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Chapter 5: Domestic Relations

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CHAPTER 5

Domestic Relations

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§5.1. Divorce—Alimony and Assignment of Property. During the *Survey* year, the Appeals Court in two significant cases continued its construction of section 34 of chapter 208 of the General Laws as amended by the statutes of 1974.[1] In following the groundwork laid by *Bianco v. Bianco*,[2] *Putnam v. Putnam*,[3] and *Rice v. Rice*,[4] the court has further elucidated the nature of awards of alimony and assignment of property.[5]

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§5.1. [1] G.L. c. 208, § 34, *as amended by* Acts of 1974, c. 565, Acts of 1975, c. 400, § 33, and Acts of 1977, c. 467, 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 value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

[2] 371 Mass. 420, 358 N.E.2d 243 (1976).

[3] 5 Mass. App. Ct. 10, 358 N.E.2d 837 (1977).

[4] 372 Mass. 398, 361 N.E.2d 1305 (1977).

[5] For an analysis of the *Bianco* and *Rice* decisions *see* Inker, Perocchi, and Walsh, *Divorce—Alimony and Assignment of Property*, 1977 ANN. SURV. MASS. LAW § 1.2, at 7-11.

In *Maze v. Mihalovich*,[6] the Appeals Court held that to the extent that a probate court fails to make a disposition of all the parties' properties in a divorce judgment, the parties may return after the entry of a judgment nisi of divorce and seek disposition of that property.[7] The plaintiff-wife was granted a judgment of divorce nisi[8] on March 12, 1976.[9] The wife was granted custody of the two minor children.[10] The judgment ordered the defendant-husband to pay to the wife $35 per week as alimony and child support.[11] The judgment made no provisions for the division of any real or personal property owned by the parties.[12]

The parties owned a parcel of real estate as tenants by the entirety.[13] On September 12, 1976, when the divorce became final, the parties held the real estate as tenants in common.[14] On October 8, 1976, the wife received notice that the husband sought a partition of this property.[15] The wife then brought an action in the probate court pursuant to chapter 208, section 34,[16] seeking a conveyance to her of the husband's interest in the property.[17] The husband moved to dismiss the wife's action on the ground that chapter 208, section 34, "does not provide authority to convey real estate at a time subsequent to a divorce when an order of alimony has been made in the judgment of divorce."[18] The probate court granted the husband's motion.[19]

The Appeals Court dismissed the wife's appeal as premature,[20] but ruled that the husband's motion to dismiss should not have been allowed.[21] The court, citing *Bianco v. Bianco*,[22] held that since the parties' property rights had not previously been adjudicated, the probate court could assign the property pursuant to chapter 208, section 34.[23] The

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[6] 1979 Mass. App. Ct. Adv. Sh. 578, 387 N.E.2d 196.

[7] *Id.* at 579, 387 N.E.2d at 197.

[8] G.L. c. 208, § 21, provides that "[j]udgments of divorce shall in the first instance be judgments nisi, and shall become absolute after the expiration of six months from the entry thereof . . . ."

[9] 1979 Mass. App. Ct. Adv. Sh. at 578, 387 N.E.2d at 197.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id. See* Childs v. Childs, 293 Mass. 67, 71, 199 N.E. 383, 386 (1936).

[15] 1979 Mass App. Ct. Adv. Sh. at 578, 387 N.E.2d at 197.

[16] See note 1 *supra.*

[17] 1979 Mass. App. Ct. Adv. Sh. at 578-79, 387 N.E.2d at 197.

[18] *Id.* at 579, 387 N.E.2d at 197.

[19] *Id.*

[20] *Id.* "As no judgment was entered (Mass. R. Dom. Rel. P. 58[a] [1975]), the case is prematurely before us." *Id.*

[21] *Id.*

[22] 371 Mass. 420, 358 N.E.2d 243 (1976).

[23] 1979 Mass. App. Ct. Adv. Sh. at 579, 387 N.E.2d at 197.

court rejected the husband's argument that the wife was seeking additional relief in the nature of alimony.[24] It noted that section 34 as amended empowered courts to deal broadly with property, quite apart from the alimony decree.[25]

The husband argued further that chapter 208, section 34, should be construed "so as to permit the court to grant either or both types of relief authorized by §34 only once; namely, at the time of divorce or at a later time."[26] The court dismissed this argument also. It noted that even prior to the 1974 amendment,[27] section 34 had been construed to allow a petition for alimony after the entry of a judgment nisi of divorce where there had been no award of alimony in the original decree.[28] Thus, the court saw no reason why a division of property should not be similarly construed.[29]

The mandate of the Appeals Court's decision in *Mihalovich* is clear. The probate court must consider all items of property belonging to the parties in making an award of alimony and property division under chapter 208, section 34. If items are not disposed of or litigated at the time of divorce, they may be the proper subject of a subsequent motion for the division of assets.

Exactly two months after *Mihalovich* was decided, the Appeals Court in *Putnam v. Putnam* (*Putnam II*)[30] reaffirmed the equitable nature of the division of property under chapter 208, section 34. The saga of *Putnam* began with a probate court judgment providing that the marital home held by the defendant-wife and plaintiff-husband as tenants by the entirety be sold and the proceeds of the sale be divided one-third to the wife and two-thirds to the husband.[31] The Appeals Court in *Putnam v. Putnam* (*Putnam I*) held that because the probate judge may have based the assignment of property upon insufficient considera-

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[24] *Id.* at 580, 387 N.E.2d at 197.

[25] *Id.* at 581, 387 N.E.2d at 197-98.

[26] *Id.* at 582, 387 N.E.2d at 198.

[27] G.L. c. 208, § 34 (prior to the amendment by Acts of 1974, c. 565) provided: "Upon a divorce, or upon petition at any time after a divorce, the court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband."

[28] 1979 Mass. App. Ct. Adv. Sh. at 582, 387 N.E.2d at 198 (citing Peluso v. Peluso, 5 Mass. App. 906, 370 N.E.2d 723 (1977); Kinosian v. Kinosian, 351 Mass. 49, 217 N.E.2d 769 (1966); Chadbourne v. Chadbourne, 245 Mass. 383, 139 N.E. 532 (1923); Parker v. Parker, 211 Mass. 139, 97 N.E. 988 (1912)).

[29] 1979 Mass. App. Ct. Adv. Sh. at 582-83, 387 N.E.2d at 198.

[30] 1979 Mass. App. Ct. Adv. Sh. 1084, 389 N.E.2d 777.

[31] Putnam v. Putnam (*Putnam I*), 5 Mass. App. 10, 11, 358 N.E.2d 837, 838 (1977).

tions, the case should be remanded for further proceedings.[32] At trial on remand, the parties produced no additional evidence, but instead rested their cases on the evidence introduced at the first trial.[33] The judge stated that he was precluded from considering all of the factors listed in section 34,[34] because the parties had not introduced evidence on some of the factors.

On the second appeal, the court stated that where the parties fail to provide evidence upon which a trial judge can base his findings, the consideration of those factors is deemed waived.[35] The husband attempted to argue that the evidence was nevertheless sufficient to justify a division of the marital home under section 34.[36] The court, however, noted the lack of evidence of the noneconomic contributions to the marital enterprise and the scant evidence of the economic contributions of the parties, other than as they related to the house at issue.[37] The court therefore refused to uphold the judgment of the probate court, finding that the evidence presented failed to provide a sufficient basis for an equitable division under section 34.[38]

The *Putnam II* decision is consistent with prior interpretation of section 34. The Supreme Judicial Court stated in *Rice v. Rice* [39] that "in future cases under [section 34] we wish to have findings, whether or not requested by a party . . . , showing that the judge below weighed all the statutory factors in reaching his decision and considered no extraneous factors." [40] The thrust of the *Putnam II* court's decision is to follow the mandate of *Rice* by refusing to uphold a judgment where the judge did not properly give consideration to the factors enunciated in section 34. It now seems clear that a lower court must take into consideration all the factors enumerated under section 34 when ordering an award of alimony or a division of property and it must be clear from the record that the judge did in fact consider such factors.[41]

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[32] *Id.* at 16, 358 N.E.2d at 842. The Appeals Court noted that the rationale for the property division was not clearly stated by the probate judge. It appeared, however, that the judge had considered capital contributions to the property in question and the wife's conduct. *Id.*

[33] 1979 Mass. App. Ct. Adv. Sh. at 1086, 389 N.E.2d at 778.

[34] *Id.* For the text of § 34 see note 1 *supra.*

[35] *Id.* at 1087, 389 N.E.2d at 778.

[36] *Id.*

[37] *Id.* at 1088, 389 N.E.2d at 779.

[38] *Id.*

[39] 372 Mass. 398, 361 N.E.2d 1305 (1977).

[40] *Id.* at 402-03, 361 N.E.2d at 1308.

[41] It should be noted that during the *Survey* year, the Appeals Court further demonstrated its approval of the statutory scheme set forth in § 34, when it held that § 34 was applicable even to divorce actions already in progress when § 34 was enacted. *See* Zildjian v. Zildjian, 1979 Mass. App. Ct. Adv. Sh. 1337, 391 N.E.2d 697.

The impact of both *Mihalovich* and *Putnam II* upon the adjudication of property and alimony issues will further the intent of the statute.[42] *Putnam II* obliges the practitioner to insure that findings are clearly made by the judge concerning all section 34 factors in order to prevent any judgment from being vacated on appeal. *Mihalovich* cautions the practitioner who wishes to avoid subsequent litigation to provide the judge with the evidence necessary to make a disposition of all the property of the parties. Thus, the decisions of the Appeals Court in *Mihalovich* and *Putnam II* should foster the complete adjudication of all issues relating to the parties' divorce and the settling of all property rights of the parties at one time.

The courts of this commonwealth have repeatedly emphasized the proper exercise of broad discretion in assignment of property under section 34. In its decisions during this *Survey* year, the Appeals Court has again demonstrated its commitment to seeing that the lower courts consider and evaluate the totality of the circumstances surrounding the parties in a divorce action in order to arrive at an equitable and fair resolution of their respective property rights.

