CRITICAL CASES IN MASSACHUSETTS FAMILY LAW

FOR THE CATEGORY E&F GUARDIANS AD LITEM

SUPPLEMENT FOR 2007-2012.

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Appellate Case Law for Category E&F GALs, Supplement 2007- 2012.

Preface

The readers are advised that the summaries and comments in these cases are the writer's. 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. The writer would like to thank Julie Ginsburg, LICSW, J.D., Jenny Robertson, J.D., Vicki Shemin, J.D., L.I.C.S.W., A.C.S.W., and Annie O'Connell, J.D., for their reviews of the summaries with respect to the legal aspects, and Geri Fuhrmann, Psy.D., for her editorial review.

Removal cases are among the most frequent domestic relations cases heard by the appellate courts in the last five years, as they were in the 2006 review. Since *Mason v. Campbell* in 2006 (see 2006 *Addendum* to Casebook), the type and amount of caretaking during the relationship or post-separation have become significant, since it affects the framework within which the Court will analyze the case. Where the children had a more traditional primary care parent, the relocation factors in *Yannas* (*Yannas v. Frondistou-Yannas* 395 Mass. 704 (1985)) further delineated in *Rosenthal v. Maney*, 51 Mass. App. Ct. 257 (2001) provide the basis for analysis. Where the children experienced more shared parental care (whether pre- or post-separation), the factors in *Mason* (*Mason v. Coleman*, 447 Mass. 177 (2006)) provide the analytic frame.

As in 2006, two cases dealt with circumstances that underlay the necessary facts for one non-biological parent to qualify as a *de facto* parent. *R.D. v. A.H*., 454 Mass. 706 (2009) discussed some of the factors as described in *Youmans v. Ramos*, 429 Mass. 774 (1999), but the case primarily fits into one of guardianship, where the *de facto* parent had petitioned the court for physical custody over the biological parent. As a guardianship case, the analysis depended first on the determination of fitness of the biological parent and then on the best interests of the child.

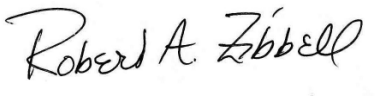
In the 2006 review, this writer suggested that there would be increasing references to the American Law Institute's *Principles of Marital Dissolution* (A.L.I.). This occurred at the trial court level in an amended judgment in *Prenaveau v. Prenaveau*, 75 Mass. App. Ct. 131 (2009), also called *Prenaveau I* (heard on remand, *Prenaveau,* 81 Mass. App. Ct. 479 (2012), (also called *Prenaveau II),* when the judge explicitly referenced the "approximation rule"[1] and tried to fashion a parenting plan consistent with his understanding of how the parents in that case had spent time caring for the children before the separation. Two cases in 2010 used a creative calculus for determining parenting responsibility. In *Prenaveau (I)* and *Katzman v. Healy*, 77 Mass. App. Ct. 589 (2010), the trial judges independently determined that the calculus for estimating parenting time would consist of the time a child is actually under the care of a parent, excluding sleep time, school time, and camp time. The Appeals Court rejected such a notion in *Katzman* and was silent about that issue in *Prenaveau II*.

This review includes two cases related to intimate partner abuse. In the first case, the judge took notice of domestic abuse by a father, but found other factors that indicated his parenting was not compromised and the child suffered no demonstrable harm (*R.D.*. 454 Mass. at 706 (2009)*)*. In the second case, *Sher v. Desmond,* 70 Mass. App. Ct. 270 (2007), the judge decided the potential

[1] American Law Institute, *Principles of the Law of Marital Dissolution: Analysis and Recommendations*. Matthew Bender & Co. Inc., (2002).

harm to a child living with Father (only legal parent available where there was clear evidence of his having physically abused Mother, who had disappeared) was sufficient to grant maternal grandparent visitation as a way to possibly prevent future harm to the child.

A final personal word:
This body of work has been a labor of love for me as I have tried to put into writing my interest in the intersection of family law and mental health as each applied to the assessment of family law disputes. My interest in the relationship between Law and Psychology grew after taking a reading course in 1991 with Dr. Thomas Grisso through the UMASS Department of Psychiatry's Forensic Psychology (Law and Psychiatry) Program. Being in the twilight of what has been an exciting career, it is likely that this will be the last supplement in this series and I hope that someone else might be willing to continue the task of following future cases and applying their lessons to these complex evaluations and investigations. I have appreciated the positive feedback I have received from fellow practitioners on these cases and the assistance of those lawyers and mental health professionals who have reviewed them. I have felt honored that they were willing to give some of their precious time to doing those reviews. As I wrote in the first publication in 2006, I would be interested in any feedback on these cases and comments via e-mail at razibbell@comcast.net



Bob Zibbell

ROSALEE A. **ABBOTT v.** MICHAEL A. **VIRUSSO, JR.**

APPEALS COURT OF MASSACHUSETTS

68 Mass. App. Ct. 326; (2007)

Keywords: Removal, Divorce and Separation, Modification of Judgment, Child Custody.

> *GAL Highlight*: This decision directs the GAL to focus on the various interests of each family member, as the Court weighs those factors against one another. Here, the trial judge had determined that the child's close relationship with Father would suffer were he to move with Mother to Arizona (AZ) and that the travel stress would be significant for him. These factors prevailed over Mother's interest in living in Arizona with (and marrying) her fiancé. The Appeals Court reversed, noting that Mother had been the primary caretaker, that there was a "real advantage" to Mother to move to AZ with her fiancé, and that her interest in moving was sincere. In addition, the decision further reminds the GAL to focus on what caretaking functions the parents actually performed and the pattern by which they performed them, rather than on what legal custodial arrangement they had agreed to at the time of divorce.

Background: The parties had a 15-year marriage in which Mother had been the primary caretaker. At the time of the trial, the daughter (13) was living with Father and was estranged from Mother. The son (9) lived primarily with Mother, but saw Father. The Judgment ordered shared physical custody, although the parenting plan involved the children living primarily with Mother. She then became engaged and was living with her fiancé; she filed a modification requesting permission to move with the son to AZ, where her future husband resided. Father counter-filed for sole physical custody. At the removal/ modification trial, the court denied both parents' motions. The case was decided under the "real advantage" standard as determined in *Yannas*, 395 Mass. at 704, where one parent was considered to be the primary caretaker and not under the *Mason* formula (*Mason*, 447 Mass. at 177), where neither parent was the primary caretaker. The Court cited the A.L.I. Principles §2.17 (4) (a), as they related to cases in which there was a clear primary caretaker:

> The court should allow a parent who has been exercising the clear majority of custodial responsibility to relocate with the child if that parent shows that the relocation is for a valid purpose, in good faith, and to a location that is reasonable in light of the purpose. *Abbott v. Virusso*, 68 Mass. App. Ct. 326, 330-31 (2009); *Principles*, at § 2.17(4)(a).

Then, under *Yannas*, when the moving parent has met the "real advantage" test, the focus turns to whether it is in the best interests of the child to move with that parent. The advantageous basis for the move continues to be a factor even in "best interests," since, as the appellate courts have stated so often, the interests of the children are intertwined with the interests of the custodial parent who wants to move. See *Yannas* 395 Mass. at 710.

In this case, the Court found that Mother had a sincere reason for the move and did not harbor any motive to deprive her ex-husband of a relationship with their child. Further, it was evident that she would benefit socially and emotionally as a result of her re-marriage. She would also be more financially secure and would earn as much if not more in AZ as she had in MA. Despite the findings that supported the personal benefit to her of the move, the trial judge denied her the right to move her son with her. The judge based his/her decision on the evidence that it was not in the child's best interest to move, because of the boy's close relationship with his father (and the resulting loss of that closeness) and some difficulties in the practicalities of father-son contact in MA, if the son were to move away and then come back to visit here. The judge also credited the superiority of the local MA school system over the one in Tucson, AZ. The wishes of the child to remain here were also taken into account.

The Appeals Court reversed, noting that "best interest" is not the sole test. The Court determined that the judge did not account for the interests of all the parties involved in his decision. The judge did not include findings about the advantages to the boy if he were to move, about the interests of Mother, or about the nature of the relationship between Mother and the son.

The Court briefly considered one other issue - sibling relationships. The trial judge had credited the importance of keeping siblings together in denying removal. The Court noted that the sibling relationship should not be more important than the mother-son relationship, but was one factor to be considered in assessing "best interest," as long as the trial judge provided specific findings related to that issue other than children's statements of preference. A key fact in this particular case, however, is that the siblings had not lived together for several years at the time of the divorce judgment. During the pendency of the divorce, Father sought "an ex parte order for custody of [the daughter], removing the child from the marital home and separating her from her brother." *Abbott*, 68 Mass. App. Ct. at 327.

Dissent: One of the three appellate judges wrote:

> I do not believe that the judge here abused his discretion by denying the mother's petition to remove one of her two children across the country. I further believe that the judge conducted a thorough hearing and issued a thoughtful decision, taking into consideration the necessary factors in his determination of what was in the best interests of the children. I, thus, respectfully dissent. *Id.* at 339.

The dissent in this case credited the trial judge for considering all the family members' interests, in direct contrast to what the majority wrote. The dissent supported the judge's discretion to give differential weights to the various factors and noted the judge had been transparent in listing the various benefits. The dissent thought the judge was within his discretion to credit the negative effects of removal on the closeness of the father-son relationship and to give weight to the importance of the sibling bond more than other factors. It noted that a Family Court Clinic evaluation did not support removal, while the GAL report did support it, so that the trial judge had conflicting opinions that he considered. It also compared the facts in this case to *Dickenson v. Cogswell*, 66 Mass. App. Ct. 442, 444-446. (2006), in which the Court denied removal because of the great stress that cross-country travel would place on the child, especially given the strength of the father-child bond and that father's involvement in the child's life, as the dissent stated,

"[t]he very concerns raised here." (*Abbott*, 68 Mass. App. Ct., at 342) The dissenting judge did not believe this case was even a "close call," and thought that the facts showed that the "advantage" of removal to the mother was "clearly" surpassed by "doing what is best for her children." (Id. at 343). He stated that it was in the best interest of both of the children that the son not be relocated.

Comment:
Coming so soon (February, 2007) after the string of removal cases in 2006, *Abbott* appeared to add to the confusion generated by the appellate courts in their 2006 decisions. Obviously, these cases are fact-specific, but it is hard to perceive any pattern that would lead to consistency or predictability in the law. *Abbott* borrows heavily from the A.L.I. *Principles* as they relate to relocation issues, but in this case the majority and dissenting opinions appeared to weigh the same facts differently, in that the majority credited the financial and social benefit to Mother of marrying her fiancé – in effect making that the "real advantage," while the dissent credited it far less than the potential damage to the father-son bond produced by the relocation (and reminded this reader of the similarity to *Dickenson*, where the Court denied relocation). The dissent also emphasized the stress of cross-country travel for the son to see Father (citing similar circumstances in an earlier decision), although it did not appear to factor in the possibility that a parent would accompany the boy on these trips.

As in other A.L.I.- related cases, the recent decisions in removal cases will push GAL's to fact-find carefully with respect to "valid purpose," "good faith," and "location reasonable in light of the purpose." In addition, if a contest exists over who performed a large enough majority of the "caretaking functions" – as distinguished from "parenting functions" – the GAL will be asked to do a thorough behavioral assessment of those two roles.[2] Finding corroboration of parental self-reports can be a challenging investigative task, yet that is what is essential to a valid determination of which parent was the primary caretaking parent. The A.L.I. writers noted that this kind of factual examination is more consistent with the kinds of evidence trial courts regularly weigh and is more reliable than the evidence often supplied by "experts," which the writers considered to be more subjective in nature.

