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## Chapter 3: Domestic Relations

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## CHAPTER 3

# Domestic Relations

### *SURVEY Staff*†

§ 3.1. **Divorce—Antenuptial Contracts Governing Alimony or Property Rights.**\* In a majority of states antenuptial contracts governing alimony or property rights upon divorce are considered void per se as against public policy.<sup>1</sup> Several reasons have been given for holding these contracts void.<sup>2</sup> Frequently, the courts have viewed these contracts as facilitating divorce by offering one spouse a financial inducement to end the marriage.<sup>3</sup> In addition, some courts have viewed these contracts as denigrating the status of marriage.<sup>4</sup> Still other courts have viewed these contracts as contrary to the public's interest in preventing one spouse from becoming a public charge.<sup>5</sup> The current trend, however, is to hold that these contracts are not void per se<sup>6</sup> and to analyze their validity on a case by case basis.<sup>7</sup>

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§ 3.1. <sup>1</sup> See 2 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS, § 90-33 (1977) [hereinafter referred to as LINDEY].

<sup>2</sup> See Klarman, *Marital Agreements in Contemplation of Divorce*, 10 U. MICH. J. L. REF. 397, 404-05 (1977) [hereinafter referred to as Klarman].

<sup>3</sup> See, e.g., *Matthews v. Matthews*, 2 N.C. App. 143, 147, 162 S.E.2d 697, 699 (1968); *Crouch v. Crouch*, 53 Tenn. App. 594, 604, 385 S.W.2d 288, 293 (1964).

<sup>4</sup> See, e.g., *Fricke v. Fricke*, 257 Wis. 124, 126, 42 N.W.2d 500, 501 (1950).

<sup>5</sup> See, e.g., *Norris v. Norris*, 174 N.W.2d 368, 370 (Iowa 1970).

<sup>6</sup> See, e.g., *Barnhill v. Barnhill*, 386 So.2d 749, 751 (Ala. Civ. App. 1980); *Parniawski v. Parniawski*, 33 Conn. Supp. 44, 47-48, 359 A.2d 719, 720-22 (1976); *Burtoff v. Burtoff*, 418 A.2d 1085, 1089 (D.C. App. 1980); *Posner v. Posner*, 233 So.2d 381, 385 (Fla. 1970); *rev'd on other grounds*, 257 So.2d 530 (1972); *Volid v. Volid*, 6 Ill. App.3d 386, 391-92, 286 N.E.2d 42, 47 (1972); *Ferry v. Ferry*, 586 S.W.2d 782, 786 (Mo. App. 1979); *Buettner v. Buettner*, 89 Nev. 39, 45, 505 P.2d 600, 604 (1973); *Freeman v. Freeman*, 565 P.2d 365, 367 (Okla. 1977); *Unander v. Unander*, 265 Or. 102, 107, 506 P.2d 719, 721 (1973).

New York permits these contracts by statute. See N.Y. DOM. REL. LAW § 236B(3) (Consol. 1981-82).

Several other jurisdictions recognize the validity of antenuptial contracts governing property rights upon divorce, but have not recently ruled on the validity of those governing alimony rights. See, e.g., *Spector v. Spector*, 23 Ariz. App. 131, 136, 531 P.2d 176, 181 (1975); *Tomlinson v. Tomlinson*, 170 Ind. App. 331, 340, 352 N.E.2d 785, 791 (1976); *In re Marriage of Cohn*, 18 Wash. App. 502, 569 P.2d 79 (1977); *Laird v. Laird*, 597 P.2d 463 (Wyo. 1979).

<sup>7</sup> See, e.g., *Burtoff v. Burtoff*, 418 A.2d 1085, 1089 (D.C. App. 1980).

During the *Survey* year, the Supreme Judicial Court, in *Osborne v. Osborne*,<sup>8</sup> addressed the issue of whether antenuptial contracts governing rights upon divorce would be treated as not void per se.<sup>9</sup> The Court had not previously ruled on the validity of these contracts.<sup>10</sup> In *Osborne*, in connection with a divorce sought by both parties, the husband sought alimony and a division of property under the state's equitable distribution statute.<sup>11</sup> In addition, the husband sought to establish an ownership interest in real property held in joint title form.<sup>12</sup> Rather than ruling on the validity of an antenuptial contract in which the parties had waived all claims to one another's property and to alimony in the event of divorce,<sup>13</sup> the probate court denied the husband's claim for alimony and a division of property on

<sup>8</sup> 1981 Mass. Adv. Sh. 2216, 428 N.E.2d 810.

<sup>9</sup> *Id.* at 2220, 428 N.E.2d at 814.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 2217, 428 N.E.2d at 812. The equitable distribution statute, G.L. c. 208, § 34 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.

Under this statute all property of either spouse, including that acquired before marriage and that acquired by gift or inheritance, is subject to distribution. *See, e.g., Rice v. Rice*, 372 Mass. 398, 400, 361 N.E.2d 1305, 1307 (1977).

<sup>12</sup> 1981 Mass. Adv. Sh. at 2217, 428 N.E.2d at 812.

<sup>13</sup> *Id.* at 2218-19, 428 N.E.2d at 813. The contract provided in relevant part that: neither, upon or subsequent to said marriage, shall acquire any interest, right or claim in or to the property . . . which the other now owns, possesses or is entitled to, or which the other may own, possess, or become entitled to hereafter and that in the event of divorce "neither shall be entitled to any alimony, support money . . . or to any other money by virtue thereof." *Id.* at 2219, 428 N.E.2d at 813.

The contract was executed several hours before the wedding. *Id.* At that time, the prospective husband and wife were medical students. *Id.* at 2218, 428 N.E.2d at 813. The wife is heiress to a family fortune of approximately \$17,000,000. *Id.* An accurate schedule disclosing her worth and expected inheritance was attached to the agreement. *Id.* at 2219, 428 N.E.2d at 813. The husband had no significant assets at that time. *Id.* The contract, however, stated that the husband, "by reason of his becoming a member of the medical profession, contemplates that he will have adequate earning power for his own support. . . ." *Id.* Both the husband and wife were practicing physicians when the Supreme Judicial Court decided this case. *Id.* at 2220, 428 N.E.2d at 814.

the ground that he was not in need of either.<sup>14</sup> The probate court found, however, that the husband was joint owner of the real estate held in joint title form.<sup>15</sup>

Both parties appealed the trial court's decision, and the Supreme Judicial Court granted the wife's application for direct appellate review.<sup>16</sup> The wife claimed that the trial court had erred in failing to give full effect to the antenuptial contract and in striking a master's report finding that she was sole owner of the real estate held in joint title form.<sup>17</sup> The Supreme Judicial Court sustained the wife's claims, concluding that the antenuptial contract was controlling on all claims of the husband.<sup>18</sup> In reaching this conclusion, the Court held that "an antenuptial contract settling the alimony or property rights of the parties upon divorce is not per se against public policy and may be specifically enforced."<sup>19</sup>

This holding was based on the *Osborne* Court's recognition that a changed public policy toward divorce allowed couples to divorce more freely.<sup>20</sup> The Legislature itself, the Court noted, had removed significant obstacles to divorce by abolishing the doctrine of recrimination<sup>21</sup> as a

<sup>14</sup> *Id.* at 2218, 428 N.E.2d at 813.

<sup>15</sup> *Id.* at 2217, 428 N.E.2d at 812.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2218, 428 N.E.2d at 813.

<sup>18</sup> *Id.* Thus, the husband received neither alimony nor a division of property. In addition, the Court found that the trial court had erred in striking the master's finding that the wife was the sole owner of real estate held in joint title form. *Id.* The Court noted that the master had found that the presumption of joint ownership was rebutted by the other evidence, that this finding was not clearly erroneous, and was consistent with the antenuptial contract. *Id.* at 2226, 2230, 428 N.E.2d at 817, 819.

The Court also rejected the husband's claim that the contract was invalid because entered into under duress. *Id.* at 2226, 428 N.E.2d at 817. The Court noted that although the husband first saw the contract several hours before the wedding, he and his intended wife had discussed the agreement previously. *Id.*

<sup>19</sup> *Id.* at 2223-24, 428 N.E.2d at 816. The Court left open the question of the validity of antenuptial contracts attempting to limit the duty of either spouse to support the other during the marriage. *Id.* at 2224, 428 N.E.2d at 816. Thus it is open to the Court to rule in a future case that waivers of alimony or support pendente lite in such contracts may not be enforced. Courts in two jurisdictions which are part of the trend holding that antenuptial contracts governing alimony and property rights upon divorce are not per se invalid have already done so. *See Belcher v. Belcher*, 271 So.2d 7, 10 (Fla. 1972) (waiver will be considered by the court but is not controlling) and *Eule v. Eule*, 24 Ill. App.3d 83, 88, 320 N.E.2d 506, 510 (1974) (clause in antenuptial contract forfeiting wife's right to temporary alimony if the marriage ended within seven years held void). *See also Holliday v. Holliday*, 358 So.2d 618, 620, 620 n.6 (La. 1978) (holding waiver of alimony pendente lite in an antenuptial contract void as against public policy, but leaving open the issue of the validity of waivers of permanent alimony).

<sup>20</sup> 1981 Mass. Adv. Sh. at 2223, 428 N.E.2d at 815.

<sup>21</sup> *Id.* at 2223, 428 N.E.2d at 815, citing G.L. c. 208, § 1 (1975). Recrimination is a defense to a divorce based on fault grounds. Recrimination bars the divorce of spouses guilty of equal marital fault. *See, e.g., Reddington v. Reddington*, 317 Mass. 760, 763, 59 N.E.2d 775, 777

defense to divorce and by recognizing irretrievable breakdown as a ground for divorce.<sup>22</sup>

In addition to establishing that antenuptial contracts governing rights upon divorce are not void per se,<sup>23</sup> the Court in dicta set forth guidelines for determining the extent to which these contracts should be enforced.<sup>24</sup> First, the Court noted that the validity of these contracts would be judged by the fair disclosure rules delineated in *Rosenberg v. Lipnick*.<sup>25</sup> In *Rosenberg*, which involved the validity of antenuptial contracts governing rights upon death,<sup>26</sup> the Court established that the parties to these contracts would be viewed as occupying a confidential relationship.<sup>27</sup> Therefore, the Court imposed upon each party the burden of disclosing the amount, character and value of his or her assets.<sup>28</sup> The *Rosenberg* Court also stated that in determining the validity of an antenuptial contract, a court may consider the following factors: (1) whether the contract contains a fair and reasonable provision as measured at the date of its execution for the party contesting the contract,<sup>29</sup> (2) whether the contract's execution was preceded by full disclosure or the party contesting the contract had, or should have had, independent knowledge of the other party's worth prior to executing the contract, and (3) whether the contract contains a waiver by the party contesting the contract's validity.<sup>30</sup>

In addition to establishing that *Rosenberg's* fair disclosure rules would determine the validity of antenuptial contracts governing rights upon divorce, the *Osborne* Court set forth other guidelines for determining the extent to which these contracts should be enforced.<sup>31</sup> First, the Court

(1945) (recrimination "rivet[s] the legal bond").

<sup>22</sup> 1981 Mass. Adv. Sh. at 2223, 428 N.E.2d at 815, citing G.L. c. 208, § 1 (1975). Divorces granted on the ground of irretrievable breakdown are often referred to as "no fault" divorces.

<sup>23</sup> 1981 Mass. Adv. Sh. at 2223-24, 428 N.E.2d at 816.

<sup>24</sup> *Id.* at 2224, 428 N.E.2d at 816. These rules did not apply to the contract at issue in *Osborne* because that contract was entered before the Supreme Judicial Court established that it would apply fair disclosure rules to antenuptial contracts. These rules apply only to antenuptial contracts entered after March 30, 1979; see *id.* and *Rosenberg v. Lipnick*, 377 Mass. 666, 671, 389 N.E.2d 385, 388 (1979).

<sup>25</sup> 1981 Mass. Adv. Sh. at 2224, 428 N.E.2d at 816, citing *Rosenberg v. Lipnick*, 377 Mass. 666, 671-72, 389 N.E.2d 385, 388-89 (1979). For a discussion of *Rosenberg*, see Inker, Perocchi, and Walsh, *Domestic Relations*, 1979 ANN. SURV. OF MASS. LAW § 5.2, at 148-50.

<sup>26</sup> 377 Mass. 666, 666, 389 N.E.2d 385, 386 (1979).

<sup>27</sup> *Id.* at 670-71, 389 N.E.2d at 388.

<sup>28</sup> *Id.*

<sup>29</sup> 377 Mass. 666, 672, 389 N.E.2d 385, 388 (1979). The *Rosenberg* Court observed that the reasonableness of the contractual provision would be judged in the light of the parties' respective worth, ages, intelligence, literacy, business acumen, and prior family ties or commitments. *Id.* at 672, 389 N.E.2d at 389.

<sup>30</sup> *Id.* at 672, 389 N.E.2d at 388.

<sup>31</sup> 1981 Mass. Adv. Sh. at 2224, 428 N.E.2d at 816.

observed that these contracts would be binding on the courts to the same extent as postnuptial separation agreements, since the same public policies applied to both kinds of agreements.<sup>32</sup> Thus, the Court established that these antenuptial contracts must be fair and reasonable at the time of the judgment nisi.<sup>33</sup> In addition, the Court established that the courts could modify these antenuptial contracts in certain situations<sup>34</sup> and provided two examples. The first example involved a spouse who would become a public charge if the contract were enforced as written.<sup>35</sup> The second concerned a custody provision that was not in a child's best interests.<sup>36</sup> The Court also observed that if support in excess of the amount provided in the contract were sought, the contract could be raised as a potential bar in the same proceeding.<sup>37</sup> Finally, the Court noted that contracts unreasonably encouraging divorce would be unenforceable on public policy grounds.<sup>38</sup>

The Supreme Judicial Court's decision in *Osborne* to treat antenuptial contracts governing rights upon divorce as not per se void is significant because it may allow prospective spouses to contract out of the statutory system of equitable distribution which would otherwise govern their alimony and property rights upon divorce.<sup>39</sup> Several of the cases the *Osborne* Court cited as examples of decisions permitting these antenuptial contracts<sup>40</sup> have explicitly recognized that given our society's high rate of divorce, these antenuptial contracts are important to those who want to

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* In establishing this guideline as well as that requiring the contract to be fair at the time of the judgment nisi, the Court cited *Knox v. Remick*. *Id.*, citing *Knox v. Remick*, 371 Mass. 433, 358 N.E.2d 432 (1976). In *Knox*, the Court suggested that spousal support provisions contained in postnuptial separation agreements could be accorded considerable finality. 371 Mass. 433, 436-37, 358 N.E.2d at 435-36. *Knox* established that if "the agreement was not the product of fraud or coercion, . . . was fair and reasonable at the time of entry of the judgment nisi, and . . . the parties clearly agreed on the finality of the agreement on the subject of interspousal support, the agreement concerning interspousal support should be specifically enforced, absent countervailing equities." *Id.* The *Knox* court provided two examples of countervailing equities, one a spouse who would otherwise become a public charge, the other a spouse who had not complied with some other provision of the agreement. *Id.* at 437, 358 N.E.2d at 436. For a discussion of *Knox*, see Inker, Perocchi, and Walsh, *Domestic Relations*, 1977 ANN. SURV. OF MASS. LAW § 1.1, at 4-7.

<sup>35</sup> 1981 Mass. Adv. Sh. at 2224, 428 N.E.2d at 816.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 2224-25, 428 N.E.2d at 816.

<sup>38</sup> *Id.* at 2225, 428 N.E.2d at 816. RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981) cited in *Osborne* contains one example of such a contract. Illustration 5 posits an antenuptial contract providing that the husband will settle one million dollars on his prospective wife in the event of divorce. The RESTATEMENT notes that a court may decide that the large settlement unreasonably encourages divorce and refuse to enforce the contract on public policy grounds.

