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Chapter 9: Domestic Relations

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CHAPTER 9

Domestic Relations

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§9.1. Introduction. The fundamental nature of the familial relationship, including the rights and responsibilities which spring from it and the means of its dissolution, has continued to be the subject of public interest and scrutiny. While much of the attention has focused on the Legislature where a variety of "no-fault divorce" bills have been filed, both the Supreme Judicial Court and, more recently, the Appeals Court have been active in the area of domestic relations.

A. Court Decisions

§9.2. Separate support: Scope of the decree. Probably the seminal decision in the area of separate support over the last several years has been the case of *Gould v. Gould.*[1] In that case, the wife of a wealthy man (net annual income of $89,000 and assets of one-half million dollars)[2] had petitioned for separate support under G.L. c. 209, §32.[3] Considering the traditional factors adopted in *Coe v. Coe*[4] and its successors—husband's financial worth, wife's needs, the couple's station in life and their manner of living—the probate court had ordered the husband to pay $2500 monthly for support and maintenance of the wife and children, a lump sum of $6,000, reasonable medical and dental expenses of the family, and reasonable educational expenses of the children in addition to counsel fees in the amount of $6,000.[5] It had also ordered the sale of the jointly-owned house, an equal division of the proceeds, and a division of per-

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§9.2. 1 1971 Mass. Adv. Sh. 315, 267 N.E.2d 652 (1971).
2 Id. at 316, 267 N.E.2d at 654.
3 Id. at 315, 267 N.E.2d at 653.
4 313 Mass. 232, 235, 46 N.E.2d 1017, 1019 (1943).
5 Id. at 315, 267 N.E.2d at 653.

sonal property within the house.[6] The husband appealed from the amount of the decree.

The Supreme Judicial Court affirmed the decree as being well within the discretion of the lower court, except as to the forced sale of the house and division of the proceeds.[7] There, the court quoted extensively from *Dunnington v. Dunnington*,[8] which held that there was no authority in the probate court to order a conveyance of real estate between the spouses as security for compliance with a separate support decree.[9] Reaffirming that judicial authority in the area of separate support was not as broad as in the area of alimony, the court noted that at the time of the lower court decree there was no provision in the law of separate support analogous to the provision permitting a court to require security for the payment of alimony.[10] Even if G.L. c. 209, §32D, which implements separate support decrees ordering a conveyance of property, had been applicable at the time of this action,[11] that statute would "not authorize the provision made in this case . . . ."[12] Thus the provision of the decree relating to the sale of the house and division of the proceeds was stricken.[13] Thus, the venerable holding of *Coe*, that a court may not provide for a division of joint property or property of the husband in a separate support proceeding,[14] remained seemingly undisturbed.

At one point, the court indicated that the fatal defect in the probate decree was the adequacy of the wife's support without the forced sale, thereby terminating whatever limited authority the lower court might have had to order a general division of the properties.[15] At another point, however, the court affirmed that portion of the decree which had granted the wife for use in her new apartment various items of personal property then contained in the house.[16] Such a division of personalty was explained by the court to be "incidental to the order for support and within the scope of the general equity jurisidiction of causes between husband and wife."[17] It was further explained to be consistent with *Dunnington*'s concept of "temporary support," providing a "sensible solu-

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6 Id.

7 Id. at 317-18, 267 N.E.2d at 655.

8 324 Mass. 610, 87 N.E.2d 847 (1949).

9 Id. at 613, 87 N.E.2d at 849.

10 1971 Mass. Adv. Sh. at 317-18, 267 N.E.2d at 655.

11 The court indicated that G.L. c. 209, §32D would have "full effect" in cases where property had first been attached pursuant to §33.

12 1971 Mass. Adv. Sh. at 318, 267 N.E.2d at 655.

13 Id. at 319, 267 N.E.2d at 655.

14 313 Mass. at 235, 46 N.E.2d at 1019.

15 1971 Mass. Adv. Sh. at 318, 267 N.E.2d at 655.

16 Id.

17 Id.

tion to a practical problem" in accordance with "broad equitable and humane considerations."[18]

In the area of separate support, therefore, *Gould* had suggested distinctions based upon: whether support provisions were adequate or inadequate without division of property; whether the division was to constitute permanent or temporary support; whether the property sought to be divided was realty or personalty; and whether, if realty, the property had been attached at some point in the proceedings.

These fertile but somewhat ambiguous distinctions made in *Gould* were at issue when the Appeals Court considered *Dee v. Dee*[19] this past year. The precise question on appeal was whether the probate court had the power to order the husband, by a separate support decree, to vacate the jointly-owned marital home in favor of the wife and child for an indefinite period of time. No attachment of the home involved had been made by the wife.[20] Nor, apparently, was there any doubt that the husband could afford to support the wife and child, and even pay for their separate living accomodations, without his vacating the home.[21] Since the husband, as a tenant by the entirety, was entitled by law to possession and control of the home under normal circumstances, the court saw no rationale for disturbing this possession, in accordance with *Gould* and *Dunnington*.[22]

