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Chapter 1: Domestic Relations

Monroe L. Inker

Paul P. Perocchi

Joseph H. Walsh

CHAPTER 1

Domestic Relations

MONROE L. INKER*
PAUL P. PEROCCHI**
JOSEPH H. WALSH**

§1.1. Divorce—Modification of Support Obligation—Effect of Separation Agreements. In two *Survey* year cases, the Supreme Judicial Court examined the effect of separation agreements upon the discretion of the probate court to modify child support decrees.

In *Ryan v. Ryan*,[1] the parties entered into a separation agreement which suvived the decree nisi of divorce. By the terms of the agreement the husband was to pay twenty-five dollars per week in child support. While the decree nisi did not mention the separation agreement, the decree like the agreement required the husband to pay twenty-five dollars per week in child support.[2] Several years after the decree was issued, the wife brought a petition in the probate court to modify the decree by increasing the child support order.[3] The husband filed suit in the superior court to enjoin the wife from prosecuting her petition for modification, arguing that the wife should not be permitted to obtain a probate court order contrary to the agreement.[4] The superior court dismissed the husband's action, and the Supreme Judicial Court affirmed.[5]

In affirming, the Court stated that "[o]ur decisions have held consistently that the power of the Probate Court to modify its support orders may not be restricted by an agreement between a husband and wife which purports to fix for all time the amount of the husband's support

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* Monroe L. Inker is a partner in the law firm of Crane & Inker, Boston.
** Paul P. Perocchi and Joseph H. Walsh are associates in the law firm of Crane & Inker, Boston. The authors acknowledge the assistance of Joel Mann in the preparation of this chapter.

§1.1. [1] 1976 Mass. Adv. Sh. 2716, 358 N.E.2d 431.
[2] *Id.* at 2717, 358 N.E.2d at 431.
[3] *Id.*, 358 N.E.2d at 432.
[4] *Id.*
[5] *Id.* at 2716-17, 358 N.E.2d at 431-32. The Court noted that the suit for an injunction amounted to a suit for specific performance of the separation agreement. *Id.* at 2717, 358 N.E.2d at 432.

obligation."[6] Thus, the Court declined to consider the merits of the separation agreement, indicating that the agreement's merits were for the probate court to consider in passing upon the wife's modification petition.

In *Knox v. Remick,*[7] decided the same day as *Ryan,* the parties entered into a separation agreement which required the husband to support the minor children of the parties. The agreement was incorporated into the decree nisi but survived the entry of the decree.[8] Subsequently, the wife petitioned the probate court to modify its decree by increasing the order for child support.[9] The trial judge reported the issue of his authority to modify the order.[10] The Supreme Judicial Court, on its own initiative, ordered direct appellate review and ruled that under the principles established in *Salveson v. Salveson,*[11] the decree had incorporated the support provisions of the agreement; accordingly, there was a support provision in the decree which the trial judge could modify if the circumstances warranted.[12] Moreover, in dicta, the Court broadly discussed the interrelationship of surviving[13] separation agreements with divorce decrees where both contain support provisions.

The Court examined separately the situations in which a party petitions the probate court to reduce the support obligation and those in which a party petitions to increase the support provisions of the judgment. Where an action to reduce the support obligation is brought, the Court stated that the probate court had the power to modify its order, thereby reducing the court-ordered support obligation.[14] However, the Court noted that since the probate court has no authority to modify the terms of separation agreements, the recipient spouse could still maintain an action on the agreement to recover any difference between the amount of support contracted to pay and the amount actually paid.[15]

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[6] *Id., citing* Madden v. Madden, 359 Mass. 356, 363, 269 N.E.2d 89, 93, *cert. denied,* 404 U.S. 854 (1971).

[7] 1976 Mass. Adv. Sh. 2719, 358 N.E.2d 432.

[8] *Id.* at 2719-20, 358 N.E.2d at 434. The opinion does not explicitly state that the agreement was to survive the decree; however, this fact was clearly implied by the Court's lengthy discussion of the effect of surviving separation agreements on the Court's power to modify a decree. *See id.* at 2721-25, 358 N.E.2d at 434-36.

[9] *Id.* at 2719, 358 N.E.2d at 434.

[10] *Id.*

[11] 1976 Mass. Adv. Sh. 1746, 1749, 351 N.E..2d 499, 500. *See* Inker, Perocchi & Walsh, *Domestic Relations,* 1976 ANN. SURV. MASS. LAW § 4.5, at 86.

[12] 1976 Mass. Adv. Sh. at 2720, 358 N.E.2d at 434.

[13] *Id.* at 2721-25, 358 N.E.2d at 434-36. The Court noted at the outset of this discussion that if the agreement was not intended to survive, then the support obligations of the parties are contained solely in the judgment which is always subject to modification. *Id.* at 2721, 358 N.E.2d at 434.

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

[15] *Id.* at 2722, 358 N.E.2d at 435.