In *Abbott*, Mother had clearly been the primary caretaker. Under the *Principles*, when there is a clear caretaking parent (someone, according to A.L.I. *Principles*, who does 60-70% of the hands-on caregiving) and if that parent satisfies the three tests of "valid purpose, good faith, and location reasonable in light of the purpose," (*Id*. at 330) they will also satisfy the (Massachusetts) "real advantage" standard and likely be allowed to move. The majority opined that Mother satisfied those three tests. While one still has to give some weight to 'best interest' issues, "real advantage" continues to be the significant factor where there is a primary caretaker, which, once established, would likely require compelling evidence that relocation was not in a child's best interest for the court to deny removal (such as might depend on the nature of the child's relationship with his/her other parent, or, with a mature adolescent, his or her wishes with respect to the move, as noted in *Altomare v. Altomare*, 77 Mass. App. Ct. 601 (2010).

[2] For a description of those two roles, see page 20

One other factor at issue, the respective strengths of the school systems, was downplayed by the majority. It suggested that, as long as the proposed new school system was "appropriate to the child's needs," (*Id.* at 334) it would not be a major variable of interest. Where a child has some special needs, it would logically follow that a careful examination of each system would be desired, but the fact that one system was clearly superior would not necessarily be determinative.

One difficult task for a GAL (and perhaps only a court can decide this) is to weight the benefits that might accrue to a child as a result of the increased happiness of his/her custodial parent as against the costs to the child of altering a significant relationship with his/her non-custodial parent. The writer does not know of any clinically or scientifically reliable formula to apply to that assessment, so the task of the GAL might be to delineate the costs and benefits without making conclusory statements as to which he or she credits more.

CHRISTOPHER **PRENAVEAU** v. SARAH **PRENAVEAU**

APPEALS COURT OF MASSACHUSETTS

75 Mass. App. Ct. 131 (2009)

Keywords: custody, removal, visitation, division of property, property division.

Highlight for GALs: This case reminds GALs to exercise due diligence in evaluating the interests of all the parties to the litigation. The Appeals Court noted that the trial judge needed to do a "searching inquiry" about these factors, and so the task of the GAL is to assure that all the relevant facts are available for review by the parties, the attorneys, and the court. There is some controversy as to whether GALs should make recommendations on the legal question in a removal case. Notwithstanding that, it does behoove them, as noted in the commentary on *Abbott v. Virusso* above, to understand the different analyses they might do related to the pattern of the caretaking responsibilities performed by the parents during the marriage or after the separation/divorce.

Background: After eight years of marriage, Mr. Prenaveau filed for divorce in 2006. They had two children, a girl, age 3 (born 2003) and a boy, just under 1 (born 2005) at the time of the filing and lived in Stoughton. Both parents had worked for company owned by Ms. Prenaveau's father; Ms. Prenaveau earning more and working longer hours than her husband. Despite Mr. Prenaveau's lighter work load and more flexible work schedule, much of the child care was performed by *au pairs*, with one of whom he was having an affair. Prior to separation, the Court found that Husband spent "only slightly more time with the children" than did the Wife. Id at 491. After Mr. Prenaveau filed, he co-habited with his wife in the home and shared legal and physical custody with her. When that proved unworkable, he and the former *au pair* moved together to the next town and had parenting responsibilities for children about a third of the time at his place. Ms. Prenaveau hired a new *au pair*, while reducing her hours with her father's company to about 25-30/week. They did not alter the legal/physical custodial arrangement. The court ordered him to pay child support.

Mr. Prenaveau lost his job and eventually was hired by the NH State Police as a trainee. He grew up in NH and had family there. He moved to NH in August, 2007, which resulted in significant time in the car for the children as they shifted between homes. On August 3, 2007, a new temporary order awarded sole physical custody to Ms. Prenaveau, allowing Mr. Prenaveau to see the children three or four weekends/ month. That order remained in effect for about 18 months until April, 2009. Mr. Prenaveau was then assigned to a part of NH that required him to live in Gonic, NH, about 100 miles from Stoughton, MA, a trip that took over three hours one way. At trial, the judge agreed with Ms. Prenaveau that the travel was onerous to the children.

The trial judge used the GAL report to credit the close relationship the children had with each parent and the need for that relationship to continue, albeit in the context of significant mistrust and animosity between the parents. The GAL finished the investigation before Mr. Prenaveau moved to NH, so data about the impact of that move on the children was unavailable through

the GAL process. The trial (seven days over 11 months) was presided over by a new trial judge. Revising the terms of the August, 2007 temporary order, the new judge modified the parenting plan and ordered the children to move in with the husband in the latter's residence in Gonic, NH. As a result, Ms. Prenaveau received less time with the children than her ex-husband did and also had the burden and expense of driving to see them (her parents had a home not far away in NH, where she could have the children on weekends). The trial judge stated that he had allocated time about equally between the parents, but the Appeals Court found that, in reality, Ms. Prenaveau would only have about 4-6 nights/month with the children, as they were both in school full time during the day. The Court noted that the trial judge viewed his decision as a reasonable compromise between each parent's position (although father's proposal was not noted in the trial court decision), but the judge's reasons for his decision "were not immediately apparent" from the decision itself. Ms. Prenaveau was able to obtain an expedited appeal to be heard before the school year began (case heard in June, 2009 and decided in August, 2009)

Discussion:
As noted in the highlight above, the critical issue in this removal litigation was what type of analysis was relevant to deciding the case. Either it was *Yannas v. Frondistou-Yannas*, 395 Mass. 704 (1985), where one parent had been the primary caregiver, or *Mason v. Coleman*, 447 Mass. 177 (2006), where parenting responsibilities had been fairly equally shared. "The main distinction between the analyses set forth in the two cases comes down to the weight that should be assigned to the benefits that relocation would provide the parent seeking to move." *(Prenaveau*, 75 Mass. App. Ct. 131, 139 (2009). The Court notes that *Yannas* gives weight to the benefits that would accrue to the children because of the advantage to the parent in his/her move, while *Mason* does not give that same weight to those benefits. In each case, the best interests of the child are paramount, but are more entwined with the "real advantage" to the moving parent in a *Yannas* analysis. The Court indicated that it appeared that the judge analyzed the case under *Mason*. Regardless, the Court opined, the judge did not make a "searching inquiry" as to how his decision, given the distance between homes, was in the best interest of the children. In fact, it said, significant distance between residences – as exists in this case - is often a contraindication for shared physical custody.

In criticizing the Judgment, the Court noted that the children's lives were spent in Stoughton, where they attended school, associated with friends, and regularly saw their maternal grandparents. Their life in Stoughton "provided a baseline" against which to determine if such a change was in their interest. Then, surprisingly, the Court referred to a 1965 case, *Jones v. Jones*, 349 Mass. 259, 264 (1965), using outmoded terminology, "Before allowing "'[t]he uprooting of [children] of tender years," the court must examine whether there are 'compelling reasons' to do so." (*Prenaveau*, 75 Mass. App. Ct. at 142, (emphasis added)). There were reasons the Court cited that did not support removal. For instance, the Court noted that the children saw their maternal grandmother regularly in Stoughton (far more than their paternal grandmother in NH) and the parents had availed themselves of the more accessible medical resources in Boston for the daughter (she had a medical condition that was stable, but needed Boston hospital attention when it was acute). The judge failed to address the impact of moving the children from Stoughton – where, as noted, their lives had been established and settled – to Gonic, NH. He opined that such a move was in their best interest, but failed to lay out supporting facts for such an opinion – that is, what was beneficial to them in moving.

Whatever established connections the children had to NH and whatever their noted flexibility of personality (making adjustment more possible), the Court said that these were not sufficient reasons why they should move to NH with their father. The judge also failed to consider alternative arrangements and seemed not to have considered the possibility of keeping the children primarily in Stoughton. The Court noted that Mr. Prenaveau could have chosen an assignment closer to the MA border, which option would have been consistent with the sacrifices parents often have to make if they want to work out a shared parenting arrangement. Finally, the Court was critical of the trial judge's desire to establish a shared physical custody plan in the face of significant problems in the distance between homes. Given that challenge, the Court noted that the trial judge should have given consideration to having one parent be the sole physical custodian. Due to those failings, the Court of Appeals reversed the removal decision and remanded the case back to the trial court for further review, based upon the factors raised in the opinion. The Court ordered the children returned to MA by the end of August (so they could start school in Stoughton).

The Court then discussed how the trial court might proceed in addressing certain facts that were suggested at trial. These include the relative flexibility of each parent's work situation and how that might affect their ability to parent, the actual amount of time that the children had been in the primary care of their mother (counting the time since separation), or the stability of the father's living situation with his paramour, a former *au pair*. She was a Panamanian national whose commitment to staying in the US was unknown. Essentially, in its remand, it asked the trial court to do a complete review of the custodial issues as well as the impact on possible removal.

There were other issues addressed by the opinion, including property/financial concerns. In the end, the Court reversed the trial court on all the issues and remanded for rehearing on them. The case was then reheard by the same trial judge, resulting in another appeal (see Prenaveau II, pp. 31-33). The dissent in this case focused on the missing recordings of the GAL testimony, and suggested that, rather than re-hearing the whole case at great expense, the trial court move to hear the GAL on the relevant issues.

Comment:
This is an unusual case of removal, tempting one to read between the lines of the opinion regarding how the trial judge came to his decision, since the facts as presented did not seem to support removal. The Appeals Court opinion reminds GALs again to consider all the relevant factors – advantages and disadvantages - for all family members. In this case, a GAL might offer data regarding the impact on the children of moving to NH from their established community, where they had friends and family or what alternative arrangements might have satisfied their need for close and continuing contact with their father. In addition, as with *Abbott* above (and others), it is essential to understand the differences in types of removal cases between *Yannas* or *Mason*, and, as a mental health GAL, to investigate all the relevant issues subsumed under either type. To reiterate, a *Yannas* analysis considers the interests of all the parties, including:

a. the sincerity of the desire to move, the interest of and advantage to the moving parent (if that parent had primary parenting responsibilities),
b. the best interest of the child, including:

- life improvements flowing from the improved economic, social, or emotional life of the moving parent,
- the effect of the move on the relationship with the non-custodial parent, and
- the effects of the move on the child's emotional, physical, or developmental needs

c. the interest of the non-custodial parent (including the significance of the ongoing relationship to the child) and,
d. alternative solutions to the relocation.

A *Mason* analysis considers all of the above factors, but provides no extra weight to the advantage of the moving parent, (i.e. it is just one "relevant factor") since each parent has the status of primary caretaker. Thus, the paramount issue is the best interest of the child, including the effect of the proposed move on the child's best welfare.

Absent an affirmative order for a recommendation, it is not the responsibility of the GAL to decide which type of analysis is paramount, as that is a legal determination. However, it is helpful to the court for the GAL to examine issues of parental responsibility (as delineated by A.L.I., for instance, in caretaking and decision-making), parent-child relationships, and parent-parent relations, and to show how those factors apply in either type of removal case. In that way, the court has all the information available at the time of the evaluation, regardless of which analysis format it decides to use. Even with a request for a recommendation, it is questionable whether a GAL should make a recommendation on the legal issue, perhaps settling for providing the court with a series of "if-then" options that would account for the various alternative outcomes with possible effects on the children.

A last comment is on the Court's use of what would appear to be an anachronistic term, "tender years doctrine," as it referred to a 40+ year old case in MA law, *Jones,* 349 Mass 259. Its use in the instant case *could* be interpreted as an important factor to consider when there is a motion for removal of children under seven and may speak to concerns about attachment, as the use of that concept becomes more widespread in family law.