While the wife relied on two recent statutes to support her claimed right to exclusive use of the home, the court found such reliance misplaced.[23] In the case of G.L. c. 208, §34B, the court construed its authority to order a spouse to vacate the marital home as specifically confined to a sixty-day limit during the pendency of separate support proceedings.[24] It found no authority to order a spouse to vacate the home indefinitely into the future.[25] As for G.L. c. 209, §32D, the court, following *Gould,* held the statute inapplicable to cases where the husband was otherwise capable of providing adequate support for his wife.[26] The statute was construed as providing a means for implementing decrees ordering the conveyance of property rather than as conferring any independent authority to order such a conveyance.[27]

Unlike the wife in *Gould,* however, the wife in *Dee* requested the *use* of the home, not division of its ownership or proceeds from its sale.[28] In

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18 Id.
19 1973 Mass. App. Ct. Adv. Sh. 369, 296 N.E.2d 521.
20 Id., 296 N.E.2d at 522.
21 Id. at 370, 296 N.E.2d at 522.
22 Id. at 371, 296 N.E.2d at 523.
23 Id. at 372, 296 N.E.2d at 523.
24 Id. at 371-72, 296 N.E.2d at 523.
25 Id. at 371, 296 N.E.2d at 523.
26 Id. at 372, 296 N.E.2d at 523-24.
27 Id. at 372-73, 296 N.E.2d at 524.
28 Id. at 369, 296 N.E.2d at 522.

the belief that the operative distinction in *Gould* was between temporary and permanent support, the wife claimed that all she sought was possession and use, subject to the husband's continued ownership interest in the home and power to dispose of it in good faith.[29] For Judge Goodman in dissent, Mrs. Dee's claim was analogous less to Mrs. Gould's claimed right to a division of the real property than to her claimed right to the use of various items of personal property, a right which the *Gould* court had affirmed on the basis of broad practical and equitable considerations.[30] Since the probate court could have made Mr. Dee's support order, including the cost of suitable lodging for his dependents, so high that he would have voluntarily vacated the home to his wife and child, Judge Goodman felt that judicial candor required the court to acknowledge and exercise such power directly.[31] Particularly in a case where the wife had been granted custody of a young, school-age child, for whom change of residence could be traumatic, the dissent found judicial power to order the husband's vacating of the home in the broad equitable provisions of G.L. c. 209, §32 et seq. and the " 'principles of fair dealing between husband and wife' which are properly considered in such a proceeding" (citing *Gould*).[32]

Curiously, then, both the majority and dissenting opinions in *Dee* relied heavily on *Gould* in support of their positions. Instead of directly examining and discussing the dissent's use of *Gould,* however, the majority chose to draw narrow and rather technical distinctions, e.g., by questioning whether the husband in *Gould* actually owned the various items of personalty he was ordered to convey to his wife's use.[33] Thus while the breadth of separate support decrees will apparently continue to be a function primarily of the husband's capacity to support his wife without a conveyance of property, the extent to which *Gould's* other distinctions affect the scope of decrees remains unsettled, even after *Dee.*

§9.3. Separate support: Jurisdiction. In *Thomas v. Thomas,*[1] a husband who had procured a Florida divorce with no requirement of alimony, appealed from the subsequent granting of the wife's petition for separate support brought in the Commonwealth.[2] The husband claimed that the Florida decree was entitled to full faith and credit and that he should, therefore, have no support obligation.[3] The wife, however, had not filed an appearance or participated in the Florida proceedings and had

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29 Id. at 369-70, 296 N.E.2d at 522.
30 Id. at 374, 296 N.E.2d at 524-25.
31 Id. at 375, 296 N.E.2d at 525.
32 Id., 296 N.E.2d at 525. Gould v. Gould, 359 Mass. 29, 33, 267 N.E.2d 652, 655 (1971).
33 1973 Mass. App. Ct. Adv. Sh. at 371 n.3, 296 N.E.2d at 522-23 n.3.

§9.3. 1 1973 Mass. App. Ct. Adv. Sh. 337, 295 N.E.2d 907.
2 Id. at 337, 295 N.E.2d at 908.
3 Id. at 339, 295 N.E.2d at 909.

challenged the jurisdiction of the Florida courts in the course of her action in the Massachusetts probate courts.[4]

In affirming the probate court decree, the Appeals Court restated what has become well-settled law: where a divorce proceeding in one jurisdiction is ex parte, the jurisdictional basis of the proceeding is reviewable in a proceeding brought in another jurisdiction by the other party.[5] Here, Florida's six-month residence requirement was construed as a domicil requirement which, after examination of all the evidence, including the husband's teaching position in Boston and his own statement giving Massachusetts as his permanent address on a loan application, it was held he did not satisfy.[6] Thus the husband's Florida divorce was a nullity, as well as his immediately subsequent marriage in 1968 to a woman with whom he had been living happily ever since.[7] The delay between the probate court decree of separate support, apparently in 1969, and the husband's appeal is unexplained.