§5.2. Antenuptial Agreements—Duty to Disclose. In *Rosenberg v. Lipnick*,[1] the Supreme Judicial Court reconsidered the traditional commonwealth rule as established in *Wellington v. Rugg*[2] that nothing short of proof of fraud will invalidate an antenuptial agreement, irrespective of the unfairness of the agreement.[3] While declining to apply a new rule to the case at bar, the Court announced that in future cases the law would impose on parties to an antenuptial agreement a duty of fair disclosure.[4]

The plaintiff-wife in *Rosenberg* had signed in 1959 an antenuptial agreement which provided that she would accept $5,000 from the defendant-husband's estate in lieu of dower or any other rights she might possess should she survive him.[5] Upon his death, she sought to invalidate the agreement on the grounds that her husband had failed to disclose his assets prior to its execution.[6] Both the master and the probate court judge found the *Wellington* rule[7] controlling, thereby

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[42] For a thorough discussion of the statutory intent of G.L. c. 208, § 34, *see* Inker, Walsh and Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 10 SUFFOLK U.L. REV. 1 (1975).

§5.2. [1] 1979 Mass. Adv. Sh. 853, 389 N.E.2d 385.
[2] 243 Mass. 30, 136 N.E. 831 (1922).
[3] *Id.* at 35, 136 N.E. at 834.
[4] 1979 Mass. Adv. Sh. at 860, 389 N.E.2d at 388.
[5] *Id.* at 855, 389 N.E.2d at 386-87.
[6] *Id.* at 853, 389 N.E.2d at 386.
[7] See text at note 3 *supra*.

rendering the wife's failure to establish misrepresentation or fraudulent concealment of the value of the husband's assets fatal to their claim.[8] On direct appellate review, the Supreme Judicial Court, thinking it unwise to act retroactively, declined to overrule the probate judge's decision.[9]

While affirming the lower court decision upholding the agreement at issue, the Court set forth a new standard for agreements executed after the date of the opinion.[10] It observed that Massachusetts is the only state requiring a showing of fraud to invalidate an antenuptial agreement.[11] The Court expressed dissatisfaction with the fact that the *Wellington* rule, which purports to acknowledge that parties to an antenuptial agreement stand in a confidential relationship, treats them as acting at arm's length.[12] In fact "they occupy a relationship of mutual trust and confidence and as such must exercise the highest degree of good faith, candor, and sincerity in all matters bearing on the proposed agreement."[13] The Court compared the duty of disclosure owed by parties to an antenuptial agreement with the obligations of disclosure owed between a corporate director and stockholder.[14] The Court concluded that the parties to an antenuptial agreement "by definition occupy a confidential relationship . . ." calling for a duty of disclosure for both parties.[15]

After concluding that a fair disclosure rule would apply to antenuptial agreements executed after March 30, 1979, the Court set forth factors relevant to determining the validity of future antenuptial agreements.[16] It stated that it would consider

> whether (1) it contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth.[17]

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[8] 1979 Mass. Adv. Sh. at 854, 389 N.E.2d at 386.

[9] *Id.* The Court noted, however, that even under a fair disclosure rule the wife would not be entitled to relief on the facts of this case. She had been advised by counsel to request disclosure but had declined to do so, for fear that such a step could jeopardize the marriage. *Id.* at 861-62, 389 N.E.2d at 389.

[10] *Id.* The Court's decision was handed down March 30, 1979. *Id.* at 853, 389 N.E.2d at 385.

[11] *Id.* at 858, 389 N.E.2d at 387.

[12] *Id.* at 858-59, 389 N.E.2d at 387.

[13] *Id.* at 858-59, 389 N.E.2d at 387-88.

[14] *Id.* at 860, 389 N.E.2d at 388.

[15] *Id.*

[16] *Id.* at 860-61, 389 N.E.2d at 388.

[17] *Id.*

It also noted that appropriate reference could be made to such factors as the parties' respective worth, ages, intelligence, literacy, business acumen, and prior family ties and commitments.[18] The Court explained that these factors should be employed to give effect to the intentions of the parties in construing antenuptial agreements, while at the same time ensuring that antenuptial agreements are "executed fairly and understandingly . . . free from fraud, imposition, deception, or overreaching."[19]

The *Rosenberg* Court's decision is a further acknowledgment of the equality and honesty that should be present throughout the marital relationship. It seems only just that where parties enter into an agreement controlling their respective future property rights, full disclosure of the circumstances and factors of such property rights be made available so that each party's execution of the agreement will be the result of an informed decision. This principle has long been recognized in contract law, and its application to antenuptial agreements is long overdue.

§5.3. Judgment of Divorce Nisi—Grant of Stay Pending Appeal. In *Singer v. Singer*,[1] the Appeals Court held that the entry of a judgment of divorce nisi for one spouse, even though stayed pending appeal, precludes the entry of a judgment of divorce nisi for the other spouse unless the divorce is stayed for "sufficient cause" under chapter 208, section 21, of the General Laws.[2] The court also held that one party's desire not to be adjudged the guilty party is not "sufficient cause" within the meaning of section 21.[3]

The *Singer* case arose out of three separate actions filed by the parties concerning their marital difficulties. The wife originally filed an action for separate support on August 9, 1974, on the ground of cruel and abusive treatment.[4] Subsequently, the husband filed a complaint for divorce, also alleging cruel and abusive treatment.[5] The two cases were referred to a master who filed his report on the husband's action on February 28, 1977, and on the wife's action one day later.[6] After

[18] *Id.* at 862, 389 N.E.2d at 389.
[19] *Id.*

§5.3. [1] 1979 Mass. App. Ct. Adv. Sh. 1491, 391 N.E.2d 1239.
[2] *Id.* at 1495, 391 N.E.2d at 1242. Chapter 208, § 21, provides in part: "Judgments of divorce shall in the first instance be judgments nisi, and shall become absolute after the expiration of six months from the entry thereof, unless the court within said period, for sufficient cause, upon application of any party to the action, otherwise orders."
[3] 1979 Mass. App. Ct. Adv. Sh. at 1497, 391 N.E.2d at 1242.
[4] *Id.* at 1493, 391 N.E.2d at 1241.
[5] *Id.*
[6] *Id.*

the filing of the master's reports, and after it became clear that a divorce would be granted to the husband, the wife filed her complaint for divorce on the ground of adultery.[7] The judge denied the wife's motion to stay the proceedings and entered a judgment of divorce nisi on the husband's complaint.[8] After the entry of the judgment nisi for the husband, the wife filed a notice of appeal and moved to stay that judgment, both on the ground of her appeal and on the ground of her pending divorce action.[9] A second judge allowed the wife's motion for a stay on December 23, 1977.[10] The wife then appeared before a third judge in the uncontested session of the court, at which time uncontradicted evidence of the husband's adultery was introduced.[11] The third judge reported the question of whether the wife was entitled to pursue her complaint for divorce after judgment nisi had been entered on the husband's complaint.[12]

In answering this question in the negative, the Appeals Court stated that although the husband and wife can each obtain a divorce,[13] this result is only possible if both actions are timely brought.[14] The court restated the strong policy of resolving all aspects of the dispute between the former spouses in one proceeding.[15] It observed that after an action for divorce has been litigated and a judgment nisi entered, additional proceedings should be entertained cautiously and then only if they serve some legal purpose.[16]

In analyzing the possible legal purposes for the wife's attempt to secure a second judgment, the Appeals Court concluded that there were none.[17] The court first examined the effect of a second judgment in the absence of a stay of the first judgment. Because the first judg-

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[7] *Id.* She filed her complaint the day before the first hearing on the adoption of the master's report, although she had known of her husband's adultery as early as November 3, 1975. *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 1494, 391 N.E.2d at 1241.

[11] *Id.*

[12] *Id.* The question reported by the third trial judge was as follows:

> Whether the plaintiff in her complaint for divorce on grounds for adultery filed during the pendency of husband's complaint but not consolidated and heard therewith, is entitled to pursue her complaint after a Judgment Nisi has been entered on husband's complaint, which Judgment is pending in the Appeals Court on wife's appeal and which Judgment has been stayed and has not yet become absolute.

Id.

[13] *Id.* at 1495, 391 N.E.2d at 1292. *See* Gilmore v. Gilmore, 369 Mass. 598, 599, 341 N.E.2d 655, 656 (1976).

[14] 1979 Mass. App. Ct. Adv. Sh. at 1495, 391 N.E.2d at 1242.

[15] *Id.*

[16] *Id.* at 1495-96, 391 N.E.2d at 1242.

[17] *Id.* at 1496-1501, 391 N.E.2d at 1242-44.

ment nisi would become final six months after its entry, thereby absolutely dissolving the marriage, the second judgment would be of no effect because the matter would have been finally adjudged before the second nisi could become final.[18] Thus, unless the first judgment is stayed, the second judgment nisi is a nullity.[19]

The wife argued that a stay of the first judgment would permit her to pursue her pending divorce action.[20] By obtaining a divorce on the grounds of adultery, she contended that she would thus not be characterized as the guilty party and would therefore be entitled to a more favorable alimony award under chapter 208, section 34, which requires a consideration of the "conduct of the parties during the marriage."[21] The Appeals Court dismissed this argument as based on an assumption that did not reflect Massachusetts law.[22] The court observed that even when a complaint for divorce was based solely on fault, alimony was determined not on fault, but rather on finances.[23] The court further observed that chapter 208, section 34, enacted by chapter 565 of the Acts of 1974, was not intended to place any greater emphasis on fault or on who obtained the divorce.[24] It concluded that the wife's attempt to obtain a second judgment based on the husband's infidelity served no legal purpose and was, therefore, not a "sufficient cause" for a stay pursuant to chapter 108, section 21.[25]

The convoluted procedural history of this case can in large part be attributed to the misapprehension on the part of the wife's counsel that there was something to be gained by having the husband found guilty of adultery. The inclusion of "conduct of the parties" within the new alimony and assignment of property statute[26] was apparently the

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[18] *Id.* at 1496, 391 N.E.2d at 1242.

[19] *Id.*

[20] *Id.* at 1497, 391 N.E.2d at 1242.

[21] *Id.* at 1498, 391 N.E.2d at 1242-43. The statute, G.L. c. 208, § 34, provides in part:

> 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 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 value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

[22] 1979 Mass. App. Ct. Adv. Sh. at 1498, 391 N.E.2d at 1243.

[23] *Id.*

[24] *Id.* at 1501, 391 N.E.2d at 1244.

