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Chapter 4: Domestic Relations

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CHAPTER 4

Domestic Relations

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§ 4.1. Removal of Minor Children from the Commonwealth by the Custodial Parent.* Massachusetts General Laws chapter 208, section 30 governs the removal of minor children from the Commonwealth by the custodial parent. The statute, in relevant part, provides that if the courts of this state have jurisdiction over the custody of a minor child of divorced parents, the child shall not be removed from the state "without the consent of both parents, unless the court upon cause shown otherwise orders."[1] Courts have held that cause for removal absent parental consent exists only where removal is in the best interests of the child.[2] In 1981, the Massachusetts Appeals Court held that the interests of the custodial parent should be taken into account in determining whether the best interests of the child would be served by his or her removal from the Commonwealth.[3]

During the *Survey* year, the Supreme Judicial Court, in *Yannas v.*

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§ 4.1. [1] G.L. c. 208, § 30 (1984) provides:

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

Id.

In the past, removal has commonly been denied "because of the potential loss of jurisdiction over custody issues." Cooper v. Cooper, 99 N.J. 42, 51, 491 A.2d 606, 610 (1984). This concern has been met in large part by the adoption in 44 states of the Uniform Child Custody Jurisdiction Act, and the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982). *Id.* at 51, 491 A.2d at 610–11.

[2] Yannas v. Frondistou-Yannas, 395 Mass. 704, 711, 481 N.E.2d 1153, 1158 (1985); Rubin v. Rubin, 370 Mass. 857, 857, 346 N.E.2d 919, 920 (1976).

[3] Hale v. Hale, 12 Mass. App. Ct. 812, 820, 429 N.E.2d 340, 345 (1981). For a good discussion of the *Hale* opinion, see Donna, *Domestic Relations*, 1981 ANN. SURV. MASS. LAW § 3.5, at 86.

Frondistou-Yannas,[4] affirmed the legal standard applied by the Massachusetts Appeals Court, and held that in determining the best interests of the child in removal cases, courts must take into account the interests of the custodial parent.[5] The father and mother in *Yannas v. Frondistou-Yannas* were granted a divorce in 1984.[6] As a part of the divorce decree, the judge for the Middlesex Division of the Probate and Family Court Department granted each parent joint legal custody of their two minor children.[7] The mother was granted physical custody of the children, and in addition was allowed to remove the children from Massachusetts to Greece.[8]

The children's mother felt that a move to Greece would provide her with opportunities for professional growth and with greater financial security than she could obtain in the United States.[9] While the mother had not found employment in Massachusetts, she had been offered employment in Greece.[10] She was a licensed engineer in Greece and was the first woman to be a member of the board of directors of the largest corporation in Greece.[11] In addition, she was an officer in the Greek National Science Foundation and a consultant to the Greek Secretary of Public Works.[12] Furthermore, if the mother resided in Greece, she would become entitled to a pension from the Greek government, and have access to real and personal property which she owned there.[13]

The probate judge concluded that a move to Greece would enhance the children's exposure to their Greek heritage and language.[14] The chil-

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[4] 395 Mass. 704, 481 N.E.2d 1153 (1985).

[5] *Id.* at 706, 481 N.E.2d at 1155.

[6] *Id.* at 705, 481 N.E.2d at 1155.

[7] *Id.* at 706, 481 N.E.2d at 1155.

[8] *Id.* The probate judge gave the father the right to take the children for six weeks each summer, for one week at Christmas time, and for one week each spring, with the cost of transportation to be shared equally. *Id.* Furthermore, the judge awarded the wife alimony and child support in the amount of $300 a week. *Id.* Rulings pertaining to the distribution and division of property were also made. *Id.*

[9] *Id.* at 707, 481 N.E.2d at 1156.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 708, 481 N.E.2d at 1156. The family's association with Greece and their Greek heritage continued in spite of their residence in Massachusetts and their American citizenship. *Id.* at 707, 481 N.E.2d at 1155. The children were fluent in both English and Greek and were cared for by Greek live-in babysitters who spoke Greek almost exclusively. *Id.* The children received five hours of instruction in Greek each week. *Id.* at 707, 481 N.E.2d at 1155–56. Furthermore, the family traveled to Greece each summer from 1975 to 1981, except for the year in which their son was born. *Id.* at 707, 481 N.E.2d at 1156. The husband held at the time of trial an interest in an apartment and a cemetery tomb in Athens.

dren were familiar with Greek culture and both grandmothers as well as various cousins, aunts, and uncles lived in Greece.[15] In addition, the children had been accepted for admission at a highly regarded school in Greece.[16] Furthermore, the probate judge concluded that the stress on the wife and her unhappiness if forced to remain in Massachusetts would probably have an adverse effect on the children.[17]

Both parties appealed the probate judge's decision.[18] The father appealed the custody award and the judge's authorization for removal of the children from Massachusetts.[19] The father also challenged the award of alimony.[20] The mother appealed the property division portion of the order.[21] The Supreme Judicial Court granted the husband's request for direct appellate review.[22]

The Supreme Judicial Court, in *Yannas v. Frondistou-Yannas*, held that the interests of the custodial parent should be considered in deciding whether it is in the child's best interests to allow him or her to be removed from the Commonwealth without the consent of both parents.[23] In so holding, the Court endorsed the application of the "real advantage" stan-

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Id. He traveled to Greece every summer between 1969 and 1981 and lectured frequently in Athens. *Id.*

[15] *Id.* at 708, 481 N.E.2d at 1156.

[16] *Id.*

[17] *Id.* From his basic findings, the probate judge concluded that the mother felt more secure in her native land. *Id.*

[18] *Id.* at 706, 481 N.E.2d at 1155.

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* After reviewing the probate court's findings of fact, the Supreme Judicial Court addressed the husband's contention that there should be a presumption in favor of joint physical custody of minor children. *Id.* at 708–09, 481 N.E.2d at 1156–57. The Court held that there is no such presumption. *Id.* at 708, 481 N.E.2d at 1156. The Court did acknowledge a tendency in this country to favor joint legal custody of minor children, which is defined in G.L. c. 208, § 31 (1984) as "a continued mutual responsibility and involvement by both parents in decisions regarding the child's welfare in matters of education, medical care, emotional, moral and religious development." *Yannas*, 395 Mass. at 708–09, 481 N.E.2d at 1156. To the Court's knowledge, however, no state had adopted by judicial decision a presumption in favor of joint physical custody. *Id.* at 709, 481 N.E.2d at 1157. In addition, the Court noted that a 1983 proposal that G.L. c. 208, § 31 be amended, to provide that "[t]here shall be a presumption that an award of joint custody is in the best interests of the minor child," S. 2080 (1983), was not incorporated that year in the most recent amendment of § 31, 1983 MASS. ACTS c. 695. The Court found no reason to believe that joint physical custody is presumptively desirable in all child custody matters and concluded that the question of physical custody should be left to the judge's determination unfettered by any presumption in favor of joint physical custody. *Yannas*, 395 Mass. at 709, 481 N.E.2d at 1157.

[23] *Id.* at 710, 481 N.E.2d at 1157–58.

dard in removal decisions.[24] The Court noted that the "real advantage" standard was adopted by the Massachusetts Court of Appeals in *Hale v. Hale*,[25] and has been followed, with some variations, in most jurisdictions which have addressed the issue.[26] The "real advantage" standard provides for a two-tiered decision-making process to determine whether removal without the noncustodial parent's consent is in the child's best interests.[27]

First, a court must determine whether the move would provide the custodial parent with a "real advantage."[28] The Court stated that the "real advantage" test is grounded in the recognition that a child's relationship with both parents after a divorce cannot be the same as it was before the divorce, and that it is the custodial parent who provides the child's quality and style of life.[29] Since a child's best interests are "so interwoven with the well-being of the custodial parent," the Court held that an accurate assessment of the interests of the child requires that the court consider the custodial parent's interests.[30]

In assessing the sincerity of the "real advantage" asserted by the custodial parent, the Court noted that the relative advantages to the custodial parent resulting from the move, the soundness of the reason for moving, and the presence or absence of a motive to deprive the noncustodial parent of reasonable visitation are relevant considerations.[31]

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[24] *Id.* at 710, 481 N.E.2d at 1157. In affirming the probate judge's application of the real advantage standard, the Court rejected the standard which is applied in New York, which, where there is no question of the fitness of the noncustodial parent and of his or her right to visitation, allows for removal only in exceptional circumstances. *Id. See* Weiss v. Weiss, 52 N.Y.2d 170, 175, 436 N.Y.S.2d 862, 865, 418 N.E.2d 377, 380 (1981).

[25] 12 Mass. App. Ct. 812, 818–19, 429 N.E.2d 340, 344 (1981). The *Hale* court adopted the less strict standard as set forth in D'Onofrio v. D'Onofrio, 144 N.J. Super. 200, 206–07, 365 A.2d 27, 30, *aff'd per curiam*, 144 N.J. Super. 352, 365 A.2d 716 (1976). *Yannas*, 395 Mass. at 710, 481 N.E.2d at 1157. The real advantage standard has been rearticulated recently by the Supreme Court of New Jersey in Cooper v. Cooper, 99 N.J. 42, 53–56, 491 A.2d 606, 611–13 (1984). *See Yannas*, 395 Mass. at 710, 481 N.E.2d at 1157.

[26] *Yannas*, 395 Mass. at 710, 481 N.E.2d at 1157. *See, e.g., Hale* at 819, 429 N.E.2d 344; In re Marriage of Brady, 115 Ill. App. 3d 521, 523, 450 N.E.2d 985, 986 (1983) (custodial parent presents prima facie case by showing a sensible reason for the move, and "a showing that the move is consistent with the child's best interests"); Jordan v. Jordan, 50 Md. App. 437, 444–46, 439 A.2d 26, 29–30 (1982); Bielawski v. Bielawski, 137 Mich. App. 587, 593, 358 N.W.2d 383, 386 (1984); Matter of Ehlen, 303 N.W.2d 808, 810 (S.D. 1981) ("The majority of cases dealing with removal of a child from the jurisdiction support the rule that if a parent who has custody of a child has good reason for living in another state, removal will be permitted, providing such a move is consistent with the best interests of the child.").

[27] *Yannas*, 395 Mass. at 711–12, 481 N.E.2d at 1158.

[28] *Id.* at 711, 481 N.E.2d at 1158.

[29] *Id.* at 710, 481 N.E.2d at 1157.

[30] *Id.* at 710, 481 N.E.2d at 1157–58 (quoting *Cooper*, 99 N.J. at 54, 491 A.2d at 612).

[31] *Id.* at 711, 481 N.E.2d at 1158.

The Court stated, however, that merely because the move is in the best interests of the custodial parent, it is not "automatically in the best interests of the child."[32] The Court stressed that the best interests of the child remain the paramount concern in determining whether the custodial parent should be permitted to remove the child from the state.[33]

If a sound reason for leaving the Commonwealth exists, then the court must consider whether the move is in the child's best interests. The Court stated that in evaluating the child's best interests, the effect that any removal might have on the child is of great significance.[34] According to the Court, it is important to consider whether the quality of the child's life might be improved by the change, either directly or as a result of an improvement in the quality of the custodial parent's life.[35] In addition, the Court stated that attention should be given to the possible adverse effect of the child's reduced association with the noncustodial parent, and the extent to which a move might affect the child's emotional, physical, or developmental needs.[36]

Furthermore, the Court stated that removal decisions should include an assessment of the interests of the noncustodial parent as well as of the custodial parent.[37] In assessing the interests of the noncustodial parent, the Court stated that the reasonableness of alternative visitation arrangements should be weighed.[38] The Court noted, however, that the fact that visitation by the noncustodial parent might become more difficult could not be controlling.[39]

In deciding the best interests of the child, the Court stressed that the interests of both parents and of the child must be considered collectively.[40] The Court noted that it is the role of the probate court to protect the interests of both parents and the child by careful factfinding rather

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[32] *Id.*

[33] *Id.* at 710, 481 N.E.2d at 1157.

[34] *Id.* at 711, 481 N.E.2d at 1158. The Court stated that in removal decisions generally a court will not give particular weight to the child's preference as to where he or she should live. *Id.* at 713, 481 N.E.2d at 1159; *see Hale*, 12 Mass. App. Ct. at 820, 429 N.E.2d at 345. The Court noted that even if the child's preference against moving is entitled to recognition as a constitutional right, a court still must consider the child's interest together with the rights of the parents and the interests of the state. *Yannas*, 395 Mass. at 713, 481 N.E.2d at 1159. According to the Court, where a court carefully considers the best interests of the child, the court provides adequate protection of the child's constitutional and other rights. *Id.*

[35] *Id.* at 711, 481 N.E.2d at 1158.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 711–12, 481 N.E.2d at 1158.

than by imposing heightened burdens of proof or by inequitably identifying constitutional rights in favor of one person over another.[41]

After delineating the factors to be considered in determining the child's best interests, the *Yannas v. Frondistou-Yannas* Court found that the probate judge had not abused his discretion in authorizing the wife to remove the children to Greece.[42] The Court found that the probate judge had made findings of fact consistent with the "real advantage" standard which indicated that the move to Greece would provide financial, emotional, and social advantages to the children's mother.[43] First, the probate judge found that the children could benefit from such advantages and could strengthen their cultural and family ties.[44] Additionally, according to the probate judge, the children's father had large blocks of free time and traveled to Greece frequently.[45] Finally, the probate court found that the children could continue to visit the United States and maintain their American citizenship.[46] Thus, the Supreme Judicial Court determined that the probate judge, upon the threshold showing of real advantage to the custodial parent, collectively considered the interests of both parents and the children in determining the best interests of the children, and that a decision in favor of removal was supported by adequate findings of fact.[47]

The Supreme Judicial Court's decision in *Yannas v. Frandostou-Yannas* is an affirmation of the pragmatic approach to removal decisions adopted by the Massachusetts Appeals Court in *Hale v. Hale*. The *Yannas v. Frandostou-Yannas* opinion, like the *Hale v. Hale* opinion, directs

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[41] *Id.* at 712, 481 N.E.2d at 1158.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* The record also indicated that Greek courts would enforce custody orders entered in this country. *Id.* at 707, 481 N.E.2d at 1156.