The net result in this situation is that the recipient spouse loses only the remedy of contempt for violation of the court order while retaining full rights to the support contracted for under the agreement.[16]

In analyzing actions to increase support obligations, the Court distinguished between interspousal support and child support. As to interspousal support, the Court concluded that the courts generally should not seek to modify support obligations between parties who, in a separation agreement, "agreed to a permanent resolution of their mutual rights and obligations, including support obligations between them. . . ."[17] Thus, while noting that the terms of a separation agreement could not in all circumstances bar a court from increasing a spousal support order,[18] the Court formulated the following rule:

> [I]f a judge rules, either at the time of the entry of a judgment nisi of divorce or at any subsequent time, that the [separation] agreement was not the product of fraud or coercion, that it was fair and reasonable at the time of entry of the judgment nisi, and that the parties clearly agreed on the finality of the agreement on the subject of interspousal support, the agreement concerning interspousal support should be specifically enforced, absent countervailing equities.[19]

As two examples of the "countervailing equities" justifying the court's refusal to specifically enforce the agreement, the Court cited the plaintiff who is or will become a public charge absent the increase, and the plaintiff who has violated other provisions of the agreement.[20] The Court also suggested that there "may be other situations where a Probate Court judge will conclude in his discretion to deny the equitable relief of specific performance."[21]

As to actions seeking an increase in child support, the Court determined that "[a]n agreement to fix a spouse's support obligation for minor children stands on a different footing. Parents may not bargain away the rights of their children to support from either one of them."[22] Nevertheless, an agreement for child support "should be upheld as far as possible"[23] if it was an informed agreement, free from fraud and coercion, and was fair and reasonable at the time the judgment was

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[16] *Id.*

[17] *Id.* at 2723, 358 N.E.2d at 435.

[18] *Id.* at 2722, 358 N.E.2d at 435, *citing* Ryan v. Ryan, 1976 Mass. Adv. Sh. 2716, 2717, 358 N.E.2d 431, 432 & cases cited therein; see text at notes 1-6 *supra.*

[19] 1976 Mass. Adv. Sh. at 2723, 358 N.E.2d at 435-36.

[20] *Id.*, 358 N.E.2d at 436.

[21] *Id.* at 2724, 358 N.E.2d at 436.

[22] *Id.*

[23] *Id.*

entered.[24] In the event the court modified the order, the obligor spouse would still have an action for breach of contract.[25]

Finally, the Court admonished litigants that all aspects of these disputes should be resolved in one proceeding.[26] Accordingly, the Court suggested that where an action is brought to increase or decrease a support order, the separation agreement ought to be raised by the defendant in his answer as a bar to the action for modification and not raised in a separate suit to restrain the probate court action as in *Ryan*.[27]

The dicta in *Knox* signal greatly increased judicial deference to support provisions in separation agreements surviving the entry of a divorce judgment. For the first time, the Court has acknowledged that an agreement by the parties as to interspousal support is a bar to an effort to increase spousal support except in certain situations.[28] While the Court reiterated the principle that parties cannot by agreement deprive the court of the power to modify its own judgment, it recognized that where the prerequisites of fairness and lack of fraud are met and the parties intend their agreement to finally resolve their differences as to interspousal support, the parties should be held to their bargain, except where "countervailing equities" exist. *Knox* thus represents a major step by the Court towards ending the cycles of modifications which frequently follow divorce judgments.

As to child support, the Court in *Knox* reaffirmed its prior holdings that the parties to a separation agreement cannot prevent the probate court from modifying their child support obligations.[29] Still, in this area as well, the Court indicated a bias in favor of upholding these agreements where possible, if the agreement is free of fraud and coercion and was fair and reasonable when entered.[30]

The new significance accorded support agreements by *Knox* places further responsibilities upon the practitioner attempting to settle a domestic case. He must advise the client that the support agreed to may well be final absent serious changes in circumstances. He should also insist upon written findings by the court[31] granting the divorce decree that the agreement as to support is fair, reasonable, free of fraud and coercion and the result of an informed intellect. As to agreements for spousal support, as the time of the divorce the practitioner should also

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[24] *Id.*

[25] *Id.* at 2725, 358 N.E.2d at 436.

[26] *Id.*

[27] *Id.*

[28] See text at notes 20-21 *supra*.

[29] *See, e.g.*, Madden v. Madden, 359 Mass. 356, 363, 269 N.E.2d 89, 93, *cert. denied*, 404 U.S. 854 (1971).

[30] *Knox*, 1976 Mass. Adv. Sh. at 2724, 358 N.E.2d at 436.

[31] *See* R. Dom. Rel. P. 52.

request a finding that the parties have agreed to the finality of the provision on the subject of such support.

§1.2. Divorce—Alimony and Assignment of Property. During the *Survey* year, the Supreme Judicial Court and the Appeals Court in three significant cases construed section 34 of chapter 208 of the General Laws as it was amended by the statutes of 1974.[1]

In *Bianco v. Bianco* the Supreme Judicial Court affirmed a decree nisi ordering the wife to convey all of her interest in the marital domicile to the husband.[2] In so doing, the Court held that section 34 as amended empowers the probate and superior courts to order the equitable division of the divorced spouses' property.[3]

The Biancos were married in 1971 when the husband was sixty-five years old and the wife fifty-two years old.[4] During the year 1974, the wife had a gross income of approximately $7,500.[5] She also had a savings account amounting to $9,000 and was employed as a secretary earning a gross weekly salary of $154.[6] Both parties owned property in their own names at the time of this marriage and in 1971 they purchased the marital domicile, the husband paying a down payment of $3,500.[7] During the marriage the wife contributed approximately $2,000 from her earnings to the common estate, keeping the remainder of her income for her own use.[8] In the decree nisi the probate court ordered the husband to pay the wife a sum of $2,500 in lieu of all alimony, and ordered the

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§1.2. [1] G.L. c. 208, § 34, *as amended by* Acts of 1974, c. 565 *and* Acts of 1977, c. 400, § 33 provides:

> Upon a divorce or upon motion in an action brought at any time after a divorce, the court may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either the husband or wife all or any part of the estate of the other. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.

