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Chapter 6: Domestic Relations

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CHAPTER 6

Domestic Relations

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A. COURT DECISIONS

§6.1. Divorce: Counsel Fees: Equal Protection. In *House v. House,*[1] the Supreme Judicial Court confronted the issue whether a trial court properly refused to allow counsel fees to the wife in connection with the maintenance of a divorce libel. The trial court held that Rule 47 of the Rules of the Probate Courts (1959)[2]—the rule upon which the wife's application for an allowance was based—violated the equal protection clause of the fourteenth amendment of the United States Constitution, since it provided for counsel fees to a wife, but not to a husband.[3]

In holding that the lower court was not constitutionally prohibited from allowing counsel fees to the wife, the Supreme Judicial Court stated that Rule 47 neither granted to the wife, nor denied to the husband, the *right* to seek an allowance of counsel fees. That Rule merely set forth the requirements that a wife must meet in order to apply for such an allowance.[4] The absence of a similar Rule with respect to a husband had no affect upon his substantive right to similarly be awarded such fees. Those rights are conferred upon a husband by virtue of section 38 of chapter 208 of the General Laws and are in no way restricted by Rule 47.[5]

Section 38 provides:

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§ 6.1. [1] 1975 Mass. Adv. Sh. 1964, 330 N.E.2d 152.

[2] Rule 47 of the Rules of the Probate Courts (1959) has been deleted from the new Probate Rules, which became effective July 1, 1975. The Rule read as follows:

> An application by a wife for an allowance to enable her to defend or prosecute a libel shall contain a statement that she intends in good faith to defend or prosecute such libel, and shall be accompanied by a certificate of her attorney that he believes such statement to be true. If such allowance is granted, it shall be paid as the Court may direct.

[3] 1975 Mass. Adv. Sh. at 1964-66, 330 N.E.2d at 153.

[4] *Id.* at 1965, 330 N.E.2d at 153.

[5] *Id.* at 1967, 330 N.E.2d at 153.

> In any proceeding under this chapter . . . the court may, in its discretion, award costs and expenses, or either, to *either party* . . . . In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to *his* or *her* counsel, or may be apportioned between them.[6]

Thus, since the probate court had equal authority to allow counsel fees to wives and husbands, there would be no denial of the equal protection of the laws where such an allowance was made to a wife.[7]

In resolving the issue by reference to the statutory *authority* to grant the allowance of counsel fees, the Court expressly avoided considering whether Rule 47 discriminated unconstitutionally in favor of women.[8] In dicta, the Court suggested that Rule 47 did not violate the equal protection clause since it was merely a procedural mechanism for dealing with the more common economic situation—a wife who needs funds to maintain a divorce action—and was not an attempt to restrict the statutory right of husbands under section 38 to receive an allowance to maintain a divorce action in appropriate circumstances.[9]

Since the decision in *House v. House,* Rule 406 of the new *Rules of the Probate Courts* has replaced Rule 47. Aside from substituting the word "party" for "wife" (along with the necessary pronominal changes), the new rule is the same as the old one.[10] Thus, a procedure whereby either the husband or the wife can apply for an allowance to defend or prosecute a divorce action has been established. This change will preclude future challenges to the Rule on equal protection grounds.

§6.2. Divorce: Jurisdiction to Award Child Support. In *Wyman v. Wyman,*[1] the husband was, pursuant to a decree nisi, awarded custody of the only child of the marriage. Thereafter, he filed two petitions with the probate court seeking an order directing his former wife to contribute to the child's support.[2] The first petition, brought

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[6] G.L. c. 208, § 38 (emphasis added).

[7] 1975 Mass. Adv. Sh. at 1967, 330 N.E.2d at 153.

[8] *Id.* at 1967, 330 N.E.2d at 154. For cases expressly confronting this issue, *see* (a) Taylor v. Louisiana, 419 U.S. 522 (1975); Stanley v. Illinois, 405 U.S. 645 (1972); Reed v. Reed, 404 U.S. 71 (1971) (cases invalidating sex-based discrimination); *and* (b) Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974) (cases upholding statutory distinctions based on sex).

[9] 1975 Mass. Adv. Sh. at 1967, 330 N.E.2d at 153.

[10] Rule 406 also substitutes the word "complaint" for "libel." The Rule reads as follows:

> An application by a party for an allowance to enable him to defend or prosecute a complaint shall contain a statement that he intends in good faith to defend or prosecute such complaint, and shall be accompanied by a certificate of his attorney that he believes such statement to be true. If such allowance is granted, it shall be paid as the court may direct.

§ 6.2. [1] 1975 Mass. App. Ct. Adv. Sh. 884, 330 N.E.2d 500.

[2] *Id.* at 884, 330 N.E.2d at 501.

pursuant to sections 34 and 34A of chapter 208 of the General Laws, prayed for a modification of the child support order. The second petition, which made no mention of child support, prayed for a modification in accordance with section 34A.[3] The probate court directed that the wife's interest in certain real estate be conveyed to the husband under section 34.[4]

The Appeals Court, in reversing the probate court decree, examined the jurisdictional basis[5] for the probate court's power to order the payment of child support. The court held that the probate court's authority to order the payment of money for the care and maintenance of minor children is principally derived from section 28 of chapter 208.[6] The husband's petition and the resulting order of the probate court were, however, based on section 34,[7] which has been construed to authorize child support only to the extent that such an award is made *incidental* to an award of alimony.[8] Since the husband had not prayed for any allowance for himself in the nature of alimony, the order directing the conveyance, was by definition, not incidental to alimony. The Appeals Court held that since the relief

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[3] *Id.* at 884-85, 300 N.E.2d at 501.

[4] *Id.* at 885, 330 N.E.2d at 501-02.

[5] *Id.* at 886, 330 N.E.2d at 502. The petitioner husband's prayers for relief were jurisdictionally infirm in that: (1) the appropriate vehicle for the order of child support sought by the husband was G.L. c. 208 § 28, see note 5 *infra* and text at notes 5-8; (2) even assuming that he was seeking provision for his own support, a prayer for modification was inappropriate—a new decree was required because there was no provision for an award of alimony in the original decree, 1975 Mass. App. Ct. Adv. Sh. at 885 n.2, 330 N.E.2d at 501-02 n.2, *citing* Baird v. Baird, 311 Mass. 329, 331-32, 333-34, 41 N.E.2d 5, 6-7 (1942) (§ 37—regarding modification of alimony and child support—applies only after a decree of alimony has been entered pursuant to § 34) *and* Kinosian v. Kinosian, 351 Mass. 49, 52, 217 N.E.2d 769, 770-71 (1966) (§ 34 is the jurisdictional basis for the original alimony decree); and (3) even if an award in the nature of alimony had been granted to the husband in the original decree, § 37—not § 34 under which the husband had proceeded—would have been the proper jurisdictional basis for modification of the decree.

