest, the constitutional due process right, if you will, of the role. The Court has often couched its decisions in terms of the value of extended family and close social networks, such as in removal cases, but when it comes down to it, those are dispensable if a parent (reasonably?) decides to remove them from a child's life, because the Court gives wide latitude toward a fiot parent's decisions. As noted in other cases, the balance seems to swing toward court or state intervention when it comes to the high probability or actuality of significant harm to the child.

DE FACTO PARENTING

C.C. v. A.B. & another

Supreme Judicial Court of Massachusetts

406 Mass. 679 (1990)

Keywords: Paternity, Parent and Child, Right to visit illegitimate child.

Background: This case is very similar to the U.S. Supreme Court case of *Michael H.* v. *Gerald D.*, 109 S. Ct. 2333 (1989). Here, C.C. (putative Father) and A.B. (biological Mother) lived together, conceived, and had a child, a girl, during that period of cohabitation. At that time A.B. was married to but separated from her husband, although they never divorced. After the child was born in May, 1986, C.C. spent much time as a caretaker. The child was also baptized in C.C.'s religion. The probate court case began in March, 1987. A.B. had, by then, reconciled with her husband. As the case report stated:

> The plaintiff's name is listed as "Father" on the child's birth certificate and on the child's baptismal record. The child bears the plaintiff's name. The mother has admitted that the plaintiff may be the Father of the child. After the child's birth, the plaintiff, the mother, and the child lived together. The plaintiff has indicated, both by his actions and his words that he has an interest in continuing his relationship with the child. On this record, there is sufficient evidence of a substantial parent-child relationship between the plaintiff and the child to allow the plaintiff to proceed with his paternity action." (*C.C.*, at 689)…. Accordingly, in cases such as this, the Probate Court must hold a preliminary hearing to determine the extent of the relationship between the putative Father and the child. This is, in its nature, a fact-based question. The court must look at *the relationship as a whole and consider emotional bonds, economic support, custody of the child, the extent of personal association, the commitment of the putative Father to attending to the child's needs, the consistency of the putative Father's expressed interest, the child's name, the names listed on the birth certificate, and any other factors which bear on the nature of the alleged parent-child relationship.* (*C.C.*, at 690, emphasis added).

The decision reviewed the history of how, first, England and then Massachusetts viewed illegitimacy. It noted that there was a presumption that a child born of a married couple was "legitimate," in that he or she was assumed to be the legal product of the marriage, absent several very clear impediments to the husband's biological fatherhood (such as being away around the time of conception). When those obstacles to fatherhood did not exist, the highest level of proof (i.e. beyond a reasonable doubt) was necessary for a putative Father to rebut that presumption, because of the state's compelling interest in protecting the sanctity of the marriage and family. However, over time, women were legally able to seek determination of paternity and child support from men who fathered their children out of wedlock, and the state also was able independently to seek paternity determinations and child support from such

men. The court determined that fairness required that putative fathers have a similar right to have paternity established in situations where Mother was married at the time, if that putative Father could show a prior substantial relationship to the child. Given the issues in this case, the circumstances of the child's birth was no surprise to A.B.'s husband, and if C.C. could show, by clear and convincing evidence (lowering the reasonable doubt standard of the past), proof of a substantial relationship with the child, he would be able to move forward legally with his petition to be adjudicated the child's Father and have a continuing relationship with the child. As the SJC stated, "The existence of a substantial parent-child relationship is, in our view, the controlling factor in determining whether this plaintiff may pursue his claim." (*C.C*, at 689).

The dissent based its disagreement on the above-mentioned U.S. Supreme Court case of *Michael H*. and quoted liberally from Justice's Scalia's majority opinion. It claimed that the majority in this case based its reasoning on social policy grounds, not legal precedent or the intent of the legislature in its enactment of General Laws c. 209C (1988 ed.), which provided for the rights of children born to parents who are not married to each other.

Comment: This case indirectly represents one of the early building blocks of the concept of *de facto* parenting. It does so by providing initial "building blocks" for the idea that a parent (biological-putative or unrelated) can have a "substantial relationship" with a child that warrants some protection by the court. The unique fact pattern in this case was that the birth was not the product of a casual relationship between the biological parents, but one in which they lived together during and after the child was born, and in which the putative Father had been a significant caregiver to the child.[58] It was on the basis of the prior "substantial" relationship, not just the possibility of biological parenthood, that the SJC allowed C.C. to proceed with his case to be a legal part of the child's life. The SJC did not analyze the facts from the perspective of the child, and whatever attachment she might have had to the putative Father was not mentioned. In fact, the focus is so parent-oriented that the decision referred to the gender of the child just once.

The important issue for GALs is the initial definitions of "substantial" in determining whether a parent was involved enough to warrant the possible court permission of an ongoing relationship against the wishes of the biological or primary parent. From the writer's perspective the *de facto* parent case of *Youmans v. Ramos* 429 Mass. 774 (1999) has its beginnings in *C.C. v. A.B.* Important also are the factors the SJC delineated as critical in analyzing the nature of the role a parent might play. Together, they provide a cognitive map that the GAL can use to investigate the facts in order to assess the quality as well as quantity of parenting.

[58] Of interest was the C.C.'s period of parenting was less than a year, whereas in *Jones* (p. 95 above), the grandparents had taken care of their grandchild for two years. Contrast these cases with *Youmans* (next page), where the aunt cared for her niece for eleven years. All of these apparently fit within the broad definition of a significant parent (or parent-like) – child relationship. Each case has different fact patterns, since in *Jones*, there was evidence of Mother's incompetence as a parent and the outcome might have changed if she had been a capable and interested parent, as Father was in *Youmans*.

DONALD R. **YOUMANS vs.** CYNTHIA M. **RAMOS.**

Supreme Judicial Court of Massachusetts

429 Mass. 774 (1999)

Keywords: Guardian. Adoption, Visitation rights, Minor, Visitation rights, Parent and child, *De facto* parent.

Background: This was the first of two cases on the issue of *de facto* parenting decided within a week of each other. The SJC held that an aunt, Cynthia Ramos, who had a long and nurturing relationship with her eleven-year old niece, could have visitation with that child when the biological Father, Donald Youmans, was opposed to it. Tamika Youmans was a twin, who was born in 1986 and whose sister was sickly from birth. After Tamika and her sister's birth, biological Mother moved to Massachusetts and lived next to her sister, Ramos, who cared for Tamika while Mother took care of the ill twin sister. Tamika had lived most of her life with her aunt, who had previously been appointed as her permanent guardian. The twin sister died before age two. Mother then died in 1991 when Tamika was five years old, with the aunt becoming Tamika's primary caretaker. Father had had never lived in Massachusetts with Tamika.

> According to the aunt's undisputed testimony, Tamika learned to walk, to talk, and to read in her care; the aunt arranged for Tamika's medical care; accompanied her to all of her appointments; oversaw her progress at school; took her to church every Sunday; and arranged for and participated in all of her extracurricular activities. Tamika refers to the aunt as her "mom," and to the aunt's biological children as her "brothers" and "sisters." The aunt testified that she has cared for Tamika "like a child of my own." She was in every sense Tamika's *de facto* parent.[59] (*Youmans*, at 776).

The case then details a very complex history involving Father's initial financial support of the children, his filing a motion for custody when he learned of Mother's death, and his then not coming forward to push for custody. He was in the armed services and was stationed abroad, including serving in the first Gulf war. He was discharged from the service in 1995, married a German national, and moved to Georgia. During all this time, he paid child support to the aunt, but made no further attempts to seek custody. Tamika visited him in Georgia several times between late 1994 and mid 1997. In March, 1997, Father filed his second petition to obtain custody of Tamika and to terminate the guardianship of the aunt. The aunt opposed Father's motion, but she did not file for visitation if the court awarded custody to Father. In

[59] "We use the terms "legal parent" and "*de facto* parent" proposed by the Reporters on the ALI Principles of the Law of Family Dissolution. See *ALI Principles of the Law of Family Dissolution* § 2.03(1) (Tent. Draft No. 3 Part 1 1998) (approved at annual meeting May, 1998). The definition of "*de facto* parent " states in relevant part:

"A *de facto* parent is an adult, not the child's legal parent, who for a period that is significant in light of the child's age, developmental level, and other circumstances,

"(i) has resided with the child, and

"(ii) for reasons primarily other than financial compensation, and with the consent of a legal parent to the formation of a de facto parent relationship . . . regularly has performed

"(I) a majority of the caretaking functions for the child." (Footnote 3, at 776).

the interim period before trial, the court allowed Tamika's visitation (in conjunction with a stipulation filed by the parties) with Father in Georgia for April and for summer vacation, and regular telephone contact with him when Tamika was with her aunt in Massachusetts. The trial occurred in July, 1997.

> On August 29, 1997, the judge issued his findings of fact, conclusions of law, and judgment. He found that Father had maintained a "continuing presence" in Tamika's life, had provided financial support for her, and over the years had telephoned, written to, and periodically visited Tamika. He made further findings concerning Father's financial well-being, his living arrangements in Georgia, his planned second marriage, and his planned child care and other arrangements for Tamika. The judge found that there was no evidence that the Father "is unfit to assume full custodial responsibilities of Tamika." The judge vacated the aunt's appointment as permanent guardian of Tamika. However, he found that it was in Tamika's best interests to maintain contact with the aunt and the aunt's family, and, "in light of the role of caretaker and guardian that [the aunt] has played in the first eleven years of Tamika's life," ordered "liberal visitation and contact" between Tamika and her aunt. He ordered Father to assume the costs of visitation because Father's financial resources "greatly exceed" those of the aunt. (*Youmans*, at 779)

Father appealed, claiming that the aunt was a "nonparent" and, as such, the judge had no authority to order the visitation, and the order violated his liberty interest to function as a parent in ways that he saw fit without state interference.

The SJC found that Father had agreed to allow Ramos to care for his daughter for eleven years and had paid child support to Ramos to do so. It held that Ramos had become a *de facto* parent in that she met the ALI criteria for such a role and that Tamika had developed a daughter-mother relationship with her aunt, because of all the parenting responsibilities Ramos had undertaken all those years. It noted that awarding custody to Father would have, by itself, ended the only parental bond Tamika had ever experienced, so it affirmed the judge's decision to order visitation with Ramos since "'the welfare of the child is the controlling consideration in custody proceedings," citing *Stevens v. Stevens*, 337 Mass. 625, 677 (1958). The court said that the potential termination of the mother-daughter relationship was no fault of Ramos, and the child deserved "to be protected from the trauma caused by that relationship."(*Youmans*, at 785). They cite earlier cases in which they note the vulnerability of a child whose bond with his or her *de facto* parent are severed, and comment that competent mental health professionals cannot always predict what harm might ensue from such separations.

The dissent objected to the majority opinion by suggesting that the bond between Tamika and her aunt was akin to that of a child and any other third-party caregiver, such as a nanny. However, the majority found that there was "a world of difference" between the relationship of Tamika to her aunt and that of a nanny. As to Father's objection to the visitation order, the SJC supported the judge's decision, noting that the judge had looked at the history of visitation when Ramos was the active parent, reviewed what agreements the parties made over visitation, considered Father's lack of objection to Tamika seeing her aunt, and had

interviewed Tamika herself. The judge then fashioned a parenting plan that was similar to the one Father had, only this time the aunt would have visitation while Father had custody.

The SJC then stated, "The best interests standard presents the trial judge "with a classic example of a discretionary decision." *Adoption of a Minor* (No. 2), 367 Mass. 684, 688 (1975). "Standards of mathematical precision are neither possible nor desirable in this field; much must be left to the trial judge's experience and judgment. Underlying each case are predictions as to the possible future development of a child, and these are beyond truly accurate forecast." *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 646 (1975). The dissent essentially argued that there was no statutory authority to award visitation to third parties and that the court had not been willing previously to recognize a third party's right to a continuing relationship with a child, although other states had statutes broad enough to encompass that issue. The dissent said that this issue begged for legislative action before the court should make law on its own.

Comment: This case is important for GALs since the question of whether a third-party-adult had been acting as a parent for a child could be part of future assessments. It is useful to have the ALI definition of a *de facto* parent, since that is what the Court used in this case to determine whether Ramos fit that role. The important qualities included performing a *majority* of caretaking functions for a significant period of the child's life (particularly early childhood), without expectation of remuneration, and with the consent of the legal parent. The case becomes entwined later with grandparent visitation issues, since after *Blixt v. Blixt*, 437 Mass. 649 (2002) the Court will use *Youmans* to look at whether a grandparental relationship would be similar a *de facto* parent relationship, which, if severed, would cause significant harm to the child. In *Youmans*, the Court determined that ending the aunt's relationship with Tamika would cause significant harm to the child, simply because Tamika and Ramos had experienced a daughter-mother relationship from Tamika's earliest life, and it wanted to protect Tamika from the vulnerability inherent in the ending of such a close bond. This writer has the impression that the Court has used a measure of several years in a *de facto* parental role in order to be consistent with its findings in some of the cases involving dispensing with consent to adoption. In one instance the year before (*Adoption of Hugo*, 429 Mass. 219 [1998]), it moved a child from an adequate, pre-adoptive foster home (where he had been for fourteen months) to another pre-adoptive parent who, it decided, could better manage the special needs of the child in question. In that case, it severed a clear bond with the prior foster parent with the explanation that the care the child received by the preferred foster, pre-adoptive parent would outweigh the harm from the separation. However, a critical legal difference in the fact pattern in *Hugo* was that neither prospective adoptive parent, by definition, was biological.

E.N.O. vs. L.M.M.

Supreme Judicial Court of Massachusetts

429 Mass. 824 (1999)

Background: This case has an extensive report. Two women shared a committed, monogamous relationship for thirteen years, clearly intended to become life partners, and had always planned to become parents. In 1991, they elected to do so biologically, deciding that L.M.M. should try to become pregnant through artificial insemination. Before the insemination process began, the defendant and the plaintiff both attended workshops to learn about artificial insemination and parenting issues. E.N.O. attended all the insemination sessions and participated in all medical decisions. L.M.M. became pregnant in Maryland and E.N.O. helped to take care of her through a complicated pregnancy, accompanying her to every visit with her doctors. When the baby was born in February, 1995, E.N.O. acted as L.M.M.'s birthing coach, cut the child's umbilical cord and stayed overnight at the hospital, where staff treated her as a mother. The parties sent out birth announcements naming themselves as parents. The child's last name consisted of the parties' last names. Pre-and post-delivery, they had created a co-parenting agreement in which they expressly stated their intent to co-parent a child, including their intent that E.N.O. would keep her role as parent, even if they were to separate. L.M.M. signed documents authorizing E.N.O. to care for the child as a parent.

After delivery, E.N.O. became the primary breadwinner and, later, was the primary caretaker for about 7 months, due to some medical problems of L.M.M. The child called E.N.O. "Mommy" and L.M.M. "Mama," and told people that he had two mothers. In September, 1997, the parties moved to Massachusetts. In April, 1998, the E.N.O. called an attorney about proceeding with joint adoption of the child. Thereafter the parties' relationship began to deteriorate. The couple separated in May, 1998. Before they had resolved the adoption issue, L.M.M. denied E.N.O. any access to the child. In June, 1998, E.N.O. filed a complaint seeking specific performance of the parties' agreement to allow the plaintiff to adopt the child and assume joint custody. She also sought visitation with the child as well as a winding down of her financial affairs with the defendant. L.M.M.'s motion to dismiss the action was denied.

After a hearing, a Probate Court judge ordered temporary visitation, pending trial, between the plaintiff and the child. The judge applied the "best interests of the child" standard, noting that "children born to parents who are not married to each other are to be treated in the same manner as all other children." See G. L. c. 209C, § 1. The judge viewed several facts as significant. He found that the decision to have the child was made jointly by the plaintiff and the defendant. After the child's birth, the plaintiff had daily contact with the child and "acted in the capacity [of] his other parent in all aspects of his life." The judge further observed that the plaintiff and the defendant "at all times referred to each other as [the child's] parents." In addition, the judge stated, without further description, that the plaintiff was "listed on all contracts and applications as [the child's] parent." (*E.N.O*, at 826).

The judge also relied on the report of the guardian ad litem (GAL). The judge specifically

cited the GAL's finding that the plaintiff was an active parent and appreciative of the child's needs. The GAL stated that "both mothers were clearly involved in [the child's] upbringing." (*E.N.O*, at 826). From all these facts, the judge concluded that temporary visitation was in the child's best interests.