[25] *Id.*

[26] G.L. c. 208, § 34. For the text of this statute, see note 21 *supra.*

basis for this misapprehension. *Singer* is a clear statement to the practitioner that the new statute has not introduced "guilt" as a factor to be considered in alimony and assignment of property cases. As the court pointed out, "conduct of the parties" has many aspects, positive as well as negative, and is not limited to marital fault. Furthermore, conduct is only one of the many factors that the statute requires the court to consider. Practitioners should, therefore, make certain that the court is provided with evidence sufficient to sustain findings in all of the enumerated categories.

§5.4. Divorce—Jurisdiction Over Minor Children Under Chapter 208, Section 29. In *Gil v. Servizio,*[1] the Supreme Judicial Court held that the probate court had jurisdiction over the two minor children of the plaintiff-mother under section 29 of chapter 208 of the General Laws,[2] notwithstanding the fact that the children—who regularly resided in Michigan—had been in Massachusetts for only two days prior to the commencement of the action.[3] The husband and wife in *Gil* were married in Massachusetts in 1969.[4] Two children were born of the marriage.[5] Marital difficulties developed, and the husband subsequently obtained a divorce from a Haitian court.[6] The decree awarded him custody of the children.[7] At the time of the Haitian decree both the parents and the children were domiciliaries and residents of Massachusetts.[8] After obtaining the divorce the husband left Massachusetts with the children.[9] After a year's stay in his native Italy, the husband returned with the children in April 1974 and established residence in Detroit, Michigan.[10] The parties were briefly reconciled in Detroit, but the wife soon returned to Massachusetts.[11] In April 1975, the wife returned to Detroit to see her children and was alarmed

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§5.4. [1] 1978 Mass. Adv. Sh. 1222, 375 N.E.2d 716.

[2] G.L. c. 208, § 29, provides:

If, after a divorce has been adjudged in another jurisdiction, minor children of the marriage are inhabitants of, or residents in this commonwealth, the superior court or probate court for the county in which said minors or any of them are inhabitants or residents, upon an action of either parent or of a next friend in behalf of the children, after notice to both parents, shall have the same power to make judgments relative to their care, custody, education and maintenance, and to revise and alter such judgments or make new judgments, as if the divorce had been adjudged in this commonwealth.

[3] 1978 Mass. Adv. Sh. 1222, 375 N.E.2d 716.

[4] *Id.* at 1223, 375 N.E.2d at 718.

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 1223-24, 375 N.E.2d at 718.

at the condition in which they were living.[12] After an unsuccessful attempt to obtain legal assistance in Detroit, the wife took the children, without the husband's consent, back to Massachusetts.[13]

Two days after the wife arrived in Massachusetts, she petitioned the probate court, pursuant to chapter 208, section 29, for an award of both temporary and permanent custody.[14] The husband entered a special appearance to contest the court's jurisdiction.[15] Temporary custody was first given to the mother and then to the Department of Public Welfare.[16] The judge of probate returned custody of the children to the father.[17] After a full hearing, the probate court granted the husband's motion to dismiss, and the petition was dismissed with prejudice.[18]

Granting the wife's application for direct appellate review, the Supreme Judicial Court noted initially that the children were not inhabitants of Massachusetts.[19] For purposes of chapter 208, section 29, inhabitant is synonymous with "domiciliary."[20] The Court found that the children were domiciled in Michigan, since Michigan was the domicile of the parent who had lawful custody of them.[21] The Court therefore concluded that jurisdiction under section 29 would lie only if the children were found to be residents of Massachusetts.[22] This well-recognized distinction between domicile and residence, which was not directly addressed in the opinion, provided the Court with a firm basis for the meaning which it attributed to the latter under the statute.

In considering the question of the children's residency, the Court discussed the case of *Aufiero v. Aufiero*,[23] which had defined residence as "expected permanence in way of personal presence . . . intended continuance as distinguished from speedy change."[24] Following *Aufiero*, the Court declared that the controlling factor in determining

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[12] *Id.* at 1224, 375 N.E.2d at 718. There was evidence that the daughter, who was three and one-half years old, had a type of venereal disease.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 1224, 375 N.E.2d at 718-19. The husband also filed a complaint in the probate court charging his wife with fraudulently taking the children from his custody. *Id.* at 1224 n.5, 375 N.E.2d at 719 n.5.

[16] *Id.* at 1224, 375 N.E.2d at 719.

[17] *Id.*

[18] *Id.* at 1225, 375 N.E.2d at 719.

[19] *Id.* Neither party challenged the validity of the Haitian decree and the Court therefore assumed it was valid. *Id.*

[20] *Id.* (citing Glass v. Glass, 260 Mass. 562, 565, 157 N.E. 621, 622 (1927)).

[21] *Id.* at 1225-26, 375 N.E.2d at 719.

[22] *Id.* at 1226, 375 N.E.2d at 719. For the text of the statute see note 2 *supra*.

[23] 322 Mass. 149, 123 N.E.2d 709 (1955).

[24] *Id.* at 153, 123 N.E.2d at 711 (quoting from City of Marlborough v. Lynn, 275 Mass. 394, 397, 176 N.E. 214, 215 (1931)).

residence was not the length of time the children spent in Massachusetts prior to the commencement of the suit, but rather the nature of the period spent in the commonwealth.[25] While noting that the children in the instant case had spent only two days in Massachusetts prior to the mother's filing of her petition, the Court stated that "the actions of the plaintiff [the wife] prior to her filing of the custody petition . . . were intended to secure permanent residence of her children in Massachusetts."[26] In the Court's view, the evidence justified a finding that the wife was concerned about the conditions in which the children were living in Detroit and brought the children to Massachusetts "in the hope of providing a better home for them with herself."[27] This intention to make Massachusetts the permanent home of the children, coupled with the children's prior connection to Massachusetts, would be sufficient, the Court ruled, if found as fact by the probate judge, to satisfy a finding of residence notwithstanding the fact that the children were in Massachusetts for only two days before the wife brought her petition.[28]

The Court used a substantive footnote at the end of the opinion as a vehicle for expressing its concern with the problem of "child snatching," a practice it was confident would not be encouraged by its decision in this case.[29] The Court noted the recent trend, exemplified by the Uniform Child Custody Jurisdiction Act, to restrict jurisdiction of courts in custody cases. It considered this decision not contrary to this trend, because this case involved more than mere physical presence in the commonwealth.[30] Thus, the Court concluded that this case presented a proper occasion for a finding of jurisdiction under chapter 208, section 29.

§5.5. Child Custody—Conflict of Laws. In *Doe v. Roe*,[1] the Supreme Judicial Court of Massachusetts considered whether the probate court properly refused to exercise its jurisdiction over a resident unmarried father's custody suit where the child and its mother were residents of New Hampshire. The plaintiff–father and the defendant–mother had been students in the commonwealth in 1977.[2] Their parents resided

[25] 1978 Mass. Adv. Sh. at 1227, 375 N.E.2d at 720.
[26] *Id.*
[27] *Id.* at 1228, 375 N.E.2d at 720.
[28] *Id.* Furthermore, the Court considered it significant that both children were born in Massachusetts and had close relatives in the commonwealth at the time of the suit. In addition, the Court was of the opinion that the presence of both parties before it would insure "an adversary proceeding and a more complete presentation of the important circumstances of the case." *Id.*
[29] *Id.* at 1229 n.11, 375 N.E.2d at 720-21 n.11.
[30] *Id.*

§5.5. [1] 1979 Mass. Adv. Sh. 789, 387 N.E.2d 143.
[2] *Id.*

in New Hampshire.[3] The couple was engaged to be married in the fall of 1977, but in October 1977 the engagement was terminated.[4] In November 1977, the defendant informed the plaintiff that she was seven months pregnant.[5] The plaintiff and defendant remained on friendly terms while the defendant sought prenatal care.[6] A child was born to the defendant on January 27, 1978.[7] Both parties acknowledged the plaintiff's paternity.[8] On February 24, 1978, the child's mother, after informing the plaintiff, took the child to her parent's home in Windham, New Hampshire, where the child remained.[9] When the case was heard, the defendant also resided in New Hampshire.[10] The plaintiff continued to attend a school in Boston, but by agreement he visited the child every other week in New Hampshire.[11]

On March 8, 1978, the plaintiff commenced an action in Suffolk Probate Court to secure custody of the child or, in the alternative, lesser parental rights.[12] In-hand service of summons and complaint was made on the defendant in Boston.[13] The defendant moved to dismiss plaintiff's action on the grounds of lack of jurisdiction over the subject matter.[14] Her motion was granted and plaintiff's complaint was dismissed.[15] Plaintiff's case was granted direct appellate review by the Supreme Judicial Court.[16] While recognizing that the Massachusetts probate court had competency to hear the claims of the unmarried parents concerning the care and custody of their child, as well as sufficient jurisdiction over the defendant to satisfy minimum contacts requirements,[17] the Supreme Judicial Court affirmed the decision of the lower court on the ground that New Hampshire was better situated to hear the case.[18]

At the outset, the Court adopted the approach of the Restatement (Second) of Conflict of Laws.[19] It recognized three alternative grounds

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[3] *Id.* at 789, 387 N.E.2d at 143-44.
[4] *Id.* at 789, 387 N.E.2d at 144.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 789-90, 387 N.E.2d at 144.
[9] *Id.* at 790, 387 N.E.2d at 144.
[10] *Id.*
[11] *Id.* His offer to contribute to the maintenance of the child was refused. *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 793, 387 N.E.2d at 144. *See* Kulko v. California Superior Court, 436 U.S. 84 (1978), and Shaffer v. Heitner, 433 U.S. 186 (1977).
[18] 1979 Mass. Adv. Sh. at 793-94, 387 N.E.2d at 145.
[19] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971). Section 79 provides:

for judicial jurisdiction in custody cases: a) the child's domicile in the state; b) the child's presence in the state; or, c) personal jurisdiction over the contestants.[20] Massachusetts was the state where both parties were present at commencement of the action, and both plaintiff and defendant were subject to the personal jurisdiction of the Massachusetts probate court.[21] Massachusetts was also the birthplace of the child.[22] Recognizing these contacts, the Court acknowledged that the Massachusetts probate court had the power to hear the case.[23] Nevertheless, after balancing the respective interests of Massachusetts and New Hampshire in the controversy, the Court concluded that New Hampshire, the state of the child's domicile, was the preferable forum.[24] New Hampshire was the state where the child was then living with its mother.[25] The Court found that, as a practical matter, the advantage of conducting a lawsuit about the interests of the parents in this child and in producing a sensible and manageable judgment lay with the courts of New Hampshire.[26] The Court considered any inconvenience to the plaintiff, as a Massachusetts resident and student, of attending litigation in New Hampshire, to be outweighed by these other factors.[27]

In rendering its decision, the Supreme Judicial Court disregarded the differences in New Hampshire and Massachusetts law concerning child custody rights and the related effects on the outcome of plaintiff's claim.[28] The Supreme Judicial Court also put to one side the question of possible application of New Hampshire law to a custody action heard by the Massachusetts probate court.[29] In so doing, the Supreme Judicial Court did not consider the effect of any principles of domestic relations law on the parties to the case. The case was classified by the Supreme Judicial Court as a conflicts of laws case rather than a domestic relations case. For the Court, the real issue was not the consequences to the parties concerned of applying Massachusetts law or New Hampshire law in the lawsuit, but rather was whether or not to

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Custody of the Person. A State has power to exercise judicial jurisdiction to determine the custody, or to appoint a guardian, of the person of a child or adult (a) who is domiciled in the state, or (b) who is present in the state, or (c) who is neither domiciled nor present in the state, if the controversy is between two or more persons who are personally subject to the jurisdiction of the state.