[6] G.L. c. 208, § 28 provides in part:

> Upon decree of divorce, or petition of either parent . . . , after notice to both parents, after such decree, the court may make such decree as it considers expedient relative to the care, custody and maintenance of the minor children of the parties, . . . and afterward may from time to time, upon the petition of either parent . . . revise and alter such decree or make a new decree, as the circumstances of the parents and the benefit of the children may require.

[7] G.L. c. 208, § 34, as in effect at the time of the decree, provided: "Upon a divorce, or upon petition at any time after a divorce, the court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband." Section 34 has subsequently been amended by chapter 565 of the Acts of 1974 and currently provides for an alimony award, or assignment of property, or both to either spouse based on the considerations set out in the new statutory provision.

[8] Topor v. Topor, 287 Mass. 473, 475, 192 N.E. 52, 53 (1934) (alimony may include provision for support and maintenance of minor children); Topalis v. Topalis, 1974 Mass. App. Ct. Adv. Sh. 863, 865, 316 N.E.2d 765, 767 (same).

sought by the petition was intended *only* for the benefit of the minor child, the petition for child support should have been brought pursuant to section 28.[9]

The *Wyman* decision is unnecessarily technical in its approach to the question of the probate court's jurisdiction to order the payments of child support. Although the jurisdiction of the probate court to enter such an award is obviously essential to its validity, the court admitted that the probate court had jurisdiction in this case to make the order, albeit under section 28 instead of section 34. Thus, although the court was correct in deciding that child support could not be ordered apart from alimony under section 34, it should have treated the petition as one under section 28, thereby reaching the merits of the petition.

§6.3. Divorce: Merger of Separation Agreements. In *Gunter v. Gunter,*[1] the Appeals Court held that the probate court was without jurisdiction to modify a separation agreement that was not merged into the decree of divorce.[2] In holding that the agreement was not merged into the divorce decree, the court stated: "Although the decree . . . referred to the agreement and purported to incorporate the same by reference . . . we think it did so only by way of explaining why no order was being entered for the support of the wife and minor child."[3] *Gunter*'s significance is that language that has always been held sufficient to incorporate agreements into decrees was found insufficient, thereby upsetting the expectations of the parties in a divorce proceeding wherein the plain intention was to incorporate the agreement.

The language of the *Gunter* decree that "purported" to incorporate the agreement was: "[S]aid libellant have the care and custody of Michael C. Gunter, their minor child and all other provisons are provided for in an *Agreement dated March 13, 1973 on file which is made part of this decree by reference thereto.*"[4] It is clear that the intention of the

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[9] 1975 Mass. App. Ct. Adv. Sh. at 887, 330 N.E.2d at 502.

§ 6.3. [1] 1975 Mass. App. Ct. Adv. Sh. 463, 325 N.E.2d 297, *appeal denied,* 1975 Mass. Adv. Sh. 1281.

[2] *Id.* at 463, 325 N.E.2d at 298. Unless a separation agreement is merged in the decree of divorce, it retains its independent legal significance as a contractual obligation. Hills v. Shearer, 355 Mass. 405, 408-09, 245 N.E.2d 253, 255 (1969); Freeman v. Sieve, 323 Mass. 652, 656, 84 N.E.2d 16, 19 (1949). The court "[has no] jurisdiction to 'modify' the contract by substituting for it new terms to which the parties have never agreed." Schillander v. Schillander, 307 Mass. 96, 98-99, 29 N.E.2d 686, 687 (1940). If the agreement had been incorporated into the decree and made a part thereof, it would have become the decree of the court. *See, e.g.,* Fabrizio v. Fabrizio, 316 Mass. 343, 346-47, 55 N.E.2d 604, 605-06 (1944).

[3] 1975 Mass. App. Ct. Adv. Sh. at 463, 325 N.E.2d at 298.

[4] (Emphasis added). This is the language used in the probate court's decree. It was not cited in the Appeals Court's decision.

trial judge was to incorporate the agreement.[5] Nevertheless, the Appeals Court held that the language used was inadequate because the decree "did not expressly order the husband to comply with the support provisions of the agreement."[6]

If expectations are to be protected in the future, the parties should specifically request in the agreement that its provisions be incorporated into the decree, and the court in its decree should ratify, approve, and incorporate the provisions of the agreement and expressly order the parties to comply therewith. Although following these suggestions should prevent misunderstandings with respect to the adequacy of future language used to incorporate separation agreements, the adequacy of language in decrees already entered will have to be resolved by the costly process of appeal on a case by case basis until *Gunter* is either reversed or further explained by the appellate courts.

§6.4. Divorce: Contempt: Payment of Support by Collateral Sources. In *Cohen v. Murphy,*[1] the probate court had ordered the appellant, pursuant to a divorce decree, to pay $50 per week for the support of his minor children.[2] After the decree was entered, the husband was awarded disability benefits by the Veterans' Administration and the Social Security Administration, which included benefits for the minor children.[3] Some of these payments were received directly by the children, others were received by the husband and paid over to his ex-wife. In a later contempt proceeding against the appellant brought by the wife alleging nonpayment of the $50 weekly payments, the probate judge found: (1) that the decree had ordered the husband to pay child support in the amount of $50 per week; (2) that the decree neither ordered nor authorized the satisfaction of that obligation by payments that might be made to the minor children by the Veterans' Administration or by the Social Security Administration; and (3) that the parties made no agreement that any such payments would satisfy the support order. Therefore, the judge ruled, as a matter of law, that the order for support was not satisfied by payment of these government dependency benefits, whether made directly to the wife or children, or made to the husband and subsequently paid over by him to the children. The support order could be satisfied only if the

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[5] If the judge had not intended to incorporate the agreement, it is difficult to understand why he identified the agreement with some particularity and then provided that it was made "*part of* this decree by reference thereto." (Emphasis added). If it had been his intention not to incorporate the agreement, that phrase would not have been included.

[6] 1975 Mass. App. Ct. Adv. Sh. at 463, 325 N.E.2d at 298.

§ 6.4. [1] 1975 Mass. Adv. Sh. 2002, 330 N.E.2d 473.

[2] *Id.* at 2002, 330 N.E.2d at 474.

