2006 Appellate Case Law in Review

As a *caveat*, the writer wants to remind the reader that the summaries and comments in these cases are his own. He would also like to thank Henry Bock and Alexander Jones for their helpful comments on these reviews, and where appropriate, he has cited them. The cases are listed by topic area and, within those categories, in chronological order. It is designed so that the reader can print the supplement out as a whole, or just the case or cases desired.

It might be fair to say that 2006 was the year of "removal" in Massachusetts Appellate Law. Of the nine new cases included in this supplement, five pertained to families in which one parent – mother in all of them – wanted to relocate with the children. Four of those cases involved mother as the parent with physical custody and were decided by the Courts within the framework of *Yannas.* Reading these cases highlights how important are the individual facts of each case, making it hard to predict outcomes. The other case, *Mason*, broke new ground, as the Court held that there had been no "primary" custodial parent in that post-divorce family, and therefore the "real advantage" standard, as defined in *Yannas*, did not apply. Instead, the prevailing standard was "the best interests of the children," interests that were – in *Mason* – not derivative of any interest of the parent seeking permission to move. In this instance the Courts relied extensively on the ALI set of principles as applied to marital dissolution.

The other set of cases dealt with what set of circumstances underlay the necessary facts for one non-biological parent to qualify as a *de facto* one. The two cases, *Sharlene* and *A.H.*, reaffirmed the use of the ALI factors in determining the status of the putative *de facto* parent, as elucidated in. *Youmans v. Ramos* 429 Mass. 774 (1999). In these cases, the putative *de facto* parent must have performed at least half of the parenting functions over at two-year period. *A.H.* also established the pre-eminence of parenting functions over the breadwinning role within that two year window. While the SJC emphasized that this "formula" was confined to *de facto* parenting cases, it is hard for this writer not to envision its utility in custody cases in general. It has been this writer's experience that parenting functions are already one of the most critical variables that the trial court considers in custody cases. Of the last two cases, one involves how the Court would handle information about an adult in the context of a GAL evaluation that might otherwise be privileged. The other relates to the relationship between immoral or illegal conduct of a parent and "best interest" determinations in a custody case.

In summary, it has been a busy year in appellate law with respect to domestic relations cases. It seems reasonable to expect additional removal cases in the next year, continued references to the *ALI Principles of Marital Dissolution*, and perhaps some challenge to the ALI two-year window in cases where the biological parent has been the breadwinning partner and the putative *de facto* parent performed the majority of the parenting functions. Stay tuned.

Robert A. Zibbell, Ph.D.
February 14, 2007.

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REMOVAL CASES

PAMELA **DICKENSON** vs. W. CLEVELAND **COGSWELL**.

Appeals Court of Massachusetts (2006)

66 Mass. App. Ct. 442

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

Background. The parents married in 1986 and shortly thereafter, Father adopted his 10-year old stepson. They later had their own son in 1994. The judge stated, "During [the child's] early years, [Mother and Father] were co-parents who shared child care responsibilities." Mother would take the child to day care, while Father would pick him up from day care at about 5:30 P.M. and be responsible for him until Mother returned from work at around 7:00 P.M. From the time the parties separated in 1996 until their divorce in 1998, the parenting schedule remained the same. (at 443)

In 1998, a Probate Court judge granted the parties a judgment of divorce nisi. The shared parenting section of the separation agreement provided that Mother and Father would share legal custody of the child and that Mother would have physical custody. The agreement further provides that Father "shall have access to said child at all reasonable times and places, including but not limited to . . . one weekend each month; one Saturday each month; one overnight during the work week; the weekend after their son's birthday; every Father's Day; one full week during each of the following periods: January and May; June and September; and October and December (a total of three weeks); and additional times to assist the wife with her work schedule; and all holidays as agreed upon…"

After their divorce, "the parties did not adhere to the parenting and visitation plan in their separation agreement. In practice, the parties were co-parents, engaging in good communication and exercising a flexible approach to visitation." Beginning sometime in 2000, Father reduced his time with the child because of his increased work responsibilities. Also in 2000, Mother met and began dating Mark Salwasser. (at 443).

In 2001, Mother commenced her current job as a sales operation manager at Smith & Nephew in Andover, where she earned approximately $100,000 per year. In April of that year, Father took a severance package from Fleet Bank and remained unemployed until July, 2002. At some point during this time period, Father met his current wife. He also rented a condominium to be closer to the child. From September, 2001, until May, 2002, he saw the child "almost daily." (at 444).

In September of 2002, Mother married Mr. Salwasser, who sold his home and moved in with her and the child in their home in Andover. He undertook "homemaker" responsibility for the family: he ran errands, he cooked, and he cleaned. That same month, he purchased a home in his name in Arroyo Grande, California with the proceeds of the sale of his Massachusetts home. Mother paid all the costs associated with the Arroyo Grande house.

Also in September of 2002, Father learned from the child that Mother wanted to relocate to California. After initially describing the relocation as only a possibility and denying any immediate plans to move, Mother confirmed in November, 2002, that she planned to move to California with her husband. In the spring of 2003, Father began working for his current employer, Webster Financial Services, a bank located in Connecticut, and began commuting 115 miles from his home in Newton to the bank, which takes one hour and forty minutes each way. He saw the child on Thursday nights and every other weekend. Father married his current wife in June, 2003. In November, 2003, Mother put her Andover home on the market, and after it was sold, she moved to her present apartment in Lawrence where she lived with her child and husband. Her husband then moved to Arroyo Grande in August, 2004, a few weeks before trial commenced. Prior to trial, Mother and her current employer agreed that she would work remotely in California for three weeks per month and that she would fly to Massachusetts for one week every month at her employer's expense. When the trial began, Mr. Salwasser, who preferred part-time employment, did not have a job in California. However, by the end of the trial, he reported that he had received an offer of part-time employment to develop after-school programs for elementary and high school students for $ 1,300 per month. He had not, however, moved to California in hope of obtaining this job. Mother would remain as the primary source of financial support for the family. Mr. Salwasser was born in California, but lived on the east coast from 1971, and in Massachusetts from the mid-1980's, until, as noted above, August, 2004. His parents, who were in their mid-eighties, resided in California. Their primary residence was in Clovis, California, 162 miles and a two and one-half hour drive from his home in Arroyo Grande. Beginning in 2002, he began traveling back and forth from California to Massachusetts to visit his parents approximately once a month.

The judgment: The judge found that Mother did indeed desire to move to Arroyo Grande to be with her husband, that she was not motivated to interfere with Father's relationship to their child, and that she believed in the importance of that relationship. The Court also noted that Mother was sincere in planning to minimize the impact of that move in terms of money and time, if the Court were to permit her to leave with the child. The judge stated that Mother believed her new work plan would permit her to work from home and be more available to the child. He also found that, while Mother might benefit emotionally from the move, there was no financial or social benefit. He stated, "Her employment will become less secure, she frequently will travel away from home, and she will be living far from her New England friends and family." (The Court noted that most of Mother's 'roots' were in New England). The judge concluded that there "(wa)s no real advantage to [Mother] in moving to California." (at 446).

The Court found that the boy was a well-adjusted, polite, and friendly ten year old at the time of the trial and had no special needs. He had a good relationship with his parents and stepparents. Father and the child "have a very close father-son relationship [and Father] has been deeply involved with his son's life." Father visited with the child every week, coached several of the child's sports teams, and took the child on numerous skiing, hiking, and camping vacations. The child will miss Father who has been a "steady and important presence" in his life. "It is in [the child's] best interests to have regular contact with [Father]." (at 446).

Mother proposed a complicated and expensive visitation schedule involving once/month flights cross-country. She would fly here with him, but he might fly home some of those times without her. Some of those flights were ones that landed very early in the morning in Boston or required stops/layovers in Las Vegas, in order to fly in to San Luis Obispo, the nearest airport to Arroyo Grande. Father would also fly to visit the child one weekend per month. While the judge credited the detailed plans that mother had made for these visits, he found them to be "impractical and unreasonable," and "denied permission to move as not in the boy's best interests." (at 446).

The Appeals Court then framed the judge's decision within the factors structured in *Yannas v. Frondistou-Yannas,* 395 Mass. 704 (1985).

a. Reasons for the move: The judge found that Mother had a sincere reason for her proposed move (to be with her husband in CA) and that she was not motivated to interfere with Father's relationship with their son. However, that sincere reason was "Not a good reason" to warrant removal. (at 448). The Court took some issue with that justification for the judge's refusal in the initial part of his analysis of the case, but said that his findings in the remainder of his analysis of the "collective balancing of interests" (at 449) provided sufficient foundation for his decision.

b. Interests of the child. In the collective balancing of interests called for in *Yannas,* 395 Mass. at 711, the probate judge first is required to consider the effect of removal on the child's interests. The judge found the move would not be in the boy's interests, as he would then have a "bicoastal existence" (at 449) with problematic flights that he would sometimes take without parental accompaniment. He would not see his mother for one week/month (she would have to come to Massachusetts to work that week). The judge concluded the boy would likely benefit from Mother's increased happiness at being with her husband and her presence in the home after school three weeks/month, whereas he would have both parents regularly in his life if he were to remain in Massachusetts with his mother.

The child's financial security would also be diminished by the move, as the judge found Mother was "embarking on a less-stable employment relationship in order to move to California." (at 449) The opinion then detailed the judge's significant concerns for the detrimental effect of the move on the child's relationship with his father, who "has been a regular part of the child's everyday life in Massachusetts, coaching the child's athletic teams, picking him up from school or day care, and facilitating the child's relationships with his brother and other relatives. This would no longer be possible if the child lived in California: spending time with his father would require significant, costly, and tiring air travel." (at 450) The Court also noted that the trial judge stated that, as the child was healthy, sociable, and pleasant, he would likely be successful if he were to move, and that the singular "troubling" aspect was "the negative emotional impact [the child] will experience from greater distance from [Father]…" (at 450)

c. Interests of the custodial parent. The probate judge must next consider the welfare of the custodial parent. *Yannas,* 395 Mass. at 711. The probate judge set out the benefits and

detriments of the move to Mother. He credited the benefit of her increased happiness in living with her new husband and being able to spend more time with her family when she was in CA. He debited the need to work on two coasts, to be "in constant motion," (at 451), to have less job security, and to be removed from her supportive friends and family who lived primarily in New England. In a footnote (8) to the case, the Court noted that the primary reason for the proposed move was Mr. Salwasser's desire to live in California, and that the home he bought was a few hours drive from his parents' home. Mother's desired to move because her husband wanted to go. There was no economic reason for him to live in California, where he had not lived for about thirty years.

d. Interests of the noncustodial parent. Lastly, the probate judge must consider the interests of the noncustodial parent. *Yannas*, 395 Mass. at 711. In discussing the difficulties with the planned visitation arrangements, Court noted, "Ample evidence supported the probate judge's conclusion that the child's relationship with his father will suffer from reduced contact." (at 451-452)

e. Balancing of interests. The Court found no fault with the judge's consideration of the relevant issues in assessing the child's best interests, which consideration involves "classic discretionary decision making by the trial judge." (at 452) The Court's reasoning in this case is important, as is included herein.