[20] 1979 Mass. Adv. Sh. at 791, 387 N.E.2d at 144.
[21] *Id.* at 1327, 389 N.E.2d at 1001-02.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 794, 387 N.E.2d at 145.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.* at 794, 387 N.E.2d at 145-46.
[29] *Id.* at 794, 389 N.E.2d at 146.

take jurisdiction at the outset. The case thus demonstrates the steps involved in interest-weighing and the new trend followed by Massachusetts courts in conflicts litigation.

§5.6. Divorce—Child Support—Support for Incapacitated Adult Children. In *Feinberg v. Diamant* [1] the Supreme Judicial Court was faced for the first time with the issue of whether a divorced parent can be compelled to contribute to the support of his mentally incapacitated adult child, and if so, whether the probate court has jurisdiction to issue such an order.[2]

In *Feinberg*, the retarded child's mother gained custody in a 1958 divorce, and his father was ordered to pay support.[3] The child was institutionalized in 1968 and reached the age of majority in 1974.[4] At that time, his mother obtained an order from the probate court making her a co-guardian, with an attorney, of the child and requiring the father to continue paying $25 per week in support.[5] When the child's father sought to modify the order, a probate judge revoked it, finding that the probate court had not had jurisdiction to make such an order.[6] The guardians appealed to the Appeals Court and the Supreme Judicial Court on its own initiative ordered direct appellate review.[7]

The Court noted that it had never squarely faced the issue of whether a parent has a duty to support an adult child.[8] Following well settled authority, the Court stated that in general there was no such duty.[9] The Court, however, found an exception to this lack of duty in a common law rule requiring a parent who is financially able to support an adult child who is as "helpless and incapable of making his support as is an infant." [10]

The Court specifically declined to say whether it would follow other jurisdictions in limiting the parental obligation only to children who were incapacitated before reaching the age of majority.[11] On the other hand, the Court refused to accept the idea that parents must

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§5.6. [1] 1979 Mass. Adv. Sh. 1321, 389 N.E.2d 998.
[2] *Id.*
[3] *Id.* at 1322, 389 N.E.2d at 998.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 1323, 389 N.E.2d at 998.
[7] *Id.* at 1323, 389 N.E.2d at 999-1000.
[8] *Id.* at 1323, 389 N.E.2d at 1000.
[9] *Id.*
[10] *Id.* at 1325, 389 N.E.2d at 1000 (citing Crain v. Mallone, 130 Ky. 125, 129-30, 113 S.W. 67, 68 (1908)).
[11] 1979 Mass. Adv. Sh. at 1325, 389 N.E.2d at 1001. There was no need for the Court to decide this point since the child in question clearly was incapacitated at his coming of age. *Id.*

provide support for these adult children if they live at home, but not otherwise.[12] This per se rule would be unfair to children who were institutionalized or whose parents were separated or divorced.[13] Although the *Feinberg* case involved divorced parents, it is apparent that the Supreme Judicial Court used the case to formulate a general duty for all parents to support incapacitated adult children. Attempts to limit its scope would probably be unsuccessful.

Turning to the jurisdictional issue, the Supreme Judicial Court found that the probate court had erred in issuing the original support order after the child reached majority.[14] The probate court had made the support order as a modification of the original order in the decree of divorce.[15] The Court rejected the contention that this modification was proper under chapter 208, section 28, which gives the probate court jurisdiction to order support for "minor" children.[16] The Court followed what it found to be a majority of other jurisdictions by interpreting the word "minor" literally. It includes no one over the age of majority, even the handicapped.[17]

Treating the jurisdictional issue as one of first impression,[18] the Court quickly rejected an assertion that chapter 208, section 33, a general grant of jurisdiction in divorce proceedings, allowed the order.[19] It pointed out that section 33 applied to matters arising between husband and wife only, while *Feinberg* involved an issue between parent and child.[20] Thus, the cause of action alleged falls outside the scope of section 33.[21]

The Supreme Judicial Court found that probate courts could order support for an incapacitated adult child under chapter 215, section 3, which gives them jurisdiction over all matters pertaining to guardianships in Massachusetts.[22] The probate court, which issued the post-majority order had, therefore, erred only in making its order as a corollary to the divorce decree. Concluding that affirming revocation

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12 *Id.*
13 *Id.*
14 *Id.* at 1327, 389 N.E.2d at 1001-02.
15 *Id.* at 1327 ,389 N.E.2d at 1001.
16 *Id.* at 1326, 389 N.E.2d at 1001.
17 *Id.*
18 *Id.* The Court noted that in Verdone v. Verdone, 346 Mass. 263, 191 N.E.2d 299 (1963), it had upheld a support decree requiring certain payments to a retarded adult child. In *Verdone,* however, neither party had made jurisdiction an issue. Therefore, the Court concluded that its previous decision was of no precedential value. *Id.*
19 *Id.*
20 *Id.* at 1327, 389 N.E.2d at 1001.
21 *Id.* at 1327, 389 N.E.2d at 1001-02.
22 *Id.* at 1327, 389 N.E.2d at 1002.

would only "be exalting form over substance . . . ," the Court did not find this error sufficient to require a revocation of the support order.[23] The Court, however, did remand the case for consideration of the father's claim that the expenses in the support order were excessive[24] and ordered the lower court to add the retarded son as a party to the petition filed by his mother and her lawyer. The Court reiterated that the probate court would be hearing the matter under its "general equity powers and powers to decide cases involving the guardianships of incompetents."[25]

As a result of *Feinberg*, a parent contemplating an action for support of an incompetent adult child must become a guardian of the child and bring the action separately from any divorce matter. The *Feinberg* Court, however, made no explicit attempt to limit its decision to divorced parents. There is nothing in *Feinberg*, for example, to prevent the legal guardian of an incompetent adult from suing that person's parents for support.

§5.7. Divorce—Condonation—Recrimination. In *Zildjian v. Zildjian*,[1] the Appeals Court considered whether proof of sexual intercourse between the husband and wife subsequent to their separation would, by itself, sustain the defense of condonation.[2] The court also considered whether the statute which abolished the defense of recrimination in divorce actions should be applied retrospectively.[3]

The parties in *Zildjian* were married in December of 1967 and began to experience marital difficulties shortly thereafter.[4] The husband filed a complaint for divorce in October of 1972 alleging cruel and abusive treatment.[5] The wife's answer denied the allegations in the complaint and alleged condonation and recrimination as a defense.[6] The trial judge found that two instances of physical attacks by the wife upon the husband were sufficient to sustain the husband's claim of cruel and abusive treatment.[7] The wife argued that the parties' sexual relations subsequent to the incidents of cruel and abusive treatment required the judge to find that the husband had condoned these incidents.[8] In support of her position, the wife introduced as exhibits twelve hotel and

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[23] *Id.*
[24] *Id.* at 1327-28, 389 N.E.2d at 1002.
[25] *Id.* at 1328, 389 N.E.2d at 1002.

§5.7. [1] 1979 Mass. App. Ct. Adv. Sh. 1337, 391 N.E.2d 697.
[2] *Id.* at 1343, 391 N.E.2d at 701.
[3] *Id.* at 1344-45, 391 N.E.2d at 702.
[4] *Id.* at 1339, 391 N.E.2d at 699.
[5] *Id.* at 1337, 391 N.E.2d at 699.
[6] *Id.* at 1337-38, 391 N.E.2d at 699.
[7] *Id.* at 1341, 391 N.E.2d at 700.
[8] *Id.* at 1342, 391 N.E.2d at 701.

motel registration cards which the trial judge agreed "would give weight" to the wife's testimony of sexual relations at the times and places indicated.[9] Although the judge accepted the wife's testimony and her exhibits, he refused to accept the wife's contention that he was required to find condonation by the husband.[10]

In rejecting the wife's argument, the Appeals Court stated that condonation is a state of mind which is to be determined upon all the evidence, including rational inferences.[11] The court stated that condonation requires a factual determination of an intent to forgive such as would rehabilitate the relationship and transform it into a significant marriage.[12] In the absence of clear error, a trial court's determination will not be disturbed on appeal.[13] On the issue of sexual relations, the Appeals Court observed that even fifty years ago, when sexual relations may have been viewed as more significant, the Supreme Judicial Court, in *Coan v. Coan*,[14] refused to go beyond holding that sexual intercourse "ordinarily implies" condonation.[15] The Appeals Court quoted language from *Littlefield v. Littlefield*,[16] in which the Supreme Judicial Court of Maine stated that "the circumstances under which the sexual activity occurred are relevant to the legal significance of the acts . . ." and that to find that sexual activity per se constitutes forgiveness would be "contrary to human experience."[17]

The Appeals Court quickly disposed of the wife's argument that the probate judge had erred in failing to find that cruel and abusive treatment by the husband constituted a defense of recrimination.[18] The court noted that this defense had been foreclosed by chapter 740 of the Acts of 1973.[19] The court reasoned that the word "entertain" as

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[9] *Id.*

[10] *Id.* at 1342-43, 391 N.E.2d at 700.