[3] *Id.*

husband himself paid the $50 per week as ordered by the court. The court therefore found the husband in contempt for his nonpayment of child support.[4]

The Supreme Judicial Court reversed the contempt decree and held that, in the absence of a contrary provision in the support order, Veterans' and Social Security benefits either paid directly to the wife or children, or given to the husband and subsequently paid over by him to his wife or children, are to be credited against amounts due under a decree for the support of minor children.[5] The Court first noted that in a contempt proceeding, ambiguities in a decree should be resolved in favor of the alleged contemnor.[6] It then reasoned that the payments to the dependent children in this case "were earned in part by the [husband] himself and [were] not altogether a gift from the Federal Government."[7] The Court therefore reversed the contempt decree and remanded the case to the probate court for further proceedings to determine the amount of these government dependency benefits, which were to be credited against the arrearages under the original support order.[8]

The *Murphy* decision is significant in that it permitted a party who had not complied with a support order to avoid the sanction of contempt[9] by satisfying the support order, at least in part, with payments from a collateral source. To this extent, the case represents a noteworthy departure from the general rule that one who is ordered by a court to pay support is personally bound to fulfill the obligation and is subject to a contempt sanction in the event of noncompliance.[10]

The breadth of the impact of the *Murphy* holding is not clear. On one hand, although the *Murphy* case deals specifically with the issue of child support,[11] there appears to be nothing that would preclude its application to either an award of alimony or separate support to a spouse. The policies relative to the need for the effective enforcement

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[4] *Id.* at 2004-05, 330 N.E.2d at 474.

[5] *Id.* at 2002-03, 330 N.E.2d 475.

[6] *Id.* at 2006, 330 N.E.2d at 475.

[7] *Id.* at 2008, 330 N.E.2d at 475.

[8] *Id.* at 2009, 330 N.E.2d at 476.

[9] The *Murphy* case is limited by both its facts and its rationale to cases where the probate court seeks to enforce its order by contempt rather than by judgment and execution. The Court stated that "*in a contempt proceeding* for violation of a divorce decree, ambiguities in the decree should ordinarily be resolved in favor of the alleged contemnor," *id.* at 2006, 330 N.E.2d at 475 (emphasis added), indicating that the focus of its concern was that the defendant was to be subject to contempt for violation of the order, rather than to some less extreme sanction. Therefore, the question remains open whether payments by a qualified collateral source would be considered sufficient to satisfy a support order where the plaintiff sought enforcement by means other than contempt. See remedies collected in J. LOMBARD, FAMILY LAW, 2A MASS. PRAC. § 2703, at 659 *et seq.* (1967).

[10] *See generally* J. LOMBARD, FAMILY LAW, 2A Mass. Prac. § 2703, at 659 *et seq.* (1967).

[11] 1975 Mass. Adv. Sh. 2002, 330 N.E.2d at 474.

of child support orders apply with equal validity to orders for spousal support. If these policies are outweighed with respect to child support in cases where support is furnished from collateral sources, they should also be outweighed in cases involving support for spouses. On the other hand, the protection from contempt provided by *Murphy* extends only to benefits that are actually received from the collateral source by the obligee of the support order.[12] It does not cover cases where the benefit is one to which the intended recipient is entitled but which is not actually received.

The major question left unresolved by the *Murphy* case is the scope of sources that will be entitled to credit under its holding. Although the Court held that the dependency benefits paid by the Veterans' Administration and the Social Security Administration are entitled to credit,[13] it expressly refused to reach the question whether welfare benefits would similarly be credited.[14] Since the Court strictly limited its holding to the facts before it, the case should not be viewed as recognizing a broad range of collateral source payments that may be credited automatically against a support order.

The Court authorized credit for payment by the Veterans' and Social Security Administrations on the grounds that these payments were earned in part by the husband, and hence were not altogether a gift from the government.[15] It is difficult to ascertain at this point if other payments by collateral sources may be recognized for credit in the future, and if so, whether credit will be limited to payments from government agencies.

Until a more precise definition of the scope of the *Murphy* holding is forthcoming from the Supreme Judicial Court, practitioners should advise clients not to rely on collateral source payments to satisfy their support obligations. In the absence of an express provision in the decree concerning the effect of such benefits, the proper remedy is to file a petition for modification[16] of the support order, seeking a determination that credit for sums paid by the collateral source be ex-

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[12] The opinion states that the probate court judge was concerned with credit for payments "either *made* directly to the wife or children or made to the husband and *paid over* by him." *Id.* at 2006, 330 N.E.2d at 475 (emphasis added).

[13] *Id.* at 2002, 330 N.E.2d at 474.

[14] *Id.* at 2008, 330 N.E.2d at 475.

[15] *Id.* at 2008, 330 N.E.2d at 475. It is difficult to fathom what policy is served by requiring that the payments be "earned" before they are credited since the Court only authorized credit where the payments are *received* by the obligee of the support order. If the donor of the benefit actually pays the support order to the obligee, it would appear to be of no consequence that the donor must pay that amount because of an obligation that the donor owes the obligor of the support order, or because he gratuitously furnishes the support. One possible explanation in the *Murphy* case is that the obligation of support derives from a father's *duty* to support his children—and that duty is not discharged where the payments depend on the goodwill of another.

[16] *See* G.L. c 208, § 28.

tended to the obligor spouse. Until a modification is obtained, the party should continue to pay the obligation himself. If the court decides that these sums should be credited, the obligor spouse may ask the court to order the modification to apply retroactively.[17] In this fashion, the party would avoid contempt, since he is obeying the decree, and yet will preserve his rights.

§6.5. Divorce: Contempt: Nature and Specificity of Charge. During the *Survey* year, the Supreme Judicial Court, in *Meranto v. Meranto,*[1] followed its recent holding in *Sodones v. Sodones*[2] that if the defendant in a contempt proceeding does not receive adequate notice that the contempt charged is criminal, the case will be treated as involving civil contempt alone.[3]

In *Meranto,* the libellant filed a libel for divorce against her husband. On October 1, 1971, a decree nisi was entered in which the probate court ordered the husband to pay child support, and to permit the wife and children to occupy the marital home. One month later, the decree was vacated by the consent of both parties and the libel was dismissed without prejudice. In January, 1972, the decree nisi, including its provisions regarding child support and occupation of the marital home, was reinstated.[4] Approximately one year later, the wife filed a petition for contempt, alleging that the husband had not complied with the reinstated decree. In March, 1973, the husband was found guilty of contempt for failure to comply with the decree nisi. He was sentenced to jail for either a period of six months or until he complied with the decree.[5]

On appeal, the Supreme Judicial Court held that because it was unclear from the contempt petition whether the contempt charged was civil or criminal, the defendant had not received adequate notice that criminal rather than civil contempt was involved. Therefore, the Court concluded that, under *Sodones,* the case was required to be treated as one involving civil contempt alone.[6]

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[17] A probate court has inherent power to modify its awards retroactively. *Cf.* Watts v. Watts, 314 Mass. 129, 49 N.E.2d 609 (1943).