G.L. c. 208, § 34, prior to amendment, provided that "[u]pon a divorce, or upon petition at any time after a divorce, the court may decree almony to the wife, or a part of her estate, in the nature of alimony, to the husband."

[2] 1976 Mass. Adv. Sh. 2702, 2706, 358 N.E.2d 243, 246.

[3] *Id.* at 2704-05, 358 N.E.2d at 245.

[4] *Id.* at 2702, 358 N.E.2d at 244.

[5] *Id.* at 2703, 358 N.E.2d at 244.

[6] *Id.*

[7] *Id.*

[8] *Id.*

wife to convey to the husband all of her interest in the marital domicile.[9] The wife sought appellate review, contending that the order of conveyance was not in the nature of alimony and was thus invalid under section 34. The Supreme Judicial Court ordered direct review and affirmed the decree.[10]

In affirming, the Court noted at the outset that prior to the 1974 amendment section 34 of chapter 208 did not authorize a portion of the wife's estate to be decreed to the husband on the theory of equitable division. Rather, such an award was authorized only where the transfer was "in the nature of alimony."[11] In contrast, the Court noted, the amended statute expressly provides that "[i]n addition to or in lieu of an order to pay alimony, the court may assign to either the husband or the wife all or any part of the estate of the other." The Court thus reasoned that the use of the words "in lieu of" created a power in the trial judge not previously authorized, namely the power to equitably divide property with due regard to the factors set out in the statute.[12] In affirming the decree nisi the Court found the assignment ordered by the probate judge justified under the circumstances in that "[t]he judge evidently considered the contribution of each of the parties in ordering the husband to pay the wife $2,500 which is approximately what she contributed to the marriage."[13]

The *Bianco* Court thus construed section 34, as amended, to create an additional power in the trial court not previously authorized, the power to "assign" property. However, how this new power to assign property differed in theory from the court's previously recognized power to order conveyance "as alimony" or "in the nature of alimony" was not clarified in *Bianco.* A further question left open by *Bianco* was whether the "contribution" of each of the parties to their respective estates, which contribution the trial court may consider in dividing the parties' property, is of the economic kind; or whether the court may consider noneconomic contributions as well. In *Bianco,* the Court upheld a decree based in part on a consideration of the economic contributions of the respective parties. Since the issue of noneconomic contributions was not raised, the Court had no occasion to determine whether such contribu-

[9] *Id.* at 2702, 358 N.E.2d at 244.

[10] *Id.* at 2702, 2706, 358 N.E.2d at 244, 246.

[11] *Id.* at 2703-04, 358 N.E.2d at 244-45, *citing* Topor v. Topor, 287 Mass. 473, 475, 192 N.E. 52, 53 (1934) (alimony award for support and not based on the theory of an equitable division of property); *see* Coe v. Coe, 313 Mass. 232, 235, 46 N.E.2d 1017, 1019 (1943) (alimony is for support and maintenance and not for the purpose of division).

[12] 1976 Mass. Adv. Sh. 2702, 2704, 358 N.E.2d 243, 245, *citing* Inker, Walsh & Perocchi, *Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts,* 10 SUFFOLK U. L. REV. 1, 4 (1974) [hereinafter cited as *Alimony and Assignment of Property*].

[13] *Id.* at 2706, 358 N.E.2d at 245.

tions may in some circumstances be determinative of the propriety of a decree.

Bianco's construction of section 34 as authorizing the equitable division of property laid the groundwork for the decisions which rapidly followed. Exactly one month after *Bianco* was decided, the Appeals Court, in *Putnam v. Putnam,*[14] shed important light on the nature of the equitable division of property which *Bianco* recognized. In *Putnam,* the wife appealed from that portion of the decree which provided that the marital home held by her and her husband as tenants by the entirety be sold and the net proceeds divided one-third to the wife and two-thirds to the husband.[15] The Appeals Court remanded, holding that the trial court's findings lacked the comprehensiveness required to support an equitable division under section 34.[16]

On appeal, the wife contended that transfers of property under section 34 must be justified "on the theory of support in accordance with traditional alimony concepts and not on the theory of equitable division of the property of the partners to the marriage."[17] Citing *Bianco,* the Appeals Court rejected this contention and noted that the 1974 amendment to section 34 conferred on the probate court the power of equitable division.[18] The court then explained the distinction between the court's power to award alimony and its power to assign property. The court noted that "[a]limony is an award for support and maintenance . . . . [p]roperty division, on the other hand, is based on the joint contribution of the spouses to the marital enterprise."[19] The court underscored this distinction by way of the example of "a long marriage in which the parties have amassed substantial assets all of which stand in the name of the husband but have lived so frugally that the alimony likely to be awarded the wife to sustain her mode of living and station in life will be minimal."[20] Under such circumstances, the court has the power to equitably apportion property accumulated during the marriage regardless of which spouse holds title.

