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Chapter 16: Domestic Relations

Sharon R. Chardak

Geoffrey E. Hobart

Tracy A. Miner

Madelyn Leopold

CHAPTER 16

Domestic Relations

SURVEY *Staff*†

§ 16.1. Divorce Decrees — Survival of Separation Agreements.* Under Massachusetts law a husband and wife may, prior to their divorce, enter into a separation agreement that settles their rights and obligations, including obligations to provide interspousal support.[1] Such an agreement will survive entry of the judgment nisi of divorce if the parties so intend.[2] When an agreement survives, its terms cannot be altered by the probate court.[3] With respect to interspousal support, the terms of the agreement should be specifically enforced if the probate court finds, at the time of entry of the judgment nisi, that the agreement was fair, reasonable, and free from fraud or coercion when entered into.[4]

These principles indicate an attitude of judicial deference to the parties' resolution of their differences as contained in the separation agreement.[5] Such deference, however, has appeared in the case law only recently.[6] Massachusetts court opinions have traditionally reinforced the general principle that the parties cannot by their agreement deprive the probate court of the power to modify its own judgment.[7] With regard to child support, the probate court's discretion had been held to extend even

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† Sharon R. Chardak, Geoffrey E. Hobart, Tracy A. Miner, Madelyn Leopold.

* Madelyn Leopold, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 16.1. [1] 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] Surabian v. Surabian, 362 Mass. 342, 345, 285 N.E.2d 909, 911 (1972); 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).

[3] Freeman v. Sieve, 323 Mass. 652, 656-57, 84 N.E.2d 16, 19 (1949). *See generally* Freedman, *Marital Agreements*, 18 BOSTON BAR J. 5, 11 (September 1974).

[4] *See* Stansel v. Stansel, 385 Mass. 510, 514, 432 N.E.2d 691, 694 (1982); Knox v. Remick, 371 Mass. 433, 436-37, 358 N.E.2d 432, 435 (1976). Under G.L. c. 215, § 6, as appearing in St. 1973, c.114, § 63, the probate court has jurisdiction to specifically enforce the separation agreement.

[5] *See* Inker, Perocchi, Walsh, *Domestic Relations*, 1977 ANN. SURV. MASS. LAW. § 1.1, at 6.

[6] *Id.*

[7] 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); Smith v. Smith, 358 Mass. 551, 553, 265 N.E.2d 858, 859 (1971); Freeman v. Sieve, 323 Mass. 652, 656-57, 84 N.E.2d 16, 19 (1949); Wilson v. Caswell, 272 Mass. 297, 302, 172 N.E. 251, 253 (1930).

further; the court is in no way restricted by the child support provisions of the parents' agreement.[8] This tension between judicial deference and judicial discretion is exemplified in the fact that the probate court has the power to modify its own judgment, but cannot alter the terms of the agreement.[9] Where support obligations of the parties are contained in both the judgment and the agreement and are inconsistent, the result has been frequent litigation.[10]

During the *Survey* year, two cases arose that reinforced the significance of separation agreements in relation to divorce decrees. In *Moore v. Moore*,[11] the Supreme Judicial Court held that language in a divorce decree that the separation agreement shall not survive the decree does not operate to dissolve the agreement when the agreement expressly provides that it shall survive the decree.[12] The Court thereby reinforced the policy of judicial deference to the intent of the parties where their agreement was fair, reasonable, and free from fraud and coercion in its adoption.[13] In *Randall v. Randall*,[14] a case following *Moore*, the Massachusetts Appeals Court held that a probate judge erred in refusing specific enforcement of a valid surviving separation agreement that was fair, reasonable, and free from fraud and coercion in its adoption.[15]

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[8] 2 J.F. LOMBARD, FAMILY LAW ,*1* 1258, at 317 (1967). *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); Dawson v. Rogers, 7 Mass. App. Ct. 351, 354, 387 N.E.2d 1162, 1165 (1979); Reeves v. Reeves, 318 Mass. 381, 383-84, 61 N.E.2d 654 (1945).

[9] *See* Freedman, *supra* note 3, at 11.

[10] For cases where the agreement is set up as a bar against a complaint for modification of the judgment in the probate court, see Stansel v. Stansel, 385 Mass. 510, 432 N.E.2d 691 (1982) (interspousal support); Surabian v. Surabian, 362 Mass. 342, 285 N.E.2d 909 (1972)(alimony); Wilson v. Caswell, 272 Mass. 287, 172 N.E. 251 (1930) (husband seeks modification of decree after former wife's remarriage); Schillander v. Schillander, 307 Mass. 96, 29 N.E.2d 686 (1940) (husband denied petition for modification of provisions in contract not incorporated in decree); Bailey v. Dillon, 186 Mass. 244, 71 N.E. 538 (1904) (because agreement acts as bar to wife's petition for support, bill in equity to enjoin petition is demurrable). Such litigation has not been confined to setting up the agreement as a bar against modification of the judgment. For example, in Ryan v. Ryan, 371 Mass. 430, 358 N.E.2d 431 (1976), the husband sought an injunction in superior court to bar the wife's petition for modification of the judgment in probate court. In Freeman v. Sieve, 323 Mass. 652, 84 N.E.2d 16 (1949), the wife sued in superior court to enforce the agreement.

The Supreme Judicial Court suggested putting an end to this proliferation of suits by resolving all aspects of the dispute in the Probate Court. Knox v. Remick, 371 Mass. 433, 438, 358 N.E.2d 434, 436 (1976).

[11] 389 Mass. 21, 448 N.E.2d 1255 (1983).

[12] *Id.* at 21-22, 448 N.E.2d at 1256.

[13] *Id.* at 24-25, 448 N.E.2d at 1257.

[14] 17 Mass. App. Ct. 24, 455 N.E.2d 995 (1983).

[15] *Id.* at 24-25, 455 N.E.2d at 996. During the *Survey* year a third case arose regarding separation agreements, Bell v. Bell, 16 Mass. App. Ct. 188, 450 N.E.2d 650 (1983). It was

In *Moore*, the husband and wife married in 1951, and had two children.[16] On December 3, 1974, they entered into a separation agreement that provided for alimony and child support payments by the husband to the wife.[17] One provision of the agreement stated that "notwithstanding the incorporation of this agreement in said decree, the provisions hereof shall not be merged . . . , but shall survive and be forever binding and conclusive on the wife and husband and their respective heirs, successors, and assigns."[18] The following day the probate court entered a judgment nisi of divorce.[19] The judgment completely incorporated the provisions of the separation agreement, but stated further that the "agreement is to be incorporated and merged into the probate decree and shall not survive as an independent agreement."[20]

In March 1980, the wife filed a complaint in district court, alleging that the husband owed her approximately $8,725 pursuant to the separation agreement.[21] The husband moved to dismiss for lack of subject matter jurisdiction on the grounds that the language of the decree terminated the agreement.[22] The district court denied the motion, and in September 1980 judgment was entered for the wife.[23] The appellate division summarily dismissed the report of the district court, and the husband appealed to the Supreme Judicial Court.[24]

The Supreme Judicial Court affirmed the summary dismissal, holding

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accepted for review by the Supreme Judicial Court. 390 Mass. 1101 (1983). In *Bell* the wife filed a contempt complaint in probate court for the husband's failure to make support payments due her under a judgment of divorce. 16 Mass. App. Ct. at 190, 450 N.E.2d at 651. The judgment incorporated the separation agreement, which the husband raised as a bar to the complaint. Under the separation agreement the parties specified that support payments to the wife would terminate upon her "living together with a member of the opposite sex, so as to give the outward appearance of marriage . . . ." *Id.* at 189-90, 450 N.E.2d at 651. The husband contended that the wife was living together with a member of the opposite sex, such that the obligation to make support payments had terminated. The probate court dismissed the wife's complaint. The appeals court reversed, finding that the separation agreement, read as a whole, indicated that support payments should terminate only when the wife's need for them terminated. *Id.* at 194, 450 N.E.2d at 653. One judge filed a dissent. *Id.* at 197.

[16] 389 Mass. at 22, 448 N.E.2d at 1256.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* Service of process on the husband under the long-arm statute, G.L. c. 223A, § 6 suggests that the district court's jurisdiction was based on diversity. A default was entered on May 7, 1980, for the husband's failure to answer the March 1980 complaint. 389 Mass. at 22-23, 448 N.E.2d at 1256. He specially appeared to remove the default three weeks later. *Id.* at 23, 448 N.E.2d at 1256. The judge allowed the motion on certain conditions. *Id.*

[22] *Id.* at 23, 448 N.E.2d at 1256.

[23] *Id.*

[24] *Id.*

that the parties' separation agreement survived the divorce decree, despite language in the decree to the contrary.[25] In reaching the conclusion, the Supreme Judicial Court first reviewed the judicial policy in Massachusetts supporting separation agreements.[26] According to the Court, the public policy of the Commonwealth favors the settlement of disputes resulting from a divorce through separation agreements fairly entered into by the parties.[27] Once such an agreement is in effect, the Court stated, it may not be altered by the probate court.[28]

The Court applied these principles to the question whether a separation agreement should survive the divorce decree where the separation agreement expressly stated that its provisions should survive and be binding, notwithstanding the incorporation of the agreement into the decree.[29] According to the Court, the intent of the parties, not the inclination of the probate court, controls the question whether the separation agreement will survive.[30] The Court, emphasizing its policy favoring survival of separation agreements, cited the general rule that unless the parties expressly provide otherwise, their agreement will be held to survive a subsequent judgment that incorporates by reference the terms of the agreement.[31]

Turning to the facts of *Moore*, the Court found that the parties' expressed intent was that the agreement survive the decree.[32] The Court held that this intent controlled.[33] The probate court had no authority to prevent survival of the agreement, the Court concluded, absent a finding that the agreement was illegal, unfair, unreasonable, or the product of fraud or coercion.[34] Therefore, pursuant to its equitable powers,[35] the Court ordered that the decree be modified to state that the agreement "is to be incorporated and merged into the probate decree and shall survive as an independent agreement."[36]

Four months after *Moore* was decided, the Appeals Court rejected a probate judge's modification of support provisions contained exclusively

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[25] *Id.* at 25-26, 448 N.E.2d at 1258.

[26] *Id.* at 24, 448 N.E.2d at 1257.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 25, 448 N.E.2d at 1257.

[30] *See id.* at 24-25, 448 N.E.2d at 1257.

[31] *Id.* at 25, 448 N.E.2d at 1257 (citing Surabian v. Surabian, 362 Mass. 342, 345-46 n.4, 285 N.E.2d 909, 911 n.4 (1972)).

[32] *Id.* at 25, 448 N.E.2d at 1257.

[33] *Id.*

[34] *Id.*

[35] G.L. c. 211, § 3.

[36] 389 Mass. at 25-26, 448 N.E.2d at 1258. The Court ordered that the decree be modified by striking the word "not." *Id.*

in a separation agreement that survived the judgment.[37] In *Randall*, the husband and wife married in 1958, and had two children.[38] On January 31, 1976, they entered into a separation agreement in contemplation of divorce.[39] Under the agreement the husband was to make unallocated monthly payments for alimony and child support combined, in decreasing amounts, through November 1986 when the payments would terminate.[40] The agreement also provided for medical insurance, lump sums toward college tuition, and an even division of marital property (the marital residence) after the emancipation of the children.[41] A judgment of divorce nisi was entered on February 2, 1979, granting custody of the children to the wife.[42] The judgment included no provisions for child support, alimony, or property division, but referred to the parties' agreement: "Signed agreement filed herewith is not merged into this judgment but shall have independent significance, all until further order of the Court."[43]

In April 1979 the wife filed a complaint for modification of the judgment, seeking an increase in the husband's alimony and child support payments.[44] The husband raised the separation agreement as a bar to the requested relief, and sought dismissal of the complaint.[45] In February 1981, when the action came before the probate judge, both parties presented evidence on the question of whether the wife's health had deteriorated, necessitating an increase in support.[46] The parties presented scant evidence with respect to the children's current needs.[47]

In his findings the probate judge observed that the husband's financial circumstances had improved since entry of the judgment, while the wife's health and ability to work had deteriorated.[48] On the basis of these observations, the judge concluded that the agreement was unfair and unreasonable and could be disregarded.[49] He held that the material change in the husband's and wife's circumstances justified additional support, and ordered the husband to make support payments to the wife in excess of the amount fixed in the separation agreement.[50] The husband appealed.[51]

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[37] 17 Mass. App. Ct. 24, 25, 30 n.4, 455 N.E.2d 995, 998 n.4 (1983).
[38] 17 Mass. App. Ct. at 25, 455 N.E.2d at 996.
[39] *Id.*
[40] *Id.* at 26, 455 N.E.2d at 997.
[41] *Id.*
[42] *Id.* at 26, 455 N.E.2d at 996-97.
[43] *Id.* at 28, 455 N.E.2d at 997.
[44] *Id.* at 27, 455 N.E.2d at 998.
[45] *Id.* at 28, 455 N.E.2d at 998.
[46] *Id.*
[47] *Id.*
[48] *Id.* at 30, 455 N.E.2d at 998-99.
[49] *Id.*
[50] *Id.* at 30, 455 N.E.2d at 999.
[51] *Id.*

The Appeals Court reversed the probate judge and dismissed the wife's complaint seeking modification of the divorce judgment.[52] The court noted, first, that the qualification "all until further order of the court" did not incorporate the agreement into the judgment.[53] Thus, the provisions for child support and alimony were not contained in the judgment.[54] The relevant inquiry, then, according to the court, was whether the agreement was fair and reasonable at the time of the entry of the judgment nisi.[55] On the issue of fairness and reasonableness, the court noted that both parties to the comprehensive, twenty-two page separation agreement had independent legal counsel of their own choosing.[56] The court noted further the parties' declaration in the agreement that each entered into the agreement voluntarily after being fully apprised of all the relevant facts.[57] According to the court, such an agreement could not be deemed unfair or unreasonable.[58] Evidence that one party might have struck a better deal, the court stated, would not render the agreement unfair or unreasonable.[59]

The court then considered two other factors that, if present, might have precluded the husband's defense of specific enforcement of the contract with respect to interspousal support.[60] The court noted first that the wife could have alleged that she was in danger of becoming a public charge.[61] Second, according to the court, she could have alleged that her former husband had failed to comply with any provision of the agreement.[62] Either of these factors might have made specific enforcement of the contract an inequitable remedy, the court stated, but neither was demonstrated on these facts.[63] The court further noted that the record failed to show an inadequate level of child support that might justify modification

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[52] *Id.* at 32, 455 N.E.2d at 1000. The appeals court prefaced its analysis by stating that it would not reverse findings made by the probate judge on the evidence unless they were clearly erroneous. *Id.* at 25, 455 N.E.2d at 996. On the record before it, which included a transcript of all the evidence, the court held that the probate judge's findings were indeed clearly erroneous. *See id.* at 26, 455 N.E.2d at 996.