<sup>39</sup> For the text of this statute see note 11 *supra*.

<sup>40</sup> 1981 Mass. Adv. Sh. at 2223, 428 N.E.2d at 815.

plan realistically for the possibility of divorce.<sup>41</sup> Nonetheless, the rules adopted by the *Osborne* Court, as well as those adopted by courts in other jurisdictions, render the enforcement of any antenuptial contract governing rights upon divorce uncertain.<sup>42</sup>

Uncertainty first arises because the validity of antenuptial contracts governing rights upon divorce will be judged by *Rosenberg's* fair disclosure rules.<sup>43</sup> Under these rules, an antenuptial contract should be valid if it contains a fair and reasonable provision for the party contesting the contract, or if full disclosure of assets has preceded the contract's execution, or if the party contesting the contract had actual or constructive knowledge of the other party's worth prior to the contract's execution.<sup>44</sup> Yet courts have varied in their views of what facts, in the absence of disclosure, are sufficient to charge the party contesting the contract with general knowledge of

<sup>41</sup> See, e.g., *In re Marriage of Dawley*, 17 Cal.3d 342, 352, 551 P.2d 323, 329, 131 Cal. Rptr. 3, 9 (1976); *Valid v. Valid*, 6 Ill. App.3d 386, 392, 286 N.E.2d 42, 47 (1972). Cf. *Unander v. Unander*, 265 Or. 102, 108, 506 P.2d 719, 722 (1973) (recognizing the importance of these antenuptial contracts to those who enter them, but not mentioning the high rate of divorce).

<sup>42</sup> See Klarman, *supra* note 2, at 403.

<sup>43</sup> 1981 Mass. Adv. Sh. at 2224, 428 N.E.2d at 816.

<sup>44</sup> For a fuller statement of the factors which may be considered in determining a contract's validity under *Rosenberg*, see *supra* text accompanying notes 28-30. The factors set forth in *Rosenberg*, with the exception of constructive knowledge and the presence of a waiver, state the majority rule for determining the validity of antenuptial contracts governing rights upon death. Lindey states the majority rule as follows:

To render an ante-nuptial agreement valid, there must be a fair and reasonable provision for the wife, or — in the absence of such provision — there must be a full and frank disclosure to her of the husband's worth, or adequate knowledge thereof on her part independently of disclosure.

LINDEY, *supra* note 1, at § 90-52.

At least two commentators have observed that the application of these rules in other jurisdictions has created uncertainty concerning the enforceability of any antenuptial contract. See Gamble, *The Antenuptial Contract*, 26 U. MIAMI L. REV. 692, 729 (1972) [hereinafter referred to as Gamble]. Gamble, referring to antenuptial contracts governing rights upon death, states that "[t]he present guidelines . . . are uncertain and unpredictable." Gamble, *supra*, at 729. See also Note, *Antenuptial Contracts Determining Property Rights Upon Death or Divorce*, 47 U. M. KANSAS CITY L. REV. 31, 32 (1978), suggesting that although the courts state that they favor antenuptial contracts as promotive of marital stability, "[i]n reality, the judicial attitude is at best confused and unpredictable, and at worst frankly hostile."

The premise underlying these rules is that the parties to an antenuptial contract occupy a confidential relationship. See Gamble, *supra*, at 719-20. The validity of this premise has been questioned. Gamble, for example, criticizes the view that those entering antenuptial contracts occupy a confidential relationship, noting that courts have seen the relationship as one which "anesthetizes the senses of the female" and that this view does not realistically reflect current premarital relationships, particularly among those who use these contracts most, men and women past middle age. Gamble at 719-23. At least two cases in which the validity of an antenuptial contract governing rights upon death was at issue have acknowledged the validity of Gamble's criticisms. See *Babb v. Babb*, 604 S.W.2d 574, 577-78 (Ark. Ct. App. 1980); *Potter v. Collin*, 321 So.2d 128, 132 (Fla. App. 1975).

the other party's worth.<sup>45</sup> Courts also have varied in their views of what constitutes a fair and reasonable provision for the party contesting the contract.<sup>46</sup> In addition, there is no settled view on whether an unfair provision will raise a presumption of nondisclosure or involuntariness and therefore shift the burden of proof on the issues of disclosure and voluntariness to the party seeking to enforce the contract.<sup>47</sup> One commentator has criticized the use of these fairness linked presumptions, noting that since contractual provisions for the spouse are usually minimal, the presumptions are raised all too frequently.<sup>48</sup>

The greatest source of uncertainty concerning the enforceability of antenuptial contracts governing rights upon divorce is the *Osborne* Court's requirement that the contract be fair and reasonable at the time of enforcement.<sup>49</sup> This requirement, which does not apply to antenuptial contracts governing rights upon death, in effect requires the parties to guess at both what a court will consider fair and at how circumstances may change between the contract's execution and its enforcement.<sup>50</sup> Admittedly, the *Osborne* Court's requirement that the contract be fair at the time of enforcement is concerned with protecting the party disadvantaged by the contract from changed circumstances. Other concerns suggest, however, that the only requirement should be that the contract was entered knowingly and voluntarily. Primary among these concerns is the importance of the freedom of contract to the parties. In at least some instances, but for the antenuptial contract, there would be no marriage.<sup>51</sup> Thus, a limitation on

<sup>45</sup> Compare *Hosmer v. Hosmer*, 611 S.W.2d 32, 35-37 (Mo. App. 1980) (recognizing that constructive knowledge of the other contracting party's worth will render the contract valid, but not discussing whether there was such knowledge where the parties lived together before the marriage) with *In re Marriage of Cohn*, 18 Wash. App. 502, 508, 569 P.2d 79, 83 (1977) (that parties lived together before marriage one factor indicating that the intended wife had constructive knowledge of her intended husband's means).

<sup>46</sup> See, e.g., *Burtoff v. Burtoff*, 418 A.2d 1085, 1089 & n.3 (D.C. App. 1980) (if the marriage has been a short one, a fair provision is one allowing the spouse contesting the agreement to live as well after the marriage as before; if the marriage has been a longer one, the court may determine fairness in reference to the marital standard of living); *Plant v. Plant*, 320 So.2d 455, 457 (Fla. App. 1975) (fairness determined in light of the husband's wealth and standard of living at the time of the marriage).

<sup>47</sup> See, e.g., *Lutgert v. Lutgert*, 338 So.2d 1111, 1115-16 (Fla. App. 1976) (unfair provision raised a presumption of undue influence). But see *In re Benker Estate*, 97 Mich. App. 754, 755, 296 N.W.2d 167, 168 (1980) (burden of proof is on party contesting the contract's validity).

<sup>48</sup> See *Gamble*, *supra* note 44, at 724-25.

<sup>49</sup> 1981 Mass. Adv. Sh. at 2224, 428 N.E.2d at 816.

<sup>50</sup> See *Klarman*, *supra* note 2, at 403 stating that the requirement that the contract be fair "handicaps individuals in their future planning because it is virtually impossible to predetermine what a court may find to be a fair provision."

<sup>51</sup> See, e.g., *Barnhill v. Barnhill*, 386 So.2d 749, 751 (Ala. Civ. App. 1980); *Burtoff v. Burtoff*, 418 A.2d 1085, 1087 (D.C. App. 1980).



the parties' contract rights may unduly interfere with their freedom to marry. An additional reason for not limiting the parties' freedom to contract by requiring the contract to be fair at the time of enforcement is that many people apparently enter these contracts knowingly. One commentator has observed that the people who use these contracts have often been previously married and are usually past middle age.<sup>52</sup> A later assessment of fairness in these circumstances would only allow a court to substitute its own judgment for that of the spouse. In enforcing an antenuptial contract governing rights upon death, one court has observed that in these circumstances the reason for enforcing the contract is "that, essentially, the woman knows perfectly well what she is doing and does it voluntarily."<sup>53</sup>

Although the rules established in *Osborne* render the enforcement of antenuptial contracts governing alimony or property rights upon divorce somewhat uncertain, the Court's decision does establish that in some circumstances these contracts may be specifically enforced. A practitioner asked to draft one of these contracts should not represent both parties, since Massachusetts views prospective spouses as occupying a confidential relationship.<sup>54</sup> Moreover, the client should be advised that because of the confidential relationship between prospective spouses, full disclosure of the amount, character, and value of each party's assets is required. The contract's effect on the rights which each spouse would otherwise enjoy under state law should also be discussed with the client. In addition, a practitioner preparing one of these contracts should be aware that the fairness of the death and divorce provisions in an antenuptial contract will be judged as of different dates. If the contract's validity is challenged in an estate context, the contract should be enforceable if it was fair at the date of its execution, or if its execution was preceded by full disclosure or general knowledge of the other spouse's worth. Yet, if the contract is questioned in a divorce proceeding, it will be valid only if there was full disclosure or general knowledge of worth, or if the contract was otherwise fair as of the date of its execution. In addition, the contract will not be enforceable unless it is fair as of the date of the decree nisi. The client should also be advised that even if the contract is enforced at the time of divorce, it may later be modified if its enforcement would render an ex-spouse a public charge.<sup>55</sup>

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<sup>52</sup> See Gamble, *supra* note 44, at 730-33. Gamble's observation is based on his survey of all antenuptial contract cases cited in volume 16 of the Seventh Decennial Digest. The results of this survey are set forth in Gamble, *supra* note 44, at 730-32.

<sup>53</sup> Rucker v. Rucker, 42 Ohio Op.2d 184, 193 (1967).

<sup>54</sup> Rosenberg v. Lipnick, 377 Mass. 666, 671, 389 N.E.2d 385, 388 (1979).

For a discussion of the problems a practitioner should consider in drafting an antenuptial contract, see Cathey, *Ante-Nuptial Agreements in Arkansas — A Drafter's Problem*, 24 ARK. L. REV. 275 (1970).

<sup>55</sup> See *supra* text accompanying notes 34-35.

Finally, a client should be advised that, even in Massachusetts, the contract will not necessarily be enforced, and that since state laws vary greatly, a contract complying with Massachusetts law will not necessarily be enforceable in other states.

**§ 3.2. Child Custody—Incarcerated Parent—Need for Court Order.\*** Under Massachusetts law, a child's interests are presumed to be served best in his own family.<sup>1</sup> The state, however, under its *parens patriae* authority,<sup>2</sup> may interfere in the familial relationship when the child's physical or emotional well-being is endangered.<sup>3</sup> When the state acts in this capacity, the courts must carefully balance the state's primary concern with the welfare of the child against the rights of parents to raise their own children,<sup>4</sup> to be free from governmental intrusion into family life,<sup>5</sup> and to be afforded basic due process of law.<sup>6</sup>

In the *Survey* year, the Supreme Judicial Court, in *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*<sup>7</sup> (*Petition*), reaffirmed the long-held principle that the welfare of a child must be the primary concern of a court in a proceeding designed to terminate the custodial rights of a natural parent.<sup>8</sup> At the same time, the Court acted to protect more fully the basic rights of parents by requiring a court order before the state takes custody of the child of an incarcerated parent.<sup>9</sup>

In *Petition*, the Department of Public Welfare (D.P.W.) had submitted a petition pursuant to chapter 210, section 3.<sup>10</sup> This statute permits the adop-

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§ 3.2. <sup>1</sup> Custody of a Minor (No. 2), 378 Mass. 712, 718, 393 N.E.2d 379, 383; Custody of a Minor (No. 1), 377 Mass. 876, 882, 389 N.E.2d 68, 73 (1979); *Richards v. Forrest*, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932); G.L. c. 119, § 1.

<sup>2</sup> *Parens patriae* means "parent of the country." For an historical view of state intervention, see generally, Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L. J. 887, 894-917 (1975).

<sup>3</sup> *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 1981 Mass. Adv. Sh. 1157, 1172, 421 N.E.2d 28, 36.

<sup>4</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>5</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), *Custody of a Minor* (No. 1), 377 Mass. 876, 880-81, 389 N.E.2d 68, 72 (1979).

<sup>6</sup> *Santosky v. Kramer*, 50 U.S.L.W. 4332 (U.S. March 24, 1982); *Lassiter v. Department of Social Services*, 452 U.S. 18, 37 (1981) (dissenting opinion); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

<sup>7</sup> 1981 Mass. Adv. Sh. 1157, 421 N.E.2d 28.

<sup>8</sup> 1981 Mass. Adv. Sh. at 1172, 421 N.E.2d at 36. See *Richards v. Forrest*, 278 Mass. 547, 553, 180 N.E. 508, 511 (1932) ("the first and paramount duty of courts is to consult the welfare of the child.").

<sup>9</sup> 1981 Mass. Adv. Sh. at 1167, 421 N.E.2d at 33.

<sup>10</sup> G.L. c. 210, § 3 provides in pertinent part:

(a) Whenever a petition for adoption is filed by a person having the care or custody of a

tion of a child over the objections of parents when a court has determined that it would be in the child's best interests to be freed for adoption.<sup>11</sup> The natural mother of the child argued that the petition should be dismissed because the Department originally had obtained custody of the child unconstitutionally,<sup>12</sup> and subsequently had violated its own regulations.<sup>13</sup> Furthermore, the mother contended that the probate court, which had granted the petition, had not made an affirmative showing of her unfitness,<sup>14</sup> and that such a showing must be made by proof beyond a reasonable doubt or by clear and convincing evidence.<sup>15</sup> While disagreeing with the mother's contentions that the petition be dismissed and that a different evidentiary standard was required, the Supreme Judicial Court reversed and remanded the case because the probate court had failed to make an express finding of the mother's current unfitness.<sup>16</sup>

The child in dispute, Shari, was born in 1975 while her unwed mother, Brenda, was incarcerated at the Massachusetts Correctional Institution at Framingham (MCIF) for a drug-related offense.<sup>17</sup> Although the mother had requested that her newborn infant be placed with an aunt, or if not, with a black foster family, the D.P.W., pursuant to chapter 119, section 23(C),<sup>18</sup>

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child, the consent of the . . . [parents] shall not be required if: . . . (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child, as defined in paragraph (c). . . (c) In determining whether the best interests of the child will be served by granting a petition for adoption without requiring certain consent as permitted under paragraph (a), the court shall consider the ability, capacity, fitness and readiness of the child's parents . . . to assume parental responsibility . . . and shall also consider the plan proposed by the department or other agency initiating the petition. If said child has been in the care of the department or a licensed child care agency for more than one year, in each case irrespective of incidental communications or visits from his parents . . . there shall be a presumption that the best interests of the child will be served by granting a petition.

*Id.*

<sup>11</sup> *Id.*

<sup>12</sup> Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 1981 Mass. Adv. Sh. at 1160, 421 N.E.2d at 30. Specifically, the mother claimed that she was not afforded a hearing when the department first took custody following the child's birth, and that the later grant of custody to the department was made without giving her proper notice, and therefore, an opportunity to be heard. *Id.* See notes 25-34 and accompanying text *infra*.

<sup>13</sup> 1981 Mass. Adv. Sh. at 1169-70, 421 N.E.2d at 35. The mother argued that the Department had failed to place the child within the extended family, that the foster home chosen was not in a geographically convenient location, that the Department had failed to encourage parental visits and to send written reminders about visits, and that the Department had failed to send notice of the termination of visiting rights. *Id.*

<sup>14</sup> *Id.* at 1159, 421 N.E.2d at 30.

<sup>15</sup> *Id.* at 1159-60, 421 N.E.2d at 30.

<sup>16</sup> *Id.* at 1178-79, 421 N.E.2d at 39-40.