The SJC, under its equity powers, decided it had authority to act in this case. The court's duty as *parens patriae* necessitates that its equitable powers extend to protecting the best interests of children in actions before the court, even if the Legislature has not determined what the best interests require in a particular situation. "In every case in which a court order has the effect of disrupting a relationship between a child and a parent, the question surely will arise whether it is in the child's best interest to maintain contact with that adult." *Youmans v. Ramos*, 429 Mass. at 774, 783 (1999).(*E.N.O*, at 827-28). In *Youmans*, decided just seven days earlier, the Court decided that the aunt was a *de facto* parent, not because she was granted guardianship, "but because she attended to the child's developmental, medical, and educational needs for the five years from the child's infancy to her appointment as temporary guardian." (*Youmans*, at 776). It is worthwhile to quote the Court in this case,

> We acknowledge that the "best interests" standard is somewhat amorphous. We must ask what facts the judge may take into account in determining where a child's best interests lie. Here (in E.N.O.), the judge emphasized the plaintiff's role as a parent of the child. It is our opinion that he was correct to consider the child's nontraditional family…A child may be a member of a nontraditional family in which he is parented by a legal parent and a *de facto* parent. A *de facto* parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The *de facto* parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. See *Youmans*, supra 429 Mass. at 776 & n.3 (1999); ALI *Principles of the Law of Family Dissolution* § 2.03(1)(b) (Tent. Draft No. 3 Part I 1998) (adopted at annual meeting May, 1998). The *de facto* parent shapes the child's daily routine, addresses his developmental needs, disciplines the child, provides for his education and medical care, and serves as a moral guide. See *ALI Principles of the Law of Family Dissolution*, supra at § 2.03(6). (*E.N.O*, at 828-829).

A *de facto* parent does not perform the above tasks for reasons of financial gain, such as a nanny or babysitter. The SJC credited how non-traditional families rear children, suggesting that the children would form significant relationships with those adults, whether biological or *de facto.* The SJC then distinguished cases in which they designated a non-biological parent as a *de facto* one (*C.C. v. A.B.*, 406 Mass. 679 [1990]) and one in which they did not (*C.M. v. P.R.*, 420 Mass. 220, [1995]). The SJC went on to affirm the trial judge's decision that E.N.O. was a *de facto* parent, and reiterated all the parenting tasks she did, and the manner in which both parents publicly announced her role as a parent. They noted that the dissent stated that E.N.O. did not adopt the child, which might have disqualified her as a *de facto* parent. However, the majority of the SJC said that, while that is a factor to take into account, it was not sufficient in itself, especially since L.M.M.'s signed agreements indicated her assent to E.N.O.'s significant role as a parent. The dissent essentially claimed that the majority was making law through its overly broad interpretation of its "equity jurisdiction" regarding

children's welfare and basing its decision on the "hitherto unrecognized principle of *de facto* parenthood as a sole basis for ordering visitation." (*E.N.O*, at 834-35). The dissent believed that the SJC had no basis in case or common law, including *Youmans*, for interfering with the right of a parent who was otherwise acting in concert with current law.

Comment: The dissent (making a clear statement that the Legislature had enacted no such statute pertinent to this case) notwithstanding, the majority in *E.N.O.* created in common law a parental role it intended to use in determining the significance of adults who have acted as parents to children in what it called "non-traditional families." That typically meant same-sex couples, where the non-biological parent did not adopt. However, it could also refer to heterosexual cohabiting couples, where the child was born of a different relationship, but the non-biological "Father" had a long term, significant bond with the child. Despite that, he neither adopted the child nor married Mother (that is, he did not become a stepparent, although the *de facto* parent concept would potentially apply to stepparents, too). Other extended family members who functioned in the role of parents, such as in *Youmans* (decided the week before) would also fit the definition of *de facto* parent.

From a GAL's perspective, what is helpful is the SJC's discussion regarding what parenting behaviors, both hands-on and administrative, are pertinent to determining the significance of that parent, both to the biological parent and to the child or children they would both raise. The SJC, at least on its face, set a high standard in that, for some one to qualify as a *de facto* parent, he or she would have to "perform a share of the caretaking functions at least as great as the legal parent." The goal for a GAL in such as case is to tease out all the "caretaking functions" so that the SJC can decide how comparable were the respective parenting roles of the legal and the putative *de facto* parent. It would also be important to investigate what legal decisions (e.g. co-parenting agreement) or public acts (e.g. birth announcement) were undertaken to solidify the relationship between the child and the putative *de facto* parent before the adult relationship deteriorated. In this writer's opinion, it is not the function of the GAL to determine whether someone has met the standard of *de facto* parenthood, but to provide the data about parenting for the court and to let the court decide how much is enough.

One of the challenges of making such a determination is that the SJC suggests a quantitative solution with criteria such as "at least as great" as in *Youmans* above or a "majority" of the caretaking functions, both meaning 50% or more. Does that suggest the putative *de facto* parent needs to calculate how many hours over the course of the child's life he or she has spent in hands-on or administrative parenting functions to meet the standard? To further cloud the issue, the SJC did not provide a key to determine what priority or weight to give to these caretaking behaviors. It is likely that any trial judge will consider the totality of the evidence without having to credit one kind of parenting function over another, since those preferences can be value judgments. Since weighting or rank-ordering parenting behaviors is a near-impossible task, the challenge to the GAL is to be comprehensive and detailed enough in the report to the court. In that way, the trial judge can make his or her own determination of how much is enough in order decide whether a prospective *de facto* parent has reached that indeterminate threshold of "at least as great."

DEFINITIONS: BEST INTERESTS, MODIFICATIONS, AND LEGAL CUSTODY

KATHY NANCE **DELMOLINO** v. JAMES S**. NANCE**

Massachusetts Appeals Court

14 Mass. App. Ct. 209 (1982)

Keywords: Divorce and Separation, Custody of child, Modification of judgment.

Background:, The parents were divorced on March 15, 1977. Mother was awarded legal and physical custody of Nicole, who was seven years old at the time of divorce, and Father had rights of visitation. Both parents subsequently remarried, Father in 1978 and Mother in 1980. They had a high conflict divorce and Mother filed several contempts against Father for failure to pay support. On February 12, 1979, Father filed a complaint for modification requesting custody of the daughter, but the issue was not marked up for a hearing. In August, 1980, mother got a promotion that required her and her family to move to Ohio. When Father heard of this plan, he filed an emergency order that gave him temporary custody of Nicole for two weeks, but mother had already taken Nicole to Ohio, where Father was unable to locate her for a time. When he did locate her, he went to her hometown and removed her from a school bus and returned her to Massachusetts, where he obtained temporary custody pending the hearing on his complaint for modification. Prior to removing Nicole from the Commonwealth, Mother did not seek the consent of the judge.

Mother then filed a complaint for modification asking permission to remove Nicole to Ohio and both issues were heard together. Subsequently, the judge ordered joint legal and physical custody of Nicole to both parents, but decided that Nicole would live with her Father during the school year and see her mother on various listed holidays, school breaks, and summer vacation. The judge made no decision on Mother's modification motion, and Mother appealed.

Citing relevant precedent, the Court said that an original judgment (as when the court awarded custody to Mother) is presumed to be correct, and a judge must find a relevant change in circumstances, if he or she is to order a change of custody. The change must be "of such magnitude" that it will satisfy the controlling principle, that is, it is conducive to the welfare of the child." (*Delmolino,* at 211). The judge had made a dramatic change, in effect giving physical custody to Father. The trial court said that the obvious change in circumstances was the move to Ohio, but the trial judge's findings in the record showed no evidence that he considered that issue. The trial judge's memorandum was full of praise for each parent's abilities, as well as those of the respective stepparents. There was no information in the record that Mother was unfit in any manner or that her second marriage was harmful to Nicole.

The Court then made reference to a GAL report, which the judge clearly relied upon to a large extent. The GAL noted that it was hard to foresee how another change in schools for Nicole (that is, back to Ohio after being in the Needham schools) would be in her best interest,

particularly since she had been doing well in the Needham schools, while living with Father and stepmother. Father took her from Ohio in October and enrolled her in the Needham schools. The GAL report, which the judge cited, had noted that the child had done well in whatever school she had been enrolled, and that included the Ohio school in which she started the academic year. She had also been doing well with each family and community before the temporary order for the change of custody to Father. The GAL made recommendations that, with one exception, the judge adopted. However, *the GAL failed to consider the law that was relevant to a change of custody* (emphasis added).[60] The GAL determined that "the paramount issue here, (is) namely with which parent as the principal custodian can the best interests and welfare of the child be best served." (*Delmolino,* at 213). The Appeals Court said that the probate court had already decided that issue at the time of divorce and had awarded custody to Mother. The Court then stated, "In sum, there is nothing in the record that shows any relevant change in circumstances that would justify the transfer of custody ordered in this case. The fact that the mother did not seek permission to remove the child from the Commonwealth does not give the judge discretion to order a change in custody solely because of the failure to obtain consent. *Hale* v. *Hale*, 12 Mass. App. Ct. 812, 816 n.5 (1981)." (*Delmolino,* at 214). The Court reversed the decision to transfer custody and indicated to Mother, that if she still wished to remove Nicole from the state, she must file a complaint for modification to that effect.

Comment: Probably the most important aspect of this case is its clear directive, both to the trial court and to the GAL, that it is critical to know under what standard the evaluation is being performed. Thus, the types of questions and fact-finding will be focused on those issues pertinent to the standard. This case was not a typical, first-instance custody dispute, but a modification of an already settled issue of custody. That meant, in more modern parlance, there needed to be a determination of a "material change of circumstances" such that, for the sake of the welfare of the child, a change in the original order, which otherwise was "presumed to be correct," was warranted. It is important to know the law and the standards, whether the question is custody, visitation, removal, etc. While "best interest" is an overriding concern of any assessment, including a modification, the standard is really the threshold question that the court has to answer. The problem for a GAL is know by what measure can he/she determine whether that threshold has been reached. How does one define "substantial" or "material?" For that matter, GALs have no more ability to determine "best interest" than do judges, a fact of life that the court fully understands. All one can do is assess the impact of any change on the child and inform the court about that. It seems that the best strategy, as is useful in removal cases, is to lay out the options in the opinion/recommendation section contingent on whether the court finds there has been a substantial change in circumstances or not, assuming recommendations are permitted in the order.

[60] Henry Bock, Jr. noted that it was "the ultimate responsibility of the Court to apply the law and identify the legal basis for its decision."

CUSTODY OF KALI.

Supreme Judicial Court of Massachusetts

439 Mass. 834 (2003)

Keywords: Minor, Parent and Child, Child Custody.

Background: This case involved a custody dispute between unmarried parents. They had lived together in a Franklin County town from 1995 and had Kali in January, 1998. The relationship then deteriorated because of conflict over Kali's care and the demanding work schedule of Father. The parents separated and Mother took Kali and went to live with her mother in Montague. After a brief reconciliation, they again separated and Mother moved out, this time to Ledyard, CT, near where she had a job in Groton, CT. The company had a plant in Springfield, and she planned to return to the Springfield area. By agreement, Kali lived with Father during the week and with Mother on weekends. Kali was in daycare during the week from 5:45 AM to between 4:00 and 5:00 PM, in a center that Mother selected. Father awakened Kali at 5:00 AM to get her to the center by 5:45. He was a mason and traveled in Massachusetts and, occasionally, to Vermont, for his job. On the weekends, Kali visited Mother in Connecticut or Mother returned to Massachusetts to spend time with Kali either in Montague or at Father's home. As Father and Mother still maintained their relationship, the former often joined Kali and Mother on weekends. In June, 2000, the parents permanently ended their relationship. The Father petitioned the court to establish paternity and for custody of Kali.

In August, 2000, the court ordered a temporary alternating week schedule and temporary shared physical and legal custody, with Kali to be in day care during the week, as each parent worked full-time. The court appointed a guardian *ad litem* to observe Kali in each home. Thereafter, the GAL recommended shared physical custody, with Kali's primary residence to be with Father. The trial occurred in January, 2002. The following July the judge ordered that Mother have legal custody and that the parents share the physical care of Kali, in that Kali would being with Father for three weekends/month during the school year and for most of the summer, while spending every other weekend during the summer with Mother.

The judge based his decision "on a number of findings, including, *inter alia*, that the mother and the father are not able to make shared decisions relative to their daughter's welfare, and joint legal custody would not be in Kali's interest;[61] that the mother provides well for Kali's physical needs, is concerned with her health and educational issues, and is the one who "preoccupies herself" with Kali's care regarding clothing, hygiene, doctor's appointments, and child care providers; that the father, while clearly fond of his daughter, and engaged in a positive relationship with her, does not appear to be "overly concerned" about Kali's physical

[61] "The parties do not contest the judge's conclusion that joint legal custody was not appropriate in light of the past inability of the parents to communicate productively about and jointly work together in making major decisions concerning Kali's well being. *Rolde v. Rolde*, 12 Mass.App.Ct. 398, 404-405 (1981). See G.L. c. 209C, § 10 (a)." (*Kali*, at 838).

needs “beyond the basics,” and has “minimized” her medical needs and her need for medical care in general; that the Father works long hours often involving overtime, resulting in Kali's spending most of her time during the week in day care; that the mother has more flexible hours and is able to spend more time with Kali during the weekdays; that the mother is more “attuned” to Kali's medical, educational, and daily needs and is better able to provide for Kali's welfare and physical needs during the week; that the father is more “attuned” to many of the activities that he and Kali can pursue together when time constraints because of his work schedule and her school do not interfere; and that it is important that Kali be able to spend as much time as possible with her father on weekends, holidays, and during school vacations to continue to foster their close and positive relationship.” (*Kali,* at 837-38)

Father appealed based on three issues. The first was that the judge had a pro-motherhood gender bias, which the SJC rejected. Second, Father said the standard should have been a “material change in circumstances (G.L. 209C, §20) instead of G.L. 209C §10 (a). The latter posits “best interest of the child” as the standard and requires three tests of that standard, including the relationship between the child and the primary caregiver, where the child lived for the six months prior to filing, and whether either parent had established a” personal and parental relationship” and “exercised parental responsibility” over the child. The court affirmed that mother had never relinquished care or custody of Kali and that the trial had been held under G.L. 209C. § 10 (a).

In its decision, the SJC spent some time reviewing the details of the “best interest” standard and its relationship to the three tests mentioned above. This is included in its entirety because of the historical detail. They wrote:

> In custody matters, the touchstone inquiry of what is “best for the child” is firmly rooted in American history, dating back to the Nineteenth Century. See generally Mercer, A Content Analysis of Judicial Decision-Making--How Judges Use the Primary Caretaker Standard to Make a Custody Determination, 5 *Wm. & Mary J. of Women & the L.* 1, 13-32 (1998) (describing evolution of Anglo-American jurisprudence since Seventeenth Century). This legal principle replaced the notion that children were the property of their parents, and instructed courts to view children as individuals with interests independent of their parents. See id. at 21-29. The “best interests” standard appeared in our case law at least as early as 1865, in *Wardwell v. Wardwell*, 91 Mass. 518, 9 Allen 518, 522 (1865), in which the court held that a judge should not follow a Father's wish regarding the guardianship of his son if custody by the proposed guardian would not be in the child's “best interests.” It has been adhered to ever since. See, e.g., *Blixt v. Blixt*, 437 Mass. 649, 657 (2002) (best interests standard “has long been used in Massachusetts to decide issues of custody and visitation”); *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 710 (1985) (“best interests of the children always remain the paramount concern”); *Surrender of Minor Children*, 344 Mass. 230, 234 (1962), quoting *Erickson v. Raspberry*, 320 Mass. 333, 335 (1946) (“most fundamental [principle] is that the paramount issue is the welfare of the child”); *DeFerrari v. DeFerrari*, 220 Mass. 38, 41 (1914) (custody award is subject to revision “as the best interests of the child may demand”)...