[53] *Id.* at 25 n.1, 455 N.E.2d at 997 n.1.

[54] *Id.* at 25, 455 N.E.2d at 997. The court's conclusion that the support provisions were not contained in the judgment, but only in the agreement, meant that they were not modifiable at the probate judge's discretion, since the judge has no power to alter the terms of a separation agreement. *See supra* text accompanying notes 3-4 and 28.

[55] *Id.* at 30 n.6, 455 N.E.2d at 999 n.6. An agreement need not be specifically enforced if unfair or unreasonable at the time of its adoption. *See supra* text accompanying note 4.

[56] *Id.* at 25, 455 N.E.2d at 997.

[57] *Id.* at 31, 455 N.E.2d at 1000.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 31-32, 455 N.E.2d at 1000.

[62] *Id.* at 32, 455 N.E.2d at 1000.

[63] *Id.* at 31-32, 455 N.E.2d at 1000.

of the child support obligations.[64] The probate judge's finding of a material change in circumstances, the court concluded, was insufficient to justify his refusing specific enforcement of a valid separation agreement.[65]

The *Moore* and *Randall* cases reinforce the emerging judicial policy favoring separation agreements. In *Moore* the Court rejected the language of earlier cases,[66] relied on by the husband, that the probate court's authority to issue or modify a judgment nisi of divorce may not be abridged by a valid separation agreement.[67] In forceful and expansive language, the Court expressed a broad policy favoring both the survival of separation agreements and their enforcement by the probate court. After *Moore*, parties to a separation agreement will be held to their bargain unless the probate court finds the agreement to have been unfair, unreasonable, or the product of fraud or coercion at the time it was signed.

The *Randall* court followed *Moore* in holding that the provisions in a separation agreement fixing interspousal support should be specifically enforced, in the absence of countervailing equities. Those equities would include the probability that one party would become a public charge without increased support, or the failure of the former spouse to comply with the provisions of the agreement.[68] The court reaffirmed the rule that child support provisions in a separation agreement are not to be controlled by the parents' bargain,[69] but noted that in this case no evidence of the children's circumstances was presented to warrant modification of the existing provisions. *Randall* also reinforced the rule that a mere change in circumstances is not sufficient to justify a court's refusal to specifically enforce an agreement.

Both *Moore* and *Randall* demonstrate that a surviving separation agreement exacts literal compliance from the parties. As a result, the practitioner must emphasize the finality of the contract to his or her client, or must seek to insert a provision allowing for re-negotiation of the terms if circumstances should change materially. *Moore* also suggests that the attorney drafting a separation agreement can best ensure its survival by including an express provision showing the parties' intent that the agreement survive. *Randall* indicates that the party — husband or wife — who might want to seek modification of support provisions in the future should be sure that the probate court incorporates the support terms into the

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[64] *Id.* at 32, 455 N.E.2d at 1000.

[65] *Id.*

[66] *See supra* note 7.

[67] 389 Mass. at 23, 448 N.E.2d at 1256-57.

[68] 17 Mass. App. Ct. at 31-32, 455 N.E.2d at 1000. *See* Stansel v. Stansel, 385 Mass. 510, 516, 432 N.E.2d 691, 695 (1982); Knox v. Remick, 371 Mass. 433, 437, 358 N.E.2d 432, 436 (1976).

[69] *See supra* note 3.

judgment, which is modifiable, rather than merely filing the agreement with the judgment. Such a move, however, only puts the support provisions within the scope of the probate court's discretion. It may not be effective against the clear policy of *Moore* favoring enforcement of separation agreements.

As a result of the *Moore* and *Randall* decisions, the balance between separation agreements and judgments nisi of divorce has tipped clearly in favor of agreements. The parties' intent, as expressed in the separation agreement, controls whether the agreement survives the judgment and remains binding on the parties. The probate court, therefore, should defer to the parties' disposition of their obligations unless their agreement was unreasonable or the product of fraud at the time of adoption. The probate court retains broad discretion only with regard to child support.

§ 16.2. Adoption — Dispensing with Parental Consent — Determination of Parental Unfitness.* Under chapter 210 section 3 of the Massachusetts General Laws, when the state petitions the court to permit an adoption, parental consent to adoption may be dispensed with if the court finds that such action would be in the best interests of the child.[1] In determining whether the best interests of the child would be served by a termination of parental rights, the court must consider the ability and fitness of the child's parents to assume parental responsibility.[2] If the child has been in the care of an agency for more than one year, a presumption arises under

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* Tracy A. Miner, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 16.2. [1] G.L. c. 210, § 3. The statute provides, in pertinent part, that:

(a) Whenever a petition for adoption is filed by a person having the care and custody of a child, the consent of the persons named in section two . . . shall not be required if — . . . (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child, as defined in paragraph (c).

(b) The Department of Social Services or any licensed child care agency may commence a proceeding, independent of a petition for adoption . . . to dispense with the need for consent of any person named in section two to the adoption of a child in the care or custody of said department or agency . . . . The court shall issue a decree dispensing with the need for said consent or notice of any petition for adoption of such child subsequently sponsored by said department or agency if it finds that the best interests of the child as defined in paragraph (c) will be served by said decree . . . .

Id.

[2] Mass. G.L. c. 210, § 3(c). This section provides, in pertinent part, that:

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

Id.

section 3(c) of chapter 210 that the best interests of the child are served by dispensing with the need for parental consent to adoption.[3]

In 1982, the United States Supreme Court in *Santosky v. Kramer*[4] considered the constitutionality of New York's statutory proceedings for the termination of parental rights.[5] Recognizing that natural parents have a fundamental liberty interest in the care and custody of their children,[6] the Supreme Court in *Santosky* held that before a state may completely sever the rights of parents to the custody of their natural child, due process mandates that the state support its allegations of unfitness by clear and convincing evidence.[7]

During the *Survey* year, Massachusetts courts considered the constitutionality of chapter 210 of the General Laws in light of the *Santosky* decision in two separate cases. First, in *Petitions of the Department of Social Services to Dispense with Consent to Adoption*[8] (*Petitions*), the Supreme Judicial Court held that the presumption that arises under section 3(c) of chapter 210 that the best interests of the child will be served by dispensing with the need for parental consent to adoption is unconstitutional under *Santosky*.[9] Second, in *Petition of the Department of Social Services to Dispense with Consent to Adoption*[10] (*Petition II*), the Massachusetts Appeals Court held that chapter 210, sections 1-6 are not generally unconstitutional despite the absence of a statutorily mandated standard of clear and convincing evidence for proceedings to dispense with parental consent to adoption brought under this chapter.[11] In *Petitions* and *Petition II*, cases brought under chapter 210, section 3, Massachusetts courts applied the clear and convincing evidence standard mandated

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[3] *Id.* The statute provides, in pertinent part:

> If said child has been in the care of the department or licensed child care agency for more than one year, in each case irrespective of incidental communications or visits from his parent . . . irrespective of a court decree awarding custody of said child to another and notwithstanding the absence of a court decree ordering said parents or other person to pay for the support of said child, there shall be a presumption that the best interests of the child will be served by granting a petition for adoption as permitted under paragraph (a) or by issuing a decree dispensing with the need for consent as permitted under the paragraph (b).

[4] 455 U.S. 745 (1982).

[5] *Id.* at 747. In *Santosky*, New York's statutory scheme for freeing a child for adoption without parental consent was attacked on due process grounds. *Id.*

[6] *Id.* at 753.

[7] *Id.* at 747-48.

[8] 389 Mass. 793, 452 N.E.2d 497 (1983).

[9] *Id.* at 803, 452 N.E.2d at 503.

[10] 15 Mass. App. Ct. 161, 444 N.E.2d 399 (1983).

[11] *Id.* at 164, 444 N.E.2d at 401.

by *Santosky*.[12] These cases, therefore, illustrate the effect that the Supreme Court's decision in *Santosky* has had on Massachusetts law regarding dispensation proceedings.

In *Petitions*,[13] the probate court had allowed the petitioners from the Department of Social Services ("Department") to dispense with the need for the natural mother's consent to adoption of her male and female twin children on January 21, 1982.[14] On July 13, 1982, the mother requested reconsideration of the probate court's decision in light of the Supreme Court's decision in *Santosky* mandating that the state prove unfitness by clear and convincing evidence in parental rights termination cases.[15] In response, the probate judge issued a memorandum decision finding that the Department had met the burden of proof required by *Santosky*.[16] The case was transferred to the Supreme Judicial Court on its own motion.[17]

On appeal, the mother argued that the Department had failed to demonstrate by clear and convincing evidence that she was unfit to provide for the best interests of her children.[18] She also challenged the constitutionality of the statutory presumption in chapter 210, section 3(c) that the best interests of the children are served by dispensing with the consent of the parent to adoption when the children have been in the Department's care for at least one year.[19]

The mother in *Petitions* was unmarried, unemployed, and had a history of psychiatric care.[20] She had four children, a nine year old and a five year old who lived with her, and the seven year old twins who were the subject of the appeal.[21] The twins had resided with their paternal grandparents,

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[12] *See Petitions*, 389 Mass. at 799, 452 N.E.2d at 499; *Petition II*, 15 Mass. App. Ct. at 165, 444 N.E.2d at 400.

[13] 389 Mass. 793, 452 N.E.2d 497 (1983).

[14] *Id.* at 794, 452 N.E.2d at 499.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 795, 452 N.E.2d at 499.

[19] The Supreme Judicial Court requested the probate court judge to make further findings as to what weight he gave to the statutory presumption in arriving at his decision. *Id.* at 795, 452 N.E.2d at 499. In his responsive findings, the judge indicated that he had not given the presumption any weight. *Id.* In the original conclusions of law, however, the probate judge had indicated that the mother had overcome the statutory presumption. *Id.* at 794 n.1, 452 N.E.2d at 499 n.1. This would indicate that the judge gave the statutory presumption at least some weight in the original decision.

[20] *Id.* at 795, 452 N.E.2d at 499.

[21] *Id.* The record indicated that there had been a history of intervention by the Department in relation to all of the children. *Id.* at 796, 452 N.E.2d at 500. On June 26, 1979, the Department filed a care and protection petition on behalf of all four children. *Id.* The court dismissed the case involving the oldest and youngest children, and gave physical and legal custody of the female twin and legal custody of the male twin to the Department. *Id.* On November 16, 1979, the court gave physical custody of the male twin to the Department. *Id.*

the prospective adoptive parents, in Alabama for more than a year.[22]

The mother in *Petitions* had a history of calling the Department when she was under stress and requesting that one or more of her children be placed in foster care and then later reclaiming them.[23] The Department claimed that the mother had refused to follow through on any plan proposed by the Department to be reunited with the twins and that she had been unable to maintain a positive relationship with the social workers.[24] Although she had in the past participated in supervised visits with the twins, during one visit she removed them illegally from their foster home.[25] Since that time she had been forbidden by the Department to make any further visits.[26] Social workers testified that the mother did not have a warm and supportive relationship with the twins.[27] Other professionals testified that the prognosis for the children was good if they were placed in a stable, secure home environment.[28]

On these facts, the Supreme Judicial Court found that there was no error in the probate judge's determination that the Department had proved by clear and convincing evidence that the mother was unfit.[29] The Court reasoned that although natural parents have a fundamental right to the custody of their children, that right is not absolute and must be balanced against the welfare of the child.[30] The Court indicated that the parental fitness test must therefore be looked at in conjunction with the best interests of the child test, and that neither test may be properly applied to the exclusion of the other.[31] After applying the parental fitness test and the best interests of the child test to the facts of the case, the Court upheld the termination of the mother's parental rights.[32]

The Court found support for the finding of parental unfitness from the mother's repeated pattern of seeking the Department's help with the children.[33] Although the Court acknowledged that the mere failure to exercise custodial rights in the past does not by itself warrant a conclusion

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In early 1980, the Department filed another care and protection petition on behalf of the youngest and oldest children. *Id.* This petition was dismissed. *Id.* In September, 1980, the Department received permanent custody of the twins. *Id.*

[22] *Id.* at 795, 452 N.E.2d at 499.

