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## MASSACHUSETTS DIVORCE PRACTICE AND PROCEDURE

Hon. Gerald D. McLellan

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# MASSACHUSETTS DIVORCE PRACTICE AND PROCEDURE\*

HON. GERALD D. MCLELLAN\*\*

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### INTRODUCTION

The following synopsis of Massachusetts divorce practice and procedure is intended to be a capsulization of what is rapidly becoming a very complex part of the law. Such brevity must, of necessity, omit substantial areas which are treated at great length in other texts.<sup>1</sup> To some people, this article may appear to be an oversimplification of some very complex problems. Nevertheless, errors are consistently made in divorce proceedings by inexperienced lawyers, or by laypersons who choose pro se representation after only a brief familiarization process. Often these errors could easily be avoided with a little pretrial planning. Hopefully, this article will be an aid to the busy practitioners in this area and enable them to obtain the best results for their clients. In addition, the general public may find the contents helpful in preparing for possible future domestic relation encounters—hopefully with the advice and guidance of their lawyers.

The following will be a guide and reference to the major areas of Massachusetts divorce law, supplemented by a review of reported decisions. Beginning with a brief discussion of the basics of

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1. See generally G. MCLELLAN, *HANDBOOK OF MASSACHUSETTS FAMILY LAW* (1978); 1-3 J. LOMBARD, *MASSACHUSETTS PRACTICE* (1967 & Supp. 1976); Freedman, *ABC's of Massachusetts Divorce Practice and Procedure: Revised January 1, 1977*, 21 B.B.J., January 1977, at 6.

jurisdiction and venue, the article proceeds into the area of motion practice and considers some of the more common forms of motions used by family law practitioners. Discussion will then focus upon permissible grounds for a divorce action. Next, some of the common difficulties encountered in the presentation of an uncontested divorce will be considered, along with problems in contested actions. The recently enacted statute affecting alimony and property transfer will then be examined in detail, and a few comments will be made on general tax implications. Finally, the possible effects of the recent court reorganization bill and the new statute for protection of persons suffering abuse will be outlined.

This article does not seek to cover comprehensively all problems that arise in divorce proceedings. Rather, its purpose is to highlight some of the more commonly encountered, and often easily avoided, difficulties. This foundation should allow for a more detailed analysis of these problems as they arise and facilitate their successful resolution.

## I. JURISDICTION AND VENUE

### A. *Divorce*

Jurisdiction in divorce cases is neither wholly in rem nor wholly in personam but is based on domicile. Jurisdiction may be in rem, quasi in rem, or in personam. Jurisdiction in rem in divorce proceedings is an action against the marital res and results in a dissolution of the marital bonds only. Jurisdiction quasi in rem may be a proceeding involving primarily the marital res but, in addition, is a proceeding against property located within the state. Jurisdiction in personam is obtained by virtue of personal service, acceptance of service, or a proceeding under the long-arm statute.

The jurisdictional statutes<sup>2</sup> require that the plaintiff live in Massachusetts for one year if the alleged cause for divorce has occurred outside of Massachusetts. If the acts allegedly constituting the cause for divorce occurred within Massachusetts, the plaintiff

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2. MASS. GEN. LAWS ANN. ch. 208, §§ 4-5 (West Supp. 1978) set forth the Massachusetts residency requirements relating to divorce. *See* Fiorentino v. Probate Court, 365 Mass. 13, 310 N.E.2d 112 (1974). This case involved a constitutional challenge to the old two-year statutory residency requirement for the filing of a complaint for divorce. The court struck down the requirement as violative of the equal protection clause. The court was in favor of what it considered to be the more precise and less burdensome alternative of case-by-case judicial determination of domicile.

must be domiciled here when the action is started. Generally, the plaintiff in a divorce case has the initial burden of proving domicile in order to establish jurisdiction.<sup>3</sup> Once established, however, the state courts may exercise divorce jurisdiction based solely on the domicile of the plaintiff even if the defendant neither appears nor is personally served and even though the parties never resided as husband and wife in the forum state.<sup>4</sup> The determination of domicile is basically a question of fact. Many highly relevant criteria bear on this determination. Any evidence indicating an intention to establish roots is considered material; length of residence is only one relevant consideration.<sup>5</sup>

### B. *Custody*

In a case involving the custody of minor children, generally jurisdiction is in the state where the child is residing.<sup>6</sup> Massachusetts courts will usually first determine whether any complaints are pending in any other jurisdiction. If there are pending actions for custody in another jurisdiction, Massachusetts courts will be reluctant to decide any questions involving custody of minor children. This is particularly true when one of the parents has "snatched" the children from the other parent and brought them into Massachusetts. Whether Massachusetts will give full faith and credit to a sister state's judgment affecting custody of a child will not override the best interests of a child residing within the commonwealth.<sup>7</sup>

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3. *Id.* at 22, 310 N.E.2d at 119. *See also* Mellon Nat'l Bank & Trust Co. v. Commissioner of Corps. & Taxation, 327 Mass. 631, 100 N.E.2d 370 (1951).

4. *Fiorentino v. Probate Court*, 365 Mass. 13, 310 N.E.2d 112 (1974).

5. *Id.* at 22, 310 N.E.2d at 119. *See* Comment, *The Problem of the "Newcomer's Divorce,"* 30 MD. L. REV. 367, 380 n.113 (1970). The *Fiorentino* court stated that other factors which may be considered include, but are not limited to, the following: (1) Whether the plaintiff has a Massachusetts drivers license and automobile registration; (2) whether he or she has purchased a home or has leased an apartment and the term of any lease; (3) whether any children have been brought to live in Massachusetts; (4) whether permanent employment has been obtained in Massachusetts; and (5) whether there is evidence of abandonment of previous domicile. *Fiorentino v. Probate Court*, 365 Mass. 13, 23 n.12, 310 N.E.2d 112, 119 n.12 (1974).

6. This general rule has been modified by the new long-arm statute. *See* notes 9-13 *infra* and accompanying text. The amendment of the long-arm statute in 1976 allows Massachusetts courts to take jurisdiction over child custody cases, even if both the parent-defendant and the child are residents outside the commonwealth. The following requirements must be met: (1) The plaintiff must be a Massachusetts resident; and (2) both spouses must have been domiciled here for one year of the two years immediately preceding the action. It is not necessary for the child ever to have lived in Massachusetts. MASS. GEN. LAWS ANN. ch. 223A, § 3(g) (West Supp. 1978).

7. *See* MASS. GEN. LAWS ANN. ch. 208, § 31 (West Supp. 1978). In proceedings

However, the presence of the child in the state merely because of a visit is not considered a residence which allows such jurisdiction.

### C. *Long-Arm Statute*

Long-arm statutes are used in every state to acquire in personam jurisdiction over a defendant who is not a resident of that state and may never physically enter the state. The basis of such jurisdiction is some contact by the individual with the state in which the suit is brought.<sup>8</sup>

The 1976 Massachusetts Legislature amended the long-arm statute.<sup>9</sup> It substantially expanded the jurisdiction of a probate court over alimony, support, custody, modification of judgments, and other disputes by giving the court in personam jurisdiction over nonresident defendants in certain instances.<sup>10</sup> In addition, the law suit may extend to property settlement orders relating to the marriage. Under the statute, for example, a nonresident de-

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dealing with the custody of minor children, the welfare of the children is the governing consideration. *Smith v. Smith*, 361 Mass. 855, 279 N.E.2d 693 (1972); *Masters v. Craddock*, 1976 Mass. App. Ct. Adv. Sh. 784, 351 N.E.2d 217.

8. As a general rule, the exercise of personal jurisdiction by a state court over a nonresident defendant depends upon the presence of reasonable notice to the defendant that the action has been brought and a sufficient connection between the defendant and the forum state so as to make it fair to require defense of the action in the forum. *See Shaffer v. Heitner*, 433 U.S. 186 (1977); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945); *Milliken v. Meyer*, 311 U.S. 457 (1950).

The United States Supreme Court has recently applied this principle in *Kulko v. Superior Court of Cal.*, 98 S. Ct. 1690 (1978). That case involved a divorced mother's action in a California court to recognize a foreign divorce judgment and to modify the judgment with respect to custody rights and child support obligations. The divorced husband, a New York resident, defended on the ground that the California court lacked personal jurisdiction over him. The Supreme Court held that where the two spouses, both of whom were originally New York domiciliaries, had for reasons of convenience married in California and thereafter spent their entire married life in New York, the California marriage by itself could not support the California court's exercise of jurisdiction over the spouse who remained a New York resident. Likewise, the divorced father's acquiescence to his daughter's desire to live with her mother in California was insufficient to confer jurisdiction over the divorced father in California courts. The Court stated that the minimum contacts test "is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present." *Id.* at 1697. The Court concluded, "[T]he mere act of sending a child to California to live with her mother is not a commercial act and connotes no intent to obtain nor expectancy of receiving a corresponding benefit in the state that would make fair the assertion of that State's judicial jurisdiction." *Id.* at 1702.

9. MASS. GEN. LAWS ANN. ch. 223A, § 3 (West Supp. 1978), as amended by 1976 Mass. Acts ch. 435.

10. *Id.*

fendant having been served by one of the methods prescribed by the statute<sup>11</sup> may be ordered to convey his or her interest in the marital domicile.

In order to use the long-arm statute in the probate court, all of the following conditions must be met: (1) The parties must be legally married, (2) they must have maintained a domicile in the state for at least one of the two years immediately preceding commencement of the action, and (3) the plaintiff must still reside in Massachusetts.<sup>12</sup> The long-arm statute is applicable to separate support proceedings in the same manner as in proceedings for divorce.

Once the long-arm statute applies, the wrongs complained of may be remedied (1) to the extent that there is property in the state to satisfy the judgment, (2) by obtaining a money judgment which can subsequently be sued upon in another jurisdiction without again proving the merits of one's case, or (3) by utilization of the Uniform Reciprocal Enforcement of Support Act.<sup>13</sup>

#### D. Venue

The Massachusetts venue statute<sup>14</sup> provides that the county where one of the parties lives is the proper county in which to bring the action. If, however, one of the parties still resides in the county where the parties last lived together as husband and wife, the action *must* be brought in that county. The court having jurisdiction may, in its discretion, transfer such action to another county in the case of hardship or inconvenience to either party.

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11. MASS. GEN. LAWS ANN. ch. 223A, § 6(a) (West Supp. 1978) prescribes five methods of service outside Massachusetts. These include (1) personal delivery, (2) any manner prescribed by the state in which the defendant resides, (3) any form of mail, signed receipt requested, (4) as directed by the foreign authority in response to a letter rogatory, and (5) as directed by the court.

12. MASS. GEN. LAWS ANN. ch. 223A, § 3(g) (West Supp. 1978). See note 6 *supra*.

13. MASS. GEN. LAWS ANN. ch. 273A, §§ 1-17 (West Supp. 1978). The purpose of the UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT is to provide an effective procedure by which one state can compel performance by one under a duty to support dependents in another state. The court has the power to make a valid order, prospective in operation, based upon the respondent's duty to support his or her children in the foreign state. *Phillips v. Phillips*, 366 Mass. 561, 146 N.E.2d 919 (1958). Proceedings under the Uniform Act are civil rather than criminal in nature. *Id.*; *Souza v. Kokoszka*, 36 Mass. App. Dec. 199 (1965). For a discussion of the obtaining of jurisdiction over a nonresident parent in filiation or support proceedings, see Annot., 76 A.L.R.3d 708 (1977).

14. MASS. GEN. LAWS ANN. ch. 208, § 6 (West Supp. 1978). There are 14 county probate courts in which an action of divorce may be brought. It should be noted that a similar venue situation is present in an action for separate support. The applicable statute is MASS. GEN. LAWS ANN. ch. 209, § 34 (West Supp. 1978).

### E. *Required Separation Period Prior to Divorce*

In a divorce action the parties must be living apart for thirty days prior to the commencement of the action, and they must so certify on the complaint.<sup>15</sup> The statute also provides that the court may, after a hearing *ex parte*, waive this requirement.

If the parties desire a waiver of this requirement, some Massachusetts courts will sign a thirty-day waiver as a matter of course without a hearing, *ex parte*, or otherwise.<sup>16</sup> Other courts require a motion and an actual hearing to waive the thirty-day requirement.<sup>17</sup>

## II. MOTION PRACTICE

A motion for temporary order, which may be for support or custody, and a motion to vacate, used to force one spouse to leave the marital home, are the most common forms of motion used by family law practitioners. As a general rule, the court may hear motions and other interlocutory matters in chambers or in open court at such times and upon such notice as may be otherwise required by law.<sup>18</sup> The moving party must serve the opponent with a copy of the motion at least three days prior to the hearing if service is by hand, and six days if by mail.<sup>19</sup>

The court, in its discretion, for good cause shown, with or without a motion or notice to the opponent, may order the time period enlarged if a request is made prior to the expiration of the

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15. MASS. GEN. LAWS ANN. ch. 208, § 6B (West Supp. 1978).

16. It should be noted that some judges refuse to sign a waiver if the parties are still living together. If the spouses are unable to agree on who should leave the premises, the plaintiff's lawyer should first serve the defendant with a notice to vacate under MASS. GEN. LAWS ANN. ch. 208, § 34B (West Supp. 1978), and then request the 30-day waiver.

17. If the divorce action is brought by the plaintiff-spouse prior to the expiration of 30 days from the time the parties began to live apart, and the defendant-spouse fails to object by pleadings or otherwise, the defendant-spouse waives such objection. The objection is not jurisdictional, nor does it go to the merits of the case. Thus, the objection is waived if not timely made. *Phillips v. Phillips*, 1975 Mass. App. Ct. Adv. Sh. 664, 326 N.E.2d 729, *cert. denied*, 423 U.S. 1022 (1975).

18. MASS. SUPP. R. PROB. CT. 101. This rule restates MASS. PROB. CT. R. 15 as amended by the probate judges. Supplemental rules of probate court are promulgated pursuant to MASS. R. CIV. P. 83.

19. MASS. R. DOM. REL. P. 6(d) provides that in the event of notice being served by mail, three days are added to the prescribed time period.

In computing any period of time for service of a motion one should note that the day of the act, event, or default after which the designated period of time begins to run is not included. MASS. R. DOM. REL. P. 6(a). The last day of the period is included unless it is a Saturday, a Sunday, or a legal holiday, in which case the period runs until the end of the next day which is not a Saturday, Sunday, or legal holiday.



period originally prescribed.<sup>20</sup> Even after the expiration of the period, the court may permit the act to be done where the failure to act was the result of excusable neglect.<sup>21</sup> Of course the parties, by agreement, may waive, extend, or reduce any of the required notices.

#### A. *Temporary Orders for Support or Custody*

Pending the outcome of an action for divorce, either of the parties may seek temporary orders relative to the care, custody, and support of their minor children.<sup>22</sup> Alimony and support orders awarded pendente lite (during the pendency of the action) are used to aid the wife or husband during the period before the hearing of the divorce action on the merits.<sup>23</sup> By definition, this is not a final order. As a practical matter, however, if the parties have not altered their financial circumstances, the final judgment will probably award the same amount as the temporary order. Efforts should be made, therefore, to present a full and fair financial picture to the court so that the order will be equitable in view of all the circumstances.<sup>24</sup> Financial statements under oath must be pre-

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20. MASS. R. DOM. REL. P. 6(b).