[11] *Id.* at 1341-42, 391 N.E.2d at 700. The court, citing an opinion of the Maine Supreme Judicial Court, stated: "Condonation occurs when the injured spouse, with knowledge of the misconduct, undertakes expressly or impliedly to overlook and forgive the wrongs and restores the other spouse unconditionally (or conditionally if there is no recurrence of the bad conduct) to the enjoyment of all marital rights." *Id.* (citing Littlefield v. Littlefield, 292 A.2d 204, 211 (Me. 1972)).

[12] 1979 Mass. App. Ct. Adv. Sh. at 1343, 391 N.E.2d at 700.

[13] *Id.* at 1342, 391 N.E.2d at 700.

[14] 264 Mass. 291, 162 N.E.2d 663 (1928).

[15] 1979 Mass. App. Ct. Adv. Sh. at 1343, 391 N.E.2d at 701.

[16] 292 A.2d 204 (Me. 1972).

[17] *Id.* at 211-12. *See also* Chrisman v. Chrisman, 156 Ind. App. 388, 391, 296 N.E.2d 904, 906 (1973) (refusal to find condonation where parties engaged in sexual relations while divorce proceedings were pending and parties were living apart); Halverson v. Halverson, 365 So.2d 600, 602 (La. App. 1978) ("isolated instances of sexual intercourse do not per se constitute reconciliation").

[18] 1979 Mass. App. Ct. Adv. Sh. at 1344, 391 N.E.2d at 701-02.

[19] G.L. c. 208, § 1, *amended by* Acts of 1973, c. 740, provides in part: "[A] divorce shall be adjudged although both parties have cause, and no defense upon

used in the statute was synonymous with "consider."[20] Thus, the court concluded, the statutory directive prohibiting the judge from entertaining the defense of recrimination was designed to apply at the point of judgment rather than at the point when the defense may have arisen.[21] Therefore, the defense of recrimination was no longer available to the wife at the time of the trial.

The *Zildjian* opinion is a restatement of what has long been the rule in Massachusetts with regard to condonation. The plea of condonation is essentially a claim that the conduct complained of has been forgiven. It thus raises the issue of the intent of the party who is alleged to have condoned the conduct. The practitioner would be well advised to adduce as much evidence as possible on the issue of intent and not rely upon isolated incidents of sexual relations in order to establish a defense of condonation.

§5.8. Annulment—Effect on Tenancy by the Entirety. In *Gleason v. Galvin*,[1] the Supreme Judicial Court considered the effect of an annulment upon rights in real property held by a husband and wife as tenants by the entirety.[2] The defendant-husband in *Gleason*, prior to his marriage to the plaintiff-wife, had purchased a single family house.[3] The defendant made the down payment with his own funds and had made all the mortgage payments.[4] Subsequently, the plaintiff and defendant were married, and the defendant transferred the property to himself and his wife as tenants by the entirety.[5] Six years later, the marriage was annulled.[6] Six years after the annulment the plaintiff filed a petition in the probate court for a partition and sale of the property.[7] The defendant subsequently sought a declaratory judgment as to the rights of each party in the property.[8] A judge of the probate

recrimination shall be entertained by the court." *See also* Inker, McGrath, & Katz, *Abolition of Recrimination As a Defense In Divorce Cases*, 18 BOSTON BAR J. No. 5, at 7 (1974).

[20] 1979 Mass. App. Ct. Adv. Sh. at 1344, 391 N.E.2d at 702.

[21] *Id.* at 1344-45, 391 N.E.2d at 702 (citing Goodwin Bros. Leasing Inc. v. Nousis, 373 Mass. 169, 366 N.E.2d 38 (1977)). The court also quoted Chief Judge Fuld, who observed: "It is worthy of note that the overwhelming weight of authority supports retroactive application of legislative creation or amendment of divorce grounds unless the statutory language employed precludes such a construction." 1979 Mass. App. Ct. Adv. Sh. at 1348, 391 N.E.2d at 703 (citing Gleason v. Gleason, 26 N.Y.2d 28, 36 n.5, 256 N.E.2d 513, 517 n.5, 308 N.Y.S.2d 347, 352 n.5 (1970)).

§5.8. [1] 1978 Mass. Adv. Sh. 597, 373 N.E.2d 357.

[2] *Id.* at 598, 373 N.E.2d at 358.

[3] *Id.* at 597, 373 N.E.2d at 358.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.* at 597-98, 373 N.E.2d at 358.

court allowed the petition for a partition and sale and dismissed the complaint for a declaration of rights.[9]

The defendant appealed from both judgments.[10] He argued that a decree of annulment renders a marriage void ab initio and, thus, no tenancy by the entirety was created.[11] He concluded, therefore, that since the home was his separate property before the marriage, after the annulment it again became his separate property.[12] Thus, the plaintiff could have no interest in the property.

The Court refused to accept the defendant's contention that an annulment, in all cases, serves to make the marriage void ab initio.[13] The Court observed that to say for all purposes that the marriage never existed was "unrealistic."[14] It noted that public policy requires that there be limits to the retroactive effects of an annulment.[15] The better rule, according to the Court, would be to recognize that transactions concluded by parties to a voidable marriage during that marriage ought not to be undone after the decree of annulment has been issued.[16] Following the annulment, however, the parties could not validly hold the property as tenants by the entirety.[17] Rather, the Court ruled that the parties would, following the annulment, hold the property as tenants in common.[18]

After declining to find that the annulment rendered the marriage void for all purposes, the Court rejected the defendant's argument that the equities of the situation compelled an award of the property to him.[19] The Court affirmed the probate court's division of one-half to each of the parties.[20] It stated that the defendant could not challenge the division because he had waited six years from the annulment to file his suit.[21] In addition, the Court noted that there was no evidence indicating that the probate court did not consider the equities of the situation.[22] The

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9 *Id.* at 598, 373 N.E.2d at 358.
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.*
17 *Id. See* Fuss v. Fuss, 373 Mass. 445, 368 N.E.2d 276 (1977).
18 1978 Mass. Adv. Sh. at 598, 373 N.E.2d at 358.
19 *Id.* at 599, 373 N.E.2d at 359.
20 *Id.*
21 *Id.*
22 *Id.* The defendant argued that since he had paid for the property and home and maintained it during the marriage, the probate court was in error to award one half to his former wife. There was no evidence before the Supreme Judicial Court, however, concerning the equities of the plaintiff in the property. *Id.*

Court did, however, reverse the probate court's dismissal of the declaratory judgment complaint, holding that the rights of the parties should have been declared.[23] It modified the lower court decree to provide that the parties hold the property as tenants in common after the annulment.[24]

The *Gleason* decision indicates that even though a subsequent annulment renders a marriage void, the Court will not simply close its eyes to the property rights of the parties that have developed as a result of their relationship. Although technically a marriage did not exist between the parties (as is evidenced by the grant of the annulment), the *Gleason* Court recognized that the ownership interest of the parties in the realty could not similarly be dissolved. The Court limited such dissolution solely to the incidents of marriage and properly let the parties' property rights stand.

§5.9. Divorce—Arbitration Clauses—Retention of Jurisdiction by Probate Court. In *Bloksberg v. Bloksberg*,[1] the Appeals Court held that even though a husband and wife had agreed to submit to arbitration any disputes arising out of their separation agreement and had incorporated the separation agreement into the decree nisi of divorce, the probate court was not precluded from enforcing the alimony or child support provisions of the decree.[2]

The husband and wife were granted a decree nisi of divorce on November 1, 1973.[3] A previously executed separation agreement requiring arbitration of any disputes arising out of the separation agreement[4] and making provision for alimony and child support was incorporated into the decree nisi by reference.[5] In November 1977, the plaintiff-wife brought an action in the probate court seeking to have the defendant-husband found in contempt, alleging that the husband had completely ceased alimony and child support payments as of August 1977.[6] In response, the husband filed a complaint seeking modification of the alimony and child support provisions of the decree and a stay of the contempt and modification actions pending their resolution by arbitration.[7] The probate judge denied the husband's motion

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[23] *Id.* (citing City of Boston v. Massachusetts Bay Transportation Authority, 373 Mass. 819, 370 N.E.2d 1359 (1977)).

[24] 1978 Mass. Adv. Sh. at 599, 373 N.E.2d at 359.

§5.9. [1] 1979 Mass. App. Ct. Adv. Sh. 474, 387 N.E.2d 156.

[2] *Id.* at 476, 387 N.E.2d at 158.

[3] *Id.*

[4] *Id.* at 474 n.1, 387 N.E.2d at 157 n.1.

[5] *Id.* at 474, 387 N.E.2d at 157.

[6] *Id.*

[7] *Id.* at 474, 387 N.E.2d at 157-58.

for stay but reported to the Appeals Court the question of the correctness of such denial.[8]

The Appeals Court held that the judge did not err in denying the husband's motion for stay.[9] In so holding, the court stated that the decree nisi imposed upon the husband alimony and child support payment obligations parallel to those imposed by the separation agreement.[10] The court treated the arbitration clause of the separation agreement, which was incorporated by reference into the decree,[11] as a component of the divorce decree and thus itself subject to modification by the court.[12] The court stated that the wife's contempt action and the husband's complaint for modification were brought pursuant to the husband's obligations under the divorce decree, not the separation agreement.[13] Since the provisions for alimony and child support were to remain in effect "until the further order of the court,"[14] the probate court retained the power to modify or eliminate all provisions, including the provision for arbitration.[15]

In reaching this decision, the court emphasized its concern that the continuing supervisory powers of the probate court not be subverted by the incorporation of an arbitration provision into a divorce decree.[16] The court refrained from discussing whether the enforcement of an arbitration provision like that in the instant case would be proper in view of the judge's denial of the stay.[17] The court strongly suggested, however, that the power of a probate court to govern and regulate the provisions of a divorce decree should not be subject to usurpation or divestment, since this supervisory power had been granted and in fact mandated by statute.[18]

The *Bloksberg* decision reaffirms the position taken by the Supreme Judicial Court in *Ryan v. Ryan*[19] and *Knox v. Remick*,[20] which held

[8] *Id.* at 475, 387 N.E.2d at 158. The ruling was reported to the Appeals Court pursuant to Mass. R. Dom. Rel. P. 64 (1975).

[9] *Id.*

[10] *Id.*

[11] *Id.* See text at note 5 *supra.*

[12] *Id.* at 475, 387 N.E.2d at 158.

[13] *Id.*

[14] *Id.*

[15] *Id.* The probate court has the power to modify obligations imposed under a divorce decree pursuant to c. 208, § 37.

