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Chapter 8: Domestic Relations

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CHAPTER 8

Domestic Relations

SURVEY Staff†

§ **8.1. Survival Of Actions For Accrued Alimony.*** When a spouse fails to make the alimony payments required by a divorce judgment,[1] the obligee spouse may sue in probate court for the unpaid amount.[2] A suit for accrued alimony may be brought against the obligor spouse[3] or, in the event of the obligor spouse's death, his[4] estate.[5] In *Spiliotis v. Campbell,*[6] the Massachusetts Appeals Court addressed two questions regarding the survival of such actions. First, the court considered whether the defense of laches can bar an action for support arrears.[7] Second, the issue of whether such an action survives the death of the obligee spouse was addressed.[8] The *Spiliotis* court virtually eliminated the defense of laches in arrearages actions and held that the death of the obligee spouse does not abate the claim for arrears.

Concetta Spiliotis was the former wife of Phillip Spiliotis.[9] The couple

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§ 8.1. [1] The probate courts have the power to award judgments to pay alimony upon divorce or upon motion after divorce pursuant to G.L. c. 208, § 34.

[2] G.L. c. 208, § 34 gives authority to the probate courts to enforce alimony decrees in the same manner as they enforce judgments in equity. It has long been recognized that equity courts may award accrued alimony under state divorce decrees. *See* Barber v. Barber, 62 U.S. (21 How.) 582, 591 (1858).

[3] *See, e.g.,* Bullock v. Zeiders, 1981 Mass. App. Ct. Adv. Sh. 1870, 428 N.E.2d 311.

[4] The use of the term "his" is not meant to imply that only a husband may be ordered to pay alimony to his wife, and that a wife may never be ordered to pay alimony to her husband. Prior to 1974, G.L. c. 208, § 34 allowed a probate court to decree "alimony" to a wife and part of a wife's estate "in the nature of alimony" to a husband. *Id.* Historically, as a result, most nonpayment cases were brought by wives. *See* J. LOMBARD, FAMILY LAW, 2A MASS. PRACTICE SERIES § 2073, at 660-61 (1967). G.L. c. 208, § 34, as amended in 1974, allows a probate court to order either party to pay alimony to the other. *Id.* Thus, the use of the term "his estate" encompasses the estates of both wives and husbands under a duty to pay alimony.

[5] *See, e.g.,* Knapp v. Knapp, 134 Mass. 353, 357 (1883).

[6] 13 Mass. App. Ct. 189, 431 N.E.2d. 591 (1982).

[7] *Id.* at 190, 431 N.E.2d at 592.

[8] *Id.* at 190-93, 431 N.E.2d at 592-94.

[9] *Id.* at 189, 431 N.E.2d at 592.

was divorced on January 26, 1967, and the divorce decree mandated that Phillip pay support to Concetta and their son Nicholas.[10] Concetta died on April 5, 1970, and Phillip died on August 27, 1979, without having paid any of the support ordered in the divorce decree.[11] On April 4, 1980, the administratrix of Concetta Spiliotis' estate and Nicholas Spiliotis brought suit in probate court against the estate of Phillip Spiliotis to recover arrears in support.[12] The executrix of Phillip Spiliotis' estate filed a motion to dismiss.[13] The probate judge ruled that the complaint did state claims against Phillip Spiliotis' estate, but dismissed the action on the ground of laches.[14]

The Appeals Court reversed the probate court's decision.[15] The court stated that the complaint should not have been dismissed based on a defense of laches.[16] The court noted that a defense of laches requires not only a showing of delay, but also of prejudice to the defendant resulting from the delay.[17] Because the requisite prejudice was not apparent from the face of the complaint,[18] the court held that the probate court's dismissal of the action was erroneous.[19]

After concluding that the defense of laches was improperly sustained in the case before it, the Appeals Court discussed the propriety of a laches defense in any claim for support arrearages.[20] The court commented that in cases such as the one at bar where there has been a delay in suing for arrearages, "the authorities do not treat the matter as one of laches."[21]

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[10] *Id.* Specifically, the decree ordered that Phillip pay alimony, child support, school tuition and books.

[11] *Id.*

[12] *Id.* The suit was brought against Veann C. Campbell, the executrix of Phillip Spiliotis' estate. *Id.*

[13] *Id.* Defendant's motion to dismiss was based on Mass. R. Dom. Rel. P. 12(b)(6) for failure to state a claim upon which relief may be granted. *Id.* While not stating so directly, the opinion suggests that the defendant's motion to dismiss was based not only on a theory that Concetta Spiliotis' death barred an action to collect arrears, but also on a defense of laches. An affirmative defense may be raised in a motion to dismiss so long as the defects upon which the defenses are based appear on the face of the complaint. J.R. NOLAN, CIVIL PRACTICE, 9 MASS. PRACTICE SERIES § 297, at 307 (1975).

[14] 13 Mass. App. Ct. at 190, 431 N.E.2d at 592. Laches is the equitable doctrine by which a party may be estopped from bringing a claim because he has failed to do so at the proper time.

[15] *Id.* at 193, 431 N.E.2d at 594.

[16] *Id.* at 190, 431 N.E.2d at 592.

[17] *Id.*

[18] Where an affirmative defense such as laches is raised by a motion to dismiss, the elements necessary to maintain such a defense must be apparent on the face of the complaint. *See supra* note 13.

[19] 13 Mass. App. Ct. at 190, 431 N.E.2d at 592.

[20] *Id.*

[21] *Id.*

Rather, the court noted, where a laches defense is asserted in such a case, the court should inquire only whether a modification of the support decree is proper in light of the delay.[22] The Appeals Court cited to its 1981 decision in *Bullock v. Zeiders*[23] as authority for this proposition.[24] In *Bullock*, the plaintiff filed a complaint for contempt of a support decree.[25] The defendant raised a defense of laches and counterclaimed for a modification of the support decree.[26] In considering the defense of laches, the *Bullock* court stated that the requisite prejudice could be proven by a change in the financial conditions of the obligor-defendant during the delay period.[27] The court noted, however, that such a change in financial condition would also present a question of whether a modification of the support decree was proper.[28] The *Bullock* court therefore treated the question of delay in the context of whether a modification of accrued and future support was proper.[29] Moreover, the court suggested that virtually every case of support in which a laches defense is advanced presents the question of whether modification of the support decree is proper.[30] As a result, the *Bullock* court indicated that the laches defense should be subsumed within the issue of whether a modification is necessary.[31] It is this dicta that the *Spiliotis* court relied upon for its suggestion that in cases in which a probate court may modify the support judgment before it,[32] a laches defense should be treated as modification issue.[33]

The *Spiliotis* court next considered the issue of the administratrix's claim for accrued alimony.[34] In particular, the Appeals Court addressed whether the administratrix of Concetta Spiliotis' estate was barred as a matter of law from recovering the accrued alimony owed to her decedent.[35] The court noted that dicta in earlier cases suggested that the death

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[22] *Id.*

[23] 1981 Mass. App. Ct. Adv. Sh. 1870, 428 N.E.2d 311.

[24] 13 Mass. App. Ct. at 190, 431 N.E.2d at 592.

[25] 1981 Mass. App. Ct. Adv. Sh. 1870, 1871, 428 N.E.2d 311, 312.

[26] *Id.*

[27] *Id.* at 1873, 428 N.E.2d at 313.

[28] *Id.* at 1873, 428 N.E.2d at 313-14.

[29] *Id.* at 1873, 428 N.E.2d at 314. The court found no change in the circumstances of the defendant sufficient to justify a modification of the support owed. *Id.*

[30] *Id.*

[31] "It is difficult to imagine facts in a case dealing with alimony and support payments where the consequences of a delayed claim would not ultimately be subsumed in whether the circumstances of the parties had so changed as to require a modification of the earlier judgment." *Id.*

[32] Probate courts have the power to modify support decrees pursuant to G.L. c. 208, § 37. *See infra* note 57 for relevant text.

[33] *See* 13 Mass. App. Ct. at 190, 431 N.E.2d at 314 (citing Bullock v. Zeiders, 1981 Mass. App. Ct. Adv. Sh. 1870, 1873, 428 N.E.2d 310, 314).

[34] 13 Mass. App. Ct. at 190, 431 N.E.2d at 592.