§9.4. Divorce: Separation agreements. In *Surabian v. Surabian*,[1] the husband and wife entered into a separation agreement whereby he was to pay weekly alimony, provided, however, that "if the wife remarries such support and maintenance shall forthwith cease and terminate and the husband (libellee) will be under no further obligation to pay any moneys for the support of the said wife."[2] This termination-upon-remarriage provision was incorporated into the divorce decree. Five years after the divorce, the wife (libellant) remarried, and the payments ceased in accordance with the agreement.[3] One year later, however, this second marriage was annulled.[4] Libellee petitioned to modify the original divorce decree by deletion of the alimony provision in view of libellant's remarriage;[5] libellant, whose claim was that the annullment of her second marriage justified the resumption of alimony as if that marriage had never occurred, appealed from the granting of the petition.[6]

In the first of a three-part opinion, the court ruled that the separation agreement, while incorporated by reference in the divorce decree, also survived it even though such survival was not specified in the agreement itself.[7] The court, via footnote, established a "general rule" that separa-

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4 Id., 295 N.E.2d at 909.
5 Id. See also Cohen v. Cohen, 319 Mass. 31, 34, 64 N.E.2d 689, 691 (1946); Rubinstein v. Rubinstein, 319 Mass. 568, 571, 66 N.E.2d 793, 795 (1946).
6 1973 Mass. App. Ct. Adv. Sh. at 340, 295 N.E.2d at 910.
7 Id., 295 N.E.2d at 910.

§9.4. 1 1972 Mass. Adv. Sh. 1461, 285 N.E.2d 909 (1972).
2 Id. at 1461, 285 N.E.2d at 910.
3 Id. at 1462, 285 N.E.2d at 910.
4 Id., 285 N.E.2d at 910.
5 Id., 285 N.E.2d at 910-11.
6 Id., 285 N.E.2d at 911.
7 Id. at 1463, 285 N.E.2d at 911.

tion agreements presumptively survive divorce decrees in which they are incorporated unless otherwise specified by the parties.[8]

This marked a change from prior law which, from *Schillander v. Schillander,*[9] *Fabrizio v. Fabrizio,*[10] and *Freeman v. Sieve*[11] through the recent *Hills v. Shearer,*[12] had stated that the question of the agreement's survival turned on the parties' intent, "to be ascertained by a reading of the entire agreement."[13] Inasmuch as the libellant was seeking to establish a right to alimony based upon the divorce decree rather than upon the separation agreement, the "general rule" established by the court was dictum. It suggests, however, that parties to future separation agreements will have an almost automatic right to the advantages of both a non-modifiable contract and an enforceable decree even in the absence of specific stipulation.

In the second part of the opinion, the court addressed the question of whether libellant was entitled to alimony under the divorce decree despite its termination-upon-remarriage provision.[14] Libellant argued that under Massachusetts law, a decree containing a provision incorporated from a separation agreement is still to be construed on the basis of judicial intent rather than the intent of the parties.[15] The court, while agreeing with libellant's argument, ruled that the probate judge had at least constructive knowledge of both the termination provision in the agreement and the common law precedent that such a provision in an agreement takes effect upon the ceremony of remarriage itself, in accordance with *Gerrig* v. *Sneirson.*[16] The judge's decision not to modify the provision upon issuing the decree required the conclusion that he intended to define remarriage as the remarriage ceremony itself, thereby preventing alimony payments from being reinstated after the subsequent annulment.[17]

Analytically, the *Surabian* decision requires no further elaboration. Yet in the last two footnotes to the opinion, the court went out of its way to indicate its attentiveness to the forces of social change as they begin to impact upon the law of domestic relations. On the issue of remarriage terminating the right to alimony, the court intimated its intention to reconsider *Robbins* v. *Robbins*[18] "if the occasion presents

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8 Id. at 1463 n.4, 285 N.E.2d at 911 n.4.
9 307 Mass. 96, 29 N.E.2d 686 (1940).
10 316 Mass. 343, 55 N.E.2d 604 (1944).
11 323 Mass. 652, 84 N.E.2d 16 (1949).
12 355 Mass. 405, 245 N.E.2d 253 (1969).
13 Id. at 408, 245 N.E.2d at 256.
14 1972 Mass. Adv. Sh. at 1464, 285 N.E.2d at 912.
15 Id. at 1465, 285 N.E.2d at 912.
16 344 Mass. 518, 183 N.E.2d 131 (1962).
17 1972 Mass. Adv. Sh. at 1465, 285 N.E.2d at 912.
18 343 Mass. 247, 178 N.E.2d 281 (1961).

itself."[19] In that case, the court had required reinstatement of alimony after annulment of a later marriage, citing the equities of the particular situation.[20] There, however, the absence of a termination-upon-remarriage provision in either an agreement or the decree left unclear the intent of the parties and the court as to the effect of annulment after remarriage upon the original alimony obligation. Via footnote, the *Surabian* court now suggested that the probate court's determination of the equity of a termination provision could "appropriately take into account the enhanced ability and desire of women today to look after their own affairs and to provide for their own economic well-being."[21] In the succeeding footnote, the court predicted that "changes in the status of women" might justify movement towards a blanket rule of alimony terminating upon remarriage—a direct reversal of the *Robbins* case-by-case approach.[22] Venturing even further beyond the issue immediately at hand, the court announced that changes in "both popular and legal thinking" could not help but have future significance for "the setting of both the amount and terms of alimony."[23]

Surabian, broadly construed, is the court's pronouncement of its readiness to view the marital relationship in a new light. In traditional cases like *Coe,* for example, wives were perceived as tied to their husbands' pursestrings and to the type of life their husbands had afforded them. While *Coe* is a case of separate support rather than alimony, that cannot entirely bridge the gap between its traditional views and the bold language, dicta, and footnotes of *Surabian.* For in *Surabian,* the court is intimating that decrees of alimony and separate support in the future will turn more heavily on the wife's capacity to be economically self-sufficient. By the same token, *Coe* prohibited wives, after years of service as homemakers and housekeepers, from having a share of the husband-owned or jointly-owned property acquired during the marital relationship except where the husband's support would be otherwise inadequate.[24] *Surabian* states that "specific property may be ordered transferred as payment of alimony," without limiting such authority to cases of otherwise inadequate support.[25] One possible implication is that property, like other aspects of the economic relationship of the spouses, will be subject to considerations of equity and fair dealing in determining its disposition upon dissolution of the marriage.

