Boston Bar Association

Fall 2010

Family Law Section

Fall 2010 **Newsletter**

A PUBLICATION OF THE BOSTON BAR ASSOCIATION FAMILY LAW SECTION

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Upcoming Events

Insight to Understanding Tax Returns and Financial Statements in Domestic Relations Cases

Tuesday, December 14, 2010 5:30 PM

This program is designed to provide attorneys with useful tools and basic knowledge of how to read, interpret and understand tax returns and financial statements. We will walk through a corporate tax return, and explain differences and similarities of tax returns and financial statements. We will incorporate and discuss terms such as distributions, pass-through entities, dividends, and depreciation. This program will provide an overview of different type of business entities and various types of financial statements.

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Panelists:
Marc Bello, Edelstein & Company LLP

Resources

Legal Advocacy & Resource Center, Inc. (LARC) a special project of the Boston Bar Foundation with additional financial support provided by the Massachusetts Bar Foundation.

The LARC Intake Update is a monthly newsletter that lists current intake information for major legal services programs throughout the state of Massachusetts. The first section lists general civil legal programs, and the second section lists programs that handle specific legal topics.

A link to this newsletter can be found here: http://www.bostonbar.org/sc/fl/Intake_Update_May_2010.pdf.

Past Events

September 14, 2010: Family Law Section Welcoming Reception
Help us kick off the new 2010-2011 year! Bring a friend along to enjoy some light refreshments, share some new ideas, join the BBA Family Law Section, and explore new ways you can become more involved!

October 7, 2010: Representation of Transgender Clients Across Practice Areas
You are about to meet with a transgender client for the first time. Could you answer the following questions?

What sorts of challenges has this person faced, and how will they shape the way you interact? What preconceptions might you be bringing with you, consciously or unconsciously? How will the client's gender identity or expression affect the case? Is his or her transgender status even relevant? If so, how is it relevant, and what questions should you ask? How do you decide?

These are just some of the issues that will be discussed when you attend this workshop and take an important step towards becoming a sensitive and effective advocate for transgender people.

October 12, 2010: When the Criminal Justice System and Family Law Intersect: Strategies for Representing "Alleged" Perpetrators and "Alleged" Victims
Domestic relations attorneys often have a myopic view on how to handle an incident giving rise to a 209A Order and a criminal charge. Prosecutors and defense attorneys approach the same situation from a very different perspective. This panel, comprised of a defense attorney, a former prosecutor, a former GBLS staff attorney specializing in domestic violence and an experienced family law attorney, will present options and strategies for representing either the "alleged" perpetrator or the "alleged" victim. The panel will be moderated by an experienced family law attorney who has had opportunity to represent parties on both sides of this issue in domestic relations cases.

October 20, 2010: CLE - Advanced Topics in Asylum Law: Standards and Recent Trades for Particular Social Group
The Board of Immigration Appeals has defined particular social group as a group that shares "a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership . . . [I]t must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." Matter of Acosta, 19 I&N Dec. 211 (BIA 1985).

The case law that has developed around the question of what actually constitutes a "particular social group" for asylum purposes, as the definition suggests, is complex, varied, and largely driven

Past Events (cont.)

by the specific facts of a given case. Determinations of whether or not the social group, as defined by the asylum applicant, exists frequently turn on its recognizability or social visibility. Some emerging trends in the law are attempts to use the concept of social group to establish a basis for asylum in the areas of persecution based on gender or sexual orientation, domestic violence as persecution, and persecution based on refusal to participate in gang activities.

After this seminar, attendees will know more about defining membership in a particular social group, determining when membership in a particular social group can be the basis for a claim to asylum and knowing how to present such a claim to adjudicators in a compelling way.

October 21, 2010: CLE - Drafting and Litigating: Prenuptial and Postnuptial Agreements
The Supreme Judicial Court has ruled that postnuptial agreements are enforceable in Massachusetts, but not under the same standard as prenuptial agreements. Hear from the attorneys who represented the parties in the Ansin case at the SJC, who will provide both drafting and litigation pointers for prenuptial and postnuptial agreements. Learn how to protect your client's interest, whether at the time of drafting or when a prenuptial or postnuptial agreement is an issue in a pending divorce / estate action.

After this seminar, attendees will know how to draft an enforceable postnuptial agreement given the guidelines in the Ansin decision, as well as receive a refresher on prenuptial agreements. Learn how to challenge prenuptial and postnuptial agreements and get pointers on litigation techniques when prenuptial or postnuptial agreements are challenged.

November 9, 2010: Allocating College Education Expenses in Divorced and Divorcing Families
College education expenses are often one of the largest expenditures that a family will make. Given the current economic crisis, the burden of financing college education expenses has become increasingly pronounced. This is especially true for families in the midst of a divorce or who are already divorced.

Mark J. Warner of Witmer, Karp, Warner & Ryan LLP will provide practitioners with perspective on how the courts are addressing the issue of college education expenses in these difficult financial times. The program will include a historical analysis of several appellate decisions, such as Mandel v. Mandel, which provides an extensive discussion of the numerous equitable factors to be considered by the trial judge in the exercise of his or her discretion.

Recent Case Law Summaries

By Kristine Ann Cummings

Norma BANNA v. Jeffrey BANNA
Decided Oct. 7, 2010
78 Mass. App. Ct. 34

The plaintiff sought and obtained, in the District Court, an *ex parte* abuse prevention order against her brother pursuant to G.L. c. 209A. Approximately two weeks later, at a hearing at which both parties were present, the District Court judge simply asked the plaintiff whether she wanted to extend the order, to which she responded "yes". The defendant's counsel briefly argued that the allegations set forth in the plaintiff's affidavit, filed at the time the *ex parte* order entered, were insufficient to sustain a 209A. The judge thereafter extended the order for one year.