[35] *Id.* at 190-91, 431 N.E.2d at 592-93.

of an obligee spouse bars an action for arrearages, but that no case had clearly decided the issue.[36] In considering whether to uphold the dicta, the *Spiliotis* court inquired into the nature of alimony at the time these earlier cases were decided.[37] Specifically, the court focused on the case of *Holbrook v. Comstock.*[38] In *Holbrook,* the Supreme Judicial Court upheld the power of an administrator to sue for arrears due under a separation agreement.[39] Crucial to the *Holbrook* Court's decision was the fact that the money involved was not technically alimony.[40] The *Holbrook* Court noted that alimony was not historically treated as the property of the wife.[41] Rather, it was treated as the husband's property, given to the wife solely for her support.[42] Because such payments were not the wife's property, they were not recoverable after her death.[43] The *Holbrook* Court, however, distinguished the payments in the case before it from alimony on the basis that under the terms of the separation agreement, the wife was free to dispose of the money as she pleased.[44] The *Holbrook* Court likened the payments involved to annuity payments, a claim to which could be passed on to the wife's beneficiary upon her death.[45]

After discussing *Holbrook,* the Appeals Court determined that this dicta should not be followed. The *Spiliotis* court commented that the nature of alimony had changed since the time of the *Holbrook* decision.[46] In particular, the court noted that generally, the legal rights of a wife regarding the rights of succession of property had undergone a change.[47] The court also noted that the technical attributes of alimony at the time of *Holbrook* no longer existed, explaining that modern statutory alimony is different from common law alimony.[48] The court reasoned that alimony is

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[36] *Id.* at 191, 431 N.E.2d at 593.

[37] *Id.*

[38] 82 Mass. (16 Gray) 109 (1860).

[39] *Id.* at 111.

[40] *Id.* at 110.

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 110-11

[45] *Id.* at 110.

[46] 13 Mass. App. Ct. at 192, 431 N.E.2d at 593.

[47] *Id.* The court cited Dumont v. Godbey, 1981 Mass. Adv. Sh. 51, 415 N.E.2d 188, as support for this propostion. In *Dumont,* the Supreme Judicial Court surveyed the state of the law relative to a spouse's property rights in the estate of his or her deceased spouse, both as to alimony payments and as to succession to real and personal property. *Id.* at 52-53, 415 N.E.2d at 189-90. The Court conducted this survey in the context of a petition for division of property after the death of a spouse under G.L. c. 208, § 34. *Id.* at 51, 415 N.E.2d at 189. The Court also noted the broader rights to property and accompanying freedom to dispose of this property given wives under modern law. *Id.* at 54-55, 415 N.E.2d at 190-91.

[48] 13 Mass. App. Ct. at 192, 431 N.E.2d at 593.

presently more like the annuity payments considered in the *Holbrook* decision, and may, therefore, be recovered after the death of the obligee spouse by her estate.[49]

The *Spiliotis* court stated that policy considerations also supported allowing alimony recovery after the obligee spouse's death.[50] The court commented that to allow claims for accrued support to expire upon the death of the obligee spouse would give a financial incentive to obligor spouses to disobey support decrees.[51] The value of support decrees to obligee spouses would be lessened as well by depriving that spouse of a source of credit to obtain support.[52] Finally, the court noted that other jurisdictions have upheld the right of the estate of an obligee spouse to sue for arrears in support owed the decedent.[53] The *Spiliotis* court, therefore, agreed with the probate judge's determination that the complaint stated a valid claim against the estate of Phillip Spiliotis.[54]

The *Spiliotis* decision is significant for two reasons. First, in adopting the dicta in *Bullock v. Zeiders*[55] as authority for merging a laches defense into a modification determination, the *Spiliotis* court effectively eliminated the laches defense in support arrearages cases. The *Spiliotis* court's decision implies that in every future case where a probate court may modify a support decree, the *Bullock* merger will apply.[56] Because probate courts have the power to modify support decrees upon petition by parties to such decrees,[57] the *Bullock* merger is applicable in all actions in which a modification petition is brought. The power to modify support decrees is not, however, limited to cases in which a petition for modification is brought. Rather, a probate court may always modify a support decree retrospectively or prospectively in any case before it, regardless of whether a petition for modification is brought by one of the parties.[58] The *Spiliotis* court, therefore, has extended the *Bullock* language to all arrears actions. Through the expansion of the *Bullock* merger, the *Spiliotis* deci-

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[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* (citing Heaton v. Davis, 216 Ala. 197, 198-99, 112 So. 756, 757 (1927); Dinet v. Eigenmann, 80 Ill. 274, 279 (1875); Miller v. Clark, 23 Ind. 370, 376-77 (1864)).

[54] 13 Mass. App. Ct. at 192-93, 431 N.E.2d at 594.

[55] 1981 Mass. App. Ct. Adv. Sh. 1870, 428 N.E.2d 311.

[56] *See* 13 Mass. App. Ct. at 190, 431 N.E.2d at 592.

[57] "After a judgment for alimony or an annual allowance for the spouse or children, the court may, from time to time, upon the action for modification of either party, revise and alter its judgment relative to the amount of such alimony or annual allowance and the payment thereof . . . ." G.L. c. 208, § 37.

[58] Binder v. Binder, 7 Mass. App. Ct. 751, 761, 390 N.E.2d 260, 266 (1979). The *Binder* court's interpretation of the probate courts' power to modify support decrees appears to represent an expansive reading of the power granted under G.L. c. 208, § 37. *See supra* note 57.

sion suggests that a laches defense can never bar a claim for arrearages.[59] Instead, the delay and prejudice requisite to a defense of laches will be relevant only insofar as they work a change in the circumstances of the parties substantial enough to justify a modification of the amount of arrears owed.[60]

Second, in upholding the right of the administratrix to sue for arrears, *Spiliotis* continues a trend in Massachusetts decisional law recognizing the survival of such actions.[61] For example, while the cessation of the continuing obligation to pay alimony under a divorce decree[62] and the lapse of the right to initially petition for alimony[63] upon the death of the obligor spouse have been recognized, the right to collect arrears from the estate of the obligor spouse has long been established.[64] Similarly, the power of a probate court to specifically order that alimony continue to be paid out of an obligor's estate after his death as well as while he is alive has been upheld.[65] *Spiliotis* continues this trend by recognizing the right of the estate of an obligee spouse to sue for arrears after the death of the obligee.[66]

The trend in recognizing the survival of arrearage actions evidences a fairly recent change in perspectives toward alimony under Massachusetts law.[67] The *Spiliotis* decision is, therefore, important in that it continues the abandonment of outdated notions of alimony and property disposition upon divorce. Alimony was originally derived from English ecclesiastical law.[68] Under ecclesiastical law, divorce was limited to an authorization of the separation of the parties, without a dissolution of the marriage.[69] Alimony was awarded in recognition of a husband's duty at common law

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[59] Earlier cases involving arrears in support had dismissed a laches defense and instead considered a modification of the amount of support due. *See, e.g.*, McIlroy v. McIlroy, 208 Mass. 458, 462, 94 N.E. 696, 697-98, 699 (1911). These cases did not, however, rule out the possibility of a laches defense in future cases. *Id.*

[60] *Cf.* J. LOMBARD, *supra* note 4, at § 2085, at 694 (suggesting arrears proceedings may be barred by laches in some cases).

[61] *See infra* notes 62-64.

[62] *See* Stone v. Duffy, 219 Mass. 178, 182, 106 N.E. 595, 596 (1914); Knapp v. Knapp, 134 Mass. 353, 355 (1883).

[63] *See* Gediman v. Cameron, 306 Mass. 138, 141, 27 N.E.2d 696, 698 (1940).

[64] *See* Stone v. Duffy, 219 Mass. 178, 182, 106 N.E. 595, 596 (1914); Knapp v. Knapp, 134 Mass. 353, 355 (1883).

[65] *See* Surabian v. Surabian, 362 Mass. 342, 348, 285 N.E.2d 909, 913 (1972). In addition, where such a decree exists, it has been held that an action for a division of property under G.L. c. 208, § 34 does not abate on the death of the former spouse. Dumont v. Godbey, 1981 Mass. Adv. Sh. 51, 57, 415 N.E.2d 188, 192.

[66] 13 Mass. App. ct. at 194, 431 N.E.2d at 594.

[67] See *infra* notes 68-74 and accompanying text.

[68] H. CLARK, LAW OF DOMESTIC RELATIONS § 14.1, at 420 (1968).

[69] *Id.*

to support his wife so long as the marriage relation continued.[70] Under the traditional characterization of alimony as a continuation of the husband's obligation to support, arrears for alimony presumably could not survive the death of the wife because her need for support ceased upon her death.[71] Modern divorce, however, dissolves the marriage bond.[72] The view of alimony as a continuation of a duty to support is, therefore, of questionable validity.[73] In light of this change in the nature of divorce, some courts have viewed alimony not as a continuation of support, but rather as an equitable property settlement between the parties upon dissolution of the marriage.[74] It is this view of alimony that the *Spiliotis* court appears to have adopted in its decision to uphold the right to sue for arrears after the death of the obligee. Characterized as an equitable property settlement, alimony becomes the property of the wife. As a result, any claims to alimony arrears should survive the death of the obligee spouse as do other claims of a decedent.

In summary, the Massachusetts Appeals Courts in *Spiliotis v. Campbell* clarified two aspects of the survival of arrearages actions. In finding that claims for arrears survive the death of the obligee, the court continued the general trend recognizing the survival of alimony actions. Moreover, the court's decision to reject outdated dicta is consistent with the modern view of alimony as property settlement, and not merely as support. Additionally, in its treatment of the laches issue, the court maintained the special nature of alimony decrees. By treating the defense of laches — which would, if upheld, bar the action — as a modification question, the court continued to recognize alimony decrees as continuing and not final decrees which, by nature, remain forever modifiable by the parties.