The writer followed up on the results of the remand in this case. It was heard again in five more days of trial in November, 2009, March and May, 2010 (12 days in all). There had been a second GAL appointed, as the original one could not serve. In meeting the goal of providing consistent and regular contact with both parents and minimizing the burden of travel on the children, in the Amended Judgment the court again ordered that the children should live primarily with Father in NH, with three long weekends (through Monday morning if she were to be in NH) with Mother. If she wished to be in NH, she could start her weekends with them on Thursday after school, with notice to Father. The judge then split holidays, vacations, and the summer period. The judge noted that he had considered alternative arrangements, but found that none of them met the goal of providing consistent and meaningful contact for each parent with the children. In being more explicit about his reasoning, the judge reiterated that Mr. Prenaveau had done more of the hands-on parenting during the marriage, was more likely to encourage a relationship with Ms. Prenaveau than she would have with him, and was more likely than she to foster their healthy development. The judge also found on several occasions that Ms. Prenaveau had misrepresented facts and was less than credible. The judge also specified the compelling reasons to relocate children of "tender years," that is, why it was in

their best interest to move and live primarily with their father. In the Amended Judgment, the court set mid-July, 2010 as the time the children would transition to Mr. Prenaveau's home, instead of in the middle of their school year.

In footnote nine of the Amended Judgment, the judge made reference to the concept of "available parenting time," which he defined as "the time in which a parent is able to interact with the children personally." Thus, a weekend day contains more "available parenting time" than a weekday, as the children are in school during the latter period. This echoes the parenting time theory the trial judge in proposed in *Katzman v. Healy*, 77 Mass. App. Ct. 589 (2010). That court proposed to define parenting time as children's waking hours at home, excluding sleep time, school time, and summer camp time, a theory the Appeals Court explicitly rejected, as it stressed the importance of a parent being available to a child during their sleep time. In addition, the schedule the trial judge ordered, by his own thinking, reflected what the children had experienced when the parties were married (i.e. more interaction with Mr. Prenaveau during the week). In the Amended Judgment, the judge referenced the A.L.I. approximation idea and cited *Custody of Kali* 439 Mass 834, 842-843 (2003).

PATRICIA M. **ALTOMARE v.** JOHN N. **ALTOMARE**

APPEALS COURT OF MASSACHUSETTS

77 Mass. App. Ct. 601 (2010)

Keywords: Divorce, custody, parent and child, (in-state) removal

> *Highlight for GALs*: One important feature of this opinion is the requirement for GALs to perform a "functional analysis" of the parenting responsibilities of each parent, including those involving direct caretaking and other parenting functions (such as suggested by A.L.I.). [3]

Background:
As part of the divorce proceeding, Mother asked permission to move from what had been the marital home in West Boylston to Scituate, about 75 miles away. There had been a long-term marriage and three children, ages 16, 12, and 11 at the time of the separation. With respect to custody, the trial judge entered a confusing judgment that denied Mother's request to move and ordered "shared legal and physical custody" with the children primarily residing with the wife. (*Altomare,* Mass. App. Ct. 601 at 602). The judge ordered that Father could have parenting time with the children "at reasonable times, as agreed upon by the parties." Mother appealed both aspects of the Judgment (in addition to her appeal of the distribution of the marital estate).

Discussion:
1. Relocation:
Citing *D.C. v. J.S.*, 58 Mass App. Ct. 351 (2003), the Appeals Court applied out-of-state removal principles to this in-state relocation request, because the move was of some distance.
(See also *Tammaro v. O'Brien*, 76 Mass App. Ct. 254 (2010). The Appeals Court discussed the differences in analyzing cases, depending on the pattern of caretaking responsibilities the parents had prior to the inception of the litigation. As in other cases, it compared the factors to be considered and the weight afforded to each of them, whether it was a *Yannas* (one primary caretaker) case or a *Mason* (shared parenting) case. The Appeals Court repeated the idea that *Yannas* and *Mason* are at opposite ends of a "custody spectrum," Mason, 447 Mass. at 175. The analysis depends upon the nature of the custodial arrangement prior to the request. The Appeals Court stressed that it was incumbent on the trial judge to "consider the functional responsibilities and involvement of each parent," regardless of the nature of the legal custodial arrangement. *Id.* at 175.

2. Shared or sole physical custody:
Here the Appeals Court noted how statutory law has defined these two different custodial arrangements, but emphasized "the label we attach to custodial status results from a factual inquiry." (*Id.* at 606, citing *Wakefield v. Hegarty*, 67 Mass. App. Ct. 772, 776 (2006)).

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3 American Law Institute (2000). *Principles of the law of Family Dissolution: Analysis and Recommendations.* Philadelphia: A.L.I.

Reviewing the findings, the Appeals Court noted that the children resided primarily with Mother, spent the majority of their evenings (overnights?) with her, while seeing their father on alternating weekends and one night/week. The trial judge even noted in her decision that Mother had "unquestionably" been "more of a traditional custodian" in terms of parental responsibilities. Using a functional analysis of parenting, the Appeals Court determined that Mother had performed as the sole physical custodial parent, contrary to the findings of the trial judge.

3. Real advantage analysis:
Having re-characterized the custodial arrangement as sole physical custody to Mother, the Appeals Court applied the "real advantage" test to her request to move. Mother said she felt uncomfortable living in the marital home in their small town, where the woman with whom Father had an affair also lived and whom Mother might meet in town (they had been friends before Father's affair). Moving to Scituate would provide her with a supportive social network and could "help restore her emotional health." *Id.* at 606. Mother asserted that the move would be "a fresh start…[and would (give her)] new enthusiasm for life…new energy for life and for my child…make a huge, huge impact on my life and the life of my children – positive impact." *Id.* The trial judge noted that, while there would be a support network in Scituate for Mother, she had no "particular personal, family, or professional roots in Scituate." *Id.* at 607. Though Mother was an attorney, she did not provide any specifics about professional prospects related to the move, other than a plan to obtain family court appointments.

Reviewing Mother's reasoning for moving, the Appeals Court indicated it found that her rationale was sincere. The Appeals Court noted, "It is undisputed that a parent's happiness can affect the quality of parenting," and observed that she had an interest in developing a supportive network in Scituate and had no roots in the West Boylston area (where Father grew up). The Appeals Court also found "no evidence that the wife seeks the move in order to deprive the husband of access to his children." *Id*. at 607. In fact, the trial judge found that their ability to make parenting arrangements for the children during the separation period was commendable. Mother was willing to shoulder some of the driving burden between residences to ease the drive for Father. Reversing the trial court, the Appeals Court concluded that Mother had demonstrated a "real advantage" for herself in the move.

4. Best interests analysis:
The trial judge found that the children had many friends in the Worcester area and were involved in many activities that relocation would adversely affect. The children spent much time with father's extended family, which would be more limited in the event of a move. Mother had not provided comparable school data. Additionally, Father was deemed to be "excellent and involved," and active in his children's lives. *Id.* at 608. The move would "significantly disrupt the husband's visitation rights," particularly as there was a 75-minute drive between the residences. *Id.* at 608-609. However, in its decision, the Appeals Court found that the failure of the trial judge to find any real advantage to Mother was compounded by a failure to weigh the benefits of the proposed move to the children, as the trial judge calculated just the adverse effects of this move. The Appeals Court noted that the trial judge made a determination that reflected a shared physical custody, *Mason*-like analysis, which negated the "mother's [effective] role as sole physical custodian." *Id*. at 609.

The Appeals Court ordered a remand to determine the best interests of the children, with particular focus by the trial judge on the impact on the children of Mother's unhappiness in West Boylston. The Appeals Court suggested that the trial judge inquire about the children's views, perhaps through a GAL who would "evaluate their expressions of preference in light of each child's age and maturity." *Id. at* 610. The trial judge was asked to review the parenting plan and the practical effect on Father's time and any alternative plans to maintain the relationship, including any changes since the Judgment was entered.

Comment:
As in other removal cases, the Appeals Court emphasized that there should be a "functional analysis" of the hands-on caretaking functions as well as more general parenting functions that existed during the marriage. This is consistent with the A.L.I. *Principles* differentiation of types of parenting (see below). One weakness of this method is that it suggests that the functional analysis is a measure of children's attachment to a parent or of the quality of that relationship. Other cases (e.g. *Custody of Zia*, 50 Mass. App. Ct. 237 (2000)) have suggested that the quality of the relationship to each parent is relevant. Even in the instant case, the Appeals Court opined that the happiness of a parent *could*, indisputably, affect the quality of that person's caretaking. Thus, the GAL should attempt to assess relationship quality and include it in the report. The GAL should also, to the extent possible, examine the effects of the emotional state of the parent who wants to move and the effects of that on the children (both if the move were to occur and if the request to move were to be denied).

In the instant case, the findings of the trial court suggested that both parents were involved with the children, even though Mother had been the primary caretaking parent. There was little data about the children themselves (at least as reported in the opinion), although the Appeals Court did suggest that the trial judge on remand solicit and weigh their preferences and feelings, perhaps through a GAL interview of them. They were all old enough to be able to share their experiences of each parent, whether any of them were willing to express a preference or not. Thus, one might estimate the effects of a move on any of the children, and thereby help the trial judge to factor that information into his/her decision.

Another aspect of this case that interested the author was Mother's rationale for moving, especially since she did not offer much in the way of practical benefit. She had no job or any family in Scituate and perhaps had just a few friends. Her reasons were emotional – increased happiness, decreased stress (from potential of meeting ex-husband's lover), and more enthusiasm for life – all of which she suggested would extend to her parenting and, thus, benefit her children. While it is hard to argue with the idea, it consists of a rather abstract set of notions. Could she not have moved to Shrewsbury – the other side of Worcester, away from the husband's lover, but close enough so that the drive between towns would not be burdensome on the children – who would have to spend an hour to ninety minutes (not counting traffic) each way in the car? That potential emotional gain to her and the absence of any motivation to limit Father's access to the children was credited more by the Appeals Court than by the trial judge. A further issue, perhaps addressed in earlier commentaries on removal opinions, was the necessity to assess whether the move would benefit the children in some way, once it was evident that there was a benefit to Mother to move. In this case, the Appeals Court directed the trial judge on remand to perhaps

solicit the children’s wishes and feelings, as they were of an age at which such information could be considered in the calculus of their best interests.

SUZANNE HOPE **TAMMARO v.** KEVIN FRANCIS **O'BRIEN**

76 Mass App. Ct. 254 (2010)

APPEALS COURT OF MASSACHUSETTS

Keywords: Divorce, Separation, Child Custody, Removal.

> *Highlights for GALs*: Where the facts indicate a sincere reason to move and clear improvement in employment and life circumstances of the moving parent, as well as benefits for the children, the court is likely to approve relocation. Where the moving parent was clearly the primary caretaker, the analysis of the factors will occur under *Yannas*.

Background: Per their 2005 separation agreement, Mother had physical custody of their four children and the parents shared legal custody. They had a detailed parenting plan and a parenting coordinator. Both parties lived within three miles of each other in Brockton. One week after the Judgment of divorce nisi, Mother filed a Modification. She had worked from home during the marriage and after the separation as a health care consultant to different hospital systems. Father was a professional baseball scout and traveled often from February to October each year. In the off-season, he had a business running youth baseball camps at different locations in Massachusetts. A few months before the divorce, Mother was in negotiations with Caritas Health Care for a full-time job at Holy Family Hospital in Methuen. She considered buying a house within reasonable commuting distance of Methuen that would allow her to accept that job or continue her consulting practice. She claimed to have been unable to find a house in the Methuen area that met her criteria. Mother eventually found a suitable home in Derry, NH. She signed a purchase and sale agreement on the home in April, 2005. She then informed Father, who did not consent to that move. In June, 2005, Mother was offered a substantial job with Caritas and Holy Family. She signed an employment contract on June 27, 2005 and her primary work site became Holy Family in Methuen, although she would be overseeing other hospitals in Brockton and Fall River. The trial judge permitted Mother to move to Derry. Father appealed.