The order was vacated on appeal, as the Appeals Court noted that to extend an abuse prevention order, a plaintiff must demonstrate a reasonable fear of imminent serious physical harm at the time the extension is sought. The Appeals Court found that the District Court judge failed to ascertain the current state of affairs at the time of the hearing, and that asking the plaintiff whether she wanted to extend the order did not constitute a basis on which the judge could determine whether the extension of the restraining order should be granted.

Natasha CORMIER v. Jonathan C. QUIST
Decided September 30, 2010
77 Mass. App. Ct. 914

This is a case involving never married parents. Soon after the mother learned she was pregnant in 2002, she informed the defendant, Jonathan Quist, that she believed him to be the biological father. Subsequently, she told the defendant that Michael Boulay was the father. The mother and Boulay became engaged to be married, and when the child was born, in July, 2003, signed his birth certificate as his parents, giving the child the surname of "Boulay." The engagement between the mother and Boulay ended in 2004. A paternity test excluded Boulay as the child's father.

Thereafter, the mother filed a complaint to establish paternity against Quist and he was adjudicated the biological father. The parties both filed petitions to change the child's surname from Boulay; the father sought to change it to Quist while the mother sought to change it to Cormier.

The parties entered into an agreement for judgment on the mother's complaint for paternity which provided for the mother to have sole legal and physical custody of the child. The agreement failed to address which party would be entitled to claim the child as a dependent for tax purposes.

A trial was held on the parties' respective petitions to change the child's name, after which the judge dismissed the mother's petition and entered a decree on the father's petition changing the child's surname to "Cormier-Quist," a name sought by neither party.

After judgment entered on the complaint for paternity, the father moved to amend the judgment seeking to claim the child as a dependent on the grounds that he provided more than fifty percent of the child's support. The probate judge allowed the father's motion in part and ordered that the parties each be entitled to claim the child as a tax dependent in alternate years.

The mother thereafter appealed the probate court order allowing, in part, the father's motion to amend the judgment of paternity; the decree

on the petition of Jonathan C. Quist (father) changing the name of the parties' son; and judgment dismissing the mother's change of name petition. The Appeals Court reversed and remanded the order, decree and judgment.

With respect to the tax dependency issue, the Appeals Court held that the procedural rules governing motions to amend, namely, Mass. R.Dom.Rel.P. 52(b) and Mass.R.Dom.Rel.P. 59, contemplate amendment of a judgment entered after trial, not pursuant to an agreement of the parties. As such, it was an abuse of discretion to amend the judgment, and the father's claim that he was entitled to the deduction must be properly addressed in the context of a complaint for modification.

With respect to the issue of the child's surname, the Appeals Court held that the 'best interests' of the child standard is applicable to controversies concerning the surnames of children. The court noted that when parents are unable to resolve differences, the "allocation of custodial responsibility" is a factor to be considered by the court in allocating significant life decision-making responsibility regarding the child. The court held that the probate judge's conclusion that it was in the child's best interests to change his surname to Cormier-Quist, a hyphenated name neither party sought, was without basis in the evidence, and did not adequately consider the mother's responsibility as custodian. The judge's decision therefore could not stand and the order was remanded for further proceedings consistent with the opinion.

Linda Marie LOEBEL v. Andrew J. LOEBEL
Decided Sept. 20, 2010
77 Mass. App. Ct. 740

The primary issue at hand in this case involved whether a probate court judge abused his discretion in denying the wife the opportunity to present additional evidence regarding child custody on remand.

After a marriage of two years during which one child was born, the wife, who was pregnant with the parties' second child at the time, filed a complaint for divorce and was temporarily granted sole legal and physical custody of the children. After a brief reconciliation, the wife obtained an abuse prevention order pursuant to G.L. c. 209A which was extended three times by the probate judge during the pendency of the proceedings. After a two day trial, the probate judge entered a judgment of divorce *nisi* and awarded sole legal and physical custody to the husband.

The portion of the judgment changing custody was stayed by a single justice of the Appeals Court and the Court, pursuant to Appeals Court rule 1:28, thereafter vacated and remanded the custody order for "further proceedings," concluding that it was "not entirely clear from the findings how the judge balanced the positive and negative findings of both the mother and father in determining the best interests of the children."

After the case was remanded, the probate judge refused the wife's request to expand the record to provide evidence of what had occurred during the intervening one and one-half years since the trial. The judge further denied, without explanation, the wife's motion to relocate to Franklin, despite the fact that the town was closer to the husband and his parents than her current residence.

The wife thereafter filed a complaint for modification, listing eight changes in circumstances, and seeking joint legal and physical custody. The judge issued an amended judgment of divorce *nisi* and additional findings to support the sole legal and physical custody award to the husband; the "additional findings" consisted solely of facts from the original Guardian *ad litem's* report (though two and one-half years had passed since the original investigation). The judge further allowed the husband's motion to dismiss the complaint for

modification on the grounds that, at the time the complaint for modification was filed, the original judgment had been vacated by the Appeals Court; thus, there was no outstanding judgment to modify.

On appeal, the wife argued that the denial of her motion to expand the record, and the affirmation of the award of custody to the husband, was an abuse of discretion. Additionally, she argued that the judge's dismissal of her complaint for modification absent an evidentiary hearing was erroneous. A single justice of the Appeals Court denied her second request to stay the custody order.

With respect to the issue of child custody, the Appeals Court found that it was an abuse of discretion to deny the wife the opportunity to present new evidence on remand in order for the judge to address adequately the best interests of the children two years after the original order. Although the Court did not explicitly order a new hearing, the judge was charged with assessing the best interests of the children, and in order to do so, he had the responsibility "to consider the widest range of permissible evidence" available at the time he was making the renewed determination.

Further, despite repeatedly extending an abuse prevention order against the husband, the judge reported in his findings in support of the divorce judgment that the wife's reports of abuse were not credible. In addition, both the GAL's recommendations and the judge's supplemental findings referred to the need for psychological evaluations for both parents, yet nothing in the judge's findings indicated whether these evaluations were performed or what their results were. The contradictory findings relating to the presence of domestic violence and what, if any, affect it had on the children also supported the Court's reversal of the custody order and remand for an evidentiary hearing.