<sup>17</sup> *Id.* at 1160, 421 N.E.2d at 30. Shari was born in December, 1975, and her mother was eligible for parole in March, 1976. *Id.*

<sup>18</sup> G.L. c. 119, § 23A, as appearing in St. 1966, c. 473, provides in part:

placed Shari with a white foster family shortly after she was born.<sup>19</sup> For the next two years, the mother was in and out of detention.<sup>20</sup> During this period, there were times when the mother and child visited regularly and satisfactorily.<sup>21</sup> There were, however, occasions when Brenda failed to maintain contact with the Department for several months at a time.<sup>22</sup> As early as November, 1977, the caseworker assigned to Brenda had recommended that the Department file guardianship proceedings for the child.<sup>23</sup> Brenda, however, never was informed of these plans, but rather, was led to believe that she could be reunited with her child.<sup>24</sup>

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Any child born to an inmate of the Massachusetts Correctional Institution, Framingham, . . . shall be accepted by the department, . . . Thereupon the department in consultation with the commissioner of correction or the chairman of the youth service board shall make such provision at said place of commitment or elsewhere for the care of said child as may seem to be for the best interests of said child.

*Id.*

<sup>19</sup> 1981 Mass. Adv. Sh. at 1160, 421 N.E.2d at 30. The family was chosen partly on the basis of their proximity to MCIF. *Id.* The probate judge had found that the D.P.W. had made attempts to place Shari within her extended family, and in particular with Brenda's aunt, but had not done so because, according to the D.P.W., no one could offer a realistic plan for the long-term care of the child. *Id.* at 1160 n.2, 421 N.E.2d 30 n.2. The mother's aunt, however, had testified that she was never approached by the D.P.W. before Shari was placed, and that she had been prepared to care for the child during the mother's incarceration. *Id.*

<sup>20</sup> The mother was paroled in March to the National Center for Attitude Change (NCAC) in Boston, which she later left without authorization. *Id.* at 1160-61, 421 N.E.2d at 30. This departure from NCAC resulted in the termination of her parole and her return to MCIF. *Id.* at 1161, 421 N.E.2d at 31. In February, 1977, Brenda was enrolled in a pre-release program at MCIF which involved outside work. She had an excellent work record in her job as a receptionist and clerk, but returned to MCIF full-time after an on-the-job drinking incident during which Brenda had assaulted a correctional officer. *Id.* at 1162, 421 N.E.2d at 31. Brenda was paroled in August, 1977, and then took to the streets for several months as she had neither a job nor money. *Id.* at 1163, 421 N.E.2d at 31. In May of 1978 Brenda was convicted of assault and battery with a dangerous weapon and was again returned to MCIF. *Id.* at 1164, 421 N.E.2d at 32.

<sup>21</sup> *Id.* at 1161, 421 N.E.2d at 30. Brenda had regular visits with Shari during her first incarceration at MCIF and saw her almost every week while she was at NCAC. *Id.* Between February and June, 1977, while Brenda was on her work-release program, Shari stayed with Brenda every other weekend from Friday through Sunday. *Id.* at 1162, 421 N.E.2d at 31. After Brenda had been released from MCIF in August of 1977, Brenda tried to arrange a weekend visit with Shari at a motel, but the D.P.W. case worker refused permission. *Id.* Brenda had one last visit with Shari in January, 1978. *Id.* at 1163-64, 421 N.E.2d at 31-32. By June of that year, Brenda was back in MCIF, the D.P.W. had filed the petition to dispense with consent to adoption, and Brenda was refused visitation rights. *Id.* at 1164, 421 N.E.2d at 32.

<sup>22</sup> *Id.* at 1161-1164, 421 N.E.2d at 30-32. Brenda did not notify the D.P.W. of her whereabouts when she left NCAC, *id.* at 1161, 421 N.E.2d at 30-31, when she was released from MCIF in August 1977, *id.* at 1162, 421 N.E.2d at 31, and in March of 1978, when Brenda left the state to "avoid the law." *Id.* at 1164, 421 N.E.2d at 32.

<sup>23</sup> *Id.* at 1162, 421 N.E.2d at 31.

<sup>24</sup> *Id.* at 1169, 421 N.E.2d at 34-35.

In March of 1978 a petition was filed by the D.P.W. for temporary legal custody of the child.<sup>25</sup> The petition was granted without the mother's knowledge, although the D.P.W. had tried to notify her by mail.<sup>26</sup> Two months later, the D.P.W. filed a petition pursuant to chapter 210, section 3, to dispense with Brenda's consent to Shari's adoption.<sup>27</sup> A hearing was held in probate court in April, 1980, and the judge granted the state's petition which freed the child for adoption by her foster parents.<sup>28</sup> The judge recognized that Brenda had benefitted from rehabilitative services, and probably would be considered a fit mother upon her release from prison.<sup>29</sup> Nevertheless, the judge concluded that the best interests of the child would be served by granting the petition because the child might be devastated by removal from her pre-adoptive home.<sup>30</sup> The mother appealed the granting of the petition, and the appeal was transferred to the Supreme Judicial Court on its own motion.<sup>31</sup>

The Court first addressed the mother's contention that the petition should have been dismissed because the D.P.W. originally had taken custody over the child under chapter 11, section 23A without affording her an opportunity to be heard.<sup>32</sup> According to the D.P.W., this statute automatically transfers custody to the D.P.W. of all minor children born of incarcerated mothers.<sup>33</sup> The Court, noting that this interpretation of the statute created an irrebuttable presumption that an incarcerated mother is unfit, interpreted the statute as not requiring such an automatic loss of custody.<sup>34</sup> While the Court acknowledged the significant state interest in

<sup>25</sup> *Id.* at 1164, 421 N.E.2d at 32.

<sup>26</sup> *Id.* The D.P.W. did not attempt to reach Brenda through her aunt, although Brenda claimed that the Department knew that she could have been reached in this manner. *Id.* at 1169, 421 N.E.2d at 34. The probate judge had found that the proceeding under G.L. c. 119, § 23(C), awarding temporary legal custody to the D.P.W., cured any original defects in the way the Department had gained custody over Shari. *Id.* at 1168, 421 N.E.2d at 34. The probate judge also concluded that Brenda's unavailability was her own fault because she was attempting to "avoid the law." *Id.*

<sup>27</sup> *Id.* It was not stated whether Brenda was able to obtain counsel or had been appointed counsel when she was notified of the c. 210 petition pending against her. In 1979, the Supreme Judicial Court held that an indigent parent is entitled to counsel appointed at state expense when contesting a petition to dispense with parental consent to adoption. *See Department of Public Welfare v. J.K.B.*, 1979 Mass. Adv. Sh. 2202, 2206, 393 N.E.2d 406, 408. *But see Lassiter v. Department of Social Services*, 452 U.S. 18, 31-32 (1981) (fourteenth amendment's due process clause does not require the appointment of counsel for indigent parents in every parental status termination proceeding).

<sup>28</sup> 1981 Mass. Adv. Sh. at 1159, 421 N.E.2d at 29.

<sup>29</sup> *Id.* at 1159 n.1, 421 N.E.2d at 29 n.1.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1158, 421 N.E.2d at 28.

<sup>32</sup> *Id.* at 1165, 421 N.E.2d at 32-33.

<sup>33</sup> *Id.* See note 15 *supra*.

<sup>34</sup> 1981 Mass. Adv. Sh. at 1166, 421 N.E.2d at 33. The Court noted that the Supreme Court

protecting children of incarcerated mothers, the Court stressed that important family interests were involved.<sup>35</sup> Therefore, the Court reasoned that absent consent, the child could not be removed from the mother's custody without a court order.<sup>36</sup> Furthermore, the Court noted that chapter 119, section 1 requires the Department to use its efforts to preserve and strengthen the family, and therefore, family members should be the first ones sought to care for the child of an incarcerated mother.<sup>37</sup> Only after these efforts to preserve the family have been shown to be futile, the Court concluded, should the Department seek custody of the child.<sup>38</sup>

Despite the Court's finding that the Department had violated the mother's rights by taking custody of Shari without a court hearing, the Court refused to dismiss the petition.<sup>39</sup> The Court noted that under chapter 210, section 3, the Department had standing to bring the petition when the child was in the "care" or "custody" of the Department.<sup>40</sup> Therefore, although there were defects in the custody proceedings, the Department had "care" of the child and could properly petition the Court to terminate parental rights.<sup>41</sup> The Court also was not persuaded by indications that the Department had not followed its own regulations in this case.<sup>42</sup> Finding that the Department had acted in good faith, the Court concluded that the Department's actions had not been "so arbitrary and irrational" as to require dismissal.<sup>43</sup> Furthermore, the Court noted that dismissal of the peti-

in *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) had struck down an irrebuttable presumption that the father of an illegitimate child was unfit as a parent. 1981 Mass. Adv. Sh. at 1166, 421 N.E.2d at 33.

<sup>35</sup> *Id.* at 1166-67, 421 N.E.2d at 33.

<sup>36</sup> *Id.* at 1167-68, 421 N.E.2d at 34.

<sup>37</sup> *Id.* The Court noted that in *Moore v. East Cleveland*, 431 U.S. 494, 504 (1977) the Supreme Court had included the extended family as part of the constitutionally protected family. 1981 Mass. Adv. Sh. at 1165 n.7, 421 N.E.2d at 33 n.7.

<sup>38</sup> *Id.* at 1167-68, 421 N.E.2d at 34. *See also* 110 C.M.R. § 5.05 (regulations of the Department of Social Services which has succeeded the Department of Public Welfare in the provision of custodial care of children pursuant to St. 1978, c. 552).

<sup>39</sup> 1981 Mass. Adv. Sh. at 1170-71, 421 N.E.2d at 35. *See also* *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 1981 Mass. Adv. Sh. 2340, 2343-44, 429 N.E.2d 685, 687 (mother argued that because the D.S.S. had behaved improperly, the petition under G.L. c. 210, § 3 should be dismissed, using the exclusionary rule by way of analogy). *See also* *Custody of a Minor*, 5 Mass. App. Ct. 741, 747, 370 N.E.2d 712, 716 (1977) (mother argued that petition should be dismissed because present finding of unfitness was based on emotional problems which were caused by the D.P.W.'s illegally taking the child from her).

<sup>40</sup> 1981 Mass. Adv. Sh. at 1169, 421 N.E.2d at 34-35.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1169-70, 421 N.E.2d at 35.

<sup>43</sup> *Id.* at 1170, 421 N.E.2d at 35 (*citing* *Petition of the Dep't of Public Welfare to Dispense with Consent to Adoption*, 376 Mass. 252, 269, 381 N.E.2d 565, 575 (1978)). *See note 9 supra* for the alleged violations.

tion because of departmental mistakes ultimately would not serve the best interests of the child.<sup>44</sup>

Having determined that the welfare of the child overrode any prior violations of the mother's rights by the Department, the Court next discussed the mother's current rights to the custody of her child. The Court noted that at common law parents are presumed to have a natural right to the care and custody of their children, and that children's interests are presumed to be best served if they are raised in their natural family.<sup>45</sup> Moreover, the Court observed that the interest of parents in their children is constitutionally protected as a fundamental interest.<sup>46</sup> Parental rights, however, are not absolute, and the Court indicated that the state may intrude into the family to protect minor children from serious physical and emotional harm.<sup>47</sup> When the Commonwealth is compelled to so intrude, the Court opined, the welfare of the child is placed over every other public or private consideration, including the rights of the parents.<sup>48</sup> Yet given the fundamental rights of parents, and the needs of the child, the Court reiterated its holding in recent decisions that a showing of parental unfitness be made before a child is removed from his natural parents.<sup>49</sup>

In requiring an affirmative showing of "parental unfitness," the Court stressed that whether a parent meets this standard turns on how the family environment affects the welfare of the child:<sup>50</sup> parents are not to be measured simply by their conduct or character,<sup>51</sup> but by their ability to fur-

<sup>44</sup> 1981 Mass. Adv. Sh. at 1170, 421 N.E.2d at 35. See generally Note, *A Damages Remedy for Abuses by Child Protection Workers*, 90 YALE L. J. 681, 701 (1981) (arguing that courts should not lose sight of the best interests of the child when confronted with abuses by child protection workers, and instead should award damages to parents).

<sup>45</sup> *Id.* at 1171, 421 N.E.2d at 36.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1172, 421 N.E.2d at 36.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1173, 421 N.E.2d at 37 (citing *Custody of a Minor (1)*, 377 Mass. 876, 882, 389 N.E.2d 68, 73 (1979)). See also *Custody of a Minor (2)*, 378 Mass. 712, 718, 393 N.E.2d 379, 383 (1979); *Bezio v. Patenaude*, 1980 Mass. Adv. Sh. 2133, 2140, 410 N.E.2d 1207, 1214-15.

<sup>50</sup> 1981 Mass. Adv. Sh. at 1173-76, 421 N.E.2d at 37-38. The statute, G.L. c. 210, § 3 allows a court to grant the petition to dispense with consent to adoption where the adoption would be in the best interests of the child. See note 7 *supra*. In *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 328 N.E.2d 854 (1975), the Court first articulated the current interpretation of this statutory language. In that case, the mother challenged the constitutionality of the statute, claiming that the state had to make a finding of parental unfitness before it could terminate her rights to the child. *Id.* at 636, 328 N.E.2d at 858. The Court, contending that the mother misunderstood the relationship between the two standards, stated that the standards reflect "different degrees of emphasis on the same factors," and are "cognate and connected." *Id.* at 641, 328 N.E.2d at 860.

<sup>51</sup> The Court noted that state intervention on behalf of a child was justifiable only where the child was endangered. 1981 Mass. Adv. Sh. at 1176, 421 N.E.2d at 38. Thus, the Court stated, intervention is not justifiable simply because parents are poor and unable to provide their

ther the best interests of the child.<sup>52</sup> In the words of the Court: “As *parens patriae* the State does not act to punish misbehaving parents; rather, it acts to protect endangered children.”<sup>53</sup> Therefore, the Court stated, parents could be fit as parents for one child, while unfit as parents of another.<sup>54</sup> Additionally, if the child had developed a strong attachment to other adults to the extent that it would be harmful to remove the child from their care, the natural parents could be considered to be unfit in the sense that they would be unsuitable for the child.<sup>55</sup> As a necessary predicate to depriving a natural parent of custody, the test of parental fitness and the test of best interests of the child, therefore, must be applied in conjunction with each other.<sup>56</sup>

While agreeing with the mother that the state must make an affirmative showing of parental unfitness, the Court rejected the adoption of a higher standard of proof for cases involving termination of parental rights.<sup>57</sup> The current standard of proof requires the judge to exercise “utmost care” in making custody decisions and that persuasive evidence be shown to remove a child from his parents.<sup>58</sup> The mother had urged that under the requirements of due process, the state must prove the parents’ unfitness by a showing of proof beyond a reasonable doubt, or by clear and convincing evidence.<sup>59</sup> The Court observed, however, that the use of a higher standard of proof might jeopardize the welfare of the children involved, by placing too great a burden on the state.<sup>60</sup> According to the Court, the important parental interests at stake could be protected adequately by the present evidentiary standard since the judge must enter detailed findings which indicate that the judge has given careful attention to the evidence.<sup>61</sup> The Court, therefore, reaffirmed its adherence to the preponderance of the evidence standard with heightened care for custody determinations.

children with material advantages. *Id.* Similarly, parents may not, according to the Court, be deprived of custody of their children because of an unusual life style. *Id.*

<sup>52</sup> *Id.* at 1174-76, 421 N.E.2d at 37-38.

<sup>53</sup> *Id.* at 1176, 421 N.E.2d at 38.

<sup>54</sup> *Id.* at 1174, 421 N.E.2d at 37.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1176, 421 N.E.2d at 38.

<sup>57</sup> *Id.* at 1176-77, 421 N.E.2d at 38-39. *See also* *Custody of a Minor (1)*, 377 Mass. 876, 884, 389 N.E.2d 68, 74-75 (1979) (rejecting higher standard of proof); *Custody of a Minor (2)*, 378 Mass. 712, 720-22, 393 N.E.2d 379, 384-85 (1979) (rejecting higher standard of proof). The Court’s rejection of a higher standard of proof has since been superceded by the Supreme Court, which has held that “clear and convincing” evidence is required by due process before a state may terminate parental rights. *Santosky v. Kramer*, 50 U.S.L.W. 4333, 4339 (U.S. March 24, 1982).