[47] *Id.* at 712, 481 N.E.2d at 1158. The Court disposed of the other objections of the husband summarily. First, the Court held that the probate judge did not err in admitting into evidence the report of the guardian ad litem, appointed under G.L. c. 215, § 56a (1984), concerning the care and custody of the minor children. *Id.* at 713, 481 N.E.2d at 1159. The guardian ad litem testified before the court and was available for cross-examination. *Id.* Second, the Court concluded that the report of a family service officer, which comments on the guardian ad litem's report and appears on the record, is not an improper report to the judge providing information not of record. *Id.* at 713–14, 481 N.E.2d at 1159. The husband did not show that the judge relied on the report to the husband's prejudice in any respect. *Id.* at 714, 481 N.E.2d at 1159. Third, the Court stated that the judge dealt properly with the testimony and report of a psychologist appointed as an expert under MASS. R. DOM. REL. P. 35, on motion of the husband, to examine the wife. *Id.* at 714, 481 N.E.2d at 1159–60. Fourth, the Court concluded that the judge's award of alimony to the wife was warranted by the evidence. *Id.* at 714, 481 N.E.2d at 1160. In addition, the Court held that the judge did not abuse his discretion in his division of the marital assets. *Id.*

trial courts to consider the custodial parent's well-being in determining the best interests of the child in removal decisions.[48] This approach, while preserving the view that the best interests of the child must govern the decision, recognizes the impact that a custodial parent's well-being ultimately has on the child's well-being.[49]

The approach adopted in *Yannas v. Frandistou-Yannas* balances the conflicting interests of parents engaged in a custody battle. The two-tiered "real advantage" standard requires that the custodial parent first demonstrate a sincere and well-motivated reason for wanting to move out of the Commonwealth.[50] Then, under *Yannas v. Frandistou-Yannas*, the probate court must consider the noncustodial parent's interest in maintaining a relationship with the child and must assess the possibility of alternative visitation arrangements.[51]

The Court's adoption of the "real advantage" standard properly recognizes that in our highly mobile society, career advancement often requires one to be geographically flexible. As the *Yannas v. Frandistou-Yannas* Court noted, after a divorce the custodial parent is responsible for the child's quality and style of life, and therefore, to the extent that a career opportunity might provide the custodial parent with benefits of both a professional and financial nature, removal of a minor child from the state should be permitted. Furthermore, by directing the trial courts to assess the possibility of alternative visitation arrangements, the Court acknowledged that while it is important to consider the child's need to maintain a relationship with the noncustodial parent, weekly visitation in and of itself does not foster the relationship and longer visitation arrangements might be preferable. Application of the "real advantage" standard suggests that if the custodial parent can demonstrate some professional, financial, emotional or social advantage to moving, then a court will likely allow a custodial parent to remove a minor child from the Commonwealth, provided that the noncustodial parent can arrange visitation with the child.

§ 4.2. Divorce — Alimony and Assignment of Property.* In the 1977 decision *Rice v. Rice*,[1] the Supreme Judicial Court determined that under

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[48] *Id.* at 710, 481 N.E.2d at 1157–58.

[49] *See id.*

[50] *Id.* at 711, 481 N.E.2d at 1158.

[51] *Id.*

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§ 4.2 [1] 372 Mass. 398, 361 N.E.2d 1305 (1977). For an analysis of *Rice*, see Inker, Perocchi, & Walsh, *Domestic Relations*, 1977 ANN. SURV. MASS. LAW § 1.2 at 7-11.

section 34 of chapter 208 of the General Laws,[2] a court may assign to one party in a divorce proceeding all or part of the separate nonmarital property of the other party in addition to or in lieu of alimony.[3] In expansive language, the Court declared that section 34 "gives the trial judge discretion to assign to one spouse property of the other spouse *whenever and however acquired*."[4] During the *Survey* year, the Massachusetts Appeals Court, in a case of first impression, addressed the issue whether property interests acquired after the dissolution of marriage are subject to division under section 34.[5] Limiting the broad language in *Rice*, the court held in *Davidson v. Davidson*[6] that property interests subject to division under section 34 are to be identified as of the time of the divorce.[7] Applying this principle, the court found that a remainder interest under a testamentary trust was a sufficient property interest to be considered in connection with property division,[8] but that no extraordinary circumstances supported treating an expectancy under a will as part of the divisible estate.[9]

In *Davidson*, five years after the parties were divorced by a judgment entered as absolute,[10] the wife filed a complaint seeking assignment of

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[2] G.L. c. 208, § 34 as amended by St. 1983, c. 233, § 77 provides in pertinent part:
Upon divorce or upon a complaint in an action brought at any time after a divorce, . . . the court . . . may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. 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, . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit . . . .

[3] 372 Mass. 398, 401, 361 N.E.2d 1305, 1307.

[4] *Id.* at 400, 361 N.E.2d at 1307 (emphasis added).

[5] Davidson v. Davidson, 19 Mass. App. Ct. 364, 474 N.E.2d 1137 (1985).

[6] *Id.*

[7] *Id.* at 370, 474 N.E.2d at 1143.

[8] *Id.* at 372, 474 N.E.2d at 1144.

[9] *Id.* at 374, 474 N.E.2d at 1145.

[10] *Id.* at 365, 474 N.E.2d at 1140. G.L. c. 208, § 21 provides:
Judgments of divorce shall in the first instance be judgments nisi, and shall become absolute after the expiration of ninety days from the entry thereof, unless the court within said period, for sufficient cause, upon application of any party to the action, otherwise orders. After the entry of a judgment nisi, the action shall not be dismissed or discontinued on motion of either party except upon such terms, if any, as the court may order after notice to the other party and a hearing, unless there has been

marital property under chapter 208, section 34.[11] The complaint alleged that at the time of the divorce the husband had an irrevocable remainder interest under a testamentary trust and an expectancy under the will of his mother.[12] At the time the complaint was filed, the interest under the trust had vested in possession and the expectancy had ripened into an inheritance.[13] The probate court, considering these assets to be subject to division under chapter 208, section 34, entered a judgment ordering the husband to pay the wife $45,000 as a division of marital property.[14] Appealing the judgment, the husband argued that since the testamentary trust interest and the inheritance did not come into his possession until after the judgment of divorce absolute,[15] they constituted after-acquired property and thus were not part of his estate subject to division under the statute.[16]

The Appeals Court determined that to the extent that the probate judge considered after-acquired property in the section 34 action, there was error requiring reversal of the judgment.[17] In reaching this conclusion, the court stated that the purpose of section 34 is to provide for the equitable division of the property interests of partners in a marriage.[18] This equitable division of property interests, the court continued, is made in recognition of the contribution made to the marital partnership.[19] The court concluded that the application of section 34 to property interests acquired after the dissolution of the marriage would be contrary to the marital partnership concept on which section 34 is founded.[20] Therefore, the court held, property interests subject to division under section 34 are

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filed with the court a memorandum signed by both parties, wherein they agree to such disposition of the action.

[11] *Id.* at 366, 474 N.E.2d at 1140.

[12] *Id.* at 368, 474 N.E.2d at 1142.

[13] *Id.*

[14] *Id.* at 366, 474 N.E.2d at 1141.

[15] The husband first argued that the wife was precluded from seeking an assignment of property by the judgment of divorce. *Id.* at 367, 474 N.E.2d at 1141. The court noted that a judgment of divorce only settles issues which were actually tried and determined. *Id.* (quoting Maze v. Mihalovich, 7 Mass. App. Ct. 323, 326, 387 N.E.2d 196, 198 (1979)). Because the judge who heard the divorce action made no findings of fact, the appeals court was unable to determine whether any question of assignment was litigated in the divorce proceeding. *Id.* at 367, 474 N.E.2d at 1142. In conclusion, the court held that the judgment of divorce did not preclude litigation of the issues raised in the complaint for the assignment of property. *Id.* at 368, 474 N.E.2d at 1142.

[16] 19 Mass. App. Ct. 364, 369, 474 N.E.2d 1137, 1142.

[17] *Id.* at 375, 474 N.E.2d at 1146.

[18] *Id.* at 369, 474 N.E.2d at 1142–43.

[19] *Id.* at 369–70, 474 N.E.2d at 1143 (citing Inker, Walsh & Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 110 SUFFOLK U.L. REV. 1, 8 (1975)).

[20] *Id.* at 370, 474 N.E.2d at 1143.

to be identified as of the time of the divorce.[21] In a footnote, the court stated that in this case it makes no difference whether property is identified as of the time of the divorce trial, the judgment nisi or the judgment absolute, as the situation was the same at all those times.[22] The court emphasized that it was not suggesting a rule fixing any of those dates, or excluding some earlier time, such as the date of separation, as determinative in identifying divisible property.[23] Rather, the court stated that development of the law in this respect is best left to case-by-case analysis.[24] Distinguishing *Rice*, the court noted that the "whenever and however acquired" language in context referred to property acquired by the husband before the marriage and as gifts during the marriage, not after dissolution of the marital partnership.[25]

Turning to the property interests as they existed at the time of the divorce, the court held that the husband's remainder interest under the testamentary trust constituted a sufficient property interest to make it part of his estate for consideration in connection with a property division under section 34.[26] The court recognized that the trustees were empowered in their uncontrolled discretion to invade the principal for the benefit of the husband's mother[27] and that the remainder was subject to a valid spendthrift provision.[28] However, noting that a more expansive approach than the wooden application of rules of the law of property is appropriate in determining the content of the estates of divorcing parties,[29] the court found it sufficient that the husband's right to the remainder was fixed at the time of the divorce, subject only to the conditions of survivorship.[30] The court added that it did not think that the uncertainty of value or the inalienability of the interest were sufficient to preclude consideration of the interest as subject to division.[31] The court was quick to point out that it did not suggest that a judge must divide such an interest, but that the determination whether to include a particular interest in the property to be divided lies within the sound discretion of the judge after consideration of all of the factors enumerated in section 34.[32]

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[21] *Id.*

[22] *Id.* at 370 n.9, 474 N.E.2d at 1143 n.9.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 370, 474 N.E.2d at 1143.

[26] *Id.* at 372, 474 N.E.2d at 1144.

[27] *Id.* at 371, 474 N.E.2d at 1143.

[28] *Id.* at 371, 474 N.E.2d at 1144.

[29] *Id.*

[30] *Id.* at 372, 474 N.E.2d at 1144. The remainder interest was to be distributed free of trust when his mother died and/or when he reached age thirty-five. *Id.* at 371, 474 N.E.2d at 1143.

[31] *Id.* at 372, 474 N.E.2d at 1144.

[32] *Id.* at 373, 474 N.E.2d at 1144–45. The § 34 factors include the length of the marriage,

The court further held that where the division of property under section 34 takes place after the divorce, the property subject to division is to be valued as of the date of the order of division.[33] Accordingly, the court stated that the judge was correct in valuing the husband's remainder interest under the trust on the basis of the distribution from the trust received at the time of trial.[34] Because the division was made at a time when the remainder interest had vested in possession, the question of valuation presented no problem in this case.[35] The court pointed out, however, that in the case where such an interest has not vested at the time of trial and where there is no spendthrift limitation, guidance in determining valuation may be found in cases dealing with pension interests.[36] The court added that in cases where it is not feasible to fashion an equitable judgment, the judge, in a careful exercise of discretion, may decide to reserve the question of division of property, and retain jurisdiction.[37]

Addressing the issue of the husband's expectancy under his mother's will, the court concluded that such expectancies generally should be excluded from the definition of property subject to division under section 34.[38] The court stated that at the time of the divorce, the husband's

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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 the parties, and the opportunity of future acquisition of capital assets and income. G.L. c. 208, § 34. The court may consider the contribution of each of the parties to the estate and as a homemaker to the family unit. *Id.* See *supra* note 2 for the text of G.L. c. 208, § 34.

The court held that the marital partnership concept embodied in § 34 dictates that in the *Davidson* case, the factors be examined as of the date of the divorce. *Davidson*, 19 Mass. App. Ct. at 375, 474 N.E.2d at 1146. The court emphasized that it did not reach the question which may arise where property is acquired or circumstances change between the entry of the judgments nisi and absolute. *Id.* at 375 n.15, 474 N.E.2d at 1146 n.15. Nor would the court comment on factual situations which might indicate the use of an earlier date for application of some or all of the factors. *Id.* at 376 n.15, 474 N.E.2d 1146 n.15.

[33] *Id.* at 376, 474 N.E.2d at 1147.

[34] *Id.* at 377, 474 N.E.2d at 1147.

[35] *Id.* at 373 n.12, 474 N.E.2d at 1145 n.12.

[36] *Id.* (citing Dewan v. Dewan, 17 Mass. App. Ct. 97, 455 N.E.2d 1236 (1983)). In *Dewan*, the Massachusetts Appeals Court stated that in dividing nonvested pension rights, the court may be able to determine present value, but if the court concludes that because of uncertainties affecting the vesting it should not attempt to divide the present value of pension rights, it can award each spouse an appropriate portion of each pension payment as it is paid. 17 Mass. App. Ct. 97, 101, 455 N.E.2d 1236, 1239 (1983) (quoting Brown v. Brown, 126 Cal. Rptr. 633, 15 Cal. 3d 838, 544 P.2d 561 (1976)). The court added that the determination whether to assign a percentage of present value as a property asset or to allocate benefits if and when received lies within the judge's discretion. *Id.* at 101–02, 455 N.E.2d at 1240.

[37] *Id.* The court does not indicate when the question of division of property should be decided when an equitable judgment as to valuation cannot be made at the date of trial.

[38] *Id.* at 374, 474 N.E.2d at 1145.

mother was alive and could have changed her will.[39] In addition, the court noted, the determination of an expectancy as a property interest might involve lengthy trial of issues collateral to the section 34 action such as the validity of the will, testamentary capacity, and valuation of the estates of others.[40] The court concluded that the record showed no extraordinary circumstances which would support treating the expectancy as a part of the husband's estate for consideration in connection with a property division under section 34.[41] However, the court added, although the expectancy itself is not a divisible property interest, it might be considered under the section 34 criterion of "opportunity of each for future acquisition of capital assets and income" in determining what disposition to make of the property which *is* subject to division.[42] The court thus determined that the judge's findings indicated that she may have considered after-acquired property in determining the husband's estate and to the extent she did so, the court concluded there was error.[43]

Davidson is consistent with the statutory intent of an equitable assignment of property under the marital partnership concept embodied in section 34.[44] The partnership concept is based on a division of property commensurate with the partners' contribution to the marital relationship.[45] In a situation where a spouse has acquired property after the dissolution of the marriage, that after-acquired property has no relation to the marital partnership. This situation is in direct contrast to the situation in *Rice*, where the property in question was acquired before and during the marriage and constituted the only means of support during the marriage.[46] In contrast to the *Rice* court's broad inclusion of "all property whenever and however acquired" within the definition of a spouse's estate, the *Davidson* court's exclusion of property acquired after the dissolution of marriage from the definition of the divisible estate is consistent with the equitable division purpose of the statute.

Although the *Davidson* decision restricts the expansiveness of the *Rice* language, the decision leaves ample room for a broad interpretation of property subject to division. Although the *Davidson* court held that after-acquired property is not a property interest subject to division under the statute, the court leaves to a trial judge's discretion the issue whether

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 374–75, 474 N.E.2d at 1146 (emphasis in original).

[43] *Id.* at 375, 474 N.E.2d at 1146.

[44] *See* Inker, Walsh & Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts*, 10 SUFFOLK U.L. REV. 1, 4–6.