> Here, the move would have clear and significant negative effects on the child. These effects, as the court in *Yannas*, supra at 711, emphasized, are "most important." For Father, a caring and involved noncustodial parent, the removal would significantly and negatively affect his relationship with his son, and for Mother, there would be significant new burdens. The primary interest being served by the move is the husband's desire to live in California. The collective balancing of interests here is unlike cases where removal was found to be appropriate. Contrast *Williams v. Pitney*, 409 Mass. at 456 (removal allowed where Mother "would be close to friends and relatives who would provide emotional support [***22] after the move, and . . . Mother would be better able to secure employment"); *Signorelli v. Albano*, 21 Mass. App. Ct. at 941 (judge failed to take into account that Mother's husband, with whom she has just had a baby, lives in New Jersey and had secured employment there); *Vertrees v. Vertrees*, 24 Mass. App. Ct. at 920 (removal allowed where the "detrimental effect of being apart from their father would be outbalanced by the strengthening of the custodial home in the community of the wife's supportive relatives" and where the wife also had increased opportunities for career advancement); *Rosenthal*, 51 Mass. App. Ct. at 271 (removal allowed where financial situation greatly improved and where relocation eliminated Mother's long commute to work, permitted her to live with her new husband, and did not deprive Father of "ongoing and meaningful contact appropriate to the circumstances"). (at 452-453)

The Court determined that the judge's decision followed a "fair balancing of the *Yannas* factors," contained no "abuse of discretion or error of law," and the judge properly concluded that removal was not in the child's best interests. (at 453)

Comment: This case is the first of several decided in 2006. The history of the family suggested that, while Mother had primary physical custody, there was an ongoing close relationship between Father and the child, one that had been fostered during the marriage of the parties. Of interest to guardians *ad litem* is the fact that Mother's sincerity in her desire to move to live with her husband in California, the emotional benefit to her of the move, and the absence of any intent to undermine the Father-son relationship were not sufficient for the court to permit the move. Other factors related to the move – potential employment problems and the complicated and perhaps precarious travel arrangements for the child – seemed to diminish the weight that the trial judge might have otherwise given to the issues of her sincerity and motivation. It was possible that there was no substantive reason for Mother's new husband to have moved to California, thus diminishing the weight given to her need to move to California to be with him.

The Appeals Court also stressed the importance of the Father-son relationship and detailed how Father had been involved in the child's life. The Court credited the judge's concern about how detrimental a move would be to that relationship, even in light of the finding that the boy would likely be successful if he did move to California. Alex Jones raised a question about what analysis the trial judge might have done in light of *Mason v. Coleman* (decided a month later), given the extensive involvement of the father with the son. What is interesting is that many relocations have significant impacts on the close attachments between the parents who are left and their children – in fact, that is what makes these cases so difficult - but, that is usually not enough, in itself, to warrant judicial denial of permission to move. In this case, the other factors related to the interests of the child (and lack of economic/financial benefit to Mother) seemed to give the judge sufficient facts to deny removal. What is also important to remember is the detailed fact-finding that the judge made in explaining the various factors and his effort to balance all the interests in this family. When there is a GAL involved in such a case, that kind of detailed information permits the judge to discern all the relevant facts in order to do the balancing-of-interests determination necessary in these removal decisions.

JAMES R. **MASON** vs. BETSY SHANLEY **COLEMAN**.

Supreme Judicial Court of Massachusetts

447 Mass. 177 (2006)

*Keywords***:** Divorce and Separation, Child custody, Removal.

Background: The mother and father married in 1985. They had two children in 1992 and 1994 respectively, in New Hampshire. They divorced there in 1998. The judge found that during the marriage each parent took the part of a "primary caretaker" to the children. Father was home with the children from 1992-1997, while he attended graduate school. After the marriage, father and mother agreed to a joint physical and legal custody agreement that was incorporated into their divorce decree.[1] Under the agreement, the parents divided physical custody of the children approximately equally. The parties agreed to move within twenty-five miles of Chelmsford and, in light of uncertainty as to where each would locate in Massachusetts, that the children would attend school in the district of the mother's residence. After a time, each parent remarried and respectively modified the divorce decree as needed.[2] Father relocated to Nashua, about 17 miles from Chelmsford. Mother had only brief notice of the Father's move and did not initiate any court action to deal with it. However, a few weeks after Father's move, Mother notified him of her intention to move to her parents' home Bristol, NH. She also planned eventually to move into her own home in that town. The stepfather – her husband's former wife and his children were also planning to move to Bristol, and he had told his former family that he would move there, too.

Additionally, the older boy had been previously diagnosed with special needs (learning disability and ADD), along with some social skills deficits. He had done well in the Chelmsford Schools' regular and special education programs and had been successful in the recently completed 5th grade. He had also participated in a social skills group led by a school counselor. He was on a 504 classroom "accommodation" plan with academic and social supports for him in the middle school. As one factor, the Court found that Chelmsford's school system was superior to that of Bristol, which it determined by comparing each school's achievement testing results to those of other school systems in their respective states. The judge determined that the changes anticipated by a move to Bristol would be harmful to the older child's social and educational development (Bristol is in Northern New Hampshire and at least a two hour drive from Nashua).

Another issue was an allegation of inappropriate touching of one of the children by one of her stepsons. The child recanted, but then reversed himself by re-asserting his allegation.

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[1] The opinion noted that the parents' stipulations did not expressly characterize the arrangement as "joint physical custody," but the parties' arguments before the court assumed that this was the relationship among the parents and children.

[2] A July 19, 2006 story in the *Boston Globe* after the opinion was published contained an interview of the Mother and the children (father did not want to be interviewed). In that story, she told the reporter that Father had parenting time with the children every other weekend, from Friday after school until Tuesday morning, and they alternated weeks in the summer. Practically speaking, that meant he had the children four days out of every fourteen-day period (assuming her version of the parenting plan was accurate, which is indeterminate since Father chose not to respond to reporter requests).

This caused much tension between the parents and pressure for the child himself.[3] When Mother informed father of her intent to move, he filed a complaint for modification asking for sole physical custody and an injunction preventing the move; Mother then counterclaimed, asking for sole physical custody and permission – on a temporary basis – to move to Bristol, NH.

Opinion: After a four-day trial, the trial court included as part of its Judgment,

> The (trial) judge found that Chelmsford schools were preferable to those of Bristol, particularly for the child with special needs; that uprooting the children would be detrimental to their interests; that the move would cause a reduction of the father's parenting time that would not be in the children's interests; that misconduct allegations against a step-sibling weighed against increased time in the mother's household; and that there was insufficient evidence of financial imperative to justify the mother's move to Bristol. The judge determined that the father's move to Nashua did not provide ground for the relief requested by the mother, and the judge did not award sole physical custody to either party, deciding instead to order continued shared legal and physical custody (at 182).

In the decision, the SJC noted that this case was different than the controlling case of *Yannas v. Frondistou-Yannas*, 395 Mass. 704, (1985), in which the moving parent had sole physical custody, since this family had shared legal and physical custody. The SJC discussed the differences between legal and physical custody and the legal expectations relevant to each type. The Court cited the seminal case on joint legal custody, *Rolde v. Rolde*, 12 Mass. App. Ct. 398 (1981), pp. 11-14, this volume. In that case, they cited Folberg, J. (1984). *Joint Custody and Shared Parenting*, ch. 13.06, which stated that shared physical custody is "generally appropriate only if the parties demonstrate an ability and desire to cooperate amicably and communicate with one another to raise the children." They reiterated the idea in *Rolde* that it is primarily a voluntary arrangement for "stable, amicable parents behaving in a mature civilized fashion." *Braiman v. Braiman*, 44 N.Y.2d 584, 589-590. They discuss at some length the nature of shared physical custody and the degree of coordination and cooperation needed to make it work for children. The SJC wrote,

> It is thus incumbent on a parent who has been awarded joint physical custody to recognize that the viability of the endeavor is dependent on his or her ability and willingness to subordinate personal preferences to make the relationship work. While a joint physical custody agreement remains in effect, each parent necessarily surrenders a degree of prerogative in certain life decisions, e.g., choice of habitation that may affect the feasibility of shared physical custody. (at 183)

Citing the American Law Institute's (ALI) Principles of the Law of Family Dissolution and cases from other jurisdictions, the SJC noted that the "calculus" necessary to decide removal issues differs when parents share physical custody, since there is no 'primary caretaker', or

[3] The opinion did not indicate whether there had been any substance to this allegation, but the opinion noted that, among other factors she considered, the judge did not wish to allow more substantial time for the children in the mother's home (if it were in Bristol) because of potential misconduct by the stepfather's children.

both parents are 'primary caretakers'. The Court noted, "No longer is the fortune of simply one custodial parent so tightly interwoven with that of the child; both parents have equal rights and responsibilities with respect to the children. The importance to the children of one parent's advantage in relocating outside the Commonwealth is greatly reduced." (at 184-185). The ALI standards indicate that, where neither parent has a predominant interest (in the instance of shared physical custody), the effect of the relocation on the child is an important factor to consider as part of best interests. The Court also cited Judith Wallerstein's article, To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce, 30 *Family Law Quarterly*, 305, 318 (1996), in which she noted that it is to the benefit of the child to protect his or her relationship with each parent (with shared physical custody) because "both are, in a real sense, primary to the child's development." Wallerstein, *supra* at 318). The Court conceded that relocation often prevented "frequent and continued contact" with the non-custodial parent. It noted that a judge could consider issues such as distance between homes and the impact of that distance (and means of transportation) on the parent-child relationships, and that one parent moving out of state need not necessarily impede continued contact and parental responsibility.

The SJC opinion stated:

> The order is based on the judge's findings that the children's best interests would be negatively affected by this move. She made detailed written findings that their current schools were superior, that uprooting the children would be difficult for them, that the move would impair the father's parenting to the detriment of their interests, that potential misconduct by other siblings in the mother's household weighed against increased physical custody by the mother, and that any financial or other advantage of the move to the mother was unclear. From this the judge determined that it was not in the children's best interests to be removed to Bristol. (at 186).

The SJC noted that the judge appropriately considered the best interests of the children, made no clear error in her findings of fact, and did not abuse her discretion in refusing to allow Mother to remove the children to Bristol, NH.

Comment: This is the first appellate case to address the issue of the relevance of the "real advantage" standard to a family where there was no primary caretaking parent. Since neither parent was "primary" or they both were (the semantic contradiction notwithstanding), the SJC determined, in keeping with the ALI standards, that the framework for their opinion was "bests interests of the child." "Bests interests" was no longer "interwoven" with the benefits of moving for the primary parent, and so all the other factors had to be considered in totality within that framework. The case continues a trend in appellate law to rely on the ALI principles.