Moreover, in highlighting the equitable nature of the division of property authorized by section 34, the court expressed its acceptance of several important principles. First, the court determined that while the financial contribution of a spouse to capital expenditures is relevant, it

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[14] 1977 Mass. App. Ct. Adv. Sh. 17, 358 N.E.2d 837.

[15] *Id.* at 18, 358 N.E.2d at 838.

[16] *Id.* at 27, 358 N.E.2d at 842.

[17] *Id.* at 23-24, 358 N.E.2d at 839-40.

[18] *Id.*

[19] *Id.* at 21 n.6, 358 N.E.2d at 840 n.6, *citing Alimony and Assignment of Property, supra* note 12, at 7-8.

[20] *Id.* at 21 n.5, 358 N.E.2d at 840 n.5, *citing Alimony and Assignment of Property, supra* note 12, at 7-8.

cannot be viewed in isolation;[21] and that the concept of contribution should not be limited to financial contribution. Otherwise, the Appeals Court reasoned, "a wife who diligently ran the home and raises the children will be at a distinct legal disadvantage when contrasted with a working wife."[22] Moreover, the court premised that an order for equitable division should normally encompass all substantial assets jointly owned as well as property separately owned but representing accretion during the marriage.[23] Finally, the court indicated that an assignment of property will not likely be sustained on appeal if it is not supported by traditional alimony considerations and findings relative to the respective contributions of the parties.[24]

Two additional important principles emerged from *Putnam*. First, the court determined that alimony or transfer of property may not be justified *purely* on the basis of the blameworthy conduct of one of the spouses.[25] Second, the court indicated that a probate judge must set forth the findings which underlie his decision. If he does not, an appellate court may remand a case for the purpose of having him do so.[26] Because the trial court's findings in *Putnam* lacked the comprehensiveness to support an equitable division; because the rationale for the division did not appear explicitly or by clear implication; and, in particular, because the trial court's findings may have been based solely on the misconduct of one of the spouses, the Appeals Court remanded for further proceedings.[27]

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[21] *Id.* at 24, 358 N.E.2d at 841. This proposition should "be obvious if one considers the example of two spouses of equal income, one of whom pays for all current expenses and the other for all capital expenses." *Id.* at 24, 358 N.E.2d at 841-42.

[22] *Id.* at 24 n.10, 358 N.E.2d at 842 n.10, *citing Alimony and Assignment of Property, supra* note 12, at 3-4 & 7-8.

[23] *Id.* at 27, 359 N.E.2d at 842. The court's use of the words "normally" and "substantial" is significant. By the use of the word "normally" the court did not limit division of property to jointly owned assets and appreciation during the marriage of separately owned property. Rather it left open the possibility that separately owned non-appreciated property may be assigned. The use of the word "substantial" frees the trial court from considering "minor" assets owned by the parties in making an equitable division.

[24] *Id.* at 22, 358 N.E.2d at 841.

[25] *Id.* at 22-23, 358 N.E.2d at 841, *citing Alimony and Assignment of Property, supra* note 12, at 10 n.98. The court did recognize, however, that blameworthy conduct was a factor to be considered by the court in awarding alimony or transferring property. *Id.* at 23 n.8, 358 N.E.2d at 841 n.8.

[26] *Id.* at 22 n.7, 358 N.E.2d at 841 n.7.

[27] 1977 Mass. App. Ct. Adv. Sh. at 25, 358 N.E.2d at 842. The court was disturbed because the judge's findings did not indicate what became of the spouses' earnings after they were deposited in a joint account and because the findings did not identify the other major assets of the parties. Furthermore, it was unclear whether the decision turned upon the respective capital contributions of the parties or whether it in fact turned upon the blameful conduct of the wife. *Id.* See text at note 16 *supra.*

In *Rice v. Rice,*[28] the defendant husband appealed from a judgment which awarded to the wife approximately one-half of his assets and $30,000 per year in alimony.[29] The parties were married for almost twenty-seven years.[30] The wife, age 50, was a homemaker, had never been gainfully employed, and had no vocational skills. The husband, age 57, had a yearly gross income of $98,000, excluding gifts from his parents of $6,000 per year.[31] His net worth exceeded $1,000,000 and included a 40 percent interest in a family corporation.[32] Twenty percent of that interest was acquired prior to his marriage and another 20 percent was acquired by gift from his father about the time of the marriage.[33]

On appeal, the husband contended that the probate court lacked authority under section 34 of chapter 208 to order transfer of his separate property acquired prior to the marriage or as gifts during the marriage.[34] In addition, he contended that the award of alimony and assignment of property was excessive and plainly wrong.[35]

In affirming the decision of the trial judge, the Supreme Judicial Court rejected the husband's contention that the legislature had intended to exclude from assignment any property not derived from the marital partnership.[36] The Court noted that section 34 as amended provides that "in addition to or in lieu of a judgment to pay alimony, the court may assign to either the husband or the wife all or any part of the estate of the other."[37] The Court then held that "[a] party's 'estate' by definition includes all property to which he holds title however acquired. Therefore, this provision gives the trial judge discretion to assign to one spouse property of the other spouse whenever and however acquired."[38]

In holding that the award was not excessive, the Court noted the wife's inability to support herself, her inability to acquire assets in the future and her need for income over a long period because of her age and her health.[39] In contrast, the Court emphasized that the husband had a

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[28] 1977 Mass. Adv. Sh. 787, 361 N.E.2d 1305.