[45] *See* Inker & Clower, *Towards a New Justice in Marital Dissolution: The Massachusetts Statutory Scheme and Due Process Analysis*, 16 SUFFOLK U.L. REV. 907, 935–36 (1982).

[46] *See Rice*, 372 Mass. 398, 399, 361 N.E.2d 1305, 1306.

there is a sufficient property interest at the time of divorce so as to be part of the estate for purposes of the statute. In effect, the Appeals Court has left the meaning of "after-acquired" property to be shaped on a case-by-case basis by the lower courts. While the court recognized that the *Davidson* fact situation tested the outer limits of a sufficient property interest, it nevertheless held that a remainder interest under a discretionary trust subject to a valid spendthrift provision was a sufficient property interest to be part of an estate for purposes of section 34.[47] The court reached this conclusion in spite of the fact that a discretionary trust may be depleted entirely at the discretion of the trustee, leaving nothing for the remainder and that a remainder subject to a spendthrift provision may not be reached to satisfy any judgment or debt.[48] Furthermore, although the court held that in general an expectancy under a will is excluded from the definition of property subject to division under the statute, it implied that under some circumstances an expectancy could be a sufficient property interest as to be part of the estate.[49] In conclusion, the Appeals Court in *Davidson* rejected the inflexible application of rules of the law of property and gave the lower courts the broad discretion necessary to an equitable division of property.

Davidson has left a number of finer points to be clarified by the lower courts in the future. For example, the court held that property interests subject to division under section 34 are to be identified as of the time of divorce. However, by not determining whether the property is identified as of the time of separation, the divorce trial, the judgment nisi, or the judgment absolute, the court has in effect held that identification of property interests should occur no later than the time of divorce. In light of the amount of time that may pass between any of these dates, the composition of the estate for the purposes of the statute may vary greatly depending upon the date chosen. The court leaves unclear whether a rule will be developed setting one of these dates as determinative or whether equitable considerations will again control. The latter position is suggested by the court's language and would be in keeping with the court's expansive approach. The court has also left open the means by which property subject to division is to be valued in cases less clear cut than *Davidson*. In cases where a remainder interest has not vested, the court suggests that cases dealing with pension interests may provide guidance.[50] Consistent with the court's approach of affording broad discretion to the

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[47] 19 Mass. App. Ct. at 372, 474 N.E.2d at 1144.

[48] *Id.* at 371, 474 N.E.2d at 1143–44.

[49] *Id.* at 374, 474 N.E.2d at 1145. The court uses the phrase "extraordinary circumstances," but does not indicate what those circumstances would be. *See id.*

[50] *Id.* at 373 n.12, 474 N.E.2d at 1145 n.12 (citing Dewan v. Dewan, 17 Mass. App. Ct. 97, 455 N.E.2d 1236 (1983)).

lower courts, the *Davidson* court leaves the development of "thoughtful solutions" to valuation problems to a case-by-case resolution by trial judges.[51]

In summary, the Appeals Court has demonstrated its commitment to a construction of section 34 that results in an equitable division of property as intended by the statute. In holding that the inclusion of after-acquired property in the definition of the estate subject to division is impermissible, the court has tempered the broad language of *Rice* allowing the assignment of property regardless of when acquired. However, *Davidson* allows a broad interpretation of a property interest sufficient to be considered for purposes of the statute. The court makes clear that it is an equitable distribution and not a rigid application of the laws of property that controls the division of property under chapter 208, section 34.

§ 4.3. Adoption–Petition of Licensed Private Child Care Agency to Dispense With Parental Consent–Clear and Convincing Standard of Proof.* Chapter 210, section 3 of the Massachusetts General Laws permits adoption without parental consent where the probate court finds, upon consideration of the parents' fitness, that adoption is in the best interests of the child.[1] Formerly, Massachusetts courts enforced a statutory presumption that adoption was in a child's best interests where the state department of social services or a licensed private child care agency had care or custody of a child for more than a year and then petitioned to dispense with parental consent to adoption.[2] In 1982, however, the Su-

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[51] *Id.* at 373–74 n.12, 474 N.E.2d at 1145 n.12.

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§ 4.3. [1] G.L. c. 210, § 3(a)(ii), (c) (1984).

Adoption of a child 12 years of age or younger ordinarily requires parental consent. *See* G.L. c. 210, § 2 (1984). Adoption of a child over 12 years of age requires the consent of either the child or the parents. *Id.*

[2] G.L. c. 210, § 3(c) (1984) (presumption invalidated in Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, 389 Mass. 793, 802-03, 452 N.E.2d 497, 503 (1983)).

G.L. c. 210, § 3 (1984) provides:

> (b) The department of social services or any licensed child care agency may commence a proceeding, independent of a petition for adoption, in the probate court . . . to dispense with the need for consent [of the parents] 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 . . . will be served by said decree. Pending a hearing

preme Court held in *Santosky v. Kramer*[3] that a state must justify termination of parental rights to a child by clear and convincing evidence.[4] The Supreme Court's *Santosky* decision led to the Supreme Judicial Court's invalidation of the Massachusetts statutory presumption in 1983,[5] and application of the clear and convincing standard of proof to a state agency petitioning to dispense with parental consent to adoption.[6]

During the *Survey* year, in *Petition of the Catholic Charitable Bureau of the Archdiocese of Boston, Inc. to Dispense with Consent to Adoption* (*Catholic Charitable Bureau*),[7] the Supreme Judicial Court upheld the application of the clear and convincing standard of proof to a licensed private child care agency petitioning to dispense with parental consent to adoption of a child in the agency's custody.[8] The Court also indicated that the probate judge's decision to dispense with parental consent was proper, notwithstanding the judge's reference to the not yet invalidated statutory presumption that adoption is in the best interests of the child.[9] Because the probate judge's conclusion that the agency had met its burden of proof rested on evidence rather than on the presumption, the Court found no reason to invalidate the judge's decision.[10]

In *Catholic Charitable Bureau*, the child in dispute was born in 1979 and, along with an older brother, lived with his mother.[11] The child's father, an alcoholic with a criminal record and a history of violence,[12] was divorced from the mother in 1973 but continued to be a disruptive

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on the merits of a petition filed under this paragraph, temporary custody may be awarded to the petitioner.

(c) . . . .

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.

[3] 455 U.S. 745 (1982).

[4] *Id.* at 769.

[5] Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, 389 Mass. 793, 802–03, 452 N.E.2d 497, 503 (1983).

[6] *Id.* Massachusetts thereby joined the majority of states that already had adopted the clear and convincing evidence or comparable standard of proof with regard to state termination of parental rights. *See* Santosky v. Kramer, 455 U.S. 745, 749 & n.3, 769 (1982).

[7] 395 Mass. 180, 479 N.E.2d 148 (1985).

[8] *Id.* at 184, 479 N.E.2d at 151.

[9] *Id.* at 187-88, 479 N.E.2d at 153–54.

[10] *Id.*

[11] *Id.* at 181, 479 N.E.2d at 150. The mother's sister had adopted the mother's third child. *Id.*

[12] *Id.*

factor in the mother's life.[13] Conditions in the mother's home were squalid[14] and the mother, overwhelmed by personal and family problems, provided little emotional support to her children.[15] At the recommendation of a social worker, the mother enrolled in a therapeutic infant-toddler program, but her preoccupation with personal problems and erratic participation limited the therapy's effectiveness.[16] A psychiatrist who examined the child diagnosed the child as suffering from severe neglect.[17] The damage to the child was so severe, the psychiatrist concluded, that only a concerted effort would restore the child's physical and mental health.[18]

In the spring of 1981, a lack of funds and inability to provide adequate housing prompted the mother to voluntarily place both children in foster care with the Catholic Family Services of Lynn.[19] The older brother eventually was returned to his mother, but the younger child remained in foster care.[20] A social worker who visited the child in foster care a year later observed that the formerly unresponsive child was cheerful, happy and verbalizing well.[21]

In December 1981, the Catholic Charitable Bureau of the Archdiocese of Boston, Inc. (the Bureau), which earlier had been granted temporary guardianship with custody of the child, filed a petition to dispense with

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[13] *Id.* That the father remained a part of the mother's life long after the 1973 divorce is evident from the fact of the child's birth in 1979. 18 Mass. App. Ct. 656, 659, 469 N.E.2d 1277, 1279 (1984).

[14] 395 Mass. at 182, 479 N.E.2d at 150. A social worker visiting the home observed broken windows, a lack of heat and electricity and a permeating odor of urine. *Id.*

[15] *Id.* The mother was an alcoholic who attended Alcoholics Anonymous meetings nightly, received financial support from the Department of Public Welfare, and spent most of her time playing cards and socializing at a social club. *Id.*

[16] *Id.*

[17] *Id.* at 182, 479 N.E.2d at 151.

Teachers in the infant-toddler program, concerned by the child's arrested emotional development, had arranged for the psychiatric evaluation, which took place in May 1981. 18 Mass. App. Ct. at 658, 469 N.E.2d at 1278. The psychiatrist observed that the child was uninterested in toys, except those in the shapes of foods, and uttered no words, other than the names of foods. *Id.* at 658, 469 N.E.2d at 1278–79.

[18] 395 Mass. at 185, 479 N.E.2d at 152.

[19] *Id.* at 182, 479 N.E.2d at 150. It was the child's third foster care placement. *Id.* at 182 & n.2, 479 N.E.2d at 152 & n.2. At the time of the foster care placements, the mother and father agreed to treatment for their personal problems so that the two children would be returned to their custody. 18 Mass. App. Ct. at 659, 469 N.E.2d at 1279.

[20] 395 Mass. at 182, 479 N.E.2d at 150-51. The older brother was strongly attached to the mother and unhappy in foster care. *Id.*

[21] *Id.* at 182–83, 479 N.E.2d at 151. At the time of the social worker's visit in December 1982, the child was in the proposed adoptive home where he had been placed in November. *Id.*

the need for parental consent to adoption of the child.[22] The parents were notified but only the mother filed an appearance, was appointed counsel,[23] and testified at trial.[24] The probate judge concluded that dispensing with parental consent to adoption of the child would be in the child's best interests.[25] The Appeals Court affirmed,[26] holding that the record contained clear and convincing evidence of the mother's current unfitness to care for the child.[27] The Supreme Judicial Court granted further appellate review,[28] and affirmed.[29]

In upholding the probate judge's decision to dispense with the mother's consent to adoption of the child,[30] the Court refuted the mother's challenge to the probate judge's findings of her unfitness and the need for termination of her parental rights in the best interests of the child.[31] The mother contended that neither finding was supported by clear and convincing evidence.[32] The mother objected in particular to the judge's consideration of the father's behavior in determining the mother's fitness, and to the judge's reference to the statutory presumption of chapter 210, section 3(c) that adoption is in the best interests of the child.[33] Before responding to the mother's objections, the Court summarized the standard which a probate court applies in disposing of a petition to dispense with parental consent to adoption.[34] The Court explained that the critical

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[22] *Id.* at 183, 479 N.E.2d at 151. The petition was filed with the Essex Division of the Probate and Family Court Department. *Id.*

Where a state or private agency files a petition under c. 210, § 3, § 3(c) requires that the agency submit to the probate court a plan detailing where the agency proposes to place the child if the petition is granted. While the plan need not identify prospective adoptive parents, it must provide enough information on the prospective parents and home to facilitate the judge's evaluation of the plan. Care and Protection of Three Minors, 392 Mass. 704, 717, 467 N.E.2d 851, 860 (1984).

[23] 395 Mass. at 183, 479 N.E.2d at 151. The father failed to appear and was defaulted. *Id.* The court-appointed guardian ad litem for the child recommended dispensing with the need for parental consent. *Id.* at 183 & n.3, 479 N.E.2d at 151 & n.3.

[24] 18 Mass. App. Ct. at 661, 469 N.E.2d at 1280. Trial was in December 1982 and January 1983. 395 Mass. at 183, 479 N.E.2d at 151. The mother was questioned as to how she proposed to care for the child, how she was coping with her alcoholism and with the father, and what sort of life she expected to make for herself. 18 Mass. App. Ct. at 661, 469 N.E.2d at 1280.

[25] 395 Mass. at 183, 479 N.E.2d at 151. The judge's decision was in April 1983. *Id.*

[26] 18 Mass. App. Ct. at 663, 469 N.E.2d at 1281.

[27] *Id.* at 662, 469 N.E.2d at 1280–81.

[28] 393 Mass. 1106, 474 N.E.2d 182 (1985).

[29] 395 Mass. at 188, 479 N.E.2d at 154.

[30] *Id.* at 181, 479 N.E.2d at 150.

[31] *Id.* at 184, 187, 479 N.E.2d at 151, 153.

[32] *Id.* at 181, 479 N.E.2d at 150.

[33] *Id.*

[34] *Id.* at 183, 479 N.E.2d at 151.

issue is whether the natural parents are currently fit to serve the best interests of the child.[35] Termination of parental rights to a child, the Court added, requires an affirmative showing that the parents are unfit by reason of grievous shortcomings that would pose a substantial risk to the child's welfare.[36]

Turning to the probate judge's finding of the mother's unfitness, the Court concluded that the Bureau had proven the mother's unfitness by clear and convincing evidence.[37] First, the Court stated, the probate judge could have concluded from the evidence of substandard living conditions and the psychiatrist's diagnosis that the living conditions were harmful to the child and had contributed to the child's deprivation.[38] Acknowledging that the mother's poverty alone would not support a finding of unfitness,[39] the Court cited additional evidence that the mother had serious emotional problems which limited her capacity to nurture the child's development.[40] The Court rejected the mother's assertions that her custody of the older brother and her voluntary placement of the child in foster care manifested her parental fitness.[41] The Court noted that children have varying parental needs and a parent therefore may be a fit parent as to one child but an unfit parent as to another.[42] In addition, the Court cited the foster care placement as manifesting the mother's aware-

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[35] *Id.* (*citing* Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 389 Mass. 793, 799, 452 N.E.2d 497, 501 (1983) (*quoting* Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 589, 421 N.E.2d 28, 37 (1981))).

[36] *Id.* at 183–84, 479 N.E.2d at 151 (*citing* Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, 391 Mass. 113, 118, 461 N.E.2d 186, 190 (1984) (*quoting* Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 646, 328 N.E.2d 854, 863 (1975))).

[37] *Id.* at 184, 479 N.E.2d at 151 (*citing* Santosky v. Kramer, 455 U.S. 745, 768–70 (1982) and Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 389 Mass. 793, 803, 452 N.E.2d 497, 503 (1983)).

[38] *Id.* at 184, 479 N.E.2d at 152.

[39] *Id.* (*citing* Care and Protection of Three Minors, 392 Mass. 704, 713 n.12, 467 N.E.2d 851, 858 n.12 (1984) and Custody of A Minor, 389 Mass. 755, 766, 452 N.E.2d 483, 490 (1983)).