21. *Id.*

22. MASS. GEN. LAWS ANN. ch. 208, § 19 (West Supp. 1978). *See generally* Note, *Custody Awards of Minors*, 6 NEW ENG. L. REV. 201 (1971).

23. Although there is some early authority denying the power of the court to award alimony pendente lite in an action for divorce, it is now generally the practice in the United States for a court, upon application by the wife, to make an allowance for her support during the pendency of the suit if she is without separate means and the husband is able to support her. *S. v. A.*, 118 N.J. Super. 69, 285 A.2d 588 (Super. Ct. Ch. Div. 1972); *Lerner v. Lerner*, 21 App. Div. 2d 861, 251 N.Y.S.2d 400 (1964). The right to alimony pendente lite is not absolute. As with any award of alimony, the spouse must establish that he or she comes within the provisions of the law which entitle him or her to the award. *House v. House*, 1975 Mass. Adv. Sh. 1964, 330 N.E.2d 152; *Gosselin v. Gosselin*, 1 Mass. App. Ct. 346, 294 N.E.2d 555 (1973). *See Stern v. Stern*, 165 Conn. 190, 332 A.2d 78 (1973) (statute providing alimony pendente lite held to be constitutional even though similarly situated females could not be compelled to pay temporary alimony); *Salito v. Salito*, 107 N.H. 77, 217 A.2d 181 (1966) (statute which authorizes the court to make temporary allowances for support has been given a limited construction). In *Saraceno v. Saraceno*, 1976 Mass. Adv. Sh. 294, 341 N.E.2d 261, the Massachusetts Supreme Judicial Court held that the alimony statute was not unconstitutional as discriminating against husbands. It should be noted that the statute, MASS. GEN. LAWS ANN. ch. 208, § 34, has been amended by 1974 Mass. Acts ch. 565, to eliminate any possible discrimination in granting alimony. *See* notes 161-65 *infra* and accompanying text.

24. Whether or not a temporary award will be made depends upon the condition of the parties at the time the application for relief is made, not on their situation at the time the suit was instituted. *See Dejoie v. Dejoie*, 6 Ill. App. 3d 381, 286 N.E.2d 38 (1972) (award of temporary alimony rests within the discretion of trial

sented as well as all other supportive financial documents.<sup>25</sup> Where the defendant owns a business, it is impossible for a judge to accurately award alimony and support payments unless the balance sheets are produced for the fiscal year ending at the time nearest the date of the hearing. Often, there will not be enough money to satisfy the demands of the parties and children. No order for alimony and support may be entered until the defendant has been personally served in the basic action and, in addition, properly served with a notice of motion.

When filing a motion for temporary custody, the moving party, in many cases, should simultaneously file a motion for investigation by the Family Service Office.<sup>26</sup> As a general rule, the status quo will be maintained at a temporary custody hearing pending: (1) An investigation and report by the Family Service Office, or (2) a hearing on the merits of the divorce complaint. Only if the health and welfare of the children is in present danger will the court, in the usual case, allow a full hearing on the question of temporary custodial rights.<sup>27</sup> It is against the best interest of the child to temporarily change custody when, after a hearing on the merits, it is possible to reverse the custody rights again.<sup>28</sup>

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court and is dependent on current circumstances of the parties). *Accord*, *Gasperini v. Gasperini*, 57 Ill. App. 3d 578, 373 N.E.2d 576 (1978); *Rabin v. Rabin*, 57 Ill. App. 2d 193, 206 N.E.2d 850 (1965).

25. MASS. SUPP. R. PROB. CT. 401. The financial statement must be filed at the same time the request for a temporary order is made. Either party in a contested matter may request the other party, upon 48 hours notice, to furnish a financial statement to the court with a copy to the requesting party.

Financial statements submitted to the court at the time of a hearing on a temporary motion for temporary alimony and support are not included among the papers in the case because this information is not available to the public. Thus, an attorney who submits a financial statement to the judge at a hearing on a motion for temporary support should not assume that the judge will have these statements at the time of the hearing on the merits.

26. The probation department and the probation officers of the probate court are generally called Family Service Officers. They make investigations and file reports whenever directed to do so by the court. When filed, their reports are entitled to some weight in the judge's deliberations, but they are by no means conclusive. *See* MASS. GEN. LAWS ANN. ch. 276, §§ 83, 85A, 85B (West Supp. 1978).

27. The basic issues at this stage are what is best for the interest and welfare of the minor children and what protection they may need until a full hearing on the merits. At that time, the court hears all the evidence and can make permanent orders. *See* 2A J. LOMBARD, MASSACHUSETTS PRACTICE § 1988 (1967). There is no absolute rule; custody is not a prize to be awarded to the prevailing party. *Clifford v. Clifford*, 354 Mass. 545, 238 N.E.2d 522 (1968).

28. The probate court may revise and alter a decree for custody "as the circumstances of the parents and the benefit of the children may require." MASS. GEN.

### B. *Motion to Vacate The Marital Home*

Upon commencement of an action for divorce, or during the pendency thereof, any court having jurisdiction may order the husband or wife to vacate the marital home for a period of time not exceeding ninety days.<sup>29</sup> The moving party has the burden to establish "a substantial likelihood of immediate danger to his or her health, safety or welfare or to that of such minor children from the opposing party . . . ."<sup>30</sup> The court will not usually take such an extraordinary measure as to remove a spouse from the home without the moving party clearly sustaining this burden of proof.<sup>31</sup>

If the moving party can establish this substantial likelihood of immediate danger, the court may enter a temporary order without notice to the opposing party. However, the party must be notified immediately and given an opportunity within five days to be heard on the question of continuing the temporary order. Although the maximum period that a court may order a party to vacate is ninety days at any one time, additional orders may be made for such period of time as the court deems necessary.

## III. GROUNDS FOR DIVORCE

Although there are several grounds for divorce in Massachusetts,<sup>32</sup> the most common is cruel and abusive treatment. This is true despite the fact that desertion and irretrievable breakdown are the easiest grounds to prove. In the future, the most common ground for divorce will probably be irretrievable breakdown be-

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LAWS ANN. ch. 208, § 28 (West Supp. 1978). Generally, a change in custody will not be ordered unless there has been some change in circumstances since the original decree for custody. It has been held that "[w]hether such a change shall be ordered is a matter 'peculiarly within the province of the judge, who observed the witnesses, among whom were both parents.'" *Palmer v. Palmer*, 357 Mass. 764, 764, 256 N.E.2d 446, 447 (1970) (quoting *Grandell v. Short*, 317 Mass. 605, 608, 59 N.E.2d 274, 276 (1945)).

29. MASS. GEN. LAWS ANN. ch. 208, § 34B (West Supp. 1978). This same rule applies in an action for nullity of marriage and in an action for separate support or maintenance.

30. *Id.*

31. In *Dee v. Dee*, 1 Mass. App. Ct. 320, 296 N.E.2d 521 (1973), the Massachusetts Appellate Court reversed a probate court order which had, in an action for separate support, required the husband to vacate the marital home. It held that the probate court did not have the power under § 34B to order the husband to vacate the marital home held in a tenancy by the entirety.

32. MASS. GEN. LAWS ANN. ch. 208, § 1 (West Supp. 1978) lists the following permissible grounds for divorce: Adultery, impotency, desertion, gross and confirmed habits of intoxication, cruel and abusive treatment, failure to provide support and maintenance, and irretrievable breakdown.

cause recent legislation has reduced the waiting period substantially.<sup>33</sup>

#### A. *Cruel and Abusive Treatment*

Virtually any act or series of acts committed by a defendant against his or her spouse may give rise to cruel and abusive treatment if those acts are committed intentionally by the defendant in such a way as to humiliate, demean, or otherwise affect the health of the plaintiff, or to create a reasonable apprehension in the plaintiff that his or her health may be impaired.<sup>34</sup> If the defendant's actions are calculated to cause the plaintiff mental or physical harm, it is not necessary, before the cause of action arises, to have the plaintiff sustain that harm.<sup>35</sup> It is enough that the defendant's actions create a reasonable apprehension in the mind of the plaintiff that mental or physical harm will result.<sup>36</sup> Many times lawyers

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33. MASS. GEN. LAWS ANN. ch. 208, §§ 1A, 1B (West Supp. 1978). See generally Freedman, *Irretrievable Breakdown of Marriage: An Additional Ground for Divorce*, 20 B.B.J., January 1976, at 3.

34. *Yee v. Yee*, 2 Mass. App. Ct. 897, 319 N.E.2d 743 (1974). There the court held that "it is not necessary to prove that the [defendant] had a malevolent intent to cause physical injury to the body or to the health of the [plaintiff] . . ." *Id.* at 897, 319 N.E.2d at 744. Cruel and abusive treatment was sufficiently established by showing that such injury was the natural consequence of the conduct, and that harm resulted or was reasonably likely to follow the acts of the defendant. In *Collis v. Collis*, 355 Mass. 25, 242 N.E.2d 423 (1968), the Massachusetts Supreme Judicial Court affirmed the denial of a husband's request for divorce. It held that the action was properly dismissed where the court had found that the husband was the aggressor in the situation which gave rise to his claim of cruel and abusive treatment. It viewed the wife's conduct as principally preventive in nature, and not done with malicious intent or with the desire to injure the husband.

Connecticut courts adopt a different view on the necessary intent with which the acts constituting cruel and abusive treatment must be performed. In *Sarafin v. Sarafin*, 28 Conn. Supp. 24, 247 A.2d 500 (1968), a divorce action was brought on the grounds of alleged intolerable cruelty. It was held that intolerable cruelty requires not only proof of acts of cruelty, but proof that in their cumulative effect they are intolerable in the sense of rendering continuance of the marital relation unbearable. Under Connecticut law, it must be determined that the conduct of the defendant was either intended by him or her to be cruel or was of such a character that the trial court may reasonably infer an intent to be cruel.

35. *Silverman v. Silverman*, 1977 Mass. App. Ct. Adv. Sh. 317, 360 N.E.2d 902. In dismissing the husband's complaint for divorce, the court held that conduct short of physical cruelty can constitute cruel and abusive treatment. "Cruelty 'is broad enough to include mere words, if they tend . . . to wound the feelings to such a degree as to affect the health of the party, or create a reasonable apprehension that it may be affected . . .'" *Id.* at 317, 360 N.E.2d at 903. This complaint was dismissed, however, because the record did not establish that damage to the husband's health was the natural consequence of the wife's conduct.

36. *Silverman v. Silverman*, 1977 Mass. App. Ct. Adv. Sh. 317, 360 N.E.2d 902;

allege cruel and abusive treatment but their witness testifies to facts indicating another ground for divorce. Frequently, lawyers assume that such testimony is sufficient for a judge to grant the divorce on grounds of cruel and abusive treatment. However, to be cruel and abusive treatment, an act constituting any other ground must be committed in such a way as to intentionally cause the plaintiff physical or mental harm.<sup>37</sup>

Similarly, a defendant's conduct, no matter how heinous or cruel and no matter how abusive it is, will not give rise to a divorce on grounds of cruel and abusive treatment unless that conduct was committed by the defendant in such a way as to *knowingly* cause the plaintiff mental or physical harm. If the acts were committed while the defendant was insane, for example, they would not be considered cruel and abusive treatment.<sup>38</sup>

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Yee v. Yee, 2 Mass. App. Ct. 897, 319 N.E.2d 743 (1974).

Whether the defendant-spouse's conduct was sufficient to create this reasonable apprehension in the mind of the plaintiff is a question of fact that must be determined from the various circumstances of the case. In *Ober v. Ober*, 1 Mass. App. Ct. 32, 294 N.E.2d 449 (1973), the plaintiff's wife accused him of having an affair with a female client. She repeated the accusation to her friends, and persisted in the accusation publicly and privately over a three-year period until her husband finally left her. The accusations had no basis in fact. The court found that the wife's baseless accusations of infidelity caused the husband to be upset and angry. The court also found it reasonably likely that injury to the husband's health would follow as a natural consequence of the wife's conduct. This evidence was deemed sufficient to sustain an award of divorce to the husband on the grounds of cruel and abusive treatment. Similarly, in *Manning v. Manning*, 1977 Mass. App. Ct. Adv. Sh. 326, 360 N.E.2d 903, the court found that the wife's conduct in making numerous telephone calls to the husband at work, her threats to speak to his employer, her quarreling with him over money, and her throwing of his clothes onto the lawn constituted a pattern of behavior likely to cause him harm. This was held sufficient to justify a divorce on the grounds of cruel and abusive treatment. Compare *Lynch v. Lynch*, 1 Mass. App. Ct. 589, 304 N.E.2d 445 (1973), in which the wife's allegedly cruel and abusive treatment consisted only of two isolated instances. The first was an exchange of epithets in the husband's barber shop where the wife had gone to ask him for money for support; the second occurred two years later when she called him a "faker" after a court hearing. This evidence was deemed insufficient to entitle the husband to a divorce on the grounds of cruel and abusive treatment. See *Carrol v. Carrol*, 358 Mass. 809, 265 N.E.2d 383 (1970).

37. *Yee v. Yee*, 2 Mass. App. Ct. 897, 319 N.E.2d 743 (1974). It is the quality rather than the duration of the acts which controls. The act need not be part of a continuing course of conduct. Under the proper circumstances, a single act of cruelty may constitute sufficient grounds for divorce. See *Collis v. Collis*, 355 Mass. 25, 242 N.E.2d 423 (1968). *But cf.* *Ober v. Ober*, 1 Mass. App. Ct. 32, 294 N.E.2d 449 (1973) (wife's course of conduct over three-year period sufficient to constitute cruel and abusive treatment as ground for divorce).

38. By consensus of American authority, with which Massachusetts law accords, a divorce cannot be granted on the grounds of cruel and abusive treatment when the

In eliciting testimony to establish this ground for divorce, care should be taken to distinguish between mental treatment that is cruel and abusive and physical treatment that is cruel and abusive.<sup>39</sup> Either type of conduct may be sufficient to warrant a divorce on grounds of cruel and abusive treatment if committed with the proper knowledge and intent. If the plaintiff vividly testifies to abusive physical treatment, it is unconscionable for a lawyer to ask, "Did that make you feel nervous and upset, Mrs. Jones?" If acts constituting a valid cause for divorce on this ground have occurred, any competent lawyer, with a little time and thought, should be able to elicit truthful testimony from his or her client sufficient to justify a judgment for divorce on grounds of cruel and abusive treatment. There is no need to strain the plaintiff's testimony to fit within a particular rigid form.

There are some limits to the type of conduct sufficient to establish this ground for divorce. Arguments between the spouses alone are insufficient to give rise to a divorce action for cruel and abusive treatment.<sup>40</sup> The fact that the defendant is "frequently

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acts complained of were done by an insane person. *Rice v. Rice*, 332 Mass. 489, 125 N.E.2d 787 (1955).