§ 8.2. Right to Forego Medical Treatment — Jurisdiction of Juvenile Court — Minor in Custody of Department of Social Services.* A terminally ill patient's right to forego or terminate medical treatment is a recently emerging concept.[1] In the 1977 landmark case of *Superintendent of Bel-*

[70] *Id.* The notion of limiting a wife's "ownership" of her husband's property was reflected as well in the law governing her succession to property after his death. At common law, a widow was entitled to a life estate in one-third of her husband's estate, sufficient to assure her a means of support after the death of her husband. *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY, § 11, at 55-56 (1962).

[71] *See supra* note 43 and accompanying text.

[72] G.L. c. 208, § 1.

[73] *See* H. CLARK, *supra* note 68, at § 14.1, at 421.

[74] *See, e.g.,* Miller v. Clark, 23 Ind. 370, 376 (1864).

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§ 8.2. [1] The right of a terminally ill patient to forego medical treatment was first recognized in the landmark case of In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied sub. nom.* Garger v. New Jersey, 429 U.S. 922 (1976). *See also,* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980); In re Storar, 52 N.Y.2d 363, 438 N.Y.2d 266 (1981).

chertown State School v. Saikewicz,[2] the Supreme Judicial Court of Massachusetts recognized the constitutional right of both competent and incompetent persons to forego life-prolonging medical treatment absent countervailing state interests.[3] The *Saikewicz* Court held that a guardian may exercise this right on behalf of his incompetent ward by petitioning for a court order to withhold or terminate the treatment in question.[4] In ruling on such a petition, the probate court is to "don the mental mantle of the incompetent,"[5] and make a substituted judgment representing the decision the incompetent patient would make if competent.[6] In *Saikewicz,* the Court emphasized that this determination should rest in the hands of the judiciary.[7] In so doing, the Court rejected the approach taken by the New Jersey Supreme Court in the landmark case of *In re Quinlan.*[8] The *Quinlan* Court left the substituted judgment decision to the incompetent's family, guardian, physician, and hospital's ethics committee.[9]

The Supreme Judicial Court clarified the role of the judiciary in such

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[2] 373 Mass. 728, 370 N.E.2d 417 (1977).

[3] *Id.* at 745, 370 N.E.2d at 427. The Supreme Judicial Court based its holding in *Saikewicz* on the constitutional right of privacy derived from the penumbras of specific guarantees of the Bill of Rights as enunciated by the Supreme Court in Griswold v. Connecticut, 381 U.S. 479, 484 (1965). 373 Mass. at 739, 370 N.E.2d at 424. The Supreme Judicial Court analogized to the holding in Roe v. Wade, 410 U.S. 113 (1973), which recognized the right of females to procure abortions, and found that the constitutional right to privacy also encompasses the right of patients to reject treatment that infringes on bodily integrity. 373 Mass. at 739, 370 N.E.2d at 424. The Court further held that the "principles of equality and respect for all individuals," *id.* at 745, 370 N.E.2d at 427, require that the right to choose to forego medical treatment be extended to the incompetent as well as the competent individual, "because the value of human dignity extends to both." *Id.* Although it recognized the parens patriae power of a state to care for the best interests of an incompetent, *id.*, the Court stated that the best interests of an incompetent cannot be served by subjecting him to medical treatment that a similarly situated competent individual could refuse. *Id.* at 746-47, 370 N.E.2d at 428.

[4] *See* 373 Mass. 728, 755-57, 370 N.E.2d 417, 433-34 (1977).

[5] *Id.* at 752, 370 N.E.2d at 431 (quoting In re Carson, 39 Misc.2d 544, 545, 241 N.Y.S.2d 288, 289 (N.Y. Sup. Ct. 1962)).

[6] *Id.* at 752-53, 370 N.E.2d at 431.

[7] *Id.* at 758-59, 370 N.E.2d at 434.

[8] In re Quinlan, 70 N.J. 10, 355 A.2d 647 (N.J. 1976).

[9] *Id.* at 55, 355 A.2d at 671-72. The New Jersey Supreme Court stated that "a practice of applying to a court to confirm such decisions [to forego medical treatment] would generally be inappropriate, not only because that would be a gratuitous encroachment upon the medical profession's field of competence, but because it would be impossibly cumbersome." *Id.* at 50, 355 A.2d at 669. In contrast, the *Saikewicz* Court stated that placing ultimate responsibility for determining when it is appropriate to forego medical treatment would not serve as a " 'gratuitous encroachment' on the domain of medical expertise." 373 Mass. 728, 759, 370 N.E.2d 417, 435. Rather, the Court concluded that "such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created." *Id.* For a comparison of *Quinlan* and *Saikewicz*, see Annas, *Reconciling Quinlan and Saikewicz: Decision Making for the Terminally Ill Incompetent,* 4 AM. J. LAW & MED. 367 (1979).

decisions to forego medical treatment in the subsequent case of *In re Spring*.[10] The *Spring* Court stated that judicial intervention was not required in every instance in which the termination of life-prolonging medical procedures is sought,[11] thereby affirming the result previously reached by the Appeals Court in *In re Dinnerstein*.[12] *Dinnerstein* had focused on language in *Saikewicz* which acknowledged the medical profession's distinction between curing the ill and prolonging the act of dying.[13] When the proposed medical treatment can only prolong the act of dying, rather than effectuate a temporary or permanent cure of the patient's underlying terminal condition, *Dinnerstein* allowed the decision to forego treatment to be made by the patient's family, physician and hospital.[14] The *Spring* Court agreed with the ruling of the Appeals Court in *Dinnerstein*, noting that a court order may not be necessary where the patient has no hope of recovery.[15] The Court concluded, however, that once a petition has been filed with the probate court for an order to terminate treatment, it is the court which must make such a determination and the court cannot dele-

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[10] 1980 Mass. Adv. Sh. 1209, 405 N.E.2d 115. In *Spring*, the Court reviewed an order of the probate court authorizing Earle Spring's physician and family to decide whether kidney dialysis treatment should be continued for an incompetent adult suffering from permanent senility and an advanced and incurable kidney disease. *Id.* at 1210, 405 N.E.2d at 117. The Probate Court had determined under the substituted judgment test that if Spring were competent, he would choose to discontinue the dialysis treatments, and upon remand, entered an order allowing Spring's son to withhold authorization for any such further treatment. *Id.* at 1210, 405 N.E.2d at 117. This order was subsequently stayed on motion of the guardian ad litem for *Spring* and the court entered a revised order permitting Spring's physician, son, and wife to make the ultimate determination. *Id.* at 1211, 405 N.E.2d at 117-18. The Court stated that in determining whether a court order should be obtained before withholding treatment, a variety of factors should be considered, including:

> the extent of impairment of the patient's mental faculties, whether the patient is in the custody of a State institution, the prognosis without the proposed treatment, the prognosis with the proposed treatment, the complexity, risk and novelty of the proposed treatment, its possible side effects, the patient's level of understanding and probable reaction, the urgency of decision, the consent of the patient, spouse, or guardian, the good faith of those who participate in the decision, the clarity of professional opinion as to what is good medical practice, the interests of third persons, and the administrative requirements of any institution involved.

Id. at 1216-17, 405 N.E.2d at 121. For a discussion of *Spring*, see Perlin, *Constitutional Law*, 1980 ANN. SURV. MASS. LAW § 2.4, at 62-68.

[11] *See* 1980 Mass. Adv. Sh. at 1216-17, 405 N.E.2d at 120-21.

[12] *Id.* at 1215, 405 N.E.2d at 120. In In re Dinnerstein, 6 Mass. App. 466, 380 N.E.2d 134 (1978), the Appeals Court held that family and physicians of an incurably ill elderly woman in a vegetative state could agree to enter a no-resuscitation order on the patient's chart without prior judicial approval. *Id.* at 467, 475-76, 380 N.E.2d at 134-35, 139.

[13] *Id.* at 471-73, 380 N.E.2d at 137-38.

[14] *Id.* at 475, 380 N.E.2d at 139.

