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Chapter 4: Domestic Relations

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CHAPTER 4

Domestic Relations

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§ 4.1. The Adverse Inference from Failure to Testify in Child Custody Cases.* Massachusetts law provides that any person with information that parents are not providing proper care for their child may petition a district court for a hearing to determine whether the child should be removed from the parents' home and committed to the custody of a public agency.[1] The Massachusetts courts steadily adhere to the view, which is virtually unanimous among the states, that the procedural rights of parents in such a hearing, while greater than those of the typical civil litigant,[2] are less than those of a criminal defendant.[3]

One procedural protection provided to a criminal defendant is the fifth

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§ 4.1. [1] G.L. c. 119, § 24 (West 1969). Section 24 provides:

> The Boston juvenile court or the juvenile sessions of any district court of the commonwealth, except the municipal court of the city of Boston, upon the petition of any person alleging on behalf of a child under the age of sixteen years within the jurisdiction of said court that said child is without necessary and proper physical, educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or who lacks proper attention of parent, guardian with care and custody, or custodian, and whose parents or guardian are unwilling, incompetent, or unavailable to provide such care, may issue a precept to bring such child before said court, shall issue a notice to the department, and shall issue summons to both parents of the child to show cause why the child should not be committed to the custody of the department of public welfare or other appropriate order made.

Id.

[2] *E.g.*, Care and Protection of Three Minors, 392 Mass. 704, 711–12, 467 N.E.2d 851, 857 (1984) ("clear and convincing" rather than "preponderance of the evidence" standard must be met for parental rights to be terminated); Petition of Worcester Children's Friend Society to Dispense with Consent to Adoption, 9 Mass. App. Ct. 594, 602, 402 N.E.2d 1116, 1121 (1980) ("extra measure" of evidentiary protection appropriate for parents justifies flexibility in application of evidentiary rules).

[3] *E.g.*, Petition of Dep't of Social Services to Dispense with Consent to Adoption, 384 Mass. 707, 710–11, 429 N.E.2d 685, 687 (1981) (exclusionary rule inapplicable to parental rights termination hearing); Petition of Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 592–93, 421 N.E.2d 28, 39 (1981) ("beyond a reasonable doubt" standard of proof inapplicable); Custody of a Minor, 375 Mass. 733, 746, 379 N.E.2d 1053, 1061 (1978) (double jeopardy doctrine inapplicable).

amendment right against self-incrimination.[4] This right implies that a fact-finder may not draw adverse inferences against a criminal defendant merely because he or she fails to testify at trial.[5] Not only may the fact-finder not infer that the defendant's testimony would be incriminating, but the prosecutor may not call the jury's attention to the defendant's failure to testify or speculate on what the defendant's testimony might have been.[6] Furthermore, the right against self-incrimination protects both civil and criminal litigants from adverse inferences when a non-party witness refuses to testify on fifth amendment grounds.[7] Moreover, when a witness does incriminate himself through testimony in an unrelated proceeding, that testimony may not be used against the witness in a later criminal trial.[8] In both civil and criminal cases, however, most states agree that an adverse inference *may* be drawn from a party's failure to call a witness, especially if the witness is readily available to the party and would be a natural witness to rebut the opponent's case.[9]

Similarly, Massachusetts allows the fact-finder to draw an adverse inference when a party fails to call a witness who might reasonably be expected to have been called if his or her testimony would have been favorable to the party.[10] This rule was explained in the 1960 case of *Grady*

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[4] U.S. CONST. amend. V. The fifth amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . . *Id.* The fifth amendment applies to the states through the fourteenth amendment. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

[5] United States v. Walker, 313 F.2d 236, 237–38 (6th Cir. 1963), *cert den.*, 374 U.S. 807 (1963); United States v. Molin, 244 F. Supp. 1015, 1018 (D. Mass. 1965).

[6] *E.g.*, Chapman v. California, 386 U.S. 18, 25–26 (1967).

[7] United States v. Johnson, 488 F.2d 1206, 1211 (1st Cir. 1973) (neither side may benefit from inference that witness would take fifth if called). *But see*, Marine Midland Bank v. John E. Russo Produce Co., Inc., 50 N.Y.2d 31, 42, 405 N.E.2d 205, 211, 427 N.Y.S.2d 961, 967 (1980) (adverse inference extends even to witness taking fifth amendment in civil trial).

[8] Lefkowitz v. Turley, 414 U.S. 70, 78 (1973).

[9] *See, e.g.*, Secondino v. New Haven Gas Co., 147 Conn. 672, 675, 165 A.2d 598, 600 (1960) (failure of tort plaintiff to produce doctor to testify concerning plaintiff's injuries allowed fact-finder to infer injuries were not serious); Wood v. Mobil Chemical Co., 50 Ill. App. 3d 465, 473–74, 365 N.E.2d 1087, 1093 (1977); Roy v. Phelps, 488 So. 2d 468, 470 (La. Ct. App. 1986); Graeff v. Baptist Temple of Springfield, 576 S.W.2d 291, 306 (Mo. 1978). *Cf.* Fruehauf Corp. v. Trustees of First United Methodist Church, 387 So. 2d 106, 112 (Miss. 1980). *But see*, Adams v. Mallory, 308 Md. 453, 465, 520 A.2d 371, 377 (1987) (alleged father's failure to testify in paternity suit does not permit adverse inference or reference to failure to testify).

[10] *See, e.g.*, Commonwealth v. United Food Corp., 374 Mass. 765, 771–72, 374 N.E.2d 1331, 1338 (1978); Commonwealth v. Franklin, 366 Mass. 284, 293–94, 318 N.E.2d 469, 476 (1974); Commonwealth v. DeCaro, 359 Mass. 388, 392, 269 N.E.2d 673, 675 (1971); Commonwealth v. Smith, 342 Mass. 180, 186–87, 172 N.E.2d 597, 602 (1961); Commonwealth v. O'Rourke, 311 Mass. 213, 222, 40 N.E.2d 883, 887–88 (1942).

v. Collins Transportation Co.[11] In *Grady*, the court granted an auto accident defendant the right to raise the adverse inference against the plaintiff, who failed to produce as witnesses the passengers in his own car.[12] The *Grady* Court allowed the fact-finder to infer that the testimony of the passengers would have been unfavorable to the plaintiff.[13] According to the *Grady* Court, the strength of the inference depends on the relative availability of the witnesses to each party,[14] whether the party could explain the absence of the witnesses,[15] and the strength of the evidence against the party.[16] The inference is strongest where, as in *Grady*, a party against whom it is being drawn has much easier access to the witness than the opposing party and the opposing party has made its case.[17]

During the *Survey* year, the Supreme Judicial Court applied the civil "adverse inference rule" to a child custody hearing for the first time.[18] In *Custody of Two Minors*, the Court held that in the course of a hearing in which the Department of Social Services sought custody over abused children, the fact-finder could draw an adverse inference from the failure of the children's parents to testify because they were available to do so.[19] Based upon a showing of clear and convincing evidence of child abuse and neglect, the Court upheld a district judge's award of custody of two children to the Department of Social Services.[20]

In *Custody of Two Minors*, a district court judge ordered two minor children removed from their parents' home and committed to the custody of the Department of Social Services.[21] The Department presented evidence of a long history of parental abuse.[22] The district court held a

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[11] 341 Mass. 502, 170 N.E.2d 725 (1960).

[12] *Id.* at 510, 170 N.E.2d at 729.

[13] *Id.* at 505, 170 N.E.2d at 727.

[14] *Id.* at 506, 170 N.E.2d at 726–27.

[15] *Id.* at 510, 170 N.E.2d at 727–28.

[16] *Id.* at 506, 170 N.E.2d at 727. The inference should not be drawn unless "'the evidence against [the party] is so strong that, if innocent, he would be expected to call them.'" *Id.* (quoting Commonwealth v. Finnerty, 148 Mass. 162, 167, 19 N.E. 215, 217 (1889)).

[17] *See id.* at 509, 170 N.E.2d at 729. Plaintiff knew all his passengers, plaintiff did not explain why none had been produced, and plaintiff's testimony was contradicted by three opposing witnesses. *Id.*

[18] Custody of Two Minors, 396 Mass. 610, 617, 487 N.E.2d 1358, 1363–64 (1986).

[19] *Id.*

[20] *Id.* at 615, 487 N.E.2d at 1363.

[21] *Id.* at 610–11, 487 N.E.2d at 1360.

[22] *Id.* at 612–14, 487 N.E.2d at 1360–62. The eldest child had allegedly suffered numerous beatings, a scalding with hot water, and several burns. *Id.* at 612–13, 487 N.E.2d at 1361. When the child was five months old, the parents voluntarily committed him to the care of the Department for one and a half months after the father had slapped the baby, requiring that the baby be hospitalized. *Id.* at 612, 487 N.E.2d at 1361. The parents were often

hearing to determine whether the children should be permanently committed to the custody of the Department.[23] The district court found, based on the record before it, that the parents were unfit to care for the children and inferred from their failure to testify at the hearing that they were "'not able or willing to express themselves as capable of giving the love and care their children need.'"[24] For these reasons, the district judge granted custody of both children to the Department.[25] When the parents appealed, the Supreme Judicial Court transferred the case on its own motion.[26]

On appeal, the parents argued that the district court judge should not have drawn an adverse inference from their failure to testify, because they were protected by a right against self-incrimination.[27] Rejecting the parents' argument, the Court held that a judge may draw an adverse inference from the parents' failure to testify in a custody proceeding.[28]

The Court reasoned that in a civil action, refusal of a party to testify on grounds of self-incrimination may give rise to an adverse inference.[29] The inference can only be drawn, however, when the opponent has presented evidence such that the failure to testify would be a "fair subject of comment."[30]

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violent toward each other, and the mother threatened to kill the younger child at least twice. *Id.* at 613, 487 N.E.2d at 1361. The Department removed both children from the home in April 1981 and again in June 1981, while providing support services for the parents. *Id.* at 613, 487 N.E.2d at 1361–62.

[23] *Id.* at 615, 487 N.E.2d at 1363.

[24] *Id.* at 616, 487 N.E.2d at 1363. The district judge also noted that although no evidence had been presented that the younger child had actually been abused, the court had the authority to remove her from the home as a preventive measure. *Id.* at 615, 487 N.E.2d at 1363.

[25] *Id.* at 610–11, 487 N.E.2d at 1360.

[26] *Id.* at 611, 487 N.E.2d at 1360. The Supreme Judicial Court has the discretion to transfer cases from a lower court to itself. G.L. c. 211, § 4A (West 1985).

[27] *Custody of Two Minors*, 396 Mass. at 611, 487 N.E.2d at 1360. The parents also argued that the evidence before the district court did not satisfy the level of proof required to terminate their parental rights. *Id.* at 620–21, 487 N.E.2d at 1366. Easily disposing of this contention, the Court held that the district judge correctly found the evidence of the parents' unfitness to be "clear and convincing." *Id.* at 619, 487 N.E.2d at 1365. The Court stated that the district judge must be accorded deference in evaluating the evidence unless there is clear error. *Id.* at 618, 487 N.E.2d at 1364. The district judge here had made sufficiently detailed and specific findings to support the removal of the children, the Court noted. *Id.* at 619, 487 N.E.2d at 1365. Evidence that the parents had abused the eldest child was undisputed, and the district court had the authority to take preventive measures where the evidence showed that a child would be abused or neglected, even if the abuse or neglect has not yet occurred. *Id.* at 620, 487 N.E.2d at 1365–66.

[28] *Id.* at 617, 487 N.E.2d at 1363–64.

[29] *Id.* at 616, 487 N.E.2d at 1363.

[30] *Id.*

While custody proceedings are not ordinary civil cases, the Court noted, the full range of constitutional rights afforded a criminal defendant is not available to custody litigants.[31] The right of parents to custody of their children is not as strong as the interest of a criminal defendant, the Court reasoned, because the state acts not to punish the parents, but to protect the children.[32] While parents have a fundamental right to possession of their children, the Court noted that the right is not absolute, and children have at least as compelling a right to a safe and stable environment.[33]

Stating that Massachusetts has generally denied parents in child custody proceedings the rights of criminal defendants,[34] the Court cited prior decisions where the criminal defendant's right to the "exclusionary rule,"[35] right to a "beyond a reasonable doubt" standard of proof,[36] and protection against double jeopardy[37] did not apply in child custody cases. The Court noted that the United States Supreme Court had also denied child custody litigants the indigent criminal defendant's right to a free court appointed attorney.[38] The Court stressed that parents were afforded sufficient procedural protection by the "clear and convincing" standard of proof and the requirement that they be permitted representation by counsel.[39] The Court thus extended its practice of denying custody litigants the protections of criminal procedure to the right against self-incrimination.

By allowing a judge to draw an adverse inference from the parents' failure to testify, the Supreme Judicial Court's decision in *Custody of Two Minors* provides a sound extension of the principles guiding Massachusetts custody procedure. This holding logically extends the Massachusetts doctrine that parents in child custody proceedings do not have as strong procedural protections as criminal defendants. The Court has held that the right of parents to guardianship of their children is a fun-

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[31] *Id.*

[32] *Id.* at 617, 487 N.E.2d at 1363.

[33] *Id.* at 617, 487 N.E.2d at 1364.

[34] *Id.*

[35] *Id.* at 617, 487 N.E.2d at 1363 (citing Petition of Dep't of Social Services to Dispense with Consent to Adoption, 384 Mass. 707, 710–11, 429 N.E.2d 685, 687 (1981) (department's prior, possibly improper placing of child in foster home did not "taint" subsequent proceedings to dispense with consent to adoption)).

[36] *Id.* (citing Petition of Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 592–93, 421 N.E.2d 28, 39 (1981)).

[37] *Id.* (citing Custody of a Minor, 375 Mass. 733, 746, 379 N.E.2d 1053, 1061 (1978) (trial de novo in superior court proper on appeal from district court custody ruling)).

[38] *Id.* at 618, 487 N.E.2d at 1364 (citing Lassiter v. Dep't of Social Services, 452 U.S. 18, 33 (1981)).

[39] *Id.* at 618, 487 N.E.2d at 1364.

damental, constitutionally protected right,[40] giving rise to certain procedural protections for parents in parental rights termination hearings which are not available to civil litigants.[41] Nevertheless, because the purpose of a custody hearing is to protect a child rather than to punish the parents, the Court has stated that such a hearing is more closely analogous to a civil than to a criminal trial.[42] Therefore, in general, the appropriate safeguards of the parents' procedural rights are those accorded a civil litigant, not those provided for a criminal defendant.[43]

The decision in *Custody of Two Minors* comports with both Massachusetts and United States Supreme Court precedent denying parents in custody proceedings the procedural rights afforded criminal defendants. The Supreme Judicial Court has denied parents in custody hearings the rights enjoyed by criminal defendants in regard to the exclusionary rule and protection against double jeopardy.[44] It has also followed the the United States Supreme Court in holding that the state need only provide "clear and convincing" evidence of parental unfitness to terminate the rights of natural parents.[45] This is a higher standard than the mere "preponderance of the evidence" required in civil litigation but less than the "beyond a reasonable doubt" standard of criminal trials. Although states are free to set an even higher standard if they choose,[46] Massachusetts has not done so and adheres to the "clear and convincing" standard.[47] The United States Supreme Court has also denied child custody litigants the criminal defendant's rights to habeas corpus review[48] and to free court appointed counsel.[49]

It is appropriate for the state to provide greater protections for the criminal defendant than for the custody litigant because the state interest in protecting innocent criminal defendants from conviction is greater than

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[40] *Petition of Dep't of Public Welfare*, 383 Mass. at 587, 421 N.E.2d at 36; Petition of Department of Social Services to Dispense with Consent to Adoption, 20 Mass. App. Ct. 689, 693, 482 N.E.2d 535, 538 (1985).

[41] *See supra* note 2.

[42] *Custody of a Minor*, 375 Mass. at 746, 379 N.E.2d at 1061 (double jeopardy doctrine is inapplicable to custody cases because "parents are neither convicted nor subject to any sort of punishment").

[43] *Id.*

[44] *See supra* notes 34–36 and accompanying text.

[45] *See supra* note 35. The United States Supreme Court set the "clear and convincing" standard for termination of parental rights in Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

[46] *Santosky*, 455 U.S. at 769–70.

[47] *See, e.g.*, Custody of a Minor (No. 2), 392 Mass. 719, 725, 467 N.E.2d 1286, 1290 (1984); Care & Protection of Three Minors, 392 Mass. 704, 711–12, 467 N.E.2d 851, 857 (1984); Custody of a Minor, 389 Mass. 755, 766, 452 N.E.2d 483, 490 (1983).

[48] Lehman v. Lycoming County, 458 U.S 502, 515–16 (1982).

[49] *Lassiter*, 452 U.S. at 33.

its interest in protecting parents from losing custody of their children. This is because the state must weigh the interests of the children along with those of the state and against those of the parents.[50]

The adverse inference rule can be further justified as a proper measure for the court to take to encourage the parents to testify. The testimony of the parents is an important tool in helping the judge evaluate the quality of the family environment and decide whether the child's best interests will be served by removing him or her from the home. In the absence of the parents' testimony, the judge must rely on the records of the public agency, which can observe the home environment only intermittently and in an artificial context.

The parents' argument that they are protected against the adverse inference from failure to testify by a right against self-incrimination is insupportable. If the parents testify, they are protected against self-incrimination by the rule of *Lefkowitz v. Turley*, which prevents their testimony from being used against them in a later criminal trial.[51] Because parental testimony would not subject parents to the risk of criminal prosecution for the abuse of their child, their procedural rights fall below those of criminal defendants. Parents' rights against "self-incrimination" should not extend to their being protected from having adverse testimony elicited from them in a child custody case because, as the Court noted, an adverse custody order does not "punish" them in the criminal sense.[52]

Custody of Two Minors correctly applied the conditions set forth in *Grady v. Collins Transportation*[53] for permitting an adverse inference to be drawn against a party for failing to call a witness.[54] The conditions discussed in *Grady* were favorable to allowing the inference in *Custody of Two Minors*. First, the witnesses, the parents themselves, were obviously available to testify and apparently did not explain their failure to do so.[55] Second, the evidence presented by the state, the opposing party,

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[50] *See Custody of Two Minors*, 396 Mass. at 617, 487 N.E.2d at 1364. The Court's assertion that parents are not "punished" by the loss of custody is rather dubious. *See id.* at 616, 487 N.E.2d at 1363. It seems obvious that the parents are contesting the award of custody to the state precisely because they are unwilling to give up custody of the children voluntarily and would suffer pain akin to that of "punishment" if the children were taken from them. In the instant case, however, the parents had an opportunity, which they declined, to testify and to express to the court how much pain they would feel if the department obtained custody of their children. The court could reasonably conclude from their failure to testify that the parents had no interest analogous to the criminal defendant's interest in avoiding unjust punishment.

[51] *See Lefkowitz*, 414 U.S. at 78.

[52] *Custody of Two Minors*, 396 Mass. at 616, 487 N.E.2d at 1363.

[53] 341 Mass. 502, 170 N.E.2d 725 (1960).

[54] *See supra* notes 12–17 and accompanying text.

[55] *See generally Custody of Two Minors*, 396 Mass. at 616, 487 N.E.2d at 1363.

was sufficiently convincing for the judge to reasonably conclude that the parents would have testified if they could have rebutted the adverse evidence.[56]

The result in *Custody of Two Minors* instructs Massachusetts attorneys to encourage their clients to testify when the state agency seeking custody has presented substantial evidence of child abuse or neglect. Under the *Custody of Two Minors* rule, it will be difficult for parents to retain custody if the state has presented credible evidence of specific instances of abuse or neglect. Even if parents cannot rebut the agency's charges of abuse or neglect, they may be able to convince the judge that they have enough love and concern for the child that the "clear and convincing" standard for determination of parental unfitness has not been met.[57]

In *Custody of Two Minors*, the Supreme Judicial Court considered the question of whether the rule allowing an adverse inference to be drawn from a party's failure to call a witness should apply to child custody proceedings. The Court held that a reasonable inference may be drawn against parents who fail to testify on their own behalf when the state seeks custody of their children. The decision follows the Massachusetts trend of denying child custody litigants the full range of rights granted to criminal defendants. The rule is sound policy because it encourages parents, who are the best source of evidence regarding the quality of the home environment, to testify. Finally, the decision does not unfairly prejudice parents' rights because parental interests are not as strong as those of criminal defendants. Thus, the holding in *Custody of Two Minors* is a sound extension of the principles of Massachusetts child custody procedure.