"It is recognized in many jurisdictions that not every type or degree of mental illness constitutes the kind of insanity which may be a defense to an action of this nature." *Cosgrove v. Cosgrove*, 351 Mass. 64, 66, 217 N.E.2d 754, 756 (1966). See *Dochelli v. Dochelli*, 125 Conn. 468, 6 A.2d 324 (1939); *Hadley v. Hadley*, 144 Me. 127, 65 A.2d 8 (1949); *Bryce v. Bryce*, 229 Md. 16, 181 A.2d 455 (1962); *Jaikins v. Jaikins*, 370 Mich. 488, 122 N.W.2d 673 (1963); *Silverness v. Silverness*, 270 Minn. 564, 134 N.W.2d 901 (1965); *Moody v. Moody*, 253 N.C. 752, 117 S.E.2d 724 (1961). See generally Annot., 19 A.L.R.2d 144, 151-55 (1951). The underlying principle appears to be that the defense of insanity will prevail only if the offending spouse was incapable of understanding the nature and consequences of his or her acts and was unable to restrain himself or herself from committing them. 351 Mass. 64, 217 N.E.2d 754.

39. In Massachusetts, the phrase "cruel and abusive treatment" includes both physical and mental cruelty. See *Reed v. Reed*, 340 Mass. 321, 163 N.E.2d 919 (1960) (mental cruelty affecting health); *LaVigne v. LaVigne*, 336 Mass. 377, 145 N.E.2d 687 (1957) (physical cruelty); *Brown v. Brown*, 323 Mass. 332, 81 N.E.2d 820 (1948) (mental cruelty affecting health).

40. *Lynch v. Lynch*, 1 Mass. App. Ct. 589, 304 N.E.2d 445 (1973) (two isolated instances of argumentative confrontation between spouses held insufficient grounds). *Contra*, *Nowak v. Nowak*, 23 Conn. Supp. 495, 497, 185 A.2d 83, 84 (1962), where it was stated:

Incompatibility of personalities is not and has never been a ground for divorce in Connecticut. Under our law, married persons are expected to accept the ordinary vicissitudes of marriage caused by unwise mating, unhappy situations, unruly tempers and common quarrels or marital wranglings. To constitute intolerable cruelty, the consequences must be serious. This rule was reaffirmed in *Sarafin v. Sarafin*, 28 Conn. Supp. 24, 247 A.2d 500 (1968).

drunk" is insufficient as well if that is the only alleged mistreatment.<sup>41</sup> Additionally, the mere fact that the defendant is absent from home frequently also fails to establish cruel and abusive treatment.<sup>42</sup> These actions, however, coupled with the further evidence that the defendant committed these acts or omissions knowing that they had a detrimental effect on the plaintiff, and affected his or her mental or physical health, so as to cause sleeplessness, loss of weight, and the like, will give rise to a valid claim of cruel and abusive treatment.<sup>43</sup> There is no doubt that in Massachusetts some probate judges have taken the attitude that they will not hold lawyers strictly to the rigid standards of case law in an uncontested divorce action. They may feel that changing times and current social pressures compel them to set lenient standards for establishing cruel and abusive treatment.

In any event, the enactment of irretrievable breakdown as a ground for divorce allows a litigant to obtain a divorce without testimony charging the defendant-spouse with fault. In this way, strained testimony in a divorce action can be avoided in situations where the facts do not meet current legal standards for cruel and abusive treatment.<sup>44</sup>

### B. *Irretrievable Breakdown*

In 1975, a legislative enactment added irretrievable breakdown as an additional ground for divorce in the Commonwealth of Massachusetts.<sup>45</sup> The statute is divided into two sections, which, in essence, divide the ground of irretrievable breakdown into two

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41. Evidence of intoxication of the defendant without malevolent purpose toward the plaintiff does not prove cruel and abusive treatment. *Callan v. Callan*, 280 Mass. 37, 181 N.E. 736 (1932). See 2A J. LOMBARD, MASSACHUSETTS PRACTICE § 1730 (1967).

42. See *Carroll v. Carroll*, 358 Mass. 809, 265 N.E.2d 383 (1970), where it was held that cruel and abusive treatment was not established by evidence that the wife had left her husband and gone to her mother's while the husband was ill in bed with pneumonia. She returned the following evening and inquired whether he was all right but did not enter the house.

43. E.g., *Reed v. Reed*, 340 Mass. 321, 163 N.E.2d 919 (1960). Where the wife refused to cease keeping company with another man despite the husband's remonstrances, with the result being that the husband's health deteriorated and he lost weight, there was cruel and abusive treatment so as to entitle the husband to a divorce.

44. There are, of course, many other circumstances which can give rise to cruel and abusive treatment as a ground for divorce. For the sake of brevity these have been omitted here. See generally 2A J. LOMBARD, MASSACHUSETTS PRACTICE §§ 1721-1745 (1967 & Supp. 1976).

45. MASS. GEN. LAWS ANN. ch. 208, §§ 1A, 1B (West Supp. 1978).

separate categories: (1) Where there is no disagreement, and (2) where there is a controversy.

1. *Both Parties Agree*

Where both parties agree that an irretrievable breakdown of marriage has occurred, and agree on all other facts, section 1A of the statute governs. The action under section 1A is commenced by the filing of the complaint, affidavit, and separation agreement. The complaint should, in addition to stating the cause, contain a short and plain statement of the claim showing that the party bringing the action is entitled to relief. The party must allege concise and legally sufficient facts which constitute an irretrievable breakdown of the marriage. In practice, most Massachusetts judges accept the complaint where the grounds for divorce are stated without any supportive facts. Better practice dictates, however, that the party bringing the action allege sufficient facts.

The affidavit must be signed by both parties and state that an irretrievable breakdown of marriage exists. Facts must be set forth in the affidavit to inform the court of the reasons why the parties believe an irretrievable breakdown exists. The separation agreement must be signed by the parties and sworn to before a notary public. If the agreement is not ready at the time of filing, it may be filed at the registry of probate within ninety days of filing the complaint and affidavit.

Various counties in Massachusetts differ as to the procedure and method of presenting a divorce on the ground of irretrievable breakdown. Some judges treat the matter no differently than an action for divorce on any other ground. Accordingly, the witness takes the stand and testifies to the facts which led to the irretrievable breakdown. The second spouse may similarly take the stand and testify accordingly. Other judges conduct a "bench conference" wherein one party testifies to the jurisdictional and venue elements, the existence of a valid marriage, and the collateral facts of the names and ages of the children of the parties. Inquiry is made, either by the attorney for one of the parties or by the court, as to why the marriage has broken down and whether there is any chance of a reconciliation. The separation agreement is explained to the parties and examined by the court, the financial statements are submitted and reviewed, child custody and visitation rights are explained in detail, and the matter is concluded on a more or less informal basis.

Both parties should be present at the hearing. To the extent



that one of the parties is unrepresented, inquiry should be made as to whether he or she understands the agreement, and whether he or she concurs in the statement by the other spouse that an irretrievable breakdown has occurred and that there is no possibility of reconciliation. Equally as important is whether the unrepresented spouse understands that the attorney represents the other spouse only.<sup>46</sup>

Six months after the approval of the agreement by the court, the judgment of divorce nisi is entered.<sup>47</sup> Six months after the entry of the judgment of divorce nisi, a judgment of divorce absolute will enter<sup>48</sup> if no statement of objections has been filed.<sup>49</sup> Within the six month period prior to the entry of the judgment of divorce nisi, the divorce agreement previously filed with the court may be modified by agreement of the parties with the approval of the court. A modification complaint must be filed and a substantial

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46. No lawyer can represent both parties to a divorce whether on the ground of irretrievable breakdown or any other ground. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 5-15, Disciplinary Rule 5-105(A).

47. A judgment nisi is one which will definitely conclude the defendant's rights unless, within the prescribed time, he or she shows cause to set it aside or successfully appeals. When a judgment nisi is finally confirmed by the defendant's failure to show cause against it, it becomes absolute.

48. As a general rule, prior to its becoming absolute a judgment nisi may be modified by the court in light of a change in circumstances of the parties. For example, where a probate court judge found that after entry of a judgment nisi, and before the judgment became absolute, the wife openly and with the intention of embarrassing and injuring the husband and his reputation conducted herself in a scandalous manner by committing adultery, to the extent that this conduct did in fact affect the husband and his ability to carry on his business, it was held that the judge's reduction of the husband's alimony obligation to the wife was not an abuse of discretion. *Miller v. Miller*, 366 Mass. 846, 314 N.E.2d 443 (1974). For a discussion of judges' discretion concerning appropriate reductions of alimony in the proper circumstances, see *Surabian v. Surabian*, 362 Mass. 342, 285 N.E.2d 909 (1972); *Richman v. Richman*, 335 Mass. 395, 140 N.E.2d 139 (1957).

49. During the six-month period after any judgment of divorce nisi, the defendant may file a statement of objections to the judgment becoming absolute. If this occurs, the judgment does not become absolute until the objections have been disposed of by the court. MASS. R. DOM. REL. P. 58(c). See *Gailis v. Gailis*, 1 Mass. App. Ct. 253, 295 N.E.2d 175 (1973). However, in the absence of a filed statement of objections or a stay, the mere pendency of an appeal does not prevent the judgment of divorce nisi from becoming absolute. *Scholz v. Scholz*, 1975 Mass. Adv. Sh. 649, 324 N.E.2d 617.

Once the judgment becomes absolute there is no longer any right to appeal from the judgment nisi. *Sloane v. Sloane*, 349 Mass. 318, 208 N.E.2d 211 (1965). However, a court of probate retains the power to correct errors in its decrees. It has been held that a divorce judgment nisi may be revoked for fraud or mistake even after it has become absolute. 1975 Mass. Adv. Sh. 649, 324 N.E.2d 617.

change in circumstances must be shown at the time of the hearing. Prior to the hearing date of a divorce on the ground of irretrievable breakdown, the parties are entitled to temporary orders in the same manner as in any other action for divorce.<sup>50</sup>

## 2. *Only One Party Seeks Divorce*

When only one of the parties avers that an irretrievable breakdown of marriage exists, and there is no agreement, section 1B is involved and the matter proceeds as a contested divorce. Twelve months must elapse after the filing of the complaint before there is a hearing. After the hearing, in the event the court finds that an irretrievable breakdown exists and has existed from the time the complaint was filed, a judgment of divorce nisi will be entered.<sup>51</sup> As part of the judgment of the court, as in judgments of divorce on any other grounds, the court will make orders relating to the custody and support of any minor children and orders for alimony in accordance with the statutory provisions for alimony, support, and for the disposition of marital property.<sup>52</sup> In those cases involving section 1B, as in section 1A, the parties may bring a motion for temporary orders prior to the hearing on the merits.<sup>53</sup>

In the event that an agreement is reached between the parties prior to the entry of judgment in a section 1B irretrievable breakdown divorce action, the parties may file a motion to amend to make it a section 1A action. The matter may then proceed under that section.

The statute concerning equitable division of marital property<sup>54</sup> is applicable to a divorce on the ground of irretrievable breakdown, except that in a proceeding under section 1A the court cannot take fault into consideration in determining if the agreement is acceptable. When there is no agreement and the proceeding is under section 1B, however, fault may be considered by the court. Financial statements, of course, must be filed by the parties.<sup>55</sup>

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50. See notes 22-31 *supra* and accompanying text.

51. See notes 47-49 *supra* and accompanying text.

52. MASS. GEN. LAWS ANN. ch. 208, §§ 28, 34 (West Supp. 1978).

53. See notes 22-31 *supra* and accompanying text.

54. MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1978). This statute is discussed at notes 161-77 *infra* and accompanying text.

55. See generally Freedman, *supra* note 33.

### C. *Desertion*

The statutes on desertion<sup>56</sup> were revised in June, 1974 to reduce the number of years of absence necessary to establish this cause for divorce to one year prior to the filing of the complaint.<sup>57</sup> By virtue of this change, desertion is one of the easiest grounds for divorce to prove in Massachusetts. Since recrimination has been abolished as a defense,<sup>58</sup> one need only prove that (1) the defendant ceased cohabitation, (2) the cessation of cohabitation has lasted for at least one year prior to the filing of the complaint, (3) the defendant intended to cease cohabitation, and (4) the defendant ceased cohabitation without the consent of the plaintiff.<sup>59</sup>

One of the most common problems involving desertion is the husband's relocation of the domicile and the wife's refusal to follow. Presently, a wife has a duty to follow her husband's domicile if the change is reasonable. Her failure to do so may give rise to an action for desertion.<sup>60</sup> What is a reasonable change will be decided in the last analysis by the court. Whether the foregoing rubric will withstand a constitutional challenge is problematical.<sup>61</sup>

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56. MASS. GEN. LAWS ANN. ch. 208, § 1, 22 (West Supp. 1978).

57. Prior to the amendment, an absence of two years was required to establish desertion as a ground for divorce. See MASS. GEN. LAWS ANN. ch. 208, § 1 (West 1974).

58. Recrimination is a charge made by an accused person against the accuser. It has been defined as a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce. *Morrison v. Morrison*, 38 Idaho 45, 221 P. 156 (1923). In 1973, MASS. GEN. LAWS ANN. ch. 208, § 1 was amended to state that in an action for divorce "no defense upon recrimination shall be entertained by the court."

59. See generally 2A J. LOMBARD, MASSACHUSETTS PRACTICE §§ 1661-1683 (1967). To be a cause for divorce, it is essential that the desertion be without consent or justification and with the intent of not returning. A divorce cannot be granted on the ground of desertion if the plaintiff-spouse consented to the separation. *Cannistraro v. Cannistraro*, 352 Mass. 65, 223 N.E.2d 692 (1967). *Accord*, *Pempek v. Pempek*, 141 Conn. 602, 109 A.2d 238 (1954).

60. *Franklin v. Franklin*, 190 Mass. 349, 77 N.E. 48 (1906), held that the refusal of the wife to follow her husband to America without other excuse than disinclination to leave her native land was desertion entitling husband to a divorce. A husband, as the head of the family and legally responsible for its support, has the right to choose and establish a domicile for himself and his wife and children. The refusal of the wife to stay with him in that domicile without reason is desertion. *Martin v. Martin*, 62 Ill. App. 2d 105, 210 N.E.2d 590 (1965) (wife has duty to follow husband when he changes residence and failure to do so constitutes desertion as a ground for divorce); *City of Somerville v. Commonwealth*, 313 Mass. 482, 48 N.E.2d 8 (1943) (refusal of wife without reasonable cause to follow husband when husband acquires a new home constitutes desertion entitling husband to a divorce).

61. A husband is not guilty of desertion because he fails to follow the wife to a new domicile selected by her. Unlike the husband, the wife has generally not been

The termination of sexual relations by one spouse may, under some circumstances, amount to desertion.<sup>62</sup> More likely, however, such conduct would be the basis for an action on grounds of cruel and abusive treatment.<sup>63</sup>

If it can be shown that after the defendant's desertion, and during the course of the year prior to the filing of the complaint, he or she attempted a reconciliation and the plaintiff resisted such an attempt and consented to the defendant's living apart, no judgment of divorce for desertion will enter.<sup>64</sup>

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viewed as the head of the family, and, thus, not legally responsible for its support. Therefore, the wife apparently does not have a similar right to choose and establish a domicile for herself and the family. *See* 2A J. LOMBARD, MASSACHUSETTS PRACTICE § 1670 (1967).

62. An early Massachusetts case held that the mere refusal by a wife of sexual intercourse with her husband for five consecutive years, although unjustified by considerations of health or physical disability, was not sufficient alone to support a divorce on the ground of desertion. *Southwick v. Southwick*, 97 Mass. 327 (1867). In a more recent decision, *Mancuso v. Mancuso*, 1 Mass. App. Ct. 867, 305 N.E.2d 868 (1974), it was held that where the wife caused the husband to leave home by excluding him from frequent gatherings with her family and terminating all sexual relations, and the evidence showed that the wife's conduct was premeditated and deliberate, the husband was entitled to a divorce on grounds of desertion. In the *Mancuso* decision the denial of marital intercourse was only one aspect of the marital misconduct which constituted desertion as a ground for divorce.