[15] *See* 1980 Mass. Adv. Sh. at 1216-17, 405 N.E.2d at 120-21.

gate that decision to the incompetent's family, doctor or hospital.[16] Consequently, the *Spring* Court, despite its recognition that in some situations the decision to forego medical treatment may be made without a court order, did not significantly depart from its earlier position in *Saikewicz* that the judiciary is generally the proper forum for resolving questions relating to the right to forego medical treatment.[17]

The petitions for orders to terminate or withhold life-prolonging treatment which were at issue in *Saikewicz, Dinnerstein,* and *Spring* were all initiated in probate court.[18] During the *Survey* year, in *Custody of a Minor,*[19] the Supreme Judicial Court addressed the role of the judiciary in determining when life-sustaining medical treatment may be withheld from an incompetent in the context of a petition arising in the Juvenile Court Department, rather than in probate court.[20] In *Custody of a Minor* the Supreme Judicial Court held that the juvenile court had jurisdiction to approve a "no code" order under which medical personnel would not resort to extraordinary means to prolong the life of an infant in the custody of the Department of Social Services ("DSS").[21]

The infant in *Custody of a Minor* was suffering from cyanotic heart disease, a terminal condition for which there was no known cure or the potential of developing a cure,[22] and his life expectancy was no more than one year.[23] The infant, abandoned at birth by its mother, was a patient at the New England Medical Center ("NEMC").[24] A social worker at NEMC petitioned the Boston Juvenile Court alleging that the child was in need of care and protection pursuant to Massachusetts General Laws chapter 119, sections 24 and 26.[25] The juvenile court appointed a guardian ad litem and counsel for the child and separate counsel for the mother.[26] Following a full evidentiary hearing, the court found the infant to be in need of care and protection and awarded temporary legal custody to the DSS.[27] In addition, the judge further provided that any party to the action

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[16] *Id.* at 1219, 405 N.E.2d at 122.

[17] *Id.* at 1219, 405 N.E.2d at 122; see Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 759, 370 N.E.2d 417, 435 (1977).

[18] *See* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 729, 370 N.E.2d 417, 419 (1977); In re Dinnerstein, 6 Mass. App. Ct. 466, 466, 380 N.E.2d 134, 134 (1978); In re Spring, 1980 Mass. Adv. Sh. 1209, 1210, 405 N.E.2d 117, 117.

[19] 385 Mass. 697, 434 N.E.2d 601 (1982).

[20] *Id.* at 700, 434 N.E.2d at 603.

[21] *Id.*

[22] *Id.* at 701-02, 434 N.E.2d at 604.

[23] *Id.* at 702, 434 N.E.2d at 604.

[24] *Id.* at 698, 434 N.E.2d at 602.

[25] *Id.* For the text of G.L. c. 119, § 24, *see infra* note 53. G.L. c. 119, § 26 is quoted *infra* at note 49.

[26] *Id.*

[27] *Id.*

could come before him for further hearing on the matter.[28]

The infant's condition worsened and one month after the Juvenile Court's decision, his physicians at NEMC requested the DSS and the child's guardian ad litem to consent to entering a "no code" order on the child's medical records providing that in the event of cardiac or respiratory arrest, no extraordinary medical efforts would be used to resuscitate him.[29] When both these parties declined to consent,[30] the NEMC petitioned the Boston Juvenile Court for an order permitting the physicians to enter the "no code" order.[31] The petition was granted following a hearing on the matter.[32] The court provided, however, that NEMC continue all other medical treatment for the infant and report to the court any changes in the infant's condition which could potentially lead to a revision in the court's order.[33] Finally, the court stated that it would hear additional evidence on the matter at the request of any party.[34] On the same day, the child's counsel and guardian ad litem obtained a stay of this order from a single justice of the Supreme Judicial Court.[35]

While an appeal of the juvenile court's ruling permitting the entrance of the "no code" order was pending in the Appeals Court, the NEMC reported a change in the child's condition to the juvenile court and requested that court to revoke its previous order.[36] As a result of this request, all parties were in agreement that the "no code" order should be revoked. A hearing was held and the judge continued in effect the prior "no code" order.[37] Additionally, the judge granted a request to authorize the release of the infant from the NEMC.[38]

Before the juvenile court issued this second order denying the petition to revoke the "no code" order, the Supreme Judicial Court, on its own motion, granted direct review of the juvenile court's first order authorizing entry of the "no code" order.[39] After the Court granted review, the child's guardian ad litem and counsel also sought review of the second order of the juvenile court, and the DSS appealed both orders of the juvenile court.[40]

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[28] *Id.*
[29] *Id.*
[30] *Id.* at 698-99, 434 N.E.2d at 602.
[31] *Id.* at 699, 434 N.E.2d at 602.
[32] *Id.* at 699, 434 N.E.2d at 603.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.* at 699-700, 434 N.E.2d at 603.
[38] *Id.*
[39] *Id.* at 700, 434 N.E.2d at 603.
[40] *Id.*

Three issues were presented to the Supreme Judicial Court: whether the Boston Juvenile Court had jurisdiction to enter a "no code" order; whether the NEMC had standing to seek a "no code" order; and whether the judged erred in the application of the "substituted judgment-best interests" test with respect to the decision to enter the "no code" order.[41] In addition to these questions, the parties contended that because they were all in agreement that the "no code" order should be revoked, the issue was removed from the proper scope of judicial intervention.[42] Consequently, the Court was called on for the first time to apply the factors it had enunciated in *Spring* for determining when a judicial order is necessary in order to withhold medical treatment.[43]

The Court began by addressing the issue of whether the juvenile court had jurisdiction to enter the "no code" order.[44] The Court noted that although *Saikewicz* stated that "[t]he Probate Court . . . has been given the specific grant of equitable powers to act in all matters relating to guardianship,"[45] the instant case was not a guardianship proceeding.[46] Instead, the case concerned the proper treatment of a child found to be in need of care and protection.[47] The Court found that under the Massachusetts Care and Protection statute,[48] the juvenile courts are responsible for carrying out the statute's broad policy of providing for the welfare of abandoned children, including determining the proper physicial and medical procedures for an infant within its jurisdiction.[49] This statutory grant of jurisdiction, the Court continued, necessarily encompasses the author-

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[41] *Id.*

[42] *Id.* at 707, 434 N.E.2d at 607.

[43] *Id.* at 708-09, 434 N.E.2d at 607-09. *See,* In re Spring, 1980 Mass. Adv. Sh. 1210, 1216-17, 405 N.E.2d 117, 120-21. *See supra* note 10 and accompanying text.

[44] 385 Mass. at 704-05, 434 N.E.2d 605-06.

[45] *Id.* at 705, 435 N.E.2d at 606 (quoting Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 755, 370 N.E.2d 417, 431).

[46] 385 Mass. at 705, 434 N.E.2d at 606.

[47] *Id.*

[48] G.L. c. 119, § 26(3).

[49] *See* 385 Mass. at 704, 434 N.E.2d at 605 (quoting Police Comm'r of Boston v. Municipal Court of the Dorchester District, 374 Mass. 640, 666-67, 374 N.E.2d 272, 287 (1978)). G.L. c. 119, § 26 provides in part:

> If the court finds the allegations in the petition proved within the meaning of this chapter, it may adjudge that said child is in need of care and protection and may commit the child to the custody of the department until he becomes eighteen years of age or until in the opinion of the department the object of his commitment has been accomplished, whichever occurs first; or make any other appropriate order with reference to the care and custody of the child as may conduce to his best interest, including but not limited to any one or more of the following:
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> . . .
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> (3) It may order appropriate physical care including medical or dental care.

ity to determine that certain medical procedures are not appropriate for an infant.[50] Accordingly, the Court found that the action was properly before the juvenile court.[51]

The Court next turned to the issue of whether the NEMC had standing to petition the juvenile court to enter the "no code" order.[52] Based in part on the language of the Care and Protection statute which provides that "any person" may, on petition, initiate a care and protection proceeding, the Court held that NEMC had standing to seek the "no code" order.[53] The Court recognized that its previous decisions had held that the words "any person" included a hospital.[54] The Court noted that this interpretation of the statutory language was necessary in order to insure the furtherance of the statutory objective of providing for the welfare of minors because hospital personnel are often the only persons beyond a child's immediate family members who can detect the need for a care and protection order.[55] Moreover, the Court observed, in the case before it, the NEMC, as a party to the ongoing care and protection proceedings, was the only party in a position to seek a "no code" order from the juvenile court due to the DSS policy of refusing to consider any such requests for minors within its custody.[56]

After deciding that the NEMC had standing to petition for a "no code" order and that the juvenile court has jurisdiction to enter such an order, the Court addressed the parties' contention that the matter was removed from the scope of judicial decision-making when all the parties agreed that the "no code" order should be discontinued.[57] The Court acknowledged that in *Spring* it had recognized that in some situations the decision of whether to forego life-prolonging medical treatment may be made by private parties without the necessity of a court order.[58] The Court ob-

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[50] 385 Mass. at 705, 434 N.E.2d at 606.

[51] *Id.*

[52] *Id.* at 705-07, 434 N.E.2d at 606-07.

[53] *Id.* at 707, 434 N.E.2d at 607. G.L. c. 119, § 24 provides:

> The Boston juvenile court, . . . upon the petition of any person alleging on behalf of a child . . . that said child is without: (a) necessary and proper physical or educational care and discipline, or; (b) is growing up under conditions or circumstances damaging to the child's sound character development, or; (c) who lacks proper attention of parent, guardian with care and custody, or custodian, or whose parents or guardian are unwilling, incompetent or unavailable to provide any such care, . . . may . . . issue . . . [an] appropriate order.

[54] 385 Mass. at 706, 434 N.E.2d at 606 (citing Custody of a Minor, 375 Mass. 733, 743, 379 N.E.2d 1053, 1060 (1978)).