[29] *Id.* at 788, 361 N.E.2d at 1306.

[30] *Id.* at 787, 361 N.E.2d at 1306.

[31] *Id.*

[32] *Id.* at 788, 361 N.E.2d at 1306.

[33] *Id.*

[34] *Id.* at 788-89, 361 N.E.2d at 1306-07.

[35] *Id.* at 789, 361 N.E.2d at 1306-07.

[36] *Id.* at 789, 361 N.E.2d at 1307. The Appeals Court had taken the position in *Putnam* that "normally," division of property would be limited to jointly owned assets and accretion during the marriage of separately owned assets. See note 23 *supra* and accompanying text.

[37] 1977 Mass. Adv. Sh. at 789, 361 N.E.2d at 1307.

[38] *Id.*

[39] *Id.* at 792, 361 N.E.2d at 1308.

substantial earning capacity and an opportunity for future acquisition of assets because of the likelihood of a substantial family inheritance.[40]

In *Rice,* the husband made no motion as required by Rule 52(a) of the Massachusetts Rules of Domestic Relations Procedure for Findings of Fact and Conclusions of Law.[41] Noting this omission, the Court stated that the husband's "right to challenge the result reached by the judge is thus doubtful, to say the least."[42] Despite its doubts, however, the Court proceeded to review the record, emphasizing that before a judge exercises discretion to award alimony or to assign property, he must consider all of the mandatory statutory criteria and the record must so indicate.[43] Because the record in *Rice* reflected consideration of all the mandatory statutory criteria, and because the record was supportive of the trial judge's conclusion, the Court affirmed the decision.[44] Finally, in accordance with its emphasis on the proper exercise of discretion in assignments of property under section 34, the Court advised trial judges that "in future cases under [section 34] we wish to have findings, whether or not requested by a party, showing that the judge below weighed all statutory factors in reaching his decision and considered no extraneous factors."[45] Thus, while it reaffirmed *Bianco's* holding that section 34 provides for equitable divisions of property, the Court in *Rice* also signalled that such divisions are likely to be subjected to close appellate review.

Several important principles emerge from *Bianco, Putnam* and *Rice:* probate courts now have the power to equitably divide property based on the criteria set out in section 34 of chapter 208 as amended; equitable assignment of property is grounded in the marital partnership theory in that both economic *and* noneconomic contributions to the "acquisition, preservation and appreciation in value" of assets are relevant to the manner in which the assets are divided; while an assignment of property normally encompasses jointly owned property and accretion in separately owned property during the marriage, it may encompass as well non-appreciated separately owned property, even if acquired prior to the marriage; blameworthy conduct is relevant but an order for alimony or transfer of property may not be based purely on such conduct; the trial court must consider all of the mandatory statutory criteria set out in section 34 and the record must so indicate; the trial court may not consider extraneous factors; in the future, findings must be made, whether requested by a party or not, showing that the lower court con-

[40] *Id.*
[41] *Id.* at 791, 361 N.E.2d at 1308.
[42] *Id.*
[43] *Id.*, 361 N.E.2d at 1307-08.
[44] *Id.* at 791-93, 361 N.E.2d at 1308.
[45] *Id.*

sidered all of the statutory factors and considered no extraneous factors.

In *Bianco, Putnam* and *Rice* the Supreme Judicial Court and Appeals Court have made an excellent start in developing the predicates for future decisions in an area of domestic relations law which promises to be extremely complex.

§1.3 Divorce—Personal Jurisdiction over Disputes Arising Out of Separation Agreements—Long-Arm Statute. In *Ross v. Ross,* the Supreme Judicial Court determined that where a non-resident spouse seeks a modification of a divorce decree and attorneys' fees in a Massachusetts court, thereby seeking the benefits and protection of Massachusetts courts, Massachusetts has personal jurisdiction over that spouse as to a dispute arising out of a separation agreement.[1]

In 1967, the parties executed a separation agreement, which by its terms was to be "construed and governed in accordance with the laws of the Commonwealth of Massachusetts."[2] The husband signed the contract in Massachusetts, the wife in New Jersey.[3] After a divorce decree was entered in Massachusetts which provided support for the wife and minor child, the non-resident wife brought an action in probate court to modify the alimony portion of the judgment and, in February 1974, the order was modified accordingly.[4] In May 1974, the husband brought an action in the superior court to enforce the terms of the separation agreement which barred actions to increase or decrease the husband's support obligations.[5] The wife filed a motion to dismiss for lack of personal jurisdiction and the superior court allowed the motion.[6] The Supreme Judicial Court reversed, holding that the Massachusetts court had personal jurisdiction over the non-resident wife since, by agreeing to have the contract construed in accordance with Massachusetts law and by seeking to modify the alimony decree, the wife had "transacted . . . business" in Massachusetts within the meaning of the Massachusetts Long-Arm Statute.[7]

The Court initially determined that the term "transacting any business" as used in section 3 of chapter 223A of the General Laws, the Massachusetts Long-Arm Statute, does not require that the defendant

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§1.3. [1] 1976 Mass. Adv. Sh. 2726, 2729, 358 N.E.2d 437, 439.