Connecticut adopts a similar view and generally holds that refusal of marital intercourse is not in itself desertion. Desertion occurs only when the refusal is coupled with substantial abandonment of other marital duties. A husband whose wife refused to have sexual intercourse during the six years that they lived together was not entitled to divorce on the ground of desertion. *McCurry v. McCurry*, 126 Conn. 175, 10 A.2d 365 (1939). Other jurisdictions that adopt a similar rule include Illinois, *Belt v. Belt*, 30 Ill. App. 2d 263, 174 N.E.2d 212 (1961) (denial of sexual intercourse by one's spouse is not a cause for divorce and does not justify abandonment of the spouse), and Pennsylvania, *Mosher v. Mosher*, 149 Pa. Super. Ct. 422, 27 A.2d 448 (1942) (wife's refusal of sexual intercourse with husband is not grounds for divorce).

In contrast, under substantially similar statutes, many appellate courts in the United States have held that the refusal by one spouse to have sexual intercourse, without cause or excuse, if persisted in for the statutory period, does constitute desertion as a ground for divorce. *See, e.g., Hinkle v. Hinkle*, 209 Ga. 554, 74 S.E.2d 657 (1953). A New Jersey case has held that the refusal to have sexual intercourse without the use of contraceptives, persisted in for the statutory period, constitutes desertion. *Kirk v. Kirk*, 39 N.J. Super. 341, 120 A.2d 854 (Super. Ct. App. Div. 1956) (by implication).

63. *See* notes 34-44 *supra* and accompanying text. *But cf. Hinkle v. Hinkle*, 209 Ga. 554, 74 S.E.2d 657 (1953), which held that denial of "conjugal rights" will not authorize a divorce on grounds of cruel and abusive treatment but may be equivalent to desertion.

64. *Miranda v. Miranda*, 350 Mass. 478, 215 N.E.2d 669 (1966) (husband could not maintain a divorce action for desertion where it appeared that after wife left him he consented to her living apart and resisted attempts at reconciliation made by her in good faith).

#### D. *Adultery*

Adultery is the voluntary sexual intercourse of a married person with a person other than the husband or wife.<sup>65</sup> An allegation of adultery differs from other grounds for divorce by virtue of special pleading problems. If adultery is alleged as a ground for divorce in any pleading, the pleader must state whether the third party, called the co-defendant, who allegedly committed adultery with the defendant-spouse, is or is not known.<sup>66</sup> The person is not named in the complaint.

If the identity of the co-defendant is known, counsel for the plaintiff, after filing a summons and complaint, must file a motion amending the complaint by inserting the name of the co-defendant and his or her residence. Counsel must also file an affidavit or affidavits supporting the allegation of adultery. In lieu of an affidavit, testimony may be taken in an ex parte motion session to support the allegation. The motion with the affidavit is sealed by the register and does not become part of the public record. If the identity of the co-defendant is not known to the plaintiff, the divorce complaint is heard in the ordinary course without regard to the foregoing steps. However, if the co-defendant becomes known after the filing of the pleadings and before the hearing, the foregoing steps must be taken.<sup>67</sup>

Where the co-defendant is known, notice of the complaint alleging adultery must be sent by registered or certified mail to such person at his or her last known address. The notice must be sent at least fourteen days before the return day of process on the complaint. Proof of service is established by affidavit containing a particular statement of such service, accompanied, if practicable, by return receipt of the mailing. The co-defendant has twenty days within which to appear or answer from the date of mailing the notice.<sup>68</sup>

Inasmuch as adultery is essentially a clandestine affair, proof of the same may be accomplished by circumstantial evidence. The

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65. MASS. GEN. LAWS ANN. ch. 272, § 14 (West 1970) states: "A married man who has sexual intercourse with a woman not his wife, an unmarried man who has sexual intercourse with a married woman or a married woman who has sexual intercourse with a man not her husband shall be guilty of adultery . . ." Adultery is listed as one of the permissible grounds for divorce in Massachusetts. See note 32 *supra*.

66. MASS. SUPP. R. PROB. CT. 404.

67. *Id.*

68. MASS. SUPP. R. PROB. CT. 405.

two essential elements necessary to establish an action for divorce on grounds of adultery are opportunity and inclination, both existing simultaneously.<sup>69</sup> The sufficiency of proof, the credibility of the witnesses, and the weight attributable to the testimony is, of course, a matter for the trier-of-fact.<sup>70</sup>

Often, in a divorce action on the ground of adultery, the defendant or co-defendant refuses to answer questions incriminating them on the basis of their fifth amendment privilege.<sup>71</sup> This refusal is allowable as long as the privilege is claimed by the witness and not by the attorney.

Adultery is still a crime in Massachusetts.<sup>72</sup> The statute exempts from the definition of adultery, however, an unmarried woman who has sexual intercourse with a married man.<sup>73</sup> The statute exempts only women in this situation. The validity of this classification has recently been challenged on constitutional grounds.<sup>74</sup> Determination of the question must await the final out-

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69. *DiRosa v. DiRosa*, 350 Mass. 765, 213 N.E.2d 923 (1966) (fact that parties had ample opportunity to commit adultery is not, of itself, grounds for divorce without some evidence indicating an adulterous disposition).

70. In *Padykula v. Padykula*, 347 Mass. 768, 197 N.E.2d 881 (1964), it was held that the failure of the judge to draw an inference, which with other testimony would have supported a finding of adultery, from testimony that the defendant and correspondent had been observed in a compromising position in an automobile late in the evening parked in a dark area of a parking lot, was not plainly wrong.

71. U.S. CONST. amend. V. *See also* MASS. GEN. LAWS ANN. ch. 233, § 20 (West Supp. 1978).

72. MASS. GEN. LAWS ANN. ch. 272, § 14 (West 1970). One found guilty of adultery may be imprisoned for up to three years or fined up to \$500.

73. *See* note 65 *supra*.

74. *Commonwealth v. Fontanielles*, No. 78-768 (Super. Ct. Mass. Aug. 8, 1978), involved a defendant's motion to dismiss an indictment for adultery on the basis that MASS. GEN. LAWS ch. 272, § 14 is unconstitutional both on its face and as applied. The indictment for adultery stemmed from a single act of voluntary and consensual intercourse between the defendant, a married 30-year-old male police officer, and a 16-year-old unmarried female. The motion to dismiss alleged that the statute violated the defendant's constitutional rights of due process and equal protection of the laws, as well as his right to privacy. It further alleged that the statute violated the new equal rights amendment to the Massachusetts Constitution.

Hampden County Superior Court Judge John Greaney heard and ruled on the motion. The due process claim was summarily dismissed on the grounds that the issue of due process was not clearly raised in the motion, the briefs, or the arguments, and thus, was not properly before the court. The statute also withstood the generalized equal protection attack. The court determined that the legislature had a sufficient state interest to justify creating this classification: the preservation of the marital relationship. The court further noted that the legislature may, in its discretion, address only a portion of a problem and ignore other areas. Similarly, the statute was held not defective as an unreasonable intrusion on personal privacy as that

come of the appeal.<sup>75</sup>

### E. *Gross and Confirmed Habits of Intoxication*

Voluntary excessive intoxication, by use of liquor or drugs, is the basis for divorce on grounds of gross and confirmed habits of intoxication.<sup>76</sup> The definition needs little interpretation. The difficulty, as usual, is in the application. To constitute this ground for divorce, the abuse must be knowing and intentional. To the extent, for example, that the defendant alleges that his or her intoxication is a sickness and, thus, an involuntary habit, one might question whether a divorce on such ground may be granted.

Extended habits of intoxication may also be the basis of a divorce action on the grounds of cruel and abusive treatment. How-

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concept is defined in *Commonwealth v. Balthazar*, 366 Mass. 298, 318 N.E.2d 478 (1974).

The statute, however, was held to be unconstitutional under the Massachusetts equal rights amendment because it subjects a male and a female involved in the illicit act of intercourse to widely disparate penalties for identical conduct.

In 1976, Massachusetts adopted the equal rights amendment and amended its constitution to declare that equality under the law shall not be denied or abridged because of *sex*, as well as race, color, creed, or national origin. This brought sex classifications within the extensive protection of the fourteenth amendment and subjects them to strict judicial scrutiny when challenged. This is a fundamental change in the type of analysis involved. Now "classifications based upon sex will be permissible only if they further a demonstratively compelling state interest and limit their impact as narrowly as possible consistent with their legislative purpose." *Commonwealth v. Fontanielles*, No. 78-768, slip op. at 11 (Super. Ct. Mass. Aug. 8, 1978).

Judge Greaney's well-reasoned opinion demonstrates how the adultery statute fails to survive this strict test. The statute is clearly sexually discriminatory on its face. It exempts the unmarried woman who has sexual intercourse with a married man, while a similarly situated male is not exempt. The court noted that the state has shown no demonstratively compelling interest to justify this discrimination. Likewise, the statute was not drawn narrowly enough to survive constitutional attack. The fact that the unmarried female in this situation could be prosecuted under a related statute for fornication does not remedy the defect since a serious sentencing disparity still exists. While a conviction for fornication is a misdemeanor entailing at most three months in a house of corrections, conviction for adultery is a felony carrying a maximum penalty of three years in a state prison. The statute was held to be constitutionally defective, and the motion to dismiss was allowed insofar as it raises issues under the equal rights amendment. The indictment was dismissed.

75. The Commonwealth of Massachusetts represented that it would seek appellate review of these findings under MASS. GEN. LAWS ch. 278.

76. MASS. GEN. LAWS ANN. ch. 208, § 1 (West Supp. 1978). See *Jasper v. Jasper*, 333 Mass. 223, 129 N.E.2d 887 (1955), where it was held that the mere use of drugs is not a ground for divorce unless an abuse of them is shown. The fact that the wife took drugs on the advice of her physician, and might have to take drugs during the remainder of her life, did not require a grant of divorce under the statute authorizing divorce for gross and confirmed habits of intoxication caused by the use of drugs.

ever, gross and confirmed habits of intoxication alone do not support the allegation of cruel and abusive treatment.<sup>77</sup> One must prove that the defendant intoxicated himself or herself in an effort to knowingly cause the plaintiff mental anguish in order to give rise to cruel and abusive treatment.<sup>78</sup>

For a divorce action on the ground of gross and confirmed habits of intoxication it is necessary that the alleged habits of the defendant exist up to the time of the filing of the complaint.<sup>79</sup>

#### F. *Imprisonment*

A divorce may be decreed in the event that one spouse has been sentenced to confinement for five years or more in a state or federal penal institution.<sup>80</sup> As soon as the spouse has been sentenced, the right of the other spouse to apply for divorce is complete. The spouse bringing the action for divorce does not have to wait until the one sentenced has been released or has served his or her sentence.<sup>81</sup> After the divorce has been granted on this ground, it makes no difference that the defendant has been pardoned or the sentence reduced.

#### G. *Impotency*

Impotency as a ground for divorce<sup>82</sup> is the inability to engage in the act of sexual intercourse.<sup>83</sup> Impotency is not the inability to have children.<sup>84</sup> Whether impotency must exist at the time of the marriage in order to constitute a ground for divorce is unclear.<sup>85</sup> It

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77. See notes 34-44 *supra* and accompanying text.

78. *Callan v. Callan*, 280 Mass. 37, 181 N.E. 736 (1932) (evidence of intoxication without malevolent purpose toward wife does not prove cruel and abusive treatment).

79. *Hammond v. Hammond*, 240 Mass. 182, 132 N.E. 724 (1921).

80. MASS. GEN. LAWS ANN. ch. 208, § 2 (West Supp. 1978).

81. See 2A J. LOMBARD, MASSACHUSETTS PRACTICE § 1781 (1967).

82. MASS. GEN. LAWS ANN. ch. 208, § 1 (West Supp. 1978).

83. *Long v. Long*, 191 Ga. 606, 13 S.E.2d 349 (1941) (impotency is the permanent inability on the part of one spouse to perform a complete act of sexual intercourse). See 2A J. LOMBARD, MASSACHUSETTS PRACTICE §§ 1631-1643 (1967).

84. *Reed v. Reed*, 26 Tenn. App. 690, 177 S.W.2d 26 (1943) (impotency as grounds for divorce means the want of *potentia copulandi* or the incapacity to consummate the marriage, and not merely incapacity for procreation). *Accord*, *Gibbs v. Gibbs*, 156 Fla. 404, 23 So. 2d 382 (1945); *Donati v. Church*, 13 N.J. Super. 454, 80 A.2d 633 (Super. Ct. App. Div. 1951).

85. MASS. GEN. LAWS ANN. ch. 208, § 1 (West Supp. 1978) states that impotency is a ground for divorce. It is silent as to the date on which the condition must be in existence. In applying the statute, the appellate courts have generally held that the impotency must exist at the time of the marriage in order to constitute a ground



seems incongruous to deny a divorce on the grounds of impotency when the uncontroverted fact is that the defendant became impotent at some time after the marriage and that, as a result thereof, sexual intercourse is impossible. To avoid this conflict it may be possible to bring the divorce on grounds of cruel and abusive treatment. The complainant would have to allege that the defendant refused to engage in sexual intercourse with the plaintiff-spouse, that the refusal caused the plaintiff anxiety, and that the refusal was done knowingly and with the intention of causing anxiety.<sup>86</sup> Such a procedure, however, does not really answer the question of why the occurrence of impotency after marriage warrants different treatment than impotency in existence at the time of marriage.

It is a matter of basic equity that a person who is knowingly impotent at the time of the marriage cannot later bring an action for divorce alleging the same as the grounds.<sup>87</sup> Laches may also be raised as a defense.

#### H. *Nonsupport*

The ground of nonsupport is extremely difficult to prove, seldom used, and as a practical matter outmoded. In order to establish this ground for divorce<sup>88</sup> one must prove that (1) the plaintiff is the wife of the defendant (the husband cannot be the plaintiff), (2) the husband has sufficient ability to provide suitable support for the plaintiff, and (3) the husband grossly or wantonly and cruelly refused to provide such suitable maintenance. Mere neglect or refusal to provide suitable support is insufficient.<sup>89</sup>

Historically, valid marriage imposes upon a husband the duty of support.<sup>90</sup> This apparent duty may exist even though the wife is living apart from her husband with his express or implied con-

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for divorce and must be unknown to the innocent party. *M. v. M.*, 324 Mass. 773, 172 N.E.2d 240 (1961) (wife's impotency unknown to husband at time of marriage is ground for divorce); *Reed v. Reed*, 26 Tenn. App. 690, 177 S.W.2d 26 (1943) (no relief will be granted where impotency arises after marriage).

86. See notes 34-43 *supra* and accompanying text. It may be somewhat difficult to establish that the spouse *knowingly* and *intentionally* became impotent.

87. It is a principle of justice and reason that no one can take advantage of their own wrong.

88. MASS. GEN. LAWS ANN. ch. 208, § 1 (West Supp. 1978).

89. To entitle the wife to a divorce, the refusal or neglect of the husband to provide suitable support and maintenance for the wife must be gross or wanton and cruel. *Young v. Young*, 333 Mass. 767, 129 N.E.2d 894 (1955).