<sup>58</sup> 1981 Mass. Adv. Sh. at 1177, 421 N.E.2d at 39.

<sup>59</sup> *Id.* at 1176, 421 N.E.2d at 38. *But see* *Santosky v. Kramer*, 50 U.S.L.W. 4333, 4339 (U.S. March 24, 1982).

<sup>60</sup> 1981 Mass. Adv. Sh. at 1177, 421 N.E.2d at 39.

<sup>61</sup> *Id.* *See* *Custody of a Minor (1)*, 377 Mass. 876, 886, 389 N.E.2d 68, 74-75 (1979).



According to the *Petition* Court, this heightened evidentiary standard was not met in this case.<sup>62</sup> The Court noted that the judge did not explicitly find that the mother currently was unfit to resume custody of her child.<sup>63</sup> Although the judge had ultimately found that Shari would be harmed by a return to her mother, his specific findings were not made with the explicitness necessary for the reviewing court to determine whether these findings were supported by the record.<sup>64</sup> It was also not clear to the reviewing court whether the judge had been influenced by inappropriate factors, such as the harm to the foster family if Shari were removed from them.<sup>65</sup> The Court, therefore, reversed and remanded the case for a new hearing, granting the parties the opportunity to present new evidence.<sup>66</sup> Furthermore, the Court ordered that the mother be granted visitation rights, denied by the D.P.W. since early 1978, subject to a showing of serious threat to the welfare of the child.<sup>67</sup> The Court also suggested that a preliminary hearing be held to determine if a program could be established which would ultimately reunite the mother with her child.<sup>68</sup> Thus, while not returning custody to the mother until her fitness could be properly adjudicated, the Court required that the Department make efforts, short of seriously harming the child, to reunite the family.

The Court's ruling in *Petition*, that the Commonwealth, absent consent, could not take custody of the child of an incarcerated parent without a

<sup>62</sup> *Id.* at 1178, 421 N.E.2d at 39.

<sup>63</sup> *Id.* The probate judge had found in part:

[T]he court is of the opinion that Brenda has effectively reorganized her life and by any reasonable standards, *ceteris paribus*, could be deemed to be a fit mother upon her expected release from prison and marriage to her fiance. . . . She has had the benefit of just about every conceivable educational, vocational or rehabilitative program one could imagine.

*Id.* at 1159 n.1, 421 N.E.2d 29 n.1.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 1178, 421 N.E.2d at 39.

<sup>66</sup> *Id.* at 1179, 421 N.E.2d at 40.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* The Court thus demanded more than a mere presumption that returning the child to the mother would be harmful. The Court found unconvincing the findings of the probate court, based on psychiatric testimony, that the long-term effects on the child of removing her from her foster parents would be "devastating." *Id.* at 1178, 421 N.E.2d at 39. Further, the Court explicitly rejected a *per se* rule that would automatically give custody to prospective adoptive foster parents who had become psychological parents to the child in dispute. *Id.* at 1175 n.16, 421 N.E.2d 38 n.16. *But see* Cennami v. Department of Public Welfare, 5 Mass. App. Ct. 403, 413, 363 N.E.2d 539, 546 (1977) ("the interest of the child in the continuation of a custody of sufficient duration to amount to a substitute parental relationship is recognized by our law to be a legally protected right."). *See also* Smith v. Organization of Foster Families For Equality and Reform, 431 U.S. 816, 854-56 (1977) (denying due process rights of foster parents).

court order,<sup>69</sup> illustrates the Supreme Judicial Court's increasing concern with parental rights in custody and termination proceedings. In 1979 the Massachusetts Court first required that the judge exercise the utmost care in all custody cases,<sup>70</sup> and that a finding be made of "current" parental unfitness.<sup>71</sup> In that same year, the Court rejected a probate judge's findings of unfitness as conclusory, for not specifying the shortcomings or handicaps of the parent that would endanger the child, and for not showing persuasively the necessity of permanently removing the child from the natural parent.<sup>72</sup> This concern with parental rights is consistent with statements in recent United States Supreme Court decisions indicating that where there is no showing of parental unfitness, it may be unconstitutional to break-up a natural family to serve the best interests of a child.<sup>73</sup> Additionally, in a petition brought to terminate parental rights under chapter 210, the Massachusetts Court ruled that indigent parents have a constitutional right to appointed counsel.<sup>74</sup>

The *Petition* Court's requirement of a court order before the state may take custody of a child without parental consent is an important safeguard for parents. Once parents have lost custody of their child, whether voluntarily or by court order, they have surrendered important rights<sup>75</sup> and

<sup>69</sup> See notes 32-38 and accompanying text *supra*.

<sup>70</sup> See notes 49-51 and accompanying text *supra*.

<sup>71</sup> *Custody of a Minor* (1), 377 Mass. 876, 880, 389 N.E.2d 68, 72 (1979). In this case, although the Court rejected the need for a "clear and convincing evidence" standard of proof, the Court stated that it was "constitutionally" required that the judge use "utmost care" by making detailed and specific findings of fact. *Id.* at 877, 389 N.E.2d at 70. Further, the Court, citing *Quilloin v. Walcott*, 434 U.S. 246 (1978), indicated that the Commonwealth must affirmatively show parental unfitness as a predicate to depriving a parent of custody of a child. *Custody of a Minor* (1) at 882, 389 N.E.2d at 73.

<sup>72</sup> *Custody of a Minor* (3), 378 Mass. 732, 393 N.E.2d 379, 385 (1979). Here, the Court stated that it was not enough for the trial judge to find that the mother was suffering from a mental disorder. *Id.*, 393 N.E.2d at 385. Instead, the trial judge should have detailed the specific shortcomings or symptoms that would endanger the child if the child were to remain with the mother. *Id.* Further, the trial judge must show persuasively the necessity of permanently removing the child from the mother. *Id.* See also *Petition of Worcester Children's Friend Society to Dispense with Consent to Adoption*, 1980 Mass. App. Ct. Adv. Sh. 791, 796, 402 N.E.2d 1116, 1119-20; *Guardianship of a Minor*, 1981 Mass. App. Ct. Adv. Sh. 674, 418 N.E.2d 343, 344.

<sup>73</sup> See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring). See also Chemerinsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions*, 18 J. FAM. L. 79, 89-113 (1979-80) (questioning the constitutionality of statutes which permit involuntary adoptions on a "best interest of the child" basis, without more specific guidelines limiting the discretion of the trial court). The author particularly criticizes the Massachusetts Case of *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 328 N.E.2d 854 (1975). Chemerinsky, 18 J. Fam. L. at 89-94.

<sup>74</sup> See note 22 *supra*.

<sup>75</sup> See 110 C.M.R. § 5.02(5) which defines "Custody" as "the power to determine the

ultimately may lose all rights to the child. Under chapter 210, parental rights to children in the care or custody of the state may be terminated under the "best interests of the child" standard.<sup>76</sup> Current court interpretation of this statute, which terminates parental rights by freeing the child for adoption without parental consent, incorporates the "unfitness" standard into the "best interests of the child" standard.<sup>77</sup> Nonetheless, as stated by the Court in *Petition*, the standard allows a finding of unfitness where a "lengthy separation and a corresponding growth in ties between the child and the prospective adoptive parents indicate that the child would be hurt by being returned to the natural parents."<sup>78</sup> Furthermore, once a child has been in custody for a year, a presumption is raised by statute that the best interests of the child will be served by allowing the child to be adopted without the parents' consent.<sup>79</sup> Thus, state assumption of custody of a child, for whatever reason, may diminish parental rights to the ultimate return of their child.<sup>80</sup>

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child's place of abode, medical care and education; to control visits to the child; and to consent to enlistments, marriages and other contracts otherwise requiring parental consent."

<sup>76</sup> See note 7 *supra*. In *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 636, 328 N.E.2d 854, 857-58 (1975) the mother argued unsuccessfully that the "best interests" standard should not apply where the child had voluntarily been placed with a private agency, as a "family obliged by temporary adversity such as illness to place its child in foster care might then be deprived of the child against its will if the agency decided that another family could better raise the child." *Id.* The Court countered with the contention that the "best interests" standard took into account the fitness of the parent. *Id.* at 636-42, 328 N.E.2d at 858. See note 40 and accompanying text *supra*. A dissent in *Little Wanderers* by Chief Justice Hennessey contended that the two standards were in fact different, and placed different burdens on the parents. *Id.* at 648-49, 328 N.E.2d at 864. Under the "best interests" test, the dissent observed, the rights of the parents were subordinated to those of the child, while under the "unfitness" test, the focus is more on the character and conduct of the parent. *Id.* See also Chemerinsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoptions*, 18 J. FAM. L. 79, 89-93 (1979-80) (criticizing the result in *Little Wanderers*).

<sup>77</sup> See notes 40-44 and accompanying text *supra*.

<sup>78</sup> 1981 Mass. Adv. Sh. at 1175, 421 N.E.2d at 38 (*citing* *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 639, 642, 328 N.E.2d 854, 859, 861 (1975)).

<sup>79</sup> See note 7 *supra*. See also 110 C.M.R. § 5.11(9).

<sup>80</sup> See *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 650, 328 N.E.2d 854, 865 (1975) (Hennessey, J., dissenting):

It occurs to me that this parent would most likely not have "lost" her child had she not temporarily placed the child in the New England Home while she attempted to settle her life, an act which in her judgment was best for the child. Yet that is the result reached by the decision rendered in this case. To extend the best interests standard to these facts would in my opinion go further than the Legislature intended. As this case indicates, the best interests standard may bring to the fore considerations different in kind and degree from unfitness, considerations perhaps decisive as to whether the parent will lose his or her right to protest the taking away of a child through an involuntary adoption.

*Id.*

Parental safeguards in the initial custody decision are also important because of the state's discretionary authority to structure the contacts parents have with a child in custody. Although the state is under an affirmative duty to encourage visits,<sup>81</sup> visitation rights may be denied if the child's physical or emotional well-being would be endangered by the visits.<sup>82</sup> Once the child is in custody, regardless of whether a finding of parental unfitness even has been made, a petition may be filed to dispense with the parents' consent to adoption.<sup>83</sup> After the petition has been filed, visitation rights are no longer of right, and may cease.<sup>84</sup> In *Petition*, for example, although the petition to dispense with consent to adoption was filed in May, 1978, by the D.P.W., a judgment on the petition was not rendered until April, 1980.<sup>85</sup> During the two year interval between the filing and judgment, the mother had no visitation rights with the child.<sup>86</sup> The probate judge had found that at the time of the hearing in 1980, Brenda had reorganized her life and was then a fit mother.<sup>87</sup> The judge held, however, that the child should be adopted by the family she had been placed with shortly *after* the petition had been filed, because it would be "cruel and dangerous" to upset her life again, and because, by that time, her natural mother was a "stranger" to her.<sup>88</sup> Between the time the petition was granted and the time the Supreme Judicial Court reversed the judgment, another year had passed during which the mother did not see her child.<sup>89</sup> Custody of the child, therefore, may inadvertently lead to a situation, as in *Petition*, where the parent is threatened with loss of a child due in part to the state's own actions in restricting visitation rights.<sup>90</sup> By requiring a court order before custody is given to the state without parental consent, the *Petition* Court has lessened the likelihood of such situations arising needlessly in the future.

<sup>81</sup> 110 C.M.R. § 5.15.

<sup>82</sup> *Id.*

<sup>83</sup> G.L. c. 210, § 3. *See also* *Petition of New England Home for Little Wanderers*, 367 Mass. 631, 642, 328 N.E.2d 854, 861 (1975) (nothing in § 3 to indicate that custody means "anything other than physical custody, whatever the original basis for it.").

<sup>84</sup> 110 C.M.R. § 5.15 states:

The right to weekly visits shall not apply in any case in which the department or provider has filed a petition to dispense with the need for parental consent to adoption pursuant to G.L. c. 210, section 3. In such a case, the department or provider shall petition the probate court to make an appropriate order regarding visits.

*Id.*

<sup>85</sup> 1981 Mass. Adv. Sh. at 1159, 1164, 421 N.E.2d at 29, 32.

<sup>86</sup> *Id.*

<sup>87</sup> *See* note 53 *supra*.

<sup>88</sup> *Id.*

<sup>89</sup> *See* notes 55-57 and accompanying text *supra*.

<sup>90</sup> *See, e.g.,* *Custody of a Minor*, 5 Mass. App. Ct. 741, 745, 370 N.E.2d 712, 715 (1977) (mother claimed that child's long absence from mother, caused by actions of D.P.W., was principal affirmative reason relied on by judge in removing custody from parent). *See generally*

The Court in *Petition* strengthened the fundamental rights of parents in the family relationship by requiring a court order when the state seeks custody of a child against the wishes of its parents. The Court, however, refused to give parents the added protection of a “clear and convincing evidence” standard of proof in proceedings to dispense with parental consent to adoption.<sup>91</sup> Shortly after the *Survey* year, the United States Supreme Court, in *Santosky v. Kramer*,<sup>92</sup> ruled that states are constitutionally required to use a standard of proof equal to or higher than “clear and convincing evidence” in hearings to terminate parental rights.<sup>93</sup> The Supreme Court in *Santosky* thus recognized the vital parental interests involved and the critical need for procedural protections where the permanent separation of parent and child is at stake.<sup>94</sup> In light of this decision, parents may now be able to challenge successfully the Massachusetts evidentiary standard<sup>95</sup> and receive added protection when the state seeks to terminate their rights to their children.

**§ 3.3. Child Custody—Parental Unfitness—Minor’s Wishes Relevant.\***

In a companion case to *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*,<sup>1</sup> the Supreme Judicial Court addressed the parental unfitness standard in the context of a care and protection proceeding under chapter 119.<sup>2</sup> The Court held, in *Custody of a Minor*,<sup>3</sup> that a

Note, *A Damages Remedy for Abuses by Child Protection Workers*, 90 YALE L. J. 681 (1981).

<sup>91</sup> See notes 45-51 and accompanying text *supra*.

<sup>92</sup> 50 U.S.L.W. 4332 (U.S. March 24, 1982).

<sup>93</sup> *Id.* at 4339.

<sup>94</sup> *Id.* at 4335.

<sup>95</sup> See notes 45-51 and accompanying text *supra*.

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§ 3.3. <sup>1</sup> 1981 Mass. Adv. Sh. 1157, 421 N.E.2d 28. See *Domestic Relations*, 1981 ANN. SURV. MASS. LAW § 3.2.

<sup>2</sup> G.L. c. 119, §§ 24 and 26. Section 24 provides in part:

The . . . court . . . upon the petition of any person alleging on behalf of a child under the age of eighteen years . . . 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 a child’s sound character development or; (c) who lacks proper attention of parent . . . or; (d) whose parents . . . are unwilling, incompetent or unavailable to provide any such care, discipline or attention, may issue a precept to bring such child before said court, shall issue a notice to the department, and shall issue summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or other appropriate order made.

Section 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 interests, . . .