In spite of its widespread use as an appropriate standard for custody determinations, the "best interests of the child" formulation has been criticized by a number of commentators, who contend that the open-endedness of the standard leads either to an inconsistency of results or to the systematic imposition by courts of unnamed prejudices regarding what outcomes represent a child's best interests. See, e.g., Crippen, Stumbling Beyond Best Interests of the Child: Reexamining Child Custody Standard-Setting in the Wake of Minnesota's Four Year Experiment with the Primary Caretaker Preference, 75 *Minn. L.Rev*. 427, 499-500 (1990) (best interests standard "risks unwise results, stimulates litigation, permits manipulation and abuse, and allows a level of judicial discretion that is difficult to reconcile with an historic commitment to the rule of law" [footnotes omitted]); Elster, Solomonic Judgments: Against the Best Interest of the Child, 54 *U. Chi. L.Rev.* 1, 16 (1987) ("best interest principle is usually indeterminate when both parents pass the threshold of absolute fitness"); Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 *Tul. L.Rev.* 1165, 1181 (1986) ("'best interests' standard is a prime example of the futility of attempting to achieve perfect, individualized justice by reposing discretion in a judge... Its vagueness provides maximum incentive to those who are inclined to wrangle over custody").

As a remedy for the perceived vagueness in the standard and for its apparent amenability to inconsistent application, Legislatures, courts, and commentators have adopted or proposed a number of constraints on judicial discretion or, in the alternative, specific criteria that a judge must take into account when ruling on the issue of custody. Some of these constraints have come in the form of irrebuttable presumptions, see, e.g., *Garska v. McCoy*, 167 W. Va. 59, 69, 70 (1981) (primary caretaker proving to be fit parent of child of "tender years" must be awarded custody); others have come in the form of legislatively required considerations. See, e.g., *Or.Rev.Stat*. § 107.137 (2001).

These efforts also reflect the view that it is in the "best interests of the child" to preserve the current placement with a parent, if it is a satisfactory one, and that stability and continuity with the child's primary caregiver is itself an important factor in a child's successful upbringing. See, e.g., Catania, supra at 1260-1261 (describing primary caretaker presumption as "fair," "gender-neutral," "creating a legal norm that encourages nurturing behavior," and "serving as a concrete model for the kind of fiduciary conduct that members of a reordering family should continue to expect from one another"). *Roen v. Roen*, 438 N.W.2d 170, 174 (N.D.1989) ("Continuity in a child's relationship with the closest, nurturing parent is also a very important aspect of stability"); *Davis v. Davis*, 749 P.2d 647, 648 (Utah 1988) ("considerable weight should be given to which parent has been the child's primary caregiver"). Echoing this view, the American Law Institute's *Principles of the Law of Family Dissolution* (2002) (ALI *Principles*) state that a judge "should" allocate custody in proportion to the amount of time each parent previously spent providing care, subject to eight listed exceptions. ALI *Principles*, supra at § 2.08(1).[62]

[62] Section 2.08(1) of the American Law Institute's Principles of the Law of Family Dissolution (2002) (ALI Principles) states, in pertinent part, that custody should be awarded "so that the proportion of custodial time the

General Laws c. 209C, § 10 (a), which was enacted in 1986, reflects this trend and is consistent with the more recently adopted ALI Principles.[63] The statute gives direction to the judge's consideration of a child's "best interests" by "evincing a general intent on the part of the Legislature to maintain the bonds between the child and her caregiver." *Custody of Zia*, 50 Mass.App.Ct. 237, 244 (2000). It cautions against rearranging a child's living arrangements in an attempt to achieve some optimum from all the available permutations and combinations of custody and visitation, when it is generally wiser and safer not to meddle in arrangements that are already serving the child's needs. If the parenting arrangement in which a child has lived is satisfactory and is reasonably capable of preservation, it is ordinarily in the child's best interests to maintain that arrangement, and contrary to the child's best interest to disrupt it. Stability is itself of enormous benefit to a child, and any unnecessary tampering with the status quo simply increases the risk of harm to the child.

The required considerations of the second paragraph of G.L. c. 209C, § 10 (a), neither replace the "best interests of the child" standard nor limit the factors that a judge may consider in determining what custodial arrangements are in the best interests of the child. See *Custody of Zia*, *supra* at 243-244 ("judge may consider any factors found pertinent to [child's best] interests in the circumstances [and] judge is to identify and weigh those factors"). Nor do they create a presumption that the caretaker with whom the child is primarily residing will be awarded permanent custody. See id. at 242-243. There may be serious shortcomings in the primary caretaker's parenting to date, or evidence that a previously exemplary caretaker will not be able to continue providing adequate care. Or, even assuming that the primary caretaker has been providing good care, and all indications are that that parent would continue to do so, it is possible that the other parent may offer some extraordinary advantage to the child that makes the disruption in the child's life worth the risk.[64] In most cases, however, if the child has been living with one parent for some time, the child's needs are being adequately met under that parent's care, and that parent is capable of continuing to care for the child, it is not in the child's best interests to disrupt that successful arrangement. Rather, it is in the child's best interests to preserve it. Belief that the other parent might be a little better in some

---

child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents' separation or ... before the filing of the action." The exceptions to this guideline are (a) that the award of custody should align with any "uniform rule of statewide application"; (b) that the award should respect the "firm and reasonable preferences" of a child of a certain (undefined) age; (c) that siblings should remain together if "necessary to their welfare"; (d) that the award should reflect any "gross disparity" in the child's attachment to the parents or in the parents' abilities to "meet the child's needs"; (e) that the award should reflect any prior agreement between the parties; (f) that the award should not create an "extremely impractical" custodial situation; (g) that the award should address a parent's decision to relocate to a distance away; and (h) that the award should "avoid substantial and almost certain harm to the child."

[63] General Laws c. 209C (concerning nonmarital children) was a new chapter of the General Laws inserted by St.1986, c. 310, § 16.

[64] Ed. Note: This last issue is basically the reasoning at the foundation of the decision in *Adoption of Hugo*, 428 Mass. 219 (1998) in a probate/family court context.

areas ought not suffice to disrupt a child's satisfactory home life with the caretaker parent.

For these reasons, the three requirements set forth in § 10 (a), second par., must be carefully considered by the judge in reaching a decision regarding custody. Moreover, merely considering these requirements at the end stages of the custody proceedings is not enough. In order to provide a child with the benefits of stability and continuity, these principles also need to be applied during the pendency of the proceedings. See ALI *Principles*, supra at § 2.08(1) (custody decisions should reflect each parent's performance of caretaking functions before the filing of the action"). When the child has been living with one parent, the judge's initial inquiry on any motion for a temporary order of custody must be whether there would be any harm to the child in maintaining that status quo pending the outcome of the case. By definition, the significant benefits of maintaining the status quo, and the option of preserving those benefits, may be irreparably lost if the status quo is disrupted at the outset of the proceedings." (*Kali*, at 840-843).

The SJC affirmed that the trial judge found that both parents had a close relationship with Kali, that each had exercised parental responsibility for her, and that she had spent regular time with each of them. As to the question of whether the judge should have preserved to the extent possible the relationship between Kali and her primary caregiver, the SJC said that the judge's temporary order that shuttled Kali between her parents every other week effectively altered what had appeared to be a stable situation in which Kali had spent most of her life in the care of Father. Because the judge made that temporary order so that he could compare the two homes, he was then left with the task of making specific comparisons of the parties' respective parenting and relationship with Kali.

In a footnote (12), the SJC stated that one consideration of the judge's decision in ordering Kali to be with Father on weekends and summers was that her care would not be limited by his need to work long hours. They said, "We would be troubled if the judge's award of primary custody between two working parents was based solely on the minor differences in the amount of time the child would spend in day care. Day care is a fact of life in such circumstances and ought not be used as the measure of a parent's ability or commitment to provide a protective, healthy, and positive environment for the child. We are satisfied here that the judge considered Kali's respective day care arrangements and the work schedules of her parents in the context of balancing many factors to reach a conclusion as to what is in Kali's best interests." (*Kali*, at 846).

In the last footnote (13), the SJC expressed its concern, as recognized by American Law Institute standards, about the risk of a judge's value judgments affecting outcomes. They commented, "Indeed, this case illustrates how subjective value judgments affect a judge's assessment of the child's best interests. See ALI *Principles*, supra at § 2.08 comment b (approach to determining child's best interests "draws the court into comparisons between parenting styles and values that are matters of parental autonomy not appropriate for judicial resolution") and § 2.02 comment c ("When the only guidance for the court is what best serves the child's interests, the court must rely on its own value judgments, or upon experts who have

their own theories of what is good for children and what is effective parenting"). Beyond the comparison of the day care providers and schedules, the judge was critical of the father because he "does not appear to be overly concerned about [Kali's] physical needs beyond the basics," whereas the mother "preoccupies herself with [Kali's] care regarding clothing, hygiene, doctor's appointments and childcare providers." To some, it would be preferable that a parent stay focused on "the basics" and not become "overly concerned" about things beyond those "basics," and some might think it a disadvantage to have a parent "preoccupied" with the child's clothes and cleanliness. Even on the issue of medical care, where the judge viewed Mother as "more attuned," the differences between the two parents reflected justifiably different attitudes. Keeping the focus on whether the child's primary caretaker has provided and can continue to provide satisfactory care, rather than engaging in an inherently subjective assessment of which parent will provide what the judge views as optimal care, is part of the purpose behind § 2.08(1) of the ALI *Principles* and the second paragraph of G.L. c. 209C, § 10 (a)." (*Kali*, at 847).

Leaving aside the legal wisdom of the judge's temporary order giving the parties shared physical custody (from which Father did not appeal), the SJC affirmed the trial court's decision, stating the judge had weighed all the factors to provide a permanent custody arrangement that met her best interests, and that he did not abuse his discretion in so doing.

Comment: This is an important case to read in its entirety, since it has the long discussion of the history of the "best interest" standard. The Court specifically stated it was in a child's best interest to reside with a parent who was the "primary caretaker," unless there were factors contradicting that solution. In *Adoption of Hugo*, 429 Mass. 219 (1998), a state intervention case in which none of the parties was a biological parent, the Court decided Hugo's interest was served by transferring him from a foster family to whom he was attached to an out-of-state extended family member, who could better meet his needs. It is interesting to note, as referenced in footnote 50 herein, that the Court applied a different standard in *Adoption of Hugo*, where it held that a child's best interest was served by removal from a foster family with whom the child had a strong bond to be placed with out-of-state family members. *Hugo* is distinguished from *Custody of Kali* because *Hugo* is a state intervention case, in which neither the foster parents nor the out-of-state family members had the status or standing of a biological parent.

Kali clearly indicates that the legal treatment of unmarried parents in custody determinations is different to that of married parents in divorce contests over custody. G.L. c. 208 § 31 designates "the rights of the parents shall, in the absence of misconduct, be held to be equal…," while in G.L. c. 209C § 10 (a), (children born out of wedlock), it states that the court shall "to the extent possible, preserve the relationship between the child and the primary caretaker parent…" and "consider where and with who the child has resided for the past six months immediately preceding proceedings…" In §10 (b) it then states, "Prior to, or in the absence of an adjudication or voluntary acknowledgement of paternity, the mother shall have custody of the child born out of wedlock." *Kali* cautions about the intrusion of value judgments into the relative weights one gives to the various factors. However, it also suggests that a primary caregiver who has given "satisfactory care" over time should be of greater value under our law (and ALI principles) than a non-custodial parent who might be able to

provide better or even "optimal" care. Without so designating, this might rise to the level of a rebuttable presumption. However, *Custody of Zia*, 50 Mass. App. Ct. 237 (2000), informs GALs that the *quality* of that parenting by the primary caretaker is a critical consideration. One footnote in *Kali* suggested that the guardian *ad litem* had made a comparison of the parties, as ordered by the court, and had recommended custody to Father, which the court ignored. The SJC opinion suggested that facts existed for the court to have determined that Father had been the primary caretaker before it ordered shared temporary custody. That determination itself would have shortened the whole legal process and not have subjected Kali to the back and forth of shared physical custody for two years. Packenham (2004) noted, "Of particular note is the nod of approval by the SJC to the controversial ALI *Principles of Law of Family Dissolution*, which advocates that the trial court should make custody determinations that allocate proportionally and consider the time a parent spends with a child prior to dissolution." (Packenham, at 476).

Of further interest was the SJC's caution to the court not to overvalue minor differences that a child would spend in day care under one parent's care or the other, because day care is such a commonplace service that parents use. This is often an argument asserted by non-custodial parents, who seek either custody or increased parenting time. They typically claim that their care of the child is preferable to that of day care personnel. Kali would suggest that, all other factors being equal, the fact that the non-custodial parent has more time available to care for a child, who would otherwise be in day care due to the primary parent's work schedule, would not be supportable grounds for a change in custody. This would appear to be one issue of which a GAL should be mindful, if and when he/she is making recommendations regarding custody. On the other hand, might that scenario be grounds for a modification of the parenting plan without a change in legal custody? For example, a common stipulation one encounters in domestic relations cases occurs where the non-residential parent has the "right of first refusal" in the event the residential parent needs substitute child care.

APPENDED RECORDS

ADOPTION OF ASTRID

Massachusetts Appeals Court

45 Mass. App. Ct. 538 (1998)

Keywords: Adoption, Care and protection, Dispensing with parent's consent, Parent and Child, Child custody proceeding.

Background: Even though she lived far away, biological Mother gave birth to Astrid when Mother was in Massachusetts in October, 1993. With an emergency order, DSS took custody of Astrid a few days after birth, and Mother returned to her home state. Per the record, Father had never been in this state. Astrid was moved to a pre-adoptive foster home in July, 1994. Neither parent attended any hearing on this matter. The juvenile court determined that neither parent was fit to care for Astrid and it was in the child's interest to dispense with their consent to adoption. The parents appealed.

In the context of preparing to give birth, Mother contacted a private adoption agency regarding surrendering Astrid for adoption. She mentioned she had given birth to a baby previously, and that baby had died. Also, her home state had removed another child from her care, but Mother declined to allow anyone in Massachusetts to contact officials from that state. Astrid was born with significant health problems (e.g. heart disorder, jaundice). Mother had begun reconsidering adoption and was thinking of taking the baby back to her home. The adoption agency reported this to DSS, because of what Mother had told them about her prior children. DSS, after contacting officials in Mother's home state, decided to obtain an emergency order to gain temporary custody of the baby, which they did successfully five days after birth. At the subsequent hearing, Mother failed to appear, having returned to her home state and to her husband (who never came to Massachusetts), despite stating she would stay long enough for the hearing.

At trial, a criminal investigator from Mother's state testified that Mother had removed one newborn from the hospital against medical advice and then disappeared. A year later, Mother gave birth again, but this time the state protective agency took the child into protective care. When visiting the home, which was a pop-up trailer that was in deplorable condition in a rural area, the investigator found no sign of the first child. The parents had wanted immunity from prosecution before cooperating with the investigator, but he refused their request. Ultimately, after being arrested for refusal to cooperate in finding the child, Mother led the investigator to a shallow grave, where the remains of the child were found, but in such decomposed condition as to make exact cause of death indeterminable. Father ultimately served four months of a year sentence for endangering the welfare of a child.

At trial regarding Astrid, the judge determined that the parents had "effectively abandoned" both infants and that they failed to appear at trial despite heroic attempts by their counsel to get them to come. The investigator reported what mother told him about the circumstances of

the death of her child. The story that he testified she told suggested that either Father murdered the child, placed the child in a van where it would have died of the heat, or failed to act to protect the child from certain injury or death. Father's attorney objected on the basis of this testimony being hearsay, which the court overruled. There were other appellate issues the attorney raised that are not relevant here. However, the parents appealed the statement that they had "abandoned" Astrid. The Court said that, while their actions did not exactly fit the definition,

> …the judge's use of the word is not unwarranted on the particular facts of this case. The parents have done little to express interest in their child. Although the Mother was in Massachusetts, she did not wait the seventy-two hours to attend the care and protection hearing. Neither parent attended the termination hearing even though the Commonwealth agreed to pay for airfare and lodging. Nor did they respond to any of the court investigator's attempts to interview them. The only evidence of their interest in the child and these proceedings included occasional communication with counsel; requests that counsel withdraw in the middle of trial; and a request for a photograph and a visit with the child on a day already scheduled for the termination hearing. (DSS denied the request for a visit as not being in the child's best interest, as well as because of concerns about safety and convenience.) In any case, the finding of abandonment was not central to the finding of unfitness. (*Astrid*, at 544).