[23] *Id.*

[24] *Id.* at 797, 452 N.E.2d at 500.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 798, 452 N.E.2d at 501.

[28] *Id.*

[29] *Id.* at 800, 452 N.E.2d at 501.

[30] *Id.*

[31] *Id.* (citing Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 641, 328 N.E.2d 854, 860 (1975)).

[32] 389 Mass. at 800. 452 N.E.2d at 502.

[33] *Id.* at 801, 452 N.E.2d at 503.

of present unfitness,[34] the court distinguished one isolated instance of relinquishment from the repeated pattern present in the case before it.[35] Moreover, the Court reasoned, the mother's refusal to participate in the various service plans offered by the Department was a further indication of her unfitness as a parent.[36] The mother's custody of the twins' siblings was not an important factor,[37] for the Court noted that a parent may be fit to bring up one child and not another.[38] Reasoning that a child's welfare is best served in a continuous family environment, the Court held that the children's best interests would be served by their adoption by their paternal grandparents.[39]

Despite its rejection of the mother's challenge to the sufficiency of the evidence in the probate proceedings, the Court accepted the mother's argument that the statutory presumption of unfitness, arising as a result of the children's having been in the Department's care for more than one year, was unconstitutional.[40] The Court reasoned that because the presumption shifts the burden of proof as to parental fitness to the parent, it violates the mandate of *Santosky* that the state prove unfitness by clear and convincing evidence.[41] Even though the Court accepted that the probate court did not give any weight to the statutory presumption, the Court held that because the probate court did not rely on the statutory presumption in the mother's case, the decision did not violate her constitutional rights.[42] Finding that there was clear and convincing evidence of her unfitness, the Court in *Petitions* affirmed the probate court's order dispensing with the need for the mother's consent to the adoption of the twins.[43]

In the second case during the *Survey* year, *Petition II*,[44] the Appeals Court also upheld the termination of parental rights in the face of a mother's challenge to the constitutionality of the termination under *Santosky*.[45] As was the case with *Petitions*,[46] the original termination decision in *Petition II* was issued before the Supreme Court decided *Santosky*.[47] A

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[34] Bezio v. Patenaude, 381 Mass. 563, 577, 410 N.E.2d 1207, 1215 (1980).

[35] *Petitions*, 389 Mass. at 801, 452 N.E.2d at 503.

[36] *Id.*

[37] At the hearing, a social worker testified that "the mother was functioning well with regard to the oldest and youngest children." *Id.* at 801 n.5, 452 N.E.2d at 502 n.5.

[38] *Id.* at 799, 452 N.E.2d at 501-02.

[39] *Id.* at 800, 452 N.E.2d at 501.

[40] *Id.* at 803, 452 N.E.2d at 502.

[41] *Id.* at 802-03, 452 N.E.2d at 503.

[42] *Id.* at 803, 452 N.E.2d at 503.

[43] *Id.*

[44] 15 Mass. App. Ct. 161, 444 N.E.2d 399 (1983).

[45] *Id.* at 165, 444 N.E.2d at 401.

[46] 389 Mass. 793, 452 N.E.2d 497 (1983).

[47] 15 Mass. App. Ct at 163, 444 N.E.2d at 400.

single justice of the Supreme Judicial Court allowed an appeal from the decision with instructions to seek from the probate judge a supplemental finding concerning the effect the clear and convincing evidence standard, if applied, would have had on the probate judge's findings.[48] The probate judge on rehearing affirmed his termination order and indicated that his decision would not be changed under the clear and convincing evidence standard.[49] In her appeal, the mother claimed that the clear and convincing standard had not been met and that, consequently, the termination violated her constitutional rights.[50]

The evidence of unfitness in *Petition II* related primarily to the mother's immaturity.[51] The court summarized the probate court's findings of fact as showing a well-intentioned, immature mother, about sixteen years old, who was unable to deal with the needs of her son.[52] Based on these findings, the probate judge found that the best interests of the child would be served by his adoption by his foster parents, an upwardly mobile professional couple with one child of their own.[53]

The Appeals Court affirmed the probate court's determination that the mother's unfitness had been established by clear and convincing evidence.[54] The court gave great deference to the decision of the probate judge.[55] Reasoning that unfitness depends on an assessment of the parent's character, temperament and capacity, as well as the consideration of the welfare of the child in connection with its age and affections, the court held that the probate judge's conclusion of unfitness was well supported.[56] As in *Petitions*, the court did not discuss the child's interest in having continuing ties with his natural mother and sibling.[57]

The Supreme Judicial Court's decision in *Petitions*[58] and the Appeals Court's decision in *Petition II*[59] indicate that the *Santosky* mandate of a clear and convincing evidence standard in termination of parental rights

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[48] *Id.*

[49] *Id.* at 163-64, 444 N.E.2d at 400.

[50] *Id.*

[51] *Id.* at 162, 444 N.E.2d at 400.

[52] *Id.*

[53] *Id.* The probate judge indicated that the foster parents lived in a suburban neighborhood. *Id.* "The husband is a high-school graduate, soon to receive his bachelor's degree, and is employed by a well-known company as a computer specialist." *Id.*

[54] *Id.* at 165, 444 N.E.2d at 401.

[55] *Id.* The court, in affirming the probate court's finding that the clear and convincing standard had been met, stated: "There is no reason to doubt that he honestly and reasonably was of the opinion that the evidence met that standard at all times and that he had been satisfied with the evidence in accordance with that standard." *Id.*

[56] *Id.* at 165, 444 N.E.2d at 401.

[57] *See id.* at 164-65, 444 N.E.2d at 400-01.

[58] 389 Mass. 793, 452 N.E.2d 497 (1983).

[59] 15 Mass. App. Ct. 161, 444 N.E.2d 399 (1983).

proceedings will have little practical effect on the outcome of cases decided under Chapter 210, section 3.[60] While a lengthy separation of a parent from his or her child may no longer shift the burden of proving unfitness from the state to the parent,[61] a long separation may still form the basis for a finding of parental unfitness. Refusal to cooperate with the Department may in itself be enough evidence to establish unfitness under the *Santosky* mandate.[62] In the absence of clear guidelines by the appellate courts on the application of the clear and convincing evidence standard, probate judges will most likely continue to determine parental unfitness based on the same criteria they used prior to the Supreme Court's decision in *Santosky*.

As applied by the Supreme Judicial Court in *Petitions*[63] and the Appeals Court in *Petition II*,[64] the clear and convincing evidence standard mandated by *Santosky* does not sufficiently protect the fundamental right of natural parents to the custody of their children.[65] Too much deference is paid to the findings and authority of the child care agencies.[66] This deference may have contributed to the further deterioration of the parent-child relationship after the child had been placed within their care.[67] As part of meeting its burden of proof under *Santosky*, the child care agency seeking to dispense with the consent of the parent to adoption should be required to show that it made good faith efforts to reunite the parent with the child. As the Appeals Court has stated, "The Department should 'take care to behave itself.' . . . Heads I win, tails you lose is as offensive in this context as in any other area of governmental action."[68] Moreover, courts should consider the alternative of continued custody by the Department with visitation rights by the parent as an alternative to total relinquishment of parental rights or relinquishment of custody by the Department. This should be done whether or not the parent directly proposes this alternative. Such an alternative may be preferable, in many instances, to the total severance of biological ties.

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[60] The probate judges in *Petitions* and *Petition II* indicated that their findings would not have been altered under the clear and convincing evidence standard of *Santosky*. *See Petitions*, 389 Mass. at 794, 452 N.E.2d at 499; *Petition II*, 15 Mass. App. Ct at 163, 444 N.E.2d at 400.

[61] 389 Mass. at 803, 452 N.E.2d at 503.

[62] *See id.* at 801, 452 N.E.2d at 502.

[63] 389 Mass. 793, 452 N.E.2d 497 (1983).

[64] 15 Mass. App. Ct 161, 444 N.E.2d 399 (1983).

[65] 389 Mass. at 799, 452 N.E.2d at 501.

[66] In *Petitions*, the court based its findings of parental unfitness in part on the mother's refusal to cooperate with the Department, despite the mother's claim that the Department repeatedly attempted to sever all family ties. *See* 389 Mass. at 801, 452 N.E.2d at 502.

[67] In *Petitions*, the Department precluded the parent from visiting the child. 389 Mass. at 797, 452 N.E.2d at 500.

[68] Commonwealth v. Tirrell, 1981 Mass. Adv. Sh. 334, 345 (Kaplan, J. dissenting).

In summary, the state now has the burden of proving parental unfitness by clear and convincing evidence before the rights of a parent may be totally and irrevocably severed. The decisions in *Petitions* and *Petition II* during the *Survey* year indicate that this burden will have little practical effect on decisions under Chapter 210, section 3 of the General Laws. The state, however, will no longer be able to rely on a presumption of unfitness in situations where the separation has lasted over one year, as was the case prior to the Supreme Judicial Court's decision in *Petitions*. In addition, courts may be more willing to explore alternatives to total revocation of parental rights, thereby making a dispensation decree harder to obtain. Despite the decisions in *Petitions* and *Petition II* during the *Survey* year, however, probate courts are still left with the difficult task of balancing the fundamental rights of parents to custody of their children against the welfare of the children, with little guidance from appellate courts as how to best achieve a result that will further the best interests of the child and society at large.

§ 16.3. Child Custody — Effect of Variant Lifestyle By One Parent on Child Custody.* The Massachusetts Supreme Judicial Court has articulated two tests that apply in evaluating the facts in custody proceedings. One such standard applied by the Massachusetts courts is the "best interest of the child" test.[1] Under this standard the first and paramount consideration is the welfare of the child.[2] Another standard applied by the courts is the "parental fitness" test.[3] This test focuses on parental rights rather than on the child's welfare.[4] Under the parental fitness test, the courts assess whether the parents exhibit traits of "moral delinquency . . . indifference or . . . vacillation of feeling toward the child, or inability or indisposition to control . . . ."[5]

Originally, the Massachusetts courts viewed the best interest of the child as the dominant standard used in child custody cases.[6] Over the

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* Sharon R. Chardak, staff member ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 16.3. [1] *See, e.g.*, Custody of a Minor (1), 377 Mass. 876, 882, 389 N.E.2d 68, 73 (1979); Custody of a Minor (2), 378 Mass. 712, 718, 393 N.E.2d 379, 383 (1979).

[2] *See* Bezio v. Patenaude, 381 Mass. 563, 572, 410 N.E.2d 1207, 1212 (1980). *See generally* J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).

[3] Richards v. Forrest, 278 Mass. 547, 552-53, 180 N.E. 508, 510-11 (1932).

[4] *Id. See, e.g.*, Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 66 GEO. L. REV. 213, 231-40 (1979).

[5] Richards v. Forrest, 278 Mass. at 552-53, 180 N.E. at 510-11. For a discussion of this standard, *see* Comment, *King Solomon's Court: Reconciling the Interests of Parent, Child and State Under Mass. Gen. Laws ch. 119*, 15 NEW ENG. L. REV. 853, 862-64 (1980).

[6] The leading case of Purinton v. Jamrock, 195 Mass. 187, 80 N.E. 802 (1907), is often quoted when discussing this standard. There, the Court said:

> [Parents] are the natural guardians of their child, entitled to its custody . . . . But this

years, the Massachusetts courts have withdrawn from this position.[7] Today, both the best interest of the child and parental fitness tests are applied in custody disputes with varying emphasis depending upon whether the custody dispute is between a natural parent and a third party,[8] a natural parent and the state,[9] or between two natural parents.[10] In custody disputes between a natural parent and a third party, and between a natural parent and the state, the inquiry has typically focused on whether the parents are "fit" to provide for the welfare of the child.[11] In these cases, however, the standard of parental fitness is broadly construed so that removal from the parents is upheld only when the child has been physically abused or denied the basic necessities of life.[12] In proceedings between two natural parents, on the other hand, the best interest of the child standard has predominated.[13] Although the courts in these

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> right is not an absolute and uncontrollable one. It will not be enforced to the detriment or destruction of the happiness and well being of the child. As the child owes allegiance to the government of the country of its birth, so it is entitled to the protection of that government, which must consult its welfare, comfort and interests . . . .

Id. at 201, 80 N.E. at 805 (citations omitted).

[7] *See* Petition of the New England Home for Little Wanderers, 367 Mass. 631, 641, 328 N.E.2d 854, 860 (1975). There the Court found that the best interest of the child test and the parental fitness test "reflect different degrees of emphasis on the same factors, that the tests are not separate and distinct but cognate and connected." *Id.* at 641, 328 N.E.2d at 860.

[8] *See* Bezio v. Patenaude, 381 Mass. 563, 577, 410 N.E.2d 1207, 1215 (1980).