<sup>3</sup> 1981 Mass. Adv. Sh. 1180, 421 N.E.2d 63.

parent could be found unfit, and the child placed in the custody of the state, if the parent was unable to further the child's welfare.<sup>4</sup> Furthermore, the Court ruled that the wishes of the fifteen-year-old child in dispute were properly accorded great weight by the trial judge.<sup>5</sup>

In *Custody of a Minor*, a mother appealed the award of permanent custody<sup>6</sup> of her son Dom to the Department of Public Welfare (D.P.W.).<sup>7</sup> Dom, the fourth child in a family of seven children, had been born in Thailand in 1964.<sup>8</sup> Since his father had died shortly before his birth, Dom went to live with an uncle for a year and a half.<sup>9</sup> In 1973 the family moved to America after the mother's marriage to an American serviceman.<sup>10</sup> Dom and a brother remained with relatives in Thailand for another year before joining their family in America.<sup>11</sup> In 1975, the marriage broke up, and the mother, then pregnant with her seventh child, became the family's sole source of support.<sup>12</sup> In that same year, Dom's fifth grade teacher, Mrs. DeWitt, became concerned about Dom's school behavior and his chronic absenteeism.<sup>13</sup> Dom complained to his teacher about his home life and the local board of health was called upon to investigate.<sup>14</sup> Although the caseworker found that the family was experiencing some difficulties, and recommended that Dom undergo a psychological evaluation, she deemed the home adequate, and found no need to remove Dom from the home.<sup>15</sup>

Difficulties, however, continued between Dom and his mother.<sup>16</sup> Shortly before the new baby was born, Dom, with the consent of his mother, went

<sup>4</sup> *Id.* 1186-87, 421 N.E.2d at 66-67.

<sup>5</sup> *Id.* at 1187-88, 421 N.E.2d at 67.

<sup>6</sup> Although called permanent custody, the parents have the right to seek a review and redetermination every six months until the child is eighteen. G.L. c. 119, § 26.

<sup>7</sup> 1981 Mass. Adv. Sh. at 1181, 421 N.E.2d at 63-64.

<sup>8</sup> *Id.* at 1181, 421 N.E.2d at 64.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 1182, 421 N.E.2d at 64. The absenteeism was due in part to the mother's effort to discipline Dom for not doing chores by keeping Dom home from school. *Id.*

<sup>14</sup> *Id.* Dom told his teacher that he was unfairly made to do household chores, was hit by his mother, and sometimes denied food. *Id.*

<sup>15</sup> *Id.* at 1182-83, 421 N.E.2d at 64-65. The caseworker met with the family several times, and found that the mother was anxious to be a good mother to her children. Although she admitted to using mild corporal punishment, no instances of physical abuse were substantiated. *Id.* at 1182, 421 N.E.2d at 64. Dom was at that time defying his mother by refusing to do household chores, not coming home in the evening when he was supposed to, and talking back to his mother. *Id.* The caseworker also found that there were financial problems, and too little space in the home. *Id.*

<sup>16</sup> *Id.* at 1183, 421 N.E.2d at 65. Dom was misbehaving at home, had threatened his family, and the atmosphere at home was very tense. *Id.*

to live temporarily with the family of his teacher, the DeWitts.<sup>17</sup> Once there, he refused to return home.<sup>18</sup> A care and protection petition was then filed, and Dom was placed temporarily with the DeWitts.<sup>19</sup> Between 1976 and 1979, efforts were made to reunite Dom with his family through regular visits, but Dom remained adamant in his refusal to return to his mother.<sup>20</sup> Because of Dom's strong feeling of hostility towards his natural mother and his attachment to the DeWitts, in 1979 a district court judge found Dom in need of care and protection and placed him in the permanent custody of the D.P.W.<sup>21</sup> After a trial de novo, the custody judgment was affirmed, and the mother appealed.<sup>22</sup> The Supreme Judicial Court granted direct review.<sup>23</sup>

In appealing the care and protection order, the mother's main contention was that the trial judge had failed to find her unfit.<sup>24</sup> Under both the federal constitution and Massachusetts law, the mother argued, a finding of parental unfitness is necessary before the state may take custody of a child.<sup>25</sup> Referring to its decision that same day in *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*,<sup>26</sup> the Court held that the trial judge's failure to make an express finding of "general parental unfitness" did not warrant a reversal.<sup>27</sup> Under the standard for unfitness enunciated in *Petition*, the Court stated that "[a] finding of parental unfitness may be predicated on the circumstances within a particular family, as they adversely affect the particular child, without regard to the general quality of parental conduct per se."<sup>28</sup> This standard, the Court concluded, had been met in this case.<sup>29</sup> The Court noted that although the trial judge did not expressly find that petitioner was an unfit parent, his conclusion, supported by the findings of fact and the trial record, amounted to a finding of unfitness.<sup>30</sup> The evidence showed a deep and longstanding rift between the mother and the son.<sup>31</sup> The evidence also showed that the mother had refused counseling as a remedy for the situation.<sup>32</sup> Although the case worker

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* Pursuant to G.L. c. 119, § 24, Dom was placed in the care of the Department of Public Welfare, and was placed with the DeWitts, as he refused to return home. *Id.*

<sup>20</sup> *Id.* at 1184, 421 N.E.2d at 65.

<sup>21</sup> *Id.* at 1185, 421 N.E.2d at 66.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 1181, 421 N.E.2d at 64.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 1981 Mass. Adv. Sh. 1157, 1171, 421 N.E.2d at 28, 36. *See supra* note 1.

<sup>27</sup> Custody of a Minor, 1981 Mass. Adv. Sh. at 1186-87, 421 N.E.2d at 66-67.

<sup>28</sup> *Id.* at 1185, 421 N.E.2d at 66.

<sup>29</sup> *Id.* at 1186-87, 421 N.E.2d at 66-67.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1186, 421 N.E.2d at 66.

<sup>32</sup> *Id.* The mother evidently refused counseling "because of the 'mean' things Dom said to

who had investigated the home had found it “adequate and clean” and the other children to be “supportive of their mother,”<sup>33</sup> a psychologist had testified that Dom felt that his mother did not love or care for him.<sup>34</sup> To return Dom to his family, according to the psychologist might “‘result in Dom’s running away, or the carrying out of threats against his mother.’”<sup>35</sup> Moreover, the trial judge had found that Dom had developed strong ties to the DeWitts and needed to have his future with them secured.<sup>36</sup> Thus, although the trial judge had not found the mother unfit per se, he had found that she was unable to further Dom’s welfare.<sup>37</sup>

In addition to contesting the failure of the trial judge to find unfitness, the mother argued that the judge impermissibly had allowed the child’s own wishes to determine the outcome of the custody dispute.<sup>38</sup> The Court noted that at the time of the trial court hearing, Dom was fifteen years old.<sup>39</sup> Further, his desire to stay with the DeWitts resulted from deep and perhaps irremedial differences between himself and his mother.<sup>40</sup> The Court observed that Massachusetts law had long given recognition to the preference of mature minors.<sup>41</sup> Thus, the trial judge had been correct in according “great weight” to the wishes of this child in this case.<sup>42</sup>

In acceding to the wishes of the child in *Custody of a Minor*, the Court realistically dealt with a situation which it could do little to alter. The child in question was approaching his eighteenth birthday at the time of the appeal, and the Court acknowledged that it had doubts whether a return of custody to the mother could be enforced.<sup>43</sup> In fact, since 1976, when the mother first allowed her son to live with the DeWitts for the month until her baby was born, her son steadfastly had refused to return home, threatening to run away if forced to do so.<sup>44</sup> Under these circumstances the Court allowed the child’s preference to be a determining factor.

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her in front of others.” *Id.* at 1184, 421 N.E.2d at 65.

<sup>33</sup> *Id.* at 1183-84, 421 N.E.2d at 65.

<sup>34</sup> *Id.* at 1184-85, 421 N.E.2d at 65.

<sup>35</sup> *Id.* at 1184-85, 421 N.E.2d at 65-66.

<sup>36</sup> *Id.* at 1186-87, 421 N.E.2d at 66-67.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1181, 421 N.E.2d at 64.

<sup>39</sup> *Id.* at 1187, 421 N.E.2d at 67.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* citing *Baird v. Attorney Gen.*, 371 Mass. 741, 753, 360 N.E.2d 288, 296 (1977) *considered sub nom.* *Bellotti v. Baird*, 443 U.S. 622 (1979) (discussing ability of mature minor to make abortion decision). The Court also cited *Curtis v. Curtis*, 5 Gray 535 (1855) and *Commonwealth v. Hammond*, 10 Pick. 274 (1830). 1981 Mass. Adv. Sh. at 1187, 421 N.E.2d at 67. Both *Curtis* and *Hammond* dealt with children who had been placed voluntarily by their mothers with the Society of Shakers until of legal age, *Curtis* by oral contract, *Hammond* by indenture. 5 Gray 535 and 10 Pick. 274.

<sup>42</sup> 1981 Mass. Adv. Sh. at 1187, 421 N.E.2d at 67.

<sup>43</sup> *Id.* at 1187-88, 421 N.E.2d at 67.

<sup>44</sup> *Id.* at 1183, 1184, 1185, 421 N.E.2d at 65, 66.



The Court limited its holding on the propriety of considering a child's wishes in care and protection proceedings to the circumstances of the case.<sup>45</sup> In addition, the Court indicated that a court should substitute its own judgment for that of a younger, less mature child.<sup>46</sup> Nonetheless, the case has established a precedent and courts will undoubtedly be called upon in the future to determine when, and to what extent, a minor's wishes will be considered.

In making these determinations, some guidance may be gleaned from both the law and literature on custody disputes in divorce actions, where the wishes of the child are frequently a factor.<sup>47</sup> The Massachusetts statute governing the award of custody in divorce proceedings<sup>48</sup> provides that, absent misconduct, the rights of parents are equal, and custody is to be determined on the basis of the "happiness and the welfare of the children."<sup>49</sup> Courts may, in determining the "happiness and welfare of the child," consider the preferences of the child.<sup>50</sup> Indeed, approximately eighteen states now have statutory provisions for considering the preferences of children in divorce custody disputes.<sup>51</sup> Furthermore, experts recognize that it may be difficult or impossible to enforce custodial orders resulting from a divorce, which do not fit the wishes of older children.<sup>52</sup> Nonetheless, experts acknowledge that children may suffer from feelings of guilt when their stated preferences determine the outcome of custodial disputes.<sup>53</sup>

Divorce custodial disputes, however, involve two parents with equal rights to the child.<sup>54</sup> Where the contest for custody is between parents and

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<sup>45</sup> *Id.* at 1187, 421 N.E.2d at 67.

<sup>46</sup> *Id.* See also *Hale v. Hale*, 1981 Mass. App. Adv. Sh. 2117, 2125, 429 N.E.2d 340, 345. The court here indicated, in a divorce custody dispute, that the preferences of children aged nine and thirteen should be treated with caution. *Id.*

<sup>47</sup> See generally Annot., 4 A.L.R.3d 1396 (1965 and Supp.).

<sup>48</sup> G.L. c. 208, § 31.

<sup>49</sup> *Id.*

<sup>50</sup> See, e.g., *Grandell v. Short*, 317 Mass. 605, 59 N.E.2d 274 (1945).

<sup>51</sup> Freed and Foster, Jr., *Divorce in the Fifty States: An Overview*, 14 FAM. L. Q. 229, 262 (1981).

<sup>52</sup> COMMITTEE ON THE FAMILY GROUP FOR THE ADVANCEMENT OF PSYCHIATRY — DIVORCE, CHILD CUSTODY AND THE FAMILY, 822-23 (1980).

<sup>53</sup> *Id.* at 890-891. See, also, "Proposed Child Custody Statute Submitted by the Subcommittee on Custody of the Massachusetts Bar Association and the Massachusetts Psychiatric Society, April 1980," reprinted in CHILD CUSTODY — AN INTERDISCIPLINARY APPROACH TO THE REDEFINED FAMILY (MCLE-NELI, INC., 1981), 46, stating:

Older children may manipulate or punish a parent by saying that he or she prefers to live with the other parent. Children should not believe that they carry the responsibility for deciding who gets custody, because this is too great a burden and engenders anxiety and guilt later on. Yet, the child's wishes and reasons should be heard and considered.

*Id.*

<sup>54</sup> G.L. c. 208, § 31.

unrelated third parties, courts have traditionally hesitated to abridge the rights of natural parents, despite the wishes of the child, except in cases where the parents have abandoned the child.<sup>55</sup> Although there is an even greater need for judicial care when it is the state which is seeking to take custody from parents, there is support for allowing a mature minor to have an active voice in the custody decision.<sup>56</sup> Courts nonetheless should proceed with caution in developing standards for determining the extent to which a child's wishes should be a factor when the state intervenes in the familial relationship.

**§ 3.4. Child Custody—Effect of Cohabitation by One Parent.\*** In custody disputes, the courts consider many factors in determining which parental environment is best for the child.<sup>1</sup> One relevant consideration in determining custody is the parents' compliance with the laws, and in particular, the legality of the parents' living arrangements.<sup>2</sup> This issue is particularly likely to arise in cases involving parental cohabitation with an unmarried person.

In *Fort v. Fort*,<sup>3</sup> the Massachusetts Appeals Court established that it was not improper to award custody of a minor child to a parent who cohabits with a person other than his or her spouse.<sup>4</sup> In so ruling, the court discussed the significance which should be ascribed to the allegation that a parent is unfit because he or she cohabits illegally with another.<sup>5</sup> The court stated that the moral or criminal nature of illegal cohabitation is only relevant

<sup>55</sup> Both *Commonwealth v. Hammond*, 10 Pick. 274 (1830) and *Curtis v. Curtis*, 5 Gray 535 (1855), cited by the Court in *Custody of a Minor* were cases where the natural mothers had voluntarily given their children over to religious societies for their long-term upbringing. See *supra* note 40. For a more modern case, rejecting the preference of a child in favor of the natural parent, see *Duclos v. Edwards*, 344 Mass. 544, 183 N.E.2d 708 (1962). For an overview of how other jurisdictions have dealt with this question, see generally Annot., 4 A.L.R.3d 1396, 1443-49 (1965 & Supp.).

<sup>56</sup> See, e.g., Institute of Judicial Administration and American Bar Association, Joint Commission on Juvenile Justice Standards, STANDARDS RELATING TO ABUSE AND NEGLECT (tent. ed. 1977) standard 8.4, p. 161; Wald, *State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 696-697 (1976).

California requires a court to consider the wishes of a child of sufficient age and reason in making custody awards. *In re B.G.*, 11 Cal.3d 679, 696, 114 Cal. Rptr. 444, 455, 523 P.2d 244 (1974). Other courts have been less willing to be swayed by a child's preference. See, e.g., *Harper v. Department of Human Resources*, 159 Ga. App. 758, 285 S.E.2d 220 (1981).

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§ 3.4. <sup>1</sup> See *infra* text at note 48.

<sup>2</sup> See *infra* notes 34-39 and accompanying text.

<sup>3</sup> 1981 Mass. App. Ct. Adv. Sh. 1594, 425 N.E.2d 754, *review denied*, 1981 Mass. Adv. Sh. 2140.

<sup>4</sup> *Id.* at 1601-02, 425 N.E.2d at 758-59.

<sup>5</sup> *Id.*

where evidence is presented which demonstrates an adverse effect on the child directly attributable to that cohabitation.<sup>6</sup>

The Court of Appeals ruled that the findings of fact, which were found by a master and adopted by the trial judge,<sup>7</sup> were supported by the evidence.<sup>8</sup> These facts revealed that the parties in *Fort* were married in 1959.<sup>9</sup> During the course of their marriage, the couple had three children: a daughter and two sons who were born in 1961, 1963 and 1973 respectively.<sup>10</sup> Since the daughter and elder son preferred to live with their father, the mother challenged only the trial judge's decision to award custody of the younger son, then eight years old, to the father.<sup>11</sup>

The master also found that the father's career required him to work long hours and often caused him to remain away from home for extended periods of time.<sup>12</sup> Consequently, prior to the divorce, the mother exclusively assumed all domestic duties, including child rearing.<sup>13</sup> According to the master's report, the mother disciplined the children by inappropriate words and acts of corporal punishment sufficient to cause humiliation and emotional estrangement of the children.<sup>14</sup> In addition, the wife's inconsistent behavior led to mental and emotional disturbances which polarized the family members.<sup>15</sup> Accordingly, the relationship between the mother and the older two children was strained.<sup>16</sup> In contrast to the mother, the master found that the husband's consistent temperament satisfied the emotional needs of the children.<sup>17</sup>

The couple's separation ultimately was caused by the husband's relationship with a woman who had been an employee at his place of business.<sup>18</sup> The master found that the father had sexual relations with the woman just prior to his separation from the mother. After leaving the marital home, the father moved into the woman's apartment where he envisioned a life together for himself, the other woman, and the children.<sup>19</sup> Most importantly, the master found that no testimony indicated that the father's cohabitation with the woman adversely affected any of the children.<sup>20</sup>

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 1595, 425 N.E.2d at 755-56.