§9.5. Divorce: Scope of the decree. In *Ober v. Ober,*[1] the Appeals

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19 1972 Mass. Adv. Sh. at 1467 n.8, 285 N.E.2d at 913 n.8.
20 343 Mass. at 252, 178 N.E.2d at 284.
21 1972 Mass. Adv. Sh. at 1466 n.7, 285 N.E.2d at 913 n.7.
22 Id. at 1467 n.8, 285 N.E.2d at 913 n.8.
23 Id. at 1466-67 n.7, 285 N.E.2d at 913 n.7.
24 313 Mass. 232 at 236, 46 N.E.2d at 1020.
25 1972 Mass. Adv. Sh. at 1466, 285 N.E.2d at 913.

§9.5. 1 1973 Mass. App. Ct. Adv. Sh. 33, 294 N.E.2d 449.

Court examined and clarified two significant areas relating to the scope of divorce decrees. The first area concerned the grounds for divorce. The evidence introduced in the principal case showed a seriously ill husband who was victimized for years by his wife's repeated but groundless accusations of infidelity.[2] The probate court had granted the husband a divorce for cruel and abusive treatment, after a finding of causal connection between the accusations and ill health.[3] The Appeals Court found no evidence that the husband's health was in fact impaired by the wife's accusations.[4] It did find, however, that the wife had caused the husband "to be upset and angry" making it "reasonably likely" that injury to his health "would have followed as a natural consequence" of her actions.[5] Rather than requiring demonstration of the actual adverse effects of the other spouse's behavior—a requirement which has often fostered exaggerations and fabrications—the court in *Ober* indicated that a spouse could also prove cruel and abusive treatment by merely showing the "reasonably likely" adverse effects of the complained-of behavior.[6]

The second significant aspect of *Ober* was its discussion of the principles of alimony. The award of $60 per week alimony to the wife was upheld as adequate, since the wife's independent earning capacity was judged to be $160 per week based on employment three years before.[7] It was apparently unimportant to the court that the wife was now sixty-one years old, with decreased and further decreasing earning capacity. At the same time, the lower court's award to the husband of a portion of the wife's estate as alimony was reversed as unnecessary to the husband's support and hence an unlawful division of property.[8] The court restated that the same principles of determining alimony to the wife were applicable in determining an award of property in the nature of alimony to the husband, i.e., financial means of the payor, necessities of the payee, the condition in life of the spouses, and their mode of living. Since the husband's condition was substantially similar to that of the wife's, an award of property was deemed improper.

In *Blitzer* v. *Blitzer*,[9] the husband appealed from that part of the decree of divorce granted to the wife which ordered him to convey his interest in the jointly-owned marital home.[10] A Pennsylvania resident on whom service had been made only by publication and mail, the husband had not contested the libel on the merits but had entered a

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2 Id. at 34, 294 N.E.2d at 450.
3 Id.
4 Id.
5 Id.
6 Id.
7 Id. at 34-35, 294 N.E.2d at 451.
8 Id.
9 1972 Mass. Adv. Sh. 985, 282 N.E.2d 918.
10 Id., 282 N.E.2d at 919.

special appearance contesting any ordered conveyance of the attached home in lieu of alimony.[11] The probate court had found that conveyance was the "only practical way" to satisfy the wife's support requirements and so ordered.[12] After assuming, arguendo, that the husband's special appearance was proper, the Supreme Judicial Court held that the probate court lacked the jurisdiction to order the husband personally to convey property to the wife.[13]

To be compared with the above case is *McIssac v. Peck*,[14] also decided in the 1972 Survey year, which decided the liability of an out-of-state executor for the unpaid separate support payments of the petitioner's deceased husband, who at the time of his death was a foreign domiciliary with substantial foreign but no Massachusetts assets.[15] The court affirmed the lower court decision that jurisdiction was lacking to enter a money decree.[16] In *Blitzer*, however, the court held that there was jurisdiction to enter a quasi in rem decree applying the husband's one-half interest in the property to the wife's support.[17] In so doing, the court reaffirmed the long line of cases including *Dunnington*[18] and *Klar v. Klar*[19] which hold that the probate court is authorized to apply property in lieu of alimony when necessary for the wife's support.[20] Since courts are acknowledged to have broader powers with alimony than separate support, it remains to be seen whether analogous authority exists in the area of separate support to order a conveyance of property where no personal jurisdiction has been acquired. Even G.L. c. 209, §32D, a recent statute which implements property conveyances in separate support proceedings, appears to presuppose personal jurisdiction.