[55] *Id.* at 706-07, 434 N.E.2d at 606-07.

[56] *Id.*

[57] *Id.* at 707, 434 N.E.2d at 607.

[58] *Id.* at 708, 434 N.E.2d at 607. *See supra* note 10.

served, however, that several of the factors listed in *Spring* as indicative of the need for judicial decision making were present in the case before it.[59] First, the Court noted that the infant was a ward of the state and lacked competence to make the decision, the parents were not present to make a decision for their child, the child was suffering from an incurable disease with no hope of successful treatment, medical opinion on the child's diagnosis and prognosis was unanimous, and the medical treatment in question would be painful and intrusive.[60] Second, the Court stressed that the infant was already within the jurisdiction of the juvenile court when the issue of the propriety of the "no code" order arose.[61] In such a situation, the Court stated, under its holding in *Spring*, a court properly presented with the legal question of whether treatment may be withheld must decide that issue and cannot delegate its resolution to some private person or group.[62] According to the Court, a subsequent agreement among the parties cannot serve to defeat the court's jurisdiction or require it to rule in accordance with the parties' agreement.[63]

After making this determination, the Court noted that the matter before it also shared certain features which were present in *Dinnerstein*.[64] Specifically, the Court recognized the fact that in both cases a "no code" order was in issue and the patient was terminally ill.[65] Unlike *Dinnerstein*, however, the Court stated that the infant had no "loving family" with whom the physicians could confer regarding the decision to forego efforts at resuscitation.[66] The Court considered this distinction to be crucial, holding that the decision regarding the entrance of the "no code" order in the case before it should be made by the judiciary applying the substituted judgment standard articulated in *Saikewicz*.[67]

Finally, the Court reviewed the propriety of the juvenile court's decision allowing the "no code" order to remain in effect.[68] The Court stated that the juvenile court had based its decision on its finding that any extraordinary efforts at resuscitation would involve a significant degree of bodily invasion and pain, and that such efforts would not cure the child's underlying disease, but instead would merely prolong the infant's pain and suffering.[69] According to the Court, the juvenile court concluded that

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[59] *Id.* at 709, 434 N.E.2d at 608. *See supra* note 10 and accompanying text.
[60] *Id.* at 709, 434 N.E.2d at 608.
[61] *Id.*
[62] *Id.*; see In re Spring, 1980 Mass. Adv. Sh. 1210, 1219, 405 N.E.2d 117, 122.
[63] 385 Mass. at 709, 434 N.E.2d at 608.
[64] *Id.* at 709-10, 434 N.E.2d at 608.
[65] *Id.*
[66] *Id.* at 710, 434 N.E.2d at 608.
[67] *Id.*
[68] *Id.* at 711-14, 434 N.E.2d at 609-10.
[69] *Id.* at 711, 434 N.E.2d at 609.

if the infant "had the mental capacity to understand the incurable nature of his illness, the terminal prognosis, the nature and purpose of a 'full code' order and the virtual certainty of its limited and temporary effect, he would choose to forego its use."[70] At the hearing on the revocation of the prior "no code" order and the discharge of the infant from the hospital, the lower court had found that a discharge would be the functional equivalent of a "no code" order because the child would most likely not be able to arrive at a hospital in time for resuscitation if the need for such treatment arose.[71] The Supreme Judicial Court found that the juvenile court had concluded that, if competent, the infant would choose to be discharged to the care of a foster family and have the "no code" order remain in effect.[72] The *Custody of a Minor* Court found that the juvenile court's findings were supported by the evidence.[73] Accordingly, the Court found no error in the juvenile court's decision based on these findings.[74]

The Court next addressed the DSS' argument that the NEMC should have been required to prove "beyond a reasonable doubt" that the infant "would not have wished such treatment or that withholding of medical treatment is in the child's best interest."[75] The DSS argued that the underlying issue centered on the infant's right to live.[76] The DSS asserted that the presumption in favor of life requires proof beyond a reasonable doubt before life-prolonging treatment may be withheld.[77] The Court rejected this argument stating that the issue presented in the case before it was not one of the right to life, but rather, the "manner of dying."[78] The Court stated that the relevant question was "what measures are appropriate to ease the imminent passing of an irreversibly terminally ill patient in light of the patient's history and condition."[79] According to the Court, the issue of whether the withholding of medical treatment was appropriate was not before it, because the juvenile court's order only concerned the foregoing of heroic efforts at resuscitation, and did not limit any treatment for the infant's underlying heart condition.[80]

The Court also refused to adopt the proof beyond a reasonable doubt standard advocated by the DSS on the grounds that it would be unrealistic to require physicians to testify to a degree of moral certainty that the

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[70] *Id.* at 713, 434 N.E.2d at 610.
[71] *Id.* at 713-14, 434 N.E.2d at 610.
[72] *Id.* at 714, 434 N.E.2d at 610.
[73] *Id.*
[74] *Id.*
[75] *Id.* at 711, 434 N.E.2d at 609.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* (quoting In re Dinnerstein, 6 Mass. App. 466, 475, 380 N.E.2d 134, 139 (1978)).
[80] *Id.* at 712, 434 N.E.2d at 609.

patient's position was hopeless.[81] According to the Court, to adopt the highest burden of proof would, in effect, negate the incompetent's right to forego medical treatment.[82] The Court concluded, therefore, that it was sufficient that the juvenile court entered detailed findings supported by the evidence, "indicating those persuasive factors that determined the outcome."[83]

The significance of *Custody of a Minor* lies in the fact that it clarifies the procedures by which decisions to forego life-prolonging medical treatment are to be made. The Court established that juvenile courts have authority to enter orders to withhold treatment for minors within their jurisdiction pursuant to the Massachusetts Care and Protection statute.[84] This holding is in accord with the statutory grant of authority to the juvenile courts under General Laws chapter 119, section 24. Although the Care and Protection statute does not expressly authorize the juvenile court to direct that medical care be withheld from minors under their jurisdiction,[85] the broad language of the statute, directing the juvenile court to "make any other appropriate order with reference to the care and custody of the child as may conduce to his best interest,"[86] can best be read as encompassing the authority to enter such orders. Furthermore, section 24 of chapter 119 places primary judicial responsibility for the care of minors in the juvenile courts.[87] These courts have undoubtedly developed particular expertise in dealing with those issues pertaining to the proper care of minors. To require a petition for the authorization to terminate medical treatment for a child already under the jurisdiction of the juvenile court to be brought in probate court would not result in any increased protection of the best interests of the minor, but instead could lead to delay, duplication of efforts, and even potentially conflicting judicial orders.[88]

The Court's holding that the NEMC had standing to petition the juvenile court to enter a "no code" order as a party to the original care and protection proceeding is similarly supported by the broad language of General Laws, chapter 119, section 24,[89] as well as that statute's policy of allowing all those parties who may be aware of the need for a particular

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[81] *Id.* at 712, 434 N.E.2d at 610.

[82] *Id.* (citing In the Matter of Moe, 385 Mass. 555, 572, 432 N.E.2d 712, 724 (1982)).

[83] *Id.* at 713, 434 N.E.2d at 610.

[84] *Id.* at 704-05, 434 N.E.2d at 605-06.

[85] *See* G.L. c. 119, § 26.

[86] *Id.*

[87] G.L. c. 119, § 24.

[88] This latter result could obtain where, for example, the juvenile court entered an order pursuant to G.L. c. 119, § 26, directing that certain medical treatment be administered to a minor, and a party simultaneously obtained an order to withhold that medical treatment from the probate court.

[89] For the text of G.L. c. 119, § 24, *see supra* note 53.

order to bring such need to the attention of the court.[90] This holding, to the extent that it is based on the fact that the NEMC was an on-going party to the original care and protection petition,[91] however, leaves open the question as to whether a third party who has not participated in the original care and protection proceedings could similarly have standing to petition for such an order. The rationale of the Court for finding that the NEMC had standing to seek the "no code" order, that of allowing third parties with information regarding the proper care of a minor within the court's jurisdiction to present this information to the court,[92] would also suggest that the NEMC would have such standing even if it were not party to the original care and protection petition.

The significance of *Custody of a Minor* also lies in the Court's reaffirmation of its commitment to the judiciary as the appropriate forum, in many instances, for determining when life-prolonging medical treatment should be withheld.[93] This emphasis on the need for judicial decision-making is particularly evident in the Court's holding that the jurisdiction of the juvenile court was not defeated by the subsequent agreement among the parties concerning the revocation of the "no code" order.[94] This holding is consistent with the holding in *Spring* that once a matter is properly presented to the court, the court must decide the issue and cannot delegate decision-making authority to some third party.[95] This emphasis on the role of the judiciary and "detached but passionate investigation and decision,"[96] is, as the Court has noted,[97] particularly necessary when matters of life and death are being determined.