§ 4.2. Contract in Derogation of Marriage.* Traditionally, courts have held contracts that interfere with the marital relationship or facilitate divorce to be void and unenforceable because they violate the public policy in favor of preserving marriage.[1] For example, most jurisdictions hold that an agreement to marry, entered into while at least one of the

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[56] *See id.* at 619, 487 N.E.2d at 1365.

[57] *See, e.g.*, Matter of Harden, 51 Or. App. 681, 687, 626 P.2d 944, 947 (1981) (where father demonstrates great interest in caring for child, his history of criminal activity is not dispositive evidence of parental unfitness); In re Interest of Hurley, 44 Ill. App. 3d 260, 267, 357 N.E.2d 815, 820 (1976) (mother's interest in caring for child, not her success, is determinative of parental fitness).

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§ 4.2. [1] See generally annotation, *What Constitutes Contract Between Husband or Wife and Third Person Promotive of Divorce or Separation*, 93 A.L.R.3d 523 (1979) for a discussion of contracts held invalid because they encouraged divorce.

parties is still married to another person, is void as against public policy.[2] Yet state legislatures and courts recently have been more willing to uphold contracts which previously were considered void and unenforceable as detrimental to the marital relationship,[3] most likely in response to the social changes of the last two decades, including an increase in divorce and in the number of cohabitating couples.[4] For example, antenuptial contracts settling property and alimony rights upon divorce are upheld in most jurisdictions, including Massachusetts, if the contract is preceded by fair disclosure and does not unreasonably encourage divorce.[5] Cohabitation contracts governing property division upon separation are enforceable also, recognizing that many couples choose to share a household with no intention of marrying.[6] Furthermore, oral agreements for support in exchange for services will be upheld as long as the "services" provided are not sexual services.[7] Although each of these contracts denigrate the marital relationship to some extent, courts

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[2] Malasarte v. Keye, 13 Alaska 407 (1951); Lowe v. Quinn, 27 N.Y.2d 397, 267 N.E.2d 251, 318 N.Y.S.2d 467 (1971); Anonymous v. Anonymous, 193 Misc. 299, 86 N.Y.S.2d 196 (1948); McNeil v. Brogan, 201 Okla. 125, 202 P.2d 696 (1949); Jones v. Allen, 14 Wash. 2d 111, 127 P.2d 265 (1942); Davis v. Davis, 3 Wash. 2d 448, 101 P.2d 313 (1940); annotation, *What Constitutes Contract Between Husband or Wife and Third Person Promotive of Divorce or Separation*, 93 A.L.R.3d 523 (1979). Although Massachusetts has abolished actions for breach of promise to marry, other actions based on the breach may be maintained, for example an action to recover an engagement ring. LOMBARD, FAMILY LAW, 2 MASS. PRACTICE SERIES § 1090 (1967).

[3] Donna, *Domestic Relations*, 1981 ANN.SURV. MASS. LAW § 3.1. The Supreme Judicial Court has noted that the Massachusetts legislature has changed several laws to facilitate divorce. Osborne v. Osborne, 384 Mass. 591, 598, 428 N.E.2d 810, 815 (1981). The *Osborne* Court declared that antenuptial contracts were no longer against public policy and void per se. *Id.* at 598, 428 N.E.2d at 816. See generally 24 AM. JUR. 2D *Divorce and Separation* §§ 889–894 (1983) for a discussion of contracts between spouses which are no longer void as against public policy.

[4] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-20, NO. 389, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1983 (1984).

[5] Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981). *See generally* LOMBARD, FAMILY LAW, 2 MASS PRACTICE SERIES §§ 1191, 1195 (1967).

[6] Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). *See* Hunter, *An Essay on Contract and Status: Race, Marriage and the Meretricious Spouse*, 64 VA. L. REV. 1039, 1076–96 (1978); Kay & Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CALIF. L. REV. 937 (1977); Levin & Spak, *Judicial Enforcement of Cohabitation Agreements: A Signal to Purge Marriage From the Statute of Frauds*, 12 CREIGHTON L. REV. 499 (1979); Note, *Beyond Marvin: A Proposal for Quasi-Spousal Support*, 30 STAN. L. REV. 359 (1978).

[7] Green v. Richmond, 369 Mass. 47, 337 N.E.2d 691 (1975) (recovery allowed under quantum meruit for services rendered in reliance on defendant's oral promise to compensate plaintiff in his will); Cummings v. Brenci, 334 Mass. 144, 134 N.E.2d 133 (1956) (married woman, separated from husband, may recover under quantum meruit for services rendered in exchange for promise to compensate her in his will).

have stated that where the harm is incidental to the basic purpose of the contract, the agreement does not offend public policy.[8]

On the other hand, courts continue to strike down contracts which have as their *primary* purpose the destruction of an existing marital relationship.[9] California courts, however, recognize the validity of such contracts if the marriage was already beyond saving at the time the agreement was entered into, on the grounds that public policy does not discourage divorce where the marriage is already broken.[10] Thus, according to California courts, where the first marriage is already beyond saving when one party promises to support the other, the promise to divorce one's spouse is merely *incidental* to the agreement and therefore does not violate public policy.[11]

During the *Survey* year, in *Capazzoli v. Holzwasser*,[12] the Supreme Judicial Court considered the issue of whether a contract made in consideration of a person's promise to divorce their spouse is enforceable. The Supreme Judicial Court reaffirmed the Commonwealth's interest in preserving the marital relationship and refused to allow recovery, under any theory, for breach of an oral agreement for support when an integral part of the agreement is the plaintiff's promise to divorce his or her spouse.[13] Nevertheless, the Court vacated the lower court's dismissal of the plaintiff's complaint, allowing the plaintiff to move for leave to amend her complaint in the event that promises were exchanged between the plaintiff and the defendant where a significant part of the consideration did not require the plaintiff to abandon her marriage.[14] Thus, the Court implied that it will recognize the validity of an oral agreement for support

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[8] Gleason v. Mann, 312 Mass. 420, 45 N.E.2d 280 (1943) (temporary reasonable restraint on marriage, which is incidental to another lawful purpose of the agreement, is not contrary to public policy); Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981) (setting guidelines on antenuptial agreements).

[9] Malasarte v. Keye, 13 Alaska 407 (1951), Lowe v. Quinn, 27 N.Y.2d 397, 267 N.E.2d 251, 318 N.Y.S.2d 467 (1971); Anonymous v. Anonymous, 193 Misc. 299, 86 N.Y.S.2d 196 (1948); McNeil v. Brogan, 201 Okla. 125, 202 P.2d 696 (1949); Jones v. Allen, 14 Wash. 2d 111, 127 P.2d 265 (1942); Davis v. Davis, 3 Wash. 2d 448, 101 P.2d 313 (1940).

[10] Spellens v. Spellens, 49 Cal. 2d 210, 225, 317 P.2d 613, 621 (1957). In *Spellens*, the plaintiff divorced her husband and waived all rights to community property and alimony in reliance on the defendant's promise that she would not need any money because he would marry her and support her three children. *Id.* at 214, 317 P.2d at 615. The court held that the agreement was not against public policy because the plaintiff's first marriage was already broken and beyond repair at the time the agreement was entered into. *Id.* at 225, 317 P.2d at 621.

[11] *Id.* at 225, 317 P.2d at 622.

[12] 397 Mass. 158, 490 N.E.2d 420 (1986).

[13] *Id.* at 160, 490 N.E.2d at 422.

[14] *Id.* at 161, 490 N.E.2d at 423.

in exchange for services as long as the essential consideration for the contract is not the divorce of a spouse.

In *Capazzoli*, the plaintiff alleged that she entered into an oral agreement with the defendant whereby the defendant promised to support the plaintiff and her children for the rest of her life in return for plaintiff's promise to divorce her current husband and relinquish all marital rights.[15] The plaintiff also agreed to run the defendant's household, provide companionship and act as a "loyal and dutiful friend."[16] The plaintiff did in fact give up her marriage and begin living with the defendant, and in return the defendant supported plaintiff and her children "for a substantial period of time."[17] When the defendant stopped supporting the plaintiff, she filed a complaint for breach of contract and sought recovery for services rendered under a theory of quantum meruit.[18] The superior court granted the defendant's motion to dismiss for failure to state a claim.[19]

On appeal, the Supreme Judicial Court transferred the case on its own initiative.[20] The Court concluded that the complaint was properly dismissed, holding that, "as an expression of public policy, . . . a contract containing as an essential provision the requirement that one of the contracting parties will abandon that party's marriage to a third person, is unenforceable in this Commonwealth on a contract, quantum meruit, or any other theory."[21] The Court pointed out that both the legislature and the Supreme Judicial Court have expressed the State's deep interest in strengthening and encouraging family life.[22] Noting that marriage is

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[15] *Id.* at 158–59, 490 N.E.2d at 421.

[16] *Id.* at 159, 490 N.E.2d at 421.

[17] *Id.* at 158–59, 490 N.E.2d at 421. Apparently the defendant supported the plaintiff for close to thirteen years. The plaintiff contracted with the defendant in the fall of 1970 and filed this complaint in January 1984. *Id.* at 158, 490 N.E.2d at 421.

[18] *Id.* at 159, 490 N.E.2d at 421–22. Quantum meruit is an equitable doctrine whereby a person may recover the reasonable value of his or her labor or materials provided so that the defendant is not unjustly enriched. The plaintiff in this case also sought recovery for negligence and intentional infliction of emotional distress. *Id.*

[19] *Id.* at 159–60, 490 N.E.2d at 422. The defendant moved to dismiss the complaint under MASS. R. CIV. P. 12(b)(6).

[20] *Id.* at 158, 490 N.E.2d at 421.

[21] *Id.* at 160, 490 N.E.2d at 422.

[22] *Id.* at 160–61, 490 N.E.2d at 422. In reaching this conclusion, the Court cited G.L. c. 119, § 1 (1984 ed.) ("the policy of the [C]ommonwealth [is] to direct its efforts . . . to the strengthening and encouragement of family life"). In addition, the Court cited several instances where the Supreme Judicial Court has expressed the state's public policy. *See, e.g.*, Commonwealth v. Stowell, 389 Mass. 171, 175, 449 N.E.2d 357, 360 (1983) (the Commonwealth has a legitimate interest in proscribing conduct which threatens marriage); Osborne v. Osborne, 384 Mass. 591, 599, 428 N.E.2d 810, 816 (1981) (certain contracts so unreasonably encourage divorce they are void as a matter of public policy); Green v. Richmond, 369 Mass. 47, 51, 337 N.E.2d 691, 695 (1975) ("Massachusetts has a strong public interest in ensuring that its rules governing marriage are not subverted"); French v.

the foundation of the family, the Court stated that the Commonwealth has a valid interest in prohibiting behavior which threatens the marital relationship.[23] The Court concluded, therefore, that where the essential consideration of the contract was the abandonment of an existing marriage, the contract was void and unenforceable.[24]

The Court distinguished its earlier decision in *Green v. Richmond*,[25] upon which the plaintiff relied, by pointing out that in that case, the plaintiff's promise to render services in return for the decedent's promise to leave his estate to her did not rely on a promise to abandon her marriage.[26] In fact, the *Capazzoli* Court noted, the plaintiff in that case was divorced before she met the decedent.[27] In contrast, the Court said, the plaintiff in *Capazzoli* promised to abandon her marriage as consideration for the defendant's promise to support her.[28] Because every count in the plaintiff's complaint asserted that consideration for the agreement was the abandonment of her marriage, the Court determined that it appeared, therefore, beyond a reasonable doubt, "that the plaintiff can prove no set of facts in support of her claim which [will] entitle [her] to relief."[29] Accordingly, the Court concluded that the plaintiff's complaint was properly dismissed.[30] The Court vacated the dismissal, however, and gave the plaintiff permission to move to amend her complaint, noting that there was a strong policy in favor of allowing the amendment of pleadings.[31]

Justice Abrams, in a concurring opinion, emphasized that under the generous rules of pleading in Massachusetts, the original complaint should not have been dismissed by the trial court.[32] The Justice reasoned

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McAnary, 290 Mass. 544, 546, 195 N.E. 714, 715 (1935) (marriage is not merely a contract but the foundation of the family, therefore, "the Commonwealth has a deep interest that its integrity is not jeopardized").

[23] *Id.* at 161, 490 N.E.2d at 422 (citing Commonwealth v. Stowell, 389 Mass. 171, 175, 449 N.E.2d 357, 360 (1983)).

[24] *Id.* at 160, 490 N.E.2d at 422.

[25] 369 Mass. 47, 337 N.E.2d 691 (1975). In that case, the plaintiff, a divorced woman, contracted with a man where she would provide household services and companionship in return for his promise to leave his estate to her. *Id.* at 48, 337 N.E.2d at 694.

[26] 397 Mass. 158, 161, 490 N.E.2d 420, 422–23.

[27] *Id.* at 161, 490 N.E.2d at 423.

[28] *Id.*

[29] *Id.* at 160, 490 N.E.2d at 422 (citing Nader v. Citron, 372 Mass. 96, 98, 360 N.E.2d 870, 872 (1957)).

[30] *Id.* The plaintiff did not request leave to amend her complaint; but nevertheless, the Court granted her leave to amend her complaint in light of the strong policy favoring amendments of pleadings in the MASS. R. CIV. P. *Id.*

[31] *Id.*

[32] *Id.* at 162, 490 N.E.2d at 423 (Abrams, J., concurring). Justice Abrams also stated that even if the trial judge did not recognize any claims, he should have allowed the plaintiff

that under a liberal construction, the plaintiff stated at least two enforceable contract claims.[33] Because the plaintiff's complaint stated that she rendered services in exchange for promises of support on several different occasions, the Justice asserted, the plaintiff may be able to prove that those occasions were subsequent to her divorce and therefore did not violate public policy.[34]

Justice Abrams stated further that because the trial judge was addressing the novel issue of whether an agreement which relies on the abandonment of marriage is enforceable, the court should have allowed the parties to "develop the facts and explore the issues."[35] Perhaps an exception to the general rule voiding contracts in derogation of marriage could be developed, the Justice reasoned, where the first marriage was already broken.[36] Justice Abrams pointed out that such an approach has been accepted already in two California cases.[37]

Justice Abrams also pointed out that the Court already has utilized this exception to permit an attorney to recover for services rendered in a divorce action under an unenforceable contingency fee arrangement.[38] The Justice noted that generally a contingency fee agreement in a divorce action is unenforceable because it violates public policy in that it gives the attorney incentive to prevent a possible reconciliation.[39] The Court permitted a recovery in that case because the marriage was already abandoned and there was no indication in the record that either party had the slightest interest in reconciliation.[40]

The *Capazzoli* decision, therefore, emphasizes the Commonwealth's deep interest in protecting the marital relationship. This strong statement of public policy is significant to the practitioner particularly at the pleadings stage. In order to survive a motion to dismiss, the complaint must

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leave to amend her complaint to state her claims more explicitly. This approach would have been more in line with the generosity required by rule 12(b)(6) and supported by case law. The majority opinion, on the other hand, simply allowed the plaintiff to move for leave to amend her complaint, leaving open the possibility that the superior court, in its discretion, would deny the motion. *Id.*

[33] *Id.* at 162–63, 490 N.E.2d at 423–24 (Abrams, J., concurring).

[34] *Id.* at 162, 490 N.E.2d at 423 (Abrams, J., concurring).

[35] *Id.* at 165, 490 N.E.2d at 425 (Abrams, J., concurring).

[36] *Id.* Justice Abrams asserts that an exception to the general rule voiding such contracts where the marriage is already beyond repair "enjoys reasonable support elsewhere." *Id.* The Justice does not, however, cite additional support other than that from the state of California. *See supra* note 10.

[37] *Id.* (citing Glickman v. Collins, 13 Cal. 3d 852, 533 P.2d 204, 120 Cal. Rptr. 76 (1975); Spellens v. Spellens, 49 Cal. 2d 210, 317 P.2d 613 (1957)).

[38] *Id.* at 164, 490 N.E.2d at 424–25 (Abrams, J., concurring) (citing Guenard v. Burke, 387 Mass. 802, 443 N.E.2d 892 (1982)).

[39] *Id.* at 164–65, 490 N.E.2d at 424–25 (Abrams, J., concurring).

[40] *Id.* at 164, 490 N.E.2d at 424–25 (Abrams, J., concurring).

clearly state valid consideration for the contract other than the abandonment of an existing marriage. At trial, the court will evaluate whether abandonment of the first marriage formed the "essential" consideration for the contract. Although the court will strike down contracts which rely on the abandonment of an existing marriage, the *Capazzoli* Court implied that it will consider the enforceability of a claim where divorce from one's spouse was not an "integral" or "essential" part of the contract.[41]

The Court's opinion in *Capazzoli* follows the general trend in other jurisdictions that hold that contracts entered into in consideration of the destruction of an existing marriage are void and unenforceable.[42] The Court does not, however, address the next logical step which is to form an exception to this general rule in cases where the marriage is already beyond repair at the time the contract was entered into.[43] As the California courts have already recognized, if the first marriage was already broken, then the divorce from the first spouse most likely was not a significant consideration in the agreement.[44] To allow such an exception would be a logical extension of the Court's previous decision permitting an attorney to recover under an unenforceable contingency fee arrangement where the couple he represented were beyond reconciliation.[45] As Justice Abrams pointed out in her concurring opinion, the Court has subordinated the importance of marital stability in favor of other policy considerations on several other occasions.[46]

The *Capazzoli* decision refusing to enforce contracts which rely on one party's divorce furthers public policy only in a situation where the spouse is encouraged to abandon a basically stable relationship and family life

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[41] 397 Mass. at 160, 490 N.E.2d at 422. Massachusetts recognizes an enforceable contract for support in exchange for household services. Green v. Richmond, 369 Mass. 47, 337 N.E.2d 691 (1975) (recovery for services rendered in reliance on decedent's oral promise to compensate her by will). *See also* Rizzo v. Cunningham, 303 Mass. 16, 20 N.E.2d 471 (1939) (young girl allowed to recover for services rendered in return for woman's promise that she would leave everything to her).

[42] *See supra* note 2.

[43] This approach is followed by California courts. Spellens v. Spellens, 49 Cal. 2d 210, 317 P.2d 613 (1957). *See also* Glickman v. Collins, 13 Cal. 3d 852, 533 P.2d 204, 120 Cal. Rptr. 76 (1975).

[44] *Spellens*, 49 Cal. 2d at 225, 317 P.2d at 621; *Glickman*, 13 Cal. 3d at 858–59, 533 P.2d at 208, 120 Cal. Rptr. at 80.

[45] Guenard v. Burke, 387 Mass. 802, 443 N.E.2d 892 (1982).

[46] 397 Mass. at 164, 490 N.E.2d at 424 (Abrams, J., concurring). Justice Abrams cited several instances where the Court has "subordinated marital harmony to other social values." *See, e.g.*, Three Juveniles v. Commonwealth, 390 Mass. 357, 361, 455 N.E.2d 1203, 1206 (1983) (not recognizing spousal privilege not to testify against other spouse although that testimony may be highly destructive of their marriage); Lewis v. Lewis, 370 Mass. 619, 351 N.E.2d 526 (1976) (abolishing interspousal tort immunity). *Id.*

in favor of a dubious "better deal" rather than attempting to reconcile difficulties in the present relationship. Although the Commonwealth has a valid interest in encouraging couples to work out their differences in order to preserve a family unit, this policy is misplaced where the marriage is so broken and destructive that there is no hope of reconciliation. Dissolution of such a marriage does not violate public policy because it opens the possibility that more fruitful family relationships will be formed elsewhere.[47]

In sum, the *Capazzoli* decision underlines the Commonwealth's strong policy favoring stable marital relationships. Thus, contracts where a significant part of the consideration is the abandonment of an existing marriage are void and unenforceable as against public policy. Contracts based on valid consideration apart from the abandonment of an existing marriage, however, will survive a motion to dismiss if pleaded properly.

§ 4.3. Divorce Decrees — Survival and Specific Enforcement of Separation Agreements.* In Massachusetts, a husband and wife may choose to enter into a separation agreement in order to privately settle their marital obligations in contemplation of divorce.[1] Such agreements commonly set forth the rights and duties of the parties, with respect to alimony, custody, and disposition of marital property.[2] A probate court may incorporate a separation agreement into its judgment of divorce, upon a finding that the agreement is fair, reasonable, and free from fraud or coercion.[3]

Regardless of whether a court chooses to incorporate a separation agreement into its judgment of divorce, the agreement may survive the judgment and continue to exist as an enforceable contract independent of the divorce decree.[4] The likelihood that a separation agreement will survive a judgment usually depends on the intent of the parties in forming the contract.[5] For instance, the parties may stipulate that the separation agreement will not survive a divorce judgment.[6] In such a case, the parties

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[47] *Glickman*, 13 Cal. 3d at 858–59, 533 P.2d at 208, 120 Cal. Rptr. at 80.