§6.5. [1] 1975 Mass. Adv. Sh. 227, 323 N.E.2d 723.

[2] 1974 Mass. Adv. Sh. 1303, 314 N.E.2d 906.

[3] *Id.* at 1311, 314 N.E.2d at 912.

[4] *Id.* at 228-29, 323 N.E.2d at 724. The Court noted that "the decree of January 10, 1972 was irregular on its face in that it purported to reinstate the terms of a decree which previously had been dismissed without prejudice." 1975 Mass. Adv. Sh. at 232, 323 N.E.2d at 725. The Court found it unnecessary to pass on the validity of this decree since the finding of contempt was reversed. *Id.*

[5] 1975 Mass. Adv. Sh. at 229, 323 N.E.2d at 724.

[6] *Id.* at 232, 323 N.E.2d at 725. The Court noted that if it had treated the case as one involving criminal contempt, it would have held that there had not been effective waiver of counsel by the defendant. Furthermore, noting that the wife's counsel had called the husband to the witness stand, the Court stated that it would be "highly improper" to call the defendant as a witness against himself in a criminal proceeding. 1975 Mass. Adv. Sh. at 233, 323 N.E.2d at 725.

The Court found that not only was the defendant not adequately notified as to the nature of the contempt proceeding against him, but he also had not been given notice of the specific acts of contempt charged.[7] The Court held that irrespective of whether the contempt was civil or criminal in nature, notice of the specific acts relied on must be given to the defendant prior to a hearing on the contempt petition.[8]

Applying these principles to the facts, the Court held that with respect to the charge of noncompliance with the order to permit the wife and children to occupy the marital home, the mere allegation in the contempt petition that the husband "refused [to allow] her to occupy the Grafton Premises" was inadequate in that it failed to set forth when, where, and in what manner he had violated the provisions of the decree.[9] The Court therefore struck out so much of the contempt charges as were based on the husband's refusal to permit the wife and children to occupy the marital home.[10]

The Court concluded that the allegation of late child support payments was set out with sufficient particularity, but nevertheless reversed the finding of contempt with respect to this issue, because the husband's payments were substantially up to date.[11]

Thus, *Meranto* establishes three requirements for pleadings in contempt actions: (1) unless it is clear from the contempt petition that the contempt charged is criminal, it will be treated only as civil

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[7] 1975 Mass. Adv. Sh. at 233, 323 N.E.2d at 725.

[8] *Id.* In so holding, the Court relied on *Sodones. Id.* In *Sodones,* the defendant appealed from a probate court decree that adjudged him guilty of contempt for failure to comply with a prior court order for separate support. The Supreme Judicial Court cited Cooke v. United States, 267 U.S. 517, 536-37 (1925), for the undisputed proposition that "[d]ue process requires that a . . . [defendant] must be given notice of the charges against him prior to a hearing on criminal or civil contempt whenever the allegedly contemptuous conduct occurred outside the presence of the Court." 1974 Mass. Adv. Sh. at 1309, 314 N.E.2d at 911.

[9] 1975 Mass. Adv. Sh. at 233, 323 N.E.2d at 725. The requirements of specificity as enunciated by the Court apply to both criminal and civil contempt, and are analogous to the defendant's right to information sought by way of a bill of particulars in a criminal proceeding. *See, e.g.,* Commonwealth v. Chapin, 333 Mass. 610, 617-18, 132 N.E.2d 404, 409 (1956) (defendant, as of right, is entitled to know in response to a bill of particulars the time, the place, the manner, and the means of the commission of the offense). *Meranto* puts on the party alleging contemptuous conduct the burden to set forth with specificity the charges, rather than requiring the defendant to ascertain through discovery the details of the alleged contemptuous conduct. In this respect, *Meranto* departs from *Sodones,* where the Court held that if the charge contained no specific allegations, the burden was on the defendant to "[move] for a continuance of the hearing or for specification of the charges." 1974 Mass. Adv. Sh. at 1310, 314 N.E.2d at 911-12.

[10] 1975 Mass. Adv. Sh. at 233-34, 323 N.E.2d at 725.

[11] *Id.* at 334, 323 N.E.2d at 725.

contempt;[12] (2) regardless of whether civil or criminal contempt is involved, it is incumbent on the moving party to specify where, when, and in what manner the decree was violated; and (3) failure to adequately specify the charge will result in dismissal. These requirements are clear and if adhered to by practitioners will avoid unnecessary confusion in the future.

§6.6. Divorce: Financial Obligations Discharged by Bankruptcy. In *Abrams v. Burg*,[1] the Supreme Judicial Court confronted the issue whether certain obligations incurred by a husband pursuant to a separation agreement were incurred for the support and maintenance of the wife, or were incurred with respect to a marital property settlement. At stake was whether these obligations had been discharged by the husband's subsequent bankruptcy, since under the Bankruptcy Act,[2] obligations with respect to a property settlement are dischargeable, while those for spousal support are not.[3]

On December 30, 1960, Harold and Edith Burg entered into a separation agreement in contemplation of divorce. A decree absolute was entered in 1961. Thereupon, the separation agreement became effective by its terms.[4] The agreement provided, *inter alia,* that the husband was to pay the wife: (1) a lump sum of $125,000 immediately, (2) an additional sum of $88,000 in nine installments, and (3) a third sum of $40,000 in 1967. He was given the option of satisfying the $88,000 and $40,000 obligations by making a single $100,000 payment prior to 1963.[5] To insure that the payments to the wife would be tax-free to her, the husband agreed to claim no tax deduction with respect to any of these payments.[6]

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[12] The distinction between civil and criminal contempt is important and must be maintained if the substantive rights of the contemnor in the proceeding are to be protected. Those rights in a criminal proceeding are of constitutional dimensions. As has been previously noted, the judge in a criminal contempt proceeding has the obligation to inform the defendant of his right to effective assistance of counsel and that right, if waived, must be done knowingly, voluntarily, and intelligently. See note 6 *supra.* Additionally, an alleged criminal contemnor is entitled: (1) to the presumption of innocence, Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911); (2) to be proven guilty beyond a reasonable doubt, *id.;* (3) to refuse to incriminate himself, *id.;* (4) to a public trial before an unbiased judge, *In re* Oliver, 333 U.S. 257, 269-73 (1948); (5) to apply for an execution pardon, *Ex parte* Grossman, 267 U.S. 87 (1924); (6) to the applicability of the statute of limitations, Gompers v. United States, 233 U.S. 604 (1913); and (7) "to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." Cooke v. United States, 267 U.S. 517, 537 (1925).