[16] 1979 Mass. App. Ct. Adv. Sh. at 476, 387 N.E.2d at 158. "It follows that the provision for arbitration of disputes, assuming it to have been validly incorporated in the decree nisi, could not have the effect of precluding resort to the Probate Court for enforcement or modification of the alimony and child support provisions of the decree." *Id.*

[17] *Id.*

[18] *Id.* Chapter 208, § 37, grants the probate court the power to revise, modify, or revoke decrees of alimony or child support.

[19] 371 Mass. 430, 358 N.E.2d 431 (1976).

[20] 371 Mass. 433, 358 N.E.2d 432 (1976).

that the power of the probate court to modify and supervise its orders cannot be restricted by agreement between the parties.[21] The practitioner is thus advised that incorporation of an arbitration provision in the settlement of a domestic case may be upheld. Such a provision will not be recognized, however, to the extent that its effect would be to divest the probate court of its supervisory power.

§5.10. Divorce—Contempt. *Binder v. Binder*[1] concerned appeals taken from a judgment of the probate court reducing a former husband's alimony obligations under a divorce decree and from a subsequent judgment of the superior court concerning the former wife's contract action on a separation agreement which, although incorporated in the divorce decree, provided that the agreement would survive the decree.[2] The Appeals Court held with respect to the probate court judgment that the evidence of changed circumstances of the former husband was insufficient to warrant a modification of the alimony provisions in the divorce decree.[3] It also ruled that a contempt proceeding in probate court did not bar a subsequent contract action in superior court for arrearages under the separation agreement.[4]

In March 1972, the parties entered into a marital separation agreement by which the husband, a surgeon, agreed to pay the wife $300 per week for her support, so long as she did not remarry, and $75,000 as a property settlement to be funded in part with proceeds of the sale of the marital home and the balance by installments of $100 per week.[5] One clause of the separation agreement provided that the parties should attempt to have the agreement incorporated into any divorce decree, but that, whether incorporated or not, the agreement would survive such a decree.[6] A decree of divorce nisi was entered on March 27, 1972, by the probate court.[7] This decree incorporated the agreement by reference, thereby in effect ordering alimony in the amounts specified in the agreement.[8]

On December 1, 1975, the former wife filed two complaints for contempt in the probate court, alleging that the husband was in arrears

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[21] *Id.* at 436, 358 N.E.2d at 435; 371 Mass. at 432, 358 N.E.2d at 432. For a full discussion of *Ryan* and *Knox*, *see* Inker, Perocchi, & Walsh, Domestic Relations, 1977 ANN. SURV. MASS. LAW § 1.1, at 3-7.

§5.10. [1] 1979 Mass. App. Ct. Adv. Sh. 1214, 390 N.E.2d 260.
[2] *Id.* at 1215-16, 390 N.E.2d at 262-63.
[3] *Id.* at 1219, 390 N.E.2d at 264.
[4] *Id.* at 1223, 390 N.E.2d at 266.
[5] *Id.* at 1214, 390 N.E.2d at 262.
[6] *Id.* at 1214-15, 390 N.E.2d at 262.
[7] *Id.* at 1215, 390 N.E.2d at 262.
[8] *Id.*

in his payments.[9] The husband filed a complaint for modification of his obligations under the divorce decree on December 8, 1976.[10] At a hearing on these three complaints, the parties agreed that the arrearages totalled $20,000.[11] Evidence was presented and accepted by the probate judge that the husband's earning capacity as a surgeon had become impaired by a progressive, "osteoarthritic" condition affecting his knees and back, making surgery increasingly difficult for him.[12]

The judge found that the husband had remarried and maintained an extravagant lifestyle with his second wife.[13] He also found that the plaintiff first wife, by adopting a very conservative lifestyle, had accumulated some $80,000.[14] The probate judge concluded that the payments called for by the divorce decree were "unrealistically high."[15] He entered a judgment determining that arrearages were $20,600 as of January 5, 1977, and ordering that they be paid off at a rate of $50.00 per week until they and any additional arrearages to the date of judgment should be paid in full.[16] He also modified the divorce decree by reducing the weekly support provision from $300 to $200 per week and by eliminating the requirement of further compliance with the property settlement provision other than payment of arrearages to the date of judgment on the timetable stated.[17] The probate judge explicitly stated, both in his findings and judgment, that he was modifying only the obligations imposed by the divorce decree and not the previously identical obligations imposed by the separation agreement.[18]

The first wife filed an appeal from the judgment entered in the probate court on the contempt and modification complaints.[19] She also filed a contract action in superior court to recover the $20,600 arrearages.[20] The husband answered that the judgment entered in the probate court in the wife's action to recover the same arrearages operated either as res judicata or as a prior binding action to bar the superior court action.[21] This contention was overruled, and the husband appealed from the ensuing judgment entered for the former wife for the arrearages.[22] The former wife's appeal from the probate court judgment and

9 *Id.*
10 *Id.*
11 *Id.*
12 *Id.*
13 *Id.*
14 *Id.*
15 *Id.*
16 *Id.* at 1215-16, 390 N.E.2d at 262.
17 *Id.* at 1216, 390 N.E.2d at 262.
18 *Id.*
19 *Id.*
20 *Id.*
21 *Id.*
22 *Id.*

the husband's appeal from the superior court judgment were consolidated for argument in the Appeals Court.[23]

The Appeals Court, noting that all questions of fact, law, and discretion are open to review, reversed the judge's findings and agreed with the wife's contention that the husband had failed to establish changed circumstances sufficient to justify modifying the divorce decree.[24] The court stated that the husband's tax returns for 1972, 1973, 1974, and 1975 showed an increase rather than a decrease in income.[25] The court reasoned that the evidence indicated at best only a decline in the husband's earning potential but not in his actual earnings.[26] No other evidence respecting the husband's change of circumstances affecting arrearage up to January 5, 1977, was shown. Nor was there any indication of relevant changes in the former wife's circumstances.[27] The Appeals Court accordingly reversed the judgment of the probate court and remanded the contempt and modification cases to the probate court for further preceedings.

The superior court judgment for the arrearages up to January 5, 1977, was based on the principle that the parties to a separation agreement may provide therein that the support provisions shall survive a subsequently entered divorce judgment, whether incorporated therein or not.[28] In such a case, "the agreement remains valid and may still be enforced by action at law after the [judgment]."[29] The husband disagreed with the superior court's application of this principle. He conceded that his former wife could recover in a contract action the difference between, for example, the $200 weekly support payment called for by the modified divorce decree and the $300 weekly support payment provided for by the separation agreement.[30] He contended, however, that recovery should be confined to the time period commencing with the judgment of modification.[31] That judgment, he contended, should be regarded as a prior adjudication of the arrearages, binding on the parties. Alternatively, should that judgment be reopened on appeal, the judgment should be viewed as a prior pending action between the same parties involving the same cause of action, thus indicating dis-

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[23] *Id.* at 1216, 390 N.E.2d at 262-63.
[24] *Id.* at 1218-19, 390 N.E.2d at 263-64.
[25] *Id.* at 1218, 390 N.E.2d at 263.
[26] *Id.* at 1218, 390 N.E.2d at 263-64.
[27] *Id.* at 1219, 390 N.E.2d at 264.
[28] *Id.* at 1220, 390 N.E.2d at 264.
[29] *Id.* (citing Schillander v. Schillander, 307 Mass. 96, 98, 29 N.E.2d 686, 687 (1942)).
[30] 1979 Mass. App. Ct. Adv. Sh. at 1222, 390 N.E.2d at 265.
[31] *Id.*

missal of the later action in favor of the earlier one.[32] He argued that his former wife's claim for the $20,600 arrearages owed as of January 5, 1977, was a single cause of action and that she was not entitled to pursue that claim for the same $20,600 arrearages in two separate actions in two different courts.[33]

The Appeals Court concluded that the separation agreement could not operate as a potential bar to such a modification. The court stated that "the modification may cause the alimony obligation imposed by the judgment to be different from that agreed to by the parties, but the obligations are not inconsistent or incompatible, each being capable of enforcement without infringing upon the other."[34] Furthermore, the probate court, having only jurisdiction conferred by statute, has no authority to hear civil actions for simple contract damages.[35] Thus, the court concluded, because the claims are enforceable only by separate proceedings in different courts and because the law does not require a plaintiff to make an election between these claims, the wife could enforce her rights under both the divorce judgment and under the separation agreement.[36]

The Appeals Court stated further that a claim for arrearages under a divorce judgment and a claim for arrearages under the separation agreement are too dissimilar to treat as the same cause of action.[37] The arrearages under the agreement are definite in amount, and, if the agreement is enforceable at all, the party to whom the arrearages are owed is entitled as a matter of law to recover the full amount in arrears.[38] Rights under a divorce judgment are ephemeral in that the judgment can be revised downward at any time.[39] The probate court could reduce the alimony provisions retroactively as well as prospectively and could do so on a complaint for enforcement by contempt, even where no complaint for modification was before the court.[40]

The Appeals Court then rejected the husband's contention that if his former wife could seek arrearages in superior court after having done so in probate court, her superior court claim must be confined to the

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[32] *Id.*

[33] *Id.*

[34] *Id.* at 1223, 390 N.E.2d at 265.

[35] *Id.* at 1223, 390 N.E.2d at 266. *See* Charney v. Charney, 316 Mass. 580, 582-83, 55 N.E.2d 917, 919 (1944).

[36] 1979 Mass. App. Ct. Adv. Sh. at 1223, 390 N.E.2d at 266.

[37] *Id.* at 1224, 390 N.E.2d at 266.

[38] *Id.*

[39] *Id.* (citing Metcalf v. Commissioner, 271 F.2d 288, 292 (1st Cir. 1959)).