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§ 4.3. [1] J. LOMBARD, FAMILY LAW, 2 MASS. PRACTICE SERIES § 1252 (1967); *see, e.g.*, Schillander v. Schillander, 307 Mass. 96, 98, 29 N.E.2d 686, 687 (1940); Bailey v. Dillon, 186 Mass. 244, 246, 71 N.E. 538, 539 (1904).

[2] J. LOMBARD, FAMILY LAW, 2 MASS. PRACTICE SERIES § 1252 (1967 & Supp. 1984). Parties may not contract to release themselves from statutory duties of child support. Ryan v. Ryan, 371 Mass. 430, 432, 358 N.E.2d 431, 432 (1976); Knox v. Remick, 371 Mass. 433, 437, 358 N.E.2d 432, 436 (1976).

[3] Dominick v. Dominick, 18 Mass. App. Ct. 85, 91, 463 N.E.2d 564, 569 (1984).

[4] *See* Moore v. Moore, 389 Mass. 21, 24–25, 448 N.E.2d 1255, 1257 (1983).

[5] *Id.* at 24–25, 448 N.E.2d at 1247.

[6] *See Knox*, 371 Mass. at 435, 358 N.E.2d at 434–35.

are bound only to the judgment of divorce, which the court may modify upon the petition of either party.[7]

The principles of contract law govern the validity of an agreement which the parties intend to survive a judgment of divorce, independent from the terms of the divorce judgment.[8] Both the superior court[9] and the probate court have jurisdiction to order specific performance of a contract.[10] Generally, Massachusetts courts will enforce separation agreements that they find to be fair and reasonable at the time of the enforcement proceedings, and free from fraud and coercion.[11] In some cases, however, countervailing equities may demand a denial of specific enforcement.[12]

During the *Survey* year, the Massachusetts Appeals Court, in *Cepek v. Cepek* followed the general rule in Massachusetts that courts should enforce separation agreements which are fair and intended by the parties to survive a judgment of divorce.[13] The *Cepek* court applied this rule despite the fact that the parties never presented their separation agreement to the probate court during the divorce proceedings.[14] In addition, the court set forth guidelines for ordering specific performance,[15] including the requirement that the court state with precision the actions the defendant must take to comply with the agreement.[16] The *Cepek* decision reinforced the importance that divorcing parties clearly understand that separation agreements are final and enforceable as independent contractual obligations, distinct from the terms of divorce judgments providing for support and distribution of assets.

In *Cepek*, the husband and wife executed a separation agreement dated April 22, 1982.[17] The parties stipulated that the agreement be incorporated into any subsequent judgment for divorce.[18] Under the terms of the

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[7] *Id.*

[8] J. Harvey, E. Moriarty, M. Bryant, Massachusetts Domestic Relations, 1 The Practice Systems Library § 31.27 (1986).

[9] *See* Roberts-Neustadter Furs, Inc. v. Simon, 17 Mass. App. Ct. 262, 270, 669 N.E.2d 673 (1983), *review denied*, 391 Mass. 1102 (1984).

[10] G.L. c. 215 § 6, as appearing in St. 1973, c. 114 § 63; *see Knox*, 371 Mass. at 438, 358 N.E.2d at 436.

[11] *Moore*, 389 Mass. at 24–25, 448 N.E.2d at 1257; Stansel v. Stansel, 385 Mass. 510, 514, 432 N.E.2d 691, 694 (1982); *Knox*, 37 Mass. at 436–37, 358 N.E.2d at 435–36.

[12] *Knox*, 37 Mass. at 437, 358 N.E.2d at 436. Such equities may include the likelihood that the dependent spouse might become a public charge, or a finding that the party seeking enforcement has violated the agreement. *Id.*

[13] Cepek v. Cepek, 22 Mass. App. Ct. 331, 333–34, 493 N.E.2d 881, 882–83 (1986).

[14] *Id.* at 333, 493 N.E.2d at 882.

[15] *Id.* at 335, 493 N.E.2d at 884.

[16] *Id.*

[17] *Id.* at 332, 335 n.10, 493 N.E.2d at 882, 884 n.10.

[18] *Id.* at 332, 493 N.E.2d at 882.

agreement, the husband was to transfer his interest in the marital home to the wife.[19] The agreement, however, made no reference to compensation for this transaction.[20] The separation agreement further provided that the husband designate the wife as the beneficiary of his Massachusetts Teacher's Retirement Fund account until the wife's remarriage.[21] The agreement also required the husband to pay all of the children's educational expenses and all of the costs of residential utilities services.[22]

In September, 1983, a probate court granted the wife a divorce nisi from the husband under chapter 208, section 1.[23] The court's judgment ordered the husband to convey his interest in the home to the wife in return for a promissory note from the wife for $27,000.[24] The judgment also provided for periodic support payments, but did not include a provision concerning the husband's retirement benefits.[25] At no time did either party present the agreement to the probate judge.[26]

In February, 1984, the wife filed a complaint in Superior Court for Hampshire County seeking specific performance of the separation agreement.[27] She sought conveyance of the husband's interest in the house, and her designation as the beneficiary of his retirement fund.[28] The superior court ordered that the husband comply with the terms of the separation agreement.[29] The husband appealed from this order, contending that the agreement was invalid because it had never been presented to the probate judge and had not been incorporated into the judgment.[30] The Appeals Court affirmed the superior court judgment, with the modification that the superior court should have been more explicit in ordering specific performance of the agreement.[31]

In affirming the judgment, the court reasoned that because the terms of the separation agreement provided that it should survive regardless of whether it was incorporated into the judgment of divorce, the agreement was enforceable.[32] The court found no evidence that the failure to bring the agreement to the probate judge signified an understanding between

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[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *Id.* at 332 n.4, 493 N.E.2d at 882 n.4.
[23] *Id.* at 331, 333–34 n.6, 493 N.E.2d at 882, 883 n.6 (citing G.L. c. 208, § 1).
[24] *Id.* at 332, 493 N.E.2d at 882.
[25] *Id.*
[26] *Id.* at 333, 493 N.E.2d at 882.
[27] *Id.* at 332, 493 N.E.2d at 882.
[28] *Id.* at 333, 493 N.E.2d at 882.
[29] *See id.*
[30] *Id.*
[31] *Id.* at 335, 493 N.E.2d at 884.
[32] *Id.* at 333, 493 N.E.2d at 882.

the parties to rescind the separation agreement.[33] Further, the court found that a separation agreement may be specifically enforced at the time of the divorce judgment or at any later time.[34]

In specifically enforcing the agreement, the superior court had determined that it was fair and reasonable.[35] In the Appeals Court, the husband did not directly dispute this finding.[36] Instead, the husband's primary challenge to the validity of the separation agreement lay in his assertion that he would be relinquishing all substantive rights to his retirement funds by designating the wife as beneficiary of his retirement pension,[37] in violation of chapter 32, section 19 which makes invalid the assignment of such rights under state retirement systems.[38] The court found that specific performance of the agreement would not violate the statute because the agreement reasonably entitled the wife to survivorship rights only as a beneficiary of the husband's state pension,[39] and thus, specific performance would not impair the defendant's pension benefits or election of retirement benefits.[40] The court determined that the substance of the husband's complaint, particularly, the husband's loss of rights to his retirement benefits, was insufficient to justify denial of enforceability of the agreement.[41]

The wife did not contest her obligation to pay the husband $27,000 in exchange for conveyance of his share of the marital home.[42] Although the compensation from the wife was not included in the terms of the separation agreement, she did not dispute her obligation to make such payments as ordered by the judge in the judgment of divorce.[43] The court indicated in a footnote, however, that even if the wife had disputed her obligation to pay, a judge may condition enforcement orders to avoid inequity in specific performance.[44]

Finally, although the *Cepek* court affirmed the superior court judgment, it criticized the superior court's lack of specificity in its order of specific

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[33] *Id.* at 333, 493 N.E.2d at 883.

[34] *Id.* Under G.L. c. 208 § 1A as inserted by St. 1975, c. 698, § 2, a court's refusal to approve a separation agreement would render the agreement void. The *Cepek* action, however, was brought under G.L. c. 208, § 1 which does not include such a provision. *Id.* at 333–34 n.6, 493 N.E.2d at 883 n.6.

[35] *See Cepek*, 22 Mass. App. Ct. at 334, 493 N.E.2d at 883.

[36] *Id.*

[37] *Id.*

[38] G.L. c. 32, § 19.

[39] *Cepek*, 22 Mass. App. Ct. at 334, 493 N.E.2d at 883.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 334 n.7, 493 N.E.2d at 883 n.7.

[43] *Id.*

[44] *Id.*

enforcement.[45] Accordingly, the appeals court in *Cepek* reasoned that an order for specific enforcement must be "clear and unequivocal" so that it will not be questioned in the event of a subsequent action for contempt.[46] The court found that a judgment of specific enforcement should indicate the "precise relief sought," and avoid any generalities or incorporations by reference of other documents.[47]

Although the *Cepek* court accorded deference to parties' settlements of their own disputes, this is a relatively recent trend in Massachusetts case law.[48] Previously, the statutory power of the court determining the rights and obligations of the parties was presumed superior to the parties' independent rights to make such determinations.[49] Recently, however, the Supreme Judicial Court has recognized a strong Massachusetts policy favoring enforcement of separation agreements voluntarily entered into by the parties to a divorce.[50]

Accordingly, courts will often imply the requisite intent of the parties to form a surviving contract absent specific language to the contrary.[51] Under present law, if the parties' intention in entering a separation agreement is that the agreement should survive the judgment of divorce, a probate court may neither modify the terms of the agreement, nor declare that it will not survive a divorce decree.[52] Where there is a valid separation agreement, the court's ability to change the parties' circumstances is limited: it may modify its own judgment; it may refuse to incorporate the separation agreement into its judgment while still allowing the agreement to be independently valid;[53] or it may find that the agreement is unfair, unreasonable, fraudulent, or the result of coercion, and refuse specific enforcement.[54]

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[45] *Id.* at 335, 493 N.E.2d at 884.

[46] *Id.*

[47] *Id.* The husband also moved for a new trial on the basis of a second separation agreement containing different terms. *Id.* at 335, 493 N.E.2d at 883–84. The husband claimed to be under the impression that he and the wife were executing the second agreement when they were actually executing the agreement which the wife sought enforced. *Id.* The appeals court confirmed the lower court's denial of this motion, however, finding that the agreement cited by the husband was not written until after the agreement in question was executed. *Id.*

[48] *See*, Inker, Perocchi, & Walsh, *Domestic Relations*, 1977 ANN. SURV. MASS. LAW § 1.1, at 6, (citing *Knox*, 371 Mass. 433, 358 N.E.2d 432). *See also Stansel*, 385 Mass. at 512, 432 N.E.2d at 693.

[49] *See, e.g., Stansel*, 385 Mass. at 512, 432 N.E.2d at 693; Ryan v. Ryan, 371 Mass. at 432, 358 N.E.2d at 432 (1976); J. LOMBARD, FAMILY LAW, 2 MASS. PRACTICE SERIES § 1252 (1967).

[50] *Moore*, 389 Mass. at 24–25, 448 N.E.2d at 1257.

[51] *See id.*

[52] *Id.* at 23–25, 448 N.E.2d at 1257.

[53] *Id.* at 24–25, 448 N.E.2d at 1257.

[54] *See id.*

The court does have discretion to give consideration to the agreement in fashioning a judgment or a modification of a judgment.[55] The court may also contradict the terms of the separation agreement,[56] provided that it does not presume to actually modify the agreement.[57] For example, the Supreme Judicial Court in *Knox v. Remick* determined that a probate judge may order that a spouse pay less money than was agreed to in the separation agreement.[58] The court acknowledged, however, that the spouse receiving the reduced amount is entitled to recover the difference in a contract action.[59] The reduced judgment's only effect, then, is to reduce the amount for which the obligated spouse will be liable for contempt on non-payment of the amount.[60]

It must be noted that the result in *Cepek* would have been different had the divorce been filed under chapter 208, section 1A, the statute providing for no-fault divorce.[61] Section 1A requires the parties to present a separation agreement to the probate judge prior to the judgment for divorce.[62] Consequently, the failure of the court to approve and incorporate an agreement would render it void between the parties.[63] Under section 1A, even though an agreement must be incorporated into the judgment, the parties may provide that the agreement is to survive the divorce judgment.[64] In contrast, a divorce filed under chapter 208, section 1, as in *Cepek*, requires no court approval of separation agreements.[65]

After *Cepek*, divorcing parties should be aware that judicial approval of an agreement is only required under section 1A.[66] Accordingly, the failure of parties to present a separation agreement to the probate court in a fault-based divorce action will not discharge the agreement.[67] In

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[55] *See Knox*, 37 Mass. at 435, 358 N.E.2d at 435.

[56] *Id.* at 435, 358 N.E.2d at 435.

[57] *See Moore*, 389 Mass. at 24, 448 N.E.2d at 1257.

[58] *Knox*, 37 Mass. at 435, 358 N.E.2d at 435.

[59] *Id.*

[60] *Id.*

[61] G.L. c. 208, § 1A. The *Cepek* court acknowledged this distinction at 33 Mass. App. Ct. 333 n.6, 493 N.E.2d 883 n.6.

[62] G.L. c. 208, § 1A provides, in part, that an action for divorce will begin when, among other things, "a notarized separation agreement executed by the parties" is filed. Such agreements may also be filed within 90 days of the commencement of the action. *Id.*

[63] G.L. c. 208, § 1A. Under the statute, if the court does not approve the agreement, "it shall become null and void and of no further effect between then parties; and the action shall be treated as dismissed . . . ." *Id.*

[64] *Id.* "The agreement either shall be incorporated and merged into [the] judgment or by agreement of the parties, it shall be incorporated and not merged, but shall survive as an independent contract." *Id.*

[65] G.L. c. 208, § 1.

[66] See *supra* text and accompanying notes 61–65 for language of related statutes.

[67] *Cepek*, 22 Mass. App. Ct. at 333, 335, 493 N.E.2d at 883.

order to assure that a divorce decree is consistent with a separation agreement, the parties to a fault-based divorce should be certain to present any valid, existing agreement to the court prior to judgment.

The *Cepek* court also directed that parties ordered to comply with separation agreements be instructed specifically as to their obligations under the agreement.[68] Further, the court noted that even in the divorce context a judge ordering specific performance may "condition the enforcement order to avoid inequity."[69] Therefore, in arguing for specific performance, the practitioner may wish to refer specifically to the precise relief he or she seeks, in order to aid the judge in structuring his or her order.

The *Cepek* court reinforced the premium placed on the contractual rights of divorcing parties who have chosen to enter separation agreements by affirming the enforcement of a separation agreement which had never been brought before the probate court.[70] The *Cepek* decision also highlights a practitioner's need for caution in advising clients entering separation agreements. A client should consider whether it is desirable for a separation agreement to survive a judgment and continue in force regardless of judicial acceptance of the agreement, or whether it is preferable to have a judge specifically approve the agreement in his order. As a result of the Massachusetts Appeals Court's decision in *Cepek*, the practitioner should be aware, that where a divorce is not brought under the no-fault statute, any valid separation agreement intended to survive a judgment will be specifically enforced regardless of whether it was presented to the probate judge prior to the judgment of divorce.

§ 4.4. The Admissibility of HLA Testing in Paternity Suits.* Courts and legislatures traditionally have viewed paternity testing as a means to conclusively exclude the paternity of the father.[1] Under this view, evidence provided by paternity tests establishing to a medical certainty the nonpaternity of an accused father is admissable for exculpatory pur-

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[68] *Id.* at 335, 493 N.E.2d at 884.

[69] *See id.* at 334 n.7, 493 N.E.2d at 883 n.7. In drawing this conclusion, the court relied on *Roberts-Neustadter Furs, Inc. v. Simon*, 17 Mass. App. Ct. at 270–71, 457 N.E.2d at 673–74, a case involving specific performance of an option to purchase leased premises.

[70] *See supra* text accompanying notes 50–52.

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§ 4.4. [1] *See, e.g.*, Symonds v. Symonds, 385 Mass. 540, 432 N.E.2d 700 (1982); Commonwealth v. D'Avella, 339 Mass. 642, 162 N.E.2d 19 (1959); Ross v. Marx, 24 N.J. Super. 25, 93 A.2d 597 (App. Div. 1952); State *ex rel.* Freeman v. Morris, 156 Ohio St. 333, 102 N.E.2d 450 (1951); Commonwealth v. Dean, 172 Pa. Super. 415, 94 A.2d 59 (1953). *See generally* J. LOMBARD, FAMILY LAW, 1 MASS. PRACTICE SERIES § 691–93 (1967) (summarizing state statutes and significant case law addressing the admissibility of blood grouping tests as a means of exonerating alleged fathers as true fathers).

poses.[2] Massachusetts, and other jurisdictions, have enacted statutes which permit the use of such evidence solely to exclude the possibility of paternity.[3] Chapter 273, section 12A, admits into evidence the results of "blood grouping tests" only when the definite nonpaternity of the father is established.[4]

The enactment of chapter 273, commonly referred to as an exclusionary blood test statute, occurred when paternity testing techniques were limited to tests which examined red blood cells.[5] At that time, two blood grouping tests, the Landsteiner series and the enhanced Landsteiner series generally were used to disprove a putative father's paternity.[6] Subsequent to the enactment of chapter 273, the human leukocyte antigen (HLA) test was developed and became a highly reliable means of paternity testing.[7]

The HLA test differs from the blood grouping tests as it identifies specific characteristics of white blood cells and can be performed not only on blood but on certain body tissue.[8] HLA testing is significantly

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[2] See J. LOMBARD, *supra* note 1, § 691 for discussion of the use of paternity tests to exclude an accused father.

[3] *See, e.g.*, Cramer v. Morrison, 88 Cal. App. 3d 873, 880–82, 153 Cal. Rptr. 865, 868–69, (1979) (court interprets Uniform Act on Blood Tests to Determine Paternity); Cutchember v. Payne, 466 A.2d 1240, 1241–42 (D.C. 1983) (court interprets District of Columbia's exclusionary statute for definition of "blood test"); Pizana v. Jones, 127 Mich. App. 1, 2–3, 339 N.W.2d 123, 127–128 (1983) (court interprets Michigan paternity statute).

[4] G.L. c. 273 § 12A states:

> In any proceeding to determine the question of paternity, the court, on motion of the alleged father, shall order the mother, her child and the alleged father to submit to one or more blood grouping tests, to be made by a duly qualified physician or other duly qualified person, designated by the court, to determine whether or not the alleged father can be excluded as being the father of the child. The results of such tests shall be admissible in evidence only in cases where definite exclusion of the alleged father as such father has been established. If one of the parties refuses to comply with the order of the court relative to such tests, such fact shall be admissible in evidence in such proceeding unless the court, for good cause, otherwise orders.

Id.

[5] Chapter 273 was orginally enacted as G.L. c. 232 in 1954. See *infra* notes 6–7 and accompanying text for a discussion of the development of paternity testing techniques.

[6] *See* Lemmon & Murphy, *The Evidentiary Use of the HLA Blood Test in Virginia*, 19 U. RICH. L. REV. 235, 236–39 (1985).

[7] *See* Terasaki, *Resolution By HLA Testing Of 1,000 Paternity Cases Not Excluded By ABO Testing*, 16 J. FAM. L. 543, 544 (1978) (HLA testing was used to a limited extent in the United States during the 1970's); Ellman and Kaye, *Probabilities and Proof: Can HLA Testing and Blood Group Testing Prove Paternity?*, 54 N.Y.U. L. REV. 1131, 1139–40 (1979) [hereinafter Ellman and Kaye] (HLA testing excludes a high proportion of falsely accused defendants).

[8] *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L.Q. 247, 272–76 (1976) [hereinafter Joint Guidelines].

more accurate than blood grouping tests in two ways. First, the HLA test more comprehensively excludes nonfathers than do the blood grouping tests.[9] In fact, HLA testing, in conjunction with the enhanced Landsteiner series, increases the probability of excluding nonfathers to over 90%.[10] Second, the HLA test, as a result of its greater ability to exclude nonfathers, produces inculpatory evidence by which a statistical estimation of the alleged father's likelihood of paternity may be calculated.[11] The probability of paternity indicates the likelihood that the alleged father is the true father when measured against the other men who are not excluded from paternity.[12] That is, the HLA test can determine the possibility of paternity by segregating men who possess the necessary trait identifiable in the child's body tissue.