§6.6. [1] 1975 Mass. Adv. Sh. 1353, 327 N.E.2d 745.
[2] 11 U.S.C. §§ 1 *et seq.* (1970).
[3] *Id.* § 35(a)(7).
[4] 1975 Mass. Adv. Sh. at 1353, 327 N.E.2d at 746.
[5] *Id.* at 1357, 327 N.E.2d at 747.
[6] *See* INT. REV. CODE of 1954, §§ 71, 215.

Pursuant to the agreement, the husband paid the $125,000 and $40,000 obligations and all installments of the $88,000 obligation with the exception of $32,000, representing the final two installments.[7] On January 30, 1969, before these final two payments were due, the defendant filed a petition for discharge in bankruptcy, which was granted on December 1, 1970.[8] Thereafter plaintiff Abrams, as trustee for the wife, brought suit in the probate court against the husband for the payment of the remaining $32,000. The probate court ruled that the unpaid amounts owed to the wife were for her maintenance and support, and hence were not discharged by the husband's bankruptcy.[9] On direct appellate review, the Supreme Judicial Court reversed and ordered that plaintiff's suit on the separation agreement be dismissed.[10]

Section 17a(7) of the Bankruptcy Act provides that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . are for alimony due or to become due or for maintenance or support of wife . . . ."[11] Thus, whereas obligations for maintenance and support are excepted from discharge by the foregoing provision, obligations incurred through a property settlement are not.[12] The Court stated that the issue whether the separation agreement is to be characterized as a property settlement or embodies as well a legal obligation to support the other spouse turns on the intent of the parties as gleaned from the face of that agreement.[13] The Court then referred to several factors that are generally indicative of the parties' intent to provide for support and maintenance rather than for a property settlement. These factors are: (1) a provision that the obligation terminates on the death of either spouse or on the remarriage of the recipient spouse; (2) a schedule of payments payable in installments over a substantial period; (3) a provision that all payments are to be taxable to the recipient; and (4) a description of the obligations of the parties in terms of support to the wife.[14]

The Court held that on the basis of these factors the unsatisfied obligations of the husband were not obligations for the maintenance and support of the wife and were therefore discharged in bankruptcy.[15] The Court found the following aspects of the separation agreement determinative: (1) the agreement was expressed not in terms of sup-

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[7] 1975 Mass. Adv. Sh. at 1357 n.3, 327 N.E.2d at 747 n.3.

[8] *Id.* at 1354, 327 N.E.2d at 746.

[9] *Id.*

[10] *Id.* at 1358-59, 327 N.E.2d at 748.

[11] 11 U.S.C. § 35(a) (1970).

[12] *E.g.*, Yarus v. Yarus, 178 Cal. App.2d 190, 3 Cal. Rptr. 50 (1960); 1A COLLIER ON BANKRUPTCY § 17.19 (14th ed. 1975).

[13] 1975 Mass. Adv. Sh. at 1357, 327 N.E.2d at 747.

[14] *Id.* at 1355-56, 1358-59, 327 N.E.2d at 747, 748.

[15] *Id.* at 1358-59, 327 N.E.2d at 748.

port for the wife, but solely in terms of the distribution of property; (2) the obligations to pay $125,000 immediately and $40,000 in 1967 were absolute, unaffected by the death of either party or by the remarriage of the wife; (3) the obligation to pay $88,000 in nine annual installments, although characteristic of a support payment, could have been discharged by the payment of a discounted sum by the end of 1962 and thus appeared to represent merely a deferred payment plan; and (4) all payments were to be tax-free to the wife and nondeductible by the husband.[16] Although noting that a discharge of the husband's obligation to support his wife may have been involved in the negotiation of the agreement, the Court felt constrained to consider only the clear language of the agreement in determining the intent of the parties.[17]

The *Abrams* case illustrates the need for lawyers to carefully take into account both tax and bankruptcy considerations before drafting a separation agreement. Although it is generally to the donor spouse's advantage to characterize obligations under the separation agreement as being for the wife's maintenance and support in order that he may benefit from the deduction provision of section 215 of the Internal Revenue Code, the donor should bear in mind that such a characterization will preclude that obligation's discharge in a subsequent bankruptcy of the donor. Conversely, although a recipient spouse may prefer to denominate payments receivable under a separation agreement as a property settlement in order to avoid the inclusion of such payments in her taxable income under section 71 of the Internal Revenue Code, she should remember that payments due in fulfillment of a property settlement agreement would be discharged if the donor spouse were to receive a discharge of obligations under a bankruptcy decree.

§6.7. Divorce: Presumption of Gift to Joint Fund Rebutted. In *Magro v. Magro,*[1] the Appeals Court held that certain checks and monies deposited by a wife in two joint bank accounts standing in the names of her and her husband were not intended as gifts for the benefit of both spouses.[2] The husband had petitioned the probate court to determine title to certain disputed items, relying on the presumption that a wife's contribution to a fund held jointly by the spouses is intended as a gift for the benefit of both spouses.[3] The probate court found no donative intent on the part of the wife and therefore con-

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[16] *Id.*
[17] *Id.*

§ 6.7. [1] 1975 Mass. App. Ct. Adv. Sh. 640, 326 N.E.2d 735.
[2] *Id.* at 640-41, 326 N.E.2d at 736.
[3] *See, e.g.,* Ross v. Ross, 1974 Mass. App. Ct. Adv. Sh. 817, 822-23, 825, 314 N.E.2d 888, 893-94, 895, *cert. denied,* 420 U.S. 947 (1975).

cluded that the presumption of a gift was rebutted.[4] The Appeals Court affirmed.[5]

The probate court concluded that the presumption of a gift was rebutted because the husband had "dominated" his wife and subjected her to "frequent beatings and other forms of harassment."[6] This domination, coupled with the additional finding by the probate court that the husband had refused to work during most of the marriage and had forced his wife to give him spending money from her biweekly paychecks, led the trial judge to conclude that the wife "was by no means a free agent and that her contributions to the joint funds in question resulted more from [the husband's] coercive tactics than from [the wife's] voluntary choice."[7] The Appeals Court held that these facts were sufficient to support a finding by the probate judge that the presumption of a gift had been rebutted.[8]

§6.8. Divorce: Appeal From Decree Nisi. Two cases decided during the *Survey* year, *Scholz v. Scholz*[1] and *Dennis v. Dennis,*[2] involved appeals from a decree nisi.

Scholz involved a familiar procedural pitfall experienced by many domestic relations practitioners. On July 10, 1972, a decree nisi was entered on Mrs. Scholz's libel from which her husband seasonably appealed. The husband's attorney, however, neglected to: (1) file a statement of objections to the decree becoming absolute;[3] (2) obtain an order from a judge of the probate court staying the decree from becoming absolute; or (3) obtain an order from a justice of the Su-

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[4] 1975 Mass. App. Ct. Adv. Sh. at 640-41, 326 N.E.2d at 736. The trial judge also found that two tax refund checks, payable to the wife and representing overpayments of taxes on income earned exclusively by the wife, were deposited by the wife in the joint account of the parties without the intention of making a gift. The Appeals Court held that, on those facts, there was no basis for applying the presumption of a gift. *Id.* at 640, 326 N.E.2d at 736.