90. *French v. McAnarney*, 290 Mass. 544, 195 N.E. 714 (1935).

sent.<sup>91</sup> What is suitable support is a matter to be determined by the judge according to the facts of each case. Similarly, whether the defendant is of sufficient ability to provide suitable support is likewise a matter for the judge to decide after consideration of the circumstances of the case.<sup>92</sup> The husband's historic duty to support may not withstand a modern constitutional challenge.

#### IV. PRESENTATION OF AN UNCONTESTED DIVORCE

The presentation of an uncontested divorce case is one of the easiest, and at the same time, one of the most abused proceedings in the courts of Massachusetts. The reason for its abuse is its obvious simplicity and the lack of an adversary. To avoid difficulties, the attorney should simply follow the declarative statements on his or her copy of the divorce complaint and turn the declarative statements into questions.<sup>93</sup>

The attorney for the plaintiff has a responsibility to inform the

91. *Id.*

92. See generally 2A J. LOMBARD, MASSACHUSETTS PRACTICE §§ 1761-1765 (1967).

93. The following may serve as a guideline:

1. "Tell the court your name and current address." (If the address is different from the address on the complaint, ask if the witness was living at the address shown on the complaint at the time of filing the complaint.)
2. "What is the defendant's name and current address?" (If the address is different from that shown on the complaint, see number 1 above.)
3. "When and where were you married?"
4. "Did you always live in \_\_\_\_\_ County as husband and wife after that?" or "Where did you live in Massachusetts after that?"
5. "Where did you last live as husband and wife?"
6. "When did you separate?"
7. "Tell the court what happened on the day you separated."
8. "What led up to that?"
9. (optional) "Had this ever happened before?"
10. (optional) "What was the basic problem in the marriage?"
11. "How many children were born of this marriage?"
12. "Tell the court the names and dates of birth of your children."
13. "Are they all now residing with you?" ("Are you seeking custody of the children?") or "With whom are the children presently residing?"
14. "How are you presently supported?"
15. "What are the health insurance provisions?"
16. "What are the assets of the marriage?" (stocks, bonds, bank accounts, etc.)
17. "Does your husband/wife work? If so, how much does he/she earn?"
18. "What do you suggest for visitation rights for your spouse?"
19. "Have you brought any other action in any other court concerning this marriage?"
20. "Do you wish to resume your maiden/former name?"

court of the financial affairs of the defendant after a reasonable effort on the attorney's part to ascertain those affairs.<sup>94</sup> Frequently, the plaintiff's lawyer may ask the plaintiff on the witness stand how much the defendant has been paying in alimony or support since the date of the separation, or how much the plaintiff is requesting the court to order the defendant to pay. Plaintiff's lawyer has an obligation to provide the court with accurate, up to date information about the defendant's financial status. A careful lawyer will issue a subpoena to the defendant requiring his or her presence on the day of the hearing for purposes of ascertaining his or her ability to pay. If the defendant fails to appear, the judge is authorized to issue a *capias*.<sup>95</sup>

In the presentation of an uncontested divorce case, the questions asked must clearly establish the following: (1) The jurisdiction of the court, (2) the venue, (3) the ground for divorce, and (4) the collateral issues of custody, alimony and support, and visitation rights.<sup>96</sup> One question that should be asked in all contested matters is: "How do you feel about visitation rights?" Many times the witness will answer the question in such a way as to inform the court that he or she has no objection to the other spouse's reasonable rights of visitation. On the other hand, the plaintiff might answer that he or she has serious objection to visitation rights of the defendant for certain reasons. Such an important matter should not be left to conjecture of the probate court.

In most counties throughout Massachusetts, a corroborating witness is not necessary in an uncontested divorce case. The plaintiff is the only witness necessary at the trial of the action. In those cases where the ground for divorce is irretrievable breakdown, both parties should appear before the court at the time of the hearing.<sup>97</sup> If the plaintiff's lawyer has no information concerning the defendant's financial status, he should serve the defendant with a subpoena. Thereafter, if the defendant does not appear, upon request, the court can issue a *capias*.<sup>98</sup>

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94. This is in accordance with MASS. SUPP. R. PROB. CT. 401. See note 25 *supra*.

95. The "*capias*" is a judicial writ by which the judge may order the sheriff to apprehend a particular individual and bring him before the court on a certain day to answer to the plaintiff in the action. See *Oliver v. Kallock*, 133 Me. 403, 178 A. 843 (1935).

96. See the suggested guideline for questioning at note 93 *supra*.

97. See text accompanying notes 45-50 *supra*.

98. See note 95 *supra*.

## V. CONTESTED ACTIONS

A. *In General*

In preparation for a contested divorce action the plaintiff's attorney must ascertain the extent and value of the assets owned by the defendant, their location, and whether or not they are encumbered. This information is essential in determining the validity of requests for alimony and support, or the assignment of various items of property pursuant to the statute governing equitable division of the marital property.<sup>99</sup> Depositions can effectively provide this information.<sup>100</sup> The court may, upon motion, order that the testimony at a deposition be recorded by other than stenographic means.<sup>101</sup> This allows depositions to be taken by a tape recorder with a simple cassette cartridge at little or no expense to the parties.

Every effort should be made by the parties' counsel to agree beforehand to the nature, extent, and fair market value of the defendant's assets. More time and expense is spent at the time of trial eliciting testimony from expert witnesses regarding valuation of assets than should be necessary. The fair market value of closely held stock, the value of unmarketed securities, the value of minority interests in a family corporation, and other similar valuations may frequently be adjusted and agreed to by counsel prior to trial.

Often, the merits of the divorce action are not contested. What is contested is the alimony and support payments, the custody rights, and the allocation of the marital property.<sup>102</sup> If that is the case, counsel may inform the trial court that the divorce action will go in as an uncontested matter, and that once a prima facie case has been testified to, the matter will take on the complexion of a contested action.

Most probate judges in Massachusetts will encourage pre-trial conferences in order to limit and narrow the issues.<sup>103</sup> Other judges not only encourage such a conference, but will ask counsel, prior to the commencement of the litigation, whether or not they will agree to submit their case to the judge in his lobby. This pro-

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99. MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1978).

100. For the rules on depositions and discovery, *see generally* MASS. R. DOM. REL. P. 26-37.

101. MASS. R. DOM. REL. P. 30(b)(4).

102. *See* MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1978).

103. The court has the discretionary power to direct these conferences. MASS. R. DOM. REL. P. 16.

cedure allows the judge to hear all the facts without regard to the rules of evidence, and with a view towards a fair and speedy disposition of the proceeding. Of course, there are times when a client insists, as a matter of right, to his or her day in court. Under those circumstances, an attorney has no other choice than to try the matter and engage in a full-scale hearing. If that is the case, the attorney should take care to inform the client of the possible length of time necessary to try the case, as well as the attendant attorney's fees and other ancillary costs that the client will incur. Many times, in the face of this expense, a client will submit to arbitration before a judge in the judge's lobby. Since the same judge is going to hear similar evidence in a courtroom setting under circumstances which will be much more expensive, traumatic, and time consuming, arbitration is a convenient alternative to a full trial. The outcome of arbitration, however, possibly may be unappealable.

## B. *Defenses*

Recrimination as a defense in divorce actions has been abolished.<sup>104</sup> Possible defenses to an action for divorce include: (1) Condonation, (2) connivance, (3) collusion, (4) mental illness, and (5) no valid marriage.<sup>105</sup>

### 1. *Condonation*

Condonation is the conditional pardoning of a known marital offense and restores equality before the law.<sup>106</sup> It is an affirmative defense and, therefore, must be pleaded and proven. Condonation is not a statutory defense in Massachusetts. It has been developed by case law over the years. It is essentially an act of forgiveness and has been recognized as a necessary element in social relationships for centuries. The forgiveness must be voluntary, however,

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104. MASS. GEN. LAWS ANN. ch. 208, § 1 (West Supp. 1978). See note 58 *supra*. See generally Inker, McGrath, & Katz, *Abolition of Recrimination as a Defense in Divorce Cases*, 18 B.B.J., May 1974, at 7.

105. In addition to these, there are several technical defenses which may be raised. These are enumerated in MASS. R. DOM. REL. P. 12(b).

106. Condonation is the conditional remission or forgiveness of one spouse, by means of continuance or resumption of marital cohabitation, of a known matrimonial offense committed by the other that would constitute a cause of divorce. The condition is that the offense shall not be repeated. *Thum v. Thum*, 105 Colo. 352, 98 P.2d 279 (1940). "If the innocent party is willing to forgive, even conditionally, the law will give full effect to it." 2A J. LOMBARD, MASSACHUSETTS PRACTICE § 1830, at 243 (1967).

and cannot be made out of fear or necessity.<sup>107</sup> Neither a single act of intercourse nor of cohabitation, standing alone, will establish condonation.<sup>108</sup> If condonation does exist, and is pleaded and proven, it constitutes a complete defense for past misbehavior.<sup>109</sup>

Condonation frequently creates a problem when establishing a prima facie case for an uncontested divorce action. For example, the plaintiff may testify that acts which allegedly constitute cruel and abusive treatment happened several months before the final separation date. Thereafter, the parties lived together as husband and wife for a long period of time. The question of condonation of the alleged misconduct by continued cohabitation is thereby inadvertently placed in issue and must be answered.<sup>110</sup>

## 2. *Connivance and Collusion*

Both connivance and collusion are affirmative defenses. Like condonation, they are not set out by statute in Massachusetts but have been developed by case law. Connivance and collusion are similar in that each involves the consent of one or both of the spouses to the acts of marital misconduct alleged as the ground for divorce. Connivance is the corrupt intent or plan of one spouse to cause, directly or indirectly, the other spouse to commit an act which is a cause for divorce.<sup>111</sup> Connivance, if proved, is a bar to an action for divorce; the alleged ground being immaterial. The basis of this defense is that a spouse who connives and encourages the other spouse to commit a marital offense is not an innocent

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107. *Belville v. Belville*, 114 Vt. 404, 45 A.2d 571 (1946) (no condonation where fear of husband and love for children caused wife to remain with husband and have sexual intercourse).

108. *Drew v. Drew*, 250 Mass. 41, 144 N.E. 763 (1924) (single act of intercourse not necessarily condonation of previously existing ground for divorce). Condonation is essentially a question of fact. It is a state of mind to be determined upon all the evidence, including rational inferences. *Id.*; *Quigley v. Quigley*, 310 Mass. 415, 38 N.E.2d 624 (1941).

109. *Johnson v. Johnson*, 210 Ga. 795, 82 S.E.2d 831 (1954); *Denisi v. Denisi*, 334 Mass. 392, 135 N.E.2d 668 (1956); *Shaw v. Shaw*, 122 Mont. 593, 208 P.2d 514 (1949).

110. *See Hayden v. Hayden*, 326 Mass. 587, 96 N.E.2d 136 (1950). *Cf. Cabral v. Cabral*, 323 Mass. 441, 82 N.E.2d 616 (1948) (resumption of marital relations was a condonation of cruel and abusive treatment on condition that the defendant would thereafter faithfully observe his marital relations; but it did not deprive the court of jurisdiction to grant plaintiff a divorce on defendant's subsequent breach of the implied condition).

111. *See* 2A J. LOMBARD, MASSACHUSETTS PRACTICE § 1831 (1967 & Supp. 1976) and the cases cited therein.

party and should not be entitled to a divorce on those grounds.<sup>112</sup> This defense is established by evidence showing either active or passive consent on the part of the plaintiff-spouse to the commission of the marital misconduct.

Collusion is an agreement, actual or implied, between both spouses that one will commit an act which will give rise to a divorce on behalf of the other.<sup>113</sup> Collusion is really a conspiracy between the spouses to obtain a divorce by fraud. If collusion is established, a divorce will not be granted even though the complainant may actually have a valid ground for divorce.<sup>114</sup> The collusive agreement is considered to be a fraud upon the court and is void as against public policy.

### 3. *Mental Illness*

The Supreme Judicial Court of Massachusetts has stated: "By the consensus of American authority a divorce cannot be granted on the ground of cruel and abusive treatment because of acts done by an insane person."<sup>115</sup> Neither can the acts of a mentally ill person be cause for a divorce action of themselves or on any other ground.<sup>116</sup> However, where insanity occurs during the pendency of a divorce action, a court may appoint a guardian ad litem for the incompetent spouse.<sup>117</sup>

### 4. *No Valid Marriage*

Divorce may only be decreed if there has been a valid marriage.<sup>118</sup> It is significant to note, however, that impotency does not

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112. Where the marital wrong complained of has actually been connived and consented to, no injury has been suffered and the moving party is not entitled to judicial relief on the basis of his or her improper conduct. *Id.*

113. *Id.* § 1829.

114. *Thompson v. Thompson*, 70 Mich. 62, 37 N.W. 710 (1888).

115. *Rice v. Rice*, 332 Mass. 489, 491, 125 N.E.2d 787, 788 (1955). *Accord*, *Hano v. Hano*, 1977 Mass. App. Ct. Adv. Sh. 1085, 367 N.E.2d 1190. *See* note 38 *supra* for an extended discussion.

116. Mental illness is not a ground for divorce in Massachusetts. However, mental illness existing at the time of marriage is a ground for annulment. *Davis v. Seller*, 329 Mass. 385, 108 N.E.2d 656 (1952). *See* 2A J. LOMBARD, MASSACHUSETTS PRACTICE § 1802 (1967) (listing states where insanity or mental illness is a ground for divorce).

117. MASS. GEN. LAWS ANN. ch. 208, § 15 (West Supp. 1978) provides as follows: "If during the pendency of an action for divorce the defendant is insane, the court shall appoint a suitable guardian to appear and answer in like manner as a guardian for an infant defendant in any civil action may be appointed."

118. *Mangue v. Mangue*, 1 Mass. 240 (1804) (divorce will not be decreed unless a legal marriage is proved).

render a marriage void, but only makes it voidable. As a result, the defense of no valid marriage cannot be sustained if it is based solely on impotency.<sup>119</sup>

### C. *Use of Stenographer*

If the trial is contested, a stenographer should always be requested. A party has an absolute right to a stenographer at no cost. A request must be made in writing to the register of probate at least forty-eight hours before trial.<sup>120</sup> In the event that the trial is cancelled, however, care must be taken to notify the register of probate twenty-four hours in advance. Otherwise costs may be assessed.

### D. *Probation Officers or Family Service Officers*

Family law practitioners should always remember to subpoena a probation officer or family service officer or other guardian ad litem who has completed an investigation involving any issue at the trial.<sup>121</sup> In those cases which involve custody and visitation rights, the testimony of the investigator is essential.<sup>122</sup> In the event that the report is contrary to one's position, intensive cross-examination is in order.<sup>123</sup>

### E. *Counsel Fees*

Counsel may file an application for fees to be paid by the other spouse in order to enable his or her client to defend or prosecute a complaint. Such application indicates that the party intends in good faith to defend or prosecute the complaint, and must contain a statement to this effect.<sup>124</sup>

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119. See notes 82-87 *supra* and accompanying text.

120. MASS. SUPP. R. PROB. CT. 202.

121. MASS. GEN. LAWS ANN. ch. 215, § 56A (West Supp. 1978) empowers a probate court judge to appoint a guardian ad litem to investigate the facts in any proceeding involving questions as to the care, custody, and maintenance of minor children, or other matters involving domestic relations. The guardian ad litem submits to the court, prior to the final judgment or decree, a written report on the results of the investigation. This written report is open for inspection to all parties and their attorneys. See also note 27 *supra*.