Experts calculate the probability of paternity through the use of Bayes Theorem. Bayes Theorem is a formula that introduces new variables to change a prior probability that a given hypothesis is true.[13] In paternity testing, a prior probability that the alleged father is the true father is changed by introducing other evidence such as blood types of the alleged father and child.[14] Many courts assume that the alleged father has a 50% probability of being the true father.[15] That is, the alleged father is as likely to have been the true father as a randomly selected nonexcluded male. Evidence such as blood type is then weighed to change this prior probability that the accused is the true father.[16] A 90% probability of paternity, therefore, indicates that an alleged father has a 90% chance of being the true father based on a prior probability of being the true father altered by the introduction of new evidence such as the blood types of the father and child.[17]

During the *Survey* year, the Supreme Judicial Court in *Commonwealth v. Beausoleil* addressed the admissibility of HLA test results which do

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[9] *Id.* Both HLA tests and blood grouping tests yield the probability of exclusion. Peterson, *A Few Things You Should Know About Paternity Tests (But Were Afraid To Ask)*, 22 SANTA CLARA L. REV. 667, 677–81 (1982) [hereinafter Peterson]. That is, the percentage chance that a nonfather is excluded by a test or series of tests. *Id.* at 677. A 90% exclusion probability means that there is a 90% chance that the test or series of tests performed excludes a wrongly accused father. *Id.* Alternatively stated, the accused father, if not conclusively excluded, falls within the tenth percentile of the male population having the necessary trait to be the true father. The enhanced Landsteiner series yields a probability of exclusion of a nonfather between 63% and 72%. Joint Guidelines, *supra* note 8, at 256.

[10] Joint Guidelines, *supra* note 8, at 257–58.

[11] *See* Peterson, *supra* note 9, at 681–702 for a discussion of the probability of paternity.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Ellman and Kaye, *supra* note 7, at 1150 n.93.

[16] *Id.* at 1147–50.

[17] *Id.* at 1149.

not exculpate the alleged father. In addition, the Court addressed whether inculpatory HLA test results are sufficiently reliable to be admitted as scientific evidence.[18] In *Beausoleil*, the Court concluded, as other jurisdictions have, that the exclusionary blood test statute, chapter 273, did not prohibit the introduction of inculpatory HLA test results.[19] The Court, moreover, held that inculpatory HLA tests are sufficiently reliable to be admissible as scientific evidence.[20] The Court limited its holding, however, by announcing guidelines for the affirmative use of HLA test results.[21]

In *Beausoleil*, Sharon Burke, using blood test results falling outside the scope of chapter 273, section 12A, accused Michael Beausoleil of fathering her child.[22] The defendant requested that the trial court order the plaintiff, the child and himself to undergo an HLA test to establish his nonpaternity.[23] The trial judge assented to the request but refused to admit the results of the HLA test as they did not exculpate the defendant.[24] The trial judge found the defendant guilty and entered an order requiring the defendant to pay child support.[25] The defendant appealed the decision.[26] Prior to a new trial, however, the Commonwealth filed a motion *in limine* asking that the results of the HLA test be introduced into evidence.[27] The trial judge denied the Commonwealth's motion, and the Commonwealth appealed the denial.[28] Due to the pendency of the numerous paternity suits raising issues concerning HLA test results, the Supreme Judicial Court transferred the case on its own motion.[29]

The *Beausoleil* Court first confronted the threshold issue of whether chapter 273, section 12A, the exclusionary blood test statute, prohibited the introduction of the inculpatory HLA test results.[30] The Court noted

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[18] Commonwealth v. Beausoleil, 397 Mass. 206, 208, 490 N.E.2d 788, 790 (1986).

[19] *Id.* at 213, 490 N.E.2d at 793. For similar decisions in other jurisdictions *see, e.g.*, Crain v. Crain, 104 Idaho 666, 671–73, 662 P.2d 538, 543–44 (1983); Callison v. Callison, 687 P.2d 106, 110 (Okla. 1984); Phillips v. Jackson, 615 P.2d 1228, 1233 (Utah 1980); Cramer v. Morrison, 88 Cal. App. 3d 873, 880–82, 153 Cal. Rptr. 865, 868–69 (1979).

[20] *Beausoleil*, 397 Mass. at 215, 490 N.E.2d at 794. For similar conclusions reached in other states *see, e.g.*, Perry v. Commonwealth *ex rel.* Kessinger, 652 S.W.2d 655, 661 (Ky. 1983); Imms v. Clarke, 654 S.W.2d 281, 284 (Mo. App. 1983).

[21] *Beausoleil*, 397 Mass. at 217, 490 N.E.2d at 795.

[22] *Id.* at 207, 490 N.E.2d at 789. See *supra* note 4 and accompanying text for a description of G.L. c. 273, § 12A.

[23] *Id.* at 207, 490 N.E.2d at 789–90.

[24] *Id.* at 207, 490 N.E.2d at 790.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.* at 207–08, 490 N.E.2d at 790.

[29] *Id.* at 208, 490 N.E.2d at 790.

[30] *Id.* at 211, 490 N.E.2d at 792.

that the statute refers to "blood grouping tests" and that the HLA test is a tissue typing procedure.[31] As a result, the Court concluded that the HLA test falls beyond the plain meaning of the language in the statute, and HLA test results, therefore, are not excluded by section 12A.[32] The Court further supported its conclusion by recognizing that the HLA test had not been developed at the time of the enactment of chapter 273 in 1954.[33] The Court reasoned that the Legislature could not have intended to prevent the introduction of paternity evidence produced by tests that were not yet known.[34] Thus, the Court held that the statute did not specifically bar HLA test results from admission.[35]

Because chapter 273, section 12A did not prohibit HLA test results as inculpatory evidence, the Court next examined HLA testing under the general guidelines applicable to the admission of scientific evidence.[36] The Court noted that for a scientific test or theory, such as HLA test results, to be admitted as scientific evidence there must be general acceptance of the test or theory in the scientific community.[37] The Court, citing some of its prior decisions in this area, concluded that once acceptance by the scientific community is established, the evidentiary benefits of the scientific theory or test should be accepted.[38] Because the issue of whether the reliability of HLA tests has been accepted by the scientific community had come to the Court through a motion *in limine* and the trial record lacked any expert testimony, the Court relied on authority from other jurisdictions and articles concerning HLA paternity testing to reach its conclusion.[39] Upon a review of these sources, the Court concluded that HLA test results are generally accepted in the scientific community as reliable.[40] As a result of this general acceptance of reliability, the Court held that HLA test results should be admissible as inculpatory evidence.[41]

The *Beausoleil* Court, however, narrowed its holding by adopting limitations on the use of inculpatory HLA test results. The Court first

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[31] *Id.* at 212, 490 N.E.2d at 792.

[32] *Id.* at 212–13, 490 N.E.2d at 793.

[33] *Id.* at 213, 490 N.E.2d at 793.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 214, 490 N.E.2d at 793.

[37] *Id.* The Court used the standard of admissibility for scientific evidence established in Frye v. United States, 293 F.2d 1013, 1014 (D.C. Cir. 1923).

[38] *Beausoleil*, 397 Mass. at 214–15, 490 N.E.2d at 793–94; Commonwealth v. Vitello, 376 Mass. 426, 381 N.E.2d 582 (1978); Commonwealth v. A Juvenile, 365 Mass. 421, 313 N.E.2d 120 (1974); Commonwealth v. Fatalo, 346 Mass. 266, 185 N.E.2d 754 (1962).

[39] *Beausoleil*, 397 Mass. at 215, 490 N.E.2d at 794.

[40] *Id.* at 216, 490 N.E.2d at 794.

[41] *Id.* at 217, 490 N.E.2d at 795.

annuciated a preference for expressing HLA test results as a probability of paternity rather than as a probability of exclusion.[42] The Court noted that both probabilities are relevant to the issue of paternity; however, it found that the exclusion probability would unneccesarily mislead a jury.[43] The Court noted, as an example, that a jury may erroneously believe that a relationship exists between the inculpatory exclusion probability, indicating that the alleged father belongs to the small percentage of men who possess the necessary trait to be the father and the likelihood of paternity when no such relationship does actually exist.[44] The possibility of creating confusion for the factfinder, the Court concluded, is too great to warrant the use of the exclusion probability. The Court particularly stressed the disadvantage of using the exclusion probability when a more meaningful statistic, such as the probability of the accused father's likelihood of paternity, is available.[45]

Next, in an attempt to prevent the presentation to a jury of a statistically insignificant probability, the Court concluded that the inculpatory evidence should be presented to the jury only when the probability of the alleged father's paternity is 95% or more.[46] Furthermore, the Court held that a probability of paternity which equals or exceeds 95% is not conclusive on the issue of paternity.[47] Rather, the Court emphasized that the probability of paternity is only one factor of many which the jury may base its decision.[48] Thus, the Court noted that the factfinder may, and should, consider other evidence such as whether the putative father ever had intercourse with the mother.[49]

Finally, the Court recognized the necessity that counsel lay a proper foundation for admitting the HLA test as scientific evidence.[50] The Court

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[42] *Id.*

[43] *Id.*

[44] The Court noted that although the exclusion probability tells the jury that the alleged father falls within the small percent of men who could have fathered the child "it does nothing to distinguish the true father from perhaps millions of men who fall into this group." *Id.* (quoting Peterson, *supra* note 9, at 680).

[45] *See id.* at 217–18, 490 N.E.2d at 795–96.

[46] *Id.* at 218–19, 490 N.E.2d at 796. The Court noted a further aspect of this limitation and concluded that a jury may be presented with the probability of paternity only when a blood group test and HLA test yields an exclusion probability of at least 90% of the nonfathers tested. *Id.* at 218, 490 N.E.2d at 796. The current practice, the Court noted, is to administer an HLA test with the enhanced Landsteiner series. *Id.* at 218 n.16, 490 N.E.2d at 796 n.16.

[47] *Id.* at 219, 490 N.E.2d at 796.

[48] *Id.* at 219–20, 490 N.E.2d at 796–97.

[49] *Id.* at 220, 490 N.E.2d at 797.

[50] *Id.* at 220–21, 490 N.E.2d at 797. The Court, as an additional protection, suggested that the judge, if requested, should instruct the jury to ignore inculpatory HLA test results if there is no evidence that intercourse between the alleged father and mother took place. *Id.* at 220 n.18, 490 N.E.2d at 797 n.18.

specifically stressed the qualifications of expert witnesses and the employment of proper testing procedures.[51] The Court concluded that inculpatory HLA test evidence, as with similar scientific evidence, is admissible only when developed by proper testing procedures and introduced through competent witnesses.[52]

The *Beausoleil* Court, in sum, held that chapter 273, section 12A does not bar the introduction of inculpatory HLA test results. Moreover, the Court concluded that HLA test results are sufficiently reliable to meet the standard of admissibility for scientific evidence. The Court, however, tempered its holding by adopting limitations concerning the presentation and weight of the evidence developed by HLA test results.[53]

Justice O'Connor concurred with the result of the majority's opinion but differed from the majority's blanket allowance of the introduction of the probability of paternity when it meets the 95% threshhold.[54] Justice O'Connor noted that the majority assumed, in its calculation of the probability of paternity, that the alleged father had intercourse with the mother.[55] Justice O'Connor argued that, as a prior condition to the use of the probability in evidence, it should be determined that the alleged father and mother had intercourse in circumstances in which conception of the child was possible.[56] Use of the probability of paternity, without a prior finding of intercourse, Justice O'Connor reasoned, would erroneously sway a jury which could not be expected to ignore the introduced probability of paternity even in a situation where there was no evidence that intercourse occurred.[57] The Justice, in short, advocated a two step presentation of evidence to establish paternity. First, in Justice O'Connor's view, adequate evidence finding that intercourse occurred between

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[51] *Id.* at 220–21, 490 N.E.2d at 797–98.

[52] *Id.* at 220, 490 N.E.2d at 797–98.

[53] The Court also considered, albeit briefly, the defendant's claims that the court's requiring of HLA blood testing violated his fourth and fifth Amendment rights. *Id.* at 222–23, 490 N.E.2d at 798–99. The Court, analogizing from *Schmerber v. California*, concluded that the defendant's privilege against self-incrimination under the fifth amendment and right against unreasonable search and seizures under the fourth amendment were not violated. *Beausoleil*, 397 Mass. at 222–23, 490 N.E.2d at 798–99 (citing *Schmerber v. California*, 384 U.S. 757, 766–72 (1966)).

[54] *Id.* at 224–25, 490 N.E.2d at 799–800 (O'Connor, J., concurring).

[55] *Id.* at 225, 490 N.E.2d at 800.

[56] *Id.* at 227–28, 490 N.E.2d at 801.

[57] *Id.* at 228, 490 N.E.2d at 801. Justice O'Connor expressed concern that even if the Judge instructed the jury to ignore the HLA test results in deciding whether intercourse ever occurred between the alleged father and mother, the jury would invariably consider the evidence in assessing the occurrence of intercourse. *Id.* The Justice acknowleged that the majority was sensitive to the problem but concluded that it did not adequately solve it. *Id.*

the alleged father and mother is necessary.[58] If that condition is met, Justice O'Connor then would allow the introduction of the probability of paternity.[59] This bifurcated approach, the Justice concluded, would allow the jury to consider only highly probative evidence regarding paternity.[60]

The majority of the *Beausoleil* Court reached what appears to be a reasonable and cautious approach to the use of evidence developed by HLA tests in paternity disputes. The Court attempted to balance the usefulness of scientific evidence in ascertaining the validity of the paternity allegations with the need to ensure the reliability and proper presentation of the evidence. Despite its laudable intentions, however, the Court allowed the introduction of evidence — the probabilty of paternity — which may mislead a factfinder.

The calculation of the probability of paternity, as noted above, is derived from an application of Bayes Theorem which changes a prior probability of an hypothesis upon additional evidence.[61] The Court expressly acknowledged the use of Bayes Theorem and, in a somewhat cavalier manner, impliedly adopted the general practice of assuming a 50% prior probability.[62] Such an assumption is unwarranted as it broadly assumes that the alleged father and a randomly selected man both have equal chances of being the true father. Implicit in this broad assumption is the underlying assumption that both men had intercourse with the mother under similar circumstances in terms of frequency, fertility, timing and use of birth control.[63] It is unrealistic to expect that these assumptions can possibly be valid.

This problem of assuming too much can be alleviated by an approach similar to that proposed by Justice O'Connor.[64] The evidence relating to the prior probability — the frequency of intercourse, use of birth control, fertility and timing of intercourse — should first be weighed by the factfinder. If the factfinder concludes that intercourse did occur, then it may analyze the probability of paternity. Moreover, the evidential factors noted above should be used to arrive at a realistic assessment of the prior probability of paternity.[65] For instance, if it is clear from the evidence presented that the alleged father had frequent intercourse with the mother without the use of birth control techniques, the prior probability may be

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[58] *Id.* at 229, 490 N.E.2d at 802.

[59] *Id.*

[60] *Id.*

[61] *See supra* notes 13–17 and accompanying text for a discussion of the probability of paternity.

[62] *See id.* at 211 n.6, 490 N.E.2d at 792 n.6.

[63] *See* Peterson, *supra* note 9, at 685.

[64] *See supra* notes 54–59 and accompanying text for a discussion of Justice O'Connor's concurrence.

[65] *See* Ellman and Kaye, *supra* note 7, at 1152–53.

assessed at greater than 50%. It is reasonable to conclude that the alleged father under such circumstances has a greater chance of being the true father than does a randomly selected man. Recalculation of the probability of paternity using a prior probability estimated on the facts and circumstances of the individual case therefore results in a statistic more useful than one based on an assumed 50% prior probability. Ignoring applicable evidence relating to the prior probability of paternity tarnishes the usefulness of otherwise probative scientific evidence.[66]

In *Beausoleil*, the Supreme Judicial Court expressly permitted the use of inculpatory evidence derived from an HLA test. In an effort to prevent confusion which may result from the introduction of complicated scientific evidence, the Court enumerated guidelines for the presentation, introduction and use by the factfinder of the evidence. The Court, unfortunately, failed to ensure that the evidence was particularly significant by assuming critical facts in the calculation of the probability of paternity. This shortcoming may be cured in the future by examining evidence relating to the underlying assumptions and adjusting the prior probability accordingly prior to calculating the probability of paternity.

§ 4.5. Authority of Juvenile Courts to Order Parents to Submit to In-Home Investigations by the Department of Social Services of Alleged Child Abuse.* In 1973, the Massachusetts legislature enacted sections 51A through 51F of chapter 119 of the General Laws.[1] These sections establish the procedures and the powers of the Department of Social Services (DSS) when dealing with physically and emotionally injured children. Under section 51A, any medical personnel, teacher, social worker, or other government official who, in his or her professional capacity, has reason to believe that a minor is physically or emotionally injured, must report that injury to the DSS.[2] In addition, any other person who has

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[66] The recalculation of the probability of paternity incorporating the factfinder's estimate of the prior probability adds complexity to the process and may cause confusion, particularly in jury trials. To alleviate this concern, Professors Ellman and Kaye propose a general approach. They recommend that the experts testifying present a chart showing a range of hypothetical prior probabilities and the associated subsequent probability of paternity. *See* Ellman and Kaye, *supra* note 7, at 1152–61.

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§ 4.5. [1] *See* annotations to G.L. c. 119 §§ 51A–F.

[2] G.L. c. 119A, § 51A. Section 51A provides, in relevant part:

> Any physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, . . . public or private school teacher, educational administrator, guidance or family counselor, . . . who, in his professional capacity shall have reasonable cause to believe that a child under the age of eighteen years is suffering serious physical or emotional injury resulting from abuse inflicted upon him including sexual abuse, . . . shall immediately report such condition to the

reasonable cause to believe that a child is abused may make a report to the DSS.[3] Upon receiving a report of abuse, the DSS must investigate and evaluate the reported information.[4] The DSS must take the child into temporary custody if it has reason to believe that removal is necessary to protect the child,[5] and must inform the district attorney if the child has died, been sexually assaulted or exploited, or has suffered serious bodily injury.[6] The DSS investigation must include a visit to the minor's home, if appropriate.[7]

During the *Survey* year, in *Parents of Two Minors v. Bristol Division of the Juvenile Court Department*, the Supreme Judical Court held that a judge of a juvenile court does not have authority to order parents of a minor to submit to a nonemergency home visit by the DSS when investigating an anonymous child abuse report.[8] In reaching this decision, the Court reasoned that neither statute nor common law granted the judge the authority to order the parents to comply with a DSS nonemergency investigation.[9] The Court did not reach any issues of unconstitutional searches.[10]

On May 8, 1985, the DSS "Child Abuse Hot-Line" received an anonymous telephone call claiming that the plaintiffs abused their children, a

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department by oral communication and by making a written report within forty-eight hours after such oral communication . . . .

Id.

[3] *Id.* ("In addition to those persons required to report pursuant to this section, any other person may make such a report if any such person has reasonable cause to believe that a child is suffering from or has died as a result of such abuse or neglect.")

[4] G.L. c. 119 § 51B. Section 51B provides, in relevant part:

The department shall —

(1) investigate and evaluate the information reported under section fifty-one A. Said investigation and evaluation shall commence within two hours of initial contact and be completed within twenty-four hours if the department has reasonable cause to believe the child's health or safety is in immediate danger from further abuse or neglect. Said investigation and evaluation shall commence within two working days of initial contact and be completed within ten calendar days for all other such reports.

Id.

[5] G.L. c. 119 § 51B(3).

[6] G.L. c. 119 § 51B(4).

[7] G.L. c. 119 § 51B(1). Section 51B also provides that:

[t]he investigation shall include a home visit at which the child is viewed, if appropriate, a determination of the nature, extent and cause or causes of the injuries, the identity of the person or persons responsible therefor, the name, age and condition of other children in the same household, an evaluation of the parents and the home environment, and all other pertinent facts or matters.

Id.

[8] 397 Mass. 846, 847, 494 N.E.2d 1306, 1307–08 (1986).

[9] *Id.* at 852–53, 494 N.E.2d at 1311.