The Appeals Court thereby vacated the custody order and remanded same for a new hearing, focusing on the children's then-current best interests. Pending such further proceedings, custody was to remain with the husband, subject to the current visitation schedule.

With respect to the complaint for modification, the Appeals Court upheld the dismissal of same as there was no "final judgment" to modify at the time that the modification complaint was filed as it was filed after the Court had vacated the original custody order and before the trial judge issued an amended judgment.

Justice Kantrowitz filed a dissent, arguing that given the wife's complaint for modification and motion to expand the record, the probate judge had to be well aware of what the expanded record would have looked like, and was within his discretion to refuse to reopen the evidence, absent instructions from the Appeals Court to do otherwise.

In Re ADOPTION OF MARIANO
Decided Sept. 14, 2010
77 Mass. App. Ct. 656

While their divorce action remained pending, the wife petitioned for a single parent adoption of the parties' infant son and the husband executed an adoption surrender form for submission with the wife's petition. The parties resided together for eight months prior to their separation, and each resided with their respective parents at the time of the petition. At the time of the petition, the husband was twenty-three years old and unemployed and the wife twenty-four years old and employed as a hairdresser. They had a strained relationship and the husband did not have any substantial relationship with the child. If the wife's petition were allowed, the husband would relinquish all parental rights and duties towards their infant son and the wife would assume the role of sole parent.

Following an evidentiary hearing, the probate judge dismissed the wife's petition, observing that the best interests of the child, and not the

wishes of the parents, determine adoption. He further concluded that in this case, the preservation of a connection between the child and his father served the best interests of the child and maintained a link to his biological identity. The wife appealed on three grounds: (1) that the judge incorrectly calculated the best interests of the child because no relationship linked him to his father and a successful relationship bound him to his mother; (2) that the father's intelligent and voluntary surrender deserved implementation; and (3) that the judge's reliance upon the child's long-term interests in a relationship with his biological father lacked proper evidentiary support. The husband joined in submission of the wife's brief.

On appeal, the Appeals Court held that granting the petition was not in the child's financial best interests; that granting the petition was not in the child's best interests in terms of his filial ties; and that the argument that the father's choice was deliberate was immaterial. The Court opined that the present case illustrated a firm principle in Massachusetts family law that "[i]n negotiation of their disengagement, divorcing parents may not bargain away the best interests of their children in general, and the children's right to support, financial or otherwise, from either one of them in particular."

Patricia Marie ALTOMARE v. John Nicholas ALTOMARE
Decided Sept. 8, 2010
77 Mass. App. Ct. 601

After a twenty-year marriage that produced three children, the wife filed a complaint for divorce. The wife also filed a pretrial motion seeking permission to move with the children from West Boylston, Massachusetts to Scituate, Massachusetts, a distance of approximately 75 miles. The wife's primary reason for seeking the removal was to avoid the frequent (weekly) and painful encounters with the woman with whom her husband had been having an affair, and that moving to Scituate would provide her a support network which could help restore her emotional health.

The probate judge applied G.L. c. 208 § 30, governing removal, to the wife's petition and denied her request to relocate at a trial solely addressing custody matters. The probate judge found, in sum, that the wife's goal of avoiding contact with her husband's lover was not a "real advantage" to her where she had no particular personal, family or professional roots in Scituate (despite the fact that individuals lived there who would provide the wife emotional and child support); that relocation would negatively affect the children's relationships with their friends and paternal relatives, and that relocation would significantly disrupt the husband's visitation rights. Approximately eight months later, the probate judge entered a judgment on all divorce matters, awarding the parties shared legal and physical custody, ordering that the children reside with the wife subject to visitation by the husband "at reasonable times" and ordering the husband to pay to the wife child support and alimony. The judge divided the marital estate equally.

The wife appealed the denial of her request to move with the parties' children to another part of the Commonwealth and challenged the equal distribution of the marital estate in the judgment, as well as the award of "shared legal and physical custody" of the children.

The Appeals Court vacated and remand the portions of the judgment regarding relocation, but affirmed the distribution of the marital estate.

With respect to the relocation issue, the Court found that as a preliminary matter, out-of-state considerations informing G.L. c. 208, § 30 also apply to situations such as the present case in that the relocation would evidently involve significant disruption of the noncustodial parent's visitation rights.

The court held that although the judge characterized the custody arrangement as "shared legal and physical custody," the

substance of the order placed the children under the primary responsibility of the wife, and as a functional matter the wife had "unquestionably been more of a traditional 'custodian' in terms of the supervision of the children and all that entails". Therefore, the Appeals Court concluded that the wife had sole physical custody.

However, the Appeals Court noted that because the probate judge found that the wife and husband "shared" physical custody, he had erroneously applied the "best interests of the child" standard (as opposed to the "real advantage" standard applicable to cases where one parent has primary physical custody) in denying the wife's petition to relocate within the Commonwealth.

The Court further held that as a matter of law, the wife's request to relocate in order to avoid painful emotional encounters and develop emotional support was a "real advantage" to her, and the probate judge's findings to the contrary were erroneous. As such, the Court held that it "cannot conclude that this erroneous treatment did not influence [the judge's] findings regarding the children's best interest", and that the probate judge's findings "reflect 'a Mason-like approach to removal,' to the diminution of 'the mother's [effective] role as sole physical custodian.'" Accordingly, the Appeals Court ordered that the portion of the judgment relevant to relocation be remanded for a redetermination of the best interests of the children.

With respect to the property division issues, the wife argued that the probate judge erred in failing to consider cash distributions from her family as contributions to the marital estate and that he abused his discretion by giving the husband a disproportionate amount of the marital estate. The Appeals Court held that the wife's claims regarding her family's contributions were not proven and that pursuant to G.L. c. 208, § 34, the judge acted within his discretion in dividing the marital estate, including premarital assets, equally. For the foregoing reasons, the provisions of the judgment relating to the division of assets were affirmed, but the provisions relating to custody and visitation, as well as the order on the wife's request for relocation, were remanded for further proceedings.