<sup>8</sup> *Id.* at 1596, 425 N.E.2d at 756.

<sup>9</sup> *Id.* at 1595, 425 N.E.2d at 755-56.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 1575-96, 425 N.E.2d at 755-56.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 1596, 425 N.E.2d at 756.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

On cross-complaints of the husband and wife for divorce, judgments were entered which dissolved the marriage, provided for alimony and equitable distribution of assets, and awarded custody of the two younger children, who were still minors, to the husband.<sup>21</sup> The wife appealed, contending that the judge's decision to award custody of the youngest son to the father was erroneous. She maintained that the father was not suited to care for this child because he was cohabiting with an unmarried woman.<sup>22</sup>

On appeal, the wife relied primarily upon an Illinois case, *Jarrett v. Jarrett*.<sup>23</sup> In *Jarrett*, the Illinois Supreme Court held that the exemplary effect on the children of the mother's continuing cohabitation with an unmarried man, in violation of Illinois statutes, justified a modification of the custody award of the three minor children.<sup>24</sup> The *Fort* court noted that the conduct of the custodial parents in *Jarrett* and *Fort* were similar because cohabitation violated state statutes in each case.<sup>25</sup> The conduct complained of in *Fort* apparently violated Massachusetts state statutes prohibiting lewd and lascivious cohabitation,<sup>26</sup> adultery,<sup>27</sup> and fornication.<sup>28</sup>

The Massachusetts Appeals Court acknowledged that courts may consider the "moral fitness or character" of a proposed custodian as a factor bearing on the best interests and well-being of the child.<sup>29</sup> The court cautioned, however, that any determination of custodial arrangements should not be made in a highly technical or overly legalistic manner.<sup>30</sup> All custody arrangements naturally have imperfections and deficiencies which can affect the well-being of the child. The judgment, therefore, must balance the significance of those imperfections with their effect on the child's well-being and development.<sup>31</sup> In addition, the Appeals Court noted that judges, serving society comprised of widely disparate cultural, moral, and religious

<sup>21</sup> *Id.* at 1594-95, 425 N.E.2d at 754. At the time of the litigation, the oldest daughter attended college and considered her father's home as her own when college was not in session. *Id.* at 1595, 425 N.E.2d at 754. The oldest son attended a private boarding school, and by preference and agreement of the parties, lived with his father when school was not in session. *Id.* The controversy, therefore, centered solely around the custody of the youngest child. *Id.* at 1595, 425 N.E.2d at 754.

<sup>22</sup> *Id.* at 1596, 425 N.E.2d at 756.

<sup>23</sup> *Id.* See *Jarrett v. Jarrett*, 78 Ill.2d 337, 400 N.E.2d 421 (1979), *cert. denied*, 449 U.S. 927 (1980).

<sup>24</sup> 1981 Mass. App. Ct. Adv. Sh. at 1597, 425 N.E.2d at 756; *Jarrett v. Jarrett*, 78 Ill.2d at 345, 400 N.E.2d at 423 (1979).

<sup>25</sup> 1981 Mass. App. Ct. Adv. Sh. at 1597, 425 N.E.2d at 756.

<sup>26</sup> G.L. c. 272, § 16.

<sup>27</sup> *Id.* § 14.

<sup>28</sup> *Id.* § 18.

<sup>29</sup> 1981 Mass. App. Ct. Adv. Sh. at 1598, 425 N.E.2d at 757.

<sup>30</sup> *Id.* at 1601, 425 N.E.2d at 758-59.

<sup>31</sup> *Id.* at 1601-02, 425 N.E.2d at 758-59.

backgrounds, cannot impose their own personal moral and religious viewpoints as the proper standard.<sup>32</sup> Moral judgments concerning the comportment of the proposed custodial parents are appropriate only where “the parent’s lifestyle has a direct and articulable adverse impact on the child . . . [or] . . . the . . . [custodial parent’s] behavior is related to parenting ability.”<sup>33</sup>

The court thereafter considered the effect which should be assigned to a parent’s violation of certain Massachusetts statutes in determining a custodial arrangement which best serves the interests of the child.<sup>34</sup> Even if the father’s moral conduct did not affect the children adversely, the court could have found, as did the court in *Jarrett*, that the father was an unfit parent because his activity violated state statutes.<sup>35</sup> Yet the court took a different approach than the Illinois Supreme Court. The court noted that despite widespread official knowledge of the statutes prohibiting “lewd and lascivious” cohabitation, fornication, and adultery, individuals rarely have been prosecuted for violating them.<sup>36</sup> The court maintained that this lack of enforcement does not necessarily invalidate such statutes or make them judicially unenforceable.<sup>37</sup> In custodial determinations, however, the court reasoned that the significance of such violations should be evaluated in terms of the interpersonal relationships of the persons involved as they affect the well-being of the child whose custody is in question.<sup>38</sup> As a practical matter, therefore, the court concluded that it is immaterial that the custodial parent’s behavior violates criminal statutes which are wholly ignored by law enforcement officials in the absence of evidence demonstrating that such conduct adversely affects the well-being of the child.<sup>39</sup> This judicial principle appears to be consistent with the general rule that in order for a violation of a criminal statute to be relevant in a civil hearing there must be a causal relationship between the activity the statute seeks to prevent and the harm alleged.

In sum, the court did not consider the moral or criminal character of the husband’s cohabitation relevant in the absence of evidence demonstrating an adverse effect on the children.<sup>40</sup> The court instead contrasted the husband’s steady disposition and the peacefulness of his living arrangement,

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<sup>32</sup> *Id.* at 1598, 425 N.E.2d at 757.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1601, 425 N.E.2d at 758-59.

<sup>35</sup> The Appeals Court, in reaching its decision, assumed the validity of the statutes which had been violated since neither party had argued that they were invalid. *Id.*

<sup>36</sup> *Id.* at 1599, 425 N.E.2d at 758.

<sup>37</sup> *Id.* at 1601, 425 N.E.2d at 758-59. See also *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 113-14 (1953); 2 Sutherland, *Statutory Construction* § 34.06 (4th ed. 1973).

<sup>38</sup> 1981 Mass. App. Ct. Adv. Sh. at 1602, 425 N.E.2d at 759.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

with the emotionally charged atmosphere generated by the wife's interaction with her family.<sup>41</sup> These considerations were sufficient for awarding custody to the husband.<sup>42</sup> In addition, the court noted that the two older children preferred to consider their father's home as their own.<sup>43</sup> The children's best interests would be served by minimizing sibling separation.<sup>44</sup> Because the Court of Appeals considered the best interests of the youngest child to have been properly assessed by the trial court, the later court's judgment was affirmed.<sup>45</sup>

The decision in *Fort*, that it is not improper to award custody of a minor child to a parent who cohabits with an unmarried person, is consistent with at least two other child custody proceedings argued during the Survey year. In *Bouchard v. Bouchard*,<sup>46</sup> the Massachusetts Appeals Court emphasized that the governing principle regarding the determination of custodial arrangements is the welfare of the child.<sup>47</sup> In this regard, the court will not sustain a custody award unless all relevant factors have been weighed solely in terms of the child's well-being.<sup>48</sup> A custody award cannot be sustained simply upon the ground that the custodial parent violated a statute without evidence demonstrating an adverse effect of such behavior on the child.<sup>49</sup> Instead, the determination should rest upon the relative advantages of the respective parental environments.<sup>50</sup> Similarly, in *Kelly v. Kelly*,<sup>51</sup> the court concluded that the child's welfare would best be served by granting custody to the mother despite the fact that she cohabited in the home with an unmarried man.<sup>52</sup> According to the court, the crucial issue is not the possible criminality of the custodial parent's conduct but rather the best interests of the child's welfare.<sup>53</sup> The court noted that there was little evidence regarding the effect that such a relationship had on the welfare of the child.<sup>54</sup> In par-

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> 1981 Mass. App. Ct. Adv. Sh. 1272, 422 N.E.2d at 471.

<sup>47</sup> *Hersey v. Hersey*, 271 Mass. 545, 555, 171 N.E. 815, 820 (1930); *Jenkins v. Jenkins*, 304 Mass. 248, 250, 23 N.E.2d 405, 406 (1939); *Heard v. Heard*, 323 Mass. 357, 375-77, 82 N.E.2d 219, 231 (1948); *Stevens v. Stevens*, 337 Mass. 625, 627, 151 N.E.2d 166, 167 (1958); *Clifford v. Clifford*, 354 Mass. 545, 548, 238 N.E.2d 522, 524 (1968); *Vilakazi v. Maxie*, 371 Mass. 406, 409, 357 N.E.2d 763, 765 (1976); *Masters v. Craddock*, 4 Mass. App. Ct. 426, 428, 351 N.E.2d 217, 218-19 (1976).

<sup>48</sup> *Haas v. Puchalski*, 1980 Mass. App. Ct. Adv. Sh. 741, 742 n.5, 402 N.E.2d 1088, 1089 n.5.

<sup>49</sup> *Tolos v. Tolos*, 1981 Mass. App. Ct. Adv. Sh. 807, 809, 419 N.E.2d 304, 306-07.

<sup>50</sup> *Heard v. Heard*, 323 Mass. at 377, 82 N.E.2d at 201.

<sup>51</sup> 1981 Mass. App. Ct. Adv. Sh. 1611, 425 N.E.2d at 760.

<sup>52</sup> *Id.* at 1612, 425 N.E.2d at 760-61.

<sup>53</sup> *Id.* at 1613, 425 N.E.2d at 761-62.

<sup>54</sup> *Id.*

particular, the court found that the relationship had not caused the child any emotional harm nor had any harmful tendency for the future.<sup>55</sup> The court, therefore, sustained custody with the wife.<sup>56</sup>

**§ 3.5. Separation and Divorce—Removal of Minor Children from the Commonwealth by the Custodial Parent.\*** In many jurisdictions, the best interests of the child determine whether the custodial parent will be allowed to remove a minor child from the state.<sup>1</sup> The best interest standard, however, varies from state to state, depending on the factors the courts consider relevant in determining the child's best interests.<sup>2</sup> Illustrative of this variation is the extent to which the courts consider the interests of the custodial parent in determining the best interests of the child for the purposes of removal from the state. In some jurisdictions, the interests of the child are considered apart from the interests of the custodial parent, the courts requiring that the move be shown to benefit the child.<sup>3</sup> In other jurisdictions, removal of the child will be allowed if the custodial parent has a legitimate reason consistent with the best interests of the child.<sup>4</sup> In yet other jurisdictions, "decisions of the custodial parent reasonably made in a good faith attempt to fulfill the responsibility imposed by the award of custody" are presumed to have been made in the best interests of the child.<sup>5</sup>

During the *Survey* year, the Massachusetts Appeals Court, in *Hale v. Hale*,<sup>6</sup> addressed the issue of whether in decisions involving removal of a minor child from the state the interests of the custodial parent should be taken into account in determining the best interests of the child. In *Hale*, a mother filed a motion in probate court seeking leave to remove her two

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

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§ 3.5 <sup>1</sup> See, e.g., *Bernick v. Bernick*, 31 Colo. App. 485, 487-88, 505 P.2d 14, 15-16 (1972); *Arquilla v. Arquilla*, 85 Ill. App.3d 1090, 1093, 407 N.E.2d 948, 950 (1980); *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 204, 365 A.2d 27, 29 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976). See also H. CLARK, LAW OF DOMESTIC RELATIONS 587 (1968) and 1 A. LINDEY, ANTENUPTIAL CONTRACTS AND SEPARATION AGREEMENTS § 14-82 (1978).

<sup>2</sup> *Hale v. Hale*, 1981 Mass. App. Ct. Adv. Sh. 2117, 2122 n.7, 429 N.E.2d 340, 343 n.7.

<sup>3</sup> See, e.g., *Meier v. Meier*, 286 Or. 437, 447-48, 595 P.2d 474, 479 (1979); *Fritschler v. Fritschler*, 60 Wis.2d 283, 287-88, 208 N.W.2d 336, 339 (1973).

<sup>4</sup> *Jafari v. Jafari*, 204 Neb. 622, 624, 284 N.W.2d 554, 555 (1979); *In re Ehlen*, 303 N.W.2d 808, 810 (S.D. 1981).

<sup>5</sup> *Bernick v. Bernick*, 31 Colo. App. 485, 487-88, 505 P.2d 14, 15-16 (1972). In the view of the Colorado Court of Appeals in *Bernick*, the responsibility imposed by the award of custody includes the custodial parent's responsibility to select the environment in which the children will be raised, to select the manner in which to raise them, and to provide the children with an opportunity to benefit from a relationship with the noncustodial parent through adequate visitation. *Id.* at 505 P.2d at 15.

<sup>6</sup> 1981 Mass. App. Ct. Adv. Sh. 2117, 429 N.E.2d 340.

minor children from the state.<sup>7</sup> The facts in the record revealed that the mother, who believed that the move would be advantageous to the children, had several reasons for desiring to move to California.<sup>8</sup> First, she wished to live near her sister and her sister's family.<sup>9</sup> Second, she believed that she would be able to provide better living conditions for herself and her children.<sup>10</sup> Finally, she considered her job in Massachusetts very demanding and a "dead end."<sup>11</sup> A career civil servant, she was eligible for a transfer to an office in California.<sup>12</sup> Although her salary would remain about the same, the transfer would allow her to change careers and work in a less pressured atmosphere.<sup>13</sup>

The record further revealed that the husband opposed the move.<sup>14</sup> Although at one time he had not seen the children often, he now had an "excellent relationship" with them and visited his minor daughters weekly.<sup>15</sup> The minor children, ages nine and thirteen, testified that they wanted to remain in Massachusetts, near their father, older sister, and school friends.<sup>16</sup> The probate judge prohibited the wife from removing the minor children to California.<sup>17</sup>

The wife appealed, and the Appeals Court reversed the probate judge's denial of the wife's motion for leave to remove the children from the state

<sup>7</sup> *Id.* at 2117, 429 N.E.2d at 341. A third child, who was not a minor, lived with the father. *Id.* at 2119, 429 N.E.2d at 342.

The mother, who had been separated from her husband since 1972, also sought separate support. *Id.* at 2217-18, 429 N.E.2d at 341. Removal of minor children of divorced parents by the custodial parent is governed by statute in Massachusetts. G.L. c. 208, § 30 provides

A minor child of divorced parents who is a native of or has resided five years within this commonwealth and over whose custody and maintenance the superior court or a probate court has jurisdiction shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders. The court, upon application of any person in behalf of such child, may require security and issue writs and processes to effect the purposes of this . . . section.

The statute also applies to separate support proceedings. 1981 Mass. App. Ct. Adv. Sh. at 2120 n.4, 429 N.E.2d at 342-43 n.4.

<sup>8</sup> *Id.* at 2118-19, 429 N.E.2d at 341-42.

<sup>9</sup> *Id.* at 2118, 429 N.E.2d at 341.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 2118, 429 N.E.2d at 341-42.

<sup>13</sup> *Id.* at 2118-19, 429 N.E.2d at 341-42.

<sup>14</sup> *Id.* at 2119, 429 N.E.2d at 342.