[10] *Id.* at 848, 494 N.E.2d at 1308.

five year old boy and a six year old girl.[11] The caller stated that she had been in close contact with the plaintiffs for four years, and that on many occasions she noticed bruises on the children, allegedly caused by parental abuse.[12] A DSS investigator attempted to substantiate the allegations by visiting the plaintiffs' home, but the plaintiffs, with their attorney's advice, refused to allow the investigator entry into their home.[13]

On May 15, 1985, the DSS petitioned the juvenile court to order the plaintiffs to allow the investigator into their house.[14] The judge granted DSS's petition, reasoning that the DSS has a "plain right" to investigate.[15] The following day the plaintiffs appealed directly, under section 3 of chapter 211,[16] to the Supreme Judicial Court to quash the juvenile court's order.[17] A single justice, without opinion, denied the plaintiffs' petition.[18] Plaintiffs then appealed to the full Court.[19]

Two DSS employees went to the plaintiffs' home on May 31, 1985, spoke with the children, and concluded the investigation.[20] On September 6, 1985, the DSS requested the Court to dismiss the plaintiffs' petition for mootness.[21] In addition, the DSS argued that the plaintiffs' direct appeal to the Supreme Judicial Court was inappropriate.[22] The parents of the minors claimed that the juvenile court judge was not authorized to order entry of their house,[23] and that the entry violated the fourth amendment of the United States Constitution,[24] as well as article fourteen of the Massachusetts Declaration of Rights.[25]

The Supreme Judicial Court rejected both the mootness and propriety of direct appeals arguments of the DSS.[26] Further, the Court did not

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[11] *Id.* at 847, 494 N.E.2d at 1308.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 847–48, 494 N.E.2d at 1308.

[16] Section 3 states that "[t]he supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided . . . ." G.L. c. 211 § 3.

[17] *Parents of Two Minors*, 397 Mass. at 848, 494 N.E.2d at 1308.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* The fourth amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

[25] *Parents of Two Minors*, 397 Mass. at 848, 494 N.E.2d at 1308. According to article 14, "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions." MASS. CONST. pt. 1, art. XIV.

[26] *Parents of Two Minors*, 397 Mass. 849–51, 494 N.E.2d at 1309–10.

reach the merits of the plaintiffs' constitutional claims.[27] Instead, the Court ruled that the juvenile court judge exceeded his authority when he issued the order allowing the DSS investigators into the plaintiffs' home.[28]

The *Parents of Two Minors* Court first considered the defendant's argument that the case was mooted when the DSS completed its investigation, thereby eliminating the parties' stake in the outcome of the litigation.[29] The Court rejected this argument, noting that where there is an issue of public importance that is likely to arise again under similar circumstances, a court may decide a moot case.[30] Thus, the Court rejected the argument of mootness, the DSS's first procedural defense.

The *Parents of Two Minors* Court similarly rejected the defendant's second procedural argument, that the plaintiffs should have proceeded through normal appellate review, rather than seek the supervisory power

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[27] *Id.* at 848, 494 N.E.2d at 1308. The Court did suggest, in dicta, however, that the legislature might enact a statute permitting juvenile courts to order parents to allow entry by DSS employees which, if properly drawn, could withstand constitutional attacks. *Id.* at 852, 494 N.E.2d at 1311.

[28] *Id.* at 848, 494 N.E.2d at 1308.

[29] *Id.* at 849, 494 N.E.2d at 1309. Courts generally refuse to hear moot cases for several reasons. First, only concrete disputes can be resolved through adversary proceedings. Wolf v. Comm'r of Pub. Welfare, 367 Mass. 293, 298, 327 N.E.2d 885, 889 (1975). Further, if the parties do not have a stake in the outcome, they may not argue their positions strenuously. *Id.* In addition, judicial resolution of hypothetical disputes would encroach upon the legislative domain. *Id.* Finally, the judiciary should spend its time resolving true conflicts, not "insubstantial controversies." *Id.*

[30] *Parents of Two Minors*, 397 Mass. at 849, 494 N.E.2d at 1309. In *Lockhart v. Attorney General*, 390 Mass. 780, 459 N.E.2d 813 (1984), the Supreme Judicial Court reasoned that it could answer a moot question when certain factors are present. First, the Court remarked, the issue before the court must be one of public importance. *Lockhart*, 390 Mass. at 783, 459 N.E.2d at 815. In addition, the Court noted, the issue must be fully argued by both sides. *Id.* Moreover, the Court reasoned, it must be very likely, if not certain, that the issue would again arise under a similar set of circumstances. *Id.* Finally, the Court noted that it would address moot issues when it is likely that, in subsequent cases, appellate review could not be obtained before the issue again became moot. *Id.* Thus, where a case is "capable of repetition, yet evading review," a court is more likely to consider moot issues. *Id.* (quoting *Wolf*, 367 Mass. at 298, 327 N.E.2d at 889). The *Lockhart* Court observed, however, that the Supreme Judicial Court has never decided a moot case where the issue concerned a constitutional question, consistent with "judicial restraint" and the tradition of not unnecessarily deciding constitutional issues. *Id.* at 784, 459 N.E.2d at 816.

The Court, in *Parents of Two Minors*, held that the conditions enumerated in *Lockhart* were present, and therefore refused to dismiss the case as moot. *Parents of Two Minors*, 397 Mass. at 849, 494 N.E.2d at 1309. Additionally, the Court reasoned that its refusal to dismiss did not violate the traditional restraint on answering moot constitutional questions because the Court did not reach the plaintiffs' constitutional arguments. *Id.* at 849 n.2, 494 N.E.2d at 1309 n.2. The Court's decision was based, instead, on statutory interpretation and determination of the limits of juvenile court authority. *See id.* at 849–53, 494 N.E.2d at 1309–11.

of the Supreme Judicial Court under section 3 of chapter 211.[31] The DSS observed that the Supreme Judicial Court had previously refused to consider direct appeals from interlocutory discovery orders.[32] Rather than directly appeal the juvenile court's order, the DSS argued, the parents of the two minors should have refused the order, incurred a ruling of contempt, and then appealed the contempt order.[33]

Rejecting this argument, however, the Court reasoned that the present case was distinguishable from interlocutory discovery orders.[34] The Court observed that direct appeals from interlocutory orders are rejected because such appeals tend to disrupt the progress of ongoing litigation.[35] The Court stated that the parents objected to a final order, and therefore no reason existed for requiring the plaintiffs to invite an order of contempt in order to obtain review.[36]

In addition, the *Parents of Two Minors* Court noted that because no statute provides for appellate review in cases of DSS child abuse investigation, the exercise of supervisory power by the Supreme Judicial Court would be the plaintiffs' only remedy.[37] The Court thus distinguished statutory provisions regarding child abuse from provisions concerning adjudication that a minor is in need of services,[38] or of care and protection,[39] or that the child is a delinquent,[40] all of which do provide expressly for right of appeal.[41] Consequently, the Court held that direct appellate review was appropriate because no other appellate review is provided in the statute, and there was no reason to require the plaintiffs to be adjudged in contempt in order to appeal.

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[31] *Id.* at 849–51, 494 N.E.2d at 1309–10. See *supra* note 16 for text of section 3.

[32] *Parents of Two Minors*, 397 Mass. at 850, 494 N.E.2d at 1309 (citing Cronin v. Strayer, 392 Mass. 525, 529, 467 N.E.2d 143, 146 (1984) (nonparty witnesses have no right to direct appeal of order requiring them to submit to discovery).

[33] *Id. See also Cronin*, 392 Mass. at 529, 467 N.E.2d at 146 ("The appellants assert that we should permit this appeal because no legitimate purpose is served by requiring witnesses to invite contempt in order to obtain appellate review. We do not agree.").

[34] *Parents of Two Minors*, 397 Mass. at 851, 494 N.E.2d at 1310.

[35] *Id.* at 850, 494 N.E.2d at 1310.

[36] *Id.* at 851, 494 N.E.2d at 1310.

[37] *Id.* at 849–50, 494 N.E.2d at 1309.

[38] *Id.* at 850, 494 N.E.2d at 1309. *See* G.L. c. 119 § 39I ("Any child who is adjudicated a child in need of services may appeal for a trial de novo in a jury-of-six session of the district courts for the county where the hearing is held . . . .").

[39] *Parents of Two Minors*, 397 Mass. at 850, 494 N.E.2d at 1309. *See* G.L. c. 119 § 27 ("A child, parent, guardian or person appearing in behalf of such child, or the department, may appeal from the adjudication of the court and from any order of commitment made as a result of the adjudication . . . .").

[40] *Parents of Two Minors*, 397 Mass. at 850, 494 N.E.2d at 1309. *See* G.L. c. 119 § 56 ("A child adjudged a delinquent child may, upon adjudication, appeal to a jury session in the district courts for the county where the hearing is held . . . .").

[41] *Parents of Two Minors*, 397 Mass. at 850, 494 N.E.2d at 1309.

Finally, the *Parents of Two Minors* Court examined the authority of a juvenile court judge to order parents to open their homes to DSS investigators. Because the legislature created juvenile courts, the Court explained, any power they have is derived from either express or implied grants of power by the legislature,[42] or from the powers inherent in all courts.[43] The Court observed that the legislature has not expressly granted juvenile courts the power to order parents to allow DSS home investigations.[44] The Court additionally noted that, although sections 51A and 51B authorize the DSS to investigate anonymous allegations of child abuse,[45] the statute is silent regarding the authority of a juvenile court judge to order reluctant parents to permit the investigation.[46] Moreover, the Court stated, power to assist the DSS is not implied in chapter 119.[47]

The *Parents of Two Minors* Court then held that authority to order investigations is not an inherent power of the juvenile court. The Court remarked that inherent powers are restricted to powers necessary for a court's ability to function as a court.[48] Because juvenile courts can function as courts absent the power to give the disputed order, the Court held that the judge had no inherent power to authorize the DSS home investigation.[49]

In summary, the *Parents of Two Minors* Court held that the DSS's procedural arguments — that the case was moot and that direct appellate review was improper — were without merit. The Court further held that the legislature did not, either expressly or by implication, grant juvenile courts the power to order parents to open their homes to DSS investigators, and that this power was not an inherent power. Therefore, without

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[42] *Id.* at 851, 494 N.E.2d at 1310. *See, e.g.*, Police Comm'r of Boston v. Municipal Ct. of the Dorchester District, 374 Mass. 640, 662–63, 374 N.E.2d 272, 285 (1978) ("It is a first principle that the jurisdictions of the several lower courts of this Commonwealth, and therefore their powers, are limited to those granted by the Constitution of the Commonwealth or by the Legislature. Such grants must either be articulated expressly or be capable of being deduced by 'necessary and inevitable' implication.") (citations omitted). In *Police Comm'r*, the Supreme Judicial Court held that juvenile court judges are authorized to order the Boston police department to expunge from its records information pertaining to the arrest of a juvenile when a delinquency proceeding against the juvenile was dismissed with prejudice. *Id.* at 668, 374 N.E.2d at 288. Reaching this decision, the Court noted that although this authority was not expressly granted by the legislature, juvenile court judges are granted broad discretion in order to serve the best interests of the child. *Id.* at 666–67, 374 N.E.2d at 287.

[43] *Parents of Two Minors*, 397 Mass. at 851, 494 N.E.2d at 1310.

[44] *Id.* at 852, 494 N.E.2d at 1311.

[45] *Id.* at 851, 494 N.E.2d at 1309. *See supra* notes 3–7 for relevant portions of sections 51A and 51B.

[46] *Parents of Two Minors*, 397 Mass. at 851, 494 N.E.2d at 1310.

[47] *Id.* at 852, 494 N.E.2d at 1311.

[48] *Id.* at 853, 494 N.E.2d at 1311.

[49] *Id.*

reaching the merits of the plaintiffs' constitutional arguments, the Court held that the plaintiffs were entitled to relief, and quashed the order of the Juvenile Court. If the legislature wishes to ensure that the DSS can conduct investigations based on anonymous reports, therefore, it must expressly grant courts the authority to order reluctant parents to open their homes to DSS personnel.

Parents of Two Minors demonstrates an unduly restrictive reading of chapter 119. Section 51B establishes a duty upon the DSS to investigate reports of child abuse, either within twenty four hours if the DSS has reason to believe the child is in immediate danger, or within ten days if the child is not in immediate danger.[50] In addition, the DSS investigation must include a home visit, if appropriate.[51] The *Parents of Two Minors* Court has, in effect, prohibited a juvenile court from recognizing and enforcing these legislatively created duties. In addition, the United States Supreme Court has held that a court may adopt appropriate remedies when a legislature has created a right.[52] The ability of a court to adopt appropriate remedies would seem to be even greater when the legislature has mandated an affirmative duty, as in *Parents of Two Minors*, rather than merely created a right. Further, the Supreme Judicial Court has previously recognized that juvenile courts are granted broad discretionary powers to guard the best interests of the child.[53] Thus, the *Parents of Two Minors* Court's assertion that the legislature has not implicitly granted courts, especially juvenile courts, the authority to order parents to allow DSS employees in their home is unfounded.

In conclusion, the Supreme Judicial Court, in *Parents of Two Minors*, held that a juvenile court does not have authority to order parents to open their homes to DSS employees who are investigating reports of child abuse. In reaching this holding, the Court stated that it was exercising judicial restraint. In effect, however, the Court refused to recognize a legislatively created duty imposed on the DSS. As a result, any parent or guardian suspected of child abuse can prevent DSS personnel from conducting in-home investigations, even though the legislature has required the DSS to conduct in-home investigations.

§ 4.6. Payment of Attorney Fees in Divorce Action Following Death.* In divorce proceedings, Massachusetts courts may award attorney's fees where necessary to enable a spouse to maintain or defend a divorce or

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[50] G.L. c. 119 § 51B(1). See *supra* note 4 for text of relevant portion of section 51B.

[51] G.L. c. 119 § 51B(1). See *supra* note 7 for text of relevant portion of section 51B(1).

[52] J.I. Case v. Borak, 377 U.S. 426, 433 (1964) (Supreme Court held that right of private action exists for violation of proxy requirements of securities laws).

[53] *Police Comm'r*, 374 Mass. at 666–67, 347 N.E.2d at 287. See *supra*, note 42 for a discussion of *Police Comm'r*.

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related action.[1] Massachusetts General Laws chapter 208, section 17 provides that during the pendency of a divorce action the court may require either spouse to pay an amount into court to enable the other spouse to maintain or defend the action.[2] The legislature enacted section 17 in 1851, and has not significantly changed its language since.[3]

Similarly, chapter 208, section 38 empowers the judge to award legal costs and fees, in contrast to section 17, however, the provision has undergone a significant historical evolution.[4] Prior to the legislature's amendment in 1933, courts did not award attorney's fees under section 38.[5] Section 17 was the only provision which allowed an award of attorney's fees in divorce cases. In 1933, however, the legislature expanded the language and scope of section 38 to include attorney's fees.[6] Unlike section 17, the additional language also provided that the courts' use of section 38 is not limited to the pendency of the action, nor is it limited to the period before the marriage is legally terminated.[7]

During the *Survey* year, the Appeals Court in *Edinburg v. Edinburg* decided the novel question of whether an order pursuant to section 17 to pay fees for legal services already rendered by the opposing attorney can survive the death of the recipient spouse.[8] In *Edinburg*, the probate judge ordered the wife to reimburse her husband's lawyer for the legal services rendered up to that point in the proceedings.[9] The husband died during

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§ 4.6. 1 *See generally* Goldman v. Rodriques, 370 Mass. 435, 349 N.E.2d 335 (1976); Malcolm v. Malcolm, 257 Mass. 225, 153 N.E. 461 (1926).

2 Section 17 provides that "[t]he court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action...." G.L. c. 208, § 17 (1984).

3 *Id.* The section was amended in 1983, however, to authorize payments for health insurance during the pendency of the action. *Id.*, *amended by* G.L. c. 208, § 17 (West 1986).

4 G.L. c. 208 § 38 (1984).

5 *See, e.g.*, Wallace v. Wallace, 273 Mass. 62, 65, 172 N.E. 914, 915 (1930).

6 Section 38 provides that

> In any proceeding under this chapter, whether original or subsidiary, the court may, it its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them.

G.L. c. 208, § 38.

Although the language does not explicitly mention attorney's fees, the amendment has been interpreted to authorize awards of fees. *See, e.g.*, Hayden v. Hayden, 326 Mass. 587, 594, 96 N.E.2d 136, 141 (1950).

7 G.L. c. 208 § 38. See *supra* note 6 for text of section 38.

8 Edinburg v. Edinburg, 22 Mass. App. Ct. 192, 492 N.E.2d 1159 (1986).

9 *Id.* at 195–96, 492 N.E.2d at 1162.

the pendency of the action, thus abating the divorce proceedings.[10] The Massachusetts Appeals Court held that the probate judge properly maintained his order for Mrs. Edinburg to pay Mr. Edinburg's attorney after Mr. Edinburg's death.[11]

Edinburg arose upon the filing of cross complaints for divorce in 1981.[12] Dorothy Edinburg controlled the far greater resources of the two parties to the marriage. Her estimated assets were worth approximately $1,900,000, not including additional real estate and art works later valued at more than $4,500,000.[13] Joseph Edinburg, in contrast, admitted to assets in his name of $1,500 and a gross weekly income of $1,348.20.[14] The Edinburg's divorce proceedings were bitter and protracted. In addition to her complaint for divorce, Dorothy Edinburg filed several other complaints against her husband, his sister, and others relating to Mrs. Edinburg's continued ownership or control of substantial assets.[15] Indeed, the Appeals Court characterized the parties' dissolution as a "state of marital war."[16]

Dorothy Edinburg gave every indication that she would strongly resist any substantial subdivision of her assets with her husband, as required by chapter 208, section 34.[17] The central issue in the Edinburg's divorce thus became the identification, valuation, and ownership of the family art collection.[18] This process required extensive discovery.[19] Mrs. Edinburg complicated and obstructed discovery on this issue, forcing Joseph

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[10] *Id.* at 194, 492 N.E.2d at 1161.

[11] *Id.* at 197, 492 N.E.2d at 1162–63.

[12] *Id.* at 193, 492 N.E.2d at 1160.

[13] *Id.*

[14] *Id.* at 194 n.6, 492 N.E.2d at 1161 n.6.

[15] *Id.* at 193, 492 N.E.2d at 1160. The cases are Edinburg v. Edinburg, 22 Mass. App. Ct. 199, 492 N.E.2d 1164 (1986) (Edinburg II) (concerning whether certain valuable art works in Dorothy Edinburg's control were gifts to her childrens' trust or remained in her property); Edinburg v. Cavers, 22 Mass. App. Ct. 212, 492 N.E.2d 1171 (1986) (court considered ownership of shares in closely held family corporation and attempted removal of attorney as trustee); Pinkowitz v. Edinburg, 22 Mass. App. Ct. 180, 492 N.E.2d 1153 (1986) (involving the removal of Dorothy Edinburg from her position as executrix of her father's will and her removal as trustee of a trust by her children as remainder beneficiaries). All these cases including the divorce action were consolidated and transfered to a probate judge of the Middlesex Division. *See Pinkowitz*, 22 Mass. App. Ct. at 185–86, 492 N.E.2d at 1156–57.

[16] *Edinburg*, 22 Mass. App. Ct. at 193, 492 N.E.2d at 1160.

[17] *Id.* at 193, 492 N.E.2d at 1160–61. Section 34 states in part that "[u]pon divorce or upon a complaint 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. . . ." G.L. c. 208 § 34.

[18] *Edinburg*, 22 Mass. App. Ct. at 193, 492 N.E.2d at 1161.

[19] *Id.*

Edinburg's counsel to file numerous motions and make several court appearances in order to compel discovery from Dorothy Edinburg on the ownership of these assets.[20]

Joseph Edinburg was forced to liquidate all the assets held in his name to pay the considerable legal fees generated by the various complaints.[21] Nonetheless, by September 30, 1982, Mr. Edinburg's obligation to his lawyer, Mr. Perera, for work done on the Edinburg's divorce action exceeded $60,000.[22] Mr. Edinburg could pay only $15,000.[23] By this time Mrs. Edinburg had paid over $75,000 to her attorneys and was continuing to pay approximately $2,300 a week to press her divorce and other actions against Mr. Edinburg.[24]

On October 19, 1982, Joseph Edinburg moved pursuant to chapter 208, section 38 for an award of attorney's fees to make it possible for him to continue to prosecute and defend the divorce action.[25] The judge suggested that the motion be refiled under chapter 208, section 17.[26] Mr. Edinburg refiled the motion under section 17 and his attorney filed an affidavit attesting that the work he had done for Mr. Edinburg totaled approximately $90,000, and requesting payment of this amount from Mrs. Edinburg.[27] The judge held a hearing on the motion on December 29, 1982.[28]

The probate judge approved the section 17 motion, noting the financial circumstances of the parties and Mr. Edinburg's need for ongoing legal services.[29] The judge ordered Mrs. Edinburg to pay $35,000 directly to

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[20] *Id.* at 194, & n.4, 492 N.E.2d at 1161 & n.4. Mrs. Edinburg claimed that the works of art were no longer hers because she had given or sold them to three irrevocable trusts which she had established for the couple's three children. *Id.* at 194, 492 N.E.2d at 1161. Further, much of the collection was distributed among several major Boston museums, and Mrs. Edinburg was uncooperative in identifying the location and extent of the art collection. *Id.* at 194 n.4, 492 N.E.2d at 1161 n.4.