[40] *Id.* at 184-85, 479 N.E.2d at 152. The court noted that the mother's participation in the infant-toddler program consisted of sessions focusing primarily on the mother's problems rather than those of the child. *Id.* at 185, 479 N.E.2d at 152. Moreover, the court observed, after placing the child in foster care, the mother had not visited the child from November 1981 to March 1982 and, when she did visit, was upset and unaffectionate toward the child. *Id.*

[41] *Id.* at 185 & n.6, 479 N.E.2d at 152 & n.6.

[42] *Id.* at 185 n.6, 479 N.E.2d at 152 n.6 (*citing* Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 589, 421 N.E.2d 28, 37 (1981)). The court noted evidence indicating that the older son had fewer problems, was more independent and required less parental attention than did the younger child. *Id.*

ness of her deficiencies rather than her fitness as a parent.[43] Given the paucity of information on the mother's current condition, the Court stated that the mother's pattern of neglect and unfitness in the past could be used to show her current unfitness.[44] In concluding on the issue of the mother's unfitness, the Court defended the probate judge's reliance on evidence of the father's unfitness to the extent that the father's behavior distracted the mother and diminished her fitness.[45]

The Court next considered the probate judge's finding that a termination of the child's relationship with the mother would be in the child's best interests.[46] The Court determined that the probate judge properly considered the child's transformation from the time of the psychiatric examination to the time of trial,[47] and concluded that evidence of the positive change supported the judge's determination that adoption would be in the child's best interests.[48] Because the evidence adequately sup-

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[43] *Id.* at 185–86, 479 N.E.2d at 152.
The court has indicated that a parent's voluntary relinquishment of custody for appropriate reasons is not sufficient in itself to support a finding of parental unfitness. *See* Petition of Dep't of Social Servs. to Dispense with Consent to Adoption, 391 Mass. 113, 120, 461 N.E.2d 186, 191 (1984); Petitions of Dep't of Social Servs. to Dispense with Consent to Adoption, 389 Mass. 793, 801, 452 N.E.2d 497, 502–03 (1983) (*citing* Bezio v. Patenaude, 381 Mass. 563, 577, 410 N.E.2d 1207, 1215 (1980)).

[44] 395 Mass. at 185, 479 N.E.2d at 152 (*citing* Custody of A Minor (No. 1), 377 Mass. 876, 883, 389 N.E.2d 68, 73 (1979)).

[45] *Id.* at 186, 479 N.E.2d at 152–53. The mother contended that the probate judge had found her "guilty by association" with the father, in violation of U.S. CONST. amend. XIV and MASS. CONST. amend. art. 106. *Id.* at 186, 479 N.E.2d at 152. The Court disposed of the mother's constitutional arguments on procedural grounds. *Id.* at 186 n.7, 479 N.E.2d at 153 n.7.

For a different treatment of evidence pertaining to the father, *see* Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 20 Mass. App. Ct. 689, 482 N.E.2d 535 (1985). There, the Appeals Court concluded that the probate judge's findings on the mother's current fitness improperly referred to the father's past behavior within the family, where the evidence indicated minimal contact between the father and mother since their separation approximately one year prior to trial. *Id.* at 695 & n.3, 482 N.E.2d at 539 & n.3.

[46] 395 Mass at 186–87, 479 N.E.2d at 153.

[47] *Id.* A prospective custodian's ability to provide the child with more advantages than would the natural parents is not in itself sufficient reason for transferring custody from the natural parents. Custody of A Minor, 389 Mass. 755, 765, 452 N.E.2d 483, 489 (1983).

[48] 395 Mass. at 187, 479 N.E.2d at 153. The court noted, however, that since the child had been with the adoptive parents for only six weeks at the time of trial, the probate judge improperly found that severing the child's bond with the adoptive parents would be detrimental. *Id.*

Even where there is a lengthier placement and presumably deeper attachment of the child to the proposed adoptive parents, the court has indicated that the natural parents still may prevail in a custody dispute if they are fit to assume parental responsibility. *See* Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, 391 Mass. 113, 117–18, 461 N.E.2d 186, 189–90 (1984).

ported the judge's finding, the Court held that the judge's reference to the unconstitutional statutory presumption would not invalidate the probate judge's decision.[49]

The Supreme Judicial Court's decision in *Catholic Charitable Bureau*, applying the clear and convincing standard to private as well as public agencies,[50] is consistent with the undifferentiated treatment that chapter 210, section 3 accords state and private agencies seeking to dispense with parental consent to adoption.[51] In *Santosky*, however, the Supreme Court indicated that it is only where the *state* seeks to terminate parental rights to a child that the clear and convincing standard of proof is constitutionally compelled.[52] Hence, although the Supreme Judicial Court's adoption of the clear and convincing standard with regard to state agencies is consistent with *Santosky*,[53] it is not immediately apparent that due process compels application of the same standard of proof to *private* child care agencies.

The Supreme Judicial Court did not cite reasons for its extension of the clear and convincing standard to private agencies. One justification, however, is that the private child care agency is performing a traditionally governmental function and therefore is subject to constitutional constraints to the same extent as the state.[54] This theory would sustain application of the clear and convincing evidence standard where a private child care agency resembles a state agency in having sizable resources that confer an unfair advantage in termination proceedings,[55] although the theory might not compel similar treatment of a private agency with fewer resources and services. The Supreme Court's reasoning in *Santosky* supports this analysis. In *Santosky*, the Supreme Court expressed concern that in state-initiated termination proceedings, the state's greater resources might enable the state to dominate the proceedings unfairly and bring about erroneous termination of parental custody.[56] To protect

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[49] 395 Mass. at 188, 479 N.E.2d at 153–54. The court noted that the statutory presumption still was valid at the time of the probate judge's decision, and that the mother failed to request that the judge reconsider the findings after the court invalidated the presumption. *Id.* at 187 n.8, 479 N.E.2d at 153 n.8.

[50] *See supra* notes 7–8 and accompanying text.

[51] *See supra* notes 2–3.

[52] 455 U.S. at 769.

[53] *See supra* notes 5–6 and accompanying text.

[54] *See* Evans v. Newton, 382 U.S. 296, 301–02 (1966) (private parties could not operate park, which was an essential public function, on segregated basis in violation of fourteenth amendment); *cf.* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352–53 (1974) (privately owned electric utility was not performing public function and therefore was not compelled by the fourteenth amendment to provide notice and hearing prior to termination of customer service).

[55] *See* Santosky v. Kramer, 455 U.S. 745, 762–65 (1982).

[56] *Id.* at 763–64.

against erroneous termination of the parent's right to care and custody of the child, a right the Court considered important,[57] the Supreme Court concluded that the state must satisfy the elevated standard of proof [58] embodied in the clear and convincing standard.[59] Similarly, the Supreme Judicial Court's adoption of the clear and convincing standard in *Catholic Charitable Bureau* may have been prompted by concern that private agencies such as the Bureau might dominate termination proceedings unfairly.

While the Supreme Judicial Court might have adopted the higher standard of proof to curb any tendency of private adoption agencies to dominate termination proceedings, there is a more plausible explanation for the *Catholic Charitable Bureau* decision. *Santosky* suggests that the Constitution prohibits the probate court, as an arm of the state, from ordering termination of parental rights on the basis of less than clear and convincing evidence. First, the Supreme Court has indicated that state court decisions may be deemed state action and therefore subject to fourteenth amendment analysis. In *Shelley v. Kraemer*,[60] for example, the Supreme Court held that state court enforcement of a private restrictive covenant in a residential property deed would be state action violating the fourteenth amendment.[61] Second, *Santosky* holds that the state may not terminate parental rights without abiding by the constitutionally compelled clear and convincing evidence standard. One reasonable conclusion is that a termination order premised on anything less than clear and convincing evidence is a violation of the natural parents' due process rights. Assuming that this state action analysis forms the basis for the Supreme Judicial Court's decision in *Catholic Charitable Bureau*, any party petitioning to dispense with parental consent to adoption under chapter 210, section 3, whether the state, a private child care agency, or an individual,[62] would have to satisfy the clear and convincing evidence standard.[63]

In *Catholic Charitable Bureau*, the Supreme Judicial Court's application of the clear and convincing standard to the Bureau seems reasonable in light of *Santosky* and state action principles. While the Court did not

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[57] *Id.* at 758–59.

[58] *Id.* at 763–64.

[59] *Id.* at 768–69.

[60] *See* Shelley v. Kraemer, 334 U.S. 1, 18–20 (1948) (court enforcement of private restrictive covenant against seller and buyer of home would violate fourteenth amendment).

[61] *Id.* at 18–20.

[62] G.L. c. 210, § 3(a) (1984) authorizes the filing of a petition for adoption without parental consent by "a person having the care of custody of a child."

[63] While the *Shelley* analysis would justify uniform treatment of agency and individual petitioners, the Supreme Judicial Court might prefer a different standard of proof with regard to individuals and smaller agencies. *See supra* notes 55–56 and accompanying text.

state that it would apply the *Catholic Charitable Bureau* standard to all licensed private child care agencies, regardless of magnitude, one analysis would support a uniform requirement of clear and convincing evidence, without differentiation among petitioners under chapter 210, section 3. At a minimum, however, *Catholic Charitable Bureau* imposes a standard of clear and convincing evidence on large resource agencies petitioning to dispense with parental consent to adoption.

§ 4.4. Preservation of the Right to Appeal After a Judgment of Divorce Nisi — *Saltmarsh v. Saltmarsh*.[1]* Under Massachusetts law, a wife and husband may submit a sworn affidavit that an irretrievable breakdown of the marriage exists, execute a separation agreement, and with court approval, receive a court order under chapter 208, section 1A for what is commonly known as a no-fault divorce.[2] Normally, a judgment nisi is entered six months after the court order is issued.[3] Absent objections from either party, the judgment becomes absolute after the running of the nisi period of an additional six months.[4] Objections to the judgment

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§ 4.4. [1] 395 Mass. 405, 480 N.E.2d 618 (1985).

[2] G.L. c. 208, § 1A. Section 1A provides, in pertinent part:

> An action for divorce on the ground of an irretrievable breakdown of the marriage may be commenced with the filing of: (a) the complaint; (b) a sworn affidavit by both parties that an irretrievable breakdown of the marriage exists; and (c) a notarized separation agreement executed by the parties . . . . [Within thirty days after a hearing on the agreement,] the court shall . . . make a finding as to whether or not an irretrievable breakdown of the marriage exists and whether or not the agreement has made proper provisions for custody, for support and maintenance, for alimony and for the disposition of marital property, where applicable . . . .
>
> If the finding is in the affirmative, the court shall approve the agreement and it shall have the full force and effect of an order of the court and shall be incorporated and merged into said order, and by agreement of the parties it may also remain as an independent contract. In the event that the court does not approve the agreement as executed, or modified by agreement of the parties, said agreement shall become null and void and of no further effect between the parties . . . .
>
> Six months from the time that the court has given its initial approval to a dissolution agreement . . . a judgment of divorce nisi shall be entered without further action by the parties.

[3] *Id.* A judgment nisi is an interim judgment which will become final unless, upon application of either party, the court otherwise orders. Prior to the entry of the judgment nisi, the separation agreement may be modified by agreement of the parties with approval of the court or by petition of one of the parties after a showing of substantial change in circumstances. *Id.*

[4] G.L. c. 208, § 21. This section provides:

> Judgments of divorce shall in the first instance be judgments nisi, and shall become absolute after the expiration of six months from the entry thereof, unless the court within said period, for sufficient cause, upon application of any party to the action, otherwise orders. After the entry of a judgment nisi, the action shall not be dismissed

becoming absolute, however, may be filed during the nisi period pursuant to rule 58(c) of the Massachusetts Rules of Domestic Relations Procedure, and the judgment will not become absolute until such objections are "disposed of by the court."[5] In addition, under rule 62(g), filing of an appeal will stay the running of the nisi period.[6] The rules do not explicitly address, however, whether rule 62(g) is applicable to an appeal of the dismissal of any rule 58(c) objection or limited only to appeals of the entry of a judgment of divorce nisi. Neither is it clear whether the dismissal of a rule 58(c) objection after the expiration of the nisi period automatically makes a nisi judgment absolute, causing an appeal of that dismissal to be moot.

The Massachusetts Appeals Court, in *Giner v. Giner*,[7] has held that an appeal of a dismissal of a rule 58(c) objection is moot if the appeal is filed after the six month nisi period has run, even though the objection was properly raised within the nisi period.[8] In *Giner*, rule 58(c) objections were raised before the expiration of the six month nisi period.[9] The objections were not dismissed until more than one year later.[10] Although the dismissal was appealed within a month,[11] the court ruled that the appeal was moot because, immediately upon dismissal of the rule 58(c) objections, the nisi period had run and the divorce judgment had become absolute.[12]

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or discontinued on motion of either party except upon such terms, if any, as the court may order after notice to the other party and a hearing, unless there has been filed with the court a memorandum signed by both parties, wherein they agree to such disposition of the action.

[5] MASS. R. DOM. REL. P. 58(c). This rule provides, in pertinent part:

Nisi Judgment. At any time before the expiration of six months from the entry of a judgment of divorce nisi, the defendant, or any other person interested, may file . . . a statement of objections to the judgment becoming absolute . . . . The judgment shall not become absolute until such objections have been disposed of by the court. If said petition to stay the judgment absolute is subsequently dismissed by the court, the judgment shall become absolute as of six months from the date of the judgment nisi.

[6] MASS. R. DOM. REL. P. 62(g). If the appeal is dismissed, the judgment becomes absolute six months from the date of the judgment nisi. *Id.* Thus, the term "staying of the running of the nisi period," as used in this article, means only that while such a stay is in effect, a judgment absolute will not be entered. It does not mean that the calculation of the nisi period is tolled.

[7] 11 Mass. App. Ct. 1023, 420 N.E.2d 5 (1981).

[8] *Id.* at 1025, 420 N.E.2d at 7.

[9] *See id.* at 1024, 420 N.E.2d at 6.

[10] *See id.* at 1025, 420 N.E.2d at 7. The court's failure to rule sooner on the objections apparently resulted from the wife's discovery efforts and her amendment of her objections. *See id.* at 1024–25, 420 N.E.2d at 6–7.

[11] *See id.* at 1025, 420 N.E.2d at 7.

[12] *See id.* The court stated that the appellant's only alternatives were either to seek relief

The *Giner* court, in dicta, also indicated that the running of the nisi period is stayed by an appeal only if the appeal is taken from the entry of the judgment nisi, implying that the nisi period would not be stayed by an appeal from a dismissal of a rule 58(c) objection.[13] Application of this dicta, together with the court's holding, would greatly limit a party's opportunity for preventing a judgment of divorce nisi from becoming absolute. If the running of the nisi period is not stayed by an apppeal of the dismissal of a rule 58(c) objection, and if the appeal is moot after the nisi period has run, regardless of when the objection was raised, then an appeal, to be successful, would have to be filed, heard, and decided within the six month period.