[9] *See* Petition of the New England Home for Little Wanderers, 367 Mass. 631, 646, 328 N.E.2d 854, 863 (1975).

[10] *See* Fuller v. Fuller, 2 Mass. App. Ct. 372, 376, 312 N.E.2d 581, 584 (1974).

[11] *See* Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207 (1980), where the Massachusetts Supreme Judicial Court stated that a homosexual mother must be found "unfit" before custody could be moved from her and given to a third party guardian. *Id.* at 577, 410 N.E.2d at 1215; Petition of the New England Home for Little Wanderers, 367 Mass. 631, 328 N.E.2d 854 (1974), where the Supreme Judicial Court held that a parent must suffer from "grievous shortcomings or handicaps, that would put the child's welfare in the family milieu much at hazard" in order for custody to be removed from the mother. *Id.* at 646, 328 N.E.2d at 863.

[12] *See* Custody of a Minor (2), 378 Mass. 712, 393 N.E.2d 379 (1979), where the Supreme Judicial Court stated that the critical question that must be asked when the state seeks to intervene is: "From what shortcomings or handicaps does the parent suffer that would endanger the well-being of the child if exposed, and has the necessity of permanently removing the child from its parents persuasively been shown?" *Id.* at 722, 393 N.E.2d at 385. *See generally* Note, *State Intrusion into Family Affairs: Justifications and Limitations*, 26 STAN. L. REV. 1383 (1974).

[13] *See* Hersey v. Hersey, 271 Mass. 545, 171 N.E. 815 (1930), where the Supreme Judicial Court enunciated the basic rule applicable in a custody dispute between two natural parents: "The governing principle by which the court must be guided in deciding the issues raised is the welfare of the child. This is so both as [sic] matter of law and as [sic] matter of humanity. Every public and private consideration establishes the dominating rule." *Id.* at 555, 171 N.E. at 820. *See generally* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 582, 584 (1968).

three types of custody cases appear to place differing emphasis on the two standards, they have failed to formulate an explicit rule regarding the correct application of the two standards.

During the *Survey* year, the Supreme Judicial Court and the Appeals Court decided three cases involving custody disputes. Although these decisions clarify somewhat the interrelation between the best interest and the parental fitness standards, they nevertheless fail once again to supply clear rules regarding the correct application of the two tests.[14] In the first case, *Freeman v. Chaplic*,[15] the Supreme Judicial Court was faced with a dispute between a third party, and a mother and the custodians selected by the mother.[16] In *Custody of a Minor*,[17] the Supreme Judicial Court dealt with a custody dispute between a woman, in whose care the mother had voluntarily placed the child, and the natural mother.[18] In *Doe v. Doe*,[19] the Appeals Court considered a custody dispute between the child's natural father and natural mother, who was a homosexual.[20] In each of these cases, the courts purported to apply both tests, but nevertheless seemed to favor one or the other depending on the relationship among the parties to the dispute.

In *Freeman v. Chaplic*,[21] the Supreme Judicial Court reviewed a judgment of the probate court that vacated the appointment of the paternal grandparents as guardians with custody, and substituted the maternal step-grandmother as guardian with custody. The child in dispute was born several months after her parents separated.[22] Shortly after the birth, due to the mother's psychological problems, the child moved with her mother to the maternal grandfather's and step-grandmother's home.[23] Shortly thereafter, the parents' divorce decree became final and the decree awarded the maternal grandparents guardianship with custody of the child.[24]

Seven years later, the mother remarried and regained custody of the

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[14] Freeman v. Chaplic, 388 Mass. 398, 446 N.E.2d 1369 (1983); Custody of a Minor, 389 Mass. 755, 452 N.E.2d 483 (1983); Doe v. Doe, 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983).

[15] 388 Mass. 398, 446 N.E.2d 1369 (1983).

[16] *Id.* at 404, 446 N.E.2d at 1373.

[17] 389 Mass. 755, 452 N.E.2d 483 (1983).

[18] *Id.* at 767, 452 N.E.2d at 490.

[19] 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983).

[20] *Id.* at 501, 452 N.E.2d at 295.

[21] 388 Mass. 398, 446 N.E.2d 1369 (1983).

[22] *Id.* at 400, 446 N.E.2d at 1371.

[23] *Id.* The maternal step-grandmother married the maternal grandfather when the mother of the child in dispute was ten years old. *Id.*

[24] *Id.*

child.[25] The mother, however, separated from her husband and again developed psychological problems.[26] The child returned to the maternal step-grandmother's home.[27] The paternal grandparents, with the assent of the parents, then obtained custody of the child.[28] The child moved to the paternal grandparents' home and lived there along with her mother and older siblings.[29] The maternal step-grandmother succeeded in regaining guardianship with custody of the child.[30] A single justice of the Appeals Court, however, stayed the probate court judgment pending appeal.[31] Subsequently, the Appeals Court affirmed the judgment.[32] The paternal grandparents appealed and a single justice of the Supreme Judicial Court issued an order for the child to remain with them pending the decision of the Supreme Judicial Court.[33] The Court reversed the judgment of the probate court and ordered the reinstatement of the judgment appointing the paternal grandparents guardians with custody.[34]

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[25] *Id.* There were only two brief periods over this seven year period when the child lived with her mother. *Id.*

[26] *Id.*

[27] *Id.* The maternal grandfather had recently died. *Id.*

[28] *Id.* at 401, 446 N.E.2d at 1371. The maternal grandmother received no notice of this appointment. The state makes no provision for notice. G.L. c. 201, §§ 2 and 5. 388 Mass. at 401 n.5, 446 N.E.2d at 1371 n.5.

[29] At this point, the mother, the child in dispute and the mother's first two children were living together at the home of the paternal grandparents. The paternal grandparents had adopted the mother. *Id.* at 401, 446 N.E.2d at 1371-72.

[30] *Id.* at 401, 446 N.E.2d at 1372.

[31] *Id.* The judge also issued findings of fact and conclusions of law. *Id.* First, he found both the maternal step-grandmother and the paternal grandparents "fully capable" of caring for the child. *Id.* Second, he found that the parents had the capacity to assent to the appointment of the paternal grandparents as guardians. *Id.* Third, he found the assent had little weight because the father seldom made contact with the child and the mother continued to suffer from emotional problems. *Id.* Fifth, he found the plan assented to by the child's parents was well designed to maintain close familial ties. *Id.* at 401-02. Sixth, he found it would be in the best interest of the child if the maternal step-grandmother was appointed guardian. *Id.* at 402, 446 N.E.2d at 1372.

[32] *Id.* at 399, 446 N.E.2d at 1370.

[33] *Id.* Due to the orders of the single justices of the Appeals Court and the Supreme Judicial Court, the child lived with the paternal grandparents during the judicial proceedings. *Id.* at 402, 446 N.E.2d at 1372.

[34] *Id.* at 409, 446 N.E.2d at 1376. In reversing, the Supreme Judicial Court first found that the maternal step-grandmother's motion for revocation of the decree could have been brought under G.L. c. 201, § 33, which gives the power to a probate court judge to remove a guardian under the circumstances specified in the statute. 388 Mass. at 401, 446 N.E.2d at 1372. The Court found that since the maternal step-grandmother was concerned with the well-being of the child, she could act as the child's next friend and seek to have a guardian removed as unsuitable. *Id.* The Court concluded that the motion brought by the maternal grandmother was properly before the probate court, and therefore the judge did not abuse his discretion by entertaining this motion. *Id.* at 402, 446 N.E.2d at 1372.

The *Freeman* Court set out a two-prong test to be used in determining whether a judge may vacate the appointment of one relative as guardian with custody of a child and appoint another relative, who the parents desired, without first finding that the parents were unfit.[35] The first prong of this test, the Court noted, is whether the present guardians are suitable to have custody of the child.[36] The second prong of this test is whether the parents are fit to have custody of the child.[37] The Court explained that only if the first inquiry reveals that the guardians are unsuitable would the second inquiry, concerning parental fitness, become necessary.[38] The Court based this two-prong test for determining custody in disputes between two relatives, where the parents desire one of the relatives to be guardians, on three Massachusetts laws.

The Court first discussed chapter 201, section 1, which allows a probate court to appoint a guardian for a child if the parents are unable to care for that child.[39] This appointment, however, does not extinguish the parents' right to custody of the child.[40] Rather, the question of custody must be determined by reference to chapter 201, section 5.[41] This section provides that parents shall have custody of their children unless the court finds that the parents are unfit to have custody.[42] Absent the parents' consent,

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[35] *Id.* at 404, 446 N.E.2d at 1373.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] See G.L. c. 119, § 1 which provides in pertinent part:

> It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.
>
> The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.

See Custody of a Minor (1), 377 Mass. 876, 882 n.5, 389 N.E.2d 68, 73 n.5 (1979).

[40] 388 Mass. at 403, 446 N.E.2d at 1373.

[41] *Id.* G.L. c. 201, § 5 provides in pertinent part:

> The guardian of a minor shall have the custody of his person and the care of his education, except that the parents of a minor, jointly, or the surviving parent shall have such custody and said care unless the court otherwise orders. The probate court may, upon the written consent of the parents or surviving parent, order that the guardian shall have such custody; and may so order if, upon a hearing and after such notice to the parents . . . it finds such parents . . . unfit to have such custody . . . .

[42] 388 Mass. at 403, 446 N.E.2d at 1373; *See* G.L. c. 201, § 5.

therefore, the only way a court could give custody of the child to the guardian instead of to the parents would be to find that the parents were unfit.[43] The guardian who replaced the parent as custodian of the child could, however, be removed as provided in chapter 201, section 33.[44] This section provides that a guardian will be removed if found unfit to care for the child and a more suitable successor will be appointed to fill the vacancy.[45]

Applying this two-prong test to the facts in *Freeman*, the Court determined that neither the mother nor the paternal grandparents, the present guardians, were unfit to be custodians of the child.[46] In reaching this determination of the mother's fitness and of the suitability of the paternal grandparents, the Court reasoned that the child had not suffered any physical or emotional harm from living with her mother or paternal grandparents.[47] Rather, the Court found that the probate court's findings demonstrated that the mother, with the assistance of the paternal grandparents, was fit to further the welfare and the best interests of the child.[48]

After finding the mother and paternal grandparents suitable as custodians, the Court concluded that the probate court's decision, which awarded custody to the maternal step-grandmother, could not be reconciled with the terms of chapter 201, sections 5 and 33, because the mother

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[43] *Id.*

[44] 388 Mass. at 403-04; 446 N.E.2d at 1373. G.L. c. 201, § 33, provides in pertinent part:

> If a guardian or conservator becomes mentally ill or otherwise incapable of performing his trust or is unsuitable therefor, the probate court, after notice to him and to all other persons interested, may remove him. If the petition for removal contains a prayer therefor the court may, upon such notice as it considers reasonable, appoint a successor to fill any vacancy caused by such removal, without the filing of a separate petition for that purpose.

[45] *See* G.L. c. 201, § 33.

[46] 388 Mass. at 405, 446 N.E.2d at 1374. The Court first found the guardians suitable and therefore concluded that it need not reach the question of parental fitness. *Id.* at 404, 446 N.E.2d at 1373. The Court decided, however, that they would address both issues because they disagreed with the Appeals Court's approach to the case. *Id.*

The Appeals Court had held that the judge did not need to make a finding of parental unfitness before appointing a guardian with custody, despite the lack of parental consent. *Id.* The Appeals Court reasoned that this case was a contest between grandparents and therefore the fitness of the parent had little relevance. *Id.* According to the Supreme Judicial Court, the Appeals Court relied on "its view of the general equity powers of the probate court" and concluded "that the judge was free to follow its own vision of 'the best interest of the child' and appoint the [maternal step-grandmother] guardian with custody." *Id.*

[47] 388 Mass. at 405, 446 N.E.2d at 1374. The Court contrasted this case with Custody of a Minor (3), 383 Mass 595, 421 N.E.2d 63 (1981), where the trial court judge had found that the removal of the child from the foster parents would result in "serious deleterious effects," *Id.* at 601, 421 N.E.2d at 66, with Wilkins v. Wilkins, 324 Mass. 261, 85 N.E.2d 768 (1949), where the probate court judge found that the child suffered psychological harm after visiting her parents. *Id.* at 263, 85 N.E.2d at 769.

[48] 388 Mass. at 405-06, 446 N.E.2d at 1374.

had not been found unfit under section 5, and the paternal grandparents had not been found unsuitable under section 33.[49] The Court concluded that these findings, together with the mother's consent to the paternal grandparents' guardianship, did not permit the probate court to terminate the paternal grandparents' guardianship and substitute the maternal grandmother in their stead.[50]

In recognizing that the parent's assent to the paternal grandparents' guardianship with custody should be considered, the Court nonetheless warned that a judge is not bound to follow the parent's wishes in every case.[51] The parent's desires could be ignored, according to the Court, if the guardians were found "unsuitable" within the meaning of chapter 201, section 33.[52] If the guardians were found unsuitable, then the judge could consider the parent's fitness to have custody of the child.[53] In making this determination of fitness, the Court noted that a judge should consider the ability of the parents to care for the child or their ability to make alternative arrangements for the child's care.[54] If the parents are found fit under this test, then the judge is bound under chapter 201, section 5 to "grant custody to them, or, in the alternative, to honor their wishes to the extent permitted by statute, on the choice of a guardian."[55]

The Court found support for its holding from principles espoused in past Massachusetts cases.[56] According to the Court, these cases established the principle that a state's intervention against the wishes of the parents must serve some substantial state interest.[57] The Court concluded that the substantial interest test was not met because no state interest would be advanced by granting custody to the maternal step-grandmother, who the parents opposed, when the parents were fit and the guardians they chose were suitable.[58]

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[49] *Id.* at 406; 446 N.E.2d at 1374.