[5] *Id.* at 640-41, 326 N.E.2d at 736.

[6] *Id.*

[7] *Id.* at 641, 326 N.E.2d at 736.

[8] *Id.*

§ 6.8. [1] 1975 Mass. Adv. Sh. 649, 324 N.E.2d 617.

[2] 1975 Mass. App. Ct. Adv. Sh. 890, 330 N.E.2d 490.

[3] This matter, previously governed by Probate Court Rule 45, is now controlled by MASS. R. DOM. REL. P. 58(c), which is substantially the same:

> 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 in the Registry of Probate a statement of objections to the judgment becoming absolute, which shall set forth specifically the facts on which it is founded and shall be verified by affidavit. Notice of the filing of said objections shall be given to the plaintiff or defendant or his attorney, not later than the day of filing said objections. 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.

preme Judicial Court staying the decree from becoming absolute.[4] In affirming a dismissal by the Appeals Court[5] of the husband's appeal from the entry of the decree nisi, the Supreme Judicial Court relied on two established principles. First, "the pendency of an appeal does not prevent the decree from becoming absolute."[6] As a result, on January 10, 1973, six months following its entry, the decree nisi became absolute.[7] Second, "[o]nce the decree becomes absolute, the appeal from the decree nisi brings no issue before the court and must be dismissed."[8]

The husband relied on *Eldridge v. Eldridge*[9] for the proposition that where a decree nisi was obtained by fraud or mistake, that fact ipso facto stayed the decree from becoming absolute.[10] The Court, however, expressly disapproved so much of *Eldridge* as suggested that fraud or mistake automatically stayed the decree nisi from becoming final.[11]

The Supreme Judicial Court held that *Eldridge* was based on the power of the probate court to correct its final decrees after they have been entered to the extent that they were occasioned by fraud or mistake.[12] Thus, when a decree nisi is fraudulently or mistakenly in-

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[4] *See* G.L. c. 215, §§ 23-24.

[5] 1974 Mass. App. Ct. Adv. Sh. 739, 314 N.E.2d 139.

[6] 1975 Mass. Adv. Sh. at 651, 324 N.E.2d at 618, *citing* MacNevin v. MacNevin, 319 Mass. 719, 722, 67 N.E.2d 477, 478 (1946).

[7] *See* G.L. c. 208, § 21.

[8] 1975 Mass. Adv. Sh. at 651, 324 N.E.2d at 618, *citing* Sloane v. Sloane, 349 Mass. 318, 319, 208 N.E.2d 211, 212 (1965).

[9] 278 Mass. 309, 180 N.E. 137 (1932).

[10] 1975 Mass Adv. Sh. at 649-50, 324 N.E.2d at 618. Part of the language of the *Eldridge* case appeared to support the proposition that a decree nisi was automatically stayed from becoming absolute by the fact that it was obtained by fraud or mistake:

> The mistake in the case at bar could have been found in believing that the plea of condonation filed originally by the attorney of the libellee was broad enough to be applicable to all causes for divorce alleged in the libel. Condonation is an affirmative defense. It could not be heard unless set up by the answer. Divorce Rule 8 of the Probate Court. . . . It is plain that the Probate Court on June 27, 1930, had jurisdiction to vacate the decree *nisi* entered on September 16, 1929, as the libellee on June 26, 1930, had waived his appeal to this court. The entry of the decree *nisi* was in its nature interlocutory; the libel was still pending and could be corrected or revoked for mistake or for any reason adequate in law. It follows that upon the facts disclosed by the record it *did not become absolute at the expiration of six months* from the date it was entered.

278 Mass. at 312, 180 N.E. at 139 (emphasis added).

[11] 1975 Mass. Adv. Sh. at 652, 324 N.E.2d at 618.

[12] *Id.* at 651-52, 324 N.E.2d at 618. The court in *Eldridge* stated:

> It is settled that a court of probate has power to correct or vacate its decree for adequate and legal cause. It was said in the recent case of Goss v. Donnell, 263 Mass. 521, at pages 523-24, 161 N.E. 896, 897: "It now is settled that a court of probate has power to correct errors in its decrees arising out of fraud, or mistake, or want of jurisdiction, or for any reason adequate in law. Its power in this field is 'analogous to that of courts of common law to issue writs of review and of courts

duced, it is subject to vacation by the probate court even after it has become absolute.[13] However, fraud or mistake does not *stay* the decree nisi from becoming absolute.[14] Since the parties in *Scholz* had not followed any authorized method of staying the decree nisi,[15] it became absolute six months after its entry,[16] thereby mooting any appeal from the decree nisi.[17]

Under the recently adopted Massachusetts Rules of Domestic Relations Procedure,[18] an appellant is protected against having his appeal mooted by the running of the nisi period. Rule 62(g) provides:

> The filing of an appeal *shall stay the running of the nisi period* as provided by Rule 58(c). If the appeal is subsequently dismissed by the appellate court, the judgment shall become absolute as of six months from the date of the judgment nisi. The filing of an appeal shall not stay the operation of any other order or judgment of the court relative to custody, visitation, alimony, support or maintenance unless the court otherwise orders.[19]

This rule is an improvement over the prior domestic relations practice in that it streamlines the process of taking an appeal from a decree nisi, eliminating the largely ceremonial process of either filing objections to the decree becoming final, seeking a special order from the court to stay the decree from becoming absolute, or both. The rule also furthers the normal expectations of the party who appeals the judgment nisi. It should be noted that Rule 62(g) only prevents the judgment nisi from becoming absolute and thus saves the appeal from that decree from becoming moot. The substantive provisions of the judgment relative to custody and alimony, and other orders incidental

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of equity to entertain bills of review. It is to correct mistakes of fact or of law.' " Crocker v. Crocker, 198 Mass. 401, 404-05, 84 N.E. 476.
278 Mass. at 314, 180 N.E. at 139.

[13] With respect to the effect of G.L. c. 208, § 21, making decrees nisi absolute after the expiration of a six month period (absent the filing of objections or obtaining a stay order), the *Eldridge* Court said:

> It is the contention of the libellant that as the libellee failed to file any objections under the rule the decree *nisi* became absolute under G.L. c. 208, § 21. It is sufficient to say that the rule is not applicable to the facts in the case at bar. Independently of the rule a decree for divorce may be revoked or denied if against public policy or for any reason adequate in law.