Discussion: Father complained that Mother filed a Complaint for Modification, not removal, and the judge should not have heard the removal issue. The Appeals Court affirmed the trial judge's decision to hear the removal issue. The second issue Father raised was that the judge did not fully consider the *Yannas* factors. However, the Appeals Court held that Mother had demonstrated "good sincere reasons" for her proposed move. Her new job was "a positive change" for her "professionally and personally." *Tammaro* 76 Mass App. Ct. at 260. The trial judge opined that Mother could have found suitable housing that she could afford in the Methuen area, but also found she had made a good faith effort to seek such housing, albeit unsuccessfully. Mother had not moved into the Derry home and had not told the children about it. She testified that she would sell the home, if the trial judge denied removal. The Appeals Court affirmed the judge's finding that the move provided a "real advantage" to Mother, as it would reduce work stress, allow more time with the children (much shorter commute), and permit better time management for her. The judge did not agree with Father's belief that Mother was motivated to

limit his time with the children. They had worked out an alternative parenting plan with the help of a parenting coordinator. The Appeals Court further affirmed that, having found a "real advantage" to Mother, the trial judge considered the collective interests of the children, Mother, and Father. The judge had noted the improved living situation of the children and proximity to schools. The judge also considered continuing parenting time with Father and decreased travel time for Mother to her new job by virtue of the move.

Comment: This case presented as a straightforward *Yannas* analysis, in that Mother had been the primary caretaking parent, worked from home (while Father traveled a great deal), and obtained a job that significantly improved her financial resources. Her motives for moving were deemed "sincere" and without intent to deprive Father of time with the children. Both parents worked (Mother from home) and Father was away from home often for his job. The facts as presented suggested that her work and her parenting were important factors, while his relationship with the children, although solid, did not rise to the level of being severely compromised by the move. In addition, the parties were able to arrange for reasonable alternative parenting time for Father, whose residence would be 90 minutes away.

ANNA **KATZMAN v.** TIMOTHY **HEALY**

APPEALS COURT OF MASSACHUETTS

77 Mass. App. Ct. 589 (2010).

Keywords: child support, physical custody, parenting, modification, separation agreement, removal, divorce, custody, parenting coordinator.

Highlights for GALs:
The case raises the question of how one evaluates the level and type of parental responsibilities each parent performed, the "functional analysis" of parenting, which informs the issue of the type of legal custody (and how a removal case is analyzed). Does one count non-school, waking hours, as the GAL did here (and which the court rejected) or "available parenting time," as the judge in *Prenaveau* did? Alternately, does one use the A.L.I. calculus, which divides such responsibilities into caretaking and parenting functions?

Background: The parents had a ten-year marriage. They had two children, a boy, age 5 and girl, age 4, at the time of filing. Their separation agreement included a parenting plan in which they had joint legal custody, while Mother was the sole physical custodial parent, having the children every overnight during the week and alternating weekends. Father had every other weekend with the children and two early evening times with them during the week. In August, 2007, Mother became engaged to Mr. Katzman, a New York FBI agent, who could not or did not want to transfer to the Boston office for professional reasons. In September, she amended a March 2007 complaint for modification of child support to include a removal request. Father then counterclaimed and requested sole physical custody. A GAL was appointed in October, 2007 and the trial occurred in early 2008. Mother married Mr. Katzman three days before the start of the trial and was expecting a child in October, 2008. Father had also remarried (earlier) and was expecting a second child from his marriage.

At trial, the judge found that both parents were competent and had nurturing relations with the children. The boy, age eight at the time of trial, was very attached to both parents, "especially" to his father, and to his stepmother. He was mildly attached to his stepfather, Mr. Katzman, although that relationship was of more recent origin. He wanted to spend much time with both parents and did not wish to move out of the area. The court took notice of the son's anxiety about losing time with his father. The girl was close to her mother and to her father and stepmother, and did not want the parenting arrangement to change. Mother's motive for moving was to live with her new husband near his job. The court did not find that she had any motivation to lessen the children's relationship with their father. (There were also significant financial issues at stake in these modifications, but that is not included here).

Parenting time issue: Citing M.G.L. c. 208 § 28, the Court noted that an earlier judgment can be changed "provided that the court finds that a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children." While noting the existing (and historical) parenting plan, the trial

judge ordered a change to a 5/2-2/5, equally shared care, parenting plan (Mon-Tue/Wed-Thu with alternating weekends) without explaining in findings what circumstances had changed to warrant such a modification. The judge noted that the GAL had recommended this plan. The judge and the GAL explained that this "approximately equal time" plan was consistent with what the parents had been doing, if one took into account their respective parenting times during the hours that the children were awake, discounting overnight time, school time, and camp time. In the decision, the Court described the change as follows: "…during the day rotation . . ., the mother's approximate percentage of awake time with the children would go from 42% to 36%, and the father's from 22% to 28%." The judge did not consider it important for his equality analysis that the mother originally had 82% of the sleep time while the father only had 18%. Under the new schedule, the mother's sleep time percentage would drop to 57% while the father's would increase to 43%.

In rejecting the trial court analysis, the Appeals Court explained that parenting involves responsibility and availability whenever a child is in one's care, noting, "[t]he law has not, however, neatly divided custodial parenthood into waking, sleeping, and schooling categories. Nor should it. Disregarding sleep or school time ignores that children get sick, have nightmares, and otherwise require their parent's assistance at unexpected times." Id. at 594. The Court emphasized that Mother had been the parent responsible for and available to the children, as sole physical custodian, for those years post separation. The trial judge could not, absent written findings regarding what circumstances had changed, simply transform Mother's custody plan into "an unofficial form of joint physical custody."

Parenting coordinator:
Noting the existing conflicts between the parents that made exchanges stressful for the children, the Court indicated in footnote 6 that this high-conflict state of affairs "was an appropriate subject for the parenting coordinator (PC) required by the separation agreement, but which had not been implemented." The Court stated that the trial judge "required the hiring of a parenting coordinator as originally required in the separation agreement. We discern no error in that part of the judgment requiring the parents to select and utilize a parenting coordinator."

Removal:
The Court said that the trial judge offered "an uncertain analysis" of the *Yannas* test, particularly after Mother's "real advantage" was established. The trial judge found that Mother had a sound and sincere reason for moving (i.e. living with her new husband and their new child) and no motivation to interfere with the children's relationship with Father. However, the judge noted that the children were integrated into both families and they felt they had "two homes." He cited the GAL, who opined…"it is not a 'psychologically viable alternative' for the children to move from this area." Id. at 595. The trial judge also noted that whatever benefit might accrue to the children by living with their mother, who would be happier living with her new husband and child in New York or Connecticut, "would not outweigh the loss they would have of the regular and frequent time in their other home." The Court explained that, when the judge determined, without written justification, that the parents had possessed approximately equal parenting responsibilities (the calculus for that including non-school waking hours), he minimized the significance of the sole physical custody arrangement that Mother had since the separation.

Yannas states that the determination of sole physical custody is important, since the welfare of the children is "so interwoven with the well-being of the custodial parent."

The Court remanded the case back to the trial judge for further review and findings, although many months had passed during which the children had lived in the shared custody arrangement that was ordered after trial. The trial judge had noted how difficult a move would be for the boy, but did not explain in any detail or "make subsidiary findings" as to what those disadvantages might be. The Court also asked the trial judge to consider – in the event that Mother has to remain apart from her new husband (who cannot transfer to this area) - the impact on her welfare and happiness (consider *Altomare*, decided earlier in the same year, in which the Court put great emphasis on the happiness of the custodial parent resulting from her move). In addition, the judge was asked to consider – if she was not permitted to move with the children - what that decline in her happiness would mean for the children, since she had been the primary physical custodian. Lastly, the Court asked the judge to factor in the issues of travel between homes for the children, particularly since he had written that cost was not going to be an issue for either parent.

The remainder of the opinion concerned financial issues. The Court reversed the decision as to custody and vacated the decision as to removal, remanding that issue to the trial judge for "further proceedings consistent with this opinion."

Comment: There are two issues of relevance for GALs. One is an unusual, one might say, even creative, method of determining parental responsibility and caretaking. This apparently was a formulation that the GAL undertook and that the trial judge incorporated into the Judgment. In this writer's experience, research studies use the number of overnights per fortnight as the major metric in distinguishing a sole from a shared-care parenting plan. Moreover, most parents consider the number of overnights of great significance in formulating their parenting plan. The number of hours of active parenting has not been a relevant metric. In *Katzman*, it was clear (by most standard measures) from the prior parenting plan who had been the primary residential or custodial parent, but it was unclear why the GAL or trial judge did not employ the traditional basis for determining custody and opted for such a novel approach (i.e. counting hours of parenting an awake child, not including school or camp time). As in so many removal cases, the assessment of parental caretaking responsibilities is critical, since the trial court needs that data to assign physical custody to one or both parents. If the facts indicate that the moving parent had been the primary caregiver, the removal analysis would proceed under *Yannas* and include whether the "real advantage" (should it exist) belongs to that parent and should be given greater weight. Conversely, if the facts indicate that both parents had been relatively evenly involved, the analysis would proceed under *Mason* and include the "advantage" to the moving parent as just one factor to be considered among others. *Katzman* makes clear that, in the parenting analysis, weight is given to parental availability to the child at all hours of the day, asleep or awake, including in the event of an emergency.

Another issue for GALs pertains to the assessment of the moving parent's welfare and happiness that would result from the move (in this case, living with her new husband in New York), the effects on the children of her unhappiness at being denied permission to move with the children, and the question of the effects of staying/moving on their happiness/unhappiness. The decision

begs the question of how the GAL defines happiness in terms for which he or she can provide relevant data.

A second significant issue relates to the Court's approval, via footnote, of the trial judge requiring the parties to hire a PC. What might have permitted this approval was that the parties had included it in their separation agreement at divorce, but had never followed through with selecting or using a PC. Query whether the Appeals Court would have approved a PC, if the trial judge had ordered it absent such language in the agreement, especially since there is no statutory authority for such a role?

C. MICHAEL **WOODSIDE v.** SHARRY A**. WOODSIDE**

APPEALS COURT OF MASSACHUSETTS

79 Mass. App. Ct. 713 (2011)

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

Highlight for GALs: This case points out, as in earlier ones, the need for the GAL to do a thorough assessment of each parent's caretaking and decision-making functions, irrespective of the legal label they have given to their parenting arrangement post-separation or divorce.

Background: The parties were married in 1993 and lived elsewhere until 2003, when they moved to Massachusetts. They had two daughters, the older being 9 and the younger being 4 at the time of the litigation. When the parties separated in April, 2008, the children remained with the mother in the marital home. As a result of the children's comments about possible sexual abuse, Mother obtained a restraining order in April, 2008 and Father vacated the home. These allegations were later investigated and were not supported by the Department of Children and Families (DCF). There were also potential sexual assault charges against Father filed by the local police department. Per agreement, Father initially had supervised time with the girls. Supervision was then withdrawn, pending a GAL assessment. The GAL did not find supervision to be necessary, but noted that Father's behavior had provided a basis for Mother's concerns. The parents then settled the custodial aspects of their divorce, agreeing upon joint legal custody, primary residence to the Mother, and alternating weekends and two weeknight times per week for the Father with the children. They then litigated the financial aspects of the divorce. Mother filed a complaint for removal to Maine, which was heard along with the financial contest. At trial, the judge found that her request to move was in good faith and that such move was in the children's interests. The judge also ordered a combined alimony/child support judgment.