122. *Gilmore v. Gilmore*, 1976 Mass. Adv. Sh. 269, 341 N.E.2d 655.

123. In *Gilmore v. Gilmore*, 1976 Mass. Adv. Sh. 269, 279, 341 N.E.2d 655, 659, the Massachusetts Supreme Judicial Court stated: "In order to determine adequately the reliability and accuracy of a report, we believe that, as a matter of sound judicial policy, the parties should have the opportunity to rebut the report, including the right to cross-examine the investigator." (Footnote omitted).

124. MASS. SUPP. R. PROB. CT. 406. This application for allowance does not



The amount of attorney's fees, of course, varies from case to case. One guideline, however, is as follows:

In determining what is a fair and reasonable charge to be made by an attorney for his services many considerations are pertinent, including the ability and reputation of the attorney, the demand for his services by others, the amount and importance of the matter involved, the time spent, the prices usually charged for similar services by other attorneys in the same neighborhood, the amount of money or the value of the property affected by controversy, and the results secured. Neither the time spent nor any other single factor is necessarily decisive of what is to be considered as a fair and reasonable charge for such service.<sup>125</sup>

Effective July 1, 1977, any judge of the superior court, probate court, land court, or housing court may order a party to pay reasonable counsel fees and other costs and expenses incurred in defending any frivolous claim in any civil action, including those in domestic relations cases.<sup>126</sup> If the party against whom the frivolous claim is asserted is not represented by counsel, the court may award that party an amount representing the reasonable costs and expenses of defending the claim. Before awarding these fees and costs, the court must find that all or substantially all of the claims, defenses, setoffs, or counterclaims are insubstantial, frivolous, and not advanced in good faith. The court is obligated to specify in reasonable detail the method by which the amount of the award was computed.

Lawyers and litigants are cautioned not to confuse a frivolous claim with an argument that is novel or unusual.<sup>127</sup> Lawyers are encouraged to promote the latter, while the statute discourages promotion of the former.

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extend to proceedings to affirm or annul a marriage. *Fuss v. Fuss*, 1977 Mass. Adv. Sh. 363, 368 N.E.2d 271.

125. *Cummings v. National Shawmut Bank of Boston*, 284 Mass. 563, 569, 188 N.E. 489, 492 (1934). *See also Paone v. Gerrig*, 362 Mass. 757, 291 N.E.2d 426 (1973).

126. MASS. GEN. LAWS ANN. ch. 231, §§ 6F, 6G (West Supp. 1978).

127. In an action brought under MASS. GEN. LAWS ANN. ch. 231, §§ 6F, 6G (West Supp. 1978) for an assessment of additional interest on the grounds that the claims advanced by the appellant were insubstantial, frivolous, or not advanced in good faith, it was held that the appellee was not entitled to such additional interest in view of the fact that the appeal concerned the construction of a newly enacted statute which presented substantial questions of first impression. *Goodwin Bros. Leasing, Inc. v. Nousis*, 1977 Mass. Adv. Sh. 1663, 366 N.E.2d 38.

### F. *Findings of Fact*

Until recently, the court, in domestic relations matters, was not required to issue a "finding of facts, conclusions of law" unless (1) counsel filed a written motion prior to final argument, (2) a stenographer was present at the trial, and (3) the original transcript was ordered from the stenographer, filed with the court, and satisfactory arrangements for payment of the cost, if any, were made.<sup>128</sup> What was supplied by the judge, thereafter, was "finding of facts, conclusions of law, and judgment," the judgment being stated separately pursuant to Rule 58.<sup>129</sup> Recent cases indicate, however, that the Massachusetts Supreme Judicial Court mandates findings of fact be entered by the judge in all cases involving the statute concerning the award of alimony or the equitable distribution of marital property.<sup>130</sup>

### G. *Statement of Evidence*

When there is no stenographic record or when the transcript is unavailable, both parties may state the evidence in written form to the court on behalf of their respective interests.<sup>131</sup> The judge, thereafter, enters his or her findings and the entire proceedings, as settled and approved, comprise the record on appeal.

### H. *Stay of Proceedings*

The filing of an appeal stays the running of the nisi period in a divorce case,<sup>132</sup> but does not stay the operation of any other part of the judgment. Provisions for custody, visitation, alimony, and support or maintenance are not automatically stayed by the filing of an appeal.<sup>133</sup> In order to stay such orders, a motion must be filed and allowed by the court.

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128. MASS. R. DOM. REL. P. 52(a), 52(c).

129. MASS. R. DOM. REL. P. 58. *See* Moran v. Moran, 1977 Mass. App. Ct. Adv. Sh. 278, 360 N.E.2d 665, where the appellate court overturned a lower court decision in a divorce action which had ordered the wife to convey her interest in the home to the husband. The appellate court found the trial judge's voluntary report of material facts and findings inadequate to support the decree.

130. MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1978). *See* Bianco v. Bianco, 1976 Mass. Adv. Sh. 2702, 358 N.E.2d 243 (record must show beyond doubt that the judge, in making an equitable division of marital property, considered all factors set forth by the statute). *Accord*, King v. King, 1977 Mass. Adv. Sh. 1494, 364 N.E.2d 1218; Rice v. Rice, 1977 Mass. Adv. Sh. 787, 361 N.E.2d 1305.

131. MASS. R. APP. P. 8(c). The statement of evidence or proceedings may be prepared from the best available means, including recollection.

132. MASS. R. DOM. REL. P. 58(c). *See* note 48 *supra*.

133. MASS. R. DOM. REL. P. 62(g).

## I. *Husband and Wife Conversations*

In a contested action, private conversations between a husband and wife are excluded.<sup>134</sup> This exclusion is sometimes referred to as a privileged communication. The statute, however, creates a disqualification of both spouses to testify to private conversations and not merely a privilege which must be appropriately claimed and may be waived.<sup>135</sup> Cases in the district court arising out of the Uniform Reciprocal Enforcement of Support Act, however, are exempted from this statutory prohibition.<sup>136</sup>

To the extent that the conversations between husband and wife are conducted in the presence of a third party, the conversation is not private, and may therefore be testified to by one of the spouses.<sup>137</sup> Care must be taken, however, to lay a proper foundation indicating the presence of a third party prior to offering the testimony. This foundation must indicate that the third party was intelligent enough to understand the conversation and was within hearing distance.<sup>138</sup>

In addition to the "non-private" exception, there are several other qualifications to the foregoing rule. For example, abusive language said by one party to another<sup>139</sup> or exclamation of pain and

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134. MASS. GEN. LAWS ANN. ch. 233, § 20 (West Supp. 1978).

135. *Commonwealth v. Gillis*, 358 Mass. 215, 263 N.E.2d 437 (1970); *Kaye v. Newhall*, 356 Mass. 300, 249 N.E.2d 583 (1969).

136. MASS. GEN. LAWS ANN. ch. 233A, § 20 (West Supp. 1978). "It is quite plain that in creating [this exception] the legislature had in mind the great probability that the exclusionary rule would destroy the entire cause of action between husband and wife." Inker & McGrath, *Husband and Wife Conversations*, 8 B.B.J., May 1964, at 33.

137. A conversation between husband and wife in the waiting room of a train station which could be heard up to four or five feet from where they were standing and by people coming and going was not a "private" conversation within the meaning of the statute, and was thus admissible in a divorce action on grounds of cruel and abusive treatment. *Linnell v. Linnell*, 249 Mass. 51, 143 N.E. 813 (1924).

138. In *Amer Realty Co. v. Spack*, 280 Mass. 96, 181 N.E. 753 (1932), it was held that a conversation between husband and wife in the presence of children was properly excluded from evidence where there was nothing showing the age or intelligence of the children. *Cf. Freedman v. Freedman*, 238 Mass. 150, 130 N.E. 220 (1921), where it was held that in a wife's suit for divorce on the ground of cruel and abusive treatment, the admission of a conversation between spouses in the presence of their nine-year-old child was not necessarily improper. It was for the trial court to determine whether the child was of sufficient intelligence at the time to understand what was said. In the same case it was also held that a conversation between spouses in a public street was properly excluded where it did not appear that any of the passersby or persons in the vicinity paid attention to them or could hear their words. *See generally* Inker & McGrath, *supra* note 136, at 30.

139. *Commonwealth v. Gillis*, 358 Mass. 215, 263 N.E.2d 437 (1970) (state-

suffering, are not generally regarded as "conversation," and thus are not within the prohibition of the statute.<sup>140</sup>

### J. *Hearings Before a Master*

More and more probate judges are referring routine cases to a master when the trial time is estimated to be longer than several days.<sup>141</sup> Most judges prefer to hear contested cases on a day to day basis. Frequently, the second and subsequent days of trial will commence at the afternoon session to enable the judge to hear other scheduled cases of shorter duration in the morning.

The judge's order of reference to the master will direct him to report on particular issues joined by the answer to the complaint. The master may also be directed by the judge to perform any particular act set forth in the order of reference.<sup>142</sup>

Subject to the specifications and limitations stated in the order of reference, the master has the power to regulate all the proceedings during the hearing.<sup>143</sup> Unless otherwise ordered, the master sets the time and place for the first meeting of the parties within twenty days after receipt of the order of reference.<sup>144</sup>

In actions tried in probate court, the court accepts the master's findings of fact unless they are clearly erroneous.<sup>145</sup> Written

ments not reasonably to be regarded as "conversation" are not within the statutory prohibition against disclosure of private husband-wife conversations, as abusive or threatening words do not have any confidential aspect within the purpose of the statutory protection).

140. See Inker & McGrath, *supra* note 136.

141. "The court in which any action is pending may appoint a master therein . . . . [T]he word 'master' includes a referee, an auditor, an examiner, a commissioner, and an assessor . . . ." MASS. R. DOM. REL. P. 53(a). The court may also "appoint a master in all cases where the parties agree that the case may be so tried." MASS. R. DOM. REL. P. 53(b).

142. For example, the master may be ordered to determine the value of real estate and effect a sale thereof pursuant to a motion to proceed in rem.

143. MASS. R. DOM. REL. P. 53(c). The master is authorized to take all measures necessary and proper for the efficient performance of his duties under the order.

144. MASS. R. DOM. REL. P. 53(d)(1). The master is under the duty to proceed with all diligence.

145. MASS. R. CIV. P. 53(e)(2). See *Richmond v. Richmond*, 340 Mass. 367, 164 N.E.2d 155 (1960). That case involved a suit by a divorced husband for an accounting by his ex-wife of all wedding presents received by her, a determination of his interest therein, and an equitable distribution thereof. The wife, in turn, filed a counterclaim for a similar accounting by her ex-husband. The case was referred to a master who heard evidence as to the value of the various gifts and concluded that the husband owed the wife a total of \$1,550. The master stated, "In making my finding as to the value . . . I have taken into consideration . . . evidence presented by

objections to the report may be served on the opponent within ten days after being served with notice of the filing of the master's report.<sup>146</sup> Thereafter, the party objecting proceeds by a motion with appropriate notice.<sup>147</sup>

### K. Appeals

An appeal from an interlocutory or final judgment or order of a probate court may be taken by any person aggrieved by such judgment or order.<sup>148</sup> The notice of appeal must be filed at the registry of probate within thirty days of the entry of the judgment and may be taken to the appeals court.<sup>149</sup> Alternatively, a judge of the probate court may reserve and report to the appeals court the evidence in all questions of law in a case over which he or she is presiding.<sup>150</sup> Upon appeal, the appeals court or the supreme judicial court may enter any judgment or order which it determines the probate court should have entered, may remand the case, or may make any order which law and justice require.<sup>151</sup>

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both parties and have drawn on my own experience as a lawyer over the past many years . . . ." *Id.* at 368-69, 164 N.E.2d at 156. The husband objected to the master's report on the ground that the evidence received as to the value was incompetent and inadmissible. In affirming the decree, the Massachusetts Supreme Judicial Court held that it was proper for the master to draw on his own knowledge and experience in making findings of value. The appellant's objection to the evidence received could not be considered where no report of the evidence had been requested below.

146. MASS. R. DOM. REL. P. 53(e)(2).

147. The party must comply with the motion notice requirement prescribed in MASS. R. DOM. REL. P. 6(c), 6(d). *See* note 19 *supra*.

148. MASS. GEN. LAWS ANN. ch. 215, § 9 (West Supp. 1978). An appeal is a judicial proceeding created by statute and is not a constitutional or inherent right. *Carilli v. Hersey*, 303 Mass. 82, 20 N.E.2d 492 (1939). The right of appeal is only available to a party who has some pecuniary interest, or some personal right, which is immediately or remotely affected or concluded by the decree to be appealed. *Petition of Lovejoy*, 352 Mass. 660, 227 N.E.2d 497 (1967) (life beneficiaries of testamentary trust who had joined in agreement on appointment of successor trustee were "persons aggrieved" by decree appointing another person successor trustee and had standing to appeal). *Accord*, *Boudakian v. Town of Westport*, 344 Mass. 61, 181 N.E.2d 336 (1962). *But cf.* *New England Merchants Nat'l Bank v. First Church*, 346 Mass. 780, 195 N.E.2d 535 (1964) (church did not have the right to appeal from decree ruling that *cy pres* doctrine was not applicable where it had no legally recognized interest in legacy which it sought).

149. MASS. GEN. LAWS ANN. ch. 215, § 9 (West Supp. 1978). In any case on appeal, the MASSACHUSETTS RULES OF APPELLATE PROCEDURE, effective July 1, 1974, control. *See, e.g.*, MASS. R. APP. P. 4. *See generally* 3 J. LOMBARD, MASSACHUSETTS PRACTICE §§ 2431-2455 (1967 & Supp. 1976).

150. MASS. GEN. LAWS ANN. ch. 215, § 13 (West Supp. 1978).

151. *Id.* § 28. It should be noted that the findings of a probate judge which are

If a stenographer was requested under Supplemental Rule of Probate Court 202,<sup>152</sup> a record is available on which the appeal may be considered by the appellate court.<sup>153</sup> Timely assembly of that record on appeal has assumed increased significance under Massachusetts Rules of Appellate Procedure. An appellant has forty days after filing the notice of appeal to take whatever action is necessary to enable the clerk of the probate court to assemble the record.<sup>154</sup> This rule differs from the federal rules of appellate procedure. Under the Massachusetts rule, the appellant is required only to initiate timely assembly of the record by taking "any action" necessary to make assembly possible. The corresponding federal rule<sup>155</sup> requires the appellant to cause the record to be assembled and transmitted to the court of appeals within the specified time.<sup>156</sup>

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necessarily implied from an entry of a decree will not be reversed by the Massachusetts Supreme Judicial Court on appeal unless they were plainly wrong. *Stein v. Dornig*, 355 Mass. 797, 247 N.E.2d 397 (1969).