[40] 1979 Mass. App. Ct. Adv. Sh. at 1224, 390 N.E.2d at 266 (citing Bloksberg v. Bloksberg, 1979 Mass. App. Ct. Adv. Sh. 474, 475-76, 387 N.E.2d 156, 158; Cohen v. Murphy, 368 Mass. 144, 147, 330 N.E.2d 473, 475 (1975); Watts v. Watts, 314 Mass. 129, 133, 49 N.E.2d 609, 612 (1943)).

difference between the alimony called for in the separation agreement and that ordered by the probate judgment.[41] The probate judgment, the court noted, was not one for $20,600, but rather a judgment for $50 per week until $20,600 should have been paid.[42] It thus constituted in legal effect a retroactive modification in the arrearages due under the divorce decree.[43] The Appeals Court stated further that the former wife was entitled at all times, regardless of proceedings in the probate court, to enforce the divorce decree or to bring a civil action in the superior court for the difference between the amount the agreement required to have been paid and the amount which had in fact been paid toward that obligation.[44] In affirming the judgment of the superior court the Appeals Court required that whatever amounts were recovered in enforcement of the superior court judgment must be credited toward the husband's alimony obligation under the probate decree.[45] In turn, whatever amounts were paid pursuant to a final judgment in the contempt proceeding in the probate court must be credited toward satisfaction of the superior court judgment.[46] In this way, the spectre of double recovery could be avoided.[47]

The issues presented in this case are not those of first impression. The significance of the case lies in the way the court applied existing law to the facts of the case. The case illustrates the proposition that in domestic relations cases the provisions of a valid separation agreement remain in effect and may still be enforced in a contract action in superior court after a final judgment of divorce had been entered.

§5.11 Foreign Divorce—Validity. In *Colarusso v. Teacher's Retirement Board,*[1] the Supreme Judicial Court considered whether a wife who did not appear or in any way participate in a foreign divorce proceeding instituted by her husband could attack the validity of such decree.[2] The Court also considered whether the husband's lack of domicile in the foreign state rendered the foreign court without jurisdiction to grant such divorce.[3]

The parties in *Colarusso* were married in 1935 and lived together as husband and wife in Massachusetts.[4] At some time the husband began

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41 1979 Mass. App. Ct. Adv. Sh. at 1225, 390 N.E.2d at 266.
42 *Id.*
43 *Id.*
44 *Id.* at 1225, 390 N.E.2d at 266-67.
45 *Id.* at 1225, 390 N.E.2d at 267.
46 *Id.* at 1226, 390 N.E.2d at 267.
47 *Id.*

§5.11. 1 1979 Mass. Adv. Sh. 1747, 392, N.E.2d 844.
2 *Id.* at 1749, 392 N.E.2d at 846.
3 *Id.* at 1750-51, 392 N.E.2d at 846.
4 *Id.* at 1748, 392 N.E.2d at 845.

to live with another woman (Frieda); he ceased living with his wife (Marie) after 1962.[5] After an unsuccessful attempt in 1965 to obtain a divorce in Massachusetts from Marie,[6] the husband went to Reno, Nevada, in July 1972.[7] On October 3, 1972, the husband sought and obtained a decree of divorce from Marie.[8] The husband married Frieda that same day, and a few days later they returned to Massachusetts where he resumed his employment as a music teacher.[9]

The Nevada divorce decree stated that Marie was duly served with summons, that she failed to appear and default was entered, and that testimony of the husband was received.[10] The Nevada court found, among other things, that the husband was a bona fide resident of Nevada and had lived apart from his wife for more than a year prior to his filing of the divorce action.[11] Marie denied having ever received notice of the proceedings and maintained that she did not know of the divorce until the husband and Frieda returned to Massachusetts.[12]

The husband died in 1974, and both Frieda and Marie claimed certain retirement benefits as his surviving spouse.[13] Frieda sued the Retirement Board (the defendant in this action) for the surviving spouse benefits, and the board impleaded Marie and the two adult children of her marriage to the husband.[14] The superior court judge ruled that the Nevada divorce was invalid under section 39 of chapter 208[15] and concluded that Marie was the lawful spouse.[16] Frieda appealed, and the case was transferred to the Supreme Judicial Court on its own initiative.[17]

The Supreme Judicial Court affirmed the trial court's decision but held that its reliance on chapter 208, section 39, which denies the

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[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 1749, 392 N.E.2d at 845.
[13] *Id.* at 1747, 392 N.E.2d at 845.
[14] *Id.* at 1748, 392 N.E.2d at 845.
[15] G.L. c. 208, § 39, *as amended by* Acts of 1975, c. 400, § 39, provides:
A divorce adjudged in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another jurisdiction to obtain a divorce for a cause occurring here while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth.
[16] 1979 Mass. Adv. Sh. at 1747, 392 N.E.2d at 845. He did so pursuant to G.L. c. 32 § 12(2), *Option (d)*.
[17] 1979 Mass. Adv. Sh. at 1748, 392 N.E.2d at 845.

validity of a divorce granted in another jurisdiction for a cause of action arising within the commonwealth,[18] as grounds for invalidating the Nevada divorce was misplaced.[19] The Court concluded that the Nevada decree was invalid for lack of jurisdiction; therefore, the section 39 ruling was unnecessary.[20] The Court ruled that because Marie did not appear or in any way participate in the Nevada proceedings, she could attack the validity of the divorce decree.[21] In particular, it noted that since jurisdiction of the Nevada court was based upon the husband's domicile in that state, Marie was free to challenge that jurisdiction on the ground that the domicile requirement was not met.[22]

The Supreme Judicial Court, examining the evidence before it,[23] found that the facts surrounding the husband's divorce from Marie and his subsequent marriage to Frieda clearly indicated that he never acquired domicile in Nevada.[24] The Court noted that the husband had lived in Massachusetts for thirty-seven years before his sojourn to Nevada.[25] He and Frieda remained in Nevada for less than three months.[26] As soon as his divorce was granted, he married Frieda in Nevada and returned to Massachusetts.[27] On this basis, the Court concluded that since the husband lacked domicile in Nevada, the Nevada court lacked jurisidiction to grant him a divorce.[28]

The *Colarusso* decision reaffirms the Massachusetts position of not recognizing the validity of ex-parte divorce where the jurisdiction of the forum granting the divorce is later challenged. A decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact.[29] Although full faith and credit is usually given to a sister state's finding of proper jurisdiction to grant a divorce, the domiciliary forum may

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18 See note 15 *supra.*

19 1979 Mass. Adv. Sh. at 1749, 392 N.E.2d at 846. The judge found the Nevada divorce invalid under c. 208, § 39, because it was granted for a cause of action that had accrued in Massachusetts and because Nevada never had jurisdiction over both the husband and Marie. *Id.*

20 *Id.*

21 *Id.* (citing Heard v. Heard, 323 Mass. 357, 363, 82 N.E.2d 219, 223 (1948)).

22 1979 Mass. Adv. Sh. at 1749-50, 392 N.E.2d at 846.

23 1979 Mass. Adv. Sh. at 1750, 392 N.E.2d at 846. The Court stated, "We accept the judge's findings unless they are clearly erroneous, but we have the evidence before us and may find facts in addition to those found by him." *Id.* (citing Nickerson v. Fiduciary Trust Co., 1978 Mass. App. Ct. Adv. Sh. 512, 513, 375 N.E.2d 357, 358).

24 1979 Mass. Adv. Sh. at 1751, 392 N.E.2d at 846.

25 *Id.* at 1750, 392 N.E.2d at 846.

26 *Id.*

27 *Id.*

28 *Id.* at 1751, 392 N.E.2d at 846.

29 *See* Williams v. North Carolina, 325 U.S. 226 (1945), and its progeny.

always relitigate the jurisdictional issue.[30] The practitioner would be ill advised to encourage a client to seek an ex parte foreign divorce, as its validity will be open to challenge at a subsequent date by the absent spouse.[31] Furthermore, the practitioner should be aware that this issue will continue to arise in the commonwealth as the popularity of Haitian and Dominican Republic divorces grows.

§5.12. Contempt—Assets v. Income Approach to Determination of Solvency. In *Krokyn v. Krokyn*[1] the Supreme Judicial Court, in a crucial decision, held that a husband's ability to pay alimony arrearages to his first wife could be determined on the basis of his ownership interest in property held by him and his present wife as tenants by the entirety.[2] In *Krokyn*, the Supreme Judicial Court shifted the analysis of ability to pay in alimony contempt cases from the husband's current income to his present ownership of capital assets, or his net worth, regardless of whether such property could in fact be reached by his creditors.

The parties in this case were divorced by a decree which became final on June 30, 1970.[3] The divorce decree incorporated a separation agreement, which required the husband to pay a lump sum of $1992.00 to the wife.[4] It further required the husband to pay the wife the sum of $75.00 per week for her support, in biweekly installments, until the happening of certain specified events.[5] The husband made the weekly payments for several years but ceased making them in September 1975.[6] On April 20, 1976, the wife filed a contempt petition.[7]

Evidence presented at the contempt hearing showed that the husband was an architect employed by a corporation of which he was the president and the only stockholder.[8] His income, derived primarily from "management fees" paid by the corporation, was approximately

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[30] The divorce decree is still valid in Nevada. A divorce that is not entitled to full faith and credit in one forum may nevertheless have satisfied due process requirements and remain valid in the state of rendition.

[31] The ex-parte foreign divorce may have further ramifications. It may affect who may claim as a "surviving spouse" (as in the instant case), areas involved in probate law, and even the issue of criminal sanctions for bigamy.

§5.12. [1] 1979 Mass. Adv. Sh. 1417, 390 N.E.2d 733.

[2] *Id.* at 1422-23, 390 N.E.2d at 736.

[3] *Id.* at 1417, 390 N.E.2d at 734.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 1418, 390 N.E.2d at 734.

[7] *Id.* After the wife filed her contempt petition the husband sought a modification of the original decree, and the judge received evidence on that issue. The judge took the question of modification under advisement. The record does not show what ruling, if any, was made thereon. *Id.* at 1419 n.4, 390 N.E.2d at 734-35 n.4.

[8] *Id.* at 1420, 390 N.E.2d at 735.