<sup>15</sup> *Id.* The husband continued his education after his retirement from the Air Force in 1975. *Id.* at 2118-19, 429 N.E.2d at 341-42. At that time, his children were on welfare and he saw them infrequently. *Id.* at 2119, 429 N.E.2d at 342. At the time of the hearing, the husband was employed. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2117-18, 429 N.E.2d at 341. The judge also awarded the wife custody of these children. *Id.* at 2117, 429 N.E.2d at 341. Custody itself was not in dispute. *Id.* at n.1.



and remanded the case for further proceedings.<sup>18</sup> The Appeals Court noted that, from what it could ascertain, the probate judge had denied the motion on the ground that the move would make visitation more difficult.<sup>19</sup> The court observed that in its view the fact that visitation would be more difficult was not controlling.<sup>20</sup> Instead, the Appeals Court established that “[t]he best interests of children for purposes of deciding whether to permit removal are also interwoven with the well being of the custodial parent, and the determination, therefore, requires that the interests of the [custodial parent] also be taken into account.”<sup>21</sup>

After establishing that in removal decisions the interests of the custodial parent must be considered in determining the best interests of the child, the court reviewed Massachusetts law. First, the court focused upon Massachusetts General Laws chapter 208, section 30,<sup>22</sup> which governs removal. This statute provides, in relevant part, that if the courts of this state have jurisdiction over the custody of a minor child of divorced parents, the child shall not be removed from this state “without the consent of both parents, unless the court upon cause shown otherwise orders.”<sup>23</sup> The Appeals Court observed that although the “upon cause shown” requirement of the statute has been interpreted as permitting removal if removal is in the child’s best interests,<sup>24</sup> the decisional law had not yet established criteria for determining the child’s best interests.<sup>25</sup> Instead, trial court decisions on removal had been upheld without much discussion.<sup>26</sup>

Second, the court noted that in a recent case involving visitation, *Felton v. Felton*,<sup>27</sup> the Supreme Judicial Court had discussed the meaning of best interests “when the parents are at odds” and the attainment of best interests “involves ‘some limitation of the liberties of one or the other of the parents.’ ”<sup>28</sup> The *Hale* court noted that the *Felton* Court had observed that

<sup>18</sup> *Id.* at 2118, 429 N.E.2d at 341.

<sup>19</sup> *Id.* at 2120, 429 N.E.2d at 342.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* n.4. For the text of this statute see note 7 *supra*.

<sup>24</sup> *Id.* at 2120, 429 N.E.2d at 342-43 (citing *Rubin v. Rubin*, 370 Mass. 857, 346 N.E.2d 919 (1976)). For a discussion of *Rubin*, see Inker, Perocchi, & Walsh, *Domestic Relations*, 1976 ANN. SURV. MASS. LAW § 4.8, at 91-93.

<sup>25</sup> 1981 Mass. App. Ct. Adv. Sh. at 2120-21, 429 N.E.2d at 343.

<sup>26</sup> *Id.* at 2121, 429 N.E.2d at 343 (citing *Colopy v. Colopy*, 348 Mass. 781, 203 N.E.2d 546 (1964); *Keiter v. Keiter*, 357 Mass. 772, 258 N.E.2d 778 (1970); *Rubin v. Rubin*, 370 Mass. 857, 346 N.E.2d 919 (1976)).

<sup>27</sup> 1981 Mass. Adv. Sh. 779, 418 N.E.2d 606.

<sup>28</sup> 1981 Mass. App. Ct. Adv. Sh. at 2121, 429 N.E.2d at 343 (quoting *Felton v. Felton*, 1981 Mass. Adv. Sh. 779, 780-81, 418 N.E.2d 606, 607). In *Felton*, the custodial parent objected to the religious instruction the noncustodial parent was providing the children during visitation. *Id.* at 779, 418 N.E.2d at 606. The lower court modified the visitation provisions of an earlier

assumptions that the child would be harmed were not sufficient; instead, there must be facts actually demonstrating harm.<sup>29</sup> In the *Hale* court's view, since significant parent-child relationships were also affected by decisions concerning removal, in these latter decisions the approach of the Supreme Judicial Court in *Felton* should be applied.<sup>30</sup> Thus, the *Hale* court indicated that comprehensive findings should be made and that the child's best interests would be served "by an accommodation 'which intrudes least on the liberties of either parent and is yet compatible with the health of the child.'"<sup>31</sup>

After finding that Massachusetts law did not clearly define best interests in the removal context, the *Hale* court evaluated the approaches other jurisdictions have taken in determining the best interests of the child in decisions concerning removal of a child from the state.<sup>32</sup> Noting that the cases varied considerably, the court observed that this variation resulted from the factors different courts considered significant, rather than from the differences in the language of the statutes involved.<sup>33</sup> Thus, in some jurisdictions, decisions of the custodial parent reasonably made in good faith were presumed to have been made in the best interests of the child.<sup>34</sup> In other jurisdictions, the custodial parent would be allowed to remove the child from the state if the parent had a legitimate reason for the move consistent with the child's best interests.<sup>35</sup> In yet others, a showing that the move benefited the child, rather than the parent, was required before removal would be allowed.<sup>36</sup>

The *Hale* court observed that its decision that the well being of the custodial parent should be taken into account in determining the best interests of the child was heavily influenced by the reasoning of the New

judgment by barring the father's visitation unless he refrained from giving the children religious instruction. *Id.* at 779-80, 418 N.E.2d at 606. The Supreme Judicial Court reversed the judgment of modification and remanded the case to the trial court, noting that the custodial parent could seek modification if she provided evidence of harm to the child which was missing from the present record. *Id.* at 789, 418 N.E.2d at 610-11.

<sup>29</sup> 1981 Mass. App. Ct. Adv. Sh. at 2121, 429 N.E.2d at 343 (citing *Felton v. Felton*, 1981 Mass. Adv. Sh. 779, 787, 418 N.E.2d 606, 610).

<sup>30</sup> 1981 Mass. App. Ct. Adv. Sh. at 2121-22, 429 N.E.2d at 343.

<sup>31</sup> *Id.* (quoting *Felton v. Felton*, 1981 Mass. Adv. Sh. 779, 782, 418 N.E.2d 606, 608).

<sup>32</sup> 1981 Mass. App. Ct. Adv. Sh. at 2122 & n.7, 429 N.E.2d at 343 & n.7.

<sup>33</sup> *Id.* Some states do not have statutes governing removal.

<sup>34</sup> *Id.* (citing *Bernick v. Bernick*, 31 Colo. App. 485, 487-88, 505 P.2d 14, 15-16 (1972)). For a fuller explanation of this standard, see text and note at note 5 *supra*.

<sup>35</sup> 1981 Mass. App. Ct. Adv. Sh. at 2122 n.7, 429 N.E.2d at 343 n.7 (citing *Jafari v. Jafari*, 204 Neb. 622, 624, 284 N.W.2d 554, 555 (1979); *In re Ehlen*, 303 N.W.2d 808, 810 (S.D. 1981)).

<sup>36</sup> 1981 Mass. App. Ct. Adv. Sh. at 2122 n.7, 429 N.E.2d at 343 n.7 (citing *Meier v. Meier*, 286 Or. 437, 447-48, 595 P.2d 474, 479 (1979); *Fritschler v. Fritschler*, 60 Wis.2d 283, 287-88, 208 N.W.2d 336, 339 (1973)).

Jersey Superior Court in *D'Onofrio v. D'Onofrio*.<sup>37</sup> The *D'Onofrio* court had recognized the importance to the child of the custodial parent's well being.<sup>38</sup> This recognition, the *Hale* court observed, was consistent with psychological studies finding that the well being of children of divorced or separated parents was closely interwoven with the well being of the custodial parent.<sup>39</sup>

After finding support for its construction of the Massachusetts statute governing removal in the *D'Onofrio* court's construction of a similar statute, the *Hale* court indicated the factors which should be weighed in deciding whether removal of minor children from the state should be allowed. The court established that the prospective advantageous effects of the move on the custodial parent's and the children's quality of life should be considered.<sup>40</sup> In addition, the motives of the custodial parent should be considered to determine whether the move was primarily motivated by a desire to frustrate visitation by the other parent.<sup>41</sup> The likelihood of the custodial parent's compliance with visitation orders intended to preserve the child's relationship with the noncustodial parent should also be considered,

<sup>37</sup> 1981 Mass. App. Ct. Adv. Sh. at 2122, 429 N.E.2d at 343 (citing *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27 (Ch. Div.), *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (App. Div. 1976)). The *Hale* court noted that the New Jersey statute governing removal of minor children without consent of the noncustodial parent was almost identical to the Massachusetts statute governing removal. 1981 Mass. App. Ct. Adv. Sh. at 2122, 429 N.E.2d at 343-44 (citing N.J. STAT. ANN. § 9:2-2 (West 1976)). The *Hale* court, noting that the *D'Onofrio* court had analyzed the differences between the child's relationship to the custodial parent and the child's relationship to the noncustodial parent, quoted *D'Onofrio* at length. 1981 Mass. App. Ct. Adv. Sh. at 2122-23, 429 N.E.2d at 344. The *D'Onofrio* court had noted, first, that a parent-child relationship maintained by visitation was "inevitably" different from that possible when parent and child lived together. *Id.* at 2122, 429 N.E.2d at 344 (quoting *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, 29 (Ch. Div. 1976)). Second, the *D'Onofrio* court had observed that the children's daily routines, the "quality of their environment," and their lifestyle were that of the custodial parent. *Id.* at 2122-23, 429 N.E.2d at 344 (quoting *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, 29 (Ch. Div. 1976)). Third, the custodial parent and the children formed a new family unit, and what was advantageous to that unit as a whole, to its members individually and to the way in which the new family unit functioned as a whole was in the best interests of the child. *Id.* at 2123, 429 N.E.2d at 344 (quoting *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, 29-30 (Ch. Div. 1976)).

Courts in other jurisdictions have also been influenced by *D'Onofrio*. See, e.g., *Gallagher v. Gallaher*, 60 Ill. App.3d 26, 31, 376 N.E.2d 279, 282-83 (1978); *Watters v. Watters*, 112 Mich. App. 1, 12-14, 314 N.W.2d 778, 782-83 (Mich. App. 1981).

<sup>38</sup> 1981 Mass. App. Ct. Adv. Sh. at 2122-23, 429 N.E.2d at 344 (quoting *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27 (Ch. Div. 1976)).

<sup>39</sup> 1981 Mass. App. Ct. Adv. Sh. at 2124 n.8, 429 N.E.2d at 345 n.8.

<sup>40</sup> *Id.* at 2123, 429 N.E.2d at 344 (quoting *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, 30 (Ch. Div. 1976)).

<sup>41</sup> 1981 Mass. App. Ct. Adv. Sh. at 2123, 429 N.E.2d at 344 (quoting *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 365 A.2d 27, 30 (Ch. Div. 1976)).

as should the possibility of substituting longer visits during the year or summer for weekly visits.<sup>42</sup> Maintaining weekly visitation by the noncustodial parent was not, in itself, the court observed, a sufficient ground for denying removal.<sup>43</sup>

After delineating the factors to be weighed in determining the child's best interests, the *Hale* court remanded the case to the trial court for further consideration.<sup>44</sup> In remanding the case, the *Hale* court noted that the trial court had considered one important factor, the children's need for weekly visitation by the noncustodial parent.<sup>45</sup> The court observed, however, that it was unable to discern whether the judge had considered other factors which were "perhaps even more important" to the children's best interests.<sup>46</sup> These factors included the move's advantages for the emotional well being of the new family unit as a whole, and "the emotional costs of forcing a stressful family and career choice, if such be the case, on the parent having the primary responsibility for the day-to-day care of the children."<sup>47</sup> In addition, the court observed that alternative visiting schedules that would be adequate to preserve the children's relationship with the noncustodial parent should be considered, as should the possibility of reducing support payments to cover increased visitation expenses.<sup>48</sup> Finally, the court noted that although the children had testified that they preferred to remain in Massachusetts, "the preferences of children of these ages must be treated with caution."<sup>49</sup>

The court's decision in *Hale* directs the trial courts to consider the custodial parent's well being in determining the best interests of the child for purposes of removal of the child from the state. This decision is to be welcomed as an effort to deal with one of the more difficult problems

<sup>42</sup> 1981 Mass. App. Ct. Adv. Sh. at 2123-24, 429 N.E.2d at 344 (quoting *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 206-07, 365 A.2d 27, 30 (Ch. Div. 1976)). See Note, *Residence Restrictions on Custodial Parents: Implications for the Right to Travel*, 12 RUT. L. J. 340, 353-59 (1981) [hereinafter referred to as Note, *Residence Restrictions*] suggesting that enactment of the Uniform Child Custody Jurisdiction Act in a great majority of states and enactment of the federal Parental Kidnapping Prevention Act of 1980 provide mechanisms for enforcing visitation provisions of a court decree outside the forum state and thus may eliminate uncertainty concerning compliance with visitation rights. Forty-seven states have enacted the Uniform Child Custody Jurisdiction Act. See Foster & Freed, *Divorce in the Fifty States: An Overview as of August 1, 1981*, 7 FAM. L. REP. (BNA) 4049, 4061. Massachusetts has not enacted the act, but the courts apply principles of the Act. *Id.*

<sup>43</sup> 1981 Mass. App. Ct. Adv. Sh. at 2123, 429 N.E.2d at 344 (quoting *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 207, 365 A.2d 27, 30 (Ch. Div. 1976)).

<sup>44</sup> 1981 Mass. App. Ct. Adv. Sh. at 2126, 429 N.E.2d at 345.

<sup>45</sup> *Id.* at 2125, 429 N.E.2d at 345.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

generated by the increasing mobility of our society<sup>50</sup> and its high divorce rate. By including the well being of the custodial parent as well as the possibility of alternative visitation schedules among the factors to be considered in determining the child's best interests, the court has attempted to balance the conflicting interests of the parents. In addition, the court has attempted to balance the child's needs for continuity in custody,<sup>51</sup> on the one hand, and for maintaining a relationship with the noncustodial parent, on the other.<sup>52</sup> The approach is more realistic than that taken by courts which require that direct benefit to the child, rather than to the parent, be shown before removal will be permitted.<sup>53</sup> As one court observed in rejecting the direct benefit to the child rule, many custodial parents would be unnecessarily tied to the state, since "a child often receives little, if any, demonstrable benefit from moving. . . ."<sup>54</sup> Thus, the *Hale* court's decision avoids imposing on the custodial parent a burden of proof which would be difficult to meet.

The *Hale* court's decision to reject interference with frequent visitation as a sufficient ground for prohibiting the custodial parent from removing the child from the state also potentially spares the custodial parent difficult choices. Career opportunities for the custodial parent or his or her current spouse may well lie in another state.<sup>55</sup> If maintaining frequent visitation with the noncustodial parent is made the determinative factor in decisions concerning removal, however, the custodial parent may have to forego a better job or a promotion in order to remain in the state and retain custody of the child. The custodial parent may also be forced to choose between retaining custody of the child by staying in the state or losing custody by moving out of the state with a current spouse whose career requires it.<sup>56</sup>

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<sup>50</sup> See, e.g., *In re Marriage of Lower*, 269 N.W.2d 823, 826 (Iowa 1979) (noting that it is unrealistic to demand that custodial parents remain in one location during the children's minority, since men and women are subject to job transfers and should be free to go where their opportunities lie). *But see* *Fritschler v. Fritschler*, 60 Wis.2d 283, 288-89, 208 N.W.2d 336, 339 (1973) (rights of other parent limit the custodial parent's right to move about freely).

<sup>51</sup> See R. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 264-65 (1975).

<sup>52</sup> See, e.g., *Bernick v. Bernick*, 31 Colo. App. 485, 505 P.2d 14, 15 (1972).

<sup>53</sup> For cases requiring direct benefit to the child see note 3 *supra*.

<sup>54</sup> *In re Marriage of Burgham*, 86 Ill. App.3d 341, 346, 408 N.E.2d 37, 40 (1980).