278 Mass. at 314, 180 N.E. at 139. The proper vehicle for invoking the probate court's power to modify decrees, whether nisi or absolute, is by motion under MASS. R. DOM. REL. P. 60(b).

[14] See text at note 11 *supra.*

[15] See text at notes 3-4 *supra.*

[16] 1975 Mass. Adv. Sh. at 651, 324 N.E.2d at 618. *See* G.L. c. 208, § 21.

[17] *Id. See* Sloane v. Sloane, 349 Mass. 318, 319, 208 N.E.2d 211, 212 (1965) (once the decree nisi becomes absolute, an appeal from the decree brings no issue to the court).

[18] The Rules of Domestic Relations Procedure became effective on July 1, 1975, by vote of the Judges of the probate court, and approval of the Supreme Judicial Court.

[19] MASS. R. DOM. REL. P. 62(g) (emphasis added).

to the decree are not held in abeyance by the filing of an appeal.[20] Furthermore, if the appeal is subsequently dismissed, the decree absolute will be considered to have taken effect as of six months from the date of the judgment nisi.[21] Thus, the Rule automatically stays the judgment nisi from becoming absolute upon the filing of an appeal, thereby avoiding the procedural trap of having the appeal dismissed because the party did not take any of the three steps to stay the decree nisi from becoming absolute.

In *Dennis v. Dennis,*[22] a decree nisi was entered on April 17, 1974. The parties did not file their respective claims of appeal from the decree until the twenty-day statutory period for filing had expired.[23] On September 5, 1974, the probate court judge vacated the April 17th decree,[24] stating that it had been entered prematurely due to clerical error, and he thereupon issued a new decree, identical in all respects to the April 17th decree, except that it was dated September 5, 1974.[25] The parties' appeals were timely with respect only to the September 5th decree.[26]

The Appeals Court dismissed the appeals on the ground that the parties had not filed their claims of appeal within the required period following the April 17th decree.[27] In reaching this decision, the Appeals Court found that there were no facts to support the trial court's conclusion that the April decree had been entered prematurely due to clerical error. Moreover, since the decree ordered alimony and support payments to begin on April 20, 1974, it could not have been intended for entry on September 5, 1974.[28] The Appeals Court concluded that the decree as entered on April 17th was still in force since (1) it did represent the court's actual decision and (2) the probate judge therefore had no authority to vacate it since vacation is only proper to correct a decree that does not conform to the court's actual decision.[29] Consequently, since the claims of appeal were not seasonably filed, the appeal was dismissed.[30]

The *Dennis* case, like the *Scholz* case, illustrates the importance of following proper procedure to preserve a party's rights on appeal. In *Dennis,* the parties tried to circumvent the requirements of section 9 of chapter 215 of the General Laws, which requires the filing of a

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[20] *Id.*

[21] *Id.*

[22] 1975 Mass. App. Ct. Adv. Sh. 890, 330 N.E.2d 490.

[23] *Id.* at 890-91, 330 N.E.2d at 491. *See* G.L. c. 215, § 9, *as amended through* Acts of 1947, c. 360.

[24] 1975 Mass. App. Ct. Adv. Sh. at 890, 330 N.E.2d at 491.

[25] *Id.*

[26] *Id.* at 890-91, 330 N.E.2d at 491.

[27] *Id.* at 892-94, 330 N.E.2d at 492-93.

[28] *Id.* at 891-92, 330 N.E.2d at 492.

[29] *Id.* at 891, 330 N.E.2d at 492, *citing* Chagnon v. Chagnon, 300 Mass. 309, 311-12, 15 N.E.2d 231, 232 (1938).

[30] *Id.* at 892, 330 N.E.2d at 492-93.

claim of appeal within 20 days following the entry of judgment, by prevailing upon the probate court to vacate the initial decree entered on April 17, 1974 and to enter judgment on a new decree, with identical substantive provisions, on September 5, 1974. The Appeals Court refused to countenance such a vacation by the probate court, which, in effect, would have had the result of lengthening the time period within which a claim of appeal could be filed.[31] Instead, the Appeals Court insisted that the parties resort to the proper procedural remedy—that of seeking leave to file their claim of appeal late by motion before the judge of the probate court.[32]

The adoption in Massachusetts of the Massachusetts Rules of Appellate Procedure and the Massachusetts Rules of Domestic Relations Procedure does not alter the result reached in the *Dennis* case. Under Rule 60(a) of the Rules of Domestic Relations Procedure, the probate court is empowered to correct clerical errors in its decrees in order that the record may reflect the judgment actually made by the court.[33] Nonetheless, this Rule cannot be used as a vehicle for altering decrees that events later show to have been improvidently issued. The proper remedy to vacate such decrees is by way of motion under Rule 60(b).[34] Moreover, Rule 60(a) cannot be used as a vehicle to circum-

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[31] *See id.* at 891 nn.1 & 2, 330 N.E.2d at 491-92 nn.1 & 2.

[32] *See id.* at 894, 330 N.E.2d at 493. *See also* G.L. c. 215, § 15, which provides:

A party who has, by mistake or accident or other sufficient cause, omitted to claim an appeal from a final decree within the time prescribed therefore may, within one year after the entry of the decree from which he desires to appeal, petition the supreme judicial court for leave to appeal, which may be granted upon terms by any of the justices of that court. Such petition shall be filed with the clerk of the supreme judicial court for Suffolk county.

[33] MASS. R. DOM. REL. P. 60(a) provides:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

[34] MASS. R. DOM. REL. P. 60(b) provides:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs

vent the effect of Rules 3 and 4 of the Massachusetts Rules of Appellate Procedure, which require a claim of appeal to be filed within thirty days following the entry of judgment.[35]

§6.9. Separate Support: Factors To Be Considered. In *LaVallee v. LaVallee,*[1] the Appeals Court affirmed a dismissal of a wife's separate support petition. The husband had deposited his life savings in joint bank accounts standing in the names of both the husband and the wife. The wife then withdrew all of the funds without her husband's knowledge and deposited them in an account standing in her name alone.[2] The court held that the probate judge was not plainly wrong in dismissing the wife's petition in light of her "acquisitive conduct considered in conjunction with the relative resources and necessities of the parties, as well as their condition in life . . . ."[3] It is not clear, however, whether the court concluded that these facts gave the husband "justifiable cause" to withhold support or whether, under the circumstances, "suitable support" had been provided.[4]

In reaching its result, the Appeals Court reiterated the applicable principles governing the issuance of an order for separate support:

> On a petition for separate support, *as in the case of a libel of divorce,* the questions whether support should be awarded and if so its amount rest in the sound discretion of the judge after consideration of the facts. . . . The circumstances to be considered include "the necessities of the wife and the pecuniary resources of the husband, the condition in life of the parties and their mode of living and the conduct of the parties."[5]

The *LaVallee* case thus raises the question whether the factors to be considered in determining the amount of separate support have been expanded by the 1974 amendment to section 34 of chapter 208 of the General Laws, the alimony provision.[6] As the Appeals Court correctly

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of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[35] MASS. R. APP. P. 4 provides: "Unless otherwise provided by statute, the notice of appeal required by Rule 3 shall be filed with the clerk of the lower court within thirty days of the date of the entry of the judgment appealed from . . . ."