Father appealed, first claiming the judge wrongly applied the "real advantage" standard from *Yannas*, because Mother was not the sole custodian and, second asserting that her motivation was to deprive him of a relationship with the children. The Court reviewed past cases of removal, looking at the balance of each parent's interests and the child's best interests. The Court noted that the practical nature of each party's parenting responsibilities would determine whether the analysis would fall under the "real advantage" standard, as in *Yannas*, where one parent performed significantly more of the parenting functions than the other) or the analysis that exists in *Mason*, where the parenting responsibilities of each parent were considered to be reasonably equivalent. In the latter test, there is no advantage to either parent, because "the fortune of simply one custodial parent [is not] so tightly interwoven with that of the child; both parents have equal rights and responsibilities with respect to the child." *Mason*, 447 Mass at 184-185. That is, the parents' actual division of parenting functions would be more determinative than the type of legal custody they had. The Court would make a "factual inquiry" to assess how the parents had divided those parenting behaviors during the course of the relationship (see discussion above in *Altomare*).

The trial judge found that Mother had been the primary caregiver during the marriage and had continued to perform that role after the separation. She and Father had agreed for her to be the primary residential parent as part of their divorce process, with scheduled parenting time to him. Father had deferred many of the parenting functions and decisions to Mother during the marriage, despite having opportunities to perform them himself. The Appeals Court did not attach significance to the legal label the parties had chosen for their custodial arrangement. Thus, the Appeals Court affirmed that the trial court judge had correctly applied the "real advantage" test, as in *Yannas*.

As to the second argument regarding good faith by Mother, The Appeals Court noted that the trial judge credited the GAL's opinion that the move permitted her improved job training opportunities and the potential for greater future income, even though there was no actual job in Maine for which she was hired. Her employment was "speculative at best," according to the GAL. The judge also credited the fact that Mother was motivated by a desire to be closer to family members. Her quality of life would also improve by virtue of family support and family assistance with child-care. The judge correctly found that Mother's concern about sexual abuse was reasonable under the circumstances at the time and that she did not thereafter interfere with visitation when it was supervised. Mother also reliably supported Father's parenting time when supervision was removed.

The Court also ruled that the judge correctly considered the best interests of the children in permitting the removal, as the move would provide benefit to them as a result of the social, emotional, and potential financial improvements in Mother's life. The judge gave consideration to the interests of Father and the need for the children's ongoing relationship with him by addressing extended weekend and vacation parenting times and limiting the time the children would have to travel between homes.

The second part of the Court decision addressed alimony and will not be considered here except to note that the Court affirmed the trial judge's decision.

Comment: First, it seemed apparent based on the background that Mother had been the primary caregiver, a role later reinforced by the terms of the separation agreement. The parents had agreed to joint legal custody, but apparently their document was silent as to any specific determination of physical custody, other than the parenting plan. As in other cases, the Court highlighted the fact that, in choosing the test of analysis for removal (i.e. *Yannas* or *Mason*) it will consider the history of functional parenting responsibilities during and after the marriage, and not the legal label the parents might subsequently apply to any post-separation arrangement.

Second, it seemed that the Court credited the potential for increased income or job training opportunities in the absence of any specific employment. That is interesting in itself, as it seemed speculative, as the GAL noted. Third, the Court gave weight to the social and emotional support Mother would receive, because she would be living near family who could provide practical child care help. The Court indicated that this psychological improvement in Mother's life would then prove beneficial to the children. Thus, it seems clear that the presence of extended family support, help with child care, and a good faith reason for moving may be a sufficient rationale for a primary caregiving parent who wishes to move, even if employment that could improve her

standard of living (and, by extension, her child's) is only a potential factor.

CHRISTOPHER **PRENAVEAU** V. SARAH **PRENAVEAU II**

APPEALS COURT OF MASSACHUSETTS

81 Mass. App. Ct. 479 (2012)

Keywords: Custody, Removal, Visitation, Division of Property

> *Highlights for GALs:* A change of custody case as much as a removal one, *Prenaveau II* focuses the GAL's attention on factors that underlie the "best interest" standard, particularly the need to provide stability and continuity of care for a young child whose caretaker has given adequate parenting over a period of time, even if the other parent could offer superior care in some ways. Additionally, the goal of providing maximum involvement and participation of the other parent should be considered through parenting plans, where both parents had been very involved in caretaking, albeit with consideration as to how burdensome it is for a child to be transported back and forth between residences.

Background:
This is the second appeal of a removal case that was also a change of custody case. The entirety of this case lasted six years. In *Prenaveau I*, the trial judge changed the primary residence of the children from Stoughton, MA to Gonic, New Hampshire, where Father lived and worked. The judge determined that the parents had essentially shared parenting and that Father would encourage a relationship of the children between Mother and the children more than she would between them and Father. The judge also instituted an onerous travel arrangement between homes, particularly if Mother remained in Stoughton where she lived and worked (she had a summer home about a half hour away from Father in NH). The Appeals Court reversed the Judgment and sent the case back to the trial judge for more detailed findings and consideration of an alternative plan that would allow the children to remain in what had been their primary home (Stoughton), but have enough time with Father in NH.

After the initial Judgment, the children had spent the last quarter of the school year and most of the summer in Gonic, but Mother got a stay of the Judgment so that the children could return to Stoughton for school, pending the re-hearing of the case. After another five days of trial, the trial judge essentially re-affirmed his original decision in an Amended Judgment. Mother obtained a stay of that Amended Judgment, thus keeping the children in the Stoughton schools, and appealed again. In *Prenaveau II*, the Appeals Court disputed some of the trial judge's findings regarding Mother's lack of cooperation with Father. The Appeals Court based its disagreement on a detailed investigation by the GAL that was part of the testimony. The Appeals Court determined that Mother had not exhibited a sufficient pattern of non-cooperation or exclusion to outweigh the value of stability and continuity of her adequate care in Stoughton (where she had family support and the children had always attended school). Thus, the removal of the children to live primarily with Father was unwarranted. Even if the record showed that Father could provide for the welfare of the children in a manner equal to Mother, that was not sufficient reason for the trial judge to change residences, given the need for continuity and stability of care of the children

in the town in which they had always lived. In addition, citing other cases, as it did in *Prenaveau I*, the Appeals Court criticized the burdensome "shuttling" of the children between homes and noted that the amended Judgment did not rectify that problem for the children by considering alternative parenting arrangements. Using the recommendations of the GAL, whose role was remarkably critical, the Appeals Court, in ordering remand, took the unusual step of prescribing a detailed parenting plan that maintained the children in their primary residence in Stoughton and allowed for alternate parenting times (alternating weekends with Father, instead of the three weekends/month for Mother) and extended vacation periods. Essentially, it fashioned an award that provided physical custody during the school year to Mother and during the summer to Father.

Comment: In reversing the same trial judge twice - this time in his Amended Judgment - the Appeals Court emphasized that any removal/custodial decision must consider the stability of the life circumstances of the children, even when the parties have participated in what was described as a shared parenting arrangement. Custodial issues must consider the stability and continuity of care by a competent parent. Removal issues must consider the distance between residences and the possible stresses created by the need for the children to travel regularly between homes. Where that travel might be burdensome for parents and children, alternate parenting arrangements should be considered, such as fewer trips during the school year and longer periods of vacation time.

IDANIA ELVIRA **MURPHY** v. DENNIS GEORGE **MURPHY**

APPEALS COURT OF MASSACHUSETTS

82 Mass. App. Ct. 186 (2012)

Keywords: Divorce, Custody, Removal, Parenting Plan.

> *Highlights for GALs*: While this appeared to be a relatively straightforward, *Yannas*-type, removal case, it is distinguished from others in that the two-year old child had counsel. The charge to such counsel from the court was to advocate for the child's best interests, not for the child's wishes. Another highlight of the case for GALs was the Court's explanation of what is included in the calculus of "best interests" in Massachusetts law, much of which is available in *Custody of Kali*, 439 Mass. 834, 840 (2003).

Background. The parties were married in 2007 and had a child, a girl, in December, 2008. They lived in the paternal grandparents' second home in Chester, MA. Prior to marriage, Mother had resided in New York, where the bulk of her family lived. She originally immigrated here from Honduras. During the marriage, she had the majority of the caretaking responsibilities, although Father was a participating parent. The marital relationship declined and Mother filed for divorce in January, 2010, although the parties occupied the marital home together until May, 2010. The daughter would have been just under two years old at the time of trial. After May, 2010, they agreed to a "nesting" arrangement, whereby their daughter remained in the marital home while Father had caretaking responsibilities in the home from Friday evening through Monday morning and Mother cared for the child during the week. That custody arrangement took effect by temporary order of the Probate and Family Court.

At trial, the judge heard testimony concerning, among other things, the Mother's desire to move with the daughter to New York. The judge found that she had a sister in New York with whom she intended to live and who would assist in providing child care, and that Mother had other family members in the nearby area. In addition, Mother explained that she had a job opportunity working as a hairdresser in a nearby part of Connecticut. Father objected to the move. The judge found that Mother had no motive to use the move as a means to deprive Father of contact with their daughter. The judge then entered a Judgment of Divorce Nisi dated November 29, 2010, which included permission for Mother to move and a parenting plan allowing Father to see his daughter every other weekend and during certain vacations and summer periods. After further hearing on the Father's motions to stay and to alter or amend the Judgment, the judge issued an order dated December 30, 2010, denying the motion to stay, and allowing in part and denying in part the motion to alter or amend (there were financial issues included in the appeal). This appeal followed.

Discussion. 1. *The judge's removal determination*: Father argued that, since he and Mother had shared custody since May, 2010, the standard by which the judge decided the case fell should have fallen under *Mason* (2006) instead of *Yannas* (1985). The Court discussed the differences between the two cases, in particular the significance of one parent having been the primary

caretaker. In that case, the interests of the child are "interwoven," in the words of *Yannas* (*Yannas*, 395 Mass. at 710), with the interests of the primary caretaking parent. Where caretaking was more evenly shared, the "the benefits of the move to that parent become[s] `greatly reduced,' and it therefore becomes more difficult for the parent to justify the uprooting of the child." (*Murphy*, 82 Mass. App. Ct. at 190, quoting from *Mason*, 447 Mass at 184-85) The Court also emphasized that an analysis of the functional responsibilities of each parent is essential, since the label for the parenting arrangement is less important than what tasks the parents actually performed. (Citing *Woodside v. Woodside*, 79 Mass. App. Ct. 713, at 717 (2011)). In *Murphy*, the trial judge determined that Mother had been the primary caretaker, notwithstanding the more shared pattern of caretaking that occurred between May and November, 2010. Therefore, the judge held that the "real advantage" standard of *Yanna*s was the appropriate one.

The Appeals Court, in upholding the trial court decision, affirmed Mother had a sincere reason for moving and was not motivated to undermine Father's relationship with or his contact with the child. Mother was relatively isolated in Chester and wanted the company and support of family in New York. She also had an opportunity for work as a hairstylist nearby in Connecticut. At the same time, she recognized the importance of the daughter being able to spend time with Father. Considering the case in total, the Appeals Court affirmed the trial court's determination that these facts were consistent with a "real advantage" to Mother to move. Father also argued that, even if there were a "real advantage" to Mother to move with their daughter, it was not in the daughter's interest to move with Mother, given the closeness of his relationship with her and his important role in providing care for her since her birth. He claimed that the inevitable decrease in their time together was not in his daughter's best interest.