<sup>55</sup> See, e.g., *Arquilla v. Arquilla*, 85 Ill. App.3d 1090, 1091, 407 N.E.2d 948, 949 (1980); *In re Marriage of Lower*, 269 N.W.2d 822, 824 (Iowa 1978); *Nedrow v. Nedrow*, 48 Wash.2d 243, 292 P.2d 872, 875 (1956).

<sup>56</sup> *Cf. Dagher v. Dagher*, 82 A.D.2d 191, 196, 441 N.Y.S.2d 494, 497 (1981) (career of current spouse did not require the move but that spouse had accepted a two year transfer to France). One court, in referring to the *Dagher* court's order prohibiting removal and ordering a transfer of custody should the custodial parent decide to leave the state, described the custodial parent's choice as a "Hobson's choice." *Jordan v. Jordan*, 50 Md. App. 285, \_\_\_\_, 439 A.2d 26, 32 (Md. Ct. Spec. App. 1982) (rejecting an approach which would require a custodial parent to choose between her fiancé and her children).

Although the *Hale* court wisely rejected interference with frequent visitation as a sufficient ground for denying removal, it recognized the importance of preserving the child's relationship with the noncustodial parent.<sup>57</sup> The *Hale* court sought to protect this interest by requiring that alternatives to once a week visitation be considered.<sup>58</sup> In doing so, the court refused to simply assume harm to the child from less frequent, but longer periods of visitation. Rather, the court recognized that, "'[i]t is at least arguable, and the literature does not suggest otherwise,'" that longer visits several times a year may do more to foster the relationship of the child and the noncustodial parent than does the typical weekly visit.<sup>59</sup>

The court's decision in *Hale* signals a changed treatment for removal cases. Although a best interests of the child standard will continue to govern these cases, the court has set forth factors to be considered in determining the child's best interests. By establishing these factors, the Appeals Court has indicated that trial court decisions concerning removal will no longer be routinely upheld as long as any reasonable ground for the decision appears in the record. After *Hale*, in determining whether to allow removal, a court must consider the well being of the custodial parent<sup>60</sup> as well as the advantages of the move for the custodial parent and the children.<sup>61</sup> A court must also consider the integrity of the motives underlying the custodial parent's desire to move.<sup>62</sup> In addition, a court must consider whether alternative visitation schedules would adequately preserve the child's relationship with the noncustodial parent.<sup>63</sup> Considered together, these factors suggest that if the custodial parent has concrete, well motivated reasons for the move, such as a specific career opportunity, better living conditions or proximity to relatives, removal of a minor child from the state is likely to be permitted as long as some visitation between the child and the noncustodial parent is possible.<sup>64</sup>

<sup>57</sup> 1981 Mass. App. Ct. Adv. Sh. at 2123-24, 429 N.E.2d at 344.

<sup>58</sup> *Id.* at 2123, 429 N.E.2d at 344.

<sup>59</sup> *Id.* at 2123-24, 429 N.E.2d at 344. (quoting *D'Onofrio v. D'Onofrio*, 144 N.J. Super. 200, 207, 365 A.2d 27, 30 (Ch. Div. 1976)). *But see* *Daghir v. Daghir*, 82 A.D.2d 191, 194, 441 N.Y.S.2d 494, 496 (1981) (to be meaningful visitation must be regular and frequent).

<sup>60</sup> 1981 Mass. App. Ct. Adv. Sh. at 2120, 429 N.E.2d at 342.

<sup>61</sup> *Id.* at 2123, 429 N.E.2d at 344.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Removal cases may also raise the issue of whether prohibiting removal infringes on the constitutionality protected right to travel. The *Hale* court noted that because its approach to the issue of removal sought to restrict the liberties of either parent as little as possible while protecting the child's interests, it need not address constitutional questions raised by the wife. *Id.* at 2122 & 2122 n.6, 429 N.E.2d at 343 & 343 n.6. For a discussion of the constitutional questions, see Note, *Residence Restrictions*, *supra* note 42, at 341.

**§ 3.6. Visitation Rights—Conflict of Religious Instruction.\*** Courts have consistently recognized that parents have the freedom of religious belief and may shape their familial relationships according to these beliefs.<sup>1</sup> This liberty may be limited, however, in situations where the best interests of the child would not be promoted by such expressions of belief.<sup>2</sup> In particular, this conflict may arise subsequent to divorce where the parents wish to educate their children in different religious traditions. During the *Survey* year, the Supreme Judicial Court set forth guidelines for resolving this issue.

In *Felton v. Felton*,<sup>3</sup> the Supreme Judicial Court reviewed a judgment of the Probate Court modifying the visitation provisions of a divorce judgment.<sup>4</sup> The mother of two children sought the modification, alleging that the father's attempts during visitation periods to indoctrinate the children in the Jehovah's Witness faith confused and disoriented the children such that they became alienated from their mother.<sup>5</sup> The Probate Court issued an order which allowed the father to visit his children only if he refrained from instructing the children in his religion.<sup>6</sup> The Supreme Judicial Court reversed the Probate Court's decision, concluding that it was clearly erroneous for the trial judge to find, from the facts in the record, that the father's religious instruction of the children had a deleterious effect on them.<sup>7</sup>

The parties in *Felton*, Diane and Wayne Felton, were married in September, 1967.<sup>8</sup> The Feltons had two children, Deborah and Jennifer, born in 1971 and 1974 respectively.<sup>9</sup> In April, 1976, pursuant to an informal agreement, Wayne and Diane separated.<sup>10</sup> The two minor children continued to live with Diane, but Wayne retained liberal visitation rights.<sup>11</sup> On June 1,

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§ 3.6. <sup>1</sup> See *infra* text at note 31.

<sup>2</sup> See *infra* accompanying text at notes 32-34.

<sup>3</sup> 1981 Mass. Adv. Sh. 779, 418 N.E.2d 606.

<sup>4</sup> *Id.* at 779-80, 418 N.E.2d at 606-07.

<sup>5</sup> *Id.* at 779, 418 N.E.2d at 606.

<sup>6</sup> *Id.* at 779-80, 418 N.E.2d at 606-07.

<sup>7</sup> *Id.* The Supreme Judicial Court, therefore, reversed the findings of the trial judge. The case would be remanded, upon the mother's election, for further development and consideration of the physical and emotional consequences of the father's actions upon the children. *Id.* at 780, 418 N.E.2d at 607. The issue to be litigated on remand would be whether there has been a change in the circumstances in the two years after the trial judge issued the original modification order. *Id.* at 789-90, 418 N.E.2d at 611.

<sup>8</sup> *Id.* at 783, 418 N.E.2d at 608.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Wayne's visitation rights, as appearing in the agreement were: "a. Between 9:00 A.M. and 5:00 P.M. b. Alternate Saturdays and Sundays. c. One weekend per month. d. One week during the year, both children for vacation. e. Holidays and birthdays on an alternate basis." *Id.* at 783 n.4, 418 N.E.2d at 608 n.4.

1977, a divorce judgment *nisi* granted custody and visitation rights to the litigants on a similar basis.<sup>12</sup>

Prior to the separation, both parents and the children had attended the Congregational Church.<sup>13</sup> Shortly after the separation, however, Wayne became interested in the Jehovah's Witnesses, a Protestant sect of fundamentalist doctrine which strictly adheres to the Biblical texts.<sup>14</sup> In December, 1977, the divorce judgment became final and Wayne married Gail, a Jehovah's Witness.<sup>15</sup> In May, 1978, Wayne was baptized into his new faith.<sup>16</sup>

The Jehovah's Witness doctrine required Wayne to instruct his children in his religion with emphasis on a strict and literal interpretation of the Bible.<sup>17</sup> In this regard, the Jehovah's Witness belief forbids recognition of birthdays, holidays and childhood fantasies such as the tooth fairy and Santa Claus.<sup>18</sup> In April, 1978, Wayne and Gail attended a family convention of Jehovah's Witnesses with the children.<sup>19</sup> As a result of these beliefs and activities, Diane refused to permit further visitation and restricted Wayne's contact with the children to weekly telephone conversations.<sup>20</sup> According to Diane, the Jehovah's Witness' disregard for birthdays and holidays conflicted with her Congregational beliefs.<sup>21</sup> In addition, Diane claimed that Wayne's Bible readings were too strict and literal to be well-suited for young children,<sup>22</sup> and that their attendance at the Jehovah's Witness convention was improper.<sup>23</sup> Diane also felt that Wayne's beliefs adversely affected his "knowing" the children.<sup>24</sup> Finally, Diane concluded from the elder daughter's reluctance to relate the particularities of her visit with her father, that she was upset and confused.<sup>25</sup>

After Diane refused to allow visitation, Wayne initiated contempt proceedings against Diane.<sup>26</sup> Diane responded by seeking modification of the

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<sup>12</sup> *Id.* at 783, 418 N.E.2d at 608.

<sup>13</sup> *Id.*

<sup>14</sup> The Court notes that this definition of the Jehovah's Witness faith "might not accord with a theologian's description." *Id.* at 783 n.5, 418 N.E.2d at 608 n.5.

<sup>15</sup> *Id.* at 783, 418 N.E.2d at 608.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 785, 418 N.E.2d at 609.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 784, 418 N.E.2d at 609.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*



visitation rights under the divorce judgment.<sup>27</sup> Pursuant to a pretrial conference, the probate judge suspended Wayne's visitation rights by means of an interim order.<sup>28</sup> Subsequently, a judgment granted Wayne visitation rights of his two minor children, at reasonable times, provided that "he refrains from giving his children any religious training or education which shall be in conflict or contrary with the religious training and beliefs of the custodial parent."<sup>29</sup>

In reversing the judgment of the Probate Court,<sup>30</sup> Justice Kaplan, writing the opinion of the court, articulated the standard to be applied in cases where a divorced parent's religious indoctrination of his child is alleged to cause harm to the child. Justice Kaplan recognized that a parent's freedom of religious expression generally includes the right of the parent to direct the religious upbringing of his children.<sup>31</sup> He maintained, however, that the parent's right of religious instruction may be limited in certain cases in order to promote the "best interests" of the children.<sup>32</sup> Such cases could exist only where it has been proven that the children have been harmed as a result of conflicting religious instruction or practice.<sup>33</sup> The harm to the child, according to Justice Kaplan, must be a "substantial injury, physical or emotional, which will have a like harmful tendency for the future."<sup>34</sup> Moreover, harm to the children may not be "assumed" or "surmised" by the Probate Court.<sup>35</sup> The record must show that the moving party has "demonstrated in detail" that conflicting religious instruction has, in fact, harmed the children.<sup>36</sup> Even where the moving party has sustained its burden, the Probate Court's order must be narrowly tailored so that it "intrudes least on the religious inclinations of either parent and is yet compatible with the health of the child."<sup>37</sup>

If the primary objective of custodial determinations is the child's best interests,<sup>38</sup> the Court notes that exposure of the child to a single religion regardless of the parental liberties might be seen to best promote a policy of

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> The Supreme Judicial Court, on its own initiative, ordered direct appellate review of the case and unanimously reversed the judgment of the Probate Court. *Id.* at 780, 418 N.E.2d at 607.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 781, 418 N.E.2d at 607.

<sup>34</sup> *Id.* at 782, 418 N.E.2d at 608.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 781-82, 418 N.E.2d at 607-08; *Vilakazi v. Maxie*, 371 Mass. 406, 409, 357 N.E.2d 763, 765 (1976).

stability and repose.<sup>39</sup> Justice Kaplan observed, however, that exposure to the divergent religious practices and beliefs of both parents ordinarily should be encouraged.<sup>40</sup> A child's "frequent and continuing contact" with both parents and their individual religious inclinations can be a valuable experience in child development.<sup>41</sup> In addition, the Court considered it important to expose the child to various religious models between which he may later choose.<sup>42</sup> Furthermore, the Court noted that exposure to diverse religious faiths may be a good stimulus for a child.<sup>43</sup>

The Court recommended that evidence of how a child's "general demeanor, attitude, school work, appetite, health or outlook has been affected . . ." by the mental conflict may be influential in seeking modification of a custody award.<sup>45</sup> Such evidence can be supported by church, school, medical, or psychiatric authorities, as well as the child's associates.<sup>46</sup> In addition, a court appointed investigator could lessen the impact of the self-serving testimonies offered by the father and mother.<sup>47</sup>

Applying the standards articulated to the facts in this case, the Court found error in the judge's determination that the father's religious instructions and influence deleteriously affected the children and undermined the custodial relationship.<sup>48</sup> In this regard, the *Felton* Court noted an insufficiency of evidence relating to such basic matters as the precise manner of Wayne's Bible instructions.<sup>49</sup> In addition, evidence concerning the elder daughter's physical and emotional condition or any causal connection between such condition and her father's behavior was non-existent.<sup>50</sup> The Court noted that general contradictory testimony that the child was upset or confused was insufficient to establish such a causal connection.<sup>51</sup> Further-

<sup>39</sup> 1981 Mass. Adv. Sh. at 781-82, 418 N.E.2d at 607-08.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*; In re Marriage of Murga, 103 Cal. App. 3d 498, 504-05, 163 Cal. Rptr. 79, 81-82 (1980) (quoting Cal. Civ. Code § 4600 (West 1981)).

<sup>42</sup> 1981 Mass. Adv. Sh. at 781-82, 418 N.E.2d at 607-08.

<sup>43</sup> *Id.* See also Smith v. Smith, 90 Ariz. 190, 194, 367 P.2d 320, 324 (1961).

<sup>44</sup> 1981 Mass. Adv. Sh. at 789, 418 N.E.2d at 611 (quoting Pope v. Pope, 267 S.W.2d 340, 343 (Mo. App. 1954)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> 1981 Mass. Adv. Sh. at 789, 418 N.E.2d at 611. A qualified investigator would inquire as to the facts, render a report, and be available for examination. *Id.* See also Gilmore v. Gilmore, 369 Mass. 589, 603-06, 341 N.E.2d 655, 659 (1976); Jones v. Jones, 349 Mass. 259, 264-65, 207 N.E.2d 922, 926 (1965); G.L. c. 215, § 56A.

<sup>48</sup> 1981 Mass. Adv. Sh. at 787, 418 N.E.2d at 610.

<sup>49</sup> *Id.* at 786-87, 418 N.E.2d at 609-10.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 787, 418 N.E.2d at 610. See Compton v. Gilmore, 98 Idaho 190, 191-92, 560 P.2d 861-62 (1977); Goodman v. Goodman, 180 Neb. 83, 88-89, 114 N.W.2d 445, 448 (1966); Munoz v. Munoz, 79 Wash.2d 810, 814, 489 P.2d 1133, 1135 (1971); Robertson v. Robertson, 19 Wash. App. 425, 427-28, 575 P.2d 1092, 1095 (1978).

more, the Court found that the Probate Court's error resulted from an apparent predisposition of the judge.<sup>52</sup> The probate judge had assumed that religious differences by themselves would have such a detrimental effect on the children as to require censorship.<sup>53</sup> The Court was not convinced, however, that "duality of religious beliefs, *per se*, creates a conflict upon young minds."<sup>54</sup> The *Felton* Court, therefore, reversed the judgment appealed from and remanded the case, upon the mother's election, for the probate judge to consider under appropriate evidence whether an order modifying the original visitation provisions was required.<sup>55</sup>

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<sup>52</sup> 1981 Mass. Adv. Sh. at 787, 418 N.E.2d at 610.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (quoting *Munoz v. Munoz*, 79 Wash.2d 810, 815, 489 P.2d 1133, 1135 (1971)). See also *In re Marriage of Murga*, 103 Cal. App.3d 498, 504-06, 163 Cal. Rptr. 79, 81-82 (1980); *Robertson v. Robertson*, 19 Wash. App. 425, 427, 575 P.2d 1092, 1093 (1978); *Lewis v. Lewis*, 260 Ark. 691, 693, 543 S.W.2d 222, 223-24 (1976).

<sup>55</sup> 1981 Mass. Adv. Sh. at 779-80, 418 N.E.2d at 606-07.