The case raised other issues. For example, Father moved out-of-state, although only as far as Nashua. He gave limited notice to Mother, who did not contest his move. Query whether she could have prevented that move, if she had raised the issue in Court. Since he had the children in a shared physical custody arrangement, his obligations to them would seem to have been the same as hers. He did not change their schools (they had agreed on

Chelmsford), but he changed their residence when they were in his care. If they had a "Mom's House – Dad's House" shared parenting type of arrangement (as the case report suggested), when they were under his care, they were living out-of-state. But when she wanted to move to the same state, he successfully blocked that. It was not clear from the case report how her move would have interfered with his time with the children, since the case did not specify the particulars of their shared physical custody plan. The case highlights the fact that what is legally in a name (e.g. type of custody) counts even more than it did before this case. The parent who had primary physical custody before *Mason* had a legal advantage, if she or he wanted to move. Now a parent who considers agreeing to a shared physical and legal custodial plan has to weigh the likelihood that any future move of more than an hour or two might not be permissible under *Mason,* even within the state. That parent would have to show that the move was in the child's best interests, irrespective of the moving parent's interest. Will this decision impel fathers, in particular, to argue for a shared physical custody arrangement as part of the divorce, so as to protect their relationship with their child? Another aspect of this case for an investigator/ evaluator is the need to analyze in some detail what parties mean when they claim to have a shared legal and physical custody arrangement. If the Mother in the *Globe* story was accurate, she was the *de facto* primary caretaker, since she claimed to be doing much more of the work of parenting since the father moved to Nashua. Thus, it is incumbent to do the fact-finding to determine whether shared physical custody exists in name only or the parents practice that legal arrangement in everyday life.

JENNIFER M. **CARTLEDGE** vs. MARK E. **EVANS**.

Appeals Court of Massachusetts

67 Mass. App. Ct. 577 (2006)

Keywords: Removal, Divorce and Separation, Child custody. Parent and Child, Custody.

Background: The parents married in 1997 and had one child, age seven at the time of the appeal. Divorced in July, 2004 after a trial, mother was awarded physical custody and they shared legal custody. Six months later, on January 7, 2005, Mother filed a complaint for modification, seeking an increase in child support, since she had lost her $70,000.00/year job with Fleet Bank. The home she rented in Newton was being sold and she could not afford to purchase a home or continue to rent in that same town. On January 10, she filed another complaint to remove the child from Massachusetts (Newton) to Old Saybrook, CT, an upscale community, where her mother lived. Before the court ruled on the motion, she had moved to CT to live with her mother for no rent. There she had the "companionship of family and readily-available child care assistance from family" (at 580), and had found part-time work with another bank in Old Saybrook. On August 30, pursuant to a hearing, the trial court judged denied the removal, ordering Mother to return to by September 2 Massachusetts to a residence within a 25 mile radius of Boston and to enroll the child in school. Mother returned to live temporarily with a sister, but could not enroll the child in a school until she had a permanent residence. In the meantime, she appealed the judge's order and successfully got a single justice of the appeals court to stay the execution of the order pending her appeal of it. The appeals court then accelerated the appeal (heard in October).

Opinion: The appeals court applied the *Yannas* "real advantage" test to the facts of this case See *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 710 (1985), noting that the "child's quality of life and style of life are provided by the custodial parent" (at 580) and that the best interest of the child is so "interwoven" with the well-being of the custodial parent that the latter's interests must be considered. The court noted that, taken at face value, the factors in this case lent themselves to a straightforward "real advantage" analysis, with the mother's circumstances establishing "a good reason" for the move and the judge's contrary findings being "clearly erroneous." (at 580). There was no finding that the mother intended to interfere with the father's ability to have time with the children. The appellate decision noted that the guardian *ad litem* had provided a balanced report, and the trial judge had based her decision on some of those guardian's findings, but primarily on the negative ones. The decision indicated that the judge had not given "fair consideration to all aspects of the situation, including the mother's needs, or improperly gave undue emphasis to only one aspect of the situation, the father's visitation." (at 580). In reviewing the discussion of the relevant factors, the Court noted that disruption of Father's visitation could not be the controlling factor, or "no removal petition would ever be allowed." (at 581). The Court suggested that the judge (improperly) found that issue (i.e. impact on Father's visitation) to be dispositive. It then said,

> In these circumstances, a move to a town and neighborhood that are familiar to the child, where the mother and child have close family connections, and which are not so distant from Boston as to preclude frequent visitation with the father, offers an obviously reasonable alternative more in keeping with the principles implicit in the real advantage test. The probate judge's findings fail to support her conclusion that the best interests of the child are served by the denial of the removal petition. (at 581).

The Appeals Court then reversed the decision of the trial court and affirmed the order of the single appellate justice. On of the judges on the three-panel dissented, stating that appellate courts traditionally give wide latitude to the discretion of a trial judge, who has listened to the evidence and had a chance to assess the demeanor of the parties when testifying under oath. Appellate courts will not reverse a decision of the trial judge "absent clear error or a firm conviction that a mistake has been committed." Citing *Mason v. Coleman*, 447 Mass. 177, 186 (2006). The dissent explained that the judge had been clear in the record about the basis for her judgment. It noted, "Each of these findings is thoroughly documented and analyzed, and is well supported by the record." (at 583). The dissent stated that the trial judge viewed the mother's motive for moving as simply a matter of "personal desire," and that the Mother had established no other "real advantage" to her by the move. The dissent stated that the judge was not clearly erroneous and had no abused her discretion, and her judgment should have been upheld.

Comment:
Of interest to investigators or evaluators is the mention in the majority Appellate decision that the GAL report was "balanced," but the judge erred in not considering all the factors noted in the report. The other issue of some significance was that the majority indicated that the trial judge appeared, in her judgment, to give undue weight to the impact of the move on the father's visitation relative to the other factors in the case. From a historical perspective, this case seems to re-emphasize the original "real advantage" factors in the *Yannas* decision that gave weight to the interests of the custodial parent who wants to move and the link between those interests and the best interest of the child. Other cases in 2006, such as *Mason v. Coleman* or *Dickenson v. Cogswell* - where removals were denied - seemed to have given more weight to the relationship between the child and the Father. In *Mason*, there was shared physical custody in Chelmsford, although, according to the *Boston Globe* story (in which Father was not quoted), Mother appeared to do more of the parenting after Father moved to Nashua, NH. In *Dickenson*, Mother had primary physical custody, but the judge noted that the child's interest in maintaining a close relationship with his father outweighed the mother's interest in living with her new husband in California, where there was no obvious economic benefit to her from the move and travel arrangements were problematic. Distance may play a factor in a case, as the Court in *Cartledge* noted that the child's residence in Old Saybrook, CT would not preclude frequent contact with the father (i.e. 115 mile drive), an idea that the Court also mentioned in *Rosenthal*, where the Mother in that case moved with the child to Providence, RI. (a 55-mile drive from Father's home).

Another aspect of *Cartledge* - in the context of the other removal cases - is that it appears to make the predictions of probable outcomes more uncertain for the attorneys in them and for GALs who might provide recommendations to the Court after completing investigations. It also suggests that opining on the sincerity of the moving party's motivation is questionable, since the judge in this case, who heard all the testimony, clearly felt that the plaintiff-Mother was disingenuous in her stated basis for moving, yet the Appeals Court – despite its historic deference to judicial discretion – asserted that the court's judgment was based on erroneous findings. Alex Jones suggested there might have been an effect on the trial judge of the brief interval (six months) between the Judgment and the Complaint for Modification for removal.

Laurie **Wakefield** vs. James **Hegarty**

Massachusetts Appeals Court

67 Mass. App. Ct. 772 (2006)

Keywords: Removal, Custody, Parent and Child.

Background. The parents met in 1989 and lived together. While they did not marry, they had child on March 23, 2000. In September, 2001, following a maternity leave of absence, the mother returned to full-time employment, obtaining the position that she held at the time of trial. Initially, the child attended daycare at the home of her paternal aunt for six to seven hours per day. The father has been very active in caring for the child since her birth, and was helpful in caring for her during this period.

Two and a half years later, in August, 2002, the parties separated and since that time the child lived solely with the mother, who, pursuant to a stipulation for temporary orders entered into by the parties, was the child's primary caretaker. On March 6, 2003, the mother filed a complaint in the Probate and Family Court on the child's behalf seeking to establish paternity against the father. She further sought an order granting her custody of and suitable child support for the child. On September 24, 2003, the parties entered into a stipulation, which was incorporated into a temporary order on that date. The temporary order granted the mother sole physical custody of the child, but granted shared legal custody to both parties. The order also granted the father visitation on Tuesdays after preschool until 7:00 P. M.; on Thursdays after preschool until 9:00 A.M. on Fridays; on Saturdays at 4:00 P.M. until 4:00 P.M. on Sundays; and at "any such other times as the parties may agree."[4]

Around November of 2004, the mother informed the father that she wanted to relocate with the child to St. Croix in the Virgin Islands, where she had grown up and where her mother, father, and sister still resided. After investigation, a court-appointed guardian *ad litem* recommended that the mother be allowed to relocate to St. Croix with the child.

In St. Croix, the mother would have continued to work for her then current employer in a new position, a "contract worker." In the new position, she planned to work at home, allowing her to be more available to the child, and at an increased salary. She claimed that she would enjoy greater family support in St. Croix from her parents, one of whom was retired and the other about to retire. Both of her parents were well-educated and active in the St. Croix community. The maternal aunt was a marine biologist, married, and had a daughter who was five years old at the time of trial.

The mother proposed a visitation schedule for the father that included extended visits, both in St. Croix and in Massachusetts, during the Christmas and spring vacations, and during

[4] The parties had thereafter agreed to their own visitation schedule. The father currently had time with the child every other weekend and every Wednesday afternoon through Thursday night. The father also at times had taken care of the child during some of the mother's business trips.

Columbus Day weekend. In addition, the father would have been allowed to visit the child at other times in St. Croix so long as he gave the mother at least thirty days' notice. The mother agreed to bring the child on any business trips she made to Massachusetts that did not conflict with school, and the child would have never traveled alone. The father would have had communication with the child via telephone, electronic mail, and Internet-accessible cameras.

Decision: The judge granted the removal request and awarded sole legal custody to Mother. The Appeals Court stated that the trial court judge's findings were supported by the record and "were not clearly erroneous."

Application of the "real advantage" test. Initially, the Court noted that, although the parties were never married, the child was entitled to the same rights and protections of the law as other children. G.L. c. 209C, § 1.[5] The Court noted that the trial judge applied the correct legal standard, M. G.L. c. 208, § 30, which provided that "a] minor child of divorced parents who is a native of ... this commonwealth ... shall not, if at suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders."

1. As an initial inquiry, the Court applied the "calculus" as established in *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 712 (1985), first determining whether there was a "real advantage" for the move, including a "a good, sincere reason for wanting to remove to another jurisdiction." (*Yannas*, at 712). Moreover, the judge must consider whether there is a motive to deprive the other parent of contact with the child (*Rosenthal v. Maney*, 51 Mass.App.Ct. 257, 267 (2001)).