During the *Survey* year, in *Saltmarsh v. Saltmarsh*, the Massachusetts Supreme Judicial Court rejected the *Giner* dicta.[14] Without expressing an opinion on the *Giner* result, the Court held that any appeal from the denial of rule 58(c) objections will stay the running of the nisi period if the appeal is filed during that period.[15] The Court did not address, however, the specific holding of *Giner*, that is, whether an appeal of the dismissal of a rule 58(c) objection, raised within the nisi period but disposed of after the period had run, would be moot because the judgment had become absolute upon dismissal of the objection by the trial court.[16]

In *Saltmarsh*, the wife and husband had executed a separation agreement, sworn an affidavit that there was an irretrievable breakdown of the marriage, and received a "1A order" for a "no-fault" divorce under chapter 208, section 1A.[17] Before the judgment nisi was to be entered, the wife claimed that she had learned that her husband had used misleading statements to persuade her to agree to the separation agreement and the no-fault divorce.[18] The wife tried several avenues of relief before

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under rule 60(b) of the Massachusetts Rules of Domestic Relations Procedure, or to initiate separate proceedings seeking reformation or a change in the separation agreement. *Id.*

[13] *Id.* The court stated in dicta that, "There was no appeal from the entry of the judgment of divorce nisi, so the running of the nisi period was not stayed under Mass. R. Dom. Rel. P. 62(g) (1975)." *Id.*

[14] 395 Mass. 405, 480 N.E.2d 618 (1985).

[15] *Id.* at 410, 480 N.E.2d at 622–23.

[16] In citing *Giner*, the Court merely referred to "whatever the rule may be as to an appeal from the dismissal of rule 58(c) objections entered after a judgment has become absolute . . . ." *Id.* at 410, 480 N.E.2d at 622.

[17] *Id.* at 406, 480 N.E.2d at 620. See also *supra* note 2 for G.L. c. 208, § 1A.

[18] *Id.* at 409, 480 N.E.2d at 622. The wife claimed that the husband had misrepresented to her that he was impotent and had contemplated suicide. *Id.* at 412, 480 N.E.2d at 623. She also asserted that after the divorce order was entered, she learned from an alleged former paramour of the husband that the paramour had maintained a long-time relationship with, and received financial assistance from, the husband and that he had induced the wife to convey to him sole ownership in certain real estate because he was secretly planning a future divorce. *Id.* at 412, 480 N.E.2d at 623–24.

the judge who had entered the 1A order. Prior to the entry of the judgment nisi, she brought an equity action for recission of the separation agreement alleging, among other things, that the husband had used fraud to induce her to agree to the separation agreement.[19] The judge dismissed the equity action, however, on the basis that she had an adequate remedy at law.[20] The wife appealed the equity action.[21]

After the judgment nisi was entered, the wife filed objections under rule 58(c)[22] to the judgment becoming absolute.[23] The husband filed a motion to dismiss for failure to state a claim[24] based on the requirement that, when claiming fraud, the circumstances of the fraud must be stated with particularity.[25] On March 15, 1984, the husband's motion to dismiss was granted.[26] The wife appealed the dismissal on March 26, 1984.[27] The judgment absolute was to enter on April 4, 1984.[28]

The Massachusetts Supreme Judicial Court, after agreeing with the lower court that the wife had an adequate remedy within the divorce proceedings,[29] vacated the order dismissing the wife's rule 58(c) objec-

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[19] *Id.* at 407, 480 N.E.2d at 621. Her amended complaint sought an order declaring the agreement null and void. *Id.* She considered the equity action to be appropriate because the separation agreement was both to be incorporated into the divorce judgment and, by its terms, to stand as an independent contract between the husband and wife. *Id.* at 407–408, 480 N.E.2d at 621. To return to the state of financial affairs existing before the execution of the agreement, the Court stated, it was necessary to attack these dual characteristics, and it was unclear whether this could be achieved within the divorce proceedings. *Id.* at 408, 480 N.E.2d at 621.

[20] *Id.* at 406, 480 N.E.2d at 620.

[21] *Id.* The wife also filed a motion under rule 60(b) of the Massachusetts Rules of Domestic Relations Procedure, seeking relief from the 1A order. *Id.* She did not appeal the denial of that motion. *Id.*

[22] *See supra* note 4 for text of rule 58(c).

[23] 395 Mass. at 406, 480 N.E.2d at 620.

[24] MASS. R. DOM. REL. P. 12(b)(6).

[25] 395 Mass. at 411, 480 N.E.2d at 623. MASS. R. DOM. REL. P. 9(b) provides in pertinent part that, "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity."

[26] 395 Mass. at 409, 480 N.E.2d at 622.

[27] *Id.* The wife also appealed late from the judgment nisi and from a denial of her motion for a stay of the entry of the judgment absolute. *Id.* at 406–07, 480 N.E.2d at 620. The Court found it unnecessary to address these issues due to the relief granted in the wife's appeal of the dismissal of her 58(c) objections. *Id.* at 407, 480 N.E.2d at 621.

[28] *Id.* at 409, 480 N.E.2d at 622.

[29] *Id.* at 408, 480 N.E.2d at 621. The Court found that the wife could not only obtain relief from the effect of the separation agreement as part of the divorce order in which it was incorporated, but she could also obtain a judgment that the agreement was null and void as an independent contract between her husband and herself. *Id.* Chapter 208, section 1A, the Court noted, specifically states that if the judge does not approve the agreement, it "shall become null and void and of no further effect between the parties." *Id.* (quoting G.L. c. 208 § 1A). If the wife were successful with her challenge the judge would be

tions.[30] The Court first ruled that the appeal was not moot since the running of the nisi period is stayed by any appeal based on rule 58(c) objections filed within the period.[31] Although the Court noted that rule 58(c) provides that a judgment nisi shall not become absolute until objections filed under that rule are disposed of, the Court did not consider whether "disposed of" included completion of the appeals process.[32] Instead, the Court based its holding on rule 62(g),[33] which states that the filing of an appeal will stay the running of the nisi period.[34] Contrary to the *Giner* dicta,[35] the Court found that the applicability of rule 62(g) was not limited to appeals from judgments of divorce nisi.[36] The Court reasoned that the rule referred only to "[t]he filing of an appeal," and ruled, therefore, that any appeal from an independently based rule 58(c) objection will stay the running of the nisi period.[37] Since the wife's appeal was filed before the expiration of the nisi period, the Court concluded, the running of the nisi period had been stayed, the nisi judgment was not yet absolute and, thus, the appeal was not moot.[38]

Finally, the Court determined that the probate judge had erred in

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required to disapprove the agreement. *Id.* at 408, 480 N.E.2d at 621. Therefore, the Court reasoned, if the agreement were disapproved, it would be null and void and of no further effect between the husband and the wife. *Id.* The probate judge, the Court concluded, thus had ruled correctly that the divorce proceedings offered the wife an adequate remedy. *Id.* The Court did not express an opinion as to what effect the disapproval would have on third parties who may have acquired rights due to actions taken pursuant to the agreement. *Id.* at 408 n.3, 480 N.E.2d at 621 n.3.

[30] *Id.* at 414, 480 N.E.2d at 624.

[31] *Id.* at 410, 480 N.E.2d at 623. If the running of the nisi period had not been stayed, it would have become absolute on April 4, 1984. *See supra* notes 17–28 and accompanying text. The appeal was filed on March 26, 1984, 395 Mass. at 409, 480 N.E.2d at 622, but not heard until March 5, 1985. *Id.* at 405, 480 N.E.2d at 618. The husband claimed, therefore, that the appeal of the dismissal of the rule 58(c) objections was moot because, when the Court heard the appeal, the nisi period had run. *Id.* at 409, 480 N.E.2d at 622.

[32] *See id.* at 410, 480 N.E.2d at 622. The Court only noted that rule 58(c) did not address the effect an appeal from the dismissal of rule 58(c) objections would have on the entry of a judgment absolute. *Id.*

[33] *Id.*

[34] MASS. R. DOM. REL. P. 62(g) provides in pertinent part that, "[t]he filing of an appeal shall stay the running of the nisi period as provided by Rule 58(c)."

[35] *See supra* note 13.

[36] 395 Mass. at 410, 480 N.E.2d at 622 (quoting MASS. R. DOM. REL. P. 62(g)).

[37] *Id.* at 410, 480 N.E.2d at 623.

[38] *Id.* at 410, 480 N.E.2d at 622–23. The Court also suggested that "fairness" required this holding since, when the probate judge heard the husband's motion to dismiss the wife's 58(c) objections, the husband's counsel had conceded that the wife would have a right of appeal if the husband's motion was granted before the nisi judgment became absolute. *Id.* at 411, 480 N.E.2d at 623. The Court reasoned that the judge may well have relied on these representations of the husband's counsel in dismissing the wife's objections while denying her motion to stay the judgment from becoming absolute. *Id.*

dismissing the wife's rule 58(c) objections without an evidentiary hearing and based only on a motion to dismiss for failure to state a claim.[39] The Court held that the wife's allegations were stated with sufficient particularity.[40] Even if the fraud allegations were deficient, the Court continued, the wife would have been allowed to amend her pleading.[41] The Court further found that the wife's allegations, if proven, were sufficiently serious to warrant the withdrawal of approval of the separation agreement, and consequently, dismissal of the divorce action.[42]

The *Saltmarsh* case is significant primarily for its holding that any appeal taken within the nisi period from the denial of a rule 58(c) objection will prevent a judgment nisi from becoming absolute until the disposition of the appeal.[43] This holding clarifies the restrictive, and perhaps inadvertent, language of *Giner v. Giner*[44] which suggested that the only type of appeal which would stay the running of the nisi period was an appeal from the entry of judgment of divorce nisi.[45] The *Saltmarsh* holding assures that a party who files a timely appeal from dismissal of objections to a judgment of divorce nisi becoming absolute will not have the appeal rendered moot simply because the appeals court did not act on the appeal prior to the scheduled expiration date of the nisi period.

The *Saltmarsh* decision, however, left open a more troublesome issue specifically addressed by *Giner* and it is questionable whether both holdings can rationally or constitutionally coexist. Under *Giner*, a dismissal of rule 58(c) objections which were seasonably filed within the nisi period yet not disposed of by the trial court within the scheduled close of that period cannot be appealed.[46] Under *Saltmarsh*, on the other hand, if the trial court dimissed those same objections within the nisi period, so that it is possible to file an appeal before the close of the period, then the appeal will be heard.[47] As a result, the opportunity for appeal from a dismissal of a rule 58(c) objection may be denied due to events, such as the other party's delaying tactics or an overloaded appeals court docket, over which a party may have no control.

Conditioning access to the appeals courts on such fortuitous circumstances may be inconsistent with the equal protection clause of the fourteenth amendment.[48] In an analogous situation, the United States

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[39] *Id.* at 411–13, 480 N.E.2d at 623–24.

[40] *Id.* at 411, 480 N.E.2d at 623.

[41] *Id.* at 412, 480 N.E.2d at 623.

[42] *Id.* at 413, 480 N.E.2d at 624.

[43] *See id.* at 410, 480 N.E.2d at 623.

[44] 11 Mass. App. Ct. 1023, 420 N.E.2d 5 (1981).

[45] *Id.* at 1025, 420 N.E.2d at 7.

[46] *See supra* notes 7–13 and accompanying text for a discussion of *Giner*.

[47] *See* 395 Mass. at 410, 480 N.E.2d at 623.

[48] The fourteenth amendment of the United States Constitution reads, in pertinent part:

Supreme Court, in *Logan v. Zimmerman Brush Co.*,[49] unanimously rejected[50] a state court interpretation of a state statute which would have conditioned a complainant's remedy on the timeliness of state action over which the complainant had no control.[51] In this case, the appellant had filed a complaint with the Illinois Fair Employment Commission alleging that, under state statute, he had been unlawfully discharged by his employer because of the appellant's physical handicap.[52] The statute required that the Commission conduct a factfinding conference within 120 days of the filing of the complaint.[53] The Commission, however, did not schedule the conference until five days after the expiration of the statutory period.[54] The Illinois Supreme Court ruled that the failure of the Commission to convene the conference within the statutorily mandated period had deprived the Commission of the jurisdiction to hear the complaint.[55] The majority of the United States Supreme Court, without reaching the equal protection issue, rejected the Illinois court's holding on the basis that it failed to provide due process to the appellant.[56]

Four justices, however, in a concurring opinion written by Justice Blackmun, did specifically address the equal protection claim.[57] Justice Blackmun noted that the statute as interpreted by the Illinois court divided claimaints into two discrete groups: those whose claims are processed within 120 days and who receive "the opportunity for full . . . judicial review," and those with identical claims who receive no judicial process simply because the claims were not processed within the statutory period.[58] This had the effect, Justice Blackmun stated, of drawing an arbitrary line between otherwise identical claims and, by state action,

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"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *U.S. Const.* amend. XIV § 1.

[49] 455 U.S. 422 (1982).

[50] *Id.* at 423. Justices Powell and Rehnquist did not join in the opinion of the Court but concurred in the judgment. *Id.* at 443.

[51] *See id.* at 426–28.

[52] *Id.* at 426.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 427.

[56] *See id.* at 428–38. The Court held that the state, through established procedure and without giving the appellant a meaningful opportunity to be heard, had improperly destroyed the complainant's entitlement to state created adjudicatory procedures. *Id.* Under the circumstances of the case, the due process clause of the fourteenth amendment required that the state provide the appellant a hearing prior to the withdrawal of that right. *Id.* at 436–37.

[57] *See id.* at 438–42 (Blackmun, J., concurring). Justice Blackmun was joined by Justices Brennan, Marshall, and O'Connor. *Id.* at 438 (Blackmun, J., concurring).

[58] *Id.* at 438–39 (Blackmun, J., concurring).

converting similarly situated claims into dissimilarly situated ones.[59] Such a classification, Justice Blackmun found, did not satisfy the requirement of the equal protection clause that there be a rational basis between the classification and a legitimate state goal.[60]

As a result of the decisions in *Giner* and *Saltmarsh*, current no-fault divorce law classifies appellants of dismissals of rule 58(c) objections in a manner rejected by *Logan*. A party's access to judicial review of a dismissal of a rule 58(c) objection is determined by how expeditiously its objection is disposed of. Two classes are arbitrarily established: those who can file an appeal because their objections are dismissed within six months of the entry of a judgment nisi, and those who are denied "the opportunity for full judicial review" because their objections are not dismissed in time to file an appeal. As in *Logan*, there is no discernible rational basis for such a classification.

The legislature could solve this problem by amending rule 58(c).[61] The rule could be clarified by amending the penultimate sentence to read: "The judgment shall not become absolute until such objections have been disposed of by the court, including appeals of the court's decision regarding such objections." The amendment would make clear that a party's right to appeal the dismissal of a rule 58(c) objection, raised within the nisi period, is not lost merely by the fact that the objection was dismissed more than six months after the entry of a judgment of divorce nisi.