Custody of a Minor also helped clarify the application of the *Spring* factors to determinations of when the decision of whether or not to withhold medical treatment should rest in the hands of the judiciary. Although the child in *Custody of a Minor* was suffering from a terminal disease and the treatment in question would not effectuate a temporary or permanent cure, factors which under *Dinnerstein* and *Spring* would weigh towards private decision-making,[98] the Court considered it significant that there was no loving family to participate in the decision-making process

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[90] *See* 385 Mass. at 706-07, 434 N.E.2d at 606-07.
[91] *See id.* at 707, 434 N.E.2d at 607.
[92] *Id.* at 706, 434 N.E.2d at 606-07.
[93] *See supra* notes 7-17 and accompanying text.
[94] 385 Mass. at 709, 434 N.E.2d at 608.
[95] In the Matter of Spring, 1980 Mass. Adv. Sh. 1210, 1219, 405 N.E.2d 117, 122.
[96] Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 759, 370 N.E.2d 417, 435 (1977).
[97] *Id.*
[98] *See supra* note 10 and accompanying text.

and concluded that a judicial determination was necessary.[99] Thus, although the Court suggested in *Spring* that in determining whether a court order should be obtained, the totality of the patient's circumstances should be considered,[100] *Custody of a Minor* seems to establish that no private decision-making can occur in the absence of family members able to take part in the process. It should be noted, however, that the presence of family members will not always justify private decision-making. As the Court has noted previously,[101] family members are not always capable of making a substituted judgment, as that process requires the decision maker to ignore his own interests and concerns and focus solely on those of the patient.[102] Thus, while absence of a loving family requires judicial decision-making, the presence of family members should only be considered as one factor under the *Spring* test in determining whether a judicial decision is necessary.

Finally, *Custody of a Minor* is noteworthy for the Court's rejection of the proof beyond a reasonable doubt standard as the burden of proof necessary for sustaining a substituted judgment finding.[103] By refusing to adopt this burden of proof, the Court continued the commitment it established in *Saikewicz* to the right of an incompetent to exercise his right to refuse treatment and thereby avoid unwanted bodily intrusion and needless pain and suffering on the same basis as a competent individual.[104] In rejecting proof beyond a reasonable doubt as the applicable standard, the Court did not clarify whether it was adopting a preponderance of the evidence standard or that of clear and convincing evidence. Rather, the Court simply noted that it was sufficient that the lower court has entered "detailed finding supported by the evidence, 'indicating those persuasive factors that determine[d] the outcome.' "[105] This language strongly suggests that the Court has adopted a preponderance of the evidence standard as the appropriate burden of proof for entering a substituted judgment decision. This level of proof is appropriate where, as in the instant case, extraordinary medical treatment can not save an individual, but instead, can only prolong the act of dying. To hold otherwise would, in effect, place a burden on incompetent persons not placed on competent persons who are capable of withholding consent to intrusive and painful treatment.

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[99] Custody of a Minor, 385 Mass. at 710, 434 N.E.2d at 608.

[100] In the Matter of Spring, 1980 Mass. Adv. Sh. 1210, 1216-17, 405 N.E.2d 117, 120-21.

[101] *See* Guardianship of Roe, 1981 Mass. Adv. Sh. 981, 1009-10, 421 N.E.2d 40, 56.

[102] *Id.*

[103] 385 Mass. at 712, 434 N.E.2d at 610.

[104] *See* Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 745, 370 N.E.2d 417, 427 (1977).

[105] 385 Mass. at 713, 434 N.E.2d at 610.

The *Saikewicz* Court's recognition of the constitutional right to forego medical treatment in certain circumstances will undoubtedly continue to raise a host of both procedural and substantive issues. One such issue left unresolved by *Custody of a Minor* is raised by the Court's holding that juvenile courts have authority to order the termination of treatment for minors within their jurisdiction. The statute on which this jurisdiction is based, General Laws chapter 119, section 26, directs the juvenile court to enter orders that are in the "best interests" of the minor.[106] The Supreme Judicial Court, on the other hand, has directed that decisions regarding the termination of treatment be made by applying the "substituted judgment" test.[107] Thus, juvenile courts may be faced with the difficult task of applying two potentially conflicting standards of decision-making. Although the Court has previously noted that as a practical matter, both standards will yield the same result when the patient is an infant,[108] different outcomes may be obtained when the minor is an older child who has expressed an opinion regarding his or her treatment.[109] This potential dilemma is left unanswered by *Custody of a Minor*.

§ 8.3. Insurance Proceeds — Recovery by Designated Beneficiaries Under a Breached Divorce Decree.* Seldom in recent years have Massachusetts courts had occasion to address the rights of insurance beneficiaries designated under separation agreements and divorce decrees.[1] During the

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[106] G.L. c. 119, § 26 (1982).

[107] Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 751-52, 370 N.E.2d 417, 431 (1977); In re Spring, 1980 Mass. Adv. Sh. 1210, 1214, 405 N.E.2d 117, 119.

[108] Custody of a Minor, 375 Mass. 733, 753, 379 N.E.2d 1053, 1065 (1978). The Court noted that the substituted judgment test is subjective in nature whereas the best interest standard is objective. *Id.* When either standard is being applied to make decisions on behalf of a child of tender years, however, both tests require "a court to focus on the various factors unique to the situation of the individual for whom it must act" and thus the criteria and reasoning under both are essentially the same where an infant is involved. *Id.*

[109] As the Court has noted, the goal of the substituted judgment test is to ascertain to the greatest extent practicable the actual needs and desires of the individual involved, even if that decision does not correspond to what most people would consider wise or prudent. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 750-51, 370 N.E.2d 417, 430 (1977). Thus, it is possible that in the case of an older child able to express his or her desires regarding treatment the substituted judgment test may lead to results at odds with those reached under the best interests test.

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§ 8.3. [1] The most recent officially reported decision prior to Green v. Green, 13 Mass. App. Ct. 340, 433 N.E.2d 92 (1982), in which this issue arose was Handrahan v. Moore, 332 Mass. 300, 124 N.E.2d 808 (1955). *Cf.* Metropolitan Life Ins. Co. v. Marcoulier, 322 F. Supp. 246 (E.D. Mo. 1971) (applying Massachusetts law in adjudicating a dispute between the ex-wife of the decedent and his second wife over the insurance proceeds from policies under which the decedent's children from his first marriage had been made beneficiaries pursuant to a divorce settlement).

Survey year, however, the Appeals Court examined this precise issue in *Green v. Green*.[2] Specifically, the court in *Green* considered the rights of children who were named beneficiaries under insurance policies which their father was required to maintain for their benefit pursuant to a divorce judgment.[3] The court recognized that these children had two equally viable causes of action in the event that their status as beneficiaries should be altered in derogation of the divorce decree.[4] Essentially, the *Green* decision provides that upon the death of the insured the beneficiaries under the divorce decree may either proceed against the estate of the breaching decedent or, in the alternative, seek recovery of the insurance proceeds in the hands of a later named beneficiary.[5]

Prior to *Green,* the Supreme Judicial Court examined the problem of using the future insurance proceeds as a component of a divorce settlement in *Handrahan v. Moore*.[6] The *Handrahan* Court held that where a husband agrees in a divorce settlement to maintain certain insurance policies for the benefit of his ex-wife, she acquires an equitable interest in the proceeds from the policies.[7] In *Handrahan,* the wife's equitable

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[2] 13 Mass. App. Ct. 340, 433 N.E.2d 92 (1982).

[3] *Id.* at 340-41, 433 N.E.2d at 92-93.

[4] *Id.* at 343, 433 N.E.2d at 94.

[5] *Id.*

[6] 332 Mass. 300, 124 N.E.2d 808 (1955).

[7] *Id.* at 303, 124 N.E.2d at 809-10. In *Handrahan,* the decedent, his first wife, and his daughter from his first marriage had entered into a trust agreement in contemplation of the decedent's divorce from his first wife. *Id.* at 300-01, 124 N.E.2d at 808. The agreement required the decedent to surrender to his daughter, the designated trustee, two insurance policies on his life in the amount of $10,000. *Id.* at 301, 124 N.E.2d at 808. The decedent's first wife was to be designated as beneficiary under the policies and the decedent was required to continue during his lifetime to pay the premiums on the policies. *Id.* The decedent was insured under a group insurance plan through his employment, thus, he did not surrender policies to his daughter, the trustee, but instead had the insurance company he worked for issue a certificate of compliance. *Id.* at 301, 124 N.E.2d at 809. Due to this arrangement, the decedent was able to substitute his second wife as beneficiary under the policies without notice to either his first wife or his daughter. *Id.* at 302, 124 N.E.2d at 809. Upon the decedent's death the trustees of the group insurance plan paid the proceeds from the policies into court. *Id.* at 302-03, 125 N.E.2d at 809. The decedent's daughter, as trustee, brought suit claiming the proceeds, which were claimed by the decedent's second wife as well. *Id.* at 200-01, 124 N.E.2d at 808. The Supreme Judicial Court considered the trust agreement executed by the decedent to be in the nature of a property settlement, based on valid consideration. *Id.* at 303, 124 N.E.2d at 809. The Court further found that the agreement operated as a binding waiver of the decedent's right to change the beneficiary under the two policies. *Id.* at 303, 124 N.E.2d at 810. The Court concluded that the daughter, acting as trustee for the decedent's first wife, acquired an equitable interest in the proceeds from the policies by virtue of the agreement. *Id.* This equitable interest was considered superior to the second wife's interest and consequently the proceeds were turned over to the trustee. *Id.* at 303-04, 124 N.E.2d at 810.