After the divorce proceedings were abated because of Mr. Edinburg's death, a probate judge found that Dorothy Edinburg had claimed that her prior sworn testimony in the divorce case was untrue, that she had filed false documents and that the art work that she had testified was the property of her children's irrevocable trusts was in fact hers. Pinkowitz v. Edinburg, 22 Mass. App. Ct. at 188–89, 492 N.E.2d at 1158. *See also Edinburg II*, 22 Mass. App. Ct. at 210 & n.1, 492 N.E.2d at 1170–71 & n.1 (Brown, J., concurring) (Mrs. Edinburg admitted committing perjury during numerous proceedings).

[21] *Edinburg*, 22 Mass. App. Ct. at 194 n.5, 492 N.E.2d at 1161 n.5.

[22] *Id.* at 194, 492 N.E.2d at 1161.

[23] *Id.*

[24] *Id.*

[25] *Id.* See *supra* note 6 for text of section 38.

[26] *Id.* at 195, 492 N.E.2d at 1161. See *supra* note 2 for text of section 17.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 195, 492 N.E.2d at 1161–62.

Mr. Perera.[30] Mrs. Edinburg was granted 30 days in which to pay attorney Perera's fees.[31] On January 29, 1983, however, thirty days after the original order, Mrs. Edinburg had not paid the attorney's fees.[32] Consequently, Mr. Edinburg entered a complaint for contempt, returnable February 16, 1983.[33] On the returnable date Mr. Perera orally presented a prima facie case for contempt based on Mrs. Edinburg's failure to pay the fees.[34] Dorothy Edinburg's attorney did not refute Mr. Perera's arguments.[35] Instead, Mrs. Edinburg's attorney asked for and received a two day continuance.[36] That evening, after the hearing, Joseph Edinburg died.[37]

The judge heard argument on March 31, 1983 as to the effect of Mr. Edinburg's death on the unpaid order of attorney's fees against Mrs. Edinburg.[38] On April 6, 1983 the judge ruled that Dorothy Edinburg must pay as ordered.[39] The judge directed that the failure to pay Mr. Perera the $35,000 by April 20, 1983 would result in an automatic judgment of contempt against Mrs. Edinburg.[40]

The Appeals Court affirmed this decision, concluding that it was within the discretion of the probate judge.[41] The Appeals Court first noted that Joseph Edinburg's death abated the divorce action.[42] Nonetheless, the appellate court found that under the particular facts of the case the order for payment properly could survive the abatement.[43] Thus, the court held that an order for payment of attorney's fees under chapter 208, section 17 may survive the death of a spouse and the abatement of the proceedings.[44]

The Appeals Court declined to formulate a rule for dealing with awards of counsel fees that are unpaid when the divorce case is dismissed or abated.[45] Rather, the court found several of the particular facts in the Edinburg's divorce case determinative.[46] First, the judge below awarded

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[30] *Id.* at 195, 492 N.E.2d at 1162.
[31] *Id.* at 195–96, 492 N.E.2d at 1162.
[32] *Id.* at 196, 492 N.E.2d at 1162.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 196–97, 492 N.E.2d at 1162.
[41] *Id.* at 197, 492 N.E.2d at 1162–63.
[42] *Id.* at 197, 492 N.E.2d at 1162.
[43] *Id.* at 197, 492 N.E.2d at 1163.
[44] *Id.* at 196–97, 492 N.E.2d at 1162–63.
[45] *Id.* at 196, 492 N.E.2d at 1162.
[46] *Id.* at 197, 492 N.E.2d at 1162–63.

Mr. Perera attorney's fees while Mr. Edinburg was still alive.[47] Second, Mrs. Edinburg was ordered to pay attorney Perera directly.[48] Third, the award of fees represented an amount Mr. Edinburg owed for past services, not future work.[49] And finally, Mr. Perera had made out a clear and uncontradicted prima facie case of contempt against Mrs. Edinburg in the February 16, 1983 hearing.[50] The Appeals Court found that on these facts the probate judge could rule that Dorothy Edinburg must pay the attorney's fees resulting from her divorce action.[51] The Appeals Court agreed with the probate judge that the order was necessary to prevent Dorothy from "unjustly reaping benefit from her own delay and contemptuous behavior in refusing to obey the order."[52] Thus, the appellate court found that the section 17 order to pay attorney's fees survived the abatement of the action.[53]

The Appeals Court affirmance in *Edinburg v. Edinburg* therefore rests on the trial judge's desire to prevent the combination of improper delay and unexpected death from creating an inequitable result by frustrating a proper order.[54] Section 17, however, authorizes payment of legal costs or alimony only "during the pendency of the action," and by its terms indicates that the amount is to be paid into court "for the use of the other party."[55] Unstated but clear in the *Edinburg* decision was the court's approval of the initial award of attorney's fees to Joseph Edinburg.[56] Given that the award was appropriate under the financial circumstances of the parties and that the award was made while Mr. Edinburg was alive and legally married to Mrs. Edinburg, the court concluded that sustaining the award after the abatement of the proceedings was within the power and discretion of the judge.[57] The Appeals Court also explicitly noted

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[47] *Id.*

[48] *Id.* at 197, 492 N.E.2d at 1163.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 197, 492 N.E.2d at 1162–63.

[54] *See id.*

[55] G.L. c. § 17.

[56] *See Edinburg*, 22 Mass. App. Ct. at 198, 492 N.E.2d at 1163. The Appeals Court did analyze the appropriateness of the size of the award, finding the $35,000 figure within the discretion of the judge as based on conservative principles and formulated from the examination of a detailed record of time and charges submitted by Mr. Perera. *Id.* The approval of this figure necessarily denotes the approval of the granting of the award.

[57] *Id.* at 197, 492 N.E.2d at 1162–63. Despite the fact that Joseph died before Dorothy paid, when the judge entered the award they were legally married. Compare Baird v. Baird, 311 Mass. 329, 332–33, 41 N.E.2d 5, 7 (1942) (section 17 inapplicable where divorce order has already been entered).

that section 17 provides sufficient authority for the judge to order the award payable directly to the attorney.[58]

It is unclear whether the court's holding in *Edinburg* suggests that a section 17 award should be enforced whenever an award of counsel fees is unpaid when the divorce action abates or is dismissed. The Appeals Court explicitly declined to make such a rule.[59] Instead, the court appears to have relied on the particular facts of the case; that is, the court apparently placed some weight on Dorothy Edinburg's behavior in this and the other related cases to decide the question of whether it was appropriate to sustain the order against her.[60]

Having implicitly determined that the facts empowered the judge to sustain the order after the abatement of the action, the propriety of the judge's decision to enforce the order rested upon Mrs. Edinburg's actions. But for her contemptuous refusal to obey the order in a timely fashion, Mr. Perera would have been paid before Mr. Edinburg's death. Both the trial and Appeals Court concluded their reasoning by noting the judicial frustration inherent in a contrary result, to permit a contemptuous party to profit from her flouting of judicial authority.[61]

Chapter 208, section 17 vests in trial judges the discretionary power to award costs and attorney's fees to either party as needed to continue the action.[62] Section 17 authorizes payment of legal costs or alimony only "during the pendency of the action."[63] Courts have interpreted the statute to require that the marriage relationship still exist at the time of the award.[64] The *Edinburg* case indicates a willingness on the part of the courts to stretch the outer chronological limit of the power to enforce awards of attorney's fees under chapter 208, section 17. In so doing, the court breaks down some of the distiction between section 17 and section 38 of chapter 208.

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[58] *Edinburg*, 22 Mass. App. Ct. at 197 n.15, 492 N.E.2d at 1163 n.15.

[59] *Id.* at 197, 492 N.E.2d at 1162.

[60] *See id.* at 197, 492 N.E.2d at 1162–63. Concurring in *Edinburg II*, Judge Brown stated that

> Given her blatent admission that she had falsified documents and committed perjury in order to deceive the trial court and her husband, I am compelled to conclude that she attempted to manipulate the legal system and make a mockery of our system of justice. Mrs. Edinburg's conduct constituted both an affront to the court's dignity and a perversion of the court's purposes as an institution for just resolution of legitimate disputes.

Edinburg II, 22 Mass. App. Ct. 199, 210–11, 492 N.E.2d 1164, 1170–71 (1986).

[61] *Edinburg*, 22 Mass. App. Ct. at 197, 492 N.E.2d at 1163.

[62] See *supra* note 2 for text of section 17. The authority of the court to decree counsel fees or alimony has always been considered to rest exclusively upon the statute. Kelley v. Kelley, 161 Mass. 111, 36 N.E. 837 (1894).

[63] G.L. c. 208 § 17.

[64] *See, e.g.*, Baird v. Baird, 311 Mass. 329, 332–33, 41 N.E.2d 5, 7 (1942).

This treatment may not be surprising given the historical development of the two sections. When the legislature amended section 38 in 1933 to authorize judges to award counsel fees in divorce and a wide range of related actions, the amendment created a redundancy within chapter 208. Section 17 provides that the judge may award a spouse "an amount to enable him to maintain or defend the action" during the proceedings.[65] Section 38 also arms the judge with the discretion to award costs and expenses, including attorney's fees.[66] Section 38, however, authorizes such an award in any proceeding under chapter 208, regardless of whether the marital relationship has terminated.[67]

Despite this redundancy, however, the language of the two sections does dovetail chronologically. Section 17 allows a judge to award legal costs and alimony during the suit before the final judgment. The language of section 38 also allows for its use during the pendency of the action, but its primary purpose is to allow the award of legal costs as part of final disposition of the divorce action, and more importantly, for any other related suit, such as adjustment of support after the marriage is terminated.[68]

Edinburg suggests, therefore, that the court is willing to limit the chronological distinction between the two sections, and expand the area of overlap. Specifically, like section 38, the enforcement of a pendente lite award under section 17 may now survive the abatement of the action and the legal termination of the marriage by death.[69]

In sum, pursuant to the discretionary authority granted by section 17 of chapter 208, a probate court ordered Dorothy Edinburg to pay $35,000 to Joseph Edinburg's attorney during a protracted divorce proceeding. When Mr. Edinburg died during the course of the action, the court faced the issue of whether to compel payment of fees to the deceased's attorney even though the death abated the action which gave rise to the order of payment. The probate court ruled that the order survived Mr. Edinburg's death, reasoning that a contrary ruling would reward Mrs. Edinburg for her previous delay and contemptuous behavior. The Appeals Court upheld the decision, finding that the judge could order payment of fees directly to the attorney, and that the abatement of the action did not

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[65] G.L. c. 208 § 17.

[66] G.L. c. 208 § 38.

[67] *Id.*

[68] *See* Kelley v. Kelley, 374 Mass. 826, 827, 374 N.E.2d 580, 581 (1978) (judge has authority to order former spouse to pay other former spouse to enable retention of counsel to prosecute or defend complanant for violation of of divorce decree provision); Whitney v. Whitney, 325 Mass. 28, 33, 88 N.E.2d 647, 652 (1949) (judge may award costs and expenses to petitioner upon unsuccessful appeal by former spouse from order increasing alimony).

[69] *See Edinburg*, 22 Mass. App. Ct. at 197, 492 N.E.2d at 1162–63.

prevent the judge from enforcing the order under section 17. Further, the Appeals Court found that under the circumstances the probate judge properly maintained the payment order to prevent Dorothy Edinburg from unjustly profiting from her refusal to obey the order.

§ 4.7. The Effect of a Separation Agreement Absent an Absolute Divorce Decree.* Massachusetts judicial opinions have traditionally maintained that private separation agreements could not substitute for the probate court's duty to structure a divorce judgment.[1] The evolving case law in regard to separation agreements, however, indicates an increasing recognition by the judiciary of the parties' right to determine their own future after the break down of the marital relationship.[2] Under Massachusetts law a husband and wife contemplating divorce may enter into a separation agreement in order to settle their mutual rights and obligations.[3] Such an agreement may provide for division of marital property, interspousal support, child custody and other arrangements similar to those which a divorce decree might order.[4]

With increasing frequency, Massachusetts courts have enforced separation agreements which are fair, reasonable and free from fraud or coercion, as favorable to public policy.[5] Courts have held that a separation agreement will survive entry of a judgment nisi[6] if the parties so intend.[7] Furthermore, language in a divorce decree that the separation agreement shall not survive the decree does not operate to dissolve the agreement when the parties expressly provide that the agreement will remain intact regardless of the decree.[8] While a probate court has broad discretion to construct the divorce decree, the judge has no authority to

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§ 4.7. [1] Stansel v. Stansel, 385 Mass. 510, 512, 432 N.E.2d 691, 693 (1982); Ryan v. Ryan, 371 Mass. 430, 432, 358 N.E.2d 431, 432 (1976); Freeman v. Siever, 323 Mass. 652, 656–57, 84 N.E.2d 16, 19 (1949).

[2] *See* Chardak, Hobart, Miner, Leopold, *Domestic Relations*, 1983 ANN. SURV. MASS. LAW, § 16.1, at 481; Inker, Perocchi, Walsh, *Domestic Relations*, 1977 ANN. SURV. MASS. LAW, § 1.1, at 6.

[3] *See* Moore v. Moore, 389 Mass. 21, 24, 448 N.E.2d 1255, 1257 (1983); Schillander v. Schillander, 307 Mass. 96, 98, 29 N.E.2d 686, 687 (1940).

[4] *See generally* Freedman, *Marital Arrangements*, BOSTON BAR J. 5, 7 (September 1974).

[5] *See, e.g.*, *Moore*, 389 Mass. at 24, 448 N.E.2d at 1257; Surabian v. Surabian, 362 Mass. 342, 345, 285 N.E.2d 909, 911 (1972).

[6] In Massachusetts after a divorce hearing, a divorce judgment nisi is issued. The divorce decree becomes absolute only after a statutorily determined waiting period of ninety days. The final divorce decree is then entered. G. L. c. 208, § 21 (1987).

[7] *Surabian*, 362 Mass. at 345, 285 N.E.2d at 911; Hills v. Shearer, 355 Mass. 405, 408, 245 N.E.2d 253, 255 (1969); Fabrizio v. Fabrizio, 316 Mass. 343, 346, 55 N.E.2d 604, 605 (1944). *See also* Freedman, *supra* note 4, at 10.

[8] *Moore*, 389 Mass. at 21–22, 448 N.E.2d at 1256.

modify a fair and reasonable separation agreement merely on the basis that it cannot be reconciled with the divorce decree.[9] The resulting tension between judicial deference to private arrangements and judicial discretion to structure parties' obligations gives rise to frequent litigation when the divorce decree and the agreement are inconsistent.[10]

During the *Survey* year in *Pavluvcik v. Sullivan*[11] the Appeals Court addressed the issue whether a separation agreement made in contemplation of divorce and incorporated by the probate court in the divorce judgment[12] was contingent upon entry of the judgment nisi of divorce[13] or had full force and effect once executed by the parties.[14] Following the trend of Massachusetts courts to recognize the enforceability of reasonable and equitable separation agreements, the court held that the terms of the agreement were binding although one spouse had died before the entry of the judgment nisi.[15] This question arose in *Pavluvcik* where a surviving spouse contested his obligation to distribute marital property under a separation agreement.[16] The wife, in *Pavluvcik*, died before the divorce was finalized, but after the probate judge had declared the marriage irretrievably broken down and merged the separation agreement with the divorce decree.[17]

In *Pavluvcik*, the wife filed a complaint for divorce on July 16, 1982.[18] On March 31, 1983 the parties executed a written separation agreement providing for the division of marital property, alimony and child sup-

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[9] *Id.* at 23–24, 448 N.E.2d at 1257. It is important to note that with respect to child support, the probate court retains broad discretion to form its own provisions regardless of the parents' agreement. 2 J.F. LOMBARD, FAMILY LAW, § 1258 at 317 (1976). *See* Madden v. Madden, 359 Mass. 356, 363, 269 N.E.2d 89, 93, *cert. denied*, 404 U.S. 854 (1971); Buchanan v. Buchanan, 353 Mass. 351, 352, 231 N.E.2d 570, 571–72 (1967).

[10] For cases where the agreement is set up as a bar against a complaint for modification in the probate court, see *Stansel*, 385 Mass. at 515, 432 N.E.2d at 695 (interspousal support); *Surabian*, 362 Mass. at 348, 285 N.E.2d at 913 (alimony); *Schillander*, 307 Mass. at 98–99, 29 N.E.2d 686 (husband denied petition for modification of provisions in contract not incorporated in decree).

[11] 22 Mass. App. Ct. 581, 495 N.E.2d 869 (1986).

[12] *Id.* at 582, 495 N.E.2d at 871.

[13] At the time of the hearing, G.L. c. 208 § 1A required a six month waiting period for entry of a judgment nisi of divorce after judicial approval of the separation agreement. *Id.* at 582–83, 495 N.E.2d 871–72. A 1985 amendment to the statute, however, reduced the waiting period to thirty days. G. L. c. 208, § 1A (1987).

[14] *Pavluvcik*, 22 Mass. App. Ct. at 584, 495 N.E.2d at 872.

[15] *Id.* at 587, 495 N.E.2d at 874.

[16] *Id.* at 583 n.5, 495 N.E.2d at 872 n.5. While the separation agreement contained provisions requiring the husband to pay child support, medical and education expenses for one minor child, the court was called upon to decide only issues regarding the marital property and the husband's rights in the wife's estate. *Id.*

[17] *Id.* at 581–82, 495 N.E.2d at 871.

[18] *Id.* at 582, 495 N.E.2d at 871.

port.[19] On that same day, a probate judge, after conducting a hearing, found that the marriage had irretrievably broken down.[20] The judge then concluded that the agreement was fair and equitable,[21] ordered the parties to comply with the agreement and incorporated and merged it with the judgment divorce nisi to be entered October 3, 1983, absent further action by the parties.[22] Unexpectedly, the wife died on May 14, 1983, several months before the judgment was to be entered.[23] At that time, the husband and one of the three children filed a complaint seeking a declaration voiding the separation agreement and freeing the husband from any obligation to transfer any of the real or personal property covered by the agreement to the wife's estate.[24] Two other children of the marriage, one of whom was appointed administratrix, filed a complaint to have the separation agreement enforced.[25] After a hearing the probate judge found that although the wife had died the husband was bound by the terms of the agreement.[26]

On appeal the husband argued that a separation agreement, now merged into the divorce decree, is only effective if an absolute divorce is eventually granted.[27] Rejecting this argument, the Appeals Court, held that while the death of one spouse may abate divorce proceedings,[28] the death of one party does not necessarily terminate the effect of a sepa-

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[19] *Id.* Also included in the agreement were provisions for alimony (which were to be terminated at wife's death), child support, payment of education and medical expenses, maintenance of life insurance and division of the parties' personal property. *Id.* The agreement required that the husband transfer an automobile to the wife within one month of the date of agreement and that the marital home, owned by each party as tenants by the entirety, be sold within two years of the agreement. *Id.* The proceeds from the house sale were to be divided 56% to the wife and 44% to the husband. *Id.* The husband and wife waived any claim to each other's estate and released each other from any past or future obligations. *Id.*

[20] *Id.*

[21] *Id.*

[22] *Pavluvcik*, 22 Mass. App. Ct. at 582, 495 N.E.2d at 871–72. The separation agreement, by its terms, was to be incorporated and merged into the divorce judgment if granted. *Id.* at 582, 495 N.E.2d at 871.

[23] *Id.* at 583, 495 N.E.2d at 872.

[24] *Id.*

[25] *Id.* The probate judge consolidated the cross complaints. *Id.*

[26] *Id.*

[27] *Id.* at 583, 495 N.E.2d at 873. *See* Ross v. Ross, 385 Mass. 30, 35, 430 N.E.2d 815, 819 (1982) (notwithstanding the fact that a judgment nisi is a judgment of divorce, the couple is not divorced until the judgment becomes absolute). *See* G. L. c. 208, § 21 (1985).