152. See note 120 *supra* and accompanying text.

153. The existence of, and quality of, a record of the proceedings below is often determinative of the outcome on appeal. Lack of a competent record greatly curtails the ability of the appellate court to review the lower court's decision. In *Donoghue v. Donoghue*, 1977 Mass. App. Adv. Sh. 1100, 368 N.E.2d 818, the husband appealed from a judgment of divorce nisi asserting that the trial judge should have dismissed the complaint on the ground that the wife's divorce from her previous husband was invalid. It was held that where the husband did not request findings of fact from the judge and did not include the transcript of the proceedings in the record, the appellate court was compelled to conclude that the entry of the judgment imported a finding by the judge of every fact required to support it. Similar results occurred in *Brine v. Brine*, 1975 Mass. App. Adv. Sh. 484, 324 N.E.2d 910. There an appeal was taken from a decree modifying an earlier decree for support. It was held that where the appellate court had no transcript of evidence, no report of material facts, and no voluntary report by the probate judge, all that was open for review on appeal was whether the decree could have been entered on the pleadings.

Generally, the record on appeal consists of the original papers and exhibits on file, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court. See MASS. R. APP. P. 8(a). In the absence of an official transcript of the proceedings, the appellant may prepare his or her own statement of the evidence under rule 8(c). See note 131 *supra* and accompanying text.

154. MASS. R. APP. P. 9(c).

155. FED. R. APP. P. 11(a).

156. In *Superintendent of Worcester State Hosp. v. Hagberg*, 1978 Mass. Adv. Sh. 187, 372 N.E.2d 242, the court allowed an appeal even though the record was not assembled within the 40-day period. It noted the difference between the state rule and the federal rule on this point and stated, "[O]ur rule does not require the record to be assembled in forty days." *Id.* at 190, 372 N.E.2d at 244. The appellant was deemed to have fulfilled her obligations by taking all actions necessary, or reasonably requested by the clerk, to enable the clerk of the lower court to assemble the

Failure of the appellant to initiate a timely assembly of the record is ground for dismissal of the appeal.<sup>157</sup> The probate court, for cause shown, may extend the time for complying with the requirement if the request is made during the original forty day period or any timely extension thereof.<sup>158</sup> Expiration of the forty day period without a request for an extension, and without appellant having taken all steps necessary for assembly of the record, leaves the court without power to permit the appeal to proceed and without power to grant an extension of time for assembly of the record.<sup>159</sup> However, the court is not required at that point to dismiss the appeal. Under the appropriate circumstances the appellant may be allowed to petition the Massachusetts Appeals Court for an extension of time to assemble the record. The probate court exercises its discretion on whether or not to dismiss the appeal in light of the particular circumstances surrounding the delay in the assembly of the record.<sup>160</sup>

## VI. STATUTE AFFECTING ALIMONY AND PROPERTY TRANSFER

In 1974, Massachusetts joined the growing number of jurisdictions<sup>161</sup> that provide for apportioning property after a divorce using principles of economic contribution in addition to traditional no-

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record. *Accord*, Callahan & Sons, Inc. v. Outdoor Advertising Bd., 1978 Mass. Adv. Sh. 2239.

157. MASS. R. APP. P. 10(c).

158. MASS. R. APP. P. 9(e).

159. *Vyskocil v. Vyskocil*, 1978 Mass. Adv. Sh. 2242.

160. In *Vyskocil v. Vyskocil*, 1978 Mass. Adv. Sh. 2242, the Massachusetts Supreme Judicial Court stated that even if the 40-day period has expired and the appellant has failed to take all steps necessary to allow assembly of the record, the judge still retains discretion on whether or not to dismiss the appeal. The court termed this failure a "serious misstep," the usual remedy for which would be dismissal. However, the dismissal is not automatic. "[T]he court may deny the motion to dismiss in a case that presents a meritorious issue on appeal when the court finds that there has been excusable neglect." *Id.* at 2246. Under such circumstances, the court stated that the proper course was for the plaintiff to press for an extension of time in the appeals court. Thereafter, "[t]he motion to dismiss . . . could appropriately be pressed if and when an extension had been denied in the Appeals Court, or when it became apparent that the appellant was not actively seeking such relief in the Appeals Court." *Id.*

This decision modifies the holding of *Westinghouse Elec. Supply Co. v. Healy Corp.*, 1977 Mass. App. Adv. Sh. 69, 85, 359 N.E.2d 634, 643, which had indicated that the court *must* allow the motion to dismiss under such circumstances.

161. For a discussion of the practices in other United States jurisdictions, as well as in other countries, see K. GRAY, *REALLOCATION OF PROPERTY ON DIVORCE* (1977).

tions of support. Probate courts now have the power to assign property to a party to a divorce based, not merely on support needs, but on equitable considerations that take into account the partnership aspects of marriage.<sup>162</sup> This newer, property assignment approach adds needed flexibility to the older statutory alimony scheme, which was based largely on support needs.

Conceptually, the duty to pay alimony flows directly from the husband's historic duty to support the wife.<sup>163</sup> The legal theory underlying alimony restricts its effectiveness as a satisfactory economic termination to a marriage. Because support was the essence of alimony, the size of the award depended on the husband's ability to pay, and the wife's needs relative to her station in life.<sup>164</sup> This approach ignored the valuable economic contribution of the

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162. The statute allowing property assignment provides:

Upon divorce or upon motion in an action brought at any time after a divorce, the court may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in the value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1978). The statute differs in particulars from, but is substantially similar in approach to, the UNIFORM MARRIAGE AND DIVORCE ACT § 397(a). See generally Inker, Walsh, & Perochi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 10 SUFFOLK L. REV. 1 (1975).

163. See Inker, Walsh, & Perrochi, *supra* note 162, at 12. The pre-1974 Massachusetts alimony statute, MASS. GEN. LAWS ch. 208, § 34 (West 1958), provided that a wife could be ordered to make payments to her husband "in the nature of alimony." While this provision was commendable for its two-way approach, it duplicated the undesirable restrictions inherent in the traditional alimony scheme by limiting awards to cases where a wife earned more money than the husband, and he therefore looked to her for support. *E.g.*, *Topor v. Topor*, 287 Mass. 473, 192 N.E.2d 52 (1934); *Ober v. Ober*, 1 Mass. App. Ct. 32, 294 N.E.2d 449 (1973).

164. As a practical matter, the size of the award often varied with the strength of the evidence presented regarding the conduct of the parties during the marriage. Many times the concept of fault overrode the more logical criterion of need; alimony became a prize to be snared by the clever attorney for the client.

The new statute does not specifically mention fault, but it retains the concept through the "conduct of the parties" factor which must be considered by the probate judge. See text accompanying note 173 *infra*.



homemaker towards all property acquired during the marriage. Additionally, absconding payors made alimony awards an unreliable means of support for the dependent party.

The newer, property assignment statute is conceptually anchored to the notion that marriage is an economic partnership.<sup>165</sup> By recognizing that both parties frequently share the burden<sup>166</sup> of acquiring property during the marriage, the property assignment approach provides for an equitable division of property when the parties divorce. Probate judges have more flexibility now than under the prior statutory scheme in fashioning a final judgment in a divorce proceeding. Although the statute lists the factors for the probate court to consider,<sup>167</sup> the relative weight assigned to each factor is a matter of discretion for the court. This element of discretion provides the flexibility needed to tailor each final judgment to the individual circumstances at hand.<sup>168</sup>

The wide discretion given the probate judges to award alimony and assign property is not without limits. The statute, by its terms, requires the court to consider all the factors listed in the third sentence: "the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income."<sup>169</sup> The fourth sentence goes on to list the following factors that *may* be considered by the court: "the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit."<sup>170</sup> The Massachusetts Supreme Judicial Court has held that, because the statute fully defines the

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165. For a full discussion of the role played by sharing principles in modern legal thought concerning marital property, see Pranger, *Sharing Principles and the Future of Marital Property Law*, 25 UCLA L. REV. 1 (1977).

166. See Inker, Walsh, & Perrochi, *supra* note 162, at 11. Proof that the statute has jettisoned the alimony concept as the exclusive theory of a property award is the phrasing in the second sentence: "[i]n addition to or in lieu of a judgment to pay alimony. . . ." *Id.* at 4.

167. See note 162 *supra*.

168. The property assignment system is not only more flexible than the prior statutory scheme, it is also more flexible than most community property systems. This element of flexibility has been criticized by some commentators because the unpredictability of the final award may discourage negotiated property settlements. See Rheinstein, *Division of Marital Property*, 12 WILLAMETTE L.J. 413, 433 (1976).

169. MASS. GEN. LAWS ANN. ch. 208, § 34 (West Supp. 1978).

170. *Id.*

scope of the trial court's discretion, "consideration of factors not enumerated in [section] 34 would constitute an error of law."<sup>171</sup>

*Rice v. Rice*<sup>172</sup> furnishes a quick example of the statute's potential. The parties were married for almost twenty-seven years and had two grown children. The wife, a homemaker, never worked during the marriage and had no vocational skills. Her husband had been paying her \$25,000 per year, but she claimed she needed \$68,000. The husband was employed by a family corporation which paid him \$50,000 a year as a salary. In addition, his unearned income was \$38,000 yearly. The husband's net worth was over \$1,000,000. His assets included: agency accounts, bank accounts, joint interest in Canadian real estate, joint interest in the marital home, forty percent ownership in a personal holding company, various insurance policies, and annual gifts from parents of \$6,000. The judge entered the following judgment in favor of the wife: (a) Husband's interest in marital home to wife (value: \$45,000); (b) husband's interest in Canadian real estate to wife (his contribution was \$10,000); (c) \$25,000 in cash to wife; (d) two agency accounts to wife (approximate value \$330,000); (e) \$30,000 per year support payment to wife; (f) status as irrevocable beneficiary for full face value of nine insurance policies (value: approximately \$80,000); and (g) \$7,500 to wife's counsel.

The Massachusetts Supreme Judicial Court stated that the judge's court order was not plainly wrong or excessive. The case has been considered by some as the most liberal property division implementing section 34.

In order for the statute to work effectively, a lawyer's duty to his client should encompass the same effort in applying the section's standards as that of a trial judge. This is especially true when the spouses, through their attorneys, have reached an agreement, which they plan to submit to the court to be included in and be made part of the court's judgment. Each element is critical in determining a fair allocation of the property.

Probate judges differ in their views on the importance of "fault" in assigning property. Except in extreme cases, fault should not play an important role in such an equitable award. On the other hand, acts which cause the plaintiff such injury, trauma, or other serious mental or physical impairment as would shock the senses of a reasonable person should be considered. However, allo-

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171. *Rice v. Rice*, 1977 Mass. Adv. Sh. 787, 361 N.E.2d 1305, 1307.

172. *Id.*

cations of property on the basis of fault are in the nature of a penalty, and, as a result, should not be considered unless the fault is clear cut and extreme. In any event, fault, no matter how extreme, is only one of the many factors mandated for consideration by section 34.<sup>173</sup>

An important element of the new section permits a plaintiff to request alimony or transfer of property "upon motion in an action brought at any time after the divorce."<sup>174</sup> A section 34 action after divorce, however, is available only when a judgment for alimony or assignment of property has neither been requested nor entered previously.<sup>175</sup> If a judgment for alimony or assignment of property has been entered, statute section 37 provides jurisdiction for modification of the preexisting judgment.<sup>176</sup> Section 37 provides only for modification of alimony, not for modification of assignment of property. The fact that section 37 fails to provide for modification of property assignments is especially logical, particularly when one considers that one of the functions of property assignment is to effect as full and complete a settlement of property rights between the parties as is possible.

Recently, the Massachusetts General Laws have been amended so as to allow a court to require sufficient security for the payment of alimony. Additionally, any subsequent modification may also require such security.<sup>177</sup>

## VII. TAX IMPLICATIONS

Although recent tax reform has made some drastic changes on a taxpayer's income tax return, the general tax implications affecting alimony and separate support, whether under divorce, separate support, or written separation agreement, remain the same.<sup>178</sup> A spouse must include in his or her gross income any periodic payments (whether or not made at regular intervals) received in discharge of a legal obligation which the paying spouse has made by virtue of his or her marital or family relationship.<sup>179</sup> These payments are deductible by the paying spouse.<sup>180</sup>

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173. See note 164 *supra*.

174. See note 162 *supra*.

175. See Inker, Walsh, & Perrochi, *supra* note 162, at 21.

176. MASS. GEN. LAWS ANN. ch. 208, § 37 (West Supp. 1978).

177. See *id.* § 36.

178. See I.R.C. §§ 71, 152, 215.

179. I.R.C. § 71(a)(1).

180. I.R.C. § 215(a). Because I.R.C. § 62(13) allows this deduction in arriving at

Periodic payments do not include installment payments of a property settlement, the principal sum of which is, either in terms of money or property, specified in the judgment, instrument, or agreement.<sup>181</sup> If, however, the principal sum is to be paid over a period of more than ten years from the date of such judgment, instrument, or agreement, then the installment payments shall be treated as periodic payments. They are included in the payee spouse's income and deductible by the payor spouse to the extent that in any taxable year such payments do not exceed ten percent of the principal sum.<sup>182</sup>

Payments which are solely in support of minor children are not includable in the receiving spouse's income nor deductible by

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adjusted gross income, the paying spouse may take the deduction irrespective of the zero bracket amount described in I.R.C. § 63.

181. I.R.C. § 71(c)(1). The new approach to property assignments set forth in MASS. GEN. LAWS ch. 208, § 34 (West Supp. 1978), discussed at notes 162-77 *supra* and accompanying text, has not altered the tax treatment of property settlements. When one spouse assigns property to the other, either by court order or by agreement, the assignment is viewed as being in consideration of the other spouse's relinquishment of his or her marital rights. The transfer is treated as a sale and the assignor-spouse realizes a gain on the transfer to the extent that the fair market value of the property at the time of the divorce exceeds the assignor's adjusted basis. This is the familiar rule of *United States v. Davis*, 370 U.S. 65 (1962). The rationale is that the transfer is an even exchange of property for marital rights.

New property assignment laws tend to ignore the old concepts of marital rights and alimony. Many of these laws look instead exclusively to the respective contributions of each spouse when fashioning an equitable division of the property acquired during the marriage. *E.g.*, OKLA. STAT. ANN. tit. 12, § 1278 (West Supp. 1976). Conceptually, settlements under these statutes are not exchanges at all. Rather, the division of property attempts to allocate to each party that which they already own based on their contribution to acquisition. Such a division is not a taxable event under the *Davis* rule. For a fuller explanation of the conceptual considerations, statutory variations, and relevant case law, see Comment, *The Federal Income Tax Consequences of Property Settlements in Common Law States and Under the Uniform Marriage and Divorce Act: A Proposal*, 29 ME. L. REV. (1977).

The Massachusetts property assignment statute does not merit this different tax treatment for two reasons. First, it retains many of the alimony or marital rights criteria as factors that must be considered by the probate court. *See* note 169 *supra*. The statute incorporates the contribution or partnership criteria only as optional factors for the court to consider. *See* note 170 *supra*. Second, the statute does not segregate property acquired after the marriage. It therefore does not adopt the contribution and partnership approach to such an extent that the assignment warrants different tax treatment. Under *Davis*, then, a property assignment under MASS. GEN. LAWS ANN. ch. 208, § 34 remains a taxable event.