§9.6. Foreign divorce. The latest installment of foreign divorce cases raised the issue of the wife's right to maintain a petition for separate support after a foreign divorce had been granted to her husband. In *Wiswall v. Wiswall*,[1] where the wife petitioned for separate support after a Nevada divorce had been granted to her husband, the probate decree granting the petition was sustained by the Supreme Judicial Court.[2] Since the wife had refused to file a Nevada appearance, and the husband

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11 Id.
12 Id. at 986, 282 N.E.2d at 919.
13 Id. at 987, 282 N.E.2d at 920.
14 1972 Mass. Adv. Sh. 786, 281 N.E.2d 610.
15 Id., 281 N.E.2d at 610.
16 Id.
17 1972 Mass. Adv. Sh. at 987, 282 N.E.2d at 920.
18 324 Mass. 610, 87 N.E.2d 847 (1949).
19 322 Mass. 59, 76 N.E.2d 5 (1947).
20 1972 Mass. Adv. Sh. at 988, 282 N.E.2d at 920.

§9.6. 1 1972 Mass. Adv. Sh. 648, 281 N.E.2d 238.
2 Id. at 648-49, 281 N.E.2d at 238.

was found not to have been a Nevada domiciliary, the Nevada divorce was held void for lack of jurisdiction.[8]

In *McCarthy v. McCarthy*,[4] however, the wife had not only appeared through her attorney in the Mexican proceedings but had signed a document by which the husband's interest in jointly-held property was conveyed to her in exchange for acquiescence to the Mexican decree.[5] In view of her Mexican appearance and "acceptance of valuable consideration in return therefor," the Supreme Judicial Court reversed the probate decree and barred her from maintaining such a petition.[6]

Gosselin v. Gosselin[7] raised the issue of whether in the case of an out-of-state divorce by a husband resulting in an order of child support without alimony, the wife was entitled to sue for alimony in the courts of the Commonwealth.[8] Since the authority to award alimony is purely statutory under G.L. c. 208, §34,[9] the issue turned on construction of the statutory word "divorce."[10] If the term included all divorces, both foreign and domestic, then the wife could petition for alimony; if the term referred only to domestic divorces, then the wife could not so petition. After applying a variety of principles of statutory construction and after reviewing the legislative history of the statute, the Appeals Court held that "divorce" was limited to divorce decrees issued in the Commonwealth.[11] Thus courts of the Commonwealth were held to be without authority to award alimony based on foreign divorce decrees. It should be noted, nevertheless, that nothing in the opinion affects the authority of courts, upon petition under G.L. c. 208, §35,[12] to enforce foreign divorce decrees where alimony has been awarded.

§9.7. Divorce: Psychotherapist-patient privilege in custody proceedings. The case of *Usen v. Usen*[1] raised the interesting issue of the admissibility of psychiatric testimony on the question of child custody. Subsequent to a divorce proceeding in which the mother was awarded custody, the father petitioned for custody.[2] He called one of the mother's

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8 Id.

4 1972 Mass. Adv. Sh. 511, 280 N.E.2d 151 (1972).

5 Id., 280 N.E.2d at 152.

6 Id. at 512, 280 N.E.2d at 152.

7 1973 Mass. App. Ct. Adv. Sh. 157, 294 N.E.2d 555.

8 Id., 294 N.E.2d at 556.

9 G.L. c. 208, §34 states: "Upon a divorce, or upon petition at any time after a divorce, the court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband."

10 1973 Mass. App. Ct. Adv. Sh. at 157, 294 N.E.2d at 556.

11 Id. at 159-60, 294 N.E.2d at 557.

12 G.L. c. 208, §35 states: "The court may enforce decrees, including foreign decrees, for allowance, alimony or allowance in the nature of alimony."

§9.7. 1 1971 Mass. Adv. Sh. 793, 269 N.E.2d 442.

2 Id., 269 N.E.2d at 443.

former psychotherapists to testify and introduced into evidence letters written by the mother's therapists and contained in a hospital record.[3] The oral testimony and written evidence related to the diagnosis and treatment of the mother's mental condition. The mother excepted to their admission.[4]

The Supreme Judicial Court quickly disposed of the father's reliance on the hospital record exception to the hearsay rule, stating that the hearsay statute in no way superseded the statute establishing a psychotherapist-patient privilege.[5] The privilege to prevent a disclosure by one's therapist in court could not be jeopardized by the mere recording of that disclosure in a hospital record.[6] The father's second argument relied on the specific statutory exception to the psychotherapist-patient privilege.[7] That exception authorizes a therapist to provide evidence in child custody proceedings where: (a) the therapist believes such disclosure is in the child's best interests, and (b) the court finds, after hearing the evidence in chambers, that the interests of justice outweigh the importance of the privilege.[8] Since the preconditions to the exception were ignored in this case, the court had little trouble holding the evidence inadmissible.[9]

As a matter of strict statutory interpretation, *Usen* is unchallengeable; confidentiality in the therapist-patient setting should not be lightly sacrificed to loose procedures. Present statutory procedures seem inappropriate, however, where the psychotherapist having valuable information as to the mental and emotional condition of the would-be custodian chooses not to come forward with testimony. Whether the interests in disclosure outweigh the value of the privilege should not be the therapist's decision in the first instance; a statutory amendment authorizing the court to initiate the disclosure process would place the ultimate responsibility for determining the proper balance where it belongs.