Father appealed the judge's finding that Astrid had a strong bond to her pre-adoptive foster parents (as well as with her extended family and grandparents) and that removing her from that home (where she had lived for a year by that time), "would likely have caused her severe harm." (*Astrid*, at 545). The pre-adoptive mother was a nurse who was familiar with cardiac care. The Court said that the trial judge's decision that Astrid should remain in the pre-adoptive home was not in error. In the end, the Court said there was clear and convincing evidence to support dispensing with the parents' consent to adoption (terminating their parental rights).

As part of the opinion, and relevant for investigators in probate and juvenile court, the parents appealed the fact that many out-of-state documents were appended to the Massachusetts' court investigator's report, because of lack of authentication and "totem-pole hearsay." The admission of the report into evidence was acceptable, because the court investigator listed her sources and the information available from them, which allowed counsel to rebut the evidence. The judge made no ruling at trial on the documents in the addendum to the report, but the record indicated he relied on them in his findings. The judge's findings stood despite this issue, because of the "overall cumulative effect of the evidence." (Packenham, 2004 at 348).

The testimony about the documents was that they were "certified," but the Court found that this was not the case. The Court wrote:

> This lapse is of particular concern because so many of the documents are from out of State. At the very least, Isringhausen, the home State criminal investigator who testified, could have authenticated his own reports, but he was never requested to do

> so. But even if it was error to admit the addendum, assuming the judge did admit it, there was no prejudice because the judge would have reached the same result whether or not he considered the information in the documents attached to the court investigator's report. See *Care and Protection of Leo*, 38 Mass. App. Ct. at 238. As a general matter, however, we remind counsel that parties submitting records such as those at issue here, particularly when the records are from out of State, should adhere to the rules of evidence as to authentication and certification, or risk having the evidence excluded. See generally G. L. c. 119, § 21. See also G. L. c. 233, §§ 76, 79, 79A, 79J." (*Astrid*, at 546-47).

Comment: This case is included because of the Court's ruling that, in any addendum or appendix to a GAL report, relevant documents should be authenticated in accordance with the statutes noted above. Thus, if a GAL receives medical records, copies of therapy records, police reports, test reports, etc., from an attorney or from a client him or herself, the GAL should not append those to the report, as whatever weight the GAL attributed to them will be for naught, if those documents are challenged. With the court order of appointment and/or a release of information, a GAL should get the information from the professionals themselves or from whatever agency or institution has the records, complete with some process to signify their authenticity (often the agency sends a cover letter with the documents). Otherwise, there is no way to know if the client had omitted certain documents deliberately or by accident. It is particularly important if one parent provides records from a helping professional working with the other parent, such as medical or psychiatric records. It is questionable whether that parent should have them in his or her possession, or whether the GAL can accept them, given that they are privileged until the other parent waives that privilege by signing a release of information specifically for that information.

GAL ISSUES

SANDRA A. **GILMORE** V. JEROLD P. **GILMORE**

Supreme Judicial Court of Massachusetts

369 Mass. 598 (1976)

Keywords: Divorce, Custody of child, Guardian *ad litem*, Investigator, Cross-examination.

Background: This decision does not provide much background information in its report. It noted that Mother filed for divorce in April, 1973 and Father cross-filed in December, 1973. In March, 1974, a divorce was granted to each of them for cruel and abusive treatment. Custody of the three minor children was awarded to Father. Mother appealed on several grounds, but most relevant was her claim that the custody award should be set aside, because the trial judge prevented her from cross-examining the guardian *ad litem* who investigated the family and filed a report, upon which the judge relied in his findings. The SJC held that the trial judge was in error in denying examination of the GAL/investigator, especially since the judge relied on the report. The SJC said, "We believe that, consistent with the principle of fundamental fairness, cross-examination should have been permitted." (*Gilmore*, at 601).

The decision cited G.L. c. 215 §56A, which allows a judge to appoint a guardian *ad litem* to investigate and report, noting, "…such report shall be open to inspection to all the parties in such proceedings or their attorneys." (*Gilmore*, at 601). The SJC noted that previous cases provided a foundation for a judge to use the services of a GAL, but no case or Ch. 215 §56A addressed whether the GAL must be available for cross-examination. During the trial, many of the collaterals whose information was in the GAL report did testify. However, the judge relied on the findings in the report in his determination of custody, but denied Mother the right to cross-examine the GAL/investigator. The SJC stated:

> In a custody proceeding, a judge makes a determination as to what is in the best interests of the child on the basis of facts presented at trial as well as facts gathered by the court-appointed investigators. The need for accurate, objective information is of foremost importance in this process. In order to determine adequately the reliability and accuracy of a report, we believe that, as a matter of sound judicial policy, the parties should have the opportunity to rebut the report, including the right to cross-examine the investigator. To promote a fair fact-finding process, cross-examination of the investigator should be permitted, subject to the rules of evidence, so that the credibility, bias, or prejudice of the investigator may be tested and the weight to be given to his report may be determined. This rule should prevail whether or not the parties consent to the investigation. (*Gilmore*, at 604-05).

The SJC then remanded the case to the trial court for a new hearing on custody, although it did not vacate the prior custody order, leaving that to the discretion of the judge.

Comment: *Gilmore* is the case most often cited as the foundation for having the GAL as a witness at trial. This writer has heard many times over the years that one "cannot cross-examine a report." It reminds any GAL that he or she needs to write the report with the expectation of cross-examination, even though the chances of trial are small. It also indirectly suggests that the GAL should write the report with the expectation that all parties will read it, including, and especially, the litigant/parents themselves. Aside from the need to be accurate in the report, it is also essential for the GAL to consider the audience in the way he or she makes statements and to avoid doing (psychological) harm, unless no better way exists to report relevant and essential facts.

WAIVER OF CONFIDENTIALITY

COMMONWEALTH V. CHARLES **LAMB**

Supreme Judicial Court of Massachusetts

1. 365 Mass. 265 (1974)
2. 372 Mass. 17 (1977)

Keywords: Evidence, Communication between patient and psychiatrist.

Background: The Superior Court had ordered Lamb committed for up to 60 days to the Bridgewater treatment center for sexually dangerous persons to be examined and diagnosed. He was subsequently committed. At the commitment hearing, the judge heard testimony from the examining psychiatrist. Lamb invoked the testimonial privilege, which the judge denied and then heard the testimony. The section in the general laws is inserted below for its definitions of patient, psychotherapist, and communications.

Section 20B, inserted by St. 1968, c. 418. "The following words as used in this section shall have the following meanings: --

"'Patient', a person who, during the course of diagnosis or treatment, communicates with a psychotherapist;

"'Psychotherapist', a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry; and

"'Communications' includes conversations, correspondence, actions and occurrences relating to diagnosis or treatment before, during or after institutionalization, regardless of the patient's awareness of such conversations, correspondence, actions and occurrences, and any records, memoranda or notes of the foregoing.

"Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition.

"If a patient is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in his behalf under this section. A previously appointed guardian shall be authorized to so act.

"Upon the exercise of the privilege granted by this section, the judge or presiding officer shall instruct the jury that no adverse inference may be drawn therefrom.

"The privilege granted hereunder shall not apply to any of the following communications: --

"(a) If a psychotherapist, in the course of his diagnosis or treatment of the patient, determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the patient in such hospital, provided however that the provisions of this section shall continue in effect after the patient is in said hospital, or placing the patient under arrest or under the supervision of law enforcement authorities.

"(b) If a judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of a psychiatric examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt."

The SJC held that:

> …while G.L. 123A proceedings are civil and non-punitive in nature, nevertheless such persons are entitled to certain minimal standards of procedural due process." While the SJC suggested that the statute was intended to apply in court-ordered examinations for sexually dangerous defendants, it also generalized to the following: "We construe G. L. c. 233, § 20B, as preserving a patient's rights to keep privileged any communications made to a court-appointed psychotherapist in the case of a court-ordered examination, absent a showing that he was informed that the communication would not be privileged and thus, inferentially, that it would be used at the commitment hearing.[65] In so doing we avoid considering whether the use of such statements in the absence of such warnings infringes upon the rights of due process guaranteed by the Fourteenth Amendment of the United States Constitution.
>
> The Commonwealth contends that such an interpretation would eliminate the ability of the psychiatrist to provide specific information which might be critical to a judge's determination at the hearing. We do not agree. Exception (b) is directed to exactly the opposite result. As prerequisite to its use, however, the patient will have to be informed that the statement is not privileged. We believe it is this balance between the need for fairness and disclosure to the patient and full information for the court which the Legislature intended to strike.
>
> The exception relating to the psychotherapist-patient privilege is sustained, and the case is remanded to the Superior Court. (*Lamb*, at 270-71).

[65] Without the legalese, this means that the statute intends for all communications by a patient to a court-appointed examiner to be privileged, unless the examiner first tells the patient that everything the patient says or does is 'on the record' and may be used in a future court proceeding.

Comment: *Lamb* is the controlling case that requires GAL evaluators or investigators to inform all participants in a court-ordered proceeding that no conversations with the GAL are confidential. These participants include parents, children, extended family, and all collateral sources, whether they are professional or laypersons. The category F standards require this of all GAL-investigators. There will be times when a collateral or even a party in a dispute will want to share information with the GAL "off the record," but that is clearly impermissible under this case and under the standards. The problem with hearing such information, its inappropriateness aside, is that the GAL cannot be certain that this information did not influence his findings and, because it is not documented anywhere, he or she cannot be examined about that evidence. It behooves the GAL to document somewhere in the notes or in the report that he or she offered the Lamb statement to each party or collateral in language appropriate to their age or ability level. Ideally, the GAL should have an agreement, which parties and counsel review, that explains the lack of confidentiality and requires parties to attest to the fact that the GAL explained that to them. If, under cross-examination, the GAL acknowledges a failure to "Lamb" a party or collateral before eliciting relevant information, the court might discard that section of the report and potentially the whole report itself. The professional and financial implications of that scenario are potentially significant.

AFTERWORD

In the course of reading the various cases that make up the core of this book, I became aware of some patterns in decision-making that exists in Massachusetts' family law. One such pattern is the use of various standards or constructs by which courts make decisions to resolve disputes. Such constructs as "best interest of the child," "material change in circumstances," "real advantage," "*de facto* parent," and the like provide frames of reference for the gathering of information by GAL investigators and evaluators. One commonality among all these standards is their imprecision; not one of them offers any formula to determine when the threshold level has been reached or what weight to apply to any particular fact. In many cases the appellate court suggests that there is not one single fact that is controlling; instead, the body of data as a whole or the balance of information in one direction or the other sways the trier-of-fact, who has broad discretion in decision-making. Thus, any number of actions or behaviors can combine to produce the critical mass of facts that will pass some indefinite level implied by the standard. As Mookin has stated, "best interest" is "indeterminate,"[66] so there is no 'bright line' threshold or set of facts that would clearly provide greater weight to one side of a dispute or the other, particularly when both parents are capable (and similarly when both parents have significant impairments).

Standards are often inter-related and conflicting. In the case of removal, the "real advantage" standard is "interwoven" with the "best interest" one, as is a "material change in circumstances." The avoidance of "significant harm to the child" seems to be "best interest" turned inside out. There are certain preferences in the case and (sometimes) statute law, such as the weight given to a primary caretaker (thus, the contest to determine which parent fits that label), the legal presumption against custody to a perpetrator of serious domestic abuse, the preference for keeping siblings together, or the statutory predisposition for an initial custody award to an unmarried mother.[67] These legal predilections, like the rest of family law, are not absolute, and there are circumstances in which the other party to the litigation can refute them.

A second pattern that emerges from the body of law is that the spotlight of the court shines upon different characters in the family drama, depending on what kind of case is at issue. In domestic relations (i.e divorce/paternity) cases, while judicial respect is given to the "best interest of the child," the case law seems to focus on the respective rights and capacities of the parents, while paying less attention to seeing the world of the family through the eyes of the child or through its needs. Since the Probate and Family Court in domestic relations cases rarely appoints an attorney for a child, the child's "voice" is channelled through either of his or her parents, and that "voice" is likely to reflect each parent's perspective or position. Sometimes the court hears the child's "voice" through the GAL. Part of the challenge faced

[66] Mnookin, R. (1975). Child custody adjudication: Judicial function in the face of indeterminacy. *Law and Contemporary Problems*, 39 (3), 226, 264. He wrote, "The indeterminacy flows from our inability to predict accurately human behavior and from a lack of social consensus about the values that should inform the decision."

[67] See respectively, *Custody of Kali* for primary caretaker preference, *Custody of Vaughn* for presumption against custody to abusive parent, *Bak v. Bak* and *Ardizoni v. Raymond* for aversion to splitting custody of siblings, and G.L. c. 209c §10 for custody to an unmarried mother.

by the court in considering an attorney for the child is the additional cost of that representation.

In contrast, in state intervention cases, the court, through its *parens patriae* power,[68] casts its light on the plight of the child and tries to view the resolution of the dispute through how this will affect that child. Because parents are often impaired in some manner (e.g. abusive, neglectful, addicted, mentally ill) or simply absent,[69] they cause harm to their children. Thus, the court does not focus as much on parents' needs or rights, although they will attend to parental capacities. However, the court has to seek ways to mitigate trauma to the children and prevent future harm. In these cases, the child is always represented through counsel and the state through DSS. Like presumptions, these are also not categorical distinctions. In the state intervention cases, one reads often about attachment issues and the cost/benefit ratio of changing a child's basic emotional connections, a discussion rarely, if ever, read in domestic relations cases, where two functioning parents are usually involved. However, in divorce cases, one is likely to read about the valued of "regular and consistent access" to children, which seems like a back-door way of attending to attachment issues. In domestic relations cases, unlike state intervention cases, the court does not consider severing the relationship of parent and child, but rather re-structuring it through various parenting plans and custody arrangements. In child protection cases, the (juvenile) trial court makes extensive efforts at family rehabilitation and reunification, before proceeding to terminating a parent's rights.[70]

A third pattern I noticed was that the law takes different approaches to parents, depending upon whether they had been married or not, or whether they lived together. This arose in the grandparents' rights case of *Blixt v. Blixt*, 437 Mass.649 (2002), p. 99 this volume, and was most apparent with respect to the issue of shared legal custody, especially at the outset of a dispute. M.G.L. c. 208 §31 states that married parents shall have temporary shared legal custody "absent emergency conditions, abuse or neglect," or unless (for other reasons) the court determines that "shared custody would not be in the best interest of the child," and makes written findings to that effect. The statute, however, does not create a legal presumption of temporary shared physical custody. That is to say, divorcing parents in most circumstances will obtain shared legal custody at the temporary order stage and the court would have to issue written findings of adverse circumstances in order to award temporary

---

[68] Latin for "father of his country," the term for the doctrine that the government is the ultimate guardian of all people under a disability, especially children, whose care is only "entrusted" to their parents. Under this doctrine, in a divorce action or a guardianship application the court retains jurisdiction until the child is eighteen years old, and a judge may change custody, child support or other rulings affecting the child's well-being, no matter what the parents may have agreed or the court previously decided. Found at http://en.wikipedia.org.wiki.parens_patriae

[69] Barth, R. (1996). The Juvenile Court and Dependency Cases. *The Future of Children*, The Juvenile Court, 6 (3), 100. Packard Foundation. At http://www.futureofchildren.org/information2826/information_show.htm?doc_id=77824

[70] Hardin, M. (1996). Responsibilities and effectiveness of the juvenile court in handling dependency cases. *The Future of Children*, The Juvenile Court. 6(3), 112. Packard Foundation. At: http://www.futureofchildren.org/information2826/information_show.htm?doc_id=77830 ; Mnookin (1975), op. cit. made the point that courts perform two different functions in family law cases, consistent with the above description. In domestic relations cases, he opined, the role of the court was to resolve disputes between two private parties (generally the parents, but other family members might be involved), while in state intervention cases, the role of the court was child protection. (at 229).

sole legal custody to one parent. In contrast, M.G.L. 209C §10(a), which relates to never-married parents, informs the court to award sole legal custody to the primary caretaker and, in conjunction with that determination, "shall also consider where and with whom the child has resided within the six months immediately preceding proceedings pursuant to this chapter and whether one or both of the parents has established a personal and parental relationship with the child or has exercised parental responsibility in the best interests of the child." However, the court could award shared legal custody, if the parents have made an agreement to that effect or have demonstrated an ability to cooperate by having "exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interests."