2. The second inquiry related to whether relocation was in the child's best interests, and whether "the quality of the child's life may be improved by the change (including any improvement flowing from an 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 noncustodial parent, and the extent to which moving or not moving will affect the emotional, physical, or developmental needs of the child." (*Yannas, supra*). Citing the above cases, the Court noted that the judge must consider that every person in the family has an interest to be considered. Father asserted that the degree of contact he had with his child in effect constituted a *de facto* joint physical custody arrangement and that the court should have applied a *Mason* analysis (*Mason v. Coleman*, 447 Mass. 177 (2006) and not a *Yannas* one, where the real advantage standard becomes moot, as there was no primary custodial parent and the "best interests of the child" standard was the controlling standard. In response, the Court noted that the parties had stipulated to a framework in which Mother had sole physical custody; the judge's findings clearly demonstrated that she "always been the child's primary caretaker and that the child resided solely with the mother." The Court affirmed that the judge applied the correct standard and the judge's findings supported her opinion permitting removal. The Court noted the financial and emotional benefit of the move to Mother, her ability to work from home, and to be more available to the child. She would have family

[5] We note that the parents in this situation were in a live-in relationship when the child was born, and they parented the child together before and after their breakup

support and be able to afford private school for the child. The judge further found no motivation to deprive Father of "reasonable visitation," and that she had supported the Father-child relationship in the past.

3. The third level of inquiry related to the child's best interests, and the judge found that the move was consistent with that. "She based her conclusion in part on her findings that the move would result in an improvement in the life of the mother that would inure to the child's benefit; that the child would have greater access to the mother, her primary caretaker, and also to an extended group of family members; that the child would have greater educational opportunities in St. Croix; and, contrary to the claim of the father, that all of this would positively affect the emotional, physical, and developmental needs of the child." (at 777) The Court also affirmed that the judge thought about the Father-child relationship, noting that, while "visitation by the father will change to his disadvantage," the alternate visitation plan was reasonable. The judge stated that Mother had endeavored to keep Father informed about the child and she would continue her past practice of supporting their relationship.

4. Legal custody of the child. Father disputed the judge's award of sole legal custody to Mother, claiming it was based wholly on Mother's assertions. The Court supported the judge's decision, noting she made that determination on the totality of the evidence.

Comment:
Coming on the heels of *Cartledge v. Evans* just a few weeks earlier, the Appeals Court seemed to affirm the prominence of the *Yannas* "real advantage standard," in cases where it determined the moving parent had a sincere reason for relocating, had been the primary physical custodian of the child, had no motivation to undermine the child's relationship with the other parent, and would benefit financially and emotionally from the move. In such circumstances, as in *Yannas*, the Court considered that those benefits would generalize or "inure," as the Court put it, to the child. As in *Yannas*, it noted the disadvantage to Father's contact with the child, but held that the alternate visitation plan was "reasonable." It seemed important that the move held certain financial gains for Mother, whereas in other cases (e.g. *Dickinson v. Cogswell* (2006)) simple social or emotional advantages (moving to live with her new husband) might not have been sufficient to meet the "real advantage" standard, notwithstanding a sincere reason for moving and an absence of intent to limit the relationship of the child with the non-custodial parent.

In *Cogswell*, Mother, too, had claimed she could work from home and be more available to the child, as in the instant case. However, the judge in *Cogswell* gave significant weight to the father-son relationship and the disruption of that which would follow relocation to California, and the Court supported his findings from the record. From the description of the father-son relationship in *Cogswell*, that father seemed more integral to the son's daily life than the father in this case. Because these decisions are fact-specific, it is hard to generalize from one case to the other, and the reader of the Appellate opinion does not have the full, detailed record describing all the facets of the various relationships within the divorced family. It again emphasizes the importance of a GAL giving detailed descriptions of the nature of each parent's relationship to and involvement with the child to help the trial court determine how much weight to give to that factor. Of additional interest according to Alex

Jones is that this case also reaffirms the public policy of the Commonwealth not to treat children born out of wedlock differently than children born to married parents. The Court applied a statute under G.L. c. 208 (the divorce statute) to a paternity situation. There is no analogous provision addressing removal under G.L. c. 209C, the paternity statute. Henry Bock raised the legal question about why the trial court (affirmed by the Appeals Court) awarded sole legal custody to the mother, when they had joint legal custody prior to the removal request and Father had been an involved parent. If, as the Court has opined, a father can maintain a relationship with a child who moves away (through alternate visitation arrangements), on what basis does it disqualify him as a parent who can have, as Henry Bock stated, "rights and obligations of shared legal decision-making and access to information?"

ANGELA **PIZZINO** vs. PATRICK **MILLER**.

Appeals Court of Massachusetts

67 Mass. App. Ct. 865 (2006)

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

Background. The parents married in 1991, and had two boys, one in 1996 and the other in 1997. At the time of trial, Mother had some part-time jobs (one being a reservist in the Air National Guard at Otis Air Force Base), in addition to her regular job as an environmental analyst with the Massachusetts Department of Environmental Protection. Father was working as a dental hygienist. He was employed by the Air National Guard at Otis Air Force Base, but retired from that service in November, 2003. Both boys had special needs; the older child struggled with academics and received special education services. The younger son had been diagnosed with pervasive developmental disorder at 16 months of age and received early intervention special education services until he was three. He was reported to be functioning at grade level and no longer needed special service. Both parents seemed to be loving and competent parents and the children were close with each of them The trial court there was a strong attachment between the boys and their father and a close relationship with their grandmother, who took care of the boys when the parents were working or on military assignment.

During National Guard training in Georgia in May, 2001, Mother met Steven Pizzino and started a relationship with him. He had been in the Air Force for 13 years and was a non-commissioned officer, stationed at Shaw Air Force Base in South Carolina. The marriage then deteriorated and ended in divorce in August 2002. The judgment consisted of joint legal custody for the parents and primary physical custody to Mother. Their incorporated separation agreement prohibited removal of the children from Massachusetts by either parent without the prior written agreement of the other parent or permission of the Probate and Family Court. Mother then married Mr. Pizzino on August 28, 2004.

Earlier, on May 5, 2003, the mother filed a complaint for modification, seeking permission to remove the children from Massachusetts to South Carolina. The father filed an answer opposing removal, as well as his own complaint for contempt. The judge appointed a guardian *ad litem* to investigate and report on the question of removal. The GAL report, which recommended against allowance of the removal request, was filed on December 17, 2003. About that time, Mother took a job Environmental Projects Group in South Carolina at a starting base salary lower than what she earned in her Massachusetts employment, but with opportunities for commissions and bonuses. She then married Steven Pizzino on August 28, 2004. Pizzino's military status precluded the possibility of a move to Massachusetts on his part.

After a trial in November-December, 2004, the judge denied permission to move, holding, "…there was no "real advantage" to the mother in moving away from Massachusetts, stating

that she "has not shown a good and sincere reason for wanting to move to South Carolina. The only reason given to the Court was the Mother's new husband, Mr. Pizzino, currently resides on a military base in South Carolina." (at 868). The judge found that the new husband had a job that could require re-assignment, which might create instability for the children. He also found that there was no financial advantage, since Mother's new job paid less salary than her current one and was more insecure in terms of tenure. Moreover, Mother would be relinquishing an "effective support system consisting of her mother and sister and entering an environment in which she had no other family." (at 868). The judge also credited the possibility that Mother's motivation was, in part, to keep the children from Father. Mother had failed to inform Father about information relevant to the children and did not encourage communication between Father and children when they were not in his care. The GAL report, which the judge cited, also referenced the idea that she was motivated diminish the relationship between Father and the children. (The appeals court took pains in footnote 7 to comment that simply citing a witness' statement was not the same as a finding, which the judge needed to do).

In addressing the interests of the children, the judge found that the proposed move would not be in their best interest. He discredited mother's claim that her new job would give her more time with them. He found that the South Carolina schools they would attend would be inferior to the Massachusetts schools they would be leaving; that base housing in South Carolina was not up to that of Massachusetts' National Guard standards; that the new schools would not address the children's special needs as well as Massachusetts had done; and the economic level of the area in which the children would reside would be "far below the neighborhood in which they currently reside." (at 869). He also held that both boys

> have demonstrated difficulty with transition both at home and at school," the judge expressed concern that the children would be separated both from their father, to whom they had a "strong attachment," and from their grandmother, who cared for the children when the parents were either working or on military assignment. In return, the children's only family contact in South Carolina other than their mother would be Pizzino, who had to date spent little time with them. (*ibid*).

Discussion. The Court framed its comments in the context of *Yannas v. Frondistou-Yannas*, 395 Mass. 704 (1985), and related cases. It noted the sequential analysis a court must do in making such a determination and opined that "a supportable finding that there is no "real advantage" to the custodial parent from the contemplated move ends the analysis, and requires a determination that the judgment shall not be modified to permit the removal." (at 870). If the court were to find that there was a "genuine, recognizable advantage" to the custodial parent, the question then would shift to whether such a move would also be in the children's best interests, although the fact of the move being demonstrably beneficial to the custodial parent "remains a significant factor in the equation." (*ibid*). They added, "Common sense demonstrates that there is a benefit to a child in being cared for by a custodial parent who is fulfilled and happy rather than by one who is frustrated and angry." (*ibid*). The Court cited *Yannas* with respect to the balancing of factors related to the child's interests as well as to the interest of the non-custodial parent, who "has an independent interest in continued, meaningful involvement with the upbringing of his or her child." (at 871). They also cited

Yannas in noting that the fact that a change in visitation due to the removal might disadvantage the non-custodial parent "cannot be controlling." They go on to note how these several criteria have been applied in recent removal cases (all in 2006), and emphasize that case decisions "plainly turn on fact finding." (*ibid*).

In addressing the instant case, the Court reiterated that the judge had found that Mother's desire to live with her new husband did not offer a 'real advantage', and that her reason for wanting to move – that is, to be with her new husband - was "not a good and sincere reason." (at 872). The Court also reported that the judge had opined that, even if Mother's plan did provide a 'real advantage', if was "not necessarily in the best interests of the children." (*ibid*). The Court then suggested the trial judge believed that no circumstances had changed post-judgment, because Mother began her relationship while still married to Miller; thus any changes had happened before the judgment was given and could not have been the basis for the modification. The Court disagreed and noted:

> In the present case, the mother's marriage is plainly a material and substantial change in circumstances occurring subsequent to the date of divorce. The judge's contrary treatment contributed to his devaluation of the mother's marriage as a factor to be considered, and may well have had a significant effect on his over-all treatment of the case. (at 873).

The Court compared its opinion in *Dickenson v. Cogswell*, 66 Mass. App. Ct. 442, 448 (2006), where the Court supported the judge's opinion that, in that instance, a desire to join a new spouse was "not a good reason for a move because we were satisfied that his analysis of the child's best interests was sound and therefore that his decision not to approve removal was justified." (*ibid*). However, in the instant case, they concluded that "a sincere desire to be with a spouse *is, per se, a good and sufficient reason* (emphasis added) that requires a finding that there is a real advantage to the custodial parent in moving." (ibid). They then add:

> It is not our function as judges to conduct reviews of the wisdom of decisions of competent adults to marry. Once the fact of the remarriage is accepted, it follows that the desire of a spouse to be with his or her marital partner is a natural and appropriate response that the law is required to acknowledge. A finding that there is no "real advantage" to the spouse in such a move is illogical and impermissible.