§9.8. Adoption. *In re Child,*[1] decided by the Appeals Court last term, dealt with the petition of an eighteen-year-old mother, whose child was born out of wedlock, to withdraw the consent she had given for surrender of the child for adoption. The probate court had found that her consent had been voluntary and fully informed, even though at the

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3 Id. at 794, 269 N.E.2d at 443.

4 Id.

5 Id. at 795, 269 N.E.2d at 443. G.L. c. 233, §20B states in pertinent part:

> Except as hereinafter provided, in any court proceeding . . . a patient shall have the privilege . . . of preventing a witness from disclosing . . . any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition . . . .

6 1971 Mass. Adv. Sh. at 795, 269 N.E.2d at 444.

7 Id.

8 Id. at 795-96, 269 N.E.2d at 444.

9 Id. at 797, 269 N.E.2d at 444.

§9.8. 1 1973 Mass. App. Ct. Adv. Sh. 299, 295 N.E.2d 693.

time of surrender one week after birth, the mother was "nervous and upset" and without the advice of counsel.[2] The Appeals Court affirmed the finding, stating that "[n]o statute has said that surrenders are valid only if executed free from emotion, tensions and pressures caused by the situation."[3] Given the voluntariness of the consent, the mother could have been permitted to withdraw it only if the welfare of the child would be thereby served. To the contrary, however, the probate court had found that the child's best interests were served by remaining with his prospective adoptive parents.[4] That finding was now affirmed on the basis of the "bonds of affection and confidence [which] rapidly arise" between a young child and the family it is placed with.[5] While the mother's original petition had been filed nine months after surrender of the child, it is not clear from the Appeals Court opinion how long the child had been apart from the mother at the time of the initial hearing. The hearing on appeal inexplicably occurred more than three years after the mother's surrender of the child. Nonetheless the court concluded: "The interests of the natural parents in such a case must be completely subordinated to the paramount interests of the child."[6] Evidence of the child's best interests was presented, in part, in the form of expert psychiatric testimony, the introduction and use of which was also affirmed.[7]

Consent to Adoption of a Minor[8] involved the appeal of a mother from the denial of her petition to vacate a decree of the probate court dispensing with the necessity of her consent to the adoption of her son.[9] The original petition to dispense with the mother's consent under what was then G.L. c. 210, §§3 and 3A had been filed in 1968 by the Catholic Charitable Bureau of Boston which had placed the child in a foster home five days after its out-of-wedlock birth and had paid for its expenses during the following year.[10] Notice of that petition had been mailed to the mother who, upon advice of counsel, had not accepted it; official notice was, therefore, by publication.[11]

On appeal to the Supreme Judicial Court, the mother claimed that the probate court was without jurisdiction to enter its decree, since per-

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2 Id. at 302, 295 N.E.2d at 695.

3 Id. at 304, 295 N.E.2d at 697.

4 Id. at 305, 295 N.E.2d at 697. While the mother's original petition had been filed nine months after surrender of the child, it is not clear from the Appeals Court opinion how long the child had been apart from the mother at the time of initial hearing. The hearing on appeal inexplicably occurred more than three years after the initial surrender.

5 Id. at 306, 295 N.E.2d at 697.

6 Id., 295 N.E.2d at 698 (citing Adoption of a Minor, 338 Mass. 635, 643, 156 N.E.2d 801, 806 (1959)).

7 Id., 295 N.E.2d at 698.

8 1973 Mass. Adv. Sh. 711, 296 N.E.2d 176 (1973).

9 Id. at 712, 296 N.E.2d at 178.

10 Id. at 713-14, 296 N.E.2d at 178-79.

11 Id. at 714, 296 N.E.2d at 179.

sonal service had never been obtained.[12] That claim was rejected, however, since notice by certified mail was held to be sufficient to constitute personal service.[13] The mother then claimed on the merits that her consent was required under G.L. c. 210, §2 and could not be dispensed with as an exception under §§3 or 3A.[14] Since the latter provision was construed by the court to authorize broad judicial inquiry into the best interests of the child regardless of whether a party was unfit or incapacitated under section 3, the mother's substantive claim was also rejected.[15]

The decision thereby emphasized the extensive power given to the probate court in adoption proceedings to determine the best interests of the child, a power which had been even further expanded on the legislative front by the repeal in 1972 of section 3A and the incorporation of most of its provisions into section 3.