$13,000 in 1973, $18,000 in 1974 and $17,000 in 1975.[9] He received no income in 1976.[10] The corporation had recently been operating at a loss, relying on loans made by the second wife and various banks in order to pay its creditors.[11] The only significant asset available to the husband at the time the probate court order was entered was the house owned by the husband and his second wife as tenants by the entirety.[12] The wife had supplied most of the funds needed to purchase and remodel the house.[13] The house was worth between $140,000 and $200,000 at the time of the hearing and was encumbered by a $70,000 mortgage.[14] Approximately $25,000 of the proceeds of the new mortgage loan had been used to pay the husband's business debts.[15]

The probate judge found the husband in arrears in the amount of $5,949.50.[16] He concluded that the husband "at all times possessed, and still possesses, the ability to make the support payments called for in the agreement incorporated into the divorce decree, being the owner of a ½ interest in real estate having a present equity of at least $70,000."[17] The probate judge found the husband in civil contempt and sentenced him to ten days' imprisonment. The husband appealed, and the Supreme Judicial Court ordered the case transferred to it on its own motion.[18]

The sole question considered on appeal was whether the husband's interest in the house was sufficient to warrant a finding that he had the present ability to pay the arrearages in his support payments to his first wife at the time he was found in contempt.[19] Notwithstanding its recognition of the unique character and incidents of a tenancy by the entirety, the Court held that an ex-husband's capital assets, including those held in tenancy by the entirety with his second wife, may be considered in addition to income in evaluating his ability to purge his contempt.[20] Despite the equality of interest shared by husband and wife in a tenancy by the entirety, the Court noted that the weight of the law accorded the husband the exclusive right to possession and

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 1421, 390 N.E.2d at 735.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 1418, 390 N.E.2d at 734.
[17] *Id.*
[18] *Id.* at 1418-19, 390 N.E.2d at 734.
[19] *Id.* at 1423, 390 N.E.2d at 736.
[20] *Id.* at 1422, 390 N.E.2d at 736, (citing Kay v. Kay, 37 N.Y.2d 632, 636, 339 N.E.2d 143, 146, 376 N.Y.S.2d 443, 446-47 (1975); Firestone v. Firestone, 263 So. 2d 223, 226 (Fla. 1972)).

income during the joint lives.[21] He could sell the property, subject always to the wife's expectancy of full title should she outlive her husband.[22] His sole creditor could levy on that interest to satisfy his debts. In contrast, the wife's mere expectancy of title was neither alienable nor subject to execution by her sole creditors.[23] Thus, despite the lack of evidence at trial of the value of the husband's interest in the house, the Court considered the presumptive value of his interest in the property sufficient to demonstrate his ability to pay, even though his second wife's cooperation would be required in order for the husband to liquidate his holding.[24] The Court found support for its position in other jurisdictions,[25] whose decisions were based primarily on the ground that contempt remedy did not implicate the rights of any class of creditor to attach particular property.[26] Thus, the Court concluded that ownership of property held in a tenancy by the entirety could be considered in determining the husband's ability to pay his arrearages.

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[21] *Id.* at 1423, 390 N.E.2d at 736 (citing Voigt v. Voigt, 252 Mass. 582, 583, 147 N.E. 887, 887 (1925)). It should be noted that this decision was handed down before the statutory reform of the tenancy by the entirety which took effect on January 1, 1980. Acts of 1979, c. 727 amends G.L. c. 209 by striking section 1 and substituting the following new section 1:

> The real and personal property of any person shall, upon marriage, remain the separate property of such person, and a married person may receive, receipt for, hold, manage and dispose of property, real and personal, in the same manner as if such person were sole. A husband and wife shall be equally entitled to the rents, products, income or profits and to the control, management and possession of property held by them as tenants by the entirety.
>
> The interest of a debtor spouse in property held as tenants by the entirety shall not be subject to seizure or execution by a creditor of such debtor spouse so long as such property is the principal residence of the nondebtor spouse; provided, however, both spouses shall be liable jointly or severally for debts incurred on account of necessaries furnished to either spouse or to a member of their family.

The statute as amended renders the rights of husband and wife substantially equivalent with respect to property held in tenancy by the entirety. Of particular importance in predicting the precedential value of the *Krokyn* opinion is the explicit legislative pronouncement, in the second paragraph of c. 209, § 1, that creditors cannot reach the interest of a debtor spouse in property held by the entirety if that property is the principal residence of the nondebtor spouse. This might seem to prevent the courts, in cases arising after the effective date of the statute, from taking property held by the entirety into account in evaluating the ability of one of the spouses to satisfy alimony arrearages. The Court, however, expressly distinguishes between the determination of ability to pay as evidenced by ownership of a valuable asset and the question of whether payment can be enforced directly against that asset. 1979 Mass. Adv. Sh. at 1427, 390 N.E.2d at 737. Thus it seems at least theoretically possible that even if payment could not ultimately be enforced against a particular asset, it could nevertheless, under *Krokyn*, be considered in evaluating ability to pay.

[22] 1979 Mass. Adv. Sh. at 1423, 390 N.E.2d at 736.

[23] *Id.* (citing Licker v. Gluskin, 265 Mass. 403, 407, 164 N.E. 613, 615 (1929)).

[24] *Id.*

[25] *Id.* at 1424-26, 390 N.E.2d at 736-37.

[26] 1979 Mass. Adv. Sh. at 1426, 390 N.E.2d at 737.

The Court also observed that not only precedent but also common sense and basic concepts of fairness supported the notion that ownership of a valuable asset demonstrated ability to pay without further inquiry as to whether payment could be enforced against the asset.[27] It found no error for the probate court to exert reasonable pressure, including an adjudication of contempt, to encourage the husband "to exercise ingenuity in managing his affairs so as to fulfill his paramount support obligations." [28] It noted that neither the court nor the aggrieved party obligee should be required to map in detail the method by which the husband should transform an asset into cash.[29] The Court noted the general principle that "[t]he law does not require that an obligor be allowed to enjoy an asset—such as a valuable home or the beneficial interest in a spend-thrift trust—while he neglects to provide for those persons whom he is legally required to support." [30] Thus, the Court, concluding that both reason and precedent justified treating the ownership of assets as relevant evidence of ability to pay, remanded the case to the probate court for further proceedings.

The Supreme Judicial Court's adoption of the approach emphasizing a contemner solvency and not his ability to reach his assets raises several serious policy considerations for a number of reasons. First, by so ruling, the Supreme Judicial Court may have sidestepped the constitutional prerequisite for incarceration by civil process, the present ability of the contemner to release himself from prison by compliance with a court order. Second, the decision ultimately may affect the rights of second wives in property held as tenants by the entirety despite its intention to abstain from that result.[31] Finally, the Court has fashioned a decision that may in fact provide a relief for the plaintiff's ex-spouse.[32]

It appears from this case that the contemner may be imprisoned to coerce payment not only out of present income or assets but also when his net worth is equal to or greater than his debts, regardless of whether the property may be reached by the creditors. Ordinarily, in domestic relations cases, a person held in civil contempt for non-payment of

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[27] *Id.* at 1427, 390 N.E.2d at 737.

[28] *Id.*

[29] *Id.* at 1427, 390 N.E.2d at 737-38.

[30] *Id.* at 1427, 390 N.E.2d at 738.

[31] As the second wife was not a party in the litigation, the Supreme Judicial Court did not consider her rights in the property held as tenants by the entirety. Therefore, it declined to express an opinion on the merits of the husband's argument relative to the effect, if any, of the Equal Rights Amendment on the rule giving a husband a greater possessory interest in property held by the entireties. *Id.* at 1430, 390 N.E.2d at 739.

[32] *See* 14 SUFF. U. L. REV. 79 (1980).

arrearages may not be imprisoned unless the court finds the contemner is presently able to pay the arrearage and yet wilfully refuses to obey the court's order. In *Krokyn,* however, the Supreme Judicial Court in effect has created a new substandard for incarceration for civil contempt. As a result, absent a present ability to purge contempt by complying with a court order, imprisonment of a civil contemner loses its intended remedial purpose and becomes unconstitutionally punitive.[33]

When the contemner's only available asset is an interest in land held by tenants by the entirety, the nature of that ownership should be crucial to the question of one's ability to pay. At the time of this case, the Supreme Judicial Court may have vitiated the common law elements of a tenancy by the entirety. The rights of the second wife may in fact ultimately be affected. Alienation by either the husband or the wife of property held in a common law tenancy by the entirety will not defeat the right of the survivor to the entire estate on the death of the other. There can be no severance of such estate by the other and no partition during their joint lives. The survivor becomes seized as sole owner of the whole estate regardless of anything the other may have done. Thus, without the wife's consent, her survivorship interest cannot be destroyed or dislodged from the entirety.[34] Yet, the *Krokyn* decision left open the question of how the defendant could purge contempt without the second wife's cooperation. The Court also failed to comment on the effect of the *Krokyn* decision on the rights of the second wife in such property should the husband be forced to sell it, even though she may have contributed a significant amount to purchase and/or remodel that property.

In aligning itself with the minority position of *Howard v. Howard,*[35] which determines the ability to pay in terms of all property held by the defendant, regardless of whether it may be reached by creditors, the Supreme Judicial Court had disclaimed the relevancy of the plaintiff's access to the defendant's interest in the tenancy by the entirety. If circumstances should arise where the second wife refuses to cooperate in the sale of the asset held in a tenancy by the entirety, the first wife would have difficulty acquiring the amount of any arrearage. In holding that whether an asset may be reached by the defendant's creditors is irrelevant, the Court has afforded to the plaintiff relief which is questionable at best.[36] In some jurisdictions, the extent of a defendant's access to an asset, not that of a creditor's access, is dispositive of a

[33] *Id.* at 81.

[34] *See* Bernatavicius v. Bernatavicius, 259 Mass. 486, 487, 156 N.E. 685, 686 (1927) and cases cited.

[35] 130 So. 2d 83 (Fla. App. 1961), *cert. denied,* 133 So. 2d 646 (Fla. 1961).

[36] *See* 14 SUFFOLK U.L. REV. 79, 91 (1980).

defendant's ability to pay. This same principle should apply with equal force to contempt proceedings in domestic relations cases.[37]

The policy implications of the *Krokyn* decision will not be so serious if the holding is construed very narrowly. In *Krokyn,* the husband did not notify the probate court of the decline in his income before he ceased making the alimony payments. He did not file his complaint for modification until after the filing of his ex-wife's complaint for contempt. Yet the court did not assess any arrearages after the husband's complaint was filed, seemingly allowing his complaint for modification from the date it was filed. Thus, if the husband had made a timely filing of his complaint for modification, it would, in all likelihood, have been allowed. Thus, if future defendants make timely notice of any changes in their economic situations, they may be absolved of their arrearages rather than be forced to comply with a court order by selling their assets. Therefore, timely notification to the probate court of a change in circumstances could avoid the harsh effects of the *Krokyn* decision.

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[37] *Id.* at 87. This commentator has criticized the *Krokyn* Court for its indifference to alternate solutions. Possible alternate solutions proposed for discharging the husband's obligations have been: parole work programs, installment arrangements, or actual execution against the husband's property interest. *Id.* at 93.