Alternatively, the judiciary could provide the needed clarification through statutory interpretation. A court could first note that since a serious question of constitutionality is presented, it must first determine whether there is a fair construction of the rules which would avoid the constitutional question.[63] The court could point out that the running of the nisi period is stayed by either a timely objection raised pursuant to rule 58(c), or filing an appeal under rule 62(g), which explicitly refers to rule 58(c).[64] Therefore, the court could reason, if both the raising of the objection and appealing its dismissal will stay the running of the nisi period, the legislature could not have intended that the judgment would become absolute after the objection was dismissed and before the appeal

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[59] *Id.* at 442 (Blackmun, J., concurring).

[60] *Id.* (Blackmun, J., concurring). Additionally, Justices Powell and Rehnquist, in a separate concurring opinion and without discussing the equal protection clause, agreed that the Commission's classification lacked rational basis. *Id.* at 443–44 (Powell, J., concurring).

[61] *See supra* note 5.

[63] *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979); International Association of Machinists v. Street, 367 U.S. 740, 749–50 (1961). *See also* Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804).

[64] *See supra* note 34.

could possibly be raised. The most logical conclusion would be that the term "disposed of by the court" in rule 58(c) means that all avenues of judicial recourse regarding the objection have been closed.

This treatment of rule 58(c) obviously will result in delaying the entry of a judgment absolute in some cases. The harmful consequences, however, will be limited by rule 62(g) which provides that the filing of an appeal shall not affect the operation of other court orders regarding custody, visitation, alimony, support, or maintenance.[65] In light of the significant property rights involved in a marriage and the importance of that institution to our social structure, the proposed interpretation of rule 58(c) is most desirable in assuring that any objections to a final marriage dissolution will be thoroughly evaluated.

As a result of *Saltmarsh*, the Massachusetts Supreme Judicial Court has clarified rule 62(g) of the Massachusetts Rules of Domestic Relations Procedure in holding that any appeal of the disposition of a rule 58(c) objection will be heard if filed before the expiration of the nisi period. The question remains whether such an appeal will be heard if the rule 58(c) objection is dismissed too late to file the appeal before the nisi period has run. Due to considerations of fairness and constitutionality, this issue needs to be addressed by either the state legislature or the judiciary.

§ 4.5. Paternity Suits by Unmarried Fathers.* For over 100 years, the Massachusetts courts have held that a child born while a couple is married is presumed to be the child of the husband.[1] This presumption of legitimacy applies even if a child is born after a divorce decree is entered but before the decree becomes final.[2] This presumption can be rebutted only by proof "beyond a reasonable doubt" that the husband could not have been the father.[3]

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[65] MASS. R. DOM. REL. P. 62(g).

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§ 4.5. [1] Phillips v. Allen, 84 Mass. (2 Allen) 453, 454 (1861) (suit regarding paternity to establish right to inherit).

[2] Koffman v. Koffman, 193 Mass. 593, 596, 79 N.E. 780, 780 (1907). The initial divorce decree is called a decree *nisi*. G.L. c. 208, § 21. The divorce does not become final until six months after the issuance of the *nisi* decree. *Id.*

[3] G.L. c. 208, § 21. The accepted means of proof are that the husband was not physically present to have sex with his wife during the probable time of conception, that the husband was impotent during the period of conception, or a blood test. Commonwealth v. Leary, 345 Mass. 59, 60, 185 N.E.2d 641, 642 (1962) (criminal case where defendant was charged with fathering the child out of wedlock). Testimony by the mother as to her husband's absence during the period of conception is sufficient proof that the husband could not have been the father. *Id.* at 61, 185 N.E.2d at 642.

Either the mother[4] of the child or the husband, known as the presumed father,[5] may challenge this presumption. In the case of illegitimate children, Massachusetts courts have held that both the mother[6] and an individual claiming to be the natural father[7] can bring suit to establish the paternity of the child. However, prior to the *Survey* year, the Supreme Judicial Court had not determined whether an individual, not the husband, claiming to be the natural father of a legitimate child could bring suit to challenge the presumption of legitimacy.[8]

During the *Survey* year, in *P.B.C. v. D.H.*,[9] the Supreme Judicial Court extended the legal presumption of legitimacy beyond the previous border of divorce nisi and held that a child *conceived* during marriage, but born after a final divorce decree, is presumed to be the child of the husband.[10] The Court therefore concluded that an individual who was not the husband at the time of conception has no standing to bring a suit to establish his paternity of the child.[11] If extended beyond the facts of this case, the holding in *PBC* could preclude all natural fathers of children who are presumed to be legitimate from ever establishing their paternity of the children.

The plaintiff, PBC, was a man who had a long sexual relationship with the defendant, DH, prior to September 1981, which was the approximate date of conception.[12] DH was married to another man during her relationship with PBC.[13] DH filed for divorce from her husband in May 1981, and the divorce was granted in December of the same year.[14] The divorce became final in June 1982, and the child was born one day later.[15] The birth certificate listed DH's husband as the father, and he never denied his paternity.[16] The alleged father of the child, PBC, had occasionally visited the child until DH began to prevent PBC's visits beginning in September 1983, leading PBC to file suit to establish his paternity of the

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[4] Symonds v. Symonds, 385 Mass. 540, 544, 432 N.E.2d 700, 703 (1982) (divorce case where husband denied paternity of his wife's child).

[5] *Id.*

[6] Baby X v. Misiano, 373 Mass. 265, 265, 366 N.E.2d 755, 756 (1977) (suit by mother for support of the fetus and of the child after the fetus is born).

[7] Normand v. Barkei, 385 Mass. 851, 853, 434 N.E.2d 631, 633 (1982) (suit by man claiming to be natural father to establish visitation rights).

[8] P.B.C. v. D.H., 396 Mass. 68, 71, 483 N.E.2d 1094, 1096 (1985), *cert. denied*, 106 S. Ct. 1286 (1986).

[9] 396 Mass. 68, 483 N.E.2d 1094 (1985), *cert. denied*, 106 S. Ct. 1286 (1986).

[10] *Id.* at 71, 483 N.E.2d at 1096 (emphasis in original).

[11] *Id.* at 68, 483 N.E.2d at 1095.

[12] *Id.* at 70, 483 N.E.2d at 1096.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

child.[17] Six days after PBC filed his suit, DH remarried her former husband who was the presumed father of her child, and she, her husband and the child lived together continuously through the time of the trial.[18]

PBC brought suit in the probate and family court to be declared the natural father of the child and to be granted custody of the child or visitation rights.[19] PBC then moved that the court order the parties and the child to submit to blood tests to determine his paternity.[20] The trial court eventually granted PBC's request, but DH refused to submit to the test.[21] The court sanctioned DH by deeming her to have made concessions favorable to PBC.[22] DH responded by moving to dismiss the suit on the grounds that PBC lacked standing to challenge paternity.[23] The trial judge denied the motion to dismiss and again ordered DH to submit to the blood test.[24] The order provided for extreme sanctions if DH did not comply.[25]

DH then filed an appeal to the Appeals Court on the denial of her motion to dismiss.[26] A single justice of the Appeals Court authorized the appeal and granted a stay of proceedings in the trial court.[27] The Supreme Judicial Court then transferred the case on its own initiative.[28] The Court chose to treat the case as a motion for summary judgment, considering only the facts discussed in the pleadings and other documents of the parties that were undisputed.[29] The Court held that PBC lacked standing to adjudicate the issue of paternity and remanded the case to the probate court for dismissal.[30]

Before determining whether PBC had the right to bring an action to

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[17] *Id.*

[18] *Id.* at 70–71, 483 N.E.2d at 1096. It is also unclear how often DH lived with her ex-husband between the conception of the child and their remarriage, but the Court stated that was irrelevant. *Id.* at 70 n.1, 483 N.E.2d at 1096 n.1.

[19] *Id.* at 69, 483 N.E.2d at 1095.

[20] *Id.* The test to be used was a Human Leukocyte Antigen white blood cell test. *Id.*

[21] *Id.*

[22] *Id.* The Court did not specify what the concessions were. *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* The possible sanctions included precluding DH from introducing evidence on paternity at trial, imprisonment until DH complied, and imposing daily costs on DH until she complied. *Id.*

[26] *Id.*

[27] *Id.* at 69–70, 483 N.E.2d at 1095. The Appeals Court justice granted the stay because he feared that if the blood test proved that PBC was the child's natural father and the court subsequently ruled that PBC lacked standing to adjudicate the issue of paternity, the child could be unnecessarily emotionally harmed. *Id.* at 69, 483 N.E.2d at 1095.

[28] *Id.* at 70, 483 N.E.2d at 1095. This was done pursuant to G.L. c. 211A, § 12 (Supp. 1985).

[29] *Id.* at 70, 483 N.E.2d at 1096.

[30] *Id.* at 68, 70, 483 N.E.2d at 1095–96.

determine paternity, the Court examined the issue of the legal presumption of the child's paternity.[31] The established presumption, the Court noted, is that a child *born* during a marriage is presumed to be the child of the husband.[32] The Court stated that this presumption could be rebutted by proof beyond a reasonable doubt that the presumed father could not be the father of the child.[33] The Court then extended the presumption of legitimacy, holding that if a child is *conceived* during a marriage, the husband is the presumed father of the child, subject to the same test for rebutting the presumption as was previously established.[34] The Court stated that extending the presumption of legitimacy to children conceived during marriage was consistent with the Court's established policy of affording legitimacy to children whenever possible.[35] The Court then concluded that because the child in question was conceived during the marriage, DH's once and current husband was presumed to be the father.[36]

The Court then turned to PBC's claim that he had a right to rebut that presumption.[37] The Court noted that it previously never had considered the issue whether a man claiming to be the natural father of a presumed legitimate child could rebut the presumption of the child's paternity.[38] The Court held that such a man had no constitutional right to adjudicate the issue of paternity[39] and that public policy did not justify granting PBC a common law right to determine paternity.[40]

Looking to the United States Supreme Court decision of *Stanley v. Illinois*,[41] the Court first examined whether PBC had a due process right to a hearing on the paternity issue under the fourteenth amendment of the United States Constitution.[42] *Stanley* involved a man who had raised his illegitimate children jointly with their mother for nearly eighteen years.[43] Upon the mother's death, the children were declared wards of the state and were placed with court-appointed guardians.[44] Stanley

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[31] *Id.* at 71, 483 N.E.2d at 1096.

[32] *Id.* (citing *Phillips*, 84 Mass. (2 Allen) at 454) (emphasis in original).

[33] *Id.*

[34] *Id.* (emphasis in original).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* In Normand v. Barkei, 385 Mass. 851, 434 N.E.2d 631 (1982), the Court held that a man claiming to be the natural father of an *illegitimate* child could seek an adjudication of his paternity. *Id.* at 853, 434 N.E.2d at 633 (emphasis added).

[39] *PBC*, 396 Mass. at 71–72, 483 N.E.2d at 1097.

[40] *Id.* at 72, 483 N.E.2d at 1097.

[41] 405 U.S. 645 (1972).

[42] *PBC*, 396 Mass. at 72, 483 N.E.2d at 1097.

[43] *Stanley*, 405 U.S. at 646.

[44] *Id.*

claimed that the taking of the children violated his due process rights to a hearing on his fitness as a parent.[45] Stanley further claimed that the taking violated his equal protection rights because married fathers and unmarried mothers were entitled to a hearing on their fitness as parents while unmarried fathers were denied such a hearing.[46] The United States Supreme Court held that unmarried fathers did have an interest in their children that warranted due process protection absent a "powerful countervailing interest" on the part of the state.[47] The Court found that Illinois did not have an interest in denying Stanley a hearing because if he was a fit parent, the children would not be protected by taking them from Stanley.[48]

The Supreme Judicial Court found *Stanley* distinguishable from the facts of *PBC* on three grounds.[49] First, the Court stated, *Stanley* involved illegitimate children, not a child presumed legitimate.[50] Second, the Court noted, *Stanley* involved the presumed unfitness of unmarried fathers as parents, not a presumption of paternity as Stanley was the acknowledged father of the children involved.[51] Finally, the Court declared, in *Stanley* the plaintiff father had raised the children for nearly eighteen years, whereas PBC only occasionally visited the child.[52] The Court then conceded that despite the distinguishable characteristics of *Stanley*, the Court recognized in general that an unwed natural father had a legally protectable interest in his children.[53] The Court concluded, however, that the circumstances in *PBC* did not justify extending protection to PBC because the state had a powerful countervailing interest in protecting the family.[54]

The Court then elaborated on its conclusion that PBC had no due process right to establish paternity by examining the appropriate standard for determining whether PBC's due process rights had been violated.[55] The Court remarked that the only requirement of due process is that the means used "have a real and substantial relation to the object sought to be obtained."[56] The State's objective here, the Court explained, was protecting a "legitimate and strong" interest in strengthening family life

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[45] *Id.*
[46] *Id.*
[47] *Id.* at 651.
[48] *Id.* at 652–53.
[49] *PBC*, 396 Mass. at 72, 483 N.E.2d at 1097.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at 73, 483 N.E.2d at 1097.
[56] *Id.* (quoting Nebbia v. New York, 291 U.S. 502, 525 (1934)).

and in affording legitimacy to children.[57] In the situation before it, the Court noted that the presumed father never denied paternity and was living with mother and child as part of a family unit.[58] Therefore, the Court concluded, denying PBC the right to adjudicate paternity advanced the State's interests by protecting that family unit, and did not violate PBC's due process rights.[59]

The Court then turned to PBC's claims under the fourteenth amendment's equal protection clause and under article 106 of the Amendments to the Constitution of the Commonwealth, the Massachusetts Equal Rights Amendment (ERA).[60] The Court concluded that the Massachusetts ERA did not apply to this case because there was no gender-based classification involved in denying natural fathers the right to pursue their claims in court.[61] *Presumed* fathers, as well as mothers, the Court stated, could bring actions to determine a child's paternity.[62]

The Court then examined the more general requirement of equal protection, that all persons in similar circumstances be treated alike.[63] The Court stated that PBC was not in the same situation as the mother or presumed father because he was not part of the family unit.[64] This distinction was justified, the Court reasoned, because a suit brought by an outsider to establish paternity would be more likely to disrupt the family unit, which the Commonwealth seeks to protect, than if a family member brought the action.[65] The Court elaborated that a suit brought by an outsider would be more disruptive for two reasons.[66] First, the Court stated, if a family member brought the suit, the family probably had been disrupted already.[67] Second, the Court explained, a member of the family would be better able to gauge the impact of a paternity suit on the family

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[57] *Id.*

[58] *Id.*

[59] *Id.* The Court also noted that unlike *Stanley*, the state here had a powerful interest in strengthening the family that justified withholding due process protection of the natural father's interest in his children. *Id.* at 73, 483 N.E.2d at 1097–98.