Parents' rights in children voluntarily placed in the custody of the Department of Public Welfare received further amplification by the Supreme Judicial Court in two cases, *Boyns v. Department of Public Welfare*[16] and *White v. Minter*.[17] The petitioner in *Boyns* involved a mother seeking a writ of habeas corpus for the return of her minor daughter two months after her transfer to the custody of the Division of Child Guardianship (DCG) under a voluntary agreement pursuant to G.L. c. 119, §23, ¶ A.[18] Despite the termination of the agreement by the mother, the DCG refused to return the child to her mother but chose instead to seek legal custody under G.L. c. 119, §23, ¶ c.[19] While the superior court, upon consideration of the best interests of the child, had denied the writ, the Supreme Judicial Court held that the DCG was required to institute custody proceedings if it sought to retain physical custody after parental termination of the agreement.[20] Since, in this particular case, the mother had had the DCG enjoined from seeking such legal custody, the court ordered the injunction vacated and reversed the lower court order denying the writ.[21] The court held that if neither the mother nor the DGG sought custody of the child within sixty days, the writ would then be allowed.[22] If such a petition were filed, however, the issues would be "peculiarly appropriate for hearing and determination

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12 Id. at 716, 296 N.E.2d at 180.
13 Id. at 716-17, 296 N.E.2d at 180-81.
14 Id. at 717-19, 296 N.E.2d at 181-82.
15 Id. at 719-20, 296 N.E.2d at 182.
16 1971 Mass. Adv. Sh. 1777, 276 N.E.2d 716.
17 330 F. Supp. 1194 (D. Mass. 1971).
18 1971 Mass. Adv. Sh. at 1777, 276 N.E.2d at 717.
19 Id. at 1778, 276 N.E.2d at 717.
20 Id.
21 Id. at 1779, 276 N.E.2d at 718.
22 Id.

by the probate court,"[28] as opposed to the superior court in which the action had been brought.

In *White v. Minter,* the plaintiff was a mother seeking to regain custody of her infant son and to challenge the constitutionality of G.L. c. 119, §23, ¶ E before a three-judge federal court.[24] The child, who had been placed by the mother with a friend pending her recuperation from an assault had, unbeknownst to her, been transferred to DCG when the friend herself entered the hospital.[25] As soon as she learned of the transfer, the mother demanded return of the child but was refused because of her alleged abandonment.[26] She was advised by the DCG to consider placing him for adoption. As in the *Boyns* situation, the DCG had neither instituted custody proceedings nor held an administrative hearing to determine the mother's fitness.[27]

The federal court refused to decide the mother's due process challenge to the constitutionality of the statute on its face.[28] It held, however, that the statute had been unconstitutionally applied when the DCG failed to afford the mother "an opportunity to appear before any tribunal, whether administrative or judicial, to contest a decision presumably made by a case worker and her supervisor . . . ."[29] The DCG was consequently ordered either to petition for custody within one week or to surrender the child back to the mother.[30]

The effect of the *Boyns* and *White* decisions was thus to ensure the continuity of the parent-child relationship in the absence of timely administrative or judicial procedures that satisfy the requirements of constitutional due process. Beyond that, both decisions suggested the probate court as the forum most appropriate to resolution of the care and custody of children. Though no official family court structure has been established in the Commonwealth, recent case laws is vesting increasing authority in the probate courts.

§9.9. Guardianship. *Russell v. Lovell*[1] addressed the question of the law to be applied when a ward petitions for an accounting and distribution of property held by his guardian—that is, ought the court use the law of the ward's domicile or that of the jurisdiction creating the guardianship? In an earlier conflicts case involving the personal custody of

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23 Id., 276 N.E.2d at 717.
24 330 F. Supp. at 1195-96.
26 Id.
27 Id.
28 Id. at 1197.
29 Id.
30 Id. at 1198.

§9.9. 1 1973 Mass. Adv. Sh. 75, 291 N.E.2d 733. The specific conflicts problems at issue, Vermont's 18 year old age of majority as opposed to Massachusetts' age of 21, has been rendered moot by the General Court's lowering of majority to 18 in this Survey Year. Talcot v. Chamberlain, 149 Mass. 57, 20 N.E. 305 (1889).

the ward himself, the law of the jurisdiction creating the guardianship was held to prevail.[2] Here, there was a possible distinction in that guarddianship of property alone was at issue. Nonetheless, the court gave weight to the fact that, while the ward was now a Vermont domiciliary, the guardians were Massachusetts domiciliaries and the guardianship was both created and administered by Massachusetts. Massachusetts was therefore held to have a more substantial relationship to the transaction, and its law of majority was held to apply in affirming the dismissal of the ward's petition.[3]

In *Guardianship of a Minor,*[4] a mother appealed from a probate court decree finding her unfit and granting the petition for custody of her son brought by a private agency under G.L. c. 201, §5.[5] While that statute deals with the awarding of the custody of a child to a guardian, it allows a corporation to be a guardian although actual custody is to be awarded to "some suitable person." Challenging the constitutionality of the statute, the mother claimed the standard of "unfitness" by which her custody could be terminated was vague and thus a denial of due process.[6] The Appeals Court rejected the broad constitutional attack[7] on the basis that in view of the lower court finding that the mother posed a physical threat to the child, she was unfit under whatever substantive standard might be applied.[8] Judge Goodman concurred in the result after applying the more articulated standards of G.L. c. 119, which he found to be more appropriate to a case in which an agency, whether private or not, was attempting to take a child from its mother.[9]

B. Legislation

§9.10. Adoption: Modernization of procedures. By far the most significant legislation in the area of domestic relations for the 1972 Survey year was chapter 800, which amended the law of adoption.[1] One of the amendment's primary effects was to standardize the procedures for consent. In addition to providing a requisite consent form, the new statute prohibits the execution of such consent before or within four days after birth and establishes the irrevocability of the consent from the date of execution.[2] It also guarantees the confidentiality of the consent proce-

3 1973 Mass. Adv. Sh. at 77, 291 N.E.2d at 735.
4 1973 Mass. App. Ct. Adv. Sh. 467, 298 N.E.2d 890.
5 Id., 298 N.E.2d at 891.
6 Id. at 469, 298 N.E.2d at 892.
7 Id. at 470, 298 N.E.2d at 892.
8 Id. at 473, 298 N.E.2d at 894.
9 Id., 298 N.E.2d at 894-95.