interest was deemed superior to that of the deceased husband's second wife, who had been substituted as the beneficiary under the policies.[8]

Unlike the plaintiff in *Handrahan,* the plaintiffs in *Green* were children of the decedent and his first wife.[9] The children were designated as third-party beneficiaries under a stipulation entered into by their parents regarding insurance policies on the husband's life.[10] The stipulation — that the decedent would maintain in effect certain insurance policies on his life under which the children of the first marriage would remain beneficiaries — was merged into the divorce judgment granted in the year prior to the decedent's death.[11] Shortly after his divorce from his first wife, the decedent remarried.[12] Without seeking modification of the divorce judgment,[13] the decedent substitued his second wife as the beneficiary under five of the seven insurance policies referred to in the divorce judgment.[14] Upon the death of the decedent, his second wife received the proceeds of the five policies totaling $42,352.50.[15] The children from his first marriage received the proceeds of the remaining two policies totaling $2,525.74.[16] In addition to the insurance policies, the decedent's will provided that his estate be evenly divided and distributed between his second wife and a trustee for the children from his first marriage.[17] At the time of his death, the decedent's estate was comprised of one savings account which had a balance of $35,854.24.[18]

The decedent's children brought suit against the decedent's second wife to recover the insurance proceeds paid to her.[19] Alternatively, if she were unable to pay the full amount of the proceeds, the plaintiff children sought recovery from the estate of the decedent.[20] The trial judge ruled that the decedent's estate was primarily liable to pay the plaintiffs the $42,352.50 in insurance proceeds of which they were wrongly divested.[21] In addition, the trial judge held that the decedent's second wife was secondarily liable for the proceeds paid to her.[22] Recovery against the second wife therefore

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[8] *Id.* at 303, 124 N.E.2d at 810.
[9] 13 Mass. App. Ct. at 340, 433 N.E.2d at 92.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 340-41, 433 N.E.2d at 92-93.
[14] *Id.*
[15] *Id.* at 341, 433 N.E.2d at 93.
[16] *Id.* at 341 n.2, 433 N.E.2d at 93 n.2.
[17] *Id.* 341, 433 N.E.2d at 93.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.*

could be had only to the extent of any deficiency after payment from the estate.[23]

The plaintiffs appealed the trial court's ruling.[24] On appeal, the judgment was revised to require the decedent's second wife to pay the plaintiffs an amount equal to the insurance proceeds paid to her.[25] Under the revised judgment, the decedent's estate was held to be secondarily, rather than primarily, liable for the insurance proceeds.[26] The Appeals Court found that the plaintiffs had a "vested equitable interest" in the insurance proceeds[27] which entitled them to elect to pursue a claim against the decedent's estate, or against the second wife wrongfully in possession of the insurance proceeds, or against both.[28]

In determining the nature of the plaintiffs' interest in the proceeds, the Appeals Court in *Green* relied upon two cases decided by the Supreme Judicial Court.[29] In both *Massachusetts Linotyping Corp. v. Fielding,*[30] and the later case of *Handrahan v. Moore,*[31] the Supreme Judicial Court stated that an insured's agreement to maintain insurance policies with designated beneficiaries, if based on valuable consideration, gives such beneficiaries an "equitable interest" in the proceeds of the policies.[32] In *Fielding*, the Supreme Judicial Court reasoned that although the insured may have the right to change beneficiaries in his contract with the insurance company, he nevertheless may contract with another not to exercise this right.[33] The contract, as between the insured and the beneficiaries,

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[23] *Id.* Presumably the trial court was persuaded by the argument which the defendant, the decedent's second wife, emphasized on appeal. *See id.* She contended that the stipulation entered into at the time of the decedent's divorce from his first wife, represented a contractual obligation breached by decedent. *Id.* Since the plaintiffs had an action for legal relief against the decedent's estate, based on his breach of contract, the defendant claimed that the plaintiffs were required to pursue this avenue of recovery before pursuing their equitable claim against her. *Id.* The defendant's argument thus was premised on the general principle that equitable relief is barred to the extent that a plaintiff has an adequate remedy at law. *Id. See infra* notes 38-39 and accompanying text.

[24] 13 Mass. App. Ct. at 341, 433 N.E.2d at 93.

[25] *Id.* at 344, 433 N.E.2d at 94.

[26] *Id.*

[27] *Id.* at 343, 433 N.E.2d at 94 (citing Handrahan v. Moore, 332 Mass. 300, 303, 124 N.E.2d 808, 810 (1955); Massachusetts Linotyping Corp. v. Fielding, 312 Mass. 147, 149, 43 N.E.2d 521, 522 (1942)).

[28] *Id.* at 343, 433 N.E.2d at 94.

[29] *See* Handrahan v. Moore, 332 Mass. 300, 124 N.E.2d 808 (1955); Massachusetts Linotyping Corp. v. Fielding, 312 Mass. 147, 43 N.E.2d 521 (1942).

[30] 312 Mass. 147, 43 N.E.2d 521 (1942).

[31] 332 Mass. 300, 124 N.E.2d 808 (1955).

[32] Handrahan v. Moore, 332 Mass. 300, 303, 124 N.E.2d 808, 809-10 (1955); Massachusetts Linotyping Corp. v. Fielding, 312 Mass. 147, 149, 43 N.E.2d 521, 522 (1942).

[33] 312 Mass. 147, 149, 43 N.E.2d 521, 523 (1942). In *Fielding,* the decedent was alleged to have entered into an agreement with a corporation, in which he and his three children were

under the contract, operates as a binding waiver of his right to change the beneficiaries under the policies designated.[34] The *Green* court applied this reasoning and concluded that the stipulation that had been merged into the divorce judgment deprived the decedent of any right to change the beneficiaries under the seven designated insurance policies.[35] Consequently, the plaintiffs named as beneficiaries under the divorce judgment acquired an equitable interest in the proceeds from the policies.[36]

Having determined the nature of the plaintiffs' interest in the proceeds, the *Green* court proceeded to analyze the extent of their rights to recover the proceeds as possessors of an "equitable interest" therein.[37] The Appeals Court first addressed the contention of the decedent's second wife that the plaintiffs had a *legal* claim for breach of contract against the decedent's estate which they were required to pursue prior to any *equitable* claim they had against her.[38] The court rejected this argument, noting that the defendant had cited no case in this context which "even inferentially" supported the priority of claims rule that she relied upon.[39] Citing

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the primary shareholders. *Id.* at 148, 43 N.E.2d at 522. The agreement purportedly provided that the decedent would make the corporation the beneficiary under an insurance policy on the decedent's life in exchange for the corporation's paying the premiums on the policy. *Id.* Several years after the alleged agreement had been entered into, the decedent's first wife died and he subsequently remarried. *Id.* Two years later, the decedent substituted his second wife as beneficiary under the insurance policy and resumed paying the policy premiums himself. *Id.* at 148-49, 43 N.E.2d at 522. Upon the death of the decedent, the policy proceeds were paid to his second wife. *Id.* at 148, 43 N.E.2d at 522. The decedent's children brought suit on behalf of the corporation seeking to impose an equitable lien against the policy proceeds. *Id.* The Supreme Judicial Court reversed and remanded the case, *id.* at 154, 43 N.E.2d at 525, citing the trial court's failure to make a finding on the "main issue" in the case, whether in fact the alleged contract had been made. *Id.* at 149-50, 43 N.E.2d at 523. The Supreme Judicial Court stated that if the alleged agreement had been made and the plaintiff had paid the premiums, "it would acquire an equitable right to the proceeds of the policy which it could enforce against a person subsequently named as beneficiary, unless the latter was a purchaser for value without notice or in some manner acquired an equity superior to that of the plaintiff." *Id.* at 149, 43 N.E.2d at 522.

[34] *Id.* at 149, 43 N.E.2d at 523. *Accord* Handrahan v. Moore, 332 Mass. 300, 303, 124 N.E.2d 808, 810 (1955).

[35] 13 Mass. App. Ct. at 342, 433 N.E.2d at 94.

[36] *Id.* at 434, 433 N.E.2d at 94.

[37] *Id.*

[38] *Id.* at 341, 433 N.E.2d at 93. *See supra* note 23.