In disagreeing with Father's argument, the Appeals Court explained, as it had in *Yannas*, that the interests of everyone in the family must be considered and, in particular, the strength of the child's relationship with each parent and the impact on the overall development of the child. The Appeals Court must also balance the financial, emotional, and social advantages resulting from the move, the ease of or obstacles to continued contact with both parents, the quality of the schools, and the nature of the new home environment. (See *Yannas,* 395 Mass at 712). In other cases, the Appeals Court considered the availability of supportive family (See *Woodside,* 79 Mass. App. Ct. at 719) and any hardships associated with travel by the child to advance contact with the other parent. (See *Dickenson*, 66 Mass. App. Ct. 442 at 449 (2006)). The Appeals Court added that the judge could also consider the quality and availability of day care for a young child. In addition, in *Murphy*, the Appeals Court determined there was "a workable visitation plan that will allow the husband meaningful access to and time with the child." (id. at 193).[4]

2. *The judge's custody award*: Father also contended that the judge abused his discretion in awarding Mother sole physical custody because his findings were inadequate to support that custody determination. The Appeals Court held that the trial judge found sufficient support for his determination that Mother had been the primary caretaker because of the significant care that she had given the daughter and the closeness of that relationship.

[4] Footnote 6 revealed that Father was able to have parenting time with their daughter every other weekend and on certain holidays and vacations.

Comment: Once the trial judge decided that Mother was the primary caretaking parent, the case became a straightforward analysis using the "real advantage" standard, as in *Yannas*. There is also a brief discussion of the "best interest" standard. A point of consideration for GALs is the young age of the child, about two years old. The fact that her move was close enough for Father to have parenting time every other weekend (with a reasonable transportation plan, one assumes) would likely mitigate any harm that might befall the now attenuated relationship of Father and daughter, especially since he had what was essentially a shared-care arrangement for about six months, or about a quarter of the child's life at that time. It could also be argued that a delay of a year or so might have benefitted the child in terms of solidifying her relationship with Father, before the relocation occurred. The last point of interest, though not so relevant to GALs, was that the trial judge appointed an attorney for the child (AFC). At two, the child could hardly be expected to have a preference, so the AFC was charged with advocating for what he or she determined was the child's "best interests," in effect substituting her judgment for that of the child. In that way, her role was similar to a GAL, as he or she would have had to make some assessment of the overall situation to formulate a recommendation on "best interests."

ALICE **SMITH** v. BETH **JONES. (pseudonyms)**

APPEALS COURT OF MASSACHUSETTS

69 Mass. App. Ct. 400 (2007)

Keywords: *de facto* parent, best interests, caretaking, custody, attachment

> *Highlight for GALs:* The case underscores the need for GALs to assess the extent to which the parties planned or intended to adopt a child together, the level of parental involvement performed by the non-biological parent, and the nature and extent that the parties participated in everyday caretaking. The extent to which the non-biological or non-legal parent was involved in child-rearing (and the child's attachment to that parent) can speak to the potential for significant harm, should that relationship be severed.

Background: Smith unsuccessfully moved the Probate and Family Court to designate her as a *de facto* parent of Liza, the adopted child of her former partner, Jones.

In 1995, Smith and Jones, two women, started what was to become a nine-year relationship; they moved in to Jones' house together in 1997. In 2000, Smith adopted a Russian child, Rose. Although co-adoption was unavailable at that time, Jones failed to adopt Rose when it was later possible and the parties never created any parenting agreement. Jones was a co-guardian of Rose for medical purposes, but abandoned that role when she filed the litigation in 2004.

In 2002, Jones went alone to Russia to adopt Liza, the child involved in the current dispute. She chose to adopt Liza from the children at the orphanage without asking Smith, although the latter met Jones in Moscow afterwards and they traveled home together with Liza. Jones then did most of the hands-on caretaking for her daughter, Liza, in the next few months, and then shared morning caregiving tasks with Smith when she returned to work. Smith, Rose's mother, then became the at-home parent during the day and cared for Liza. When Liza developed medical complications, Jones took her daughter to doctors' appointments and follow-up visits, stayed home with her when necessary, and was the sole decision maker and authority regarding medical procedures for Liza.

Throughout their relationship, the parties maintained separate bank accounts and did not commingle their finances. They did not enter into a civil union in any jurisdiction or register as domestic partners or marry as *Goodridge v. Department of Pub. Health*, 440 Mass. 309, (2003*)* was not effective until May 17, 2004, after their separation in April, 2004. During their separation that summer, Smith and Jones worked out joint visits with their respective children. However, Smith filed for joint legal and physical custody of Liza (Jones) in August of 2004. After a trial, the Judgment appealed here was issued in April, 2006.

Discussion: In reviewing the question of whether Smith quaified to be a *de facto* parent, the Appeals Court referred to earlier cases that referenced the A.L.I. *Principles of the Law of Family Dissolution*, including, *A.H. v. M.P.*, 447 Mass. 828 (2006), *Care & Protection of Sharlene*, 445 Mass. 756, 767 (2006); and *E.N.O. v. L.M.M.*, 429 Mass. 824 (1999). The Appeals Court cited

the A.L.I. "rules" for determining whether a non-biological parent had met the threshold test for *de facto* parenthood, as described in *A.H.*, including having performed without expectation of financial compensation (like a nanny) a majority or at least half ("at least as great" as the biological parent) of the hands-on caretaking functions for a child over a period of no less than two years before the filing of litigation. Such involvement also needed to be with the agreement of the other parent. If the petitioning parent has met such a threshold test, the court then would apply a "best interest of the child" standard to the facts. The opinion described why the Appeals Court denied *de facto* status in *A.H.* and granted it in *E.N.O*. However, in *Smith*, the instant case, the Appeals Court indicated that the facts fell in between those two cases, and it was within the judge's discretion to weigh the facts against the *de facto* parenting rules. On the issue of harm to the child (that is, the potential of harm resulting from the exclusion of Smith from Liza's life), the Appeals Court found that, despite her attachment to Smith, Liza would not be likely to suffer "significant harm" by being apart from Smith and that any possible harm would be mitigated by the caretaking of her mother, Jones.[5]

On the issue of intent, the Appeals Court noted that parties' intentions were not specifically mentioned in the A.L.I. tests, but it emphasized that examining what the parents actually did was the best measure of their intentions. The Appeals Court cited the *Principles*, § 2.03 cmt. c(iii), at 121. as described in *A.H.*:

> Although a matter of discretion, the A.L.I. Principles factors relevant to intent or agreement can be summarized as follows: 1) the legal parent must know about and agree to caretaking by the *de facto* parent, which agreement can be objectively expressed or inferred; 2) the legal parent must objectively show a willingness to share parental responsibilities; 3) mere babysitting will not suffice; and 4) a lack of agreement can be inferred from the retention of certain kinds of authority, including discipline.
>
> *Smith v. Jones*, 69 Mass. App. Ct. 400, 406 (2007).

The Appeals Court determined that Jones did not intend to co-parent Liza with Smith, since Jones retained sole authority over medical decisions, traveled to Russia alone to get and adopt Liza, and did not designate Smith as guardian for Liza in case of Jones' death. The Appeals Court reiterated that it was the concrete behavior of the parties with respect to parenting Liza that was pivotal, not any subjective or private perceptions they may have had about what they wanted or did not want. While the Appeals Court noted that the failure of the parties to effect a co-parenting agreement was not dispositive of the issue of *de facto* status, there was ample evidence otherwise that Jones did not intend for Smith to be the co-parent. The Appeals Court noted that Jones listed her own sister as guardian for Liza (in the event Jones was incapacitated or died), that she chose and adopted Liza without Smith's participation, that she gave Liza her own last name despite Smith's wish that Liza have both their last names, and that she made several

[5] Designating a non-biological parent as a *de facto* one suggests that any severing of that relationship "by inference" would result in "significant harm" to the child by virtue of the loss of that relationship. In chapter two of the *Principles*, A.L.I. explains that meeting the threshold of *de facto* parenthood is sufficient to *presume* (emphasis added) a close bond or attachment between that parent and the child. There is an explicit prediction that the total separation of the *de facto* parent and child would result in irreparable harm to the child (i.e., a rupture of a secure attachment), unalleviated by, as noted above in *Smith*, "the good relationship with (the biological) Jones" and through other resources." *Smith* at 405. That "harm" to the child is sufficient to overcome the right of the biological parent to raise the child in whatever way he or she might desire.

medical decisions without consulting Smith. Given those facts, the Appeals Court could not assert that the trial judge was in error in deciding that Jones had no intent to co-parent with Smith.

Similarly, the Appeals Court noted that Smith's failure to adopt when it was possible is not singularly determinative of the issue of *de facto* status. However, the trial judge gave it great weight (as was the case in *A.H.*), because, the judge noted, the parents were sophisticated and resourceful, and had access to competent counsel that could have helped them co-adopt. Thus, the Appeals Court asserted, "There was no co-adoption of [Liza] and there was no co-parenting agreement concerning [Liza] because the defendant did not wat a permanent co-parenting arrangement." (*Id.* at 408).

As to the issue of time, the parties had lived together with Liza for 19½ months, well under the A.L.I. two-year limit. However, the trial judge did not reference that issue in his decision. The Appeals Court said that the *A.H.* decision had also referenced that two-year requirement, but had also not expressed an opinion on it in that case.[6] The Appeals Court then stated that it appeared that the *A.H.* court was reluctant to "to adopt a bright-line time requirement in these contexts," (Id.) so it "assumed" that the time limit by itself in *Smith* would not have been essential, because of the other facts that resulted in the denial of *de facto* parenthood status. That is, the Appeals Court never had to address the two-year time limit, because it denied Smith's appeal based on other factors in the case. While *A.H.* was decided after the *Smith* trial court decision, the Appeals Court noted that nothing in *A.H.* would have resulted in a different analysis in *Smith*.

Comment: The thoughts expressed in *A.H.* apply here. In many ways – as with relocation cases - these decisions encourage more of a fact-based, historical assessment of parenting behavior as well as the history of what the parties negotiated between themselves as putative co-parents, including such things as agreements, joint involvement in administrative aspects of child-rearing, pursuit of co-adoption, etc. A.L.I. suggests that by investigating the "facts" of parenting, the court can make reasonable inferences about intent (motivation to share all aspects of parenting or not). A.L.I. also posits that one could reasonably make inferences about the nature of childhood attachment from how much time relative to the two-year limit the non-biological parent spent in hands-on caretaking tasks and what proportion of those tasks that parent did in that time relative to the biological parent, and so on. Critics might object that a time limit of two years and the proportion of caretaking functions performed are not more useful or reliable measures of attachment than that derived from actual observations of each parent and child together (also concrete, point-at-able behavior) or from tasks that each parent might engage in with a child, such as some mental health professionals might require as part of an evaluation. It is possible that one could use research-based methods of measuring attachment with young children (e.g., Strange Situation) rather than a simple metric of time. Other critics of these criteria would suggest that they do not give any indication of the quality of the parent-child relationship, which has been found to be more important in post-divorce adjustment of children.