[28] *Pavluvcik*, 22 Mass. App. Ct. at 583, 495 N.E.2d at 872. *See* Pine v. Pine, 323 Mass 524, 525, 83 N.E.2d 171, 171 (1948) (divorce did not become effective when operation of divorce decree had been suspended on libelee's motion on appeal); Diggs v. Diggs, 291 Mass. 399, 401–02, 196 N.E. 858, 860 (1935) (death of either party before entry of judgment nisi has become absolute ends divorce proceedings).

ration agreement.[29] The court further stated that while the husband did become sole record title owner of the marital real estate, he might still be bound by the obligation to sell the property and transfer the proceeds to the wife's estate, if the separation agreement is binding.[30] Noting that Massachusetts' public policy favors agreements where parties attempt to settle their own financial relationship,[31] the court stated that whether the separation agreement in this case was effective apart from the divorce decree required analysis of the entire agreement and its context to determine the parties' intent.[32]

The *Pavluvcik* court looked at the context in which the agreement was executed,[33] the actual language of the separation agreement,[34] and the conduct of the parties involved to examine the parties' intent.[35] The court determined that the separation agreement was a result of a marriage irretrievably broken down.[36] Furthermore, the court noted the parties had been living apart for over two years and there was no indication that the couple was going to reconcile their differences.[37] Given the context of a lengthy separation and the breakdown of a relationship, the court assumed that neither party would have wanted the other to inherit the bulk of the marital property in the event of the death of one spouse before the final divorce was entered.[38] Furthermore, the court noted that under this assumption both parties were equally exposed to the risk of untimely death.[39] The only suggestion that the obligations in the agreement where to be affected by death, the court observed, was in regard to the husband's alimony payments which were to be discontinued in the event of the wife's death.[40] Thus, absent any basis for assuming that the parties would abrogate the agreement, the court found no reason for supposing

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[29] *Pavluvcik*, 22 Mass. App. Ct. at 583–84, 495 N.E.2d at 872.

[30] *Id.* When the disposition of property, jointly held by spouses, is at issue, some courts reach the same result by holding that the property has been converted to a tenancy in common by the provision in the separation agreement that the property be sold. *Id.* at 587–88, 495 N.E.2d at 874. *See* Rucks v. Taylor, 282 Ark. 200, 667 S.W.2d 365 (1984); Wardlow v. Pozzi, 170 Cal. App. 2d 208, 338 P.2d 564 (1959); Snow v. Mathews, 190 So.2d 50 (Fla. Dist. Ct. App. 1966). *Contra* In Re Violi, 165 N.Y.2d 392, 482 N.E.2d 29, 492 N.Y.S.2d 550 (1985).

[31] *Pavluvcik*, 22 Mass. App. Ct. at 584, 495 N.E.2d at 873.

[32] *Id.* at 584, 495 N.E.2d at 872.

[33] *Id.* at 584–86, 495 N.E.2d at 873–74.

[34] *Id.* at 587, 495 N.E.2d at 874.

[35] *Id.* at 584–85, 495 N.E.2d at 873.

[36] *Id.* at 584, 495 N.E.2d at 873.

[37] *Id.* at 584–85, 495 N.E.2d at 873.

[38] *Id.* at 585, 495 N.E.2d at 873.

[39] *Id.*

[40] *Id.* at 582, 495 N.E.2d at 871.

that it was not a final arrangement of the parties' mutual rights toward each other.[41]

The court found, contrary to the husband's contention, that the actual language of the separation agreement did not rely on entry of the judgment nisi, even when the agreement had been merged with the probate court's divorce decree.[42] Because the judge crossed out the printed words stating that "by agreement of the parties the separation agreement may also remain an independent contract" on the form used to enter the order, the husband contended that the agreement had no independent significance.[43] In addition, because the agreement, itself, was silent as to whether it had independent effectiveness,[44] the court referred to past case law which indicated that unless otherwise stated, a separation agreement is usually held to survive a subsequent divorce judgment incorporating its provisions.[45] The court concluded, however, that it need not address this issue because the incorporation of the agreement into the divorce judgment merely operated to make the agreement binding on parties as part of the judicial decree.[46] Surviving as an independent agreement would affect only the means of its enforcement,[47] the court elaborated, as it could be enforced in a separate action.[48]

Lastly, the husband argued that language in two clauses of the agreement, that stated that the agreement would be incorporated into a divorce decree, indicated that the agreement was binding only upon obtaining an absolute judgment of divorce.[49] The court, however, rejected the husband's contention and found that these clauses merely reflected the parties' intention to have the final divorce decree make the terms of the private separation agreement judicially enforceable.[50] Thus, the court

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[41] *Id.* at 585, 495 N.E.2d at 873.

[42] *Id.* at 587, 495 N.E.2d at 874.

[43] *Id.* at 586, 495 N.E.2d at 873–74.

[44] *Id.* at 586, 495 N.E.2d at 874.

[45] *Id. See Moore*, 389 Mass. at 24–25, 448 N.E.2d at 1257 (held that language in a divorce decree that the separation shall not survive such decree does not dissolve the agreement when the parties expressly provide that the agreement shall survive); *Subarian*, 362 Mass. at 345–46 n.4, 285 N.E.2d at 911 n.4 (1972) (mere fact that the separation agreement was incorporated in divorce decree did not mean it was terminated upon entry of the decree). *See also* Chardak, Hobart, Miner, Leopold, *Domestic Relations*, 1983 ANN. SURV. MASS. LAW, § 16.1, at 481–88.

[46] *Pavluvcik*, 22 Mass. App. Ct. at 586, 495 N.E.2d at 874.

[47] *Id.*

[48] *Id.* at 586–87, 495 N.E.2d at 874.

[49] *Id.* at 587, 495 N.E. 2d at 874.

[50] *Id.*

The incorporation and merger of the agreement in a divorce judgment would have made its terms binding on the parties as part of the judgment. Only the method of

concluded, these clauses would not nullify the agreement if an absolute divorce judgment was not rendered.[51] The court noted that, in addition, the agreement specifically provided that its terms would be binding upon heirs, representatives and assigns of the parties.[52]

The court then looked to the parties' conduct during the period between the execution of the agreement and the entry of the judgment nisi of divorce.[53] The court found that the couple had partially performed their obligations under the separation agreement.[54] Specifically, the husband had complied with the agreement by transferring the automobile to the wife and presumably had made alimony and child support payments beginning May 1, 1983.[55] The court found these acts indicative of the parties' intent to have the terms of the agreement immediately binding.[56]

Absent any "countervailing equities,"[57] the court held there was no reason why the agreement could not be the final resolution of the parties' mutual rights.[58] The two situations which may give rise to countervailing equities, the court explained, are where one spouse is in danger of becoming a public charge because of the financial obligation to the other, and where there is an indication that the spouse, if alive, would have

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enforcing the terms of the agreement would have been affected by it also being an independent surviving agreement.

Id. at 586–87, 495 N.E.2d at 874.

[51] *Id.* at 586, 495 N.E.2d at 874. While some courts refuse to enforce a separation agreement after the death of one spouse where language in the agreement indicates that the terms were only effective if the divorce was granted, the *Pavluvcik* court found that language in the agreements at issue differed significantly from the separation agreement at issue. *Id. See* Bassett v. First Nat'l Bank & Trust Co., 189 Neb. 206, 210–11, 201 N.W.2d 848, 850 (1972) (the property settlement agreement specifically provided that it was contingent upon being approved and upon a divorce decree being entered); Garland v. Gilbert, 85 Ohio App. 410, 88 N.E.2d 243 (1949) (separation agreements provided that *when* and *if* a divorce decree is granted, the husband is required to pay the wife $3000.00 in satisfaction of all claims) (emphasis in original). *Compare* Daywalt v. Bertrand, 10 Or. App. 418, 500 P.2d 484 (1972) (where agreement was silent as to procedure if a spouse dies before a divorce decree is entered, the court held, death of one party had no effect on surviving spouses right to inherit).

[52] *Pavluvcik*, 22 Mass. App. Ct. at 582, 495 N.E.2d at 871. While the *Pavluvcik* court does not comment on the binding clause in the agreement, other jurisdictions have specifically found that such a clause, providing that the agreement is enforceable as to heirs, beneficiaries and representatives, is determinative of the parties intention to have the agreement extend beyond either party's death. *See, e.g.*, Roberts v. Roberts, 381 So.2d 1333, 1335 (Miss. 1980); Shutt v. Butner, 62 N.C. App. 701, 705, 303 S.E.2d 399, 401 (1983).

[53] *Pavluvcik*, 22 Mass. App. Ct. at 586, 495 N.E.2d at 885.

[54] *Id.*

[55] *Id.* at 582–83, 495 N.E.2d at 872.

[56] *Id.* at 585, 495 N.E.2d at 873.

[57] *See* Knox v. Remick, 371 Mass. 433, 436–37, 358 N.E.2d 432, 435.

[58] *Pavluvcik*, 22 Mass. App. Ct. at 585, 495 N.E.2d at 873.

failed to fulfill his or her part of the agreement.[59] While the court recognized the probate court's discretion to find other equities as grounds for denying enforcement of the agreement, it found no injustices to prevent enforcement of the agreement.[60] Thus, the court concluded that the parties' right to arrange their own financial settlement in a fair and reasonable agreement was not contingent on a divorce decree.[61]

The *Pavluvcik* decision is indicative of the deference Massachusetts courts now will give to separation agreements. But for the separation agreement the wife's estate would not have benefited from any marital property, because, as the court noted, death abates any pending divorce proceedings. Although the agreement had been merged into the probate court's divorce decree and the judgment nisi had not been entered, the *Pavluvcik* court, nonetheless, found the agreement binding after it assessed the parties' intent. This decision makes clear that in the absence of an express intention that the agreement's effectiveness be contingent upon the entry of a judgment absolute, the agreement likely will be enforceable on its own. Unlike other jurisdictions, the *Pavluvcik* court did not describe the agreement between the parties in contract terms.[62] The decision, however, is consistent with recent Massachusetts court decisions attributed to separation agreements.[63] From the *Pavluvcik* decision it appears that a separation agreement, like a contract,[64] is not terminable on death if performance is still possible.[65] The trend is to exact strict compliance by the parties to the terms of the separation agreement, regardless of unexpected circumstances which may arise. A separation agreement should, thus, provide for both expected and unexpected contingencies. After *Pavluvcik*, separation agreements should include the parties' specific intent in the event an absolute divorce decree is not obtained.

The Appeals Court's opinion is consistent with the Supreme Judicial Court's recent view that a fair and reasonable separation agreement is a final settlement of the parties' affairs.[66] The *Pavluvcik* decision held that a separation agreement merged with a judgment of divorce was enforceable even without actually obtaining an absolute divorce, if this would achieve more closely the parties' intent. Similarly, recent Supreme Ju-

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[59] *Id.* (*citing* Randall v. Randall, 17 Mass. App. Ct. 24, 29, 455 N.E.2d 995, 999 (1983)).

[60] *Pavluvcik*, 22 Mass. App. Ct. at 584, 495 N.E.2d at 873.

[61] *Id.* at 587–88, 495 N.E.2d at 874–5.

[62] *See, e.g.*, Bruce v. Dyer, 67 Md. App. 499, 508 A.2d 510, 514 (1985); Shutt v. Butner, 62 N.C. App. 701, 303 S.E.2d 399, 401 (1983).

[63] *Moore*, 389 Mass. 21, 448 N.E.2d 686 (judge cannot modify a valid separation agreement on the ground that it is inconsistent with the decree).

[64] 17A C.J.S. *Contracts* § 465 (1987).

[65] *Pavluvcik*, 22 Mass. App. Ct. at 587, 495 N.E.2d at 874.

[66] *See infra* note 67.

dicial Court decisions have held that a divorce decree does not necessarily interfere with the survival of a separation agreement and therefore such an agreement exacts strict compliance from the parties.[67] The *Pavluvcik* decision thus reinforces the independent enforceablility of a separation agreement regardless of later judicial adjudication regarding the parties' marital status.

Pavluvcik exemplifies the recent tendency of Massachusetts courts to favor private separation agreements at the expense of the deference traditionally awarded the probate courts to structure divorce arrangements. In turn, the parties' intent at the time the separation agreement is executed will likely control any subsequent events or contingencies. The probate court should recognize that in most cases, especially when child support is not at issue, the separation agreement is independent from the divorce decree.

§ 4.8. Cohabitation after Divorce: Not Enough to Terminate Alimony where Cohabitation Provision is Merged in the Judgment.* Most states, including Massachusetts, allow modification of an alimony award based on a change in the recipient or supporting spouse's circumstances after divorce.[1] The recipient spouse's cohabitation after divorce is one change in circumstances that the courts in some states find sufficient to modify or terminate alimony.[2] Several states have statutes that specifically terminate alimony merely upon post-divorce cohabitation.[3] A significant number of states, however, will allow judges to modify alimony only if there is a change in the economic circumstances of the recipient spouse.[4] One state stresses the economic circumstances of the recipient spouse to such an extent that even subsequent remarriage will not terminate

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[67] *Moore*, 389 Mass. at 24, 448 N.E.2d at 1257; *Randall*, 17 Mass. App. Ct. at 29, 455 N.E.2d at 999. *See* Chardak, Hobart, Miner, Leopold, *Domestic Relations*, 1983 ANN. SURV. MASS. LAW, § 16.1, at 487.

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§ 4.8. [1] *See generally* Basset, *Changing Circumstances, Changing Agreements*, 8 FAM. ADVOC. Winter 1986, at 29 (provides a comprehensive list of state statutes authorizing modification to existing alimony awards). *See also* G.L. c. 208, § 37 (Massachusetts statute allowing alimony modification).

[2] *See, e.g.*, Sims v. Sims, 245 Ga. 680, 682, 266 S.E.2d 493, 495 (1980) (cohabitation alone enough to terminate alimony); *In re* Support of Halford, 70 Ill. App. 3d 609, 612–13, 388 N.E.2d 1131, 1134 (1979) (same). *See generally* Annotation, *Divorced Woman's Subsequent Sexual Relations or Misconduct as Warranting, Alone or With Other Circumstances, Modification of Alimony Decree*, 98 A.L.R.3d 453 (1980).

[3] *See, e.g.*, ALA. CODE § 30-2-55 (1983); GA. CODE ANN. § 19-6-19(b) (1982); ILL. REV. STAT. ch. 40, para. 510(b) (1980); UTAH CODE ANN. § 30-3-5(6) (1986). *See generally* Note, *The Effect of Third Party Cohabitation on Alimony Payments*, 15 TULSA L.J. 772, 780–85 (1980) (discusses legislative response to post-divorce cohabitation).

[4] *See infra* note 15 and accompanying text.

alimony automatically.[5] Thus, states differ in their determination of whether the recipient spouse's mere cohabitation is sufficient to alter or terminate alimony.

In Massachusetts, the power to grant alimony is wholly conferred by statute.[6] The relevant statute which empowers a probate court judge to award alimony is chapter 208, section 34 first enacted in 1974.[7] While section 34 provides a judge with broad discretion for making alimony awards,[8] Massachusetts public policy encourages parties to execute enforceable separation agreements that reflect the parties' intent toward alimony and other support and maintenance payments.[9] In fact, in order to sue for divorce under chapter 208, section 1A, the six-month no-fault divorce provision, a separation agreement must be submitted to the court.[10] Often, the parties to a divorce set forth in the separation agreement that alimony payments will terminate upon the recipient spouse's cohabitation.[11] Generally, a court's determination of whether or not to

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[5] *In re* Marriage of Schober, 379 N.W.2d 46, 47 (Iowa Ct. App. 1985) (construing Iowa rule).

[6] G.L. c. 208, § 34 (1984). *See* Orlandella v. Orlandella, 370 Mass. 225, 227, 347 N.E.2d 665, 666 (1976); Parker v. Parker, 211 Mass. 139, 141, 97 N.E. 988, 989 (1912).

[7] G.L. c. 208, § 34 (1984). Section 34 specifies that alimony may be granted to either spouse. *Id.* Earlier law allowed courts to decree alimony to wives, but only a part of the wife's estate could be granted to the husband "in the nature of alimony." *See* Topor v. Topor, 287 Mass. 473, 474, 192 N.E. 52, 52 (1934) (interpreting G.L. (Ter. Ed.) c. 208, § 34). Prior to 1974, the alimony statute considered only "the necessities of the recipient and the pecuniary resources of the giver of property in the nature of alimony, the condition in life of the parties, their mode of living and their conduct . . . ." *Id.* at 475, 192 N.E. at 53. Section 34 now requires the court to consider the following in determining the amount of alimony:

> 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.

G.L. c. 208, § 34.

A probate judge is also empowered to modify an alimony award upon petition of one of the parties. G.L. c. 208, § 37. The award may be modified to include anything that could have been ordered in the original action. *Id.*

[8] Bianco v. Bianco, 371 Mass. 420, 423, 358 N.E.2d 243, 245 (1976).

[9] Moore v. Moore, 389 Mass. 21, 24, 448 N.E.2d 1255, 1257 (1983).

[10] G.L. c. 208, § 1A ("An action for divorce on the ground of an irretrievable breakdown of the marriage may be commenced with the filing of: . . . (c) a notarized separation agreement.")

[11] *See, e.g., Gottsegen v. Gottsegen*, 397 Mass. 617, 619–20, 492 N.E.2d 1133, 1135 (1986).

uphold such a clause turns on whether the judgment for divorce incorporates or merges the parties' agreement.[12]

In general, if a separation agreement contains a clause which terminates alimony upon mere cohabitation, without change in financial circumstances, and this agreement survives as a contract independent of the judgment of divorce, courts are likely to uphold the agreement as it reflects the intent of the parties.[13] If a separation agreement is merged, and thus does not survive the judgment of divorce, then the situation is different. In such a case, enforcement of the terms of the agreement is left to the discretion of the court.[14] Many courts, however, find it beyond a judge's discretion to alter alimony based solely upon cohabitation after divorce because in their view, a party's financial circumstances after divorce, and not his or her conduct, should affect the alimony award.[15]

Prior to the *Survey* year, the leading case in Massachusetts on the enforceability of cohabitation clauses in separation agreements was the

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[12] *See id.* at 624 n.8, 492 N.E.2d at 1138 n.8. This chapter deals primarily with no-fault divorces sought under G.L. c. 208, § 1A (1984). Under section 1A, parties must submit a separation agreement that will be either simply incorporated or incorporated and merged in the divorce decree. G.L. c. 208, § 1A. An incorporated separation agreement has the full force and effect of a court order. *Id.* If the agreement is incorporated and merged into the decree it no longer survives as an independent agreement. *See* J. LOMBARD, FAMILY LAW, 2 MASS. PRACTICE SERIES § 1263, at 338 (1967). Because the agreement is no longer separate from the court order, it can be enforced only by the contempt power of the probate judge. *Gottsegen*, 397 Mass. at 624 n.8, 492 N.E.2d at 1138 n.8. Section 1A also provides that the separation agreement can be incorporated and still survive as an independent contract if the parties choose this option. G.L. c. 208, § 1A. If the agreement is incorporated but not merged, the separation agreement would be enforceable in a contract action. *See* LOMBARD, *supra*, § 1252, at 73. Whether a separation agreement is incorporated, or both incorporated and merged, the probate judge under section 1A has the power to modify the agreement upon petition of one of the parties if there has been a substantial change in circumstances. G.L. c. 208, § 1A. *See generally* LOMBARD, *supra*, §§ 1251–75 (discussion of the effects of incorporation and/or merger on the enforceability of separation agreements).

If a divorce is not filed under section 1A, so that incorporation of a separation agreement is not required, it is possible for the parties to execute an independent separation agreement enforceable under the principles of contract law. *See id.* § 1263, at 340. The judge, however, may ignore this non-incorporated agreement and make his own alimony award. *Id.* § 1263, at 336–37.

[13] *See, e.g.*, Bell v. Bell, 393 Mass. 20, 23–24, 468 N.E.2d 859, 861 (1984), *cert. denied*, 470 U.S. 1027 (1985); Bisig v. Bisig, 124 N.H. 372, 376, 469 A.2d 1348, 1350 (1983) (dictum).

[14] *Gottsegen*, 397 Mass. at 624 n.8, 492 N.E.2d at 1138 n.8. *See also* LOMBARD, *supra* note 12, § 1263, at 338.

[15] *E.g.*, *In re* Marriage of Schober, 379 N.W.2d at 47; Mitchell v. Mitchell, 418 A.2d 1140, 1143 (Me. 1980); Petish v. Petish, 144 Mich. App. 319, 322, 375 N.W.2d 432, 434 (1985); *Bisig*, 124 N.H. at 376, 469 A.2d at 1350; Gayet v. Gayet, 92 N.J. 149, 154, 456 A.2d 102, 104 (1983); Overson v. Overson, 125 Wis. 2d 13, 17–18, 370 N.W.2d 796, 798 (Ct. App. 1985).