[2] *Id.* at 2727, 358 N.E.2d at 438.

[3] *Id.*

[4] *Id.*

[5] *Id.* By the terms of the separation agreement the wife agreed "not to 'prosecute any action in any Court for support or other distribution or to otherwise increase the obligations of the husband hereunder.'" *Id.*

[6] *Id.* at 2728, 358 N.E.2d at 438.

[7] *Id.*, 358 N.E.2d at 439. The Long-Arm Statute, G.L. c. 223A, § 3, provides in pertinent part that "[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's (a) transacting any business in this commonwealth; . . ."

have engaged in commercial activity.[8] In reaching this determination, the Court first reaffirmed its holding in *"Automatic" Sprinkler Corp. of America v. Seneca Foods Corp.*[9] that the Long-Arm Statute asserts jurisdiction over a person to the limits allowed by the federal constitution.[10] Quoting *International Shoe Co. v. Washington,*[11] the Court noted that the constitution requires "certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[12] Construing the scope of section 3 of chapter 223A of the General Laws as coextensive with this constitutional requirement, the Court concluded that the term "transacting any business" should not be limited to commercial activity. Rather, an individual will be deemed to have "transacted any business" in the commonwealth if the individual has engaged there in "any purposeful acts, . . . whether personal, private or commercial."[13] Turning to the facts of *Ross,* the Court held that the wife's act of seeking a modification of the support order and counsel fees in Massachusetts constituted "intentional activities 'invoking the benefits and protections of [our] laws,' "[14] so as to satisfy the constitutional requirement of "certain minimum contacts" with the state seeking to assert jurisdiction.[15] Hence, the Court ruled that the wife was subject to the jurisdiction of the Massachusetts court.[16]

Ross has several significant aspects for the practitioner. First, the case makes it clear that non-commercial activity falls within the scope of "transacting any business" under section 3(a) of the Long-Arm Statute. This approach is contrary to the traditional view, which limits similar sections of other states' long-arm statutes to commercial activity,[17] although a significant minority of courts extending these sections to non-commercial activities is developing.[18] Hence, domestic relations practi-

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[8] *Id.*

[9] 361 Mass. 441, 280 N.E.2d 423 (1972).

[10] 1976 Mass. Adv. Sh. at 2728, 358 N.E.2d at 438, *citing "Automatic" Sprinkler Corp.,* 361 Mass. at 443, 280 N.E.2d at 425.

[11] 326 U.S. 310 (1945).

[12] 1976 Mass. Adv. Sh. at 2728, 358 N.E.2d at 438, *quoting International Shoe,* 326 U.S. at 316.

[13] *Id.,* 358 N.E.2d at 439.

[14] *Id.* at 2729, 358 N.E.2d at 439, *quoting* Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[15] *Id.*

[16] *Id.*

[17] *See generally* Anderson, *Using Long-Arm Jurisdiction to Enforce Marital Obligations,* 42 Miss. L.J. 183, 188 (1971) ("transacting any business" connotes commercial transaction).

[18] VanWagenberg v. VanWagenberg, 241 Md. 154, 172, 215 A.2d 812, 822 (1965), *cert. denied,* 385 U.S. 833 (1966) (execution of separation agreement and performance under it constituted "doing an act" within state and came under "transacts any business"); Spitz v. Spitz, 31 Mass. App. Dec. 124, 130 (1966) (Boston Mun. Ct. 1965) (upholding exercise

tioners can look to this section for help where the more restrictive section 3(g) does not apply.[19]

Secondly, the Court did not indicate clearly what the "minimum contacts" were which resulted in the wife's being subject to the personal jurisdiction of the Massachusetts court. While the Court initially stated unequivocally that the non-resident was subject to personal jurisdiction in Massachusetts because she sought the benefit of a Massachusetts forum in her action for modification,[20] the Court later suggested that it was the bringing of the action coupled with the choice of laws clause in the agreement forming the subject matter of the second suit which justified the exercise of jurisdiction over the defendant.[21] Moreover this latter suggestion followed the Court's discussion of case law elsewhere holding that the execution of the separation agreement within the forum state was sufficient contact to justify the exercise of jurisdiction over the signing party.[22] Despite the existence of some doubts, it appears nevertheless that the Court's position is that where, as in *Ross,* the agreement is signed outside of Massachusetts, the action of the party in seeking relief before a Massachusetts court is sufficient for the exercise of jurisdiction irrespective of a choice of laws clause in the agreement. The choice of laws clause should be viewed only as further evidence of a purposeful intent to avail oneself of the protection of Massachusetts law. Still, the significance, if any, of the choice of law provision of the contract on the exercise of jurisdiction over a non-resident party to the contract is uncertain.

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of long-arm jurisdiction where parties had entered into separation agreement); Kochenthal v. Kochenthal, 28 App. Div. 2d 117, 283 N.Y.S.2d 36, 40 (1967) (separation agreement falls under "any business").

[19] Subsection (g) was added to G.L. c. 223A, § 3 by Acts of 1976, c. 435, approved on October 19, 1976. That subsection provides:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's (g) living as one of the parties to a duly and legally executed marriage contract, with the marital domicile of both parties having been within the commonwealth for at least one year within the two years immediately preceding the commencement of the action, notwithstanding the subsequent departure of the defendant in said action from the commonwealth, said action being valid as to all obligations or modifications of alimony, custody, child support or property settlement orders relating to said marriage or former marriage, if the plaintiff continues to reside within the commonwealth.