[50] *Id.*

[51] *Id.* at 406, 446 N.E.2d at 1375.

[52] *Id.* at 405-06, 446 N.E.2d at 1375.

[53] *Id.* at 407, 446 N.E.2d at 1375.

[54] *Id.*

[55] *Id.* The Court in espousing this principle cited the first sentence of G.L. c. 201, § 5, which reads as follows: "The guardian of a minor shall have the custody of his person and the care of his education, except that the parents of the minor, jointly, or the surviving parent shall have such custody and said care unless the court otherwise orders." For full text of this statute, see *supra* note 41.

[56] 388 Mass. at 407, 446 N.E.2d at 1375.

[57] *Id.*

[58] *Id.* The Court mentioned that a different finding would raise serious constitutional difficulties. *Id.* The Court, however, did not address these difficulties, deciding that the Court's "resolution of the case relieves [it] of the duty to decide whether that resolution is also mandated by constitutional principles." *Id.* at 407 n.16, 446 N.E.2d at 1375 n.16.

In a second custody case decided during the *Survey* year, *Custody of a Minor*,[59] the Supreme Judicial Court was again faced with the application of the parental fitness test and the best interest of the child test. This case differed from *Freeman*, however, because the dispute was between a third party and the natural mother rather than between a third party and the custodian the parent had selected.[60] The child in dispute was born out of wedlock.[61] For the first seven years of the child's life the mother and child moved from place to place in the United States and England, finally settling in Hawaii.[62] Soon after they moved to Hawaii, the mother made arrangements for the child to stay with a caretaker[63] and attend school while the mother worked elsewhere in the state.[64] Sometime later the caretaker, with the mother's permission, took the child to live in Massachusetts.[65] The mother and the caretaker communicated regularly by mail until the time when the mother traveled to Massachusetts to visit the child.[66] During this visit, the mother planned a trip for the child to Hawaii, but the child refused to go.[67] On the day the trip was scheduled, the mother returned to the caretaker's home and demanded the child.[68] The police were called and the mother retained counsel.[69]

The Department of Social Services ("Department") filed a care and protection petition pursuant to chapter 119, section 24.[70] This section

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[59] 389 Mass. 755, 452 N.E.2d 483 (1983).

[60] *Id.* at 756, 452 N.E.2d at 484.

[61] *Id.* at 757, 452 N.E.2d at 485. This was the mother's second child; she gave up her first child for adoption shortly after its birth. *Id.*

[62] *Id.* Among the places the mother and child lived were a farm in Virginia, a commune in Scotland, and a religious sect in California. *Id.* at 757-58, 452 N.E.2d at 485.

[63] No legal guardianship was created. *Id.* at 757-58, 452 N.E.2d at 486.

[64] *Id.* at 757-58, 452 N.E.2d at 485. The mother left the child with the caretaker and went to live with a man fifty miles away. The mother occasionally visited the child. *Id.* at 757-58, 452 N.E.2d at 485-86.

[65] *Id.* at 759, 452 N.E.2d at 486.

[66] *Id.* at 760, 452 N.E.2d at 486. The mother, according to the trial judge, continued to express her approval of the child's caretaker and admitted her own inadequacy as a mother. *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 756, 452 N.E.2d at 484. G.L. c. 119, § 24, provides in pertinent part:

> The Boston juvenile court . . . [list of the other Massachusetts courts], upon the petition of any person alleging on behalf of a child under the age of eighteen 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 guardians 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

provides that a care and protection petition can be filed by anyone who has reason to believe that a child is being abused or neglected or is without proper care.[71] The district court adjudicated the child in need of care and protection and awarded legal custody to the Department.[72] The mother appealed and the caretaker filed a motion to dismiss.[73] The motion was denied and the case was transmitted to the Appeals Court.[74] The appeal was transferred to the Supreme Judicial Court on the Court's motion.[75] The Supreme Judicial Court first addressed the validity of the procedures the district court followed.[76] The Court reversed the district court's order transferring custody to the Department, finding that the custody dispute was not a proper subject for a care and protection proceeding.[77] Rather, the Supreme Judicial Court concluded that the custody dispute should have been litigated as a guardianship proceeding in the probate and family court pursuant to chapter 201, section 5.[78]

After concluding that the district court's procedure for resolving the custody dispute was incorrect, the Court reviewed the substantive findings of the district court to determine if the district court erroneously awarded physical custody of the child to the caretaker and legal custody

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department, and shall issue summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or other appropriate order made.

See also Note, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. L.J. 213, 228 (1979).

[71] *See* G.L. c. 119, § 24.

[72] 389 Mass. at 756, 452 N.E.2d at 484. The procedure prior to this consisted of the following: The district court issued an emergency order transferring custody of the child to the Department; a motion of the Department to withdraw as co-petitioner and substitute the caretaker was allowed; soon afterwards, the district court dismissed the petition and the caretaker appealed. *Id.* The case was then transferred to the juvenile appeals session of the district court where a trial without a jury was conducted and resulted in this finding. *Id.*

[73] *Id.* at 756, 452 N.E.2d at 485.

[74] *Id.*

[75] *Id.* The Supreme Judicial Court may directly transfer from a lower court any case, in whole or in part, to its docket. *See* G.L. c. 211, § 4A.

[76] 389 Mass. at 770, 452 N.E.2d at 492. The Supreme Judicial Court noted that there was no objection in the district court to the procedure followed. *Id.* at 761, 452 N.E.2d at 487. Moreover, the appellant did not question either the propriety of the caretaker's substitution as petitioner or whether the caretaker was entitled to a de novo appeal from the dismissal of the petition. *Id.* The Supreme Judicial Court, nonetheless, decided to address these procedural issues because it found that the procedural infirmities had a bearing on the case. *Id.*

[77] *Id.* at 762, 452 N.E.2d at 487-88. The Supreme Judicial Court distinguished this case from several cases where the custody proceedings were brought under the care and protection statute, G.L. c. 119, § 24. The Court cited Custody of a Minor (3), 378 Mass. 732, 744, 393 N.E.2d 836, 843 (1979) and *Custody of a Minor (1)*, 377 Mass. at 881, 389 N.E.2d at 72.

[78] 389 Mass. at 762, 452 N.E.2d at 487-88. The Supreme Judicial Court next addressed the question of the appellant's right to a de novo appeal. *Id.* at 762-63, 487 N.E.2d at 488. This issue, however, will not be discussed in this chapter.

to the Department.[79] The Court laid out the framework to be used in deciding whether a child should be removed from his or her parents.[80] The Court noted that Chapter 119, section 1, requires the Commonwealth to use its efforts to preserve and strengthen the family.[81] The Court emphasized that, at common law, parents are presumed to have a natural right to the care and custody of their children, but parental rights are not absolute and "must yield to the welfare of the child."[82] In order to remove a child from his natural parents, the Court noted, an affirmative showing of parental unfitness is necessary.[83] In requiring this showing of parental unfitness, the Court stressed that the state may not intrude into the family just because a prospective guardian is thought to be better qualified or because the court may disapprove of the natural parent's lifestyle.[84] Parents are to be measured, cautioned the Court, not only by their conduct or character, but also by their ability to further the best interests of the child.[85]

The Constitution, the Court noted, requires that "clear and convincing" evidence of parental unfitness be found before a child may be removed from his or her natural parents.[86] The removal may only be ordered based on a "specific and detailed" finding that removal is neces-

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[79] *Id.* at 761-62, 452 N.E.2d at 488-89

[80] *Id.* at 764-70, 452 N.E.2d at 489-92

[81] *Id.* at 764-65, 452 N.E.2d at 489. For text of G.L. c. 119, § 1, see *supra* note 39.

[82] *Id.* at 765, 452 N.E.2d at 489.

[83] *Id. See* Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 589, 421 N.E.2d 28, 37 (1981); *Custody of a Minor (1)*, 377 Mass. at 882, 389 N.E.2d at 72.

[84] 389 Mass. at 765, 452 N.E.2d at 489. The Court cited Petition of the New England Home for Little Wanderers, 367 Mass. 631, 640, 328 N.E.2d 854, 860 (1975).

[85] 389 Mass. at 765-66, 452 N.E.2d at 489-90. The Court emphasized that fitness of the parents and the best interests of the child are related. *Id.* at 766, 452 N.E.2d at 490. Several past Supreme Judicial Court cases have also articulated this interrelationship. *See, e.g.*, Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 589, 421 N.E.2d 28, 38 (1981); Bezio v. Patenaude, 381 Mass. 563, 576-77, 410 N.E.2d 1207, 1214-15 (1980); Petition of the New England Home for Little Wanderers, 367 Mass. 631, 641, 328 N.E.2d 854, 860 (1975).

[86] 389 Mass. at 766, 452 N.E.2d at 490. The Supreme Judicial Court cited Santosky v. Kramer, 455 U.S. 745, 769-70 (1982), for articulating this constitutional requirement. Prior to this case, the Massachusetts Supreme Judicial Court recognized a lower standard of proof. In *Custody of a Minor (1)*, 377 Mass. at 885-86, 389 N.E.2d at 75 (1979), for instance, the Supreme Judicial Court found that a judge need only "exercise utmost care," as demonstrated through specific findings of fact, in rendering a judgment that deprives a parent of custody.

See also Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 592-93, 421 N.E.2d 28, 38-39 (1981). For a discussion of the evidentiary standards generally and this case specifically, see Note, *Domestic Relations*, 1981 ANN. SURV. MASS. LAW § 3.2, at 71, 71 n.51.

sary in order to further the welfare of the child.[87] Consequently, before the district court judge could deprive the natural mother of custody, reasoned the Court, his "findings must support his conclusions and order, and it must be clear that the order was not motivated by inappropriate factors."[88]

Having articulated that a finding of parental unfitness requires clear and convincing evidence, the Supreme Judicial Court addressed whether the district court's findings supported the removal of custody from the mother.[89] The Court noted at the outset that the district court judge's findings and observations suggested that he may have been motivated by inappropriate factors when applying the parental unfitness test.[90] The district court judge, noted the Supreme Judicial Court, determined who should have custody by comparing the advantages for the child of living with the caretaker to the advantages of living with the mother.[91] This comparison, according to the Court, was inappropriate because the district court did not consider the presumption that a natural mother has a right to raise her child.[92] Moreover, the Court noted that in terminating the mother's parental right, the district court relied too heavily on an assessment of her unconventional lifestyle.[93] The Court acknowledged that the district court could have considered the mother's lifestyle if it significantly harmed the child.[94] The Supreme Judicial Court cautioned, however, that the state may not deprive parents of custody of their children because "the parents embrace ideologies or pursue life-styles at odds with the average."[95] In the instant case, since the child had not suffered any physical, mental or emotional deficits, the mother's uncon-

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[87] 389 Mass. at 767, 452 N.E.2d at 490.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 768, 452 N.E.2d at 491.

[92] *Id.*

[93] *Id.* at 767-68, 452 N.E.2d at 490-91. The Supreme Judicial Court found that the district court judge's

> focus on the mother's unconventional behavior, including her frequent moves from place to place, her unusual residences, unorthodox religion, vegetarianism, adherence to holistic medicine, communal living, and nonmarital cohabitation with men, casts doubt on whether he gave sufficient recognition of the principle that '[t]he state may not deprive parents of custody of their children . . . simply because the parents embrace ideologies or pursue life-styles at odds with the average.'

Id. at 767-68, 452 N.E.2d at 491 (citing Bezio v. Patenaude, 381 Mass. 563, 579, 410 N.E.2d 1207, 1216 (1980) and Custody of a Minor (2), 378 Mass. 712, 719, 393 N.E.2d 379, 383 (1979)).

[94] 389 Mass. at 768, 452 N.E.2d at 491.

[95] *Id.*

ventional lifestyle could not result in the district court judge's finding that the mother was unfit.[96]

After concluding that the mother's unconventional lifestyle did not render her unfit, the Court turned to the effect that should be assigned to the time separation between the child and mother in determining custody of the child.[97] The Supreme Judicial Court explained that such a separation could result in a finding of parental unfitness if the return of the child to the mother was "seriously detrimental to the child."[98] In determining the effect of the separation, the Court stated, the district court had given too much weight to the fact that the mother placed the child with the caretaker voluntarily and had consented to this arrangement for two and one half years.[99] The Court found that the separation between the mother and child in this case did not warrant the district court's conclusion that the child would be harmed if returned to the mother.[100] Because the return of the child to the mother would not be seriously detrimental to the child, the Court concluded that the time separation should not result in a finding that the mother was unfit to have custody of her child.[101]

Finally, after finding that the return of the child to the mother would not cause irreparable harm, the Court considered the appropriate weight that should be given to the child's wishes.[102] The Court found that in this case the district court judge had given undue weight to the child's desire to remain with the caretaker.[103] Although the child's wishes should be considered, the Court stated that they are not dispositive.[104] Rather, the Court stated, the controlling question is "whether the welfare of this child would be seriously endangered if custody is not transferred from the mother."[105] The Court found that there was insufficient evidence to support such a conclusion.[106] Consequently, the Court reversed the district court and ordered that the parties be allowed to present new evidence,

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[96] *Id.* at 767-68, 452 N.E.2d at 490-91.