[6] In *A.H.*, the Court did not have to express an opinion about what weight it might give that factor, because it determined that the plaintiff failed to "meet her burden" on other grounds. However, it noted that the two-year limit was a "refinement" of the A.L.I. factors underlying *de facto* parenthood. The Court seemed to give more than a hint that it would be a factor in the event that some plaintiff could satisfy the other elements of the A.L.I. *de facto* parenthood "test".

MARJORIE **SHER** v. ROBERT **DESMOND**.

APPEALS COURT OF MASSACHUSETTS

70 Mass. App. Ct. 270 (2007)

Keywords: grandparent visitation, domestic violence, best interest

> *Highlights for GALs:*
> This case highlights for GALs the question of whether there has been such a close relationship between a grandparent and a grandchild that regular contact between them is essential for the welfare and happiness of the child (or whether the lack of such contact would cause significant harm). Alternatively, where there was not a close relationship, is grandparent contact essential for a grandchild's welfare because of other factors related to the child's best interest?

Background: The plaintiff maternal grandmother (Mrs. Sher) had been estranged from her daughter, Amy, after Amy began a relationship with the defendant Father (Desmond). After many years of no contact, Grandmother hired an investigator in June, 2002 to locate her daughter and learned that Amy had delivered a son in 1996. The investigator found Amy and talked with her, but learned that she did not want to reconcile with her family. Shortly thereafter, Amy disappeared. When Grandmother learned of that, she contacted local police, who did an investigation. Grandmother also contacted a medical professional about how to initiate contact with her grandson and she sent two notes to the child, both of which were returned to her by Father. Father asserted in his Motion to Dismiss Grandmother's complaint that Amy had left the family in 2002 and had no further contact with him or their son. In her Affidavit, Grandmother alleged that Father had been violent towards Amy (and may have been responsible for Amy's disappearance). She based the allegations on letters from Amy'co-workers, who observed evidence of physical abuse toward Amy and who overheard telephone conversations Amy had at work with Desmond in which he could be heard screaming at her and Amy could be heard pleading with him. Desmond claimed that his wife left the family of her own accord and he had not heard from her. He noted there was no relationship between his son and Grandmother, who had not even been aware of the existence of her grandson until he was six years old. He did not want his son to see Grandmother. He claimed that she had not shown that, by her failure to have contact with the boy, the latter would suffer "significant harm by adversely affecting his health, safety, or welfare." (*Sher*, 70 Mass. App. Ct. at 675, citing *Blixt* v. *Blixt*, 437 Mass. 649, 659 (2002)). He included a letter of April 20, 2005 from the Department of Social Services (D.S.S.), now the Department of Children and Families, which did not support allegations of abuse or neglect. At trial, the judge dismissed Grandmother's Complaint with prejudice, but without findings or explanation.

Discussing *Blixt* as the "governing law," the Appeals Court noted that the onus of proof was on the grandmother to show that denial of contact with the child was not in his best interest and, more to the point, her absence from the boy's life would result in significant harm to the boy. The Appeals Court then reviewed some of the guidelines it set forth in *Blixt* in which it had said

that a parental decision regarding grandparent visitation would be given "presumptive validity," which could be overcome by evidence that such denial of contact would cause significant harm and, therefore, was not in the best interest of the child. Any grandparent seeking to have visitation against the decision of the parent would have to file a detailed and verified Affidavit setting out the factual basis for the Complaint.

In this case, Grandmother argued that the trial judge should have "read indulgently" her Complaint and assumed the facts she delineated in her Affidavit supporting her Complaint were true. She argued further that the significant harm she sought to prevent was the exposure of her grandchild to domestic violence.

The Appeals Court then went through a discussion of the level of proof a grandparent must supply in the Affidavit that supports the complaint to overcome a plea by the other side for summary judgment. The Appeals Court stated that it was "enough that the grandparent states in verified form the specific 'factual basis relied on by the plaintiff[ ] to justify relief[,]' [citation omitted], as well as the source or sources of the factual information upon which she relies," similar to rules in other areas of law. (*Sher*, 70 Mass. App. Ct. at 278. The Appeals Court noted that such a Complaint will rely on two demonstrations: the first being a significant pre-existing relationship between grandparent and child or, second, absent such a relationship, that contact is essential to prevent significant harm to the child. It noted that to assume the validity of parental decision-making requires that the parent be a fit one (in this case, there was no pre-existing grandparental relationship with the child, thus negating Grandmother's Complaint at least on the first demonstration).

The decision then discussed the issues arising in cases in which there was an instance of serious physical abuse or a pattern of abuse, referring to the statutes (M.G. L. ch. 208, § 31A, M.G. L. ch. 209, § 38, M.G. L. ch. 209C, § 10), and case law (*Opinion of the Justices*, 427 Mass. 1201, 1205-06, (1998). The Appeals Court referred to its decisions on parental fitness when there was domestic abuse. It noted the presumption against parental custody ("sole, shared legal or shared physical"), where that parent had perpetrated domestic violence. The Appeals Court noted that courts have determined a parent to be unfit when (usually) she has not remained apart from a physically abusive partner (even if the child was not a direct victim of abuse) See, e.g. *Adoption of Ramon*, 41 Mass. App. Ct. 709, 717 (1996). Fitness to parent has depended on perpetration of partner abuse, even in the absence of child abuse. See, e.g. *Care & Protection of Lillith*, 61 Mass. App. Ct. 132, 139-42 (2004). Following this, the Appeals Court discussed the basis for determining the nature or degree of any pre-existing grandparental relationship, as explained in *Blixt*. What follows is a legal discussion of how the issue of possible domestic violence might affect a court's decision regarding the question of harm to the child, absent contact with the grandparent - where the harm does not arise from a disruption of the relationship – as there was no grandparent-child relationship at all. The court determined that the information in Grandmother's Affidavit and data from other supporting documents (e.g. statements from former co-workers of the mother regarding visible bruises) led to a reasonable inference that Mother had suffered domestic abuse by Father "over a prolonged period of time," and that the child, at the very least, was a witness to such abuse or the effects of that abuse, because of the visible nature of her injuries. The Appeals Court noted that a child who has witnessed abuse "suffers a grievous kind of harm (*Sher*, 70 Mass. App. Ct. at 282, quoting *Custody of Vaughn*, 422 Mass. 590, 595

(1996)), and that batterers are more likely to assault their children than the average parent (*Opinion of the Justices*, 427 Mass. at 1208 & n.5 (1998)). The Appeals Court indicated that one purpose of the grandparent visitation statues was to "safeguard children" (*Sher*, 70 Mass. App. Ct. at 283, quoting *Blixt*, 437 Mass. at 663). That same case allowed grandparent visitation in order to protect a child from significant harm. The Appeals Court in *Sher* noted that in the case before it, the visitation may permit observation of abuse of the child, should that occur, or the possibility of such observation, since otherwise the father had isolated the child from any contact with the mother's family. The grandmother's verified allegations overrode the father's motion to dismiss her petition and contact between her and the child "may be necessary to protect the child from significant harm." The case was remanded to the Probate and Family Court for further action pursuant to this opinion.

Comment: This was an unusual case because Mother had disappeared and Grandmother had no contact with her grandchild for 10 years. By report, Mother did not want to have contact with her family either, before she went missing. Grandmother could not claim under *Blixt* that any rupture in her relationship with her grandchild would cause harm, as there was no relationship to dissolve. Instead, she argued that the contact was essential to prevent serious harm to the child from Father, where the evidence strongly suggested he had beaten Mother on several occasions over a period of time and that the boy had either witnessed the abuse itself or seen the effects of that abuse in Mother's injuries (as her co-workers reportedly had seen). In this case, the Appeals Court determined from the evidence that one could *infer* serious harm to the child from seeing the effects of Father's physical violence on Mother. Such violence compromised the presumed fitness of Father to parent as he saw fit; as a result, he could not prevent contact between the child and Grandmother, as that grandparent contact could protect the child from further potential harm, since, the Appeals Court argued, batterers are known to more likely be perpetrate abuse on their children. However, in this case there had been no evidence presented of such direct abuse of the child, and, in contrast, Father presented documentation that child protective services (D.S.S. then) had found no evidence of abuse or neglect. Compare this with issues raised in *Custody of Zia* 50 Mass. App. Ct. 237 (2000) and *R.D. v. A.H.* 454 Mass. 706 (2009), where domestic abuse was an issue, but was not given as much weight as in this case. Query what the Appeals Court might opine when the parental abuse was psychological, mental, or verbal and witnessed or overheard by the children?

From the perspective of a GAL, the task(s) in this case would involve interviewing collateral sources (e.g., school, physician) who may have information about the alleged abuse, investigating the background of the father for evidence of past aggression or criminal behavior, and interviewing the child in a way that makes it safe for him to report on his past experiences with his parents. If the father is in a current relationship, that person would be of interest to the investigation as well.

R.D. v. A.H.

MASSACHUSETTS SUPREME JUDICIAL COURT

454 Mass. 706 (2009)

Keywords: Parent and Child, Custody, Custody of child, Domestic Abuse, Guardian, Child custody, De facto parent.

Highlights for GALs: The primary issue for assessment is the fitness of the biological parent, where there is a contest between that parent and any non-parent for care and custody of a minor child. There is also a more rigorous standard of unfitness, as exists in termination of parental rights cases, that is, the Court must find the biological parent unfit "by clear and convincing evidence." Also, fitness would be considered to be parenting capacity under the particular circumstances and for a particular child. Where domestic abuse was found to occur (by the biological father against the de-facto parent (his girlfriend)), the court determined that, while the child had witnessed some of the events, he had not been a victim and had suffered no demonstrable negative effects as a result of his experiences.

Background: R.D., a female, was a *de facto* parent to the child for much of Tommy's (pseudonym) life, while A.H. was the biological father. R.D. petitioned to be appointed the child's permanent guardian, claiming that A.H. was not fit. After a 13-day trial in family court, the trial judge did not find that A.H was unfit, resulting in A.H. retaining custody of Tommy. R.D. appealed, claiming that custody should have been awarded on the basis of what was in the child's best interests, regardless of whether the biological parent was fit. R.D. also claimed that she should have been awarded custody in accordance with M.G.L. c. 209 C § 10 (a), a statute that concerns in part issues of custody in relation to children born out of wedlock. The SJC concluded that the governing guardianship statute was G. L. c. 201 § 5[7] and that a legal parent is entitled to custody unless determined to be unfit, and that determination "necessarily includes a consideration whether the legal parent is fit to further the best interests of the child."

The Court noted the case had "a long and tortuous history." Tommy, was born in 1998 to A.H. and, R.P., his biological mother, who never lived together. For the first 14 months of his life, Tommy lived with his biological mother or her relatives, but not with A.H. In 1999, Tommy left the care of his biological mother (and family) and came to live with A.H. and R.D. That relationship was unstable over the next six years. During that time A.H. assaulted R.D. and pleaded guilty to such assault. During the trial in this case, R.D. claimed A.H. was assaultive and abusive to her on multiple occasions. The legal history around this case was remarkably

[7] Section 5. The guardian of a minor shall have the custody of his person and the care of his education, except that the parents of the minor, jointly, or the surviving parent shall have such custody and said care unless the court otherwise orders. The probate court may, upon the written consent of the parents or surviving parent, order that the guardian shall have such custody; and may so order if, upon a hearing and after such notice to the parents or surviving parent as it may order, it finds such parents, jointly, or the surviving parent, unfit to have such custody; or if it finds one of them unfit therefore and the other files in court his or her written consent to such order. The marriage of a person under guardianship as a minor shall deprive his guardian of all right to the custody and education of such person but not of the care and possession of such person's property. If a corporation is appointed guardian of a minor, the court may, subject to the right of his parents, or of the spouse of a minor, as provided in this section, award the custody to some suitable person. The court may revoke the appointment of a guardian if the party petitioning for revocation proves a substantial and material change of circumstances and if the revocation is in the child's best interest.

complex, including, the court awarding temporary guardianship to R.D; A.H. taking the child to Florida ostensibly for an agreed-upon week vacation; A.H. and then not returning to Massachusetts. A.H. misrepresented the issues to a Florida court, who finally ordered Tommy returned to R.D. in Massachusetts. There were four GALs appointed during the course of these proceedings, two of whom recommended that Tommy be in Father's custody, one of whom recommended Tommy be in R.D.'s custody, and the fourth was appointed to waive Tommy's therapeutic privilege.