§ 6.9. [1] 1975 Mass. App. Ct. Adv. Sh. 611, 326 N.E.2d 720.

[2] *Id.* at 611, 326 N.E.2d at 721.

[3] *Id.*

[4] *See id.* G.L. c. 209, § 32 provides: "If a husband fails without justifiable cause, to provide suitable support for his wife, . . . the probate court may . . . make . . . orders relative to the support of the wife . . . ."

[5] 1975 Mass. App. Ct. Adv. Sh. at 611-12, 326 N.E.2d at 721-22 (emphasis added), *citing* Verdone v. Verdone, 346 Mass. 263, 191 N.E.2d 299 (1963); Wilson v. Wilson, 329 Mass. 208, 107 N.E.2d 195 (1952); Coe v. Coe, 313 Mass. 232, 46 N.E.2d 1017 (1943); Topor v. Topor, 287 Mass. 473, 192 N.E. 52 (1934); Brown v. Brown, 222 Mass. 415, 111 N.E. 42 (1916).

[6] Acts of 1974, c. 565.

observed in *LaVallee,* the factors governing separate support orders in the past have been the same as those governing awards of alimony in divorce cases.[7] The question therefore arises whether the numerous factors set forth in section 34—factors that must considered by a court in awarding alimony[8]—must also be considered by a court in passing upon a separate support petition. There is no bar to such consideration. Indeed, the long-standing recognition of the similarity in function of separate support and alimony suggests such an application of section 34. Furthermore, since identical factors have been considered in the past, it seems logical to continue that tradition and to incorporate into the law of separate support the Legislature's most recent pronouncement of factors relevant in determining alimony.

Of course, even if separate support petitions are to be considered henceforth in light of the additional factors inserted in the alimony provision by the Legislature, the probate court is still without power to divide property on a separate support petition. Section 32 of chapter 209 of the General Laws permits a party to file a complaint for separate support and allows the court to "make further orders relative to the *support* of the wife."[9] Thus, the power of the probate court on a separate support petition is limited to providing for the support of the wife. Such support does not encompass a division of the marital assets. Such a division should only follow a termination of the marital relationship and therefore should not be required in an order of separate support since the marital relationship is still in force.[10]

B. Legislation

§6.10. Divorce: Jurisdiction. Chapter 400 of the Acts of 1975 changed the jurisdictional requirements of section 5 of chapter 208 of the General Laws for obtaining a divorce in Massachusetts. Where the cause of action arose outside of the Commonwealth, jurisdiction now exits to grant a divorce where the plaintiff has lived in the Commonwealth for a period of one year prior to the commencement of the action.[1] Formerly, a two-year period was required.[2] Where the cause of action arose within the Commonwealth, the jurisdictional require-

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[7] See text at note 5 *supra.*

[8] Those factors are:

> 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.

G.L. c. 208, § 34.

[9] G.L. c. 209, § 32 (emphasis added).

[10] *Cf.* G.L. c. 208, § 34, which provides in part: "In addition to or in lieu of an order to pay alimony, the court may assign to either the husband or wife all or any part of the estate of the other."

§ 6.10. [1] Acts of 1975, c. 400, § 10.

[2] G.L. c. 208, § 5, *as amended through* Acts of 1969, c. 162.

ments have been modified to require that the plaintiff be a "domiciliary" of the Commonwealth at the time the action is commenced.[3] Prior to this enactment, section 5 required that the plaintiff be a "resident" of the Commonwealth at the time of the commencement of the action.[4] Thus, where the issue of jurisdiction arises in a case where the cause of action arose within the state, the plaintiff will now have to establish not only physical presence within the Commonwealth but also an intent to maintain a permanent home.[5]

§6.11. Divorce: Orders to Vacate the Marital Home. Chapter 321 of the Acts of 1975, as amended by chapter 400 of the Acts of 1975, modified section 34B of chapter 208 of the General Laws, which relates to orders by the court to vacate the marital home. Section 34B now provides in part:

> Any court having jurisdiction of actions for divorce, or for nullity of marriage or of separate support or maintenance, may, upon commencement of such action and during the pendency thereof, order the husband or wife to vacate forthwith the marital home for a period of time not exceeding ninety days, and upon further motion for such additional certain period of time, as the court deems necessary or appropriate if the court finds, after a hearing, that the health, safety or welfare of the moving party or any minor children residing with the parties would be endangered or substantially impaired by a failure to enter such an order.[1]

This modification enlarges, from sixty to ninety days, the initial time period for which a spouse can be ordered to vacate the marital home.[2] The provision also allows the court, upon a subsequent motion, to extend the order for such a period as the court deems necessary.[3] In the prior enactment, there was no such provision for extending the initial sixty-day period.[4]

Chapter 400 also added a new provision to section 34B, following the provision quoted *supra,* which authorizes temporary orders to vacate made without notice:

> If the moving party demonstrates a substantial likelihood of immediate danger to his or her health, safety or welfare or to that of such minor children from the opposing party, the court may enter a temporary order without notice, and shall immediately

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[3] Acts of 1975, c. 400, § 10.
[4] G.L. c. 208, § 5, *as amended through* Acts of 1969, c. 162.
[5] *See* Shaw v. Shaw, 98 Mass. 158, 160 (1867).

§ 6.11. [1] Acts of 1975, c. 400, § 35.
[2] *See* Acts of 1970, c. 472, *as amended,* G.L. c. 208, § 34B.
[3] Acts of 1975, c. 400, § 35.
[4] Acts of 1970, c. 472, *as amended,* G.L. c. 208, § 34B.

thereafter notify said opposing party and give him or her an opportunity to be heard as soon as possible but not later than five days after such order is entered on the question of continuing such temporary order. The court may issue an order to vacate although the opposing party does not reside in the marital home at the time of its issuance, or if the moving party has left such home and has not returned there because of fear for his or her safety or for that of any minor children.[5]

The prior statute required that the spouse be given at least three-days' notice of the hearing.[6]

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[5] Acts of 1975, c. 400, § 35.
[6] Acts of 1970, c. 472, *as amended,* G.L. c. 208, § 34B.