The Court reported that the judge seemed to be struggling with the Mother's mixed motives, one of which was to "interfere with Father's relationship with the children," and the other of which was that her desire to live with her new husband did constitute a "good and sincere reason" for moving. The guardian ad litem had expressed a concern that the distance between homes, in the event of a move, would make it even easier for Mother to exclude Father from the children's lives.

The court continued:

> Mixed motives of these kinds can be difficult to unravel. To the extent possible, a trial judge must attempt to identify whether a proper or improper motive is the

> predominant stimulus for the custodial parent's desire to move. "The judicial safeguard of th[e]se interests [of parents and child] lies in careful and clear fact-finding." Yannas, *supra* at 712. However, if the mixed motives are so intertwined as to be inseparable, and the judge is unable to determine a predominant objective in the custodial parent, we believe that if the judge concludes that the desire to be with the new spouse plays at least an important part in bringing about that parent's desire to remove, then such a finding satisfies the requirement that the move bring about a real advantage to the custodial parent. (at 874).

The Court then stated that it was vacating the order denying remove, returning the case to the trial court, and requiring the judge to accept the new marriage and motivation to move as sincere reasons, unless the judge were to find that Mother's wish to interfere with the children's relationship with Father was the paramount reason. If the judge concluded that Mother's wish to move was indeed advantageous, he must follow through with the other tests of the children's and the father's interests. The Court felt that the judge's devaluing of Mother's remarriage affected his subsequent treatment of the children's interests, since, as they stated earlier, her status is an important factor then in weighing the interests of the children, since they are likely to be directly affected by that status. Since he did not find any advantage to her move, "perhaps erroneously," he gave no weight to that advantage in analyzing the children's interests.

In a secondary appeal in this case, Mother argued that the judge depended too heavily on the GAL report. After noting that the GAL can be cross-examined and any hearsay in the report be questioned, it stated, "The guardian ad litem is free to make recommendations, "provided the judge draws his own conclusions and understands that 'the responsibility of deciding the case [is] his and not that of the guardian.'" *Delmolino v. Nance*, 14 Mass. App. Ct. 209, 212, 437 N.E.2d 578 (1982), quoting from *Jones v. Jones*, 349 Mass. 259, 265, 207 N.E.2d 922 (1965)." (at 876). The Court opined that the GAL report was properly admitted and, while the judge referred to it, he did his own independent and critical thinking about the case.

Comment: This was the fifth removal case in 2006. It appeared to state that the desire to live with a new husband and move to his location with the children should be given the weight of a "good and sincere reason" in itself, absent factors that might contravene that. If, in a mixture of motives, the desire to live with a new spouse is pre-eminent among other reasons (including intent to interfere with the Father-child relationship), that would seem to suffice as a 'real advantage' to the moving parent, although that does not presuppose that it would also be in the children's interest. It appeared that this case differed from *Dickenson*, because the new spouse in that case chose to move to California, when he could have lived anywhere and where there was no financial advantage to him to live there. In that case, the trial judge did credit that Mother would be happier living in California with her husband and would have more time with her family. Yet he found no financial advantage to the move and credited the difficulties of cross-country travel. Significantly, he found no motivation by the moving parent in *Dickenson* to undermine the children's relationship with their father, whereas that did exist in *Pizzino.* Yet, the Court upheld the trial judge's denial of the motion to relocate in *Dickenson.* The importance of this case – compared to the others – is that the Court emphasized that the trial judge should not devalue the desire to live with a new spouse and,

absent countervailing factors (such as her motivation to undermine the children's relationship with their father or the lack of financial benefit), it should be considered a 'real advantage'. In this case, by remanding to the trial court, the Court left the door open for the judge to re-weigh the relative significance of the intent to interfere with Father's relationship with the children in balancing of interests that *Yannas* requires.

DE FACTO PARENTING CASES

CARE AND PROTECTION OF SHARLENE

Supreme Judicial Court

445 Mass. 756 (2006)

Keywords: *De facto* parent

Background: This was a high profile case that involved a child who was allegedly physically abused by her mother and stepfather (petitioner), such that her injuries resulted in neurological damage and coma. DSS and the Commonwealth wanted to remove her from life support. After DSS took custody of Sharlene, her adoptive mother (who was also her maternal aunt) and only guardian, died. The stepfather, who was charged with assault and battery on Sharlene, asked the court to be adjudicated a *de facto* parent of the child, ostensibly for the purpose of having the state keep Sharlene on life support, since the state – as DSS - was considering removing her from it.

Sharlene was born on February 24, 1994. Sharlene's biological mother sent her to live with her aunt when the child was four. Sharlene's biological father was ab86sent and not a party to this case. DSS also had determined that Sharlene had been sexually abused by the boyfriend of her biological mother. DSS obtained custody of Sharlene and permitted her to live with her aunt in February, 2000. The petitioner in this case had lived with Sharlene's aunt and married her in September, 2001. In October, 2001, Sharlene's aunt adopted her. The GAL in the case noted that there were multiple reports of child abuse filed with DSS, which were all listed in the decision. Some reports were screened out, some were screened in and not supported, one or two were screened in and supported and services were instituted. The listing in the decision indicated that the allegations increased in severity, including evidence of burns in 2004 and bruises and broken bones in 2005, until the final allegation in September, 2005, whose acts resulted in multiple trauma, life-threatening injuries, and coma. Note 6 in the decision stated, "In spite of receiving a total of fifteen G. L. c. 119, § 51A, reports over a period of three years, all alleging that Sharlene was an abused or neglected child, it was not until the last report was filed that allegations of abuse were determined to be supported. That determination came too late to protect Sharlene." (at 761). The Court continued with a description of Sharlene's injuries and emergency treatment, noting that she had been in a vegetative state since her emergency hospitalization. The court appointed counsel for Sharlene and a GAL, one of whose duties was to assess whether there should be a DNR for Sharlene through a substituted judgment process. Sharlene's adoptive mother and the petitioner were arraigned, released on bail, and the adoptive mother and her own mother then either killed themselves or died through a murder-suicide pact on September 22, 10 days after Sharlene was hospitalized. On September 26, the petitioner moved to be declared Sharlene's *de facto* parent.

In a hearing on the motion, the case report stated:

> Through counsel, the petitioner described his relationship with Sharlene during the four years in which he had lived in the home. The petitioner proffered that he had supported her financially, had attended her dance recitals, had taught her how to perform minor repair jobs around the house, and generally took an interest in her welfare. He stated that Sharlene had no other father figure during the four years he lived in the house, and pointed out that, to her friends, Sharlene referred to him as "her father, her dad." The petitioner conceded that he did not perform a majority of Sharlene's parenting functions, but insisted, essentially, that he did the best that he could…The petitioner also requested in the motion to be declared the "de facto" parent of Sharlene's nine year old sister. The judge denied the motion as to both children. The petitioner has appealed from the denial of his motion only insofar as it pertains to Sharlene. (at 763)

Both DSS and Sharlene's counsel opposed the motion. They argued that the petitioner was rarely available for interviews as part of DSS' home visits, because he was not present. They also claimed that he had been aware that Sharlene was injured and vomiting on the day in question, but did nothing to check on her until a day later. They also argued that he had to be aware of the abuse and neglect ongoing in the family and was, at worst, a contributor to the abuse, or at best, simply ignored it, particularly if he was the *de facto* parent that he said he was. The judge concluded that petitioner had not performed the majority of caretaking functions for Sharlene; the judge also made negative inferences as a result of petitioner's refusal to testify as to Sharlene's injuries (protecting his right against self-incrimination in the criminal case against him). The judge concluded that…"the petitioner is not the legal, adoptive, putative, or de facto father of Sharlene…" (at 763) and could not participate in the hearings on the motions for DNR. At the emergency hearings on the DNR motion, the court heard the medical evidence and approved the motion, from which the petitioner appealed. For the purposes of this casebook, the decision regarding the issue of *de facto* parenthood is the relevant aspect of the case, although those who perform "substituted judgment" evaluations would be well served to read the remainder of the case.

The court cited *E.N.O. v. L.M.M.*, 429 Mass. 824 (1999) and *Youmans v. Ramos*, 429 Mass. 774 (1999), noting the definitions included in those cases from the ALI Principles of the Law of Family Dissolution. They repeated, "…we noted (without adopting) further refinements to the concept -- that a *de facto* parent must live with the child for not less than two years and that the caretaking relationship have been established "for reasons primarily other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions." (at 767). They noted the necessity of showing that there had been a "significant preexisting relationship," the disruption of which would create "measurable harm," and the presumption that such a relationship would have been "loving and nurturing." The Court affirmed the trial judge's finding that the petitioner had not demonstrated a *de facto* relationship nor had even shown any evidence that he had a loving or nurturing relationship with Sharlene. Since the petitioner had no legal standing as any kind of parent

figure for Sharlene, he had no basis for participating in any of the medical decisions affecting her.

Comment: This case is included since it had a discussion of *de facto* parenting in a tragic fact-pattern unlike those typically seen in family law. The reiteration of a formulaic notion of "not less than two years" of significant parenting responsibilities in the context of a nurturing relationship is the threshold over which those parents offering it as support for continued involvement in a child's life must go. Cases that are more typical would include such scenarios as same-gender parenting relationships that dissolve (see *A.H. v. M.P*, later in 2006 –see below), instances where one parent was neither biological nor adoptive, and families where grandparents or a stepparent had done significant parenting.

A.H. vs. **M.P.**

Supreme Judicial Court

447 Mass 828 (2006)

Keywords: Parent and Child, Custody, Visitation rights, "*De facto* parent," "Caretaking."

Background: The parties lived together and together they bought a home in 1998. They decided each to try *in vitro* fertilization with the same sperm donor, but M.P. was the first to conceive (in 2001) and had a child, a boy, in October of that year. Together they attended prenatal appointments and parenting classes; they chose the pediatrician together, were present at the birth, and authorized A.H. to make medical decisions for the child. They sent out a joint announcement of the birth and "in all aspects were a family." (at 831). They gave the child A.H.'s surname as a middle name and decided the call A.H. "Mama" and M.P. "Mommy."[6]

The parties discussed adoption with an attorney, who informed them of the need to adopt to protect parental rights of same-gender parents and, at their request, the attorney prepared documents necessary for adoption.[7] A.H. understood those concerns. M.P. reviewed the adoption papers. She completed the steps to expedite the process and gave them to A.H. to consider and sign. On at least three occasions between November 2001 and April 2002 (the Court then noted), M.P. asked A.H. to act on those documents, and A.H. acknowledged at trial that M.P. had asked her, but she did not believe M.P. had set a deadline for completion. A.H. also perceived her signature on the papers as a "formality necessary in the unlikely event of a 'worst case scenario'." (at 832). She testified that she felt that M.P. was "nagging" her to finish the adoption process. At the time of the separation, A.H. had not done anything about those documents, and the trial court found that she had had at least six months to act on them.