Thus, with never-married parents, in most circumstances and absent agreement, the mother will obtain temporary legal custody, and the putative father will have to demonstrate that he and the mother have been able to cooperate and communicate for the benefit of the child in order to gain an award of shared legal custody.[71] In a somewhat simplified way, that means that in most instances, married parents who separate can expect to have shared legal custody at the temporary order stage, unless one parent can clearly demonstrate they *cannot cooperate*, while never-married parents can expect to have the mother receive temporary sole legal custody unless the father can affirmatively show that they *can cooperate*. From a legal perspective, that would vary the burden of proof relative to whether parents had been married or not. For the GAL, this distinction requires, as in most other cases, a focus on the details of how the parents have each managed their individual responsibilities for child care. An analysis of how they cooperated in dealing with the health and welfare of the developing child would also be an essential part of any investigation.

In reviewing the cases, I would suggest that it is hard to draw parallels in fact patterns between domestic relations cases and state intervention ones. Consistent, I suspect, with social policy, the appellate courts give substantial weight to biological parenthood, especially where parents are competent. Thus, in *Adoption of Hugo* (p. 63) –a state intervention case- the pre-adoptive foster parent had raised the child for almost two years, but the SJC gave greater weight to the long-term advantages of moving Hugo to his aunt, who, although a stranger to him, could provide greater opportunities for his development, because of her qualities and skills as a parent. Contrast that with *C.C. v. A.B.* (p. 107), a ground-breaking domestic relations case in its own right, wherein the putative biological father was awarded the opportunity to have a continuing relationship with his child, even though the mother was married to another man at the time. His less-than-a-year participation in child rearing was deemed "substantial" enough to warrant a hearing on his claim for paternity. If he had not had

[71] A recent paternity case, *Custody of Odette*, 61 Mass. App. Ct. 904 (2004), required that, as a basis for making a shared legal custody order for never-married parents, the trial court had to make affirmative findings that they had been cooperative, instead of stating the double negative, that is to say, the parents had not shown an inability to communicate and cooperate. One can contrast this with *Kendall v. Kendall*, 426 Mass. 238 (1997), p. 75 this volume, in which the court retained their shared legal custody arrangement, despite intense religious differences, because Mother could not claim conflicts in other areas of parenting. The footnote (21) suggests that the judge "apparently did not consider the parties unable to cooperate on other child care issues." (Kendall @ 251). Thus, when in dispute, never-married parents have to provide affirmative evidence that they can cooperate, while married or formerly-married parents have to provide affirmative evidence that they cannot cooperate.

that year's experience with child care, the fact of his being the biological father would not have carried the weight it did, because Mother was married to someone else when she had the child. Thus, for the GAL, what is substantial in one context might not carry the same weight in another.

Those were some of the themes that emerged for me in reading the cases. There was another issue that evolved in my thinking through this review. As a mental health practitioner, I try to integrate clinical methods and social science data with legal standards. Social science attempts to improve the validity of its concepts and the reliability of the measures underlying those ideas. In the forensic arena, social science seeks to improve judicial decision-making by matching those methods (and research drawn from them) to the imprecise standards of family law. The history of clinical judgment, even scientifically-crafted clinical judgment,[72] is such that predictions in the individual case are quite unreliable.[73] In contrast to social science (but not to clinical judgment), family law seems purposefully indeterminate so that the courts can find individualized solutions to the problems presented by the incredible variety of cases with which it has to cope, as the Joyce Carol Oates quotation at the start of the casebook implies. In scientific terms, such a construct as "best interest" has no operational definition,[74] which precludes any means of knowing how to validly or reliably measure it and, Shuman (2002, at 144) would add, is "…so ambiguous and value laden that reaching a consensus that would permit accurate measurement of this characteristic in a forensic assessment is not possible."[75]

Apropos of this, Tippins and Wittman (2005, at 215), in a review of issues related to custody recommendations, have recently written, "The best interests standard is a legal and socio-moral construct, not a psychological construct. There is no empirically supportable method or principle by which an evaluator can come to a conclusion with respect to best interests entirely by resort to the knowledge base of the mental health profession."[76] This creates significant discontinuity and conflict between the striving for increasing precision and

[72] I borrow from Jonathan Gould here, as he described it in his 1998 book, *Conducting Scientifically Crafted Custody Evaluations*, Thousand Oaks, CA: Sage.

[73] Grisso, T. (2005). Commentary on "Empirical and ethical problems with custody recommendations:" What now? *Family Court Review*, 43[2]), 223, 227. He commented that with millions of dollars spent during thirty years of research and good actuarial data on violence prediction, "Clinicians using methods derived from these studies can now assess the risk of violence fairly accurately, but the methods only rarely allow them to conclude that anyone is "more likely than not" to be violent." That is, making predictions from the specific population under study to the particular individual is extremely difficult. There is also a large collection of research on the limitations of clinical prediction and judgment, beginning with Meehl, P. (1954), *Clinical Versus Statistical Prediction: A Theoretical Analysis and Review of the Literature*. Minneapolis: University of Minnesota Press. Subsequent articles of importance included: Faust, D. & Ziskin, J. (1988). The expert witness in psychology and psychiatry. *Science*, 241, 31; Dawes, R., Faust, D., & Meehl, P. (1989). Clinical versus actuarial judgment. *Science*, 243, 1688; and Garb, H. (1989). *Studying the Clinician: Judgment Research and Psychological Assessment*. Washington, DC: American Psychological Association.

[74] An exact description of how to derive a value for a characteristic you are measuring. It includes a precise definition of the characteristic and how, specifically, data collectors are to measure the characteristic. It is needed to remove ambiguity and ensure all data collectors have the same understanding. It reduces chances of different results between data collectors. Found at http://www.isixsigma.com/dictionary/Operational_Definition-621.htm

[75] Shuman, D. W. (2002). The role of mental health experts in custody decisions: Science, psychological tests, and clinical judgment. *Family Law Quarterly*, 36, 135.

[76] Tippins, T. & Wittman, J. (2005). Empirical and ethical problems with custody recommendations: A call for clinical humility and judicial vigilance. *Family Court Review*, 43(2), 193

predictability of social science and the deliberate imprecision of the law. It is not just that the languages of law and social science are different, but their essential outlook on their primary data is also different.[77]

Social science seeks levels of certainty far beyond that entertained by family law. By custom, the scientific community and the consumer of scientific information cannot have much confidence in research results that cannot be repeated 95 times out a 100 (a small, but predictable and measurable error rate or significance level), whereas the family law community will have confidence in a decision in which only 50.1% of the data are necessary to reach a conclusion (a large, essentially non-measurable error rate reflecting a preponderance of the evidence standard). In addition, social scientists have more confidence in studies with large samples than in those with small ones, whereas family law essentially focuses on the individual case, the smallest sample possible. Those are different measures of how one comes to depend on a conclusion,[78] but they reflect the large distinction between the relative precision of social science and the relative imprecision of family law.[79] To further muddy the conceptual waters, I would suggest that, in Massachusetts, "best interest" is a legal, psychological, social, and moral construct, since the Massachusetts statute, G.L. c. 208 §31 states that, when taking into account the happiness and welfare of the child (another term for "best interest"), the court "shall consider whether or not the child's present or past living conditions adversely affect his *physical, mental, moral or emotional health*." (emphasis added).[80]

In coming to this conclusion, I was surprised to find that it relates to an old argument that has often occurred between practicing forensic professionals who have a scholarly inclination (and write about their ideas) and practitioners who do not. That debate concerns whether it is a legitimate practice to make recommendations to the court about the legal issues that frame the assessment process, or in other words, to express an opinion about the ultimate legal question. Until the promulgation of the Category F standards, it was common practice to make recommendations in a GAL report for evaluators and investigators alike. It still is for evaluators. It seems that the Category E standards under review might continue that practice.

---

[77] While this may be pushing the notion, it seems to me that science looks at large group data to reach conclusions about a question, and the clinician takes that group data and tries to make predictions about the individual case. Science goes from the general to the particular. In contrast, appellate family law uses the individual case to answer questions that will cover a group of cases with a similar disputed issue at the trial court level. Law proceeds from the particular to the general. They converge again in that both bodies of knowledge ultimately need to deal with the problems of individuals. It is hard to generalize in family law cases, because they are fact-specific. Conversely, it is hard to particularize in using clinical judgment, since the characteristics of the individual or family are likely to vary from that of the group whose data informs that judgment.

[78] One might even consider these to reflect different standards of proof, with more than a passing similarity to the legal concept.

[79] Since there are few outcome studies of evaluated custody cases, the error rate for recommendations or ultimate issue opinion is essentially unknown, and therefore, cannot be estimated to be better than chance.

[80] G.L. c. 208 §31 includes such terms as "misconduct" in determining whether the rights of the parents shall be equal. The statute does not define this term, but, in a separate paragraph, it includes such issues as substance abuse or desertion as considerations for temporary orders. "Misconduct" implies a moral, right-wrong judgment. The general thrust of case law directs the court to consider misconduct as it affects the happiness and welfare of children, but that door is then open to moral considerations.

There are several reasons for this,[81] including such notions as:

- GALs have always made recommendations – the "tradition" argument.
- The Court expects GALs to make recommendations; it will not make further referrals if we do not provide our opinions – the "customer (client) is always right" argument.[82]
- GALs have a tremendous amount of information from multiple sources about the family and have a professional obligation to make such recommendations based on the collected body of data – the "expertise" argument.
- Attorneys often want GALs to make recommendations, since the advocate whose side was favored by the GAL report will want to use that recommendation to bolster the client's case - the "GAL is fair game for either side" argument.
- GALs can make recommendations, because the court can reject or alter them if it sees fit to do so – the "no harm, no foul" argument. As one reads the cases, this argument has some foundation, and in fact a judge who relied too heavily on a GAL recommendation without exercising independent judgment could find his or her decision overturned on appeal.
- Very few cases that have GAL assessments proceed all the way to trial. The GAL recommendations are integral to an alternative dispute resolution process that usually results in case settlement - the "court diversion" argument. In fact, were a majority of domestic relations cases to go all the way to trial, it would likely slow the pace of dispute resolution – the goal of a trial in civil law – to an unbearable crawl. The recent implementation of time standards in juvenile and probate/family court was intended to expedite the resolution of cases. The prohibition against recommendations could undermine that effort, although there is no current data about that concern.[83]

From a practical perspective, all these arguments are valid, based on my experience. But - and this is a significant but - I realized by reading the cases and by understanding the various standards that, in making a recommendation, a GAL may simply be offering a personal opinion, although cloaking it in the guise of a professional one.[84] Because the various standards are vague (and none more vague than "best interest"), there is no evidence that we GALs have any more ability to know when the threshold level of the standard has been reached than the average, reasonably intelligent person with the same information. The only person who has the authority to make that decision is the judge, whom society (through the legislature) has granted wide discretion to decide what facts are relevant and when those facts meet the standard.

---

[81] See Stahl (2005), who had enumerated some of the same reasons that ultimate issue recommendations have endured, and added a few others in: "The benefits and risks of child custody evaluations: Making recommendations to the court." *Family Court Review*, 43(2), 260.

[82] In reality, Massachusetts' Probate and Family Court judges vary greatly in this expectation, although there are judges who have been much annoyed at the omission of recommendations, even if the GAL has good reasons for omitting them.

[83] Bala, N. (2005). "Tippins and Wittman asked the wrong question: Evaluators may not be "experts," but they can express best interest opinions." *Family Court Review*, 43(4), 554, 557. In this article Bala, a law professor from Queens College in Ontario, Canada, makes the same point. He also noted, …"unless there are abuse or violence issues that have been improperly dealt with, a settlement that the parents are prepared to accept is almost always preferable for a child than the emotional trauma resulting from continuing litigation."

[84] This mirrors a comment by Martindale, D. (2001). Cross-examining mental health experts in child custody litigation. *Journal of Psychiatry and the Law*, 29(4), 483, 503.

I recognize that, if it is not possible for me to know how much of something constitutes a "material change of circumstances," or what is an actual "real advantage," or how much abuse does it take to create "a pattern of abuse" (to name just a few), how can I have ever really know (or even think that I know) what kind of custody arrangement is in a particular child's "best interest." This is a question that I have struggled with over the years and one that recycles itself with some regularity in the forensic psychology field. It was the main topic of the 2004 AFCC Child Custody conference in Nashville and of the April, 2005 edition of its Family Courts Journal. AFCC looked at the levels of data that GALs could obtain and whether there was any scientific validity to the kind of data necessary to offer an opinion on the legal issues. As a mental health professional and user of social science research, I have always viewed this argument through clinical and scientific lenses, but reading the various cases forced me to view the debate from another angle, the legal one. From that vantage point, there does not seem to be any logical or legal basis to make recommendations or offer opinions on the legal questions. Moreover, from a pure legal perspective of guaranteeing a client's rights, to include influential ultimate issue opinion without any logical foundation for that opinion may unfairly abrogate the rights of the litigants. For litigants in probate/family court, who are of limited financial resources or who represent themselves, their inability to effectively challenge those recommendations at trial puts them at an added disadvantage [85] and shifts power from the court to the GAL.

In the end, this argument may be "academic," in the colloquial sense of the word, as has been the case every time the debate re-emerges in the literature.[86] However, my reading of the case law has altered my view of what is legitimate professional GAL practice (as opposed to what is traditional or accepted behavior) and makes it even more difficult for me to express opinions on the legal questions.[87] I used to think that the court needed a recommendation, but I now appreciate this is an illusion, maybe even a self-serving one (in terms of my own importance to the process). Instead, what the court needs – and has always needed - is a thorough examination and reporting of the facts to help determine whether those facts meet some standard so that the judge can make a decision to resolve the dispute. Within that kind of reporting, it seems perfectly legitimate, based on the facts found, to offer suggestions that are *contingent* on how the judge decides the ultimate question (e.g. custody, removal, etc.). In practical terms, that means suggesting, "If the Court awards custody to X, then the following

[85] It occurred to me that this might have been one rationale for prohibiting ultimate issue opinion in the Category F (investigator) standards, even though investigators often had theretofore included them in reports.

[86] Grisso (2005), op. cit. makes the case that this debate started about thirty years ago and has re-emerged with some regularity since then. He reports that, despite the cyclical debate, forensic practitioners commonly offer opinions on ultimate legal questions, including such areas as criminal responsibility, competence to stand trial, and sex offender recidivism, among other issues. These ultimate issue opinions, he said, have "general acceptance across almost all other areas of law in which psychological testimony is involved." at 225. He did not see why custody-related opinions should be treated in any different manner than psychological opinions in other forensic arenas. In their rejoinder to their respondents, Tippins & Wittman asserted that the courts should not "lower the standards of evidentiary reliability, designed to safeguard liberties, to suit the limited state of knowledge of a discipline." (Tippins, T. & Wittman, J. (2005). A third call: Restoring the noble empirical principles of two professions. *Family Court Review*, 43(2), 270, 275).

[87] Tippins and Wittman, op. cit. (at 206) go so far as to assert that, under the American Psychological Association Code of Ethics, it would be unethical for a psychologist to offer an opinion or recommendation on a legal question. Despite all the controversy over that issue, I believe that conclusion is far too draconian.

arrangements would benefit the children…," as well as suggestions addressed to the possibility that the Court will award custody to Y. For mental health professionals and for attorneys knowledgeable about social science, relevant scientific research about and professional experience with children and family dynamics should inform these alternatives. However, these suggested "recommendations" are secondary to some determination of the primary legal issue by the trier-of-fact. To use a common analogy, GAL's are the "eyes and ears" of the court, but not the "brain," although GAL analysis of various scenarios can truly assist the brain.

Despite all the recurring professional and philosophical debate over the validity of GAL recommendations, unless the standards for both E and F category GALs prohibit them, it would appear their value to the court, to the attorneys, and to the many litigants will allow them to persist.[88] That section of the report is typically the first that a litigant or attorney reads. Absent an absolute regulatory prohibition against such recommendations, judges will have the option of making an affirmative order requesting them. While the debate on this issue between the academic and the pragmatic recycles periodically, at the end of the professional day it will depend on the desire of judges to have GALs include recommendations in their reports or on the parties or their attorneys to request them. Given the limitations in social science, in clinical judgment, and in the law, their utility in probate/family court is arguable, particularly when litigants with limited resources are likely to be handicapped in mounting an effective challenge to them. However, if offered, GAL recommendations are likely to continue to have a signficant influence on all the players in the family court drama. I can only hope that the increased understanding of their limitations will diminish some of the power they possess in the legal process.