However, the Court in *Ross* noted that this subsection did not relate to contract actions such as that before the Court, but rather only to "actions concerning certain court orders." 1976 Mass. Adv. Sh. at 2729 n.1, 358 N.E.2d at 439 n.1.

[20] *Id.* at 2729, 358 N.E.2d at 439. See text at note 14 *supra.*

[21] *Id.*

[22] *Id., citing* VanWagenberg v. VanWagenberg, 241 Md. 154, 172-76, 215 A.2d 812, 822-24 (1965), *cert. denied,* 385 U.S. 833 (1966).

Finally, *Ross* leaves open, but nevertheless implies an answer to, the question of the circumstances in which a cause of action will be said to be "arising from" the defendant's transacting business in the commonwealth for the purposes of the Long-Arm Statute. In *Ross* the husband's suit to enforce the separation agreement was in reality little more than a defense to the wife's modification petition, and thus the husband's suit clearly arose from the wife's "transacting . . . business." In other cases, however, the words "arising from" are likely to be at issue. For instance, cases may arise in which a spouse bringing a claim similar on the merits to that in *Ross* bases a jurisdictional claim on the non-resident spouse's having sued him or her in an action unrelated to their divorce settlement or even to their domestic relations in general.

In such cases, *Ross* and *"Automatic" Sprinkler* imply that the Court will construe the terms "arising from" so as to allow jurisdiction under the Massachusetts Long-Arm Statute to reach the constitutionally allowable limits.[23] In particular, it appears that the Court's interpretation of "arising from," like its interpretation of "transacting any business" will be based not on a literal construction—or even, necessarily, on a tenable construction—of the statutory language. Rather, it will be based on the Court's perception of the constitutional "minimum contacts" requirements of *International Shoe.* In practical terms *Ross* thus implies that a very expansive reading of the term "arising from" is to be anticipated.

§1.4. Child Custody—Visitation Rights. In *Vilakazi v. Maxie*,[1] the Supreme Judicial Court reaffirmed the principle that the best interest of the child controls the issue of visitation rights as well as custody. Applying the principle, the Court upheld the trial court's denial of visitation privileges to the child's mother.[2]

Initially, the probate court granted custody of the girl to the father and visitation privileges to the mother, a resident of New York.[3] As relations between the divorced parents degenerated, there were several captures and recaptures of the child by the parents in New York and Boston, causing the child adverse emotional and physical reactions.[4] Furthermore, the mother insisted on teaching the child a "certain philosophy"[5] to which the father was opposed. In response, the father at-

[23] See text at notes 9-13 *supra.*

§1.4. [1] 1976 Mass. Adv. Sh. 2685, 357 N.E.2d 763.

[2] *Id.* at 2690, 357 N.E.2d at 765.

[3] *Id.* at 2687, 357 N.E.2d at 764. At the time of the original award of custody the child was almost three years old; *id.* at 2685, 357 N.E.2d at 764.

[4] *Id.* at 2687, 357 N.E.2d at 764.

[5] *Id.* Although the Court did not describe the philosophy, it implied that the philosophy was, at least, unconventional. *See id.*

tempted to counter these teachings with teachings of his own. The parents' disagreements resulted in the father's bringing suit for custody without visitation rights for the mother. Based on the determination that the girl suffered as a result of the conflict between her parents; and on the further determination that if given visitation rights the mother would continue her "teachings" to the child, the trial judge revoked the mother's visitation rights.[6]

Since the Supreme Judicial Court had before it only a report of the facts found by the judge, the Court merely inquired whether the decree was supported by the reported facts.[7] The Court observed that the controlling consideration was the welfare of the child and that the subject was "'peculiarly within the discretion of the trial judge.'"[8] Applying these principles to the facts, the Court concluded that the facts amply supported the action of the trial judge.[9]

§1.5. Psychiatric Records—Access by Parent-Attorneys— Consent Requirements. In *Doe v. Commissioner of Mental Health,*[1] the Supreme Judicial Court held that an attorney is entitled to the hospital records of his client under section 36(2) of chapter 123 of the General Laws where his request is accompanied by the written consent of the client to the disclosure, even if the attorney is the client's parent and has previously sought such records under section 36(1).[2]

The plaintiff's daughter was hospitalized at the Massachusetts Mental Health Center from June 26, 1972 to January 17, 1973.[3] At the time of the confinement, the daughter was thirteen years old. Following her discharge, the plaintiff in his parental capacity made several unsuccessful efforts to gain access to his daughter's hospital records.[4] Subsequently, the plaintiff commenced an action as next friend and attorney of record for his daughter seeking removal of certain trustees for the failure of the trustees to provide trust funds for psychotherapeutic care for the daughter.[5]

Following the commencement of that action, the plaintiff again requested access to the hospital records, this time under section 36(2) in

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[6] *Id.* at 2688, 357 N.E.2d at 765.

[7] *Id.* at 2688-89, 357 N.E.2d at 765.

[8] *Id.* at 2689-90, 357 N.E.2d at 765, *quoting* Jenkins v. Jenkins, 304 Mass. 248, 250, 23 N.E.2d. 405, 406 (1939).