[97] *Id.* at 768, 452 N.E.2d at 491.

[98] *Id.* The Court (citing Freeman v. Chaplic, 388 Mass. 398, 446 N.E.2d 483 (1983)) noted that parents do not give up their right to custody by choosing "a caretaker proxy." *Id.*

[99] *Id.*

[100] *Id.* at 768-69, 452 N.E.2d at 491.

[101] *Id.*

[102] *Id.* at 769, 452 N.E.2d at 491.

[103] *Id.*

[104] *Id.* The Supreme Judicial Court cited in support of this proposition, Custody of a Minor (3), 383 Mass. 595, 602, 421 N.E.2d 63, 67 (1981) (preferences of children of sufficient maturity may be considered).

[105] 389 Mass. at 769, 452 N.E.2d at 491.

[106] *Id.* at 769, 452 N.E.2d at 491-92.

especially in light of the long period of time since the start of the case.[107]

In the third custody case, *Doe v. Doe*,[108] the Appeals Court was faced with the correct application of the parental fitness test and the best interest of the child test. This case differed from the Supreme Judicial Court cases of *Freeman* and *Custody of a Minor*, however, because it involved a dispute between the natural parents rather than between parents and third parties.[109] The child in question was six years old when his parents separated.[110] Following the separation, the mother took the child to live in a nearby city.[111] Soon after the move, the mother's homosexual companion moved in with the mother and child.[112]

The father then brought a complaint for divorce and sought sole custody of the child.[113] A cross-complaint by the mother sought joint custody.[114] A temporary order gave the parents joint legal and physical custody.[115] The trial judge appointed a child psychiatrist as a guardian ad litem and also visited the parents' respective homes and spoke with the child.[116] Both the judge and the psychiatrist found that the child suffered no psychological harm from living with the mother and her homosexual companion and that both the mother and father were good parents.[117] Accordingly, the judge ordered that the parents be awarded joint legal and physical custody.[118] The father appealed this order.[119]

In appealing the joint custody award, the father first argued that because there is a conflict between the mother and father, joint custody

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[107] *Id.* at 769-70, 452 N.E.2d at 492. The Supreme Judicial Court then vacated the order of the district court, awarding legal custody to the Department and physical custody to the caretaker. *Id.* at 770, 452 N.E.2d at 492. The Court suggested that a proceeding in the probate and family court be expedited to resolve the custody dispute. *Id.*

[108] 16 Mass. App. Ct. 499, 452 N.E.2d 293 (1983).

[109] *Id.* at 500, 452 N.E.2d at 294.

[110] *Id.*

[111] *Id.* At the time of the separation the mother and father worked out a visitation agreement whereby the child would spend approximately equal time with each parent. *Id.*

[112] *Id.* at 501-02, 452 N.E.2d at 295. The wife stipulated at the time of trial that she was engaged in a homosexual relationship that she intended to continue. *Id.*

[113] *Id.* at 501, 452 N.E.2d at 295.

[114] *Id.*

[115] *Id.* The husband was granted physical custody during the week and the wife was granted physical custody two out of every three weekends. *Id.* The court pointed out that this custody arrangement meant that the child lived with his mother while she was engaged in the homosexual relationship. *Id.*

[116] *Id.*

[117] *Id.* The child was almost ten years old at the time of the trial. *Id.* According to the court, both the trial court judge and the guardian ad litem found that the child was a "verbal, intelligent young man who knows what he wants and has the ability to articulate the same. He would prefer to live with both parents under one roof, but if that is not possible, he would like to live with both parents separately." *Id.*

[118] *Id.*

[119] *Id.* at 501-02, 452 N.E.2d at 296.

would not be in the child's best interests.[120] The father further argued that since joint custody is against the child's best interest and since the mother "leads a deviant lifestyle," due to her homosexual relationship, sole custody should be awarded to him.[121] In addressing the father's first argument, the Appeals Court recognized that there was a conflict between the parents.[122] According to the court, this conflict was irrelevant because it only involved the parents' feelings toward one another and not their feelings concerning the raising of the child.[123] The court contrasted this case with *Rolde v. Rolde*[124] where the conflict between the parents concerned the proper way to raise the child. In *Rolde*, the Appeals Court held that "in order for joint custody or shared responsibility to work, both parents must be able mutually 'to agree on the basic issues in child rearing and want to cooperate in making decisions for [their] children.' "[125] In *Doe*, the court stated, because the evidence showed that the mother and father shared "mutual desires and concern" over the "child's welfare and happiness," *Rolde* was inapplicable.[126] The court, therefore concluded that the type of conflict that existed between the parties in this case did not render the joint custody award inappropriate.[127]

The *Doe* court then considered the husband's second argument that the wife's "deviant lifestyle" compelled the court to award sole custody to the husband.[128] In considering this argument, the court first noted that a

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[120] *Id.*

[121] *Id.* at 502, 452 N.E.2d at 295. The court, prior to addressing these two arguments, noted that custody disputes arising out of divorce must be determined in accordance with G.L. c. 208, § 31, which provides that the parents' rights to custody are presumed equal, absent misconduct, and custody is to be determined on the basis of the happiness and welfare of the child.

[122] 16 Mass. App. Ct. at 502, 452 N.E.2d at 295. The father, in arguing that the conflict between the mother and father precluded an award of joint custody, relied on Rolde v. Rolde, 12 Mass. App. Ct. 398, 425 N.E.2d 388 (1981). For facts of the case, see *infra* note 125.

[123] 16 Mass. App. Ct. at 502, 452 N.E.2d at 295.

[124] 12 Mass. App. Ct. 398, 425 N.E.2d 388 (1981).

[125] *Id.* at 404, 425 N.E.2d at 390. The facts in *Rolde* are as follows: At the time that the parents separated they agreed upon certain custody and visitation rights, whereby the child would live with the mother, and the father would have reasonable visitation rights. A temporary custody order reiterated this arrangement. The probate court, however, after a full trial awarded the mother sole custody and eliminated much of the father's visitation rights. The father appealed the award of sole custody. *Id.* at 399-400, 425 N.E.2d at 389.

[126] 16 Mass. App. Ct. at 503, 452 N.E.2d at 296.

[127] *Id.*

[128] *Id.* at 502, 452 N.E.2d at 296. For articles on homosexuality in custody disputes, *see generally* Note, *The Law and the Problem Parent: Custody and Parental Rights of Homosexual, Mentally Retarded, Mentally Ill and Incarcerated Parents*, 16 J. FAM. L. 797 (1977-78). *See also* Campbell, *Child Custody: When One Parent is a Homosexual*, 17 JUDGES J. 38 (1978); Hunter & Polikoff, *Custody Rights of Lesbian Mothers; Legal Theory*

parent's lifestyle standing alone is an insufficient ground for termination of parental custody.[129] The court found support for this proposition in the Appeals Court case of *Fort v. Fort*.[130] In *Fort* the court held that it is not improper to award custody of a minor child to a parent who cohabits illegally with a person other than the parent's spouse.[131] The *Fort* court stated that the moral or criminal nature of illegal cohabitation is only relevant where evidence is presented that demonstrates an adverse effect on the child directly attributable to that cohabitation.[132] Applying the *Fort* standard to the facts in *Doe*, the court found that there was no evidence to show that the mother's homosexual relationship would adversely affect the child.[133] The court, in reaching this conclusion, relied both upon the testimony of psychiatrists at the trial, and upon the evidence presented to support the trial judge's decision to award joint custody to the parents.[134] The Appeals Court noted that the psychiatrist had testified that the mother's lifestyle would not adversely affect the child if she were awarded some form of custody.[135] According to the court, the father presented no other evidence to show that the mother's lifestyle would adversely affect the child.[136] In fact, the evidence demonstrated that the child was very comfortable at the mother's home and liked the mother's homosexual

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and Litigation Strategy, 25 BUFFALO L. REV. 691 (1976); Comment, *Bezio v. Patenaude: The "Coming Out" Custody Controversy of Lesbian Mothers in Court*, 16 NEW ENG. L. REV. 331 (1981).

[129] 16 Mass. App. Ct. at 503, 452 N.E.2d at 296. (citing Custody of a Minor, 389 Mass. 755, 767-70, 452 N.E.2d 483, 489-90 (1983); Bezio v. Patenaude, 381 Mass. 563, 579, 452 N.E.2d 1207, 1216 (1980)). The court noted that although the cases cited did not involve custody proceedings arising out of a divorce, the same principle was applicable. 16 Mass. App. Ct. at 503, 452 N.E.2d at 296.

[130] 12 Mass. App. Ct. 411, 425 N.E.2d 754 (1981), *review denied*, 1981 Mass. Adv. Sh. 2140. For a discussion of this case, see 1981 ANN. SURV. MASS. LAW § 3.4, at 81.

[131] 12 Mass. App. Ct. at 418-19, 425 N.E.2d at 758. The facts in *Fort* are as follows: Upon the parents' separation, the father moved from the marital home and began cohabiting with an unmarried woman. Soon after, the father was awarded custody of the child in the divorce decree. The mother appealed, contending that the judge's decision to award custody of the child to the father was erroneous because the father was not suited to care for the child because of this cohabitation. *Id.* at 412-13, 425 N.E.2d at 755-56.

[132] *Id.* at 418-19, 425 N.E.2d at 759.

[133] 16 Mass. App. Ct. at 503, 452 N.E.2d at 296.

[134] *Id.*

[135] *Id.* Four psychiatrists testified at trial. *Id.* The trial judge said that "three of these people were of the opinion that the wife's lifestyle, in and of itself, would not adversely affect the minor child, should the wife be awarded some form of custody." *Id.* The fourth psychiatrist found that "mere association between a minor child and a homosexual parent was detrimental to the child." *Id.* at 503 n.2, 452 N.E.2d at 296 n.2. The trial court judge, however, did not find this opinion credible because "[the psychiatrist] had no supporting studies and his exposure to single parent lesbians was limited." *Id.*

[136] *Id.* at 504, 452 N.E.2d at 296.

companion.[137] The court also found important in its determination of the award of joint custody that the child was not teased by his friends concerning his mother's homosexual relationship.[138] In sum, the Appeals Court treated the mother's sexual orientation as only one element to be considered in the custody decision. The court deemed homosexuality a relevant factor only where there is clear proof that the child would be appreciably harmed by being placed in the custody of the homosexual parent.

In custody disputes, each case is unique, and thus no rigid set of guidelines is ever satisfactory. Nevertheless, in the three cases discussed above, the Supreme Judicial Court and the Appeals Court articulated the standards to be used in three different types of custody disputes. In *Freeman v. Chaplic*,[139] the Supreme Judicial Court established the standard for use in custody disputes between a third party and the custodian selected by the natural mother. The Court formulated a two-prong test when it determined that the paternal grandparents, who the mother had chosen as custodians rather than the maternal step-grandmother, should be appointed guardians with custody.[140] Under this test, the first inquiry is the determination of the suitability of the present guardians.[141] If they are found suitable, then the inquiry ends and the child remains with the guardians.[142] If the guardians are found unsuitable, then the court addresses the second issue: the fitness of the parent.[143] If the parent is found fit to have custody, then that parent is either granted custody or the court must honor his or her selection of a guardian.[144] If the parents are found unfit, then the court appoints a guardian.[145]

The *Freeman* court, in formulating this two-prong test, ignored the best interest of the child standard. The Court did not consider that the child had lived with the maternal step-grandmother almost exclusively for the first seven years of her life, and with the paternal grandparents for only the two years prior to the custody hearing, or that the child preferred to live with the maternal step-grandmother. Instead of considering the child's interests, the Court focused on the present guardians and the parents. Because the present guardians were found suitable and the mother was found fit, the Court reasoned that it was required to honor the mother's wishes as to her choice of a guardian.

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[137] *Id.*
[138] *Id.*
[139] 388 Mass. 398, 446 N.E.2d 1369 (1983). *See supra* notes 21-58 and accompanying text.
[140] 388 Mass. at 404, 446 N.E.2d at 1373.
[141] 388 Mass. at 403-04, 446 N.E.2d at 1373.
[142] *Id.*
[143] *Id.* at 405-06, 446 N.E.2d at 1373.
[144] *Id.* at 404-06, 446 N.E.2d at 1373-74.
[145] *Id.*

In *Custody of a Minor*,[146] the Supreme Judicial Court articulated the standard to be used in a custody dispute between a third party and the natural mother. Using the parental fitness standard, the Court determined that the appeals court judge gave undue weight to the mother's lifestyle.[147] The Court indicated that the only way a parent could be found unfit is if the child would be "seriously endangered" as a result of living with that parent.[148] The Court, while alluding to the interests of the child, clearly used the parental fitness test as the controlling standard. In so doing, the Court gave little credence to the lower court's finding that the mother's absence from the child for two and one half years caused the child to harbor a continuing resentment toward the mother. Thus, it appears that in Massachusetts in cases between third parties and natural parents, the parents will be given custody absent serious endangerment to the child.