[88] Bala (2005) op. cit., opined that court-appointed evaluators are different from "party-retained" experts in family court, and the court should hold just the latter to the higher standard that Tippins and Wittman suggested should apply to all mental health evaluators. He stated that the legal limitations on expert testimony relevant to other civil litigation were inapplicable to family law. He added, "Given the indeterminacy of child-related family law cases, it is appropriate for judges not to unduly restrict the opinions that a court-appointed evaluator may express." (at 559). Bala also cited research from Michigan (Bow, J. & Quinnell, F. (2004). Critique of child custody evaluations by the legal profession, *Family Court Review*, 42, 115) showing that the vast majority of attorneys and judges in the family court process wanted evaluators to make recommendations about custody and visitation.

RELEVANT GENERAL LAWS

PROTECTION OF CHILDREN

CHAPTER 119. PROTECTION AND CARE OF CHILDREN, AND PROCEEDINGS AGAINST THEM

Chapter 119: Section 21 Definitions applicable to sections 22 to 51F

Section 21. The following words and phrases when used in sections twenty-two to fifty-one F, inclusive, shall, unless the context otherwise requires, be construed as follows:--

”“Department", the department of social services.

”“Parent", means mother or father, unless specified parent as defined under section one of chapter one hundred eighteen.

”“Child in need of services", a child below the age of seventeen who persistently runs away from the home of his parents or legal guardian, or persistently refuses to obey the lawful and reasonable commands of his parents or legal guardian, thereby resulting in said parent's or guardian's inability to adequately care for and protect said child, or a child between the ages of six and sixteen who persistently and willfully fails to attend school or persistently violates the lawful and reasonable regulations of his school.

”“Custody", shall include the following powers: -- (1) to determine the child's place of abode, medical care and education; (2) to control visits to the child; (3) to consent to enlistments, marriages and other contracts otherwise requiring parental consent. In the event that the parent or guardian shall object to the carrying out of any power conferred by this paragraph, said parent or guardian may take application to the committing court and said court shall review and make an order on the matter.

”“Evidence", shall be admissible according to the rules of the common law and the General Laws and may include reports to the court by any person who has made an investigation of the facts relating to the welfare of the child and is qualified as an expert according to the rules of the common law or by statute or is an agent of the department or of an approved charitable corporation or agency substantially engaged in the foster care or protection of children. Such person may file with the court in a proceeding under said sections a report in full of all the facts obtained as a result of such investigation. The person reporting may be called as a witness by any party for examination as to the statements made in the report. Such examination shall be conducted as though it were on cross-examination. Evidence may include testimony of foster parents or pre-adoptive parents concerning the welfare of a child if such child has been in the care of the foster or pre-adoptive parents for six months or more,

and may include the testimony of the child if the court determines that the child is competent and willing, after consultation with counsel, if any, to testify.

Chapter 119 Section 24: Procedure to commit child to custody or other disposition; notice; report of conditions affecting the child; expedited hearings

Section 24. The divisions of the juvenile court department, upon the petition under oath of a person alleging on behalf of a child under the age of 18 within the jurisdiction of the court that the child: (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent or unavailable to provide any such care, discipline or attention, may issue a precept to bring the child before the court, shall issue a notice to the department and summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or that any other appropriate order should not be made. The summonses shall include notice that the court may dispense with the right of the parents to notice of or consent to the adoption, custody or guardianship or any other disposition of the child named therein if it finds that the child is in need of care and protection and that the best interests of the child would be served by any such disposition. Notice shall be by personal service upon the parent. If the identity or whereabouts of a parent is unknown, the petitioner shall cause notice in a form prescribed by the court to be served upon such parent by publication once in each of three successive weeks in any newspaper as the court may order. If, after reasonable search, no parent can be found, a summons shall be issued to the child's legal guardian, if any, known to reside within the commonwealth and, if none, to the person with whom such child last resided, if known. If, after a recitation under oath by the petitioner of the facts of the condition of the child who is the subject of the petition, the court is satisfied that there is reasonable cause to believe that the child is suffering from serious abuse or neglect or is in immediate danger of serious abuse or neglect and that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the court may issue an emergency order transferring custody of the child to the department or to a licensed child care agency or individual described in clause (2) of the first paragraph of section 26. A transfer of custody shall be for a period not exceeding 72 hours except that upon the entry of the order, notice shall be given to either or both parents, guardian with care and custody or other custodian to appear before the court. The court shall, at that time, determine whether temporary custody shall continue until a hearing on the merits of the petition for care and protection is concluded before the court. The court shall also consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C.

Upon the issuance of the precept and order of notice, the court shall appoint a person qualified under section 21 to make a report to the court under oath of an investigation into conditions affecting the child. The report shall then be attached to the petition and be a part of the record.

If a child who is the subject of a petition is alleged to be abandoned as defined in section 3 of chapter 210, hearings on the petition under section 26 shall be scheduled and heard on an

expedited basis. Any child may be committed to the department under this section without a hearing or notice with the consent of the parents or guardian.

Chapter 119: Section 25 Hearing; custody of child

Section 25. When such child is taken into custody upon said precept and brought before said court, the court may then hear said petition, or said petition may be continued to a time fixed for hearing, and the court may allow the child to be placed in the care of some suitable person or licensed agency providing foster care for children or the child may be committed to the custody of the department, pending a hearing on said petition.

If the court commits a child to the custody of the department, the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C.

Chapter 119: Section 26 Procedure at hearing; order of commitment; visitation rights; reimbursement of commonwealth; petition for review

Section 26. If the child is identified by the court and it appears that the precept and summonses have been duly and legally served, that said notice has been issued to the department and said report is received, the court may excuse the child from the hearing and shall proceed to hear the evidence.

If the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that the child is in need of care and protection. In making such adjudication, the health and safety of the child shall be of paramount concern. If the child is adjudged to be in need of care and protection, the court may commit the child to the custody of the department until he becomes 18 years of age or until, in the opinion of the department, the object of his commitment has been accomplished, whichever occurs first, and the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C and any other appropriate order with reference to the care and custody of the child as may be in his best interest including, but not limited to, any one or more of the following:--

(1) It may permit the child to remain with his parents, guardian, or other custodian, subject to conditions and limitations which the court may prescribe including supervision as directed by the court for the care and protection of the child.

(2) It may, subject to such conditions and limitations as it may prescribe, transfer temporary legal custody to any of the following:--

(i) any individual who, after study by a probation officer or other person or agency designated by the court, is found by the court to be qualified to give care to the child;

(ii) any agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child;

(iii) the department of social services.

(3) It may order appropriate physical care including medical or dental care.

(4) It may enter an order to dispense with the need for consent of any person named in section 2 of chapter 210, to the adoption, custody, guardianship or other disposition of the child named therein, upon a finding that the child is in need of care and protection pursuant to this section and that the best interests of the child will be served by such an order. In determining whether such an order should be made, the standards set forth in section 3 of said chapter 210 concerning an order to dispense with the need for consent to adoption of a child shall be applied. If the child who is the subject of the petition is under the age of 12, and if the court adjudicates the child to be in need of care and protection in accordance with this section, the court shall enter an order dispensing with the need for consent to adoption upon finding that the best interests of the child, as defined in paragraph (c) of said section 3 of said chapter 210, will be served thereby. The entry of such an order shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein.

The department of social services shall file a petition or, in the alternative, a motion to amend a petition pending pursuant to this section, to dispense with parental consent to adoption, custody, guardianship or other disposition of the child under the following circumstances: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of an assault constituting a felony which resulted in serious bodily injury to the child or to another child of such parent; or (iii) the child has been in foster care in the custody of the state for 15 of the immediately preceding 22 months. For the purposes of this paragraph, a child shall be considered to have entered foster care on the earlier of: (a) the date of the first judicial finding, pursuant to section 24 or this section, that the child has been subjected to abuse or neglect; or (b) the date that is 60 days after the date on which the child is removed from the home. For the purposes of this section, ““serious bodily injury" shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty. The department shall concurrently identify, recruit, process, and approve a qualified family for adoption.

The department need not file such a motion or petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child if the child is being cared for by a relative or the department has documented in the case plan a compelling reason for determining that such a petition would not be in the best interests of the child or that the family of the child has not been provided, consistent with the time period in the case plan, such services as the department deems necessary for the safe return of the child to the child's home if reasonable efforts as set forth in section 29C are required to be made with respect to the child.

Notwithstanding the foregoing, the following circumstances shall constitute grounds for dispensing with the need for consent to adoption, custody, guardianship or other disposition of the child: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of an assault constituting a felony which resulted in serious bodily injury to the child or to another child of the parent.

(5) Whenever the child is placed in family foster care, the court shall ensure that grandparents, upon their request, have access to reasonable visitation rights with the child who is the subject of the petition and that the department establish a schedule for such visitation unless it is determined by the court or the department that such visitation is not in the child's best interests. In determining the best interests of the child the court or the department shall consider the goal of the service plan and the relationship between the grandparents and the child's parents or legal guardian. Upon recommendation by the department or on its own accord, the court may establish reasonable conditions governing grandparent visitations, including but not limited to requiring that the grandparents be restrained from revealing the whereabouts of the child's placement.

The court shall, whenever reasonable and practical, and based upon a determination of the best interests of the child, ensure that children placed in foster care who are separated from siblings who are either in other foster or pre-adoptive homes or in the homes of parents or extended family members, have access to, and visitation rights with, such siblings throughout the period of placement in the care and custody of the commonwealth, or subsequent to such placements, if the children or their siblings are separated through adoption or long-term or short-term placements in foster care.

The courts shall determine, at the time of the initial placements wherein children and their siblings are separated through placements in foster, pre-adoptive, or adoptive care, that such visitation rights be implemented through a schedule of visitations or supervised visitations, to be arranged and monitored through the appropriate public or private agency, and with the participation of the foster, pre-adoptive or adoptive parents, or extended family members, and the child, if reasonable, and other parties who are relevant to the preservation of sibling relationships and visitation rights.

Periodic reviews shall be conducted, so as to evaluate the effectiveness and appropriateness of the visitations between siblings placed in care.

Any child who has attained the age of 12 years, may request visitation rights with siblings who have been separated and placed in care or have been adopted in a foster or adoptive home other than where the child resides.

In appropriate cases the court shall order the parents or parent of said child to reimburse the commonwealth or other agency for care.

On any petition filed in any court pursuant to this section, the department, parents, person having legal custody of, counsel for a child, the probation officer, guardian or guardian *ad litem* may petition the court not more than once every six months for a review and redetermination of the current needs of such child whose case has come before the court, except that any person against whom a decree to dispense with consent to adoption has been entered pursuant to clause (4) shall not have such right of petition for review and redetermination. Unless the court enters written findings setting forth specific extraordinary circumstances that require continued intervention by the court, the court shall enter a final order of adjudication and permanent disposition, no later than fifteen months after the date the case was first filed in court; provided, however, that the date by which a final order of adjudication and permanent disposition shall be entered may be extended once for a period not to exceed three months; and, provided, further, that said extension shall only be granted if the court makes written finding that the parent has made consistent and goal-oriented progress likely to lead to the child's return to the parent's care and custody. Findings in support of such final order of adjudication and permanent disposition shall be made in writing within a reasonable time of the court's order. The court shall not lose jurisdiction over the petition by reason of its failure to enter a final order and the findings in support thereof within the time set forth in this paragraph.

Chapter 119: Section 29 Counsel for child; appointment

Section 29. Whenever a child is before any court under subsection C of section twenty-three or sections twenty-four to twenty-seven, inclusive, or section twenty-nine B, said child shall have and shall be informed of the right to counsel at all hearings, and if said child is not able to retain counsel, the court shall appoint counsel for said child. The parent, guardian or custodian of such child shall have and shall be informed of the right to counsel at all hearings under said sections and in any other proceeding regarding child custody where the department of social services or a licensed child placement agency is a party, including such proceedings under sections five and fourteen of chapter two hundred and one; and if said parent, guardian or custodian of such child is financially unable to retain counsel, the court shall appoint counsel for said parent, guardian or custodian. The probate and family court department of the trial court shall establish procedures for notifying said parent, guardian or custodian of such right, and for appointing counsel for an indigent parent, guardian or custodian within fourteen days of a licensed child placement agency filing or appearing as a party in any such action. In any such proceeding regarding child custody, where the department of social services or a licensed child placement agency is a party, the parent, guardian or custodian of such child shall have and shall be informed of the right to a service or case plan for the child and his family which complies with applicable state and federal laws and regulations regarding such plans. The department or agency shall provide a copy of such plan to the parent, guardian or custodian of the child and to the attorneys for all parties appearing in the proceeding within forty-five days of the department or agency filing an appearance in such proceeding. Thereafter, any party may have the original or changed plan introduced as evidence, and with the consent of all parties such plan shall be filed with the court. Notwithstanding the provisions of this section, the court may make such temporary orders as may be necessary to protect the child and society.

Chapter 119: Section 39D: Visitation rights to certain grandparents of unmarried minor children; place to file petition

Section 39D. If the parents of an unmarried minor child are divorced, married but living apart, under a temporary order or judgment of separate support, or if either or both parents are deceased, or if said unmarried minor child was born out of wedlock whose paternity has been adjudicated by a court of competent jurisdiction or whose Father has signed an acknowledgement of paternity, and the parents do not reside together, the grandparents of such minor child may be granted reasonable visitation rights to the minor child during his minority by the probate and family court department of the trial court upon a written finding that such visitation rights would be in the best interest of the said minor child; provided, however, that such adjudication of paternity or acknowledgment of paternity shall not be required in order to proceed under this section where maternal grandparents are seeking such visitation rights. No such visitation rights shall be granted if said minor child has been adopted by a person other than a stepparent of such child and any visitation rights granted pursuant to this section prior to such adoption of the said minor child shall be terminated upon such adoption without any further action of the court.

A petition for grandparents visitation authorized under this section shall, where applicable, be filed in the county within the commonwealth in which the divorce or separate support complaint or the complaint to establish paternity was filed. If the divorce, separate support or paternity judgment was entered without the commonwealth but the child presently resides within the commonwealth, said petition may be filed in the county where the child resides.

CHAPTER 208. DIVORCE

GENERAL PROVISIONS

Chapter 208: Section 28: Children; care, custody and maintenance; child support obligations; provisions for education and health insurance; parents convicted of first degree murder

Section 28. Upon a judgment for divorce, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties and may determine with which of the parents the children or any of them shall remain or may award their custody to some third person if it seems expedient or for the benefit of the children. In determining the amount of the child support obligation or in approving the agreement of the parties, the court shall apply the child support guidelines promulgated by the chief justice for administration and management, and there shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the circumstances; the specific facts of the case which justify departure from the guidelines; and that such departure is consistent with the best interests of the child.

Upon a complaint after a divorce, filed by either parent or by a next friend on behalf of the children after notice to both parents, the court may make a judgment modifying its earlier judgment as to the care and custody of the minor children of the parties provided that the court finds that a *material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children* (emphasis added). In furtherance of the public policy that dependent children shall be maintained as completely as possible from the resources of their parents and upon a complaint filed after a judgment of divorce, orders of maintenance and for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines promulgated by the chief justice for administration and management or if there is a need to provide for the health care coverage of the child. A modification to provide for the health care coverage of the child shall be entered whether or not a modification in the amount of child support is necessary.

There shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome such presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the circumstances; the specific facts of the case which justify departure from the guidelines; and that such departure is consistent with the best interests of the child. The order shall be modified accordingly unless the inconsistency between the amount of the existing order and the amount of the order that would result from

application of the guidelines is due to the fact that the amount of the existing order resulted from a rebuttal of the guidelines and that there has been no change in the circumstances which resulted in such rebuttal; provided, however, that even if the specific facts that justified departure from the guidelines upon entry of the existing order remain in effect, the order shall be modified in accordance with the guidelines unless the court finds that the guidelines amount would be unjust or inappropriate under the circumstances and that the existing order is consistent with the best interests of the child.