§9.10. 1 G. L. c. 210.
2 G.L. c. 210, §2, states in pertinent part:

dure.[3] Chapter 520 of the Acts of 1973 has limited these new consent procedures solely to prospective application.

Rather than specifying conditions under which the normally required consent can be dispensed with, as did former law, the new statute vests considerable discretion in the probate court to consider the best interests of the child in determining the necessity of consent.[4] Thus the same criteria by which consent has been dispensed with in proceedings instituted by the Department of Public Welfare or child care agencies under the former section 3A—now repealed—are now also applicable to determine whether petitions for adoption can be granted without consent. The presumption is established, moreover, that the child's best interests require dispensing with consent

> if said child has been in the care of the department or a licensed child care agency for more than one year . . . irrespective of incidental communications or visits from his parents or other persons . . ., irrespective of a court decree awarding custody of said child to another and notwithstanding the absence of a court decree ordering said parents or other person to pay for the support of said child. . . .[5]

The purpose of this provision is to remove the obstacle hitherto posed by the parent or legal custodian who, after waiving the duties of parenthood to the state, sought to claim his privileges to prevent appropriate placement of the child. It also brings statutory law into harmony with the recent trend of common law as exmplified by *Adoption of a Minor.*[6]

Several additional and beneficial changes have been effected by the statute. Eliminated is any notice requirement to state or local welfare authorities if the child whose adoption is sought is publicly supported.[7] The requirement of residency in the adoptive parents' home has been

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Such written consent shall be executed no sooner than the fourth calendar day after the date of birth of the child to be adopted . . . A consent executed in accordance with the provisions of this section shall be final and irrevocable from date of execution.

3 G.L. c. 210, §2 states: "Execution of such consent shall be carried out in a manner which shall preserve privacy and confidentiality."

4 G.L. c. 210, §3(c) states:

In determining whether the best interests of the child will be served by issuing a decree dispensing with the need of consent as permitted under paragraph (b), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section two of chapter two hundred ten to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition.

5 G.L. c. 210, as amended, Acts of 1972, c. 800.

6 357 Mass. 490, 258 N.E.2d 567 (1970).

7 G.L. c. 210, §3(b), as amended, Acts of 1972, c. 800 states in pertinent part: "The court shall issue a decree dispensing with the need for said . . . notice of any petition for adoption of such child subsequently sponsored by said department or agency if it finds that the best interests of the child . . . will be served by said decree."

reduced from a year to six months and can be waived in the discretion of the court.[8] Finally, to protect the confidentiality of the adoptive process, any inspection of adoption records must receive prior authorization from the probate court for good cause shown.[9]

Another significant legislative amendment to the adoption laws is chapter 592 of the Acts of 1972, which provides that the rights of inheritance of a child adopted in a foreign jurisdiction are no different than if the child had been adopted within the Commonwealth.[10] This represents a change from the former applicability of the law of the state of adoption (except in the case of a conflict of laws).

§9.11. Miscellaneous. As for the area of divorce, legislative developments have been relatively scarce. Chapter 379 of the Acts of 1973 permits a woman to resume her maiden name or the name of a former husband after divorce whether or not she is the party granted it.[1]

Chapter 415 of the Acts of 1973 amends the venue requirements for divorce libels by requiring the libel to be heard in the county where the parties last lived together, so long as one of the parties still resides there.[2] Former law had permitted the libel to be heard in the county where the libellee resided even if the libellant still resided in the county where the parties last lived together. The purpose of reducing the libellant's venue options, apparently, is to effect a more equitable distribution of libels throughout the probate court system.

Chapter 433 of the Acts of 1973 permits a person providing foster care to be notified by the Department of Public Welfare when the child becomes eligible for adoption and to be considered as a prospective adoptive parent.[3]

Perhaps the most important is chapter 740 of the Acts of 1973 which abolishes the defense of recrimination in divorce libels, thereby requiring a divorce to be granted in the case where both parties have grounds for it.[4] Prior law barred the granting of a divorce where both parties had sufficient grounds on the theory that one party's grounds constituted an affirmative defense to the other party's grounds.[5] The often absurd results reached by strict application of such a doctrine and the usually collusive tactics employed by the parties to avoid its application are now rendered unnecessary.

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8 G.L. c. 210, §5, as amended, Acts of 1972, c. 800.
9 G.L. c. 210, §6, as amended, Acts of 1972, c. 800.
10 G.L. c. 210, §9, as amended, Acts of 1972, c. 592.

§9.11. 1 G.L. c. 208, §23, as amended, Acts of 1973, c. 379.
2 G.L. c. 208, §6, as amended, Acts of 1973, c. 415.
3 G.L. c. 119, §23F, as amended, Acts of 1973, c. 433.
4 G.L. c. 208, §1, as amended, Acts of 1973, c. 740.
5 G.L. c. 208, §1.