[9] 1976 Mass. Adv. Sh. at 2689-90, 357 N.E.2d at 765. *See* J. LOMBARD, 3 MASSACHUSETTS PRACTICE—FAMILY LAW, § 200, at 518, 526, 529 (1967) (rights of child are paramount and lie within court's discretion; court has discretion to deny visitation rights).

§1.5. [1] 1977 Mass Adv. Sh. 966, 362 N.E.2d 920.

[2] *Id.* at 970-71, 362 N.E.2d at 922.

[3] *Id.* at 967, 362 N.E.2d at 921.

[4] *Id.*

[5] *Id.* at 968, 362 N.E.2d at 921.

his capacity as attorney for his daughter in the pending action against the trustees.[6] The hospital demanded, pursuant to a regulation of the Department of Mental Health ("department"), that a consent form be signed by the daughter before releasing the records.[7] Following execution of the consent form, however, the hospital still refused access on the basis that the plaintiff's interest as parent overrode his interest as attorney.[8]

The plaintiff brought an action before a single justice of the Supreme Judicial Court,[9] who reserved and reported the question to the full court. The Court held that under section 36(2) of chapter 123, the plaintiff was entitled to access to the records as the patient's attorney irrespective of the plaintiff's status as her parent.[10] However, the Court also held that the department was not required to supply the records requested unless the request was accompanied by the patient's consent.[11] Thus, the Court upheld the department's regulation requiring the patient's consent to disclosure of records to the patient's attorney, and rejected the plaintiff's contention that the regulation was inconsistent with the language of section 36(2). Finally, the Court briefly considered the department's

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[6] *Id.* at 967, 362 N.E.2d at 921. G.L. c. 123, § 36 provides:

> The department shall keep records of the admission, treatment and periodic review of all persons admitted to facilities under its supervision. Such records shall be private and not open to public inspection except (1) upon proper judicial order whether or not in connection with pending judicial proceedings, (2) that the commissioner shall allow the attorney of a patient or resident to inspect records of said patient or resident if requested to do so by the patient, resident or attorney, and (3) that the commissioner may permit inspection or disclosure when in the best interests of the patient or resident as provided in the rules and regulations of the department. This section shall govern the patient records of the department notwithstanding any other provision of law.

[7] 1977 Mass. Adv. Sh. at 967, 362 N.E.2d at 921. Department Regulation § 7.03(b) required that the attorney's request be "accompanied by the written consent of the patient or resident if he is competent, of the guardian of such patient or resident if he has been adjudicated incompetent, or the parent or legal guardian of such patient or resident if he is a minor."

[8] 1977 Mass. Adv. Sh. at 968, 362 N.E.2d at 921. The department argued that since the plaintiff initially sought the information as parent to the patient rather than as her attorney, he was compelled to obtain a court order for access under G.L. c. 123, § 36(1) rather than be granted access as her attorney under G.L. c. 123, § 36(2). *Id.* at 969, 362 N.E.2d at 922. The Court ruled that § 36(2) did not exclude parent-attorneys; and that "the discretionary powers granted the Commissioner by § 36(3) to make exceptions to the general rule of nondisclosure if he determines such disclosure to be in the patient's best interests cannot be read to authorize the application of a best interests standard to § 36(2)." *Id.* at 971, 362 N.E.2d at 922.

[9] *Id.* at 966, 362 N.E.2d at 920-21. The action was brought pursuant to G.L. c. 249, § 5 and G.L. c. 231A, § 1; *id.*

[10] *Id.* at 971, 362 N.E.2d at 922.

[11] *Id.* at 970, 362 N.E.2d at 922.

contention that the plaintiff had failed to comply with the consent requirement since the daughter was not yet eighteen years of age when the consent form was given the department.[12] In response to this contention the Court merely noted that "the question of her legal capacity is no longer an issue in this case because she has now reached the age of majority. We conclude that if Jane *now* executes the . . . consent form . . . the department must release her records to Mr. Doe."[13]

While the Court's holding that section 36(2) entitled the plaintiff-attorney to the records at issue appears clearly correct, its upholding of the department's consent requirement may prove problematic. In particular, that requirement may pose an unwarranted obstacle to an attorney seeking legitimate access to the hospital records of a client who lacks legal capacity to consent. While capacity was not a troublesome issue in *Doe* since the patient had such capacity at the time of the appeal,[14] the Court in *Doe* nevertheless indicated that it was mindful of potential problems concerning capacity. More particularly, in an important footnote, the Court expressly reserved the issues of consent and legal capacity where the patient is a minor.[15] Until the Court addresses these issues, it will be difficult to assess the practical effect of *Doe's* upholding of the department's consent requirement as to record requests under section 36(2).

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[12] *Id.* at 971, 362 N.E.2d at 922.

[13] *Id.* (emphasis supplied).

[14] *Id.*

[15] The Court stated that

> [i]mportant issues of consent and legal capacity will arise where the patient child is still a minor. To preserve our ability to formulate a workable rule regarding minor consent and the ability of a parent-attorney to consent for a child incapable of giving informed consent, we will not address those issues until a case arises which presents a concrete fact situation in which the parties can address these issues thoroughly.

Id. at 971 n.5, 362 N.E.2d at 922 n.5.