182. I.R.C. § 71(c)(2). *See also* Treas. Reg. § 1.71-1(d)(3) (1960) which treats payments over a 10-year or less period as periodic, even though the sum is set forth in the decree, if the payments are subject to certain contingencies and are in the nature of alimony or support.

the paying spouse.<sup>183</sup> If the payment is for both spouse and minor child, without specifically saying how much is for the spouse and how much for the child, the entire payment is treated as though made to the spouse and therefore taxable to that spouse and deductible by the paying spouse.<sup>184</sup>

If a child receives over half of her support from her parents, the parent having custody of the child for over half of the calendar year is entitled to take the dependent exemption for that child.<sup>185</sup> This general rule, however, is subject to two important exceptions. The first exception applies where a written decree or agreement provides that the parent not having custody shall be entitled to claim the exemption and that parent contributed at least \$600 for the support of the child.<sup>186</sup> The second exception allows a parent not having custody for the required time, but who has provided over \$1200 for a child's support, to take the exemption unless the parent having custody can "clearly establish" that he or she provided more for the support of the child than did the parent not having custody.<sup>187</sup>

In determining alimony and support, consideration must be given to the tax impact on both spouses in order for the court to allocate the maximum amount of money for the greatest possible benefit. Tax avoidance planning is an important part of every family law practitioner's efforts, and a failure to understand the tax implications of a judgment or the tax impact on the client might subject the lawyer to disciplinary action.<sup>188</sup>

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183. I.R.C. § 71(b).

184. I.R.C. § 71(a); Treas. Reg. § 1.71-1(e) (1960). *See also* Commissioner v. Lester, 366 U.S. 299 (1961).

185. I.R.C. § 152(e)(1). I.R.C. § 152(e)(1)(A) requires that the child receive more than half of his support from his parents.

186. I.R.C. § 152(e)(2)(A).

187. I.R.C. § 152(e)(2)(B). This exception is important because it allows a parent to take an exemption even though no exemption provision was made in a written agreement or even if a contrary provision was made. Treas. Reg. § 1.152-4(d)(3) (1971). Once the noncustodial parent establishes that he or she has provided \$1200 or more for child support, the custodial parent has the burden of establishing "by a clear preponderance of the evidence" that he or she has provided more support than the noncustodial parent. *Id.*

188. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Canon 6, Disciplinary Rule 6-101(A)(1). *See also* Freedman, *Guideline for Alimony and Support Orders*, 19 B.B.J., May 1975, at 3.

## VIII. RECENT LEGISLATIVE DEVELOPMENTS

### A. *Court Reorganization Bill*

Recently, the Massachusetts Legislature has passed Senate Bill #1322,<sup>189</sup> commonly referred to as "The Court Reorganization Bill." The new law, as broad as it is, does little if anything to change the substance of family law within Massachusetts. It focuses, rather, on terminology changes, procedural changes, and most important, structural changes that will increase the effectiveness of the judicial branch of government. For example, there is no longer a "probate court." The correct appellation now is "Probate Department of the Trial Court, Worcester Division."<sup>190</sup> There are no longer any "probate judges." They are now called "associate justices of the trial court." Of greater importance, however, is the statute's effect upon the ability to allocate judicial manpower among the various departments of the trial court. This may now be done on the basis of need, without regard to the strictures or limitations of the prior court structure.

### B. *Statute Protecting Persons Suffering From Abuse*

Another significant change brought about recently by the legislature will have an important effect on the daily practice of family law; 1978 Mass. Acts chapter 447 ostensibly affects persons suffering from abuse.<sup>191</sup> In fact, the act will affect policemen, lawyers,

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189. 1978 Mass. Acts ch. 478.

190. In Massachusetts there are 14 divisions of the "probate department."

191. The new act is set forth in 1978 Mass. Legis. Serv. 448 (West) as follows:  
Chap. 447. AN ACT PROVIDING CERTAIN TEMPORARY PROTECTION FOR  
PERSONS SUFFERING ABUSE.

*Be it enacted, etc., as follows:*

SECTION 1. Chapter 208 of the General Laws is hereby amended by inserting after section 34B the following section:

*Section 34C.* Whenever a court issues an order to vacate the marital home under section thirty-four B, or an order prohibiting a person from imposing any restraint on the personal liberty of another person under section eighteen and section thirty-two of chapter two hundred and nine, and an order under chapter two hundred and nine A, the register shall transmit a copy of each order forthwith to the appropriate local law enforcement agency. Law enforcement agencies shall establish procedures adequate to insure that an officer at the scene of an alleged violation of such order may be informed of the existence and terms of such order. Law officers shall use every reasonable means to enforce such orders.

Any violation of the aforementioned orders shall be a misdemeanor, which shall be punished by a fine of no more than five thousand dollars or by imprisonment for

not more than two and one half years in a house of correction, or both. The court shall immediately notify the defendant of the issuance of each order and every order issued shall bear the following language:

**VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE.**

SECTION 2. The General Laws are hereby amended by inserting after chapter 209 the following chapter:

**CHAPTER 209A.  
ABUSE PREVENTION.**

*Section 1.* The following words as used in this chapter shall have the following meanings:

“Abuse”, the occurrence of one or more of the following acts between family or household members:

- (a) attempting to cause or causing physical harm;
- (b) placing another in fear of imminent serious physical harm;
- (c) causing another to engage involuntarily in sexual relations by force, threat of force or duress.

“Court”, the superior, probate or district courts.

“Family or household member”, household member, a spouse, former spouse or their minor children or blood relative.

“Law officer”, any officer authorized to serve criminal process.

*Section 2.* Proceedings under this chapter shall be filed, heard and determined in the district, superior court or the probate court of the county in which the plaintiff resides. If the plaintiff has left the residence or household to avoid abuse, he shall have the option to bring an action in the county of the previous residence or household or the new residence or household.

*Section 3.* A person suffering from abuse from an adult or minor family or household member may file a petition in the district, probate or superior court requesting any order which will protect him from abuse, including, but not limited to the following:

- (a) ordering the defendant to refrain from abusing the plaintiff, whether the defendant is an adult or minor;
- (b) ordering the defendant to vacate forthwith the household;
- (c) awarding the plaintiff in the case of husband or wife temporary custody of a minor;
- (d) ordering the defendant to pay temporary support for the plaintiff or any child in the plaintiff’s custody, or both, when the defendant has a legal obligation to support such person;
- (e) ordering the defendant to pay to the person abused monetary compensation for losses suffered as a direct result of the abuse. Compensatory losses shall include, but not be limited to, loss of earnings or support, out-of-pocket losses for injuries sustained, moving expenses and reasonable attorney fees.

No filing fee shall be charged for such a petition.

Any relief granted by the court shall be for a fixed period of time not to exceed one year, at the expiration of which time the court may extend any order, upon motion of the plaintiff, for such additional time as it deems necessary to protect the plaintiff from abuse. The court may modify its order at any subsequent time upon motion by either party.

No order under this chapter shall in any manner affect title to any real property.

Any proceedings under this chapter shall not preclude any other available civil or criminal remedies.

*Section 4.* Upon the filing of a petition under this chapter, the court may enter such temporary orders as it deems necessary to protect a plaintiff from abuse, including relief as provided in section eighteen and section thirty-four B of chapter two hundred and eight and section thirty-two of chapter two hundred and nine.

If the plaintiff demonstrates a substantial likelihood of immediate danger of abuse, the court may enter such temporary order without notice as it deems necessary to protect the plaintiff. The court shall immediately thereafter notify the defendant and give him an opportunity to be heard as soon as possible, but not schedule the hearing later than five days after such order is entered on the question of continuing such temporary order.

*Section 5.* When the court is unavailable after the close of business at the end of the week, a petition may be filed before any available district court justice who may grant relief to the plaintiff under section three upon cause shown in an ex parte proceeding. Immediate and present danger of abuse to the plaintiff shall constitute cause for purposes of this section.

Any order issued under this section shall terminate as of the close of business on the next day the court is in session.

Any order issued under this section and any documentation in support thereof shall be certified immediately by the clerk of the district court to the court. Such certification to the court shall have the effect of commencing proceedings under this chapter and invoking the other provisions of this chapter.

*Section 6.* Whenever any law officer has reason to believe that a family or household member has been abused, that officer shall use all reasonable means to prevent further abuse, including: (1) remaining on the scene as long as there is a danger to the physical safety of such person without the presence of a law officer, including but not limited to staying in the dwelling unit; (2) assisting such person in obtaining medical treatment necessitated by an assault, including driving the victim to the emergency room of the nearest hospital; (3) giving such person immediate and adequate notice of his rights; (4) arresting the person if the officer has probable cause to believe that a felony has been committed, or a misdemeanor has been committed in the officer's presence, or a misdemeanor has been committed pursuant to section thirty-four C of chapter two hundred and eight. Said notice shall consist of handing such person a copy of the following statement written in English and Spanish, and reading the same to such person:

"You have the right to go to the district, probate or superior court and file a complaint requesting any of the following applicable orders for temporary relief: (a) an order restraining your attacker from abusing you; (b) an order directing your attacker to leave your household; (c) an order awarding you custody of a minor child; and (d) an order directing your attacker to pay support for you or any minor child in your custody if the attacker has a legal obligation to support them; (e) an order directing your attacker to pay you for losses suffered as a result of the abuse, including medical and moving expenses, loss of earnings or support, attorney fees and other out-of-pocket losses for injuries sustained.

You have the right to go to district court and file a criminal complaint for threats, assault and battery, assault with a deadly weapon, assault with intent to kill or other related crimes. You may go to district court for an emergency on weekends or holidays.

If you are in need of medical treatment, you have the right to demand that the officer present drive you to the nearest hospital or otherwise assist you.

If you believe that police protection is needed for your physical safety, you have the right to demand that the officer present remain at the scene until you and your children can leave or until your safety is otherwise insured."

**SECTION 3.** Section 120 of chapter 266 of the General Laws is hereby amended by striking out the first sentence and inserting in place thereof the following two sentences:—Whoever, without right, enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf, or pier of another, after having been forbidden so to do by the person who has lawful control of said premises, either directly or by notice posted thereon, or in violation of a court order pur-



almost all departments of the trial court, spouses, children, judges and chief judges. The act took effect on August 16, 1978, and its

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suant to section thirty-four B of chapter two hundred and eight or section four of chapter two hundred and nine A, shall be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days, or both. Proof that a court has given notice of such a court order to the alleged offender shall be prima facie evidence that the notice requirement of this section has been met.

SECTION 4. Section 28 of chapter 276 of the General Laws is hereby amended by striking out the first sentence and inserting in place thereof the following sentence:—Any officer authorized to serve criminal process may arrest without the issuance of a warrant and detain a person found by him in the act of stealing property in his presence regardless of the value of the property stolen and may arrest without warrant and detain a person whom he has probable cause to believe has committed a misdemeanor under section thirty-four C of chapter two hundred and eight. Said officer may arrest and detain a person charged with a misdemeanor, without having a warrant for such arrest in his possession, if the officer making such arrest and detention shall have actual knowledge that a warrant then in full force and effect for the arrest of such person has in fact issued.

SECTION 5. Said chapter 276 is hereby amended by inserting after section 42 the following section:—

*Section 42A.* Whenever a court issues a criminal complaint and the crime involves assault and battery, trespass, threat to commit a crime, nonsupport, or any other complaint which involves the infliction, or the imminent threat of infliction, of physical harm upon a person by such person's family or household member as defined in section one of chapter two hundred and nine A, the court may, in lieu of or in addition to any terms of personal recognizance, and after a hearing and finding, impose such terms as will insure the safety of the person allegedly suffering the physical abuse or threat thereof, and will prevent its recurrence.

Such terms and conditions shall include reasonable restrictions on the travel, association or place of abode of the defendant as will prevent such person from contact with the person abused.

As part of the disposition of any criminal complaint, the court may establish such terms and conditions of probation as will insure the safety of the person who has suffered such abuse or threat thereof, and will prevent the recurrence of such abuse or threat thereof.

Such terms and conditions shall include reasonable restrictions on the travel, association or place of abode of the defendant as will prevent such person from all contact with the person abused; or the payment by the defendant to the person abused of monetary compensation for losses suffered as a direct result of the crime. Compensatory loss shall include, but not be limited to; loss of earnings or support, out-of-pocket losses for injuries sustained, moving expenses and reasonable attorneys fees.

In addition, the terms and conditions of either the probation or the disposition of the complaint may include, but not be limited to, referral of the defendant to a clinic, facility or professional for one or more examinations, diagnoses, counseling or treatment; requiring the defendant to report periodically to a probation officer; or release of the defendant to the custody of a residential treatment facility.

SECTION 6. The chief justice of the superior court and the chief judge of the probate court and the chief justice of the district courts shall jointly promulgate a form of petition for chapter two hundred and nine A of the General Laws, inserted by section one of this act, which shall be simple and permit a person to file a petition himself.

provisions will certainly be discussed and litigated<sup>192</sup> in the months to come. It provides that any person who suffers abuse from a family or household member may petition the district, probate, or superior departments of the trial court for an order of protection. Such relief may include, but is not necessarily limited to, an order to vacate, a temporary change of custody of children, an order for temporary support, damages, or a restraining order.<sup>193</sup>

One can readily see that the jurisdiction of the district department of the trial court is greatly expanded. Although the relief under this section may be granted for no longer than one year, this limitation may be extended for good cause shown. Moreover, the court may modify its order at any subsequent time on motion by either party.<sup>194</sup>

The new statute goes on to provide: "Any proceeding under this chapter shall not preclude any other available civil or criminal remedies."<sup>195</sup> The implications of this phrase are unclear. At the very least there will be some confusing overlapping among the three departments of the trial court. On the other hand, this statute might be the catalyst needed to force some members of the bar out of a quagmire of rigidly defined jurisdictional rules among the various courts. After all, there is now only one trial court.

Police officers will be directly affected by the act. Whenever a law enforcement officer has reason to believe that a family or household member has been abused, he is empowered under the statute to use all reasonable means to prevent further abuse. In addition to remaining on the scene to protect the person suffering from abuse and assisting in obtaining any necessary medical treatment, the officer is specifically given the authority to arrest "if the officer has probable cause to believe that a felony has been committed, or a misdemeanor has been committed in the officer's presence, or a misdemeanor has been committed pursuant to section thirty four C of chapter two hundred and eight."<sup>196</sup>

The police officer has the apparent right to arrest without a warrant a person charged with a misdemeanor even under circum-

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192. Several arguments militate in favor of the statute's repeal or modification. Many provisions are vague in certain areas regarding adequate police protection and enforcement of sanctions. Some of the provisions, in particular those dealing with arrest and double jeopardy, may not withstand constitutional scrutiny.

193. MASS. GEN. LAWS ch. 209A, § 3 (1978). See note 191 *supra* SECTION 2.

194. *Id.*

195. *Id.*

196. MASS. GEN. LAWS ch. 209A, § 6 (1978) (emphasis added). See note 191 *supra* SECTIONS 1 & 2.

stances where the misdemeanor was not committed in the officer's presence.<sup>197</sup> Another section of the new statute specifically gives the police officer authority to arrest without a warrant if the officer has probable cause to believe a misdemeanor has been committed under section 34C of chapter 208, or if he or she has actual knowledge that a warrant then in full force and effect for the arrest of such person has in fact been issued.<sup>198</sup>

Other potential problems exist. The district department of the trial court, by the express terms of this statute, may now enter into many areas of family law previously reserved to the probate court. What the outcome will be, whether the statute or some provisions thereof can withstand a constitutional test,<sup>199</sup> how it will be administered by various judges who have no training in family law, all are questions that soon must be answered.

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197. See text accompanying note 196 *supra*.

198. MASS. GEN. LAWS ch. 276, § 28 (1978). See note 191 *supra* SECTION 4.

199. See note 192 *supra*.