When the baby was born, M.P. left her job and became a full-time, at-home parent, which the parties expected would last for a year. A.H. took a two-month leave from her job in a non-profit organization, and then returned to full-time work. A.H. performed most of her caretaking tasks when she was on her two-month leave, calming a colicky baby, walking him, bathing him, etc, as did M.P., who also breast-fed the baby. The trial court found that both parents were involved at that time, although it said that M.P. was "the final arbiter" as to the care of the child. Within the first six months, however, A.H.'s work involvement increased, as did her travel related to that (that had been an issue for the couple prior to

[6] The judge noted that M.P. disputed this decision, but made no findings about it.

[7] From footnote 5 of the case, "The attorney simultaneously advised the parties to execute other documents, including wills, healthcare proxies, and powers of attorney. Both parties executed healthcare proxies and powers of attorney, naming each other as primary decision makers. The defendant executed a will naming the plaintiff "as the guardian ... of any child of mine" in the event of the defendant's death, but the plaintiff did not execute her will until five months after the litigation was commenced, a delay she attributed to the adoption attorney's advice to seek independent legal advice concerning her estate. The plaintiff did, however, designate the defendant as the beneficiary of life insurance policies worth $600,000. The judge found that the plaintiff "acknowledged that the parties' situation as a same-sex couple had significant legal implications, noting that they changed the title to the house because 'the law is so unclear with respect to gay families that I wanted to make sure that should I die, no one would remove [the defendant] and [the child] from the house.' "

conception) and M.P. felt as if she were parenting alone (and she reported that to a close friend). Practically speaking, M.P. was doing the bulk of the responsibilities of parenting. A.H.'s organization suffered a financial crisis in March 2002, which then occupied almost all of her time for the better part of a year, until the organization was on a more secure financial footing. A.H. was also a tri-athlete, and competed in two triathlons and one half-marathon during this period, although she claimed she ran only once a week and sometimes with the child. By mid-spring, 2002, A.H. asked M.P. to return to work (A.H. had suffered a decrease in salary because of the problems in her agency), which M.P. did, despite their prior agreement for a year hiatus from work. They hired a nanny and she went back to work, part-time. By this time, their relationship was deteriorating, particularly since M.P. felt responsible for most of care of their child. In addition, A.H. worked long hours, and she failed to complete the adoption process. By the time that A.H.'s agency was back on sound financial ground (April, 2003), M.P. wanted to separate from A.H. and asked her to leave, which A.H. did. They consulted a mediator/child development expert and devised a parenting plan, which lasted until July, 2003, when A.H. told M.P. she was moving back into the home. M.P. then moved into her parents' home on Cape Cod for a short time, which affected the visitation arrangement for about a week. At some undefined time after the separation, M.P. tore up the adoption papers which A.H. had failed to sign, thus ending that process.

Procedural issues: In July, 2003, A.H. filed for joint legal and physical custody and visitation. She also wanted to be considered a *de facto* parent and sought an order that she pay child support. Three years of litigation ensued.[8] The Court took pains to note the intensity of the legal conflict by listing the frequency and types of motions, hearings, sanctions, etc., that this case has endured. In August 2003, a judge issued a temporary order for visitation and child support. In May, 2004, the trial judge appointed co-guardians *ad litem* to investigate "whether the child's best interests required continued contact" with A.H., and if so, what kind of contact. The order specifically prohibited an investigation on issues of custody,[9] referencing Standing Order 1-05, standards 1.1 and 1.3 for Category F Guardians *ad litem* investigators "limiting guardian *ad litem* investigators to gathering and reporting facts that will assist the court in making decisions on custody, visitation, and other matters, in accordance only with the areas for investigation specified in the judge's order." (at 835). The guardians *ad litem* submitted their report in May, 2005 and the case proceeded to trial, although there were several motions/hearings in the interim. The case culminated in the trial court in an eleven-day trial.

After that trial, the judge entered a judgment in July, 2006. She awarded sole legal and physical custody to M.P., dismissed all of A.H.'s claims, and left visitation to the discretion of M.P.. A.H. had not provided sufficient facts to justify *de facto* parent status.

Findings: Specifically, the judge found that A.H.'s efforts during the relationship toward the child's care were not equal either in quantity or quality to those of M.P., that A.H. had failed to prove that continued contact between her and the child was in his best interests, that visitation would not be in the child's best interests because A.H., "in direct contravention of

[8] No pun intended.
[9] The order stated that current law does not recognize rights of custody in *de facto* parents, and so ordered no investigation on that issue.

both the parties' previous practices and common sense ... selectively ignored [the defendant's] directives regarding the child's care and custody," and that the child would not suffer irreparable harm from the severing of his contact with A.H. (at 836). She also concluded that A.H. plaintiff had no standing to bring claims for either visitation or a support order under any other theory.[10]

De facto parent: The SJC described the factors underlying any determination that a non-biological parent had a significant pre-existing relationship with the child. In such a relationship, he/she would have had to perform a variety of child caretaking tasks at least as great as the legal parent and be involved to such an extent that the Court could infer that any severance of that relationship "would allow an inference, when evaluating a child's best interests, that measurable harm would befall the child on the disruption of that relationship." *Care & Protection of Sharlene*, 445 Mass. 756, 767 (2006), and cases cited.[11] They stated:

> 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....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." *E.N.O. v. L.M.M.*, 429 Mass. 824, 829 (1999). See ALI Principles, supra at § 2.03(1)(c) (defining de facto parent).[12] (at 837).

A.H. claimed that the trial judge mistakenly failed to consider her financial contributions to the family - that she was the primary 'breadwinner'. The SJC disagreed and stated the trial judge had taken that factor into account. However, they referred back to the ALI definitions, which indicate that there is a difference between "parenting functions," which are "tasks that serve the needs of the child or the child's residential family," ALI Principles, *supra* at § 2.03(6), and "caretaking functions," which are " the subset of parenting functions that focuses on "tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others." *Id*. at § 2.03(5). "Parenting functions" that are not "caretaking functions" include, for example, providing financial support and maintaining the home. See id. at § 2.03(6) & comment g, at 125. Caretaking functions "involve the direct delivery of day-to-day care and supervision of the child," including grooming, feeding, medical care, and physical supervision. *Id*. at § 2.03(5) & comment g. (at 839). The SJC asserted that they did not intend to "disparage or discount the role of breadwinners in providing for a child's welfare." Instead, the justices opined that a parent-child bond develops through the variety of hands-on acts involved in tending to a child's basic physical and emotional needs. The consideration of direct caretaking as the "particular subset of parenting tasks having most directly to do with interacting with and on behalf of the child serves as a valuable tool for assessing the adult's bond with the child. See ALI Principles, *supra* at Introduction." (at 839). They distinguish those caretaking acts from other parenting activities,

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[10] After the judgment, A.H. successfully moved in the Appeals Court to stay the judgment until the full Appeals Court could hear her appeal. In so doing, the extant visitation plan remained in effect.

[11] In Footnote 12 of the case, the Court noted that a "best interests" assessment is relevant only after the Court has determined that the non-legal parent has met the criteria for *de facto* parenthood.

[12] In Footnote 13, the SJC defines *de facto* parenthood using the ALI standard, but notes that they did not need to use the criterion of a two year period of significant caretaking, because A.H. did "not meet her burden on other grounds of proving she is the de facto parent…"

such as working on a parent-teacher committee at school or working outside of the home, that benefit a child indirectly. They state that the direct, hands-on activities of caregiving "are likely to have a special bearing on the strength and quality of the adult's relationship with the child." ALI Principles, supra at § 2.03 comment g.

> The focus on caretaking in the ALI Principles is one means by which to anchor the best interests of the child analysis in an objectively reasonable assessment of whether disruption of the adult-child relationship is potentially harmful to the child's best interests. See generally ALI Principles, supra at § 2.02 comment b, at 96. And potential harm to the child is, of course, the criterion that tips the balance in favor of continuing contact with a de facto parent against the wishes of the fit legal parent, who has "fundamental liberty interests" in the child's care, custody, and control. *Troxel v. Granville*, 530 U.S. 57, 65 (2000)… (at 840).

> More than parental functions not aligned with "caretaking," it more directly and accurately furthers the principal goal of the de facto parent principle: to prevent trauma to the child, *Youmans v. Ramos*, supra at 784, that may result from forced rupture of a parent-child bond forged in the "direct delivery of day-to-day care and supervision of the child." ALI Principles, supra at § 2.03 comment g. It does not denigrate the importance of an adult's financial contributions to a family, or the role of such contributions in securing the child's welfare, to require that one who is not a legal parent and who invokes the equity powers of the court to establish herself as a de facto parent demonstrate a history of substantial direct, loving, appropriate involvement in the child's supervision and care.[13] (at 841).

The justices noted that the trial judge had the discretion to credit the financial contributions of A.H. as a benefit to the child, which she did, but the trial judge found that the child's primary bond was with M.P. and that "the relationship between the plaintiff and the child, however salutary to the child, did not "rise to that of a parental relationship." The SJC also stated that the trial judge was free to include or ignore aspects of the GAL testimony, that of M.P.'s expert witness, and information from other fact witnesses. The justices also credited the trial judge in considering both the "quantity and quality" of the parties caretaking of the child, contrary to A.H.'s claim that the judge considered the caretaking factor in a "mechanistic" way.

Parent by estoppel. The SJC considered this appeal as the A.H. claimed that the trial judge erred in not viewing the evidence within a framework of "parent by estoppel" theory.

> "The ALI Principles also recognize "parent by estoppel." Into this category of parents falls an individual who, in relevant part, although not a legal parent, "(i) is obligated to pay child support ... or ... (iii) lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent ... to raise a child together each with full parental rights and responsibilities, when the court finds that

[13] In Footnote 15, the SJC noted that this distinction between parenting functions and caretaking functions is not appropriate in a custody dispute between two legal parents.

> recognition of the individual as a parent is in the child's best interests." ALI Principles, supra at § 2.03(1)(b). (at 842).

According to the decision, this legal theory applies where, according to ALI Principles, parents agree between themselves to raise a child together when "adoption is not legally available or possible Id. at § 2.03 comment b (iii), at 114." In this case, they noted, A.H. could have adopted "virtually from the moment of the child's birth." They noted that private agreement is not sufficient in itself to create parental rights in a non-legal parent. In *T.F. v. B.L.*, 442 Mass. 522 (2004), they held that, " '[p]arenthood by contract' is not the law in Massachusetts," and contracts entered into to the contrary were void as against public policy. Id. at 530. They noted:

> An express or implied agreement to have or raise a child may be relevant to the parties' intentions, help explain a course of conduct, or otherwise shed light on matters of material import to a custody or visitation determination. Here, the judge found that the parties entered into an agreement to have and raise a child together, and found that the parties' subsequent actions in respect to the agreement to parent jointly illuminate an important source of the couple's conflicts. But evidence of an agreement is not and cannot be dispositive on the issue whether the plaintiff is the child's legal parent. (at 844).

The SJC then briefly discussed the notion of judicial estoppel, where A.H. said that statements and actions taken during the litigation (such as asking for child support) should limit M.P.'s constitutional right, as a competent parent, to make decisions for her child unfettered by state interference. This would give the court to right to "estop" M.P.'s claim to deny parent status to A.H.. The SJC affirmed the trial court judge in finding that the evidence did not support the notion of judicial estoppel and it also found that this legal mechanism was not an appropriate tool in the "intimate, private realm of family life." (at 845).