A modification of child support may enter notwithstanding an agreement of the parents that has independent legal significance. If the IV-D agency as set forth in chapter 119A is responsible for enforcing a case, an order may also be modified in accordance with the procedures set out in section 3B of said chapter 119A. The court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree. When the court makes an order for maintenance or support of a child, said court shall determine whether the obligor under such order has health insurance or other health coverage on a group plan available to him through an employer or organization or has health insurance or other health coverage available to him at a reasonable cost that may be extended to cover the child for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of the child or obtain coverage for the child.

When a court makes an order for maintenance or support, the court shall determine whether the obligor under such order is responsible for the maintenance or support of any other children of the obligor, even if a court order for such maintenance or support does not exist, or whether the obligor under such order is under a preexisting order for the maintenance or support of any other children from a previous marriage, or whether the obligor under such order is under a preexisting order for the maintenance or support of any other children born out of wedlock. If the court determines that such responsibility does, in fact, exist and that such obligor is fulfilling such responsibility such court shall take into consideration such responsibility in setting the amount to paid under the current order for maintenance or support.

No court shall make an order providing visitation rights to a parent who has been convicted of murder in the first degree of the other parent of the child who is the subject of the order, unless such child is of suitable age to signify his assent and assents to such order; provided, further, that until such order is issued, no person shall visit, with the child present, a parent who has been convicted of murder in the first degree of the other parent of the child without the consent of the child's custodian or legal guardian.

Chapter 208: Section 31: Custody of children; shared custody plans

Section 31. For the purposes of this section, the following words shall have the following meaning unless the context requires otherwise:

”“Sole legal custody", one parent shall have the right and responsibility to make major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development.

”“Shared legal custody", continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development.

”“Sole physical custody", a child shall reside with and be under the supervision of one parent, subject to reasonable visitation by the other parent, unless the court determines that such visitation would not be in the best interest of the child.

”“Shared physical custody", a child shall have periods of residing with and being under the supervision of each parent; provided, however, that physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents.

In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody. When considering the happiness and welfare of the child, the court shall consider whether or not the child's present or past living conditions adversely affect his physical, mental, moral or emotional health.

Upon the filing of an action in accordance with the provisions of this section, section twenty-eight of this chapter, or section thirty-two of chapter two hundred and nine and until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have temporary shared legal custody of any minor child of the marriage; provided, however, that the judge may enter an order for temporary sole legal custody for one parent if written findings are made that such shared custody would not be in the best interest of the child. Nothing herein shall be construed to create any presumption of temporary shared physical custody.

In determining whether temporary shared legal custody would not be in the best interest of the child, the court shall consider all relevant facts including, but not limited to, whether any member of the family abuses alcohol or other drugs or has deserted the child and whether the parties have a history of being able and willing to cooperate in matters concerning the child.

If, despite the prior or current issuance of a restraining order against one parent pursuant to chapter two hundred and nine A, the court orders shared legal or physical custody either as a temporary order or at a trial on the merits, the court shall provide written findings to support such shared custody order.

There shall be no presumption either in favor of or against shared legal or physical custody at the time of the trial on the merits, except as provided for in section 31A.

At the trial on the merits, if the issue of custody is contested and either party seeks shared legal or physical custody, the parties, jointly or individually, shall submit to the court at the trial a shared custody implementation plan setting forth the details of shared custody including, but not limited to, the child's education; the child's health care; procedures for resolving disputes between the parties with respect to child-raising decisions and duties; and the periods of time during which each party will have the child reside or visit with him, including holidays and vacations, or the procedure by which such periods of time shall be determined.

At the trial on the merits, the court shall consider the shared custody implementation plans submitted by the parties. The court may issue a shared legal and physical custody order and, in conjunction therewith, may accept the shared custody implementation plan submitted by either party or by the parties jointly or may issue a plan modifying the plan or plans submitted by the parties. The court may also reject the plan and issue a sole legal and physical custody award to either parent. A shared custody implementation plan issued or accepted by the court shall become part of the judgment in the action, together with any other appropriate custody orders and orders regarding the responsibility of the parties for the support of the child.

Provisions regarding shared custody contained in an agreement executed by the parties and submitted to the court for its approval that addresses the details of shared custody shall be deemed to constitute a shared custody implementation plan for purposes of this section.

An award of shared legal or physical custody shall not affect a parent's responsibility for child support. An order of shared custody shall not constitute grounds for modifying a support order absent demonstrated economic impact that is an otherwise sufficient basis warranting modification.

The entry of an order or judgment relative to the custody of minor children shall not negate or impede the ability of the non-custodial parent to have access to the academic, medical, hospital or other health records of the child, as he would have had if the custody order or judgment had not been entered; provided, however, that if a court has issued an order to vacate against the non-custodial parent or an order prohibiting the non-custodial parent from imposing any restraint upon the personal liberty of the other parent or if nondisclosure of the present or prior address of the child or a party is necessary to ensure the health, safety or welfare of such child or party, the court may order that any part of such record pertaining to such address shall not be disclosed to such non-custodial parent.

Where the parents have reached an agreement providing for the custody of the children, the court may enter an order in accordance with such agreement, unless specific findings are made by the court indicating that such an order would not be in the best interests of the children.

Chapter 208: Section 31A. Custody and Visitation of Children With Abusive Parent.

In issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child. For the purposes of this section, “abuse” shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. “Serious incident of abuse” shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress. For purposes of this section, “bodily injury” and “serious bodily injury” shall have the same meanings as provided in section 13K of chapter 265.

A probate and family court's finding, by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. For the purposes of this section, “an abusive parent” shall mean a parent who has committed a pattern of abuse or a serious incident of abuse.

For the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse; nor shall an order or orders entered *ex parte* under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether a pattern or serious incident of abuse has in fact occurred; provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a finding by the probate and family court that a pattern or serious incident of abuse has occurred.

If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child.

If ordering visitation to the abusive parent, the court shall provide for the safety and well-being of the child and the safety of the abused parent. The court may consider:

(a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;

(b) ordering visitation supervised by an appropriate third party, visitation center or agency;

(c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;

(d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;

(e) ordering the abusive parent to pay the costs of supervised visitation;

(f) prohibiting overnight visitation;

(g) requiring a bond from the abusive parent for the return and safety of the child;

(h) ordering an investigation or appointment of a guardian ad litem or attorney for the child; and

(i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.

Nothing in this section shall be construed to affect the right of the parties to a hearing under the rules of domestic relations procedure or to affect the discretion of the probate and family court in the conduct of such hearings.

PART IV.
CRIMES, PUNISHMENTS AND PROCEEDINGS IN CRIMINAL CASES

TITLE I.
CRIMES AND PUNISHMENTS CHAPTER 265. CRIMES AGAINST THE PERSON

Chapter 265: Section 13K Assault and battery upon an elderly or disabled person; definitions; penalties

Section 13K. (a) For the purpose of this section the following words shall, unless the context requires otherwise, have the following meanings:--

[Definition of "Abuse" in paragraph (a) inserted by 2004, 501, Sec. 3 effective April 11, 2005.]

"Abuse", physical contact which either harms or creates a substantial likelihood of harm.

"Bodily injury", substantial impairment of the physical condition, including, but not limited to, any burn, fracture of any bone, subdural hematoma, injury to any internal organ, or any injury which occurs as the result of repeated harm to any bodily function or organ, including human skin.

CHAPTER 209C. CHILDREN BORN OUT OF WEDLOCK

Chapter 209C: Section 1 Declaration of purpose; definition; responsibility for support

Section 1. Children born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children. It is the purpose of this chapter to establish a means for such children either to be acknowledged by their parents voluntarily or, on complaint by one or the other of their parents or such other person or agency as is authorized to file a complaint by section five, to have an acknowledgment or adjudication of their paternity, to have an order for their support and to have a declaration relative to their custody or visitation rights ordered by a court of competent jurisdiction. For the purpose of this chapter, the term ““child born out of wedlock" shall refer to any child born to a man and woman who are not married to each other and shall include a child who was conceived and born to parents who are not married to each other but who subsequently intermarry and whose paternity has not been acknowledged by word or deed or whose paternity has not been adjudicated by a court of competent jurisdiction; and a child born to parents who are not married to each other whose paternity has been adjudicated by a court of competent jurisdiction, including an adjudication in a proceeding pursuant to this chapter or prior law. Every person is responsible for the support of his child born out of wedlock from its birth up to the age of eighteen, or, where such child is domiciled in the home of a parent and principally dependent upon said parent for maintenance, to age twenty-one. Each person charged with support under this section shall be required to furnish support according to his financial ability and earning capacity pursuant to the provisions of this chapter.

Chapter 209C: Section 10 Award of custody; criteria

Section 10. (a) Upon or after an adjudication or voluntary acknowledgment of paternity, the court may award custody to the mother or the Father or to them jointly or to another suitable person as hereafter further specified as may be appropriate in the best interests of the child.

In awarding custody to one of the parents, the court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent. The court shall also consider where and with whom the child has resided within the six months immediately preceding proceedings pursuant to this chapter and whether one or both of the parents has established a personal and parental relationship with the child or has exercised parental responsibility in the best interests of the child.

In awarding the parents joint custody, the court shall do so only if the parents have entered into an agreement pursuant to section eleven or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interests.

(b) Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have

custody of a child after an adjudication of paternity or voluntary acknowledgment of parentage.

(c) If either parent is dead, unfit or unavailable or relinquishes care of the child or abandons the child and the other parent is fit to have custody, that parent shall be entitled to custody.

(d) If a person who is not a parent of the child requests custody, the court may order custody to that person if it is in the best interests of the child and if the written consent of both parents or the surviving parent is filed with the court. Such custody may also be ordered if it is in the best interests of the child and if both parents or the surviving parent are unfit to have custody or if one is unfit and the other files his written consent in court.

(e) In issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child. For the purposes of this section, ““abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. ““Serious incident of abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress. For purposes of this section, ““bodily injury" and ““serious bodily injury" shall have the same meanings as provided in section 13K of chapter 265.

A probate and family court's finding by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody, or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. For the purposes of this section, an ““abusive parent" shall mean a parent who has committed a pattern of abuse or a serious incident of abuse.

For the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse; nor shall an order or orders entered ex parte under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether a pattern or serious incident of abuse has in fact occurred; provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a finding by the probate and family court that a pattern or serious incident of abuse has occurred.

If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in

the furtherance of the child's best interests and provides for the safety and well-being of the child.

If ordering visitation to the abusive parent the court shall provide for the safety and well-being of the child, and the safety of the abused parent. The court may consider:

(a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;

(b) ordering visitation supervised by an appropriate third party, visitation center or agency;

(c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;

(d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;

(e) ordering the abusive parent to pay the costs of supervised visitation;

(f) prohibiting overnight visitation;

(g) requiring a bond from the abusive parent for the return and safety of the child;

(h) ordering an investigation or appointment of a guardian ad litem or attorney for the child; and

(i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.

Nothing in this section shall be construed to affect the right of the parties to a hearing under the rules of domestic relations procedure or to affect the discretion of the probate and family court in the conduct of such hearing.

Chapter 209C: Section 20: Modification of judgments; jurisdiction

Section 20. A court with original jurisdiction pursuant to section three has continuing jurisdiction, upon a complaint filed by a person or agency entitled to file original actions, to modify judgments of support, custody or visitation; provided however, that no modification concerning custody or visitation shall be granted unless the court finds that a substantial change in the circumstances of the parties or the child has occurred and finds modification to be in the child's best interests. Except as restricted by section twenty-three, the court may also modify a judgment to protect a party or child. In furtherance of the public policy that dependent children be maintained as completely as possible from the resources of their parents and upon a complaint filed after a judgment of support, orders of maintenance and for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support

guidelines promulgated by the chief justice for administration and management or if there is a need to provide for the health care coverage of the child. A modification to provide for the health care coverage of the child shall be entered whether or not a modification in the amount of child support is necessary. There shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered. If, after taking into consideration the best interests of the child, the court determines that a party has overcome the presumption, the court shall make specific written findings indicating the amount of the order that would result from application of the guidelines; that the guidelines amount would be unjust or inappropriate under the circumstances; the specific facts of the case which justify departure from the guidelines; and that such departure is consistent with the best interests of the child. The order shall be modified accordingly unless the inconsistency between the amount of the existing order and the amount of the order that would result from application of the guidelines is due to the fact that the amount of the existing order resulted from a rebuttal of the guidelines and that there has been no change in the circumstances which resulted in such rebuttal; provided, however, that even if the specific facts that justified departure from the guidelines upon entry of the original order remain in effect, the order shall be modified in accordance with the guidelines unless the court finds that the guidelines amount would be unjust or inappropriate under the circumstances and that the existing order is consistent with the best interests of the child. A modification of child support may enter notwithstanding an agreement of the parents that has independent legal significance. For cases being enforced by the IV-D agency as set forth in chapter 119A, a support order may also be modified in accordance with section 3B of said chapter 119A.

Chapter 209: Section 32: ***Order prohibiting restraint of personal liberty of spouse; support, custody and maintenance orders; information provided to complainant; domestic violence record search; investigations; factors determining support amount***

Section 32. If a spouse fails, without justifiable cause, to provide suitable support of the other spouse, or deserts the other spouse, or if a married person has justifiable cause for living apart from his spouse, whether or not the married person is actually living apart, the probate court may, upon the complaint of the married person, or if he is incompetent due to mental illness or mental retardation upon the complaint of the guardian or next friend, prohibit the spouse from imposing any restraint upon the personal liberty of the married person during such time as the court by its order may direct or until further order of the court thereon. Upon the complaint of any such party or guardian of a minor child made in accordance with the Massachusetts Rules of Civil Procedure the court may make further orders relative to the support of the married person and the care, custody and maintenance of minor children, may determine with which of the parents the children or any of them shall remain and may, from time to time, upon similar complaint revise and alter such judgment or make a new order or judgment as the circumstances of the parents or the benefit of the children may require.

Upon the filing of a complaint pursuant to this section to prohibit a spouse from imposing any restraint upon the complainant's personal liberty, a complainant shall be informed that proceedings hereunder are civil in nature and that violations of orders issued hereunder are criminal in nature. Further, a complainant shall be given information prepared by the

appropriate district attorney's office that other criminal proceedings may be available and shall be instructed by such district attorney's office relative to the procedures required to initiate criminal proceedings including, but not limited to, the filing of a complaint for a violation of section forty-three of chapter two hundred and sixty-five. Whenever possible, a complainant shall be provided with such information in the complainant's native language.

When considering a complaint to prohibit a spouse from imposing any restraint upon the complainant's personal liberty under this section, a judge shall cause a search to be made of the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation and shall review the resulting data to determine whether the named defendant has a civil or criminal record involving domestic or other violence. Upon receipt of information that an outstanding warrant exists against the named defendant, a judge shall order that the appropriate law enforcement officials be notified and shall order that any information regarding the defendant's most recent whereabouts shall be forwarded to such officials. In all instances where an outstanding warrant exists, a judge shall make a finding, based upon all of the circumstances, as to whether an imminent threat of bodily injury exists to the petitioner. In all instances where such an imminent threat of bodily injury is found to exist, the judge shall notify the appropriate law enforcement officials of such finding and such officials shall take all necessary actions to execute any such outstanding warrant as soon as is practicable.

Upon request by the court, the state police, local police or probation officers shall make an investigation in relation to any proceedings and report to the court. Every such report shall be in writing and shall become a part of the record of such proceedings.

In determining the amount of a support order, if any, to be made, the court shall consider, but is not limited to, the following factors, to the extent pertinent and raised by the parties: (a) the net income, assets, earning ability, and other obligations of the obligor; (b) the number and ages of the persons to be supported; (c) the expenses incurred by the obligor and the persons to be supported for the necessities of life, and the usual standard of living of the persons to be supported; (d) the assets and net earnings, including a deduction for the provision for childcare, of the persons to be supported; (e) the marriage or remarriage of any person being supported; (f) the responsibilities of the obligor for the maintenance or support of any other children of the obligor, even if a court order for such maintenance or support does not exist, or for any preexisting order for the maintenance or support of any other children from a previous marriage, or for any preexisting order for the maintenance or support of any other children born out of wedlock and that said obligor is fulfilling such responsibility; and (g) the capacity of any person being supported or having custody of supported children, except persons under eighteen years of age, to work or to make reasonable efforts to obtain employment, including the extent of employment opportunities in fields in which such person is suited for employment, the necessity for and availability to said person of job training programs, and the extent to which said person is needed during business hours by members of the family and the availability to said person of child care services and the extent to which such person needs to attend school to obtain skills necessary for employment. When the court makes an order for maintenance or support on behalf of a spouse or child, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him

through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse or child for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of the spouse and child or obtain coverage for the spouse and child.