Anna KATZMAN v. Timothy HEALY
Decided Sept. 7, 2010
77 Mass. App. Ct. 589

This is a modification action involving issues of removal as well as child support. At the time of divorce, the parties agreed to share joint legal custody of their two children and for the mother to retain sole physical custody and act as the primary child care provider. The children were to be with the mother except for alternating weekends and dinner-type visits on Tuesday and Thursday nights. The father, who earned $150,000 per year, was to pay the mother the sum of $2,903.33 per month as child support; said amount was based upon the father's weekly income at the time, "exclusive of bonuses," as set forth in his financial statement. The separation agreement further provided, "[i]n the event that he receives a cash bonus during any year then he shall pay to the wife within 45 days from his receipt of said bonus a sum equal to 20% of the net bonus amount as additional child support." The mother was employed as a clinical nurse specialist earning $42,000 per year.

Approximately one year after the divorce, the mother filed a modification complaint seeking an increase in child support as the father's base salary had increased to $325,000 per year. The father filed a cross-complaint that sought an increase in parenting time. Several months thereafter, the mother amended her complaint to request permission to relocate with the children to New York or Connecticut in order to reside with her new spouse, whom she married thereafter and shortly prior to the trial, and with whom she was expecting a child. The father had remarried and had a child with his second wife by the time of trial. A Guardian *ad Litem* was appointed to report to the court on the issues of custody, visitation and removal, and recommended

a "5/2" split wherein the children would be with the mother Tuesdays and Wednesdays, with the father Thursdays and Fridays and the parents would alternate weekends. The GAL, as well as the judge, considered this to be a "continuation of approximately equal time with the parents" based upon a scrutiny of the time the children had spent asleep, awake and at school/camp under the prior parenting plan; the GAL focused on the "awake" time to arrive at the conclusion that the prior parenting plan had been "approximately equal".

After a twenty-three day trial, the probate judge adopted the GAL's recommendation regarding parenting time, denied the mother's request for removal and ordered that the father's support obligation be increased to $6,028.33 per month.

On appeal, the Appeals Court held that the law does not "neatly divide custodial parenthood into waking, sleeping and schooling categories" and that under the prior arrangement, the mother clearly had primary responsibility for parenting the children. As such, the probate judge erred in transforming the wife's sole physical custody into an unofficial form of joint physical custody in the absence of the requisite findings reflecting substantial and material changed circumstances supported by the evidence. As such, the trial court's decision was reversed.

With respect to the issue of removal, the Appeals Court found that despite the fact that the probate judge expressly cited reliance on the Yannas (real advantage) test, applicable where one parent had sole physical custody of the children, and not the Mason (best interest) test, where physical custody is shared, his actual application of the Yannas test was uncertain, and his handling of the parenting issue casted doubt on his removal analysis.

In sum, the Appeals Court held that although the probate judge properly found that the mother had met the first prong of the real advantage test in that she had a sound and sincere wish to live with her new husband, the child they were expecting together, and her two older children, and further was not seeking to deprive the father of his relationship with the children, there was concern regarding how he analyzed and weighed the respective interests of the mother and the father in evaluating the best interests of the children pursuant to the second part of the inquiry. Namely, the Court found that "the judge's decision, colored in large part by its focus on the children's "full integration" into two parenting relationships he considered essentially equal, seems to have diminished the importance of the mother's role as sole physical custodian." Consequently, the judge's decision appeared actually to apply a Mason-like approach to removal. Given the judge's substantial discounting of the significance of sole legal custody and apparent blurring of the Yannas and Mason tests, the Appeals Court concluded that a remand as to removal was necessary.

With respect to the issue of child support, the Appeals Court found that the probate judge was justified in ordering a modification given the provision in the separation agreement contemplating adjustment in child support, the substantial increase in the father's income since the divorce and the children's entitlement to share in the lifestyle of the parents.

Francesca CERUTTI-O'BRIEN v. Donna-Marie CERUTTI-O'BRIEN
Decided July 1, 2010
77 Mass. App. Ct. 166

This matter involved a question of subject-matter jurisdiction in the context of a same-sex divorce action. At the time of the parties' marriage, the defendant lived in Florida and the plaintiff in Massachusetts. The parties were married in Massachusetts and "lived here" four days after their wedding before moving to Florida, where they purchased a home in both their names. Approximately six months later, the marriage broke down and the plaintiff filed for divorce in Massachusetts, alleging in the complaint that an irretrievable breakdown had occurred in Florida.

She moved back to Massachusetts approximately two months later.

Because the cause for divorce occurred while the parties were living in Florida, the plaintiff must either have been "continuously domiciled" in Massachusetts for at least one year prior to the commencement of the action, or, alternately, determined to be domiciled in Massachusetts at the time the marriage broke down, in order to satisfy the jurisdictional requirements of § 4 or § 5 of G.L. c. 208 at the time she filed the complaint for divorce.[1]

At the time of trial, the defendant, appearing *pro se,* called into question the court's ability to hear the case, raising the issue of the plaintiff's domicil at the time she filed the complaint. The judge treated the matter as an oral motion to dismiss for lack of subject matter jurisdiction and subsequently held an evidentiary hearing on the issue.
The judge determined that the credible evidence supported a finding that the plaintiff changed her domicil to Florida when the parties' moved there after the divorce, thus she could neither be considered domiciled in Massachusetts for one year prior to filing the complaint or domiciled in Massachusetts at the time the marriage broke down. The probate judge thus dismissed the plaintiff's complaint. The plaintiff filed a second complaint thereafter which was likewise subsequently dismissed.