In *Doe v. Doe*, the Appeals Court discussed the standard to be used in a custody dispute between two natural parents where one parent is a homosexual.[149] In a custody dispute between two natural parents, consideration of the best interests of the child has traditionally predominated over the fitness of the parent inquiry.[150] Consistent with this tradition, the *Doe* court, unlike the *Freeman* and *Custody of a Minor* courts, did not abandon the best interest of the child standard in favor of the parental fitness standard. Instead, the *Doe* court gave weight both to evidence of the fitness of the homosexual mother and the effect of the mother's homosexual relationship on the child.[151] The *Doe* decision thus indicates that, in custody disputes between two natural parents, the best interests standard, while no longer the dominant test in Massachusetts, remains significant.

Several important principles emerged from *Freeman*, *Custody of a Minor*, and *Doe* regarding the correct application of the parental fitness and the best interests of the child tests and the type of evidence needed to prove each one. In disputes between a third party and the custodian selected by the parent, and disputes between a third party and the natural parent, the parental fitness test predominates. In disputes between the natural parents, both the parental fitness and the best interest tests are significant. The use of the parental fitness test as either the predominant test or the significant test in these custody disputes indicates a recognition by the courts of parents' rights to custody of their own children.

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[146] 389 Mass. at 767, 452 N.E.2d at 491. *See supra* notes 59-107 and accompanying text.

[147] 389 Mass. at 769-70, 452 N.E.2d at 492.

[148] *Id.* at 767, 452 N.E.2d at 491.

[149] 16 Mass. App. Ct. at 503, 452 N.E.2d at 296. *See supra* notes 108-138 and accompanying text.

[150] *See supra* note 13 and accompanying text.

[151] 16 Mass. App. Ct. at 503-04, 452 N.E.2d at 296.

Consistent with this recognition, these cases demonstrate that the trial court judge's determination of custody may no longer be based on the court's bias or prejudice but rather must be based on objective factors. The petitioner must be able to provide concrete factual proof that the parent's behavior will adversely affect the child.[152] By requiring that the trial court judge's determination of custody be based solely on objective factors, the courts have circumscribed a trial judge's broad discretionary power in custody proceedings. In so doing, these courts have recognized that the important fundamental rights of parents demand high standards when parents are to be denied custody of their children.

§ 16.4. Divorce — Equitable Distribution of Property — Pension Benefits.* If the parties in a divorce action do not reach a property settlement, section 34 of chapter 208 of the General Laws grants the trial court the authority to fashion an equitable division of the marital property in addition to, or in lieu of, awarding alimony to either spouse.[1] During the *Survey* year, the Appeals Court rendered three decisions that will affect the equitable distribution of property under section 34. In *Bennett v. Bennett*[2] and *Sheskey v. Sheskey*,[3] the court addressed the significance of tax consequences produced by an equitable distribution of property. In *Dewan v. Dewan*,[4] the court addressed some of the valuation and distribution problems created by the equitable distribution of pension benefits

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[152] Freeman v. Chaplic, 388 Mass. 398, 404-05, 446 N.E.2d 1369, 1373-74 (1983); Custody of a Minor, 389 Mass. 755, 767-68, 452 N.E.2d 483, 490-91 (1983); *Doe*, 16 Mass. App. Ct. at 503-04, 452 N.E.2d at 296.

* Geoffrey Hobart, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

§ 16.4. [1] G.L. c. 208, § 34 provides in pertinent part:

> Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of 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 acquisiton, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit.

[2] 15 Mass. App. Ct. 999, 448 N.E.2d 77 (1983)

[3] 16 Mass. App. Ct. 159, 450 N.E.2d 187 (1983).

[4] 17 Mass. App. Ct. 97, 455 N.E.2d 1236 (1983).

under section 34. This chapter will consider separately the issues raised in these cases, beginning with the court's treatment of tax consequences in *Bennett* and *Sheskey*.

The Appeals Court in *Bennett* and *Sheskey* outlined the manner in which tax issues should be handled in distribution of property cases. Prior to the *Bennett* and *Sheskey* decisions, the Supreme Judicial Court in *Rice v. Rice*[5] stated that a judge's order could not be considered "plainly wrong" because of a failure to consider the tax consequences involved in a property distribution if the appellant spouse did not present evidence at trial concerning such issues.[6] The *Bennett* court applied the principle expressed in *Rice*.[8]

In *Bennett*, the Appeals Court reviewed a property award in a divorce action.[9] The probate judge granted Mrs. Bennett a divorce and awarded her alimony, child support, a provision for the educational expenses of the children of the marriage, and a division of property.[10] At the time of the trial, Dr. Bennett was employed as an orthodontist by a professional corporation of which he was the sole stockholder.[11] During the proceedings, Mrs. Bennett presented a certified public accountant as a witness.[12] The accountant testified about various tax and valuation issues concerning Dr. Bennett's professional corporation, distributions and loans received by Dr. Bennett from his corporation, Dr. Bennett's pension and profit sharing plan, and his interests in certain commercial properties.[13] Although Dr. Bennett's attorney cross-examined the accountant, he did not present any evidence relevant to tax and valuation issues as part of Dr. Bennett's case in chief.[14] On appeal, Dr. Bennett challenged the property award on the ground that the probate judge had failed to consider the tax effects accruing to Dr. Bennett as a result of the property award.[15]

The Appeals Court upheld the probate judge's property award, stating that under the circumstances it could not hold that the probate judge's findings were clearly erroneous.[16] The court found that Dr. Bennett had

[5] 372 Mass. 398, 361 N.E.2d 1305 (1977).

[6] *Id.* at 402 n.4, 361 N.E.2d at 1308. For an analysis of the *Rice* decision, see Inker, Perocchi and Walsh, *Domestic Relations*, 1977 ANN. SURV. MASS. LAW § 1.2 at 11-13. The Appeals Court followed the Supreme Judicial Court's language in *Rice* in two subsequent decisions. *See* Angelone v. Angelone, 9 Mass. App. Ct. 728, 732, 404 N.E.2d 672, 674 (1980); 9 Mass. App. Ct. 869, 870, 401 N.E.2d 163, 164 (1980).

[8] 15 Mass. App. Ct. at 1000, 448 N.E.2d at 78.

[9] *Id.* at 999-1000, 448 N.E.2d at 78.

[10] *Id.* at 999, 448 N.E.2d at 78.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 999-1000, 448 N.E.2d at 78.

[14] *Id.* at 1000, 448 N.E.2d at 78.

[15] *See id.* at 999, 448 N.E.2d at 78.

[16] *Id.* The Appeals Court cited *Rice*, *Angelone*, and *Langerman* in support of its ruling. 15 Mass. App. Ct. at 1000, 448 N.E.2d at 78.

failed to present evidence at trial relevant to the tax issues in the case and had not requested consideration of such issues.[18] As a result, the court stated that it could not find that the probate judge had failed to consider the criteria set out in section 34.[19]

The court noted, however, that Dr. Bennett was not without recourse. Dr. Bennett, the court stated, could seek review of the alimony and support awards on the grounds of changed circumstances.[20] According to the court, Dr. Bennett could also challenge the alimony and support awards in the context of contempt proceedings if he was unable to make these payments because of the unexpected tax liability created by the property distribution.[21] The court concluded by cautioning attorneys that tax consequences are likely to be of great importance in property distribution cases involving sophisticated profit sharing and estate planning arrangements.[22]

In *Sheskey*, the Appeals Court further explicated the appropriate judicial treatment of the tax issues involved in property distribution cases.[23] At the time of the trial, Dr. Sheskey was employed as an anesthesiologist at Brigham and Women's Hospital.[24] Before becoming affiliated with the hospital, Dr. Sheskey had been employed by Pilgrim Anesthesia Services, Inc. ("Pilgrim"), of which he was the sole director and shareholder.[25] When Dr. Sheskey joined Brigham and Women's Hospital, Pilgrim became inactive but was not dissolved.[26] For the purposes of Pilgrim's pension plan, Dr. Sheskey still retained his status as a Pilgrim employee.[27] At trial, the probate judge valued Dr. Sheskey's interest in this plan at $240,000 and included this amount in the marital assets to be distributed.[28]

Dr. Sheskey's attorney requested that the judge consider the adverse tax consequences involved in the premature withdrawal of funds from the Pilgrim pension plan.[29] The attorney presented affidavits and expert tes-

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[18] *Id.* On appeal, Dr. Bennett's attorney conceded that absent a request that he do so and absent sufficient evidence, the probate judge was under no obligation to consider tax issues in making the property distribution in question. *Id.*

[19] *Id.* In *Bianco v. Bianco*, the Supreme Judicial Court held that because section 34 grants the courts such broad discretion in fashioning a settlement in divorce cases, the record must clearly indicate that the trial judge considered all the factors set out in section 34. 371 Mass. 420, 423, 358 N.E.2d 243, 245 (1976). For an analysis of the *Bianco* decision see Inker, Perocchi and Walsh, *Domestic Relations*, 1977 ANN. SURV. MASS. LAW § 1.2, at 7-9.

[20] 15 Mass. App. Ct. at 1000, 448 N.E.2d at 78.

[21] *Id.*

[22] *Id.*

[23] 16 Mass. App. Ct. 159, 159-62, 450 N.E.2d 187, 187-89 (1983).

[24] *Id.* at 160, 450 N.E.2d at 187.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 159, 450 N.E.2d at 187.

timony concerning the tax issues relevant to this matter.[30] Despite counsel's request and the evidence presented on behalf of Dr. Sheskey, the probate judge did not consider the tax issues involved in the case when making the property distribution.[31]

On appeal, the Appeals Court held that the probate judge's failure to consider the adverse tax impact on Dr. Sheskey in making the property distribution was reversible error.[32] The court distinguished *Bennett* with respect to the way the tax issues were dealt with at trial.[33] The *Sheskey* court found that Dr. Sheskey's attorney had made a timely request that the judge consider the tax consequences involved in the case and had presented sufficient evidence relevant to the issue.[34] Because the record did not show that the probate judge had considered the tax consequences involved in making the property distribution, the court remanded the case for reconsideration of the property award in light of the adverse tax consequences to Dr. Sheskey.[35]

While the *Bennett* and *Sheskey* decisions dealt with the tax issues involved in the distribution of pension rights, the issue in *Dewan* was the valuation of pension benefits. Specifically, the *Dewan* court addressed the problem of how to value and distribute a spouse's interest in a federal employee's civil service retirement plan.[37] The trial judge valued Mr. Dewan's interest in the pension plan according to the amount of his actual contributions to the plan.[38] Mrs. Dewan contended that her husband's pension rights should be valued at their present value.[39] In support of her position, Mrs. Dewan presented an actuary as an expert witness.[40] According to the actuary, if Mr. Dewan retired in six years after accumulating 30 years of service, the present value of his retirement benefits would

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[30] *Id.* at 162, 450 N.E.2d at 188. The expert produced by Dr. Sheskey estimated that a withdrawal of $159,173 from the Pilgrim pension fund in 1980 would result in a tax increase to Dr. Sheskey of $104,100. *Id.*

[31] *Id.* at 162, 450 N.E.2d at 188-89.

[32] *Id.*

[33] *Id.* at 159, 450 N.E.2d at 187.

[34] *See id.* at 159-61, 450 N.E.2d at 187-88.

[35] *Id.* at 162, 450 N.E.2d at 188-89. The Appeals Court instructed the probate judge to restructure the property settlement "with a view to minimizing the unnecessary adverse income tax consequences." *Id.* at 162, 450 N.E.2d at 189. The court offered suggestions as to how the adverse tax impact on Dr. Sheskey could be avoided. *Id.* In particular the court suggested that Dr. Sheskey could pay enhanced periodic alimony payments in lieu of the previously ordered lump sum payment. *Id.* Interestingly, the court did not suggest that the pension benefits be divided according to a set percentage when received by Dr. Sheskey upon retirement.

[37] 17 Mass. App. Ct. at 97, 455 N.E.2d at 1237.

[38] *Id.* at 97, 455 N.E.2d at 1237.

[39] *Id.* at 97, 455 N.E.2d at 1237-38.

[40] *Id.* at 97, 455 N.E.2d at 1237.

be $175,803.[41] The actuary also testified that if Mr. Dewan retired immediately, the present value of his future pension benefits would be $275,383.[42] The trial judge rejected this testimony and valued Mr. Dewan's interest in the plan at $34,843.44, the amount of Mr. Dewan's actual contributions to the plan.[43] Dissatisfied with the judge's determination, Mrs. Dewan appealed this part of the decision.[44]

The Appeals Court held that it was clearly erroneous for the trial judge to value the husband's interest in his pension plan according to his accumulated contributions to the plan.[45] The court reasoned that this valuation technique was incorrect because the actuarial benefit of a pension generally far exceeds the amount of an employee's accumulated contributions.[46] According to the court, the husband's accumulated contributions would be depleted after approximately two years of retirement if they were the sole source of his pension benefits.[47] The Appeals Court, however, was unwilling to accept the present value calculations offered by Mrs. Dewan,[48] finding the evidence presented insufficient to establish their applicability to the facts in the case before it.[49] The court noted, for example, that the actuary's calculation of $275,383 was based on the assumption that Mr. Dewan would retire immediately.[50] The record did not show, however, that Mr. Dewan could retire immediately without

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[41] *Id.*

[42] Although the husband's pension would be higher after 30 years of service, the time delay in the receipt of the benefits and the expectation of fewer payments upon retirement account for the difference in the two calculations. *Id.* at 97 n.1, 455 N.E.2d at 1237 n.1.