No order shall leave a obligor with less money than is required to provide him minimum subsistence, including food, shelter, utilities, clothing and the reasonable expenses necessary to travel to or obtain employment.

CHAPTER 210. ADOPTION OF CHILDREN AND CHANGE OF NAMES

ADOPTION OF CHILDREN

Chapter 210: Section 3 Dispensing with required consent in certain cases

Section 3. (a) Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the persons named in section 2, other than that of the child, shall not be required if:-- (i) the person to be adopted is 18 years of age or older; or (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child pursuant to paragraph (c).

(b) The department of social services or a licensed child care agency may commence a proceeding, independent of a petition for adoption, in the probate court in Suffolk county or in any other county in which the department or agency maintains an office, to dispense with the need for consent of any person named in section 2 to adoption of the child in the care or custody of the department or agency. Notice of such proceeding shall be given to such person in a manner prescribed by the court. The court shall appoint counsel to represent the child in the proceeding unless the petition is not contested by any party. The court shall issue a decree dispensing with the need for consent or notice of any petition for adoption, custody, guardianship or other disposition of the child named therein, if it finds that the best interests of the child as provided in paragraph (c) will be served by the decree. Pending a hearing on the merits of a petition filed under this paragraph, temporary custody may be awarded to the petitioner. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein. The department shall provide notice of the hearing on the merits to any foster parent, pre-adoptive parent or relative providing care for the child informing the foster parent, pre-adoptive parent or relative of his right to attend the hearing and be heard. The provisions of this paragraph shall not be construed to require that a foster parent, pre-adoptive parent or relative be made a party to the proceeding.

A petition brought pursuant to this paragraph may be filed and a decree entered notwithstanding the pendency of a petition brought under chapter 119 or chapter 201 regarding the same child. The chief justice for administration and management of the trial court may, pursuant to the provisions of section 9 of chapter 211B, assign a justice from any department of the trial court to sit as a justice in any other department or departments of the trial court and hear simultaneously a petition filed under this paragraph and any other pending case or cases involving custody or adoption of the same child. A temporary or permanent custody decree shall not be a requirement to the filing of such petition.

A juvenile court or a district court shall enter a decree dispensing with the need for consent of any person named in section 2 to the adoption of a child named in a petition filed pursuant to section 24 of chapter 119 in such court upon a finding that such child is in need of care and protection pursuant to section 26 of said chapter 119 and that the best interests of the child as

defined in paragraph (c) will be served by such decree. The entry of such decree shall have the effect of terminating the rights of a person named therein to receive notice of or to consent to any legal proceeding affecting the custody, guardianship, adoption or other disposition of the child named therein. Facts may be set forth either in the care and protection petition filed pursuant to said section 24 of said chapter 119 or upon a motion made in the course of a care and protection proceeding, alleging that the allowance of the petition or motion is in the best interests of the child.

The department of social services shall file a petition or, in the alternative, a motion to amend a petition pending pursuant to section 26 of chapter 119 to dispense with parental consent to adoption, custody, guardianship or other disposition of the child under the following circumstances: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of any assault constituting a felony which results in serious bodily injury to the child or to another child of the parent; or (iii) the child has been in foster care in the custody of the commonwealth for 15 of the immediately preceding 22 months. For the purposes of this paragraph, a child shall be considered to have entered foster care on the earlier of: (a) the date of the first judicial finding, pursuant to section 24 or section 26 of chapter 119, that the child has been subjected to abuse or neglect; or (b) the date that is 60 days after the date on which the child is removed from the home. For the purposes of this paragraph, ““serious bodily injury" shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

The department shall concurrently identify, recruit, process and approve a qualified family for adoption.

The department need not file a motion or petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child, or, where the child is the subject of a pending petition pursuant to section 26 of chapter 119, a motion to amend the petition to dispense with parental consent to the adoption, custody, guardianship or other disposition of the child, if the child is being cared for by a relative or the department has documented in the case plan a compelling reason for determining that such a petition would not be in the best interests of the child or that the family of the child has not been provided, consistent with the time period in the case plan, such services as the department deems necessary for the safe return of the child to the child's home if reasonable efforts as set forth in section 29C of said chapter 119 are required to be made with respect to the child.

(c) In determining whether the best interests of the child will be served by granting a petition for adoption without requiring certain consent as permitted under paragraph (a), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section 2 to assume parental responsibility and shall also consider the ability, capacity, fitness and readiness of the petitioners under said paragraph (a) to assume such responsibilities. In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern.

In determining whether the best interests of the child will be served by issuing a decree dispensing with the need for consent as permitted under paragraph (b), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section 2 to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition. In making the determination, the health and safety of the child shall be of paramount, but not exclusive, concern.

In considering the fitness of the child's parent or other person named in section 2, the court shall consider, without limitation, the following factors:

(i) the child has been abandoned;

(ii) the child or another member of the immediate family of the child has been abused or neglected as a result of the acts or omissions of one or both parents, the parents were offered or received services intended to correct the circumstances which led to the abuse or neglect and refused, or were unable to utilize such services on a regular and consistent basis so that a substantial danger of abuse or neglect continues to exist, or have utilized such services on a regular and consistent basis without effectuating a substantial and material or permanent change in the circumstances which led to the abuse or neglect;

(iii) a court of competent jurisdiction has transferred custody of the child from the child's parents to the department, the placement has lasted for at least six months and the parents have not maintained significant and meaningful contact with the child during the previous six months nor have they, on a regular and consistent basis, accepted or productively utilized services intended to correct the circumstances;

(iv) the child is four years of age or older, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least 12 of the immediately preceding 15 months and the child cannot be returned to the custody of the parents at the end of such 15-month period; provided, however, that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(v) the child is younger than four years of age, a court of competent jurisdiction has transferred custody of the child from the child's parents to the department and custody has remained with the department for at least 6 of the immediately preceding 12 months and the child cannot be returned to the custody of the parents at the end of such 12-month period; provided, however, that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(vi) the parent, without excuse, fails to provide proper care or custody for the child and there is a reasonable expectation that the parent will not be able to provide proper care or custody within a reasonable time considering the age of the child provided that the parents were offered or received services intended to correct the circumstances and refused or were unable to utilize such services on a regular and consistent basis;

(vii) because of the lengthy absence of the parent or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker, the bond has existed for a substantial portion of the child's life, the forced removal of the child from the caretaker would likely cause serious psychological harm to the child and the parent lacks the capacity to meet the special needs of the child upon removal;

(viii) a lack of effort by a parent or other person named in section 2 to remedy conditions which create a risk of harm due to abuse or neglect of the child;

(ix) severe or repetitive conduct of a physically, emotionally or sexually abusive or neglectful nature toward the child or toward another child in the home;

(x) the willful failure to visit the child where the child is not in the custody of the parent or other person named in section 2;

(xi) the willful failure to support the child where the child is not in the custody of the parent or other person named in section 2. Failure to support shall mean that the parent or other person has failed to make a material contribution to the child's care when the contribution has been requested by the department or ordered by the court;

(xii) a condition which is reasonably likely to continue for a prolonged, indeterminate period, such as alcohol or drug addiction, mental deficiency or mental illness, and the condition makes the parent or other person named in section 2 unlikely to provide minimally acceptable care of the child;

(xiii) the conviction of a parent or other person named in section 2 of a felony that the court finds is of such a nature that the child will be deprived of a stable home for a period of years. Incarceration in and of itself shall not be grounds for termination of parental rights; or

(xiv) whether or not there has been a prior pattern of parental neglect or misconduct or an assault constituting a felony which resulted in serious bodily injury to the child and a likelihood of future harm to the child based on such prior pattern or assault.

For the purposes of this section ““abandoned" shall mean being left without any provision for support and without any person responsible to maintain care, custody and control because the whereabouts of the person responsible therefore is unknown and reasonable efforts to locate the person have been unsuccessful. A brief and temporary absence from the home without intent to abandon the child shall not constitute abandonment.

Hearings on petitions to dispense with consent to adoption that allege that a child has been abandoned shall be scheduled and heard on an expedited basis. Notwithstanding the foregoing, the following circumstances shall constitute grounds for dispensing with the need for consent to adoption, custody, guardianship or other disposition of the child: (i) the child has been abandoned; (ii) the parent has been convicted by a court of competent jurisdiction of the murder or voluntary manslaughter of another child of such parent, of aiding, abetting, attempting, conspiring or soliciting to commit such murder or voluntary manslaughter or of an

assault constituting a felony which resulted in serious bodily injury to the child or to another child of the parent. For the purposes of this section, ““serious bodily injury" shall mean bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.

(d) Nothing in this section shall be construed to prohibit the petitioner and a birth parent from entering into an agreement for post-termination contact or communication. The court issuing the termination decree under this section shall have jurisdiction to resolve matters concerning the agreement. Such agreement shall become null and void upon the entry of an adoption or guardianship decree.

Notwithstanding the existence of any agreement for post-termination or post-adoption contact or communication, the decree entered under this section shall be final.

Nothing in this section shall be construed to prohibit a birth parent who has entered into a post-termination agreement from entering into an agreement for post-adoption contact or communication pursuant to section 6C once an adoptive family has been identified.

REGISTRATION AND LICENSING OF PSYCHOLOGISTS

Chapter 112: Section 135B Confidential communications; testimonial privilege

Section 135B. Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a client shall have the privilege of refusing to disclose and of preventing a witness from disclosing, any communication, wherever made, between said client and a social worker licensed pursuant to the provisions of section one hundred and thirty-two of chapter one hundred and twelve, or a social worker employed in a state, county or municipal governmental agency, relative to the diagnosis or treatment of the client's mental or emotional condition.

If a client is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in the client's behalf under this section. A previously appointed guardian shall be authorized to so act.

Upon the exercise of the privilege granted by this section, the judge or presiding officer shall instruct the jury that no adverse inference may be drawn therefrom.

The privilege granted hereunder shall not apply to any of the following communications:

(a) If a social worker, in the course of making a diagnosis or treating the client, determines that the client is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the client against himself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the client in such hospital; provided, however, that the provisions of this section shall continue in effect after the client is in said hospital, or placing the client under arrest or under the supervision of law enforcement authorities;

(b) If a judge finds that the client, after having been informed that the communications would not be privileged, has made communications to a social worker in the course of a psychiatric examination ordered by the court; provided, however, that such communications shall be admissible only on issues involving the client's mental or emotional condition but not as a confession or admission of guilt;

(c) In any proceeding, except one involving child custody, adoption or adoption consent, in which the client introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between the client and the social worker be protected;

(d) In any proceeding after the death of a client in which his mental or emotional condition is introduced by any party claiming or defending through or as a beneficiary of the client as an element of the claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between client and social worker be protected;

(e) In the initiation of proceedings under paragraph C of section twenty-three or under section twenty-four of chapter one hundred and nineteen, or section three of chapter two hundred and ten or to give testimony in connection therewith;

(f) In any proceeding whereby the social worker has acquired the information while conducting an investigation pursuant to section fifty-one B of chapter one hundred and nineteen;

(g) In any other case involving child custody, adoption or the dispensing with the need for consent to adoption in which, upon a hearing in chambers, the judge, in the exercise of his discretion, determines that the social worker has evidence bearing significantly on the client's ability to provide suitable care or custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between client and social worker be protected; provided, however, that in such case of adoption or the dispensing with the need for consent to adoption, a judge shall determine that the client has been informed that such communication would not be privileged; or

(h) In any proceeding brought by the client against the social worker and in any malpractice, criminal or license revocation proceeding in which disclosure is necessary or relevant to the claim or defense of the social worker.

CHAPTER 233. WITNESSES AND EVIDENCE

WITNESSES

Chapter 233: Section 20B Privileged communications; patients and psychotherapists; exceptions

Section 20B. The following words as used in this section shall have the following meanings:--

”“Patient", a person who, during the course of diagnosis or treatment, communicates with a psychotherapist;

”“Psychotherapist", a person licensed to practice medicine, who devotes a substantial portion of his time to the practice of psychiatry. ““Psychotherapist" shall also include a person who is licensed as a psychologist by the board of registration of psychologists; a graduate of, or student enrolled in, a doctoral degree program in psychology at a recognized educational institution as that term is defined in section 118, who is working under the supervision of a licensed psychologist; or a person who is a registered nurse licensed by the board of registration in nursing whose certificate of registration has been endorsed authorizing the practice of professional nursing in an expanded role as a psychiatric nurse mental health clinical specialist, pursuant to the provisions of section eighty B of chapter one hundred and twelve.

”“Communications" includes conversations, correspondence, actions and occurrences relating to diagnosis or treatment before, during or after institutionalization, regardless of the patient's awareness of such conversations, correspondence, actions and occurrences, and any records, memoranda or notes of the foregoing.

Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition. This privilege shall apply to patients engaged with a psychotherapist in marital therapy, family therapy, or consultation in contemplation of such therapy.

If a patient is incompetent to exercise or waive such privilege, a guardian shall be appointed to act in his behalf under this section. A previously appointed guardian shall be authorized to so act.

Upon the exercise of the privilege granted by this section, the judge or presiding officer shall instruct the jury that no adverse inference may be drawn therefrom.

The privilege granted hereunder shall not apply to any of the following communications:--

(*a*) If a psychotherapist, in the course of his diagnosis or treatment of the patient, determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the patient in such hospital, provided however that the provisions of this section shall continue in effect after the patient is in said hospital, or placing the patient under arrest or under the supervision of law enforcement authorities.

(*b*) If a judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of a psychiatric examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt.

(c) In any proceeding, except one involving child custody, adoption or adoption consent, in which the patient introduces his mental or emotional condition as an element of his claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

(*d*) In any proceeding after the death of a patient in which his mental or emotional condition is introduced by any party claiming or defending through or as a beneficiary of the patient as an element of the claim or defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychotherapist be protected.

(e) In any case involving child custody, adoption or the dispensing with the need for consent to adoption in which, upon a hearing in chambers, the judge, in the exercise of his discretion, determines that the psychotherapist has evidence bearing significantly on the patient's ability to provide suitable care or custody, and that it is more important to the welfare of the child that the communication be disclosed than that the relationship between patient and psychotherapist be protected; provided, however, that in such cases of adoption or the dispensing with the need for consent to adoption, a judge shall determine that the patient has been informed that such communication would not be privileged.

(*f*) In any proceeding brought by the patient against the psychotherapist, and in any malpractice, criminal or license revocation proceeding, in which disclosure is necessary or relevant to the claim or defense of the psychotherapist.

The provision of information acquired by a psychotherapist relative to the diagnosis or treatment of a patient's emotional condition, to any insurance company, nonprofit hospital service corporation, medical service corporation, or health maintenance organization, or to a board established pursuant to section twelve of chapter one hundred and seventy-six B, pertaining to the administration or provision of benefits, including utilization review or peer review, for expenses arising from the out-patient diagnosis or treatment, or both, of mental or nervous conditions, shall not constitute a waiver or breach of any right to which said patient is

otherwise entitled under this section and section thirty-six B of chapter one hundred and twenty-three.

Robert A. Zibbell, Ph.D., is a licensed psychologist in Framingham, who has been doing GAL work since 1980. He was one of the founders in 1993 of the Massachusetts Association of Guardians ad Litem, Inc. He has been on the board of that organization in many capacities, and is a past Chair of the Education Committee. He is also on the board of the Massachusetts Chapter of the Association of Family and Conciliation Courts, and is a past chair of their Conference Committee. He has participated in the writing of the original parenting plan guidelines in 1991 and again in 2004 revision, and had been directly involved in the creation of standards for Category F and indirectly for Category E GALs. He has presented on child and family forensic issues in various venues to judges, family law attorneys, mental health professionals (GALs) and family service officers. Dr. Zibbell has published articles for MCLE and for peer-reviewed journals, such as *Family Court Review* and the *Journal of Divorce and Remarriage.*