Comment: This was the second case in 2006 to deal with *de facto* parenthood. The first case, *Sharlene*, involved a step-parent. *A.H. v. M.P.* adhered to the ALI *Principles*, as had earlier decisions in this area of law. Most importantly for an investigative or evaluative work GAL was the distinction – important where one parent is not a legal parent – between direct, hands-on *caretaking* functions and indirect *parenting* functions. The Court also seemed to give some weight to parenting functions that might affect the direct care of the child, but are one-step removed, such as giving instructions to babysitters or nannies, setting up medical or dental or other health care appointments, finding tutors, day care/pre-school centers, enrolling children in extra-curricular activities, coaching extra-curricular activities, and (in modern society), driving children to and from activities. These would appear to reflect parenting activities that "direct, arrange, and supervise the interaction and care provided by others." In relying on the ALI *Principles*, the Court applied a threshold time test of two years of parental involvement, rather (as Alex Jones observed) than relying on the more qualitative concept of attachment. Query what would happen if the non-biological parent had been the one who did the majority of the hands-on parenting, but functioned in that role for

less than two years before the relationship ended. One aspect of such a fact pattern would be the amount of time in parenting, but another, more psychological one, would be the nature of the attachment between the child and the non-legal parent who invested all that time in caregiving. This case appears to suggest that the "bright line" criterion of two years trumps the issue of attachment.

A second implication of this opinion relates to the factors one considers in custody determinations. While the Court explicitly differentiated their thinking in a *de facto* parenting case from a custody determination, among the issues under consideration in the latter instance is the assessment of direct and indirect hands-on "caretaking functions" as well as other "parenting functions," such as employment and income production (i.e. being the "primary breadwinner") which "serve the needs of the child or the child's residential family." (at 839). It has been this writer's experience that the court and attorneys strongly credit direct and indirect "caretaking functions" over the more general "parenting functions" in considering who has been the primary caretaking parent. In one case, an attorney used a creative argument in which she totaled all the hours of parenting over several years of the child's life to bolster her claim that her client was the primary parent. That kind of calculus, all other things being equal (which is rare), is often front and center in a balancing of factors in custody assessments. Subsumed under this balancing of factors is a political/cultural debate about what aspects of parenting should be considered when making custody determinations, and the weight the trial court should give to what the SJC (using the ALI description) called "parenting functions."[14]

A third aspect of this case reflects the fact that a "best interests" determination is subsumed under the question of whether the non-legal parent can prove that he or she was sufficiently and directly involved to meet the threshold test of being a *de facto* parent. One of the conditions of *de facto* parenthood –after meeting the time criterion - is that the nature of the pre-existing relationship with the child would be such that severing it would result in demonstrable harm to the child. The SJC said that, where one parent has been so involved as to be a *de facto* parent, one could *infer* that a rupture of that relationship would cause demonstrable harm. The challenge then for an evaluator or investigator would be to provide the court with some scenarios of visitation that would prevent harm to the child, a difficult task in itself, since prediction of specific harm is probably impossible and there is no base rate data with which to make a comparison to

[14] Fathers and Families, Inc. submitted an *amicus* brief in which it advocated that the Court "neither overvalue nor undervalue breadwinning, but to include it as a factor of equal importance among other caretaking functions of parenthood. A breadwinner with whom the child has formed a parent-like attachment, and who satisfies certain other reasonable criteria as may be established, should have an equal claim to the status of de facto parent (or custodial parent), not just in deference to the virtue of the breadwinning parent, but in light of the needs of the children." *A.H. v. M.P., On Appeal from a Judgment of the Middlesex Probate and Family Court. Brief of Amici Curiae on Behalf of Fathers and Families, Inc.* (October 4, 2006), at 33. The apparent agenda in the B*rief* was to draw a parallel between the importance of the breadwinner role in a *de facto* parenting situation and the same role in the far more common separation/divorce scenario, where the father is the breadwinner in the vast majority of those cases. In several places in the *Brief*, when they mentioned the relationship with breadwinning and being a *de facto* parent, they followed that immediately with a parenthetical "custodial parent."

any particular case (perhaps divorce in which one parent does not see the child might be close). Should the GAL, using the ALI principle of proportionality,[15] recommend a schedule that reflected the amount of time the *de facto* parent gave when the couple lived together? That would be problematic, since one measure of *de facto* parenthood is a situation in which the former non-legal parent did as much hands-on parenting as the legal one, suggesting a shared physical custody arrangement. Obviously, somewhere between that schedule and one that maintains reasonable contact between the child and the *de facto* parent is likely to be more practical, but where to draw that line would appear in the end to depend upon common sense, clinical acumen, and simple practicality.

[15] See a brief discussion of this in *Custody of Kali*. 439 Mass. 834 (2003) in casebook, 119-125,121.

CONFIDENTIALITY/PRIVILEGE

P.W. vs. **M.S.**

Massachusetts Appeals Court

67 Mass. App. Ct. 779 (2006)

Keywords: Guardian *ad litem*. Divorce and Separation, Medical record, Privileged record.

The issue for the Court was "to determine whether a judge of the Probate and Family Court properly could allow a guardian *ad litem* (GAL) unrestricted access to some 2,000 pages of medical and mental health records of the plaintiff, P.W. (father)."

Background. The parents married in 1985 and P.W. (the father) filed for divorce in October, 2003. With three children, ages 13, 10, and 7 respectively, the parents had been embroiled in a custody and visitation dispute. The mother had temporary physical custody of the children. Father had an extensive psychiatric history that preceded his filing, including hospitalizations and therapy, which was ongoing during the litigation. M.S. (the mother) had significant concerns about Father's mental health. Contributing to that was the fact that Father attempted suicide in April, 2004. In the divorce litigation, Mother sought primary physical custody, while Father wanted shared legal and physical custody. Father had visitation that mother supervised after the separation (due to his psychiatric disorder), but he moved the Court to withdraw that supervision in December, 2004. Father wanted a parenting plan that would prevent Mother from (what he perceived as) interference with his relationship with the children. The Court appointed a GAL, who, in March, 2005, moved to have access to Father's medical/psychiatric records. The GAL was willing to have the Court either limit the scope of that review or help determine which records were most relevant. Father was concerned about the release of all his records and disputed the GAL review. In May, 2005, he told the Court that he would withdraw his motion for a change in custody or visitation to avert any review of his medical records. He asserted that the release of those records would harm him and the children. He also sought to have the court withdraw the appointment of the GAL. The court permitted Father to amend his complaint regarding the custody and visitation issue, but denied Father's motion to withdraw the GAL appointment. Thus, the GAL evaluation proceeded..

In June, 2005, the GAL submitted an interim report. While noting the obstacle to her investigation due to the dispute over Father's records (not all of the voluminous record was available), she indicated that some continuing contact with their father was important for the children. She opined that any decrease in contact was not of benefit to the children, and that provisions should be made for regular contact "in any suitable setting supervised by an acceptable monitor other than their mother, or supervised by their mother if she is out of earshot of the visit." (at 782). In September, 2005, the Court granted Mother's motion for sole legal and physical custody, but maintained the extant visitation arrangement (Mother supervising).

On October, 2005, the trial court judge ordered Father to produce within a month "all medical and mental health records to the Court for an *in camera* review pursuant to [G. L. c. 233, § 20B], regarding [the father's] visitation with the minor children." (at 782). Later that same month, Father moved the court to extend the time for production of these documents and for advance notice of when such records would be released to the GAL or to Mother. He noted, among other reasons, that he wanted to protect his rights of appeal. The Court granted his extension, and so, in early December, Father handed in over 2000 pages of medical records. In January, 2006, the court ordered that the GAL can review those records as part of her investigation, but that neither party nor counsel should have independent access to those records. The Court ordered also that, when the GAL finished her investigation and report, either party could move that the Court release records for preparation for trial. Father appealed that January, 2006 order, stating that it violated various privileges. The appeal was "interlocutory," meaning an order issued between the inception of the litigation and the conclusion, but the Appeals Court heard it, asserting that a decision would "avoid further interruption of the litigation and avoid waste of judicial effort." (at 784).

Decision: The Court noted that Father had withdrawn claims for custody or visitation, pleading that this obviated the need for a GAL. However, as part of his appeal, he had indicated he still wanted to retain some rights of visitation, and argued, therefore, that fewer of his records would be relevant. The Court held that the case needed to be remanded to the trial court to "clarify the status of the father's visitation." (at 784), and the judge could then determine what limits should be placed on such contacts. In considering the appeal on the issues of Father's privilege, it referenced M. G. L. c. 233, § 20B (see appendix in Casebook), and noted exception (e) regarding child custody disputes, where the judge must balance whether the information to be gained is more important for the child's welfare versus the need to protect the relationship of the patient with the therapist. Father argued that the trial judge erred in allowing the GAL to do an *in camera* review of the records, a task which should rightly be the responsibility of the judge. The Appeals Court agreed with Father, and noted that it was the judge's responsibility to review such records, although she could have appointed a separate GAL or discovery master to help her review the documents if they were "overly burdensome." In a footnote (10), the Court emphasized that it was uniquely the responsibility of the judge to determine which records would be protected, and she could not assign that task to the GAL or a discovery master.

The opinion noted that, in order for the judge to undertake such a task, the statute required Father to first "assert the privilege," as it was "not self-executing." *Commonwealth v. Oliveira*, 438 Mass. 325, 331 (2002). "The actual assertion of the privilege is a requirement of the statute, not a meaningless formality or a foregone conclusion." *Id.* at 335. If Father did not claim the privilege, his records could be considered not privileged. The Court noted that not everything in a record is privileged (once that is asserted), only those items that "contain the communications or notes of communications between the patient and a psychotherapist." *Petitions of the Dept. of Social Servs. to Dispense with Consent to Adoption*, 399 Mass. 279, 287 (1987), and the law does not protect admission of aspects of a record that are 'conclusions based on objective indicia rather than on communications from the [patient].' *Adoption of Abigail*, 23 Mass. App. Ct. 191, 198-199 (1986)." *Adoption of Seth*, 29 Mass.

App. Ct. 343, 353 (1990). See *Adoption of Saul*, 60 Mass. App. Ct. 546, 551-553 (2004) (diagnostic terms, without more, are not privileged).

The Court concluded that, if after hearing the issue on visitation, the judge determined there was no issue over visitation, the issue of the records would be moot, since there would be no basis for an order requiring disclosure or judicial review. If there was indeed an issue surrounding visitation, the judge must determine whether the medical records are relevant to deciding about the issue. In that case, the judge would have to order Father to produce the records, assert which of the records are privileged and which are not, supported by affidavit. The judge would then have to determine if those selected records were privileged and whether it was more important (for the children's welfare) to admit the relevant aspects of those than it was to protect the father's therapeutic relationship. If the judge decides that the privileged material should be disclosed to the GAL, she could make such an order "with appropriate limitations on its disclosure and orders of confidentiality." (at 787).