1984 Supreme Judicial Court decision of *Bell v. Bell*.[16] In *Bell*, a cohabitation clause terminated the recipient spouse's alimony independent of a change in financial circumstances.[17] The Appeals Court had determined that the Bells' cohabitation clause could not be interpreted to mean termination upon mere cohabitation.[18] Rather, the Appeals Court maintained that the clause was designed to terminate alimony if the wife received "significant actual support" from the man with whom she cohabited.[19] Because Mrs. Bell was not receiving significant actual support from the man with whom she cohabited, the Appeals Court determined that her alimony should not be terminated.[20]

The Supreme Judicial Court reversed the *Bell* appellate decision.[21] In its decision, the *Bell* Court concluded that the Appeals Court misread the language of the Bells' agreement.[22] Because the language of the Bells' agreement did not mention specifically that the wife must receive significant outside support from her cohabitant before alimony ceased, the Court allowed the termination of alimony.[23] The Court concluded that termination of alimony was appropriate because this result was the clear intent of the parties as manifested by the language of the separation agreement.[24]

During the *Survey* year, in *Gottsegen v. Gottsegen*,[25] the Supreme Judicial Court again examined the enforceability of a separation agreement that terminates alimony merely upon the recipient spouse's post-divorce cohabitation. The Court held that where a challenged separation agreement clause has been merged with the judgment of divorce, a probate judge may not order the termination of alimony based solely upon the conduct of the recipient spouse.[26] The Court stressed that the purpose of alimony is to provide economic support for the recipient spouse.[27] Thus, the Court concluded that cohabitation may not operate to terminate alimony if the cohabitation is unrelated to the recipient spouse's need for alimony or the supporting spouse's ability to pay.[28]

In *Gottsegen*, Mrs. Gottsegen sued for divorce in 1980 on the grounds

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[16] 393 Mass. 20, 468 N.E.2d 859 (1984), *cert. denied*, 470 U.S. 1027 (1985).
[17] *Id.* at 21, 468 N.E.2d at 860.
[18] Bell v. Bell, 16 Mass. App. Ct. 188, 194, 459 N.E.2d 109, 112 (1983).
[19] *Id.*
[20] *Id.* at 195, 459 N.E.2d at 113.
[21] *Bell*, 393 Mass. at 20, 468 N.E.2d at 860.
[22] *See id.* at 23, 468 N.E.2d at 861.
[23] *Id.*
[24] *Id.*
[25] 397 Mass. 617, 492 N.E.2d 1133 (1986).
[26] *Id.* at 618, 625, 492 N.E.2d at 1134, 1138–39.
[27] *Id.* at 623–24, 492 N.E.2d at 1137–38.
[28] *See id.* at 625, 492 N.E.2d at 1138–39.

of irretrievable breakdown of the marriage pursuant to chapter 208, section 1A.[29] Before the divorce, the parties executed a separation agreement, as required by section 1A,[30] that they agreed to incorporate into the divorce decree.[31] Further, the parties agreed that the provisions in Article III[32] of the agreement concerning Mrs. Gottsegen's "financial arrangements" would be merged in the judgment although the remaining provisions of the agreement would stand as an independent contract.[33] As the parties intended, the separation agreement was incorporated and Article III was merged in the judgment of divorce nisi on August 3, 1981.[34]

Article III made provisions for the payment of alimony to Mrs. Gottsegen. Article III provided that Mr. Gottsegen would pay Mrs. Gottsegen $812.50 per month for her support and maintenance as long as she did not remarry within five years of the execution date of the agreement.[35] If she remarried, Mr. Gottsegen's support payments would terminate and be substituted by an obligation to pay $30,000 to his former wife in monthly installments of $833.33 over three years.[36] Article III, however, defined remarriage of the wife to include "cohabitation with the same unrelated man with whom the wife has a romantic relationship for more than two (2) consecutive months."[37]

In 1983, Mr. Gottsegen terminated his support payments and commenced paying installments on the $30,000 obligation after confirming that his former wife was cohabiting with a man with whom she was involved romantically.[38] Mrs. Gottsegen responded to the altered alimony payments by filing a complaint for civil contempt of the divorce judgment.[39] Mr. Gottsegen counterclaimed that his former wife had caused the termination of alimony payments by remarrying, as defined by the

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[29] *Id.* at 618, 492 N.E.2d at 1134. It is relevant that Mrs. Gottsegen filed for divorce under section 1A. Under section 1A, the parties must submit a separation agreement for court approval. G.L. c. 208, § 1A. If the court does not approve the agreement, it is null and void between the parties. *Id.* In general, filing under section 1A is desirable because a divorce nisi can be obtained in six months. *Id.* Under other divorce statutes, it takes at least one year to obtain a divorce. *See, e.g.*, G.L. c. 208, § 1B (1984).

[30] G.L. c. 208, § 1A.

[31] *Gottsegen*, 397 Mass. at 619, 492 N.E.2d at 1135.

[32] Article III of the separation agreement was titled: "Financial Arrangements Relating to Wife." *Id.* (quoting Art. III of Gottsegen separation agreement).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 620, 492 N.E.2d at 1135.

[38] *Id.*

[39] *Id.*

terms of the separation agreement, within five years of the date of execution of the agreement.[40]

The probate judge determined that Mrs. Gottsegen had engaged in a romantic relationship and that she had cohabited with a man for more than two consecutive months;[41] the judge concluded, therefore, that her alimony should terminate according to the terms of Article III of the separation agreement.[42] The judge reached this conclusion even though he made detailed findings of fact that Mrs. Gottsegen had a continuing financial need for alimony.[43] Accordingly, the probate judge concluded that Mr. Gottsegen was not in contempt and that the remarriage clause — terminating Mrs. Gottsegen's alimony upon two month's cohabitation — should be given effect.[44] Mrs. Gottsegen appealed this decision.[45]

The Supreme Judicial Court transferred the appeal of the probate court's decision on its own initiative.[46] The *Gottsegen* Court held that a probate court may not order the termination of alimony absent a change in the economic circumstances of either of the parties.[47] The majority in *Gottsegen* concluded that where the challenged provision in a separation agreement no longer stands on its own because it has been merged with the divorce decree, a judge does not have the discretion to order the termination of support payments based solely upon the recipient spouse's cohabitation.[48] Consequently, the Court vacated and remanded the probate court's ruling on civil contempt.[49] The Court found that the judge did not have the discretion to allow Mr. Gottsegen to terminate alimony

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[40] *Id.*

[41] *Id.* at 620–21, 492 N.E.2d at 1135–36. The parties stipulated that Mrs. Gottsegen had a romantic relationship with one L.W. *Id.* at 620, 492 N.E.2d at 1135.

[42] *Id.* at 620–21, 492 N.E.2d at 1136.

[43] *Id.* at 620, 492 N.E.2d at 1136. The probate judge's findings included:

> 40. [L.W.] and Mrs. Gottsegen have never represented to be man and wife, even on over night trips. 41. Mrs. Gottsegen receives no financial support from Mr. [L.W.] except [that] he pays for about 85% of the cost of eating out. Mrs. Gottsegen provided no financial support to [L.W.] 42. Mrs. Gottsegen and [L.W.] have no joint assets of any kind. 43. Mrs. Gottsegen and [L.W.] maintain separate residences. 44. There is a continuing need for alimony for Mrs. Gottsegen.

Id.

[44] *Id.* at 620–21, 492 N.E.2d at 1136. In addition to her civil contempt claim, Mrs. Gottsegen also moved for relief from the judgment of divorce under MASS. R. DOM. REL. P. 60 (b) (1975). *Id.* at 618, 492 N.E.2d at 1135. This motion was dismissed as untimely. *Id.* at 628, 492 N.E.2d at 1140.

[45] *Id.* at 618–19, 492 N.E.2d at 1135.

[46] *Id.* at 619, 492 N.E.2d at 1135.

[47] *Id.* at 618, 492 N.E.2d at 1134.

[48] *Id.* at 625, 492 N.E.2d at 1139.

[49] *Id.* at 619, 492 N.E.2d at 1135.

because the findings of fact clearly indicated that Mrs. Gottsegen's financial circumstances had not materially changed.[50]

The Court reached this result by examining its powers to grant alimony.[51] The historical purpose of alimony, the Court explained, was to provide economic support for wives who traditionally were dependent on their husbands.[52] The Court noted that although the decision to award alimony is generally within the discretion of the judge,[53] the judge's discretion must conform to the provisions of chapter 208, section 34.[54] The Court explained that the fundamental purpose of alimony under section 34 is consistent with the historical analysis; economic support of the recipient spouse is still the essential element.[55] Given the statutory purpose, and the limits in section 34 on a judge's discretion to award alimony, the Court mandated that "the Probate Court may not in the original divorce judgment order alimony to be terminated on mere cohabitation."[56] The Court concluded that the probate judge has no authority to allow a divorced spouse to exercise control over a former spouse's life by terminating alimony for moral, rather than economic, reasons.[57] The *Gottsegen* Court thus overturned the probate court because it had ordered Mrs. Gottsegen's alimony terminated solely because she was cohabiting after the divorce.[58]

The majority opinion in *Gottsegen*, and the even more emphatic concurrence of Chief Justice Hennessey, stated that the decision in *Gottsegen* did not overrule the Court's decision in *Bell*.[59] *Bell* is distinguishable, the Court explained, because the disputed cohabitation clause in *Bell* existed as an independent clause in a contract after the judgment of divorce.[60] Because the *Bell* clause existed independently, the Court stated

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[50] *Id.* at 626, 492 N.E.2d at 1139.

[51] *Id.* at 621–24, 492 N.E.2d at 1136–38.

[52] *Id.* at 622, 492 N.E.2d at 1137.

[53] *See id.* at 623, 492 N.E.2d at 1137.

[54] *Id.*

[55] *Id.* at 623–24, 492 N.E.2d at 1137.

[56] *Id.* at 625, 492 N.E.2d at 1138. The Court noted that a party's conduct *after* divorce is not relevant in examining an alimony award. *Id.* at 625 n.10, 492 N.E.2d at 1139 n.10. *See infra* notes 76–86 for discussion of whether this statement coupled with a footnote to the statement precludes future separation agreements from containing mere cohabitation clauses.

[57] *See Gottsegen*, 397 Mass at 624–25, 492 N.E.2d at 1138.

[58] *See id.* at 626, 492 N.E.2d at 1139.

[59] *See id.* at 624 n.8, 492 N.E.2d at 1138 n.8 (majority); *id.* at 629, 492 N.E.2d at 1141 (Hennessey, C.J., concurring) ("I wish to emphasize that this case does not overrule the principles of *Bell v. Bell* . . . .").

[60] *Id.* at 624 n.8, 492 N.E.2d at 1138 n.8.; *see also id.* at 629, 492 N.E.2d at 1141 (Hennessey, C.J., concurring).

that it was enforceable according to the intent of the parties.[61] In *Gottsegen*, however, the fact that the cohabitation clause was merged, left enforcement to the discretion of the judge;[62] the intent of the parties was no longer important.[63] The Court concluded that it was beyond the scope of the judge's discretion to alter alimony based on the moral conduct of the parties after divorce.[64] Accordingly, a judge may not alter alimony based on a merged mere cohabitation clause even if the initial agreement reflected this intention.[65]

The altered financial circumstances analysis by which the Court reached its conclusion was accepted in principle by the dissent of Justice Nolan.[66] He maintained, however, that this analysis was not appropriate to this case.[67] Even though he accepted that a *judge* may not terminate alimony based on post-divorce moral conduct, Justice Nolan explained that the *parties*, through a separation agreement, can agree to terminate alimony upon mere post-divorce cohabitation.[68] Justice Nolan stated that the decision in *Gottsegen* contradicts the Court's holding in *Bell* because the majority ignored the intent of the parties.[69] Because *Gottsegen* and *Bell* are so similar, he maintained, distinguishing the cases based on the merger or non-merger of the cohabitation clause elevates form over substance.[70] By ignoring the intent of the parties, Justice Nolan stated that *Gottsegen* "has irredeemingly overruled *Bell* without forthrightly admitting it."[71]

The effect of *Gottsegen* on existing divorce settlements in the Commonwealth rests on whether or not the cohabitation clause involved is merged with the judgment of divorce.[72] If the parties in a divorce have merged the disputed clause, it is unlikely that a probate judge will now enforce the clause absent a change in financial circumstances of the recipient spouse.[73] A court likely will reach this result even though the

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[61] *Id.* at 624 n.8, 492 N.E.2d at 1138 n.8.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 624–25, 492 N.E.2d at 1138–39.

[65] *Id.* at 624 n.8, 492 N.E.2d at 1138 n.8.

[66] *Id.* at 630, 492 N.E.2d 1141 (Nolan, J., dissenting).

[67] *Id.*

[68] *See id.*

[69] *Id.* at 631, 492 N.E.2d at 1142 (Nolan, J., dissenting).

[70] *Id.* at 630, 492 N.E.2d at 1141 (Nolan, J., dissenting). It is interesting to note that the majority Justices in the *Gottsegen* decision (Justices Abrams, Wilkins, Liacos) each dissented in *Bell*. Likewise, the dissenter in *Gottsegen*, Justice Nolan, was part of the majority in *Bell*.

[71] *Id.*

[72] *See supra* notes 60–63 and accompanying text.

[73] *Gottsegen*, 397 Mass. at 624, 492 N.E.2d at 1138.

parties originally intended for the provision to be enforced.[74] If an existing cohabitation clause remains an independent contract, because the parties chose not to merge the clause with the divorce decree, *Gottsegen*, by explicitly upholding *Bell*, suggests that a court will uphold a cohabitation clause.[75]

The practical effect of *Gottsegen* on a separation agreement made after this decision is less certain. Obviously, parties who intend mere cohabitation to terminate alimony will refuse to merge a cohabitation provision with the judgment in the hope that *Bell* will apply to their agreement.[76] The Court suggests in a footnote, however, that probate judges may ignore the intent of the parties by not allowing incorporation of separation agreements into divorce decrees if the agreement contains a mere cohabitation clause.[77] The Court stated that the probate court should not accept clauses like the one in *Gottsegen* because approval of the resulting order would be beyond the judge's discretion.[78] The Court noted that the probate court may allow the parties to renegotiate or may incorporate some or all of the allowable portion of the agreement.[79] It is unclear whether the Court intends, with this footnote, to render all future mere cohabitation clauses invalid, thus implicitly overruling *Bell*, or whether it refers only to future clauses that will not survive the judgment of divorce.

Under the provisions of chapter 208, section 1A, the parties must

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[74] *Id.* at 624 n.8, 492 N.E.2d at 1138 n.8.

[75] *Id.*

[76] *See id.*

[77] *Id.* at 625 n.9, 492 N.E.2d at 1138 n.9. The sentence that introduces this footnote reads: "Thus, the Probate Court may not in the original divorce judgment order alimony to be terminated on mere cohabitation." *Id.* at 625, 492 N.E.2d at 1138. The footnote states:

> If the parties submit such a clause to the court for incorporation in the judgment, as was done in this case, the court should inform the parties that such an order is beyond the scope of its discretion. The court may then allow the parties an opportunity to renegotiate a proposed order to present to the court, or may incorporate in the judgment some or all of the allowable portion of the agreement. Nothing in today's decision, however, disturbs our holding in *Moore v. Moore*, that the Probate Court may not order that a separation agreement shall not survive when the parties clearly intended that it should.

397 Mass at 625 n.9, 492 N.E.2d at 1138 n.9 (citations omitted). *Moore v. Moore* stands for the proposition that a probate judge may modify a decree, or refuse to incorporate the separation agreement into the decree, but it may not modify the agreement by saying that it shall not survive the decree when the parties clearly intend for the agreement to survive independently. *Moore*, 389 Mass. 21, 24, 448 N.E.2d 1255, 1257. *See also* Leopold, *Divorce Decrees–Survival of Separation Agreements*, 1983 ANN. SURV. MASS. LAW, § 16.1, at 481–88.

[78] *Gottsegen*, 397 Mass. at 625 n.9, 492 N.E.2d at 1138 n.9.

[79] *Id.* The relevant language is set out in note 72 above. This language is consistent with the discretionary authority of the probate court. *See* G.L. c. 208, § 1A.

submit a separation agreement for incorporation to the probate judge.[80] Before a separation agreement is incorporated, it must be approved by the judge.[81] Before a judge approves a separation agreement, he or she must find the terms "fair" and "reasonable" in accordance with the Supreme Judicial Court's 1976 decision of *Knox v. Remick*.[82] Combining the *Knox* message with the clear message from *Gottsegen*, that the supporting spouse cannot regulate the private life of his or her spouse after divorce,[83] a probate judge may find cohabitation clauses unfair and unreasonable. Therefore, the judge may refuse to incorporate an anti-cohabitation clause into a divorce decree whether or not the clause will stand independently after divorce.[84] Because a probate judge can interpret the language in *Gottsegen* as disallowing any incorporation of cohabitation clauses, the Court arguably has overruled *Bell*.

Thus, while *Gottsegen* explicitly does not overrule *Bell*, implicitly *Gottsegen* seems to give a judge the discretion to disregard the intent of the parties and refuse to incorporate a separation agreement with a mere cohabitation clause into a decree.[85] Because section 1A requires the parties to submit a separation agreement to the judge, *Gottsegen* may effectively foreclose this divorce statute to parties who want a cohabitation clause in a separation agreement.[86] Therefore, parties may be

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[80] G.L. c. 208, § 1A. *See also supra* note 10 and 12.

[81] G.L. c. 208, § 1A.

[82] 371 Mass. 433, 436–37, 358 N.E.2d 432, 435–36 (1976). The *Knox* Court explains:

> If a judge rules, either at the time of the entry of a judgment nisi of divorce or at any subsequent time, that the agreement was not the product of fraud or coercion, that it was fair and reasonable at the time of entry of the judgment nisi, and that 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. This has been the result indicated by this court, [Supreme Judicial Court], numerous times in the past.

Id.

[83] *Gottsegen*, 397 Mass. at 624, 492 N.E.2d at 1138.

[84] The *Bell* appellate decision, *see supra* text accompanying notes 18–20, indicates that at least some courts in the Commonwealth are willing to ignore the plain language of a separation agreement and refuse to uphold a mere cohabitation clause. *See Bell*, 16 Mass. App. Ct. at 194, 459 N.E.2d at 112. The *Bell* appellate court found that only cohabitation accompanied with a financial change could trigger the clause even though the clause did not say this. *Id.* Even though this opinion was reversed by the Supreme Judicial Court, it was only done so over three strong dissents (the *Gottsegen* majority). *Bell*, 393 Mass. at 24–27, 468 N.E.2d at 862–63 (Wilkins, J., Liacos, J., Abrams, J., dissenting). The Appeals Court's predilection for equitable enforcement of the cohabitation clauses may resurface given the Court's decision in *Gottsegen*.

[85] *See Gottsegen*, 397 Mass. at 625 n.99, 492 N.E.2d at 1138 n.9.

[86] *See supra* note 12. If the judge under section 1A finds a provision in a separation agreement unfair or unreasonable, the judge may refuse to incorporate the agreement unless the parties modify the challenged portion. G.L. c. 208, § 1A. If the parties do not change the agreement, the divorce action will be dismissed. *Id.*

forced to balance the benefits of obtaining a quick divorce with the burden of not including a cohabitation clause in the separation agreement.

In summary, the Supreme Judicial Court, in *Gottsegen v. Gottsegen*, held that in cases where a separation agreement clause that terminates alimony upon the recipient spouse's cohabitation is merged into the judgment of divorce, it is beyond the discretion of the probate court to enforce such a provision. The *Gottsegen* Court maintains that this decision upholds its decision in *Bell* because *Gottsegen* does not apply if the disputed clause is not merged with the decree. The practical effect of *Gottsegen* is that mere cohabitation clauses that are currently merged with a judgment of divorce are no longer enforceable absent a change in financial circumstances accompanying the cohabitation. If the clause is simply incorporated into the judgment so that it has survived the judgment, the clause will most likely be upheld. The language in *Gottsegen*, however, is sufficiently ambiguous to permit a probate judge to reasonably interpret *Gottsegen* to give him or her the discretion to reject altogether the incorporation of cohabitation clauses that terminate alimony without a change in financial circumstances. Thus, *Gottsegen* may signal that a change in Massachusetts probate law is coming in which cohabitation after divorce without a corresponding change in financial circumstances is no longer a valid reason to terminate alimony even if the parties intend termination.