[60] *Id.* at 73, 483 N.E.2d at 1098. The Court noted that the Massachusetts ERA required a higher standard of review than that required by the fourteenth amendment. *Id.* at 74, 483 N.E.2d at 1098. The ERA standard of strict scrutiny, the Court stated, requires that there be a compelling state interest served by a minimally intrusive statute. *Id.* By contrast, the Court explained, the fourteenth amendment requires only that a statute be substantially related to an important governmental interest. *Id.*

[61] *Id.*

[62] *Id.* (citing *Symonds*, 385 Mass. at 544, 432 N.E.2d at 703) (emphasis added).

[63] *Id.* (quoting Opinion of the Justices, 332 Mass. 769, 779-80, 126 N.E.2d 795, 801 (1955)).

[64] *Id.*

[65] *Id.* at 74–75, 483 N.E.2d at 1098.

[66] *Id.* at 75, 483 N.E.2d at 1098.

[67] *Id.*

than an outsider could.[68] Therefore, the Court concluded, PBC had no right under equal protection to bring a paternity action.[69]

Finally, the Court briefly addressed the possibility of establishing a common law right for PBC to bring his action.[70] The Court concluded that allowing alleged natural fathers to bring an action to establish paternity of children conceived while the mother was married to another man would be contrary to the social policies of strengthening the family unit and affording legitimacy to children where possible.[71] The Court expressly declined to offer an opinion on whether the child could later bring an action to establish PBC as the father.[72] The Court then remanded the case to the probate court for dismissal.[73]

The PBC decision changes the law in Massachusetts in two ways. First, prior to *PBC*, a child conceived during a marriage was only presumed to be the child of the husband if the child was born between the *nisi* decree and the time the divorce became final.[74] As a result of *PBC*, all children conceived during a marriage are presumed to be the child of the husband regardless of when they are born.[75] Secondly, prior to *PBC*, the Court had only decided that a man could sue to establish paternity of an illegitimate child.[76] Under *PBC*, the Court has established that a man who is not the putative father of a child conceived by a married woman does not have the right to bring a court action to establish the paternity of a child who is presumed to be legitimate.[77] The courts of California,[78] Delaware[79] and Wyoming[80] have reached the same result regarding an alleged natural father's right to sue for paternity. On the

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[68] *Id.*

[69] *Id.*

[70] *Id.* at 75, 483 N.E.2d at 1099.

[71] *Id.*

[72] *Id.* Where the putative parents attack a child's legitimacy in an adultery action, the findings of the court regarding a child's paternity are not binding on the child. Sayles v. Sayles, 323 Mass. 66, 69, 80 N.E.2d 21, 24 (1948). However, if the proof of the child's illegitmacy is established by a blood test, the child's ability to sue to establish the putative father as the child's real father may be essentially worthless. *Symonds*, 385 Mass. at 545 n.7, 432 N.E.2d at 703 n.7.

[73] *Symonds*, 385 Mass. at 545 n.7, 432 N.E.2d at 703 n.7.

[74] Koffman v. Koffman, 193 Mass. 593, 596, 79 N.E. 780, 780 (1907).

[75] *PBC*, 396 Mass. at 71, 483 N.E.2d at 1096.

[76] Normand v. Barke, 385 Mass. 851, 853, 434 N.E.2d 631, 633 (1982).

[77] *PBC*, 396 Mass. at 75, 483 N.E.2d at 1098–99.

[78] Vincent B. v. John R., 126 Cal. App. 3d 619, 625–27, 179 Cal. Rptr. 9, 11–13 (1981) (child born during marriage and parents subsequently divorced four years later).

[79] Petitioner F. v. Respondent R., 430 A.2d 1075, 1078–80 (Del. 1981) (child born during marriage and parents still married).

[80] A. v. X., Y., and Z., 641 P.2d 1222, 1224–27 (Wyo.), *cert. denied*, 459 U.S. 1021 (1982) (mother married six months before child was born with her husband presumed to be the father; presumed parents still married).

other hand, the Colorado Supreme Court has held that alleged natural fathers do have the right to sue.[81]

It is possible that the holding that an alleged natural father does not have standing to sue for paternity may be limited to the facts of this case, where the mother remarried her ex-husband who was the putative father and lived with him and the child as a "family unit."[82] This holding should be limited to the facts in this case because it could prevent many natural fathers from establishing paternity of their children, especially when coupled with the extension of the presumption of legitimacy. The extension of the presumption of legitimacy to all pregnancies which begin during marriage is by itself acceptable and is consistent with the established policy of affording legitimacy to children whenever possible.[83] It is important to note, however, that the extension of the presumption together with the Court's holding that alleged natural fathers lack standing to sue for paternity of children presumed to be legitimate sharply limits a natural father's ability to establish paternity of his own children. Alleged natural fathers should be allowed to establish paternity of their children unless it would clearly conflict with state policy, as in the present case where the child was living with the mother and the presumed father as a family.

The Court discusses two state interests, protecting the family[84] and affording legitimacy to children whenever possible,[85] to justify its decision. In order for the Court's denial of standing to alleged natural fathers for paternity suits to pass muster under due process, however, the denial

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[81] R. McG. v. J.W., 200 Colo. 345, 352–53, 615 P.2d 666, 671–72 (1980) (mother had conceded that the alleged natural father was the father of the child).

[82] *PBC*, 396 Mass. at 73–74, 483 N.E.2d at 1097–98. The Court makes continual references to the existence of a family unit in this case. *Id.* Of the three state cases in accord with the Court's holding, only one case, *Vincent B.*, involves a divorced couple. 126 Cal. App. 3d at 622, 179 Cal. Rptr. at 10. The couple in *Vincent B.* remained separated, but the child had lived in a family unit with the mother and the presumed father for four years. *Id.* at 626–27, 179 Cal. Rptr. at 12–13. The court concluded that granting the alleged natural father visitation rights in that situation could be confusing to the child. *Id.* at 628, 179 Cal. Rptr. at 13. The problem of confusion could be solved in two ways. Standing to sue could be granted only when the child was born after a divorce and had never lived together with both parents as a family unit, or a guardian ad litem could be appointed for the child to help determine whether visitation is in the child's best interests. *See R. McG.*, 200 Colo. at 353, 615 P.2d at 672. In that case, the guardian ad litem concluded that the paternity suit was in the child's best interests. *Id.*

[83] *See* Powers v. Steele, 394 Mass. 306, 310–11, 475 N.E.2d 395, 397–98 (1985); Green v. Kelley, 228 Mass. 602, 605, 118 N.E. 235, 237 (1917) (Massachusetts public policy not frustrated by the use of other states' less strict legitimacy laws to determine the right to inherit Massachusetts trusts and estates).

[84] *PBC*, 396 Mass. at 73, 483 N.E.2d at 1097.

[85] *Id.*

must serve only one "powerful countervailing interest."[86] The Court's analysis of PBC's due process claim is relatively brief and focuses more on distinguishing PBC's situation from *Stanley* than on the impact of granting standing on the state's interests.[87] Under the facts of *PBC*, however, it is indisputable that both state interests are served by denying alleged natural fathers standing. Therefore, under the due process clause, the Court can deny standing to alleged natural fathers.

The interest in affording legitimacy to children is served in all circumstances by denying alleged natural fathers standing to sue. By limiting the parties who can challenge a child's legitimacy to the child's presumed parents, it becomes more difficult for a suit challenging legitimacy to be brought.[88] Since the concern here is limiting the parties who may sue, and not with a "family unit," it does not matter whether the presumed parents are still married to each other. This analysis thus applies to all circumstances where alleged natural fathers seek standing to sue.

The state's interest in preserving the family, however, is only served as long as there is a family to protect. The Court's analysis of PBC's due process interest emphasizes the fact that there was a family unit formed by DH, the child and the presumed father which should not be considered less of a unit because they were temporarily separated by a divorce.[89] However, if a family unit were dissolved by a divorce and did not reunite, there would be no family unit to protect, and the state's interest in protecting the family would not be served by denying alleged natural fathers standing to sue for paternity when the family had dissolved.[90] Since the state's interest in promoting legitimacy is served by denial of standing to alleged fathers, however, alleged natural fathers should have no due process right to sue for paternity under any circumstances.

Under equal protection, the issue is not whether a state interest is served but whether "all persons in the same catagories and in the same circumstances" must be treated alike.[91] The Court's analysis of the equal

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[86] *Stanley*, 405 U.S. at 651. The state interest asserted in *Stanley* was protecting the welfare of the children by removing them from unfit parents. *Id.* at 652.

[87] *PBC*, 396 Mass. at 72–73, 483 N.E.2d at 1097–98.

[88] *See id.* If either of the presumed parents challenges the child's legitimacy, the stigma of illegitimacy may attach regardless of the legal conclusions because the presumed parents are the ones who should be the most familiar with the child's paternity.

Aside from the social stigma of illegitimacy, there are also legal consequences. In order for an illegitimate child to inherit from his or her natural father, the natural father must have either acknowledged his paternity orally or in writing or have had a court determine his paternity. Lowell v. Kowalski, 380 Mass. 663, 669–70, 405 N.E.2d 135, 141 (1980). There is also a presumption that any reference to "issue" in a will includes only legitimate children. *Powers*, 394 Mass. at 309, 475 N.E.2d at 397 (1985).

[89] *PBC*, 396 Mass. at 73, 483 N.E.2d at 1097.

[90] *Contra Vincent B.*, 126 Cal. App. 3d at 626, 179 Cal. Rptr. at 12.

[91] Opinion of the Justices, 322 Mass. 769, 779–80, 128 N.E.2d 795, 801 (1955).

protection issue is limited to discussing the different statuses of PBC and of DH and the presumed father in light of the state's interest in preserving the family.[92] The Court does not consider how classifying PBC differently from the presumed parents impacts on the state's interest in affording legitimacy to children, but the analysis is similar to that regarding the state's interest in preserving the family. Using the equal protection analysis, the Court is justified in treating PBC differently under the facts of this case where DH and the presumed father form a family unit, and PBC is an "outsider" relative to the family unit.[93] Once the family unit is dissolved, however, there is no practical distinction between "insiders" and "outsiders," since the distinction is drawn to protect the family.[94] The insider/outsider distinction makes no sense at all when considering the state's interest in protecting the legitimacy of children.

One of the Court's concerns in denying PBC standing to inititate a paternity suit is that such a suit "has the likely effect of seriously disrupting an intact marriage and family . . . ."[95] The Court distinguished between those within the family and those outside the family based on this concern. The Court noted that family "insiders" would be better able to determine the impact of a paternity suit on the family than an outsider could.[96] The Court also stated that if a family member did bring a paternity suit, the family unit probably has already been harmed beyond repair.[97] The logical extension of this latter line of reasoning is that if the family is already disrupted, there is no longer a need to protect it. Therefore, if there is no longer a family unit and the mother is living alone with her child, there is no need to protect the family by denying "outsiders" the right to bring paternity suits because there is no longer a family to protect. Furthermore, if there is no longer a family, there are

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[92] *PBC*, 396 Mass. at 74, 483 N.E.2d at 1098.

[93] It is not clear what the Court considers as constituting a family unit, merely living together or having the mother and father married as well. *See id.* at 74–75, 483 N.E.2d at 1098.

Moreover, the Court correctly dismissed PBC's claims of a gender-based distinction in the rules governing who may establish paternity. *Id.* at 74, 483 N.E.2d at 1098. Any advantage that the mother has over a third party claiming to be the natural father in determining paternity suits comes from the fact that she is a member of the family unit. *Id.* at 74–75, 483 N.E.2d at 1098. Women as a class differ from men because they do not have to prove maternity by the nature of biology. *See Lowell* 380 Mass. at 668, 405 N.E.2d at 140 (holding that the Commonwealth could establish different standards for a child to establish illegitimate paternity and illegitimate maternity for inheritance purposes because it is easier to establish maternity). *See also X., Y., and Z.*, 641 P.2d at 1225.

[94] *PBC*, 396 Mass. at 74, 483 N.E.2d at 1098.

[95] *Id.* at 74–75, 483 N.E.2d at 1098.

[96] *Id.* at 75, 483 N.E.2d at 1098.

[97] *Id.*

no insiders or outsiders, just presumed parents and alleged natural parents.

Where there still is a family, as in *PBC*, the distinction between insiders and outsiders is warranted. Someone who is not a part of the family is presumably not as familiar with the family as someone who is a family member. This presumption is far different from the presumption made by Illinois and struck down by the Supreme Court in *Stanley* that illegitimate fathers in the same circumstances as illegitimate mothers would always be unfit parents.[98] The Court's argument that family members would be better able to gauge the impact of paternity suits and therefore minimize the harm to the family thus justifies denying alleged natural fathers the right to standing for paternity suits where the child is part of a family unit with his or her presumed parents. However, if there is no family, there should be no distinction between the presumed parents and the alleged natural father.

The Court does not discuss equal protection in relation to the state's interest in affording legitimacy to children whenever possible,[99] but the legitimacy interest does not justify extending *PBC* beyond the facts of the case. In distinguishing between family members and outsiders for the protection of the family, the Court stated that if a family member brought a paternity suit, there would either be no family left to protect, or the family member would be able to judge the impact of the suit and would bring the suit only if it did not harm the family.[100] The first part of this concern may apply to legitimacy; if a parent challenges the legitimacy of the child there will be a severe impact.[101] However, there is no indication that a putative parent would be less likely to bring a paternity suit than an outsider. A putative father may be more inclined than an outsider to bring a paternity action because proving that he is not the father could relieve him of support obligations.[102] On the other hand, if someone establishes himself as the child's father, that individual may be required to pay support.[103] More than monetary concerns are involved, of course, but on the whole it does not appear that alleged natural fathers would be more or less likely than putative fathers to bring paternity actions. In that instance, there is no reason to distinguish between the two groups for equal protection purposes.[104]

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[98] *Stanley*, 405 U.S. at 646.

[99] *See PBC*, 396 Mass. at 74–75, 483 N.E.2d at 1098.

[100] *Id.* at 75, 483 N.E.2d at 1098.

[101] *See id.* at 73, 483 N.E.2d at 1097.

[102] *See Symonds*, 385 Mass. at 544, 432 N.E.2d at 703. "A married man should have no duty to support a child born to his wife during their marriage but fathered by another man . . . ." *Id.*

[103] *See Normand*, 385 Mass. at 853, 434 N.E.2d at 633.

[104] *See R. McG.*, 200 Colo. at 351, 615 P.2d at 670–71. There may be a different result if

PBC establishes one clear change in Massachusetts law by extending the presumption of legitimacy to all children conceived during a marriage. The case also establishes that under some circumstances, at least, a man who fathers a child by a woman who was married to another man at the time of conception does not have a right to adjudicate the child's paternity. However, there are indications that this holding may be limited to the facts of *PBC* where the mother remarried her ex-husband and lived with her husband and the child as a family after the divorce. It is possible that under different circumstances a third party may be able to pursue his claim of being the natural father in court. For the moment, however, alleged natural fathers do not have the right to establish paternity unless the child is clearly illegitimate.