[39] *Id.* at 342, 43 N.E.2d at 93. The defendant relied on three cases decided in other jurisdictions to support her priority-rule argument. *See, e.g.,* Lock v. Lock, 8 Ariz. App. 138, 444 P.2d 163 (1968) (court finding that, although divorce decree mandated that insured maintain children from his first marriage as beneficiaries on a policy, children had no vested equitable interest since no specific policy was designated in decree; thus, no indication that the insured intended policies outstanding at his death to be covered by agreement merged into the decree); Greenberg v. Greenberg, 264 Cal. App. 2d 896, 71 Cal. Rptr. 38 (1968) (court holding that first wife's rights to proceeds were cut off, even though she had vested equitable

the Supreme Judicial Court's opinion in *Kruger v. John Hancock Mut. Life Ins. Co.*,[40] the *Green* court analogized the plaintiffs' equitable interest as beneficiaries under the insurance policies to that of beneficiaries of a trust.[41] The Appeals Court considered the decedent, in effect, to have been a trustee standing in a fiduciary relationship to the plaintiffs.[42] The court referred to several Supreme Judicial Court cases establishing the rights of trust beneficiaries triggered by a trustee's breach of his fiduciary duty in disposing of the trust corpus.[43] From these cases, the *Green* court concluded that "the person having the equitable interest in the property may pursue either the property, or the fiduciary who improperly disposed

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interest, since second wife paid the premiums on the policy without notice of the first wife's interest therein); Gray v. Bush, 430 S.W.2d 258 (Tex. Civ. App. 1968) (court denied relief to first wife seeking to enforce property settlement agreement calling for ex-husband to maintain insurance for the benefit of the couple's children and to make child support payments, since ex-husband had set up an irrevocable trust to discharge his obligations under the agreement).

[40] 398 Mass. 124, 10 N.E.2d 97 (1937).

[41] 13 Mass. App. Ct. at 343, 433 N.E.2d at 94. *Accord* Kruger v. John Hancock Mut. Life Ins. Co., 298 Mass. 124, 129, 10 N.E.2d 97, 100 (1937).

[42] *See* Simonds v. Simonds, 45 N.Y.2d 233, 241-42, 408 N.Y.S.2d 359, 363, 380 N.E.2d 189, 193-94 (1978), *cited with approval in* 13 Mass. App. Ct. at 343, 433 N.E.2d at 94. In *Simonds* the decedent's first wife brought suit against the decedent's second wife and the daughter of his second marriage, seeking to impose a constructive trust on proceeds from insurance policies on the life of the decedent. 45 N.Y.2d at 236-37, 408 N.Y.S.2d at 360, 380 N.E.2d at 191. A separation agreement entered into between the decedent and his first wife required the decedent to maintain in effect existing insurance policies with the first wife as beneficiary. *Id.* at 237, 408 N.Y.S.2d at 360, 380 N.E.2d at 191. The decedent allowed the policies to lapse and took out new policies naming his second wife and daughter as beneficiaries. *Id.* at 238, 408 N.Y.S.2d at 361, 380 N.E.2d at 191-92. The New York Court of Appeals affirmed the trial court's judgment for the first wife, imposing a constructive trust on the proceeds of the policies. *Id.* at 236-37, 408 N.Y.S.2d at 360, 380 N.E.2d at 191. The court of appeals cited four factors as forming a basis for its imposition of a constructive trust: 1) a promise; 2) a transfer in reliance on the promise; 3) the fiduciary relationship between the decedent and his first wife; and 4) the unjust enrichment of the second wife. *Id.* at 242, 408 N.Y.S.2d at 363-64, 380 N.E.2d at 194. With respect to its finding a fiduciary relationship to exist between the decedent and his first wife, the court stated, "Because decedent and plaintiff were husband and wife, there is a duty of fairness in financial matters extending even past the contemplated separation of the spouses." *Id.* at 242, 408 N.Y.S.2d at 364, 380 N.E.2d at 194.

[43] *See, e.g.*, Tierny v. Coolidge, 308 Mass. 255, 259, 32 N.E.2d 198, 200 (1941) (Court holding that one who receives trust property, with notice that its delivery constitutes a breach of trust, holds property as constructive trustee for the trust beneficiary, who may recover the property or its value from the constructive trustee); Hervey v. Rawson, 164 Mass. 501, 503-04, 41 N.E. 682, 682-83 (1895) (in action brought by formerly insane person against guardian for disposition of a bond held for the benefit of the plaintiff, the Court, adopting the trust law, ruled that the plaintiff could proceed either against the person to whom the bond was transferred, or the guardian wrongfully disposing of the bond).

of the property, or both, at the election of the person having the equitable interest."[44]

Although the *Green* court held that beneficiaries may seek recovery of the proceeds wrongfully transferred to another, the court indicated that the right to proceed against a later named beneficiary may be a qualified one. Drawing support from the Supreme Judicial Court's earlier decisions in *Fielding* and *Handrahan,* the *Green* court indicated that it was significant that the later named beneficiary in the present case — the decedent's second wife — had received the proceeds "gratuitously or with knowledge of the plaintiffs' equitable interest."[45] The Supreme Judicial Court in *Fielding* had expressly stated that the right of designated beneficiaries to enforce their equitable interest against a later named beneficiary would be contingent upon whether the later beneficiary was a purchaser for value without notice "or in some manner acquired an equity superior to that of the plaintiff."[46] The *Green* court's emphasis on the second wife being a gratuitous beneficiary, possibly with knowledge of the children's interest, indicates that the qualifications stated in *Fielding* continue to be viable.

The Appeals Court's decision in *Green* is significant for several reasons. First, it is the only officially reported decision by a Massachusetts court in almost two decades to confront the issue of beneficiaries' rights to insurance proceeds fixed by consideration based agreements made by the insured.[47] Second, unlike prior Massachusetts decisions addressing this issue, the beneficiaries seeking to recover the insurance proceeds in *Green* were not parties who themselves had contracted with the insured; they had tendered no consideration in exchange for their right to remain as beneficiaries.[48] Without referring to this distinction, the *Green* court took the position that beneficiaries need not be contracting parties to

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[44] 13 Mass. App. Ct. at 343, 433 N.E.2d at 94.

[45] *Id.* at 343, 433 N.E.2d at 94.

[46] 312 Mass. 147, 149, 43 N.E.2d 521, 522 (1942).

[47] *Cf.* Metropolitan Life Ins. Co. v. Marcoulier, 322 F. Supp. 246 (E.D. Mo. 1971) (applying Massachusetts law in holding that children from decedent's first marriage had an equitable interest in proceeds from insurance policies covered in divorce decree and thus, as against second wife of decedent — later named beneficiary — they had a superior right to the proceeds). In recent years, courts in other jurisdictions have permitted beneficiaries of life insurance policies, removed in violation of divorce judgments and separation agreements, to recover the proceeds from substituted beneficiaries, *see, e.g.,* Hirsh v. Travelers Ins. Co., 134 N.J. Super. 466, 341 A.2d 691 (1975); Simonds v. Simonds, 45 N.Y.2d 233, 208 N.Y.S.2d 189 (1973); McKissick v. McKissick, 93 Nev. 139, 560 P.2d 1366 (1977); Richards v Richards, 58 Misc.2d 290, 206 N.Y.S.2d 134 (1973), or, where the proceeds had not yet been distributed, from the insurers. *See, e.g.,* Brunner Meyer v. Massachusetts Mut. Life Ins. Co., 66 Ill.App.3d 315, 384 N.E.2d 466 (1978); Lincoln Natl. Life Ins. Co. v. Watson, 71 Ill.App.3d 900, 390 N.E.2d 506 (1979).

[48] *See* 13 Mass. App. Ct. at 340, 433 N.E.2d at 92.

enforce their "equitable interest" acquired under an insured's agreement with another.

A third aspect of the *Green* decision which distinguishes it from the prior Supreme Judicial Court decisions in *Fielding*[49] and *Handrahan,*[50] is the Appeals Court's emphasis on trust law in reaching its decision. The *Green* court views the substitution of beneficiaries not so much as a breach of the separation agreement, but instead as a breach of the decedent's fiduciary obligations in his role as a quasi-trustee.[51] By adopting the trust analogy the *Green* court eliminates the ambiguous "breach of contract — equitable interest" claim which the Supreme Judicial Court posited in *Fielding*[52] and *Handrahan.*[53] The *Green* decision clarifies not only the avenues of recovery available to beneficiaries with an "equitable interest," but, in addition, clarifies that insurance beneficiaries, like trust beneficiaries, have a legally cognizable option to elect which avenue(s) of recovery they wish to pursue.[54] In order to have the benefits of this election, however, a plaintiff beneficiary may have to be prepared to prove that the later beneficiary did not acquire its rights by giving value without notice of the prior equitable interest.[55]

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[49] 312 Mass. 147, 43 N.E.2d 521 (1942).
[50] 332 Mass. 300, 124 N.E.2d 808 (1955).
[51] 13 Mass. App. Ct. at 343, 433 N.E.2d at 94.
[52] 312 Mass. at 149, 43 N.E.2d at 522.
[53] 332 Mass. at 303, 124 N.E.2d at 810.
[54] *See supra* notes 40-44 and accompanying text.
[55] *See supra* notes 45-46 and accompanying text.