[43] *Id.* at 97, 455 N.E.2d at 1237-38.

[44] *Id.* at 97, 455 N.E.2d at 1237.

[45] *Id.* at 100, 455 N.E.2d at 1239. The court noted, however, that the accumulated contributions technique could be the appropriate way to value pension benefits, if the pension rights were vested and there was evidence showing that the employee-spouse was likely to shift employment and withdraw the accumulated contributions. *Id.* at 100 n.8, 455 N.E.2d at 1239 n.8.

[46] *Id.* at 100, 455 N.E.2d at 1239. The court cited cases from community property states in support of its position. *Id. See* Phillipson v. Board of Admin., Pub. Employees' Retirement Sys., 3 Cal. 3d 32, 49, 473 P.2d 765, 776, 89 Cal. Rptr. 61, 72 (1970) (the community property of a marriage includes not only the employee spouse's contributions to the plan, but also the matured pension rights payable as a benefit of employment), *disapproved sub nom.*, In re Marriage of Brown, 15 Cal. 3d 838, 851 n.14, 544 P.2d 561, 569 n.14, 126 Cal. Rptr. 633, 641 n.14 (1976); Copeland v. Copeland, 91 N.M. 409, 414, 575 P.2d 99, 104 (1975)(ordering the trial court to make a determination of the present value of the unmatured pension benefits and equitably divide the pension on a "pay as it comes in" system); In re Marriage of Minnis, 54 Or. App. 70, 75-76, 634 P.2d 259, 262 (1981) (the trial court's valuation of pension rights as the amount of the husband's contributions was erroneous).

[47] 17 Mass. App. Ct. at 99-100, 455 N.E.2d at 1239.

[48] *Id.* at 99, 455 N.E.2d at 1238.

[49] *Id.*

[50] *Id.* at 97, 455 N.E.2d at 1237.

forfeiting his pension rights.[51] In addition, the court noted, the $175,803 figure was based on the assumption that Mr. Dewan would be willing to retire after 30 years service.[52] Yet, according to the court, the record failed to indicate that Mr. Dewan was in fact willing to retire after 30 years of service.[53]

Even in circumstances where the assumptions underlying a present value calculation could be substantiated, the court observed that the distribution of the present value of a spouse's pension rights often would be unrealistic.[55] According to the court, the assignment of the present value of pension benefits is problematic because the present value of future pension benefits is not a liquid asset.[56] If the present value of pension benefits is included in the marital property to be distributed at the time of the judgment, the court noted, there may not be sufficient liquid assets to carry out the property settlement.[57] In order to alleviate this problem, the court held that pension rights could be distributed "if, as, and when" the retiring spouse receives the benefits.[58]

The manner in which pension rights should be distributed, the court stated, may depend on the age of the parties and the length of the marriage. The court observed that in situations where the spouses are far from retirement age and where the marriage is of short duration, assignment of the present value of pension rights at the time of the divorce may be feasible because of the low present value of the benefits and the low percentage to which the nonretiring spouse would be entitled.[59] On the other hand, in situations where the marriage is of longer duration and where retirement age is more proximate, the trial court might retain jurisdiction and distribute the benefits if and when received by the retiring spouse.[60] The court noted that in the latter situations structuring the

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[51] *Id.* at 99 n.6, 455 N.E.2d at 1238.

[52] *Id.* at 97, 455 N.E.2d at 1237.

[53] *Id.* at 99, 455 N.E.2d at 1238-39.

[55] *Id.* at 100, 455 N.E.2d at 1239.

[56] *Id.*

[57] *Id.*

[58] *Id.* The court stated that in instances where the division is made to apply to pension benefits when received, the applicable percentage is typically a portion of the pension benefits attributable to the period of the marriage. *Id.* at 101, 455 N.E.2d at 1239-40. According to the court, the appropriate percentage is generally a fraction, the numerator of which is the time period during the marriage in which the benefits were accrued, the denominator of which is the total period of accrual. *Id.* at 101, 455 N.E.2d at 1240.

[59] *Id.* at 102, 455 N.E.2d at 1240. The court noted that in such cases it may not be inappropriate for a judge to value pension rights by any accumulated contributions which are refundable upon the employee-spouse's voluntary termination of employment. *Id.* at 102 n.9, 455 N.E.2d at 1240 n.9.

[60] *See id.* at 102, 455 N.E.2d at 1240. The court left open the possibility that if other significant assets existed, the distribution of the present value of a spouse's pension rights

division of pension benefits according to a percentage of future retirement receipts would alleviate a number of potential problems caused by the distribution of the value of pension rights at the time of the trial.[62] The court pointed out that valuing pension benefits at the time of the divorce is often exceedingly difficult due to various contingencies surrounding the vesting and maturation of pension rights.[63] Consequently, according to the court, the distribution of pension rights at the time of the trial may be unfair because one spouse then bears the risk that those rights might be destroyed by death or by termination of employment prior to maturation.[64] Distributing pension benefits as received, the court observed, makes it unnecessary to calculate the present value of a spouse's pension benefits[65] and allocates equally the risk that the pension will fail to vest.[66] Furthermore, the court stated, when the present value of a spouse's pension rights is large, the division of those rights at the time of divorce simply may not be feasible in the absence of other significant assets.[67] Concluding that the appropriate method of dealing with pension rights must be determined by the circumstances of the particular case, the court remanded the case to the lower court for an appropriate determination.[68]

The Appeals Court's decisions in *Bennett*, *Sheskey*, and *Dewan* significantly affect the valuation of pension benefits and the consideration of tax consequences in property distributions under chapter 208, section 34 of the General Laws. In *Bennett* and *Sheskey*, the court concluded that a trial judge is under no obligation to consider the tax consequences in-

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might be appropriate. *See id.* For example, if the property to be distributed under section 34 included a home, the non-working spouse could receive the home and the employee-spouse could retain the rights to the future pension benefits. The problem remains, however, that the employee-spouse may never receive those benefits because of premature termination of employment or death.

[62] *Id.* at 101, 455 N.E.2d at 1239. The court quoted a passage from In re Marriage of Brown, 15 Cal. 3d 838, 848, 126 Cal. Rptr. 633, 639, 544 P.2d 561, 567 (1976), which described the advantages of distributing nonvested pension rights according to a percentage of the benefits as received. *Id.*

[63] *See id.* at 102, 455 N.E.2d at 1240. An employee's interest in a pension plan is vested when the minimum term of employment necessary to receive retirement benefits has been completed. L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY 168 (1983). An interest in a pension plan has matured when the employee-spouse has an unconditional right to immediate receipt of the retirement benefits. *Id.* It is possible for an interest to be vested but not matured. *Id.*

[64] *See* 17 Mass. App. Ct. at 102, 455 N.E.2d at 1240.

[65] *Id.* at 101, 455 N.E.2d at 1239 (quoting In re Marriage of Brown, 15 Cal. 3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976)).

[66] *Id.* (quoting *Brown*, 15 Cal. 3d at 848, 126 Cal. Rptr. at 639, 544 P.2d at 567).

[67] *Id.* at 102, 455 N.E.2d at 1240.

[68] *Id.*

volved in a property distribution case unless the issue is properly raised.[69] The *Sheskey* case clarifies the manner in which a tax issue can be raised, explains the obligations of the trial judge once a tax issue has been so presented,[70] and indicates that, once raised, the record must reflect consideration of tax consequences.[71]

The *Bennett* and *Sheskey* decisions are consistent with other Massachusetts cases in finding that trial judges are not required to consider tax consequences in property distribution cases if the issues have not been properly raised.[72] The failure of the Massachusetts courts to treat tax consequences as a mandatory factor for consideration in property distribution cases, however, can lead to inequitable results.[73] The *Bennett* case illustrates the consequences that can result from not addressing the tax issue at the property distribution trial. While the *Bennett* court recognized that the probate judge's decision would probably result in Dr. Bennett incurring significant tax liabilities, the court refused to set aside the probate judge's findings because the tax issue had not been properly raised at trial.[74] The Appeals Court held that to obtain recourse, Dr. Bennett would have to either petition for a hearing on grounds of changed circumstances or withhold payment and pursue the matter in a contempt proceeding.[75] Neither alternative is satisfactory. To promote judicial efficiency and ensure fair results in property distribution cases, trial judges should be required to consider the tax consequences of a property distribution whether or not the issue is raised by the parties.

Because current Massachusetts law does not require judicial consideration of tax issues in property distribution cases, counsel should be particularly careful to research thoroughly the tax ramifications of a proposed property distribution.[76] If a case does involve tax implications, the tax issue should be raised in the manner approved by the *Sheskey* court.[77] By properly raising the tax issues at trial, the client's interests are protected

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[69] *See Bennett*, 15 Mass. App. Ct. at 1000, 448 N.E.2d at 78; *Sheskey*, 16 Mass. App. Ct. at 159, 162, 450 N.E.2d at 187, 188-89.

[70] *See* 16 Mass. App. Ct. at 159, 162, 450 N.E.2d at 187, 188-89.

[71] *See id.* at 162, 450 N.E.2d at 188-89.

[72] *See Rice*, 372 Mass. at 402 n.4, 361 N.E.2d at 1308 n.4; *Angelone*, 9 Mass. App. Ct. at 732, 404 N.E.2d at 674; *Langerman*, 9 Mass. App. Ct. at 870, 401 N.E.2d at 164.

[73] *See* Freedman & Musko, *General Laws 208, Section 34 and the Internal Revenue Code*, 24 BOSTON B.J. (No. 2) 15, 18 (1980).

[74] 15 Mass. App. Ct. at 999, 448 N.E.2d at 78.

[75] *Id.*

[76] For a good discussion of some of the tax problems involved in divorce cases, see Freedman & Musko, *supra* note 73, at 15-17, and *Domestic Relations Tax Problems*, 36 TAX LAWYER 977 (1983).

[77] Freedman & Musko maintain counsel has the duty and obligation to request the trial court to take judicial notice of the tax issues involved in a property settlement case. Freedman & Musko, *supra* note 73, at 16.

because, under *Sheskey*, the trial court is then required to address those tax issues in the assignment of property.[78]

The Appeals Court's decision in *Dewan* will significantly affect the way pension benefits are treated under section 34. The question of how to value pension benefits for the purposes of a section 34 property distribution had not been raised before in Massachusetts. In the *Dewan* case, the court severely limited the use of the accumulated contributions valuation method, favoring instead apportioned distribution of pension benefits "if, as, and when" the benefits are received.[79]

After *Dewan*, the trial courts will have the discretion to use the method most appropriate to the circumstances of a given case.[80] When the marriage is of short duration and the spouses are far from retirement age, division of the pension benefits at the time of the divorce may be warranted.[81] With an immediate distribution, the pension rights may be valued according to the amount of accumulated contributions refundable on voluntary termination of employment.[82] In cases where the marriage is of longer duration and the employee-spouse is closer to retirement age, two factors in particular should guide the treatment of pension benefits. First, the court should look to see what other marital assets are to be distributed.[83] Second, it should determine whether the pension rights are vested or matured.[84]

If the employee-spouse's benefits are either unvested[85] or unmatured, counsel representing the employee-spouse should argue for the application of the "if, as, and when received" method of distribution, even if other significant assets are available to offset the present value of the client's pension rights. The "if, as, and when received" method allocates the risk that the pension benefits will in fact be realized equally between the parties.[86] This method of distribution requires that courts retain jurisdiction to achieve fair results in cases where the present assignment of

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[78] 16 Mass. App. Ct. at 162, 450 N.E.2d at 188-89.

[79] 17 Mass. App. Ct. at 99-100, 455 N.E.2d at 1238-39.

[80] *Id.* at 101-02, 455 N.E.2d at 1240.

[81] *Id.* at 102, 455 N.E.2d at 1240.

[82] *Id.* at 102 n.9, 455 N.E.2d at 1240 n.9.

[83] *See id.*

[84] *See id.*

[85] Golden maintains that if pensions are viewed as a form of deferred compensation, it should be irrelevant whether or not the pension benefits have vested. L. GOLDEN, *supra* note 63, at 171. Golden observes, however, that a major controversy in the pension area concerns whether nonvested pension rights fit within the concept of property acquired during the marriage. *Id.*

[86] *See* In re Marriage of Brown, 15 Cal. 3d 838, 848, 544 P.2d 561, 567, 126 Cal. Rptr. 633, 639 (1976).

pension benefits places an unfair risk on the party who must wait for the receipt of the pension benefits.[87]

[87] The reserved jurisdiction method may be desirable in all cases where the parties fail to reach a property settlement. The present distribution of the value of pension rights may be inherently unfair because the nonemployee spouse enjoys the benefits of a share of this value from the date of the distribution. *See* L. Golden, *supra* note 63, at 177. The employee-spouse, on the other hand, must wait until retirement, which might not occur, to realize his or her share of the property assignment. *Id.*