Comment:
In GAL practice, there are occasional circumstances wherein a parent does not want his or her records of mental health or substance abuse treatment disclosed. In such an instance, the GAL should motion the court for clarification or for further directions about such records, if the GAL believes there is information (not obtainable elsewhere) in those documents that would shed relevant light on the issues presented by the court. If the parent, as a competent adult, signs an authorization to disclose his or her medical information and does not assert the privilege (after being duly informed of the then discoverable nature of that information), he/she has waived that privilege. However, in light of *Adoption of Diane,* one wonders what happens to the independent privilege of the child regarding his or her therapy records, if neither parent asserts the child's privilege (and both sign an authorization to release that information, as often occurs). It may be that for a child, who is not considered competent to make that decision, the privilege is considered self-executing (the converse of *P.W. v. M.S.*) and would only be waived *after* the investigating GAL initiates a request to obtain the records. It would thus require either one of the parties or the GAL to ask the court to appoint a special-purpose GAL to investigate and recommend whether the child's privilege should be waived.

CUSTODY ISSUES

B.B.V. vs. **B.S.V.**

APPEALS COURT OF MASSACHUSETTS

68 Mass. App. Ct. 12 (2006)

*Keywords***:** Divorce and Separation, Custody, Incest.

Background. The parties married in June, 1990. They had twin boys, W.V. and G.V., in November, 1998. The boys were six and one-half years old at the time of trial and almost seven when the judge made his findings of fact (the children were younger when evaluations and interviews were done). In May, 2002, B.S.V. (Mother) contacted her biological father, R.S., whom she had not seen virtually all her life, after her father had left her mother during her mother's pregnancy (she also knew that one of the reasons for her parents' divorce was that her father committed some sexual offense). B.S.V. then began an extensive e-mail and telephone communication with her father (up the three hours/day), including messages that were sexually suggestive. She went to visit her father in September, 2002, and, as she later told a friend, she had "broken her marriage vows." In November, 2002, R.S. visited Mother at Thanksgiving and in March, 2003, he came to live with the parties. This served to exacerbate the marital problems and contributed to the demise of the marriage. In May, 2003, Mother filed for divorce. She then slept on the floor in the room where her father slept, until B.B.V. (Father) vacated the home. Father then filed complaints with DSS, the police, and the probate court, alleging that R.S. was sexually abusing their son, W.V., and that R.S. and Mother were engaged in an incestuous relationship. He sought sole custody, supervised visitation for his wife, and orders to bar R.S. from contact with their children.

After investigations, neither DSS nor the police department found any substance to the allegations of abuse. The court appointed a guardian *ad litem* to also investigate and report on issues of custody and visitation. The children were ordered to be evaluated with respect to possible abuse (an MSPCC psychologist performed this assessment).

The GAL filed his report in March, 2004 and concluded that Mother was involved in an incestuous relationship with her biological father. Father then motioned the court for sole physical custody of the children and a prohibition on visitation with Mother. After an evidentiary hearing, the judge made findings of fact and granted Father temporary sole physical custody of the children, pending the results of the children's MSPCC abuse assessment. The judge concurred with the GAL's assessment regarding the presence of an incestuous relationship. Mother was allowed to see the children, but the court prohibited her from having her father present at any time that she was with them. The judge ordered Mother to undergo a mental health evaluation by a "psychiatrist or psychologist of her own choosing." Until the judgment of divorce nisi in November, 2005, Father then continued as the physical custodian of the children while Mother had visitation, as long as R.S. was not present with the children.

At trial, the judge heard testimony from the various experts involved in the case, including several mental health professionals and other collaterals. DSS had no concern about safety issues and neither parent alleged that the other was unfit. In his detailed findings, the judge determined that Mother was the better parent despite the obvious concerns about her relationship with her father. The judge found that Mother had always been the primary caretaker (up until the temporary order granting custody to Father) and managed the daily administrative tasks of the family [the "caretaking" and "parenting" functions referred to in *A.H. v. M.P.* 447 Mass 828 (2006)]. Even when Father had primary responsibility for the children, Mother kept in contact with the children's teachers and was the person who did the direct care of the children when they were with her. She was capable of taking care of the children after work (children were in day care during the day). She was willing to encourage the children's relationship with their father and to ensure telephone contact with him. Father did not similarly encourage the children's relationship with Mother, because of his anger over the marriage and her relationship with her father. She kept Father informed about the children's welfare during the separation period, when she still had primary custody of them and she included him in decision-making and school affairs. The GAL, who had initially recommended a change in custody to Father, testified at trial that Mother was the more competent parent, since her father had moved out of the house and had no contact with the children. There was information that the children missed their mother and had trouble separating from her at the end of their time with her. Father even asserted that he would prefer that the children be with Mother, if the court were not to give custody to him.

No assessment found any connection between Mother's incestuous relationship with her father and the adjustment of the children, who were "rambunctious, happy and healthy six (6) year-old children." No agency or professional found that the children had witnessed any inappropriate behavior by their mother and there was no evidence of trauma. Mother had been in therapy since April, 2004, dealing with her relationship with her father and she had kept her father from the children without fail since the court order. However, she had maintained a relationship with her father, when the children were not with her. The judge found, however, that, at the time of trial Mother's relationship with her father was not active. Mother's relationship with her father was not deemed to have impaired her parenting of the children, and:

> in the judge's view, there was no nexus between the wife's inappropriate relationship with R.S. and her parenting and providing for the children's needs. See *Bouchard v. Bouchard*, 12 Mass. App. Ct. 899, 899 (1981) (custody award not a device to discipline parent for shortcomings); *Doe v. Doe*, 16 Mass. App. Ct. 499, 503 (1983) (parent's involvement in illegal relationship not in and of itself valid reason for denying custody of minor child). Compare *Adoption of Katharine*, 42 Mass. App. Ct. 25, 28 (1997) (for termination of parental rights, parental unfitness means more than character flaw or conviction of a crime; child's best interests bear on how much parental deficiency is tolerable). The judge exhorted the wife to continue with her counselling efforts. (at 17)

The trial judge further found that Father showed no interest in being the primary caretaker, having left that role to his girlfriend (up to 45 hours/week of care), with whom he lived. In

effect, the girlfriend was performing all the functions that Mother had previously done. Father interacted with the children when he had the time, but had not made any effort to alter his work schedule to be more available to them or to participate more in their care (he worked two to three night/week and Sundays). While he indicated he would seek more flexible employment or different hours, he in fact did not follow through on those commitments. Father noted that, if the court awarded him permanent custody, his girlfriend would continue to be the primary caretaker. From the trial court's findings, it was clear that Father could not handle the care of the children, that he was careless in some medical follow-up of an ear-tube insertion in one child, and that he tried to keep Mother out of the loop in medical decisions. Furthermore, he entered one child in therapy without informing Mother. He and his girlfriend moved three times in one year, one of those moves being to a two-bedroom apartment where the children slept on an air mattress on the floor. The judge found the Father's continuing anger at his ex-wife had compromised his parenting. In addition, Father had monitored phone conversations, talked about his ex-wife with her neighbors, and asked them to spy on her for him, and he spoke ill of Mother to the children. He admitted he was keeping a log of his ex-wife's behavior to show to the children when they were older. Given those relative strengths and weaknesses of the parents (and the children's attachment to their mother), the judge ruled, "…it is currently in the best interests of these children to be in the physical custody of their mother, who can be their primary caretaker and provide them with stability."

Discussion. The Appeals Court opinion stated:

> "The determination of custody is a choice among limited alternatives, all of which, invariably, have imperfections, often serious imperfections. The judgment that is called for is a realistic, commonsense judgment, one which weighs the practical significance of those imperfections or deficiencies in terms of their effect on the well-being of the child and his future development." *Fort v. Fort*, 12 Mass. App. Ct. 411, 418 (1981). (at 18).

In affirming the trial judge's decision to award physical custody to Mother, the Appeals Court said that the judge was remiss in not continuing the prohibition against any further contact by the children with her father. It said that returning custody to her "must rest on this condition." It suggested that one could infer that prohibition was one basis for the judge's decision and that it was even more necessary after the court returned physical custody to Mother, given her prior conduct. The Court would have considered it an "abuse of discretion" were the judge to omit an explicit prohibition against further contact, given the fact that, as the children grew older, there was a greater chance that exposure to that incestuous relationship would cause "obvious harm." A judge needs to needs to "consider the welfare of the child[ren] in reference not merely to the present, but also to the probable future . . . ." *Jenkins v. Jenkins*, 304 Mass. 248, 250 (1939). A judge need not wait for the obvious harm that would befall children who are exposed, directly or indirectly, to an incestuous relationship."

In remanding the case back to the trial court for inclusion of that condition, the Appeals Court added:

> There can be no real dispute that if the wife and R.S. were to engage in an ongoing incestuous relationship to which the minor children were exposed, directly or indirectly, then at some point there would be a direct and articulable adverse impact on the children. See *Fort v. Fort*, 12 Mass. App. Ct. at 414-417. In these circumstances, it would be error to omit such an essential prophylactic measure to safeguard the well-being of the children, especially one that was already in place and relied on by the judge and other experts at the award of physical custody. (at 18-19).

Comment: This was an interesting opinion because of the unusual nature of the fact pattern. It would have been interesting to see what the judge might have ordered, if Father had been reasonably involved as a parent and, among other misjudgments Father made after he obtained temporary custody, had not left all the parenting functions to his girlfriend. It strikes this writer that Mother's conduct with respect to her incestuous relationship is akin to other forms of adult behavioral problems that include, but are not limited to, such things as substance abuse or other addictions (Internet pornography being a more recent one), extra-marital affairs, mental illness, and the like. The test is whether there is some demonstrable or reasonably predictable connection (or as the Court put it, "nexus") between the behavior and its effect on the children. The variable between the conduct and the children's response is that of parenting function, and the research shows that this "mediating" variable is critical to understanding the connection between the (mis)conduct and children's responses. In *B.B.V.*, the Appeals Court noted that not only were the children protected from the incestuous relationship by Mother, multiple evaluations indicated no exposure, no harm, and no trauma. In effect, the court found that Mother's conduct with her father had not compromised her more-than-adequate parental functioning, even when she did not have custody of the children, and that was reflected in how well the children had been doing.

What was also informative was that the Appeals Court reminded the trial judge that it was his responsibility to consider "the probable future," where he could reasonably have predicted future damage to the children, and his responsibility, therefore, to make some order related to that "probable future." In cases with problematic behavior by one parent, when there is data that informs about future outcomes, it is useful to communicate that information to the court, so that the judge can consider it among the different scenarios he or she could eventually order. Henry Bock noted that, were the children older, they could have been more affected by simple knowledge of their mother's illegal relationship (even if they did not witness anything) or by social stigmatization among their peers were the facts of that incestuous relationship to become public. Alex Jones suggested that this might have been the very reason the Appeals Court remanded the case to the trial court, in order to set in place those protections. This case also reminds us, as the Court has noted before, that its focus is on children's needs and interests. It is not the goal of the Court to punish parents for misconduct (as one spouse would sometimes desire), as long as there has been some wall of protection that the so-called "offending" parent has erected between the behavior and his or her parenting.