The trial judge found that R.D. had been Tommy's primary caretaker and was a *de facto* parent. In addition, the judge found that A.H. had been consistently involved in Tommy's life, participated in his care, and loved him. Since there was no evidence that A.H. was unfit, the judge awarded physical custody to him, with rights of access to R.D. R.D. appealed.

Discussion: The trial judge rejected R.D.'s argument that, since she had been declared a *de facto* parent to Tommy, his "best interests" should have been considered in her quest for guardianship of him, not whether A.H. was a fit parent or not. R.D. brought her motion for guardianship under M.G.L. 201 § 5, (7) which provides, in part:

> The guardian of a minor child shall have the custody of his person and the care of his education, except that the parents of the minor . . . shall have such custody and said care unless the court otherwise orders. The probate court may, upon the written consent of the parents . . . order that the guardian shall have such custody; and may so order if . . . it finds such parents . . . unfit to have such custody . . . .

The intent of the statute was clear, said the Court, in that it requires a finding of unfitness by the legal parent, if another person is seeking to become the child's guardian. In addition, the person seeking guardianship would have to establish the legal parent's unfitness by "clear and convincing evidence." See *Custody of a Minor*, 389 Mass. 755, 766-67 (1983), (citing *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982))).

The Court was critical of R.D's reliance on the *de facto* parenting cases, noting that in neither decision did the court transfer custody to the *de facto* parent, but rather awarded rights of access by the *de facto* parent to the child. (See *Youmans v. Ramos*, 429 Mass. at 781-85 (1999) and *E.N.O. v. L.M.M.*, 429 Mass. 824 (1999)). The Court then shifted to a discussion of which clause in Chapter 209C provided the basis for R.D.'s argument that she should be awarded custody. The Court observed that a non-biological "parent" (such as a *de facto* one) could only be awarded custody on a finding of unfitness of the biological parent. The Court discussed the idea that Massachusetts law does not propose any absolute measure of fitness ("the limits of acceptable parental conduct"), but rather provides that "fitness" is closely related to what is in the child's best interests and includes "the conception of being unsuitable or ill adapted to serve under the existing circumstances . . . and this is to be adjudged with reference primarily to the welfare of the child." *Hirshson v. Gormley*, 323 Mass. 504, 507 (1948), (quoting *Cassen v. Cassen*, 315 Mass. 35, 37 (1943)). Fitness presupposes a parent's desire to care for a child and the impact on the child of that parent's caregiving. Fitness is to some degree situational, in that "[o]ne who is fit to parent in some circumstances may not be fit if the circumstances are otherwise. A parent may be fit to raise one child but not another." *Guardianship of Estelle*, 70 Mass. App. Ct. 575, 581 (2007).

R.D. had raised the issue of domestic violence as a factor that would demonstrate A.H.'s unfitness as a parent. The trial judge took notice of that, stating that A.H. had acknowledged to D.S.S. some physical aggression (e.g. pushing), but the judge gave little weight to R.D.'s claims because of credibility issues (both parties apparently were less than truthful). The judge also noted that, while Tommy had witnessed some of those encounters, there did not appear to be any demonstrable impact on him and he had never been a victim of violence by either parent.[8] The judge credited A.H. with taking an anger management course and of admitting that he was working on this issue. The judge also credited A.H. with "loving" Tommy. In addition, since A.H. moved to New Hampshire during the lengthy proceedings, the judge opined that the likelihood of further violence between the parties was minimal. Thus, the judge decided that "any violence [the child] has witnessed has not had an adverse effect on child to the extent that it would preclude an award of custody to [A.H.]." *R.D.*, 454 Mass. at 717

In comparing the strengths and weaknesses of the parents (a fitting analogue to how a GAL might analyze a case), the judge noted several positive qualities of A.H., including that he had married and had a new child, had undergone anger management work, had been involved in Tommy's life and participated in parenting, had done well during supervised visits, had the support of three GALs in restoring his parental rights, and did what he could to maintain contact with Tommy through the legal proceedings. The judge noted that the bond between Tommy and A.H. was not "the strongest," but that the boy knew and loved his father, was unafraid of him, and had enjoyed his contacts with his father. The judge was critical of A.H.'s lack of cooperation with the Massachusetts and Florida courts, but did not want to punish Tommy for the problems that his father created, especially when Tommy would be best served by being in A.H.'s custody. Ultimately, he did not find that A.H. was unfit to parent Tommy.

Of some interest is this excerpt from the decision on the issue of fitness:

> In *Guardianship of Estelle,* 70 Mass. App. Ct. 575, at 579- 580, a case that involved a custody dispute between a child's biological father and relatives who had served as the child's temporary guardians for many years, the Appeals Court correctly described the interrelationship between unfitness and the child's best interests as follows:
>
> Fitness is not merely the absence of abuse or neglect; nor is it a set of abilities or characteristics that are the same in all circumstances. On the one hand, we defend the right of a parent to the custody of his or her child, yet we recognize that the right will not be enforced if it results in harm to the child, in other words, if the parent is "unfit.'" . . At the same time, the "best interests of the child" is the touchstone of the analysis. . . . The question, then, is how to balance a parent's capacity to care adequately for a child (i.e., his or her "fitness") with that child's "best interests,'"given the child's current circumstances. It has been stated that the tests "best interests of the child" in the adoption statute and "unfitness of the parent" in the guardianship statute reflect different degrees of emphasis on the same factors, that the tests are not separate and distinct but cognate and connected. *Petition of the New England Home for Little Wanderers to Dispense with*

[8] In *Sher*, the Court determined that one could infer the child had witnessed domestic abuse and that it created serious harm to the child. In that case, the Court allowed grandparent visitation in order to prevent further harm to the child. In thie instant case, there was adjudicated domestic abuse by A.H., but instead of inferring serious harm to the child (as it did in *Sher*), the Court determined there was no demonstrable evidence of harm. It appeared that the evidence of serious abuse was limited or R.D.'s credibility was such that little weight was given to the history of abuse.

> *Consent to Adoption*, (367 Mass. 631, 641 (1975)). “Neither the "parental fitness" test nor the "best interests of the child" test is properly applied to the exclusion of the other.” *Bezio v. Patenaude*, (381 Mass. 563, 576-577 (1980)). 'The term ["unfitness"] is a standard by which we measure the circumstances within the family as they affect the child's welfare.” *Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption*, 383 Mass. 573, 589 (1981)."

R.D., 454 Mass. at 715, n. 14.

With respect to R.D. and her relationship with the child, the trial judge determined that R.D. was Tommy’s primary caregiver (from 14 months old), and loved the boy; that Tommy was attached to R.D. and saw her as his mother, and that R.D. was Tommy’s *de facto* parent. The judge also noted some negative parenting behaviors, such as neglecting recommended speech therapy or keeping Tommy isolated (as well as being isolated herself). The judge acknowledged that transferring custody to A.H. would be difficult, but mitigated by R.D. having some regular contact with Tommy. The judge thought Tommy would adjust to being primarily in Father’s care “with the support of professional counseling.” The judge ordered weekly telephone contact and visitation for R.D. with Tommy.

Comment:

When the Court was discussing the idea that “fitness” was situational (in this guardianship case), it seemed reasonable to deduce that such an elastic concept might apply in custody cases, where each parent is presumed to be “good-enough,” and the issue is relative parenting ability, not fitness to parent. A “best interest” analysis presupposes not only an inquiry into who did what kind of caretaking for a child (as in the A.L.I. caretaking list), but how the skills and deficits of each parent interacts with the needs of each child - the “goodness of fit,”[9] as it were. The 2009 American Psychological Association Child Custody Guidelines explains this as the “fit” between child needs and a parent’s abilities to meet those needs. Thus, while one parent may have been the primary caretaker for a child during the active years of the marriage (a pattern given great weight), at the time of the filing the calculus of that parent-child fit may suggest that the other parent would best meet the needs of the child.

Another instructional aspect of the case was the weight given by the trial judge to the allegations of domestic violence. Apparently, Tommy witnessed this partner abuse by Father, but was not the victim of it. The judge decided that any such exposure did not have such a negative effect on Tommy to preclude awarding custody to Father. Contrast this with *Sher*, 70 Mass. App. Ct. at 270 (discussed above) in which the Court awarded Sher grandparent visitation rights. Even though she had no relationship with the child, the Court apparently decided that the child’s father’s history of domestic violence was sufficiently severe to create enough risk to the child such that Sher’s involvement would act as a protective and possibly a preventive factor. In *Sher*, there was no evidence that Desmond, the father, had been abusive to the child, although the Court opined that one could *infer* harm to the child from witnessing domestic abuse (the facts as reported in each case suggested that the violence in *Sher* was more severe). That said, the Court in *Sher* did not require a showing of actual harm. In the instant case, the Court awarded R.D.

[9] American Psyhological Association (2009), *Guidelines for Child Cusody Evalutions in Family Law Proceedings*, Washington, D.C.: A.P.A. Accessed on December 12, 2012 at http://search.apa.org/search?query=Child%20Custody%20Guidelines

rights of access because she had been a *de facto* parent, but not – as in *Sher* – because she was to be a protector of the child against possible child abuse.

A further issue relates to the concept of attachment. Tommy was at least 10 at the time of the appellate case. He had been in the care of R.D. and of Father at various times, but the Court noted the lack of a strong bond with Father, suggesting much greater attachment to R.D. The absence of a "strong bond" was apparently mitigated by the fact that "the child knows his father, loves his father, is not fearful of father and seemingly has a good time with father." *R.D.*, 454 Mass. at 718. In addition, further emotional assistance for this transfer of custody to father was to come, ironically, through regular contacts with R.D. The Court reasoned that, as long as A.H. was not unfit, his biological, but less secure connection to Tommy trumped R.D.'s *de facto*, but more secure relationship to the boy.

APPENDIX A: American Law Institute Definitions

Custodial and Decision-making Responsibility

§2.03 Definitions

(2) A *parenting plan* is a set of provisions for allocation of custodial responsibility and decision-making responsibility on behalf of a child and for resolution of future disputes between the parents.

(3) *Custodial responsibility* refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility.

(4) *Decisionmaking responsibility* refers to authority for making significant life decisions on behalf of the child, including decisions about the child's education, spiritual guidance, and health care.

(5) *Caretaking functions* are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:

(a) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child's physical safety, and providing transportation;

(b) directing the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;

(c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child's needs for behavioral control and self-restraint;

(d) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;

(e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;

(f) arranging for health-care providers, medical follow-up, and home health care;

(g) providing moral and ethical guidance;

(h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.

(6) *Parenting functions* are tasks that serve the needs of the child or the child's residential family. Parenting functions include caretaking functions, as defined in Paragraph (5), and all of the following additional functions:

(a) providing economic support;

(b) participating in decision-making regarding the child's welfare;

(c) maintaining or improving the family residence, including yard work, and house cleaning;

(d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks supporting the consumption and savings needs of the household;

(e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development.