On appeal, the Appeals Court affirmed the trial court judgments, holding that the plaintiff's domicil was Florida, not Massachusetts. The majority opinion took note of the fact that at the outset, the burden of establishing domicil in order to obtain a divorce in Massachusetts is on the plaintiff, and in the matter at hand, the plaintiff failed to rebut the presumption that when she moved to Florida and established a marital residence with the defendant, her domicil changed to Florida. The court relied heavily on the general rule that for the purpose of jurisdiction in cases of divorce, domicil is presumed to follow the marital residence. Although the trial court judgments were affirmed, the court took note of the fact that by the time the decision entered, the plaintiff had satisfied the one-year residency requirement, having reestablished her domicil in Massachusetts, and could at that time properly file a divorce complaint under G.L. c. 208 § 5.

In her dissent, Justice Duffly argued that at the time of the parties' marriage, it was not disputed that the plaintiff had been a long-time domiciliary of the Commonwealth, and that once domicile is established, it is presumed to continue, with the burden of showing a change placed upon the party who asserts it. She further argued that some of the majority's findings were not supported by the evidence and that findings that were supported did not establish that the plaintiff changed her domicile from Massachusetts to Florida.

Gymetta BRANTLEY v. HAMPDEN DIVISION OF THE PROBATE AND FAMILY COURT DEPARTMENT & others
Decided June 30, 2010
457 Mass. 172

In an opinion issued June 30, 2010, Chief Justice Margaret Marshall stated as follows:
"For many years the judges of the Hampden Division of the probate and Family Court Department (Hampden) have employed certain "protocols" or "procedures" (the terms are used by that court) in child-related litigation that are intended to assist them in making decisions concerning a child's best interests, often in emergency circumstances.

1 General Laws c. 208, § 4 provides that "[a] divorce shall not, except as provided in [G.L. c. 208, § 5], be adjudged if the parties have never lived together as husband and wife in this commonwealth; nor for a cause which occurred in another jurisdiction, unless before such cause occurred the parties had lived together ... in this commonwealth, and one of them lived in this commonwealth at the time when the cause occurred." General Laws c. 208, § 5, enumerates certain exceptions to § 4, providing that "[i]f the plaintiff has lived in this commonwealth for one year last preceding the commencement of the action if the cause occurred without the commonwealth, or if the plaintiff is domiciled within the commonwealth at the time of the commencement of the action and the cause occurred within the commonwealth, a divorce may be adjudged for any cause allowed by law, unless it appears that the plaintiff has removed into this commonwealth for the purpose of obtaining a divorce."

Pursuant to these protocols, judges, with the assistance of probation officers assigned to the court, orally obtain confidential information about litigants from the Department of Children and Families (department) that judges are permitted to consider as substantive evidence, even in cases where the parties did not authorize the release of that material. We were informed at oral argument that Hampden is the only division of the probate and Family Court to employ these "protocols," which are at the core of the petitioner's appeal from portions of the judgment of a single justice in the county court.

Two petitioners filed an amended complaint in the county court seeking relief under G.L. c. 211, § 3, as well as declaratory and injunctive relief, to halt the respondents' use of the protocols on the ground that they infringed the petitioners' rights of due process under the Federal and Massachusetts Constitutions. They further asserted that the implementation of the protocols violated the statutory duties of the department under G.L. c. 119, §§ 51E and 51F, and the Fair Information Practices Act, G.L. c. 66A. The petitioners also sought class certification. After the case was filed, Hampden substantively revised its protocols several times.

The single justice concluded that the protocols employed in the petitioners' cases deprived them of an adequate opportunity to rebut hearsay adverse allegations against them, in violation of their rights of due process. He ordered that Hampden "make available to litigants at ex parte hearings the reports of the probation officers containing information obtained orally from [the department] and presented to the judge, and afford those same litigants the opportunity to rebut such information." The respondents have not appealed from this aspect of the single justice's decision, and it is not before us.

The single justice also concluded that the petitioners lacked standing to challenge the protocols in effect after the date they filed their complaint in the county court; declined to certify a class; and ordered entry of a declaratory judgment that the department did not violate any of its statutory duties or regulations in acting pursuant to the protocols. The petitioner appeals from the judgment on the issues of standing, class certification, and the statutory claims. She seeks declaratory and injunctive relief on the merits of the revised protocols.

We agree with the single justice that the petitioner has not demonstrated that she has been or will be harmed by the current protocols and affirm his ruling on standing. We also affirm the judgment of the single justice denying class certification and declaring the evidence insufficient to show that the department violated any of its statutory obligations or its regulations. Turning to the protocols currently in effect, we recognize the often daunting task of probate and Family Court judges as they attempt to discern a child's best interests when parents are engaged in adversary litigation. We recognize that confidential department information concerning a parent or a family may be highly relevant in a legal dispute over a child's care or custody. Balancing the best interests of children with the rights of their parents or between adversary parents is always a delicate undertaking, not amenable to the drawing of bright lines. When these interests are balanced in the present case, certain aspects of Hampden's unique protocols do not withstand scrutiny. Specifically, we are concerned that the current protocols systemically may deny litigants in Hampden a meaningful opportunity to be heard on matters concerning the care and custody of their children. Because in the singular circumstances of this case dismissal would work a manifest injustice to nonparties, we exercise our broad discretion pursuant to G.L. c. 211, § 3, to direct Hampden to stay application of its current protocols or any revisions to those protocols. The Chief Justice of the probate and Family Court may, if she chooses, promulgate a department-wide standing order concerning use of confidential department information to replace the current protocols in accordance with the Procedure Regulating the

Issuance of Standing Orders, Mass. Ann. Laws, Rules of the Trial Court 1677 (LexisNexis 2008-2009), keeping in mind the concerns we discuss later. Because of the fundamental issues involved, any such proposed department-wide standing order shall be submitted to the Supreme Judicial Court rules committee for approval before implementation. (Brantley v. Hampden Div. of probate & Family Court Dept., 457 Mass. 172, 172-75, (2010))

Tammaro v. O'Brien, 76 Mass.App.Ct. 254 (2010)

Within days of the entry of a judgment of divorce nisi, the mother filed a complaint for modification in which she sought to remove the parties' four minor children to New Hampshire. The trial court granted the requested relief and the judgment was affirmed on appeal.

At the time of divorce, the parties entered into a separation agreement by which they agreed to share legal custody of their four minor children and for the mother to have physical custody; said agreement, which was incorporated into a judgment of divorce nisi dated June 15, 2005, also set forth a comprehensive parenting plan.

Within days of entry of said judgment, the mother, on June 21, 2005, filed a complaint for modification seeking permission to remove the children from Massachusetts to New Hampshire and for the court to modify the parenting plan. Although the parties resided in Brockton, Massachusetts during the divorce, the mother was offered a lucrative employment position in Methuen, Massachusetts (approximately ninety minutes from Brockton) just prior to the date the parties signed the agreement; the proposed move to Derry, New Hampshire would place the mother substantially closer to her workplace.

At trial, the judge applied the "real advantage" test and found that the mother had demonstrated good, sincere reasons for the proposed move such as to constitute a "real advantage" to her. Specifically, the judge found that the move offered a financial and emotional benefit to the mother where it would reduce her commuting time to her new place of employment, reduce her stress, enable her to plan her work time more efficiently and permit her to spend more time with the children as well as be more easily assessable to them. Additionally, the move would allow the mother to obtain suitable housing within her price range.

Although the father asserted that the mother's request for removal lacked sincerity and good faith in that she "lied" to the court and him when she entered into a divorce agreement with which she never intended to comply, the judge found that the parties' parenting plan was "destined to fail from the outset" because of the mother's pending employment opportunity and the father's business travel schedule, stating that the father "knew there was a change in the offing... and should not have been surprised by the mother's actions after the agreement was signed". The judge further rejected the father's argument that the mother was motivated by a desire to limit his parenting time.

Having concluded that the mother had established a good reason for the proposed move, the trial judge applied prong two of the "real advantage" test in order to determine whether the removal was in the best interests of the children. The judge considered collectively the interests of the father, the mother and the children, including "the effect of the proposed move on the emotional, physical, and developmental needs of the children, including whether the quality of the children's lives may be improved by the change...". Specifically, the court found that in addition to the many benefits provided to the mother by the move that would also flow to the children, such as the benefit of having the mother significantly closer to their home and school, the move would also allow the children to reside in a new home in a quiet neighborhood close to a new elementary school.

The Appeals Court decision also noted that the trial judge took into account continuing visitation by the father with the children.

In affirming the lower court's decision, the Appeals Court concluded that the trial court's findings "amply support its judgment" permitting the mother to remove the children from the Commonwealth to New Hampshire.

Zizza v. Zizza 456 Mass. 401 (March 30, 2010)
In December 2008, nearly ten years after the parties' divorce, the former wife, on behalf of herself and her two minor children, filed an action in the Superior Court against her former husband, his employer, and the employer's principal, alleging, *inter alia*, the breach of an agreement between the former spouses regarding child support, and seeking payment of child support arrearages and specific performance of the contract. Specifically, the former wife's complaint alleged that the former husband had agreed, in 1999, to pay the amount of $262 per week in child support, "and would have such taken from his paycheck by his employer and sent directly to [the former wife]"; although the husband and his employer had complied with the agreement since 1999, no weekly paycheck deduction had occurred since September 2008, nor had the father made any regular child support payments.

The employer and the former husband each filed motions to dismiss under, *inter alia*, Rule 12(b)(10) of the Massachusetts Rules of Civil Procedure for failure to satisfy the amount in controversy required to proceed in the Superior Court. After hearing, the Superior Court judge ordered the complaint dismissed against all defendants pursuant to Mass. R. Civ. P. 12(b)(10) for failure to satisfy an amount in controversy requirement.

The former wife appealed the dismissal to a single justice of the Appeals Court, who vacated the order of dismissal but reported the case to a panel of the Appeals Court. The Supreme Judicial Court transferred the case from the Appeals Court on its own motion.

In its decision, the Supreme Judicial Court stated that it agreed with the Superior Court judge and the single justice of the Appeals Court that any damages awarded to the former wife were not likely to exceed $25,000 as possible unpaid amounts of child support in the future may not currently be considered as part of the plaintiff's damages. Citing the case of *Larson v. Larson*, 30 Mass.App.Ct. 418, 426, (1991), the Court noted that ("later violations [by defendant of monthly payment obligations pursuant to divorce agreement] were not and could not have been raised in the original action because the times for payment had not yet occurred or given rise to any cause of action in favor of [plaintiff]"). The Court further held that although the former wife's equity claim fell squarely within the Superior Court's broad equity jurisdiction and the judge had the power to exercise ancillary jurisdiction over damages claims for less than the statutory threshold amount, the court had discretion in determining whether or not to retain the action and exercise its ancillary jurisdiction as an alternative to dismissing the action for refiling in the District Court.

In the case at hand, the Supreme Judicial Court held that the Superior Court judge had acted within his discretion in declining to retain the action as against the former husband's employer and employer's principal as defendants, concluding that the action was one where the contract claim for damages was paramount, the amount at issue small, and that although he might exercise his discretion to retain the action in the Superior Court, "the District Court is better equipped than the Superior Court to handle such a matter on a time-and-cost-efficient basis." Although the former husband's motion to dismiss under rule 12(b)(10) was not timely, the SJC further held that with respect to the action against the former husband as the defendant, the Superior Court judge could properly raise

the issue of the damage limitation amount in connection with a civil action that includes a claim for money damages, whether or not an equitable claim is included, even in the absence of a timely motion to dismiss on such ground.

The order of the single justice of the Appeals Court was reversed, and the matter remanded to the Appeals Court for entry of an order affirming the Superior Court judgment of dismissal.

Atkinson v. Garvin, 76 Mass App Ct. 1107 (January 14, 2010)

Court may order that custody be given to a person who is not the biological parent only in two situations: either when it is in the child's best interests *and* the child's surviving parent consents; or when it is the child's best interests *and* the parents or surviving parent is determined to be unfit. In this case the father's complaint to establish paternity came six years after the birth of the child but he was found to be fully fit.

Mikels v. Mikels, 76 Mass. App. Ct. 1109 (January 26, 2010)

Denial of husband's request for reduction in undifferentiated alimony and child support obligations was not an abuse of discretion. For purposes of separation agreement, husband deemed to have an annual income of $400,000.00. Agreement explicitly said that "by reason of adjustments solely for the purpose of resolving disagreements between the parties in arriving at a settlement of this matter, an income figure of $400,000 annually for the husband has been utilized. When he filed complaint for modification, his income was $347,000. At time of divorce, his income on his financial statement was $348,000. Thus, no material change in circumstances. Trial judge rejected husband's argument that he should have established the theoretical $400,000 annual income specified in the separation agreement as the baseline of his income for purposes of the modification. Nothing in the separation agreement indicated any intention that the compromise figure of $400,000 had any utility following the divorce; not an abuse of discretion to not attribute any continuing effect as a baseline for modification purposes.

Korman v. Korman, 76 Mass. App. Ct. 1112 (February 11, 2010)

Wife appealed judgment of divorce claiming that the judgment was wrong and excessive and that she should recover a share of the equity in the home because she made a significant investment of time and financial resources into the marital enterprise. Trial judge properly considered the Section 34 factors. Husband purchased the home six years before the marriage. Affirmed.

Sachdev v. Khanna, 76 Mass. App. Ct. 1113 (February 17, 2010)

Husband appealed judgment of divorce. Husband and wife were married in India in 2004 and subsequently moved to Massachusetts. Their son was born in 2006. Husband earned $95,000 a year exclusive of bonuses and sent undetermined amounts of money from his earnings to accounts and to family in India. Wife earned 70% of the husband's salary. She was solely responsible for the care of the child and the household. Husband was abusive toward the wife during the marriage. On same day as she filed for divorce, the wife obtained a restraining order against the husband. Three months after the wife filed for divorce, the Husband went to India and did not return. Trial judge granted the wife legal and physical custody of the child and ordered husband to pay $350 per week in child support and arrears were established at $22,475. Judge made property division orders. Husband's argument that the Probate Court lacked jurisdiction because the parties were married in India failed. Husband's claim that he did not have the opportunity to "defend his case" failed because he voluntarily left Massachusetts, chose to remain in India and had the opportunity to be represented by counsel and to participate in proceedings in writing and by phone. Husband's claim that judge erred in denying his motion to reduce support failed because he voluntarily

resigned his job in the U.S., enjoys an upper class lifestyle in India, is working on plans to develop a company, is highly employable and has a $75,000 earning capacity. Husband's suggestion that assets in India were not part of the marital estate failed because the term "estate' encompasses all property to which a party holds title, whenever and however acquired.

Hagenian v. Hagenian, 76 Mass. App. Ct. 1114 (February 24, 2010)

Plaintiff appealed from an Order of the Probate & Family Court judge dismissing an earlier appeal for failure to docket an appeal within ten days pursuant to Mass.R.A.P. 10(a)(1). Plaintiff filed a timely notice of appeal from the judgment but failed to prefect the appeal. Trial records was not assembled until two years after the notice of appeal and plaintiff did not pay the docketing fee within ten days after notice of assembly. Probate and Family Court judge allowed defendant's motion to dismiss for failure to timely docket an appeal. Plaintiff's position on appeal that his neglect in failing to docket the appeal was excusable because a clerk of the Probate and Family Court sent the formal notice of the assembly of the record to the plaintiff's former counsel was unreasonable. Plaintiff should have followed up by docketing the appeal.

D.V. v. W.C., 76 Mass. App. Ct. 1116 (March 3, 2010)

Parties were married in 1977 and had one child in 1977. They were divorced in 1979 on grounds of cruel and abusive treatment by the father. Mother granted custody and father was ordered to pay child support of $50 per week and arrears of $2,750. On June 2, 1982, mother filed a complaint for contempt pro se alleging the father failed to pay any child support. Two attempts at service of the summons failed as the sheriff's office could not locate the father. In 2001, the mother tried unsuccessfully to collect the child support arrears through a private company. In 2006, the father and son made contact with each other after many years. In 2007, the mother filed a new complaint for contempt alleging non payment of support and the father was served. Father filed a motion to dismiss. At the hearing, the Probate and Family Court judge instructed the parties to make additional written submission. In the memorandum of decision, the judge denied the father's motion to dismiss and found him in contempt. Arrears were established at $41,965 plus interest. Father argued on appeal that the judge erred in not holding an evidentiary hearing on the contempt complaint. Argument failed because the father assented to proceeding on written submissions and he did not request an evidentiary hearing until after the issuance of the judgment. Father also argued that mother's delay in bringing the contempt complaint constituted latches. Father's unpaid child support obligation became vested as judgments by operation of law and the defense of latches was not available to him. evidentiary hearing until after the issuance of the judgment. Father also argued that mother's delay in bringing the contempt complaint constituted latches. Father's unpaid child support obligation became vested as judgments by operation of law and the defense of latches was not available to him.

Epstein v. Epstein, 76 Mass. App. Ct. 1121 (March 30, 2010)

Husband appealed judgment of divorce ordering him to pay $900 a week as child support subject to an annual cost of living adjustment, 30% of his gross bonus as additional child support, alimony in the amount of $500 per week subject to a cost of living increase and division of property. Judgment affirmed. Husband's claim of possible future hardship arising from the cost of living increase was unpersuasive in light of the trial judge's findings that he has been able to develop a successful and lucrative law practice that should continue to provide him with a comfortable income. The husband's child support obligations will cease in the near future and a cost of living increase on his modest alimony order will not likely have a significant impact on his lifestyle. Judge did not abuse her

discretion by failing to order that child support be reduced upon emancipation of the older child who will be emancipated three years before the younger child. Husband's own proposed judgment contains no provision for automatic adjustment of child support. Judge did not abuse her discretion in awarding the wife 60% of certain marital assets and 80% of the sale proceeds of the marital home. Judge found that the wife did not stand on equal ground with the husband in terms of her ability to earn income and her education. She had been out of the workforce since 1992. In addition, the judge awarded the husband his law practice which was indicated in her rationale regarding the property awarded to the wife.

King v. King, 76 Mass. App. Ct. 1122 (April 5, 2010)

Post divorce the wife filed an action in the probate and family court to confirm her right to live in the marital home based on a written postdivorce agreement by the parties. Following trial, the judge ruled in wife's favor and the husband appealed. Parties were married for 30 years. They were divorced by agreement with the husband represented by counsel and the wife pro se. Under the agreement the marital home which was the only piece of real estate was given entirely to the husband. In exchange, the husband agreed to pay $6,000 in joint credit card debt. The agreement said the wife waived her interest in the house because the husband owned the land prior to the marriage. The agreement was approved by the judge as fair and reasonable. Wife filed a motion to set aside the division of assets alleging the husband had purchased the property during the marriage and that he had defrauded her into agreeing to give him the house. It was unclear whether the wife's motion was ever heard and judgment entered incorporating the separation agreement. Both parties continued to live in the house after the divorce. They later signed a piece of paper that was notarized agreeing that the husband was giving the wife the downstairs apartment for as long as she wanted. Three years later the husband served a notice to quit on the wife and she brought the action in the probate and family court. After a one day trial, the judge found that consideration in the wife's forbearance of her claim that the separation agreement was fraudulently induced. "Abandonment of a claim that appears well founded, and not frivolous, vexatious, or unlawful, is sufficient consideration for a contract." The appeals court agreed with the wife that the parties' post-divorce agreement regarding the house was free of ambiguity.

Rule 1:28 Decision Case Summaries

By Rosanne Klovee, Esq.

Benoit v. Benoit, 09-P-692 (August 18, 2010)

The husband's increased parenting time for a four year period since the divorce judgment of a three and one-half hour visit every other week was not a material change in circumstances, particularly since the husband failed to demonstrate that his request for equal parenting time with the child was in the child's best interests.

Lambert-Huber v. Huber, 09-P-1793 (August 30, 2010)

In this case, the trial judge found that the wife contributed significantly more to the acquisition, preservation, and appreciation of the marital estate. The wife had worked throughout the marriage, even when she was a student and caring for a newborn. In contrast, the husband was an undependable financial and emotional partner during most of the marriage. The wife was also suffering from health issues which limited her opportunity for future acquisition of assets and future income. The wife was awarded fifty-six percent of the marital estate while the husband was awarded forty-four percent. The judgment was upheld. (Commentary: Unfortunately, the court fell short of referring to the wife as a "super contributor.")

Dunkless v. Ginsberg, 09-P-1194 (August 31, 2010)

At the time of the divorce judgment and at the time of the modification trial, the court properly found that the husband's income from his parents was part of his income for support purposes. The husband had been dependent on his parents' financial contributions for many years and the trial judge did not credit the husband's testimony that his parents' contributions were loans.

Krintzman v. Honig, 09-P-1976 (September 1, 2010)

In this case, the divorce judgment provided that the husband was to receive twenty percent of all distributions the wife would receive in the future from a family trust on an "if, as and when" basis. In the first 1:28 opinion, the Appeals Court found that the "if and when received" method was beyond the scope of judicial discretion and noted that a better course would have been for the judge to award the husband a dollar amount equal to the value of his share of the trust assets. The case was remanded for determination of what the trial court thought the wife would receive as an annual distribution. On remand, the trial judge awarded the husband twenty percent of the value of the trust as of the date of divorce but did not conduct an evidentiary hearing. The case was remanded again because the judge had made no findings as to the present value of those distributions measured at the time of trial. The appeals court stated that an evidentiary hearing was necessary to determine, based on expert testimony, the present value of the husband's share of the distributions at the time of the initial divorce trial.

MacLeod v. Gugger, 09-P-1675 (September 14, 2010)

The trial judge did not abuse his discretion when he valued the husband's 401K plan on the date of the judgment of divorce nisi and not the judgment absolute. By the date of the judgment absolute, the husband's 401K plan had decreased by over $45,000.00 and had further declined by an additional

$6,000.00 by the time the QDRO was signed by the judge. This resulted in the wife receiving fifty percent of the high value of the plan on the date of judgment nisi but eighty-two percent of the value of the plan at the time of the judgment absolute. The Husband was left with only eighteen percent of the value as of the date of the judgment absolute.

Long v. Long, 09-P-1280 (September 21, 2010)

Husband's claim that the wife was precluded from recovering uninsured dental and educational expenses because she did not raise them as they occurred lacked merit due to language in the parties' separation agreement that "failure of the Husband or the Wife to insist in any instance upon the strict performance of any of the terms hereof shall not be construed as a waiver of such term or terms in the future, and such terms shall nevertheless continue in full force and effect." With regard to an increase in the husband's pension payments post divorce and due to renegotiation of contract agreements between the husband's employer and his union, the trial judge did not err in finding that the wife was entitled to an adjustment in the amount she received from the husband's pension to reflect its increase. The separation agreement was ambiguous as to the parties' intent and had two conflicting provisions as to the addition of future cost of living adjustments.

The Lawyer As Abider

By John A. Fiske, Esq.

The lawyer whose client is in mediation is an advisor, not a zealous advocate. To quote the rule,

> "As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." Preamble, A Lawyer's Responsibilities, SJC Rule 3:07 Professional Conduct.

This short article arises from several recent encounters with experienced family lawyers who are understandably confused and upset by trying to advocate zealously for their client in mediation. The lawyer has difficulty allowing the client to do what the clients thinks is best for him or her under the circumstances. The lawyer may even tell the client to stop talking to the other party or to the mediator for fear that the client may agree to something the lawyer does not think is appropriate. Some of these lawyers tell me they fear accusations of malpractice if they are not a zealous advocate. I tell them, "Read the rule."

The rule is even more helpful in addressing the circumstance when the