§ 4.6. Judicial Discretion to Award Alimony and to Divide Property in Divorce Actions.* Section 34 of chapter 208 of the Massachusetts General Laws authorizes probate and superior courts to award alimony and to order the division of property in divorce actions.[1] A court may award alimony to the husband or wife, and, in addition to or in lieu of alimony, may assign to either party all or part of the other's estate.[2] Section 34 lists factors that a court "shall consider" as well as factors that a court "may consider" when determining the amount of alimony to be awarded or the nature and value of the property to be assigned.[3] The factors a court shall consider include "the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income."[4] As one court has noted, these mandatory criteria are traditional alimony considerations.[5] The factors a court may consider include each party's contribution to

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the child was born during a marriage and lived with both parents for some time before the divorce. *See Vincent B.*, 126 Cal. App. 3d at 626, 179 Cal. Rptr. at 12. *See also* Quilloin v. Wolcott, 434 U.S. 246, 256, *reh'g denied*, 435 U.S. 918 (1978) (holding that it is constitutional to distinguish between divorced father and alleged natural father on equal protection grounds because the divorced father has borne the responsibility of raising the child).

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§ 4.6. [1] G.L. c. 208, § 34 (1983).

[2] *Id.* For a definition of "estate" see Rice v. Rice, 372 Mass. 398, 400, 361 N.E.2d 1305, 1307 (1977) (a party's estate includes all property to which he or she holds title, however acquired). *But see* Davidson v. Davidson, 19 Mass. App. Ct. 364, 474 N.E.2d 1137, 1145–46 (1985) (expectancy under a will generally not property subject to division under section 34). For a discussion of *Davidson*, see section 4.2 of this *Survey*.

[3] G.L. c. 208, § 34 (1983).

[4] *Id.*

[5] Putnam v. Putnam, 5 Mass. App. Ct. 10, 14, 358 N.E.2d 837, 840 (1977).

"the acquisition, preservation or appreciation in value of their respective estates," and each party's contribution to the family unit as a homemaker.[6] One commentator has noted that these factors relate to equitably dividing property rather than to awarding alimony.[7]

Massachusetts courts interpreting section 34 have ruled that it confers upon courts broad discretion when awarding alimony and making an equitable division of property upon divorce.[8] For example, in the 1977 case of *Rice v. Rice*,[9] the Massachusetts Supreme Judicial Court ruled that section 34 empowers courts to assign to one party all or part of the nonmarital property of the other "whenever and however acquired."[10] Furthermore, Massachusetts courts have held that the weight to be accorded to each of the section 34 factors in a particular case is within the judge's discretion.[11] In *Rice*, the Supreme Judicial Court stated that courts need broad discretion to address the "myriad" fact situations surrounding divorces and to resolve each case fairly.[12] Because section 34 provides such latitude, Massachusetts courts also have held that a judge's findings must clearly indicate that he or she considered all of the statutory factors, both mandatory and discretionary, in making an alimony award or property assignment.[13] In *Rice*, the Supreme Judicial Court stated that in future cases it wished to have findings showing that the judge weighed all of the statutory factors in making his or her decision.[14] Although section 34 distinguishes between factors a court shall consider and factors it may consider, the courts have concluded that the factors listed in section 34 define the scope of judicial discretion, and

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[6] G.L. c. 208 § 34 (1983).

[7] Inker & Glower, *Towards a New Justice in Marital Dissolution: The Massachusetts Statutory Scheme and Due Process Analysis*, 16 SUFFOLK U.L. REV. 907, 912 (1982).

[8] *See Rice*, 372 Mass. at 400–01, 361 N.E.2d at 1307 (court may order transfer of separate property acquired before marriage and as gifts during marriage); Bianco v. Bianco, 371 Mass. 420, 423, 358 N.E.2d 243, 245 (1976) (court may order wife to convey her interest in marital domicile to husband). The *Rice* court noted that courts require broad discretion to deal with the various fact situations surrounding divorces. *Rice*, 372 Mass. at 401, 361 N.E.2d at 1307.

[9] 372 Mass. 398, 361 N.E.2d 1305 (1977).

[10] *Id.* at 399–400, 361 N.E.2d at 1307. *But see Davidson*, 18 Mass. App. Ct. at 474 N.E.2d at 1143 (property interests subject to division are to be identified as of the time of divorce; "whenever and however acquired" does not refer to property acquired after divorce). For a discussion of *Rice*, see Inker, Perocchi & Walsh, *Domestic Relations*, 1977 ANN. SURV. MASS. LAW § 1.2, at 11. For a discussion of *Davidson*, see section 4.2 of this *Survey*.

[11] *See* Caldwell v. Caldwell, 17 Mass. App. Ct. 1032, 1032, 461 N.E.2d 834, 835 (1984); Langerman v. Langerman, 9 Mass. App. Ct. 869, 870, 401 N.E.2d 163, 164 (1980).

[12] *Rice*, 372 Mass. at 401, 361 N.E.2d at 1307.

[13] *See Rice*, 372 Mass. at 401, 361 N.E.2d at 1307; *Bianco*, 371 Mass. at 423, 358 N.E.2d at 245; *Putnam*, 5 Mass. App. Ct. at 15, 358 N.E.2d at 841; Inker, Perocchi & Walsh, *Domestic Relations*, 1979 ANN. SURV. MASS. LAW § 5.1, at 147.

[14] *Rice*, 372 Mass. at 402–03, 361 N.E.2d at 1308.

consideration of all the factors is mandatory.[15] Thus, under section 34, as interpreted by Massachusetts courts, a judge dividing property pursuant to a divorce has discretion to weigh the section 34 factors subject only to the requirement that the judge's findings clearly indicate that he or she considered all of the factors.[16]

During the *Survey* year, in *Grubert v. Grubert*,[17] the Massachusetts Appeals Court ruled that the provision for property division in section 34 was not intended to reduce traditional alimony awards, and that any financial settlement incident to divorce must reflect a consideration of the need for alimony by adequately addressing the parties' needs for support, measured by their respective financial circumstances.[18] The *Grubert* decision indicates that a judge's discretion to fashion a financial settlement may be curtailed by the requirement that he or she adequately address the parties' need for alimony in each case,[19] and that evidence that a judge considered all of the section 34 factors may not insulate his or her findings from reversal on appeal.

In *Grubert*, a probate court judge granted the wife a divorce, divided the marital property in half, and awarded the wife $400 a week in alimony.[20] At the time of divorce the parties had been married for thirty-two years.[21] During most of the marriage the wife had not worked outside of the home, and at the time of trial she was unemployed.[22] The wife was 59 years old, suffered from high blood pressure, a high cholesterol reading, anxiety, depression, and arthritis.[23] At the time of divorce, the husband, who was 54 years old and also had health problems,[24] was a sales representative employed by his own wholly owned corporation and had an income exceeding $100,000 a year.[25] The parties enjoyed a comfortable income station during the marriage's latter years.[26]

The probate court judge, finding that the parties had contributed equally to the marriage, divided the marital assets equally.[27] The judge

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[15] *See Rice*, 372 Mass. at 401, 361 N.E.2d at 1307; *Bianco*, 371 Mass. at 423, 358 N.E.2d at 245.

[16] *See Rice*, 372 Mass. at 401, 361 N.E.2d at 1307–08; *Bianco*, 371 Mass. at 423, 358 N.E.2d at 245.

[17] 20 Mass. App. Ct. 811, 483 N.E.2d 100 (1985).

[18] *Id.* at 818–19, 483 N.E.2d at 105.

[19] *See id.*

[20] *Id.* at 811, 483 N.E.2d at 101.

[21] *Id.* at 812, 483 N.E.2d at 101.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.* at 816, 483 N.E.2d at 103.

ordered the conveyance of the parties' home to the wife.[28] Because the home was the principal marital asset, however, the judge ordered the wife to grant the husband a second mortgage on the home,[29] and ordered the wife to assume all of the expenses of the home, including the first mortgage.[30] The judge awarded the wife $400 per week in alimony to cover her expenses, and ordered the husband to pay half of the wife's unpaid attorney's fees.[31] The wife appealed, challenging the judge's findings as to the husband's income and assets.[32]

The Appeals Court ruled that equal division of property should not overshadow traditional principles of alimony,[33] and that any financial award pursuant to divorce must include a consideration of the parties' need for alimony as part of its "focus."[34] The *Grubert* court conceded that section 34 empowers courts to deal broadly with the division of property.[35] But the court concluded that section 34 was not designed to reduce traditional alimony awards, and that "an order for the division of property cannot be viewed apart from alimony."[36] The court stated that the fundamental issue in awarding alimony is a spouse's need for support in relation to the financial circumstances of the parties[37] and that such need for support should be measured by the standard of living enjoyed by the parties during marriage.[38]

The *Grubert* court found the apparent evenhandedness of the probate court's division of property illusory.[39] First, the court noted that the wife was unemployed and that the marketability of her services was questionable.[40] Furthermore, the court found that the alimony award of $400 a week would not cover the wife's expenses, and that the wife would be forced to sell the home.[41] Finally, the court noted that while the wife

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[28] *Id.*

[29] *Id.*

[30] *Id.* at 816–17, 483 N.E.2d at 104.

[31] *Id.* at 816, 483 N.E.2d at 103–04.

[32] *Id.* at 813, 483 N.E.2d at 102.

[33] *Id.* at 818, 483 N.E.2d at 104–05.

[34] *Id.* at 819, 483 N.E.2d at 105 (citing Partridge v. Partridge, 14 Mass. App. Ct. 918, 919, 436 N.E.2d 447, 449 (1982)).

[35] *Id.* at 818, 483 N.E.2d at 105 (citing *Bianco*, 371 Mass. at 422–23, 358 N.E.2d at 245).

[36] *Id.* at 818, 483 N.E.2d at 105.

[37] *Id.* at 819, 483 N.E.2d at 105 (quoting *Partridge*, 14 Mass. App. Ct. at 919, 436 N.E.2d at 448–49).

[38] 20 Mass. App. Ct. at 819, 483 N.E.2d at 105.

[39] *Id.* at 817, 483 N.E.2d at 104.

[40] *Id.* at 818, 483 N.E.2d at 104.

[41] *Id.* The court also noted that it was questionable whether the wife could find smaller shelter costing less than her current mortgage and maintenance expenses. *Id.* at 818 n.14, 483 N.E.2d at 104 n.14.

faced a future of uncertainty,[42] the husband could afford to contribute more money for her support.[43] Accordingly, the Appeals Court held that the equal division of property in *Grubert* did not adequately address the wife's need for support in relation to the husband's ability to contribute to her support.[44] The Appeals Court reversed the judgment, and remanded for determination of a more suitable award.[45]

The Appeals Court offered comments as a guide to the probate judge on remand.[46] The court suggested that the judge consider ordering a more generous payment to the wife for counsel fees.[47] The court termed the judge's finding that the wife was able to work part time "unrealistic and inappropriate," thus indicating that the judge should not expect the wife in this case to contribute to her support by working.[48] The court also noted that parties to a divorce have an obligation to provide financial information to each other and to the court.[49] Because the husband in *Grubert* was evasive about his finances, the Appeals Court ruled that a judge could draw all reasonable inferences against him.[50]

Section 34 lists factors a court must consider and those it may consider when awarding alimony and dividing marital property,[51] and Massachusetts courts have ruled that a judge must weigh all of these section 34 factors.[52] In ruling that a judge dividing property incident to a divorce must consider the parties' need for alimony, *Grubert* reaffirms the principle that a court must weigh all of the section 34 factors. To this extent, the *Grubert* decision is consistent with section 34 and Massachusetts courts' application of the statute.[53]

Nevertheless, *Grubert*'s emphasis on alimony considerations seems to change the interpretation Massachusetts courts have given to section 34. Section 34 does not provide a means of weighing the various factors that it lists, and, prior to *Grubert*, Massachusetts courts had ruled that a judge has broad discretion to weigh the factors, subject to the requirement that

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[42] *Id.* at 818, 483 N.E.2d at 104.
[43] *Id.* at 820, 483 N.E.2d at 106.
[44] *Id.* at 819, 822, 483 N.E.2d at 105, 106.
[45] *Id.* at 819, 483 N.E.2d at 105.
[46] *Id.*
[47] *Id.* at 820, 483 N.E.2d at 105.
[48] *Id.*, 483 N.E.2d at 106.
[49] *Id.* at 822, 483 N.E.2d at 107.
[50] *Id.*, 483 N.E.2d at 106–07.
[51] G.L. c. 208 § 34 (1983).
[52] *Rice*, 372 Mass. at 401, 361 N.E.2d at 1307; *Bianco*, 371 Mass. at 423, 358 N.E.2d at 245; *Putnam*, 5 Mass. App. Ct. at 15, 358 N.E.2d at 841.
[53] G.L. c. 208 § 34 (1983); *see Rice*, 372 Mass. at 401, 361 N.E.2d at 1307; *Bianco*, 371 Mass. at 423, 358 N.E.2d at 245; *Putnam*, 5 Mass. App. Ct. at 15, 358 N.E.2d at 841; Inker, Perocchi & Walsh, *Domestic Relations*, 1977 ANN. SURV. MASS. LAW § 1.2, at 12.

the judge's findings reflect a consideration of all the factors.[54] The courts had held that a judgment was subject to reversal only if the judge abused his or her discretion, that is, if the judge's findings were plainly wrong and excessive.[55] In *Grubert*, however, the Massachusetts Court of Appeals reversed a probate judge's order dividing property even though the record as cited by the Appeals Court indicated that the judge had considered all of the section 34 criteria,[56] and even though Massachusetts courts had previously ruled that a judge has broad discretion to weigh the statutory criteria. The *Grubert* court's decision was not based on a finding of abuse of discretion or of clear error. Rather, the *Grubert* court held that the probate court's equal division of property overshadowed consideration of the need for alimony, which should be the focus of any such division of property.[57] By ruling that courts must *adequately* address a spouse's need for alimony, the *Grubert* court apparently has circumscribed the judge's discretion to divide property pursuant to a divorce. Under *Grubert*, an order dividing property may now be subject to reversal even if the record indicates that the judge considered the alimony factors listed in section 34, because even an equal division of property must include as part of its focus a consideration of the parties' need for support, as measured by their financial circumstances.[58]

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[54] *See Rice*, 372 Mass. at 401, 361 N.E.2d at 1308; *Bianco*, 371 Mass. at 423, 358 N.E.2d at 245.

[55] *See Rice*, 372 Mass. at 402, 361 N.E.2d at 1308; Meghreblian v. Meghreblian, 13 Mass. App. Ct. 1021, 1023, 433 N.E.2d 497, 499 (1982).

[56] *Grubert*, 20 Mass. App. Ct. at 811–15, 483 N.E.2d at 100–03.

[57] *Id.* at 818–19, 483 N.E.2d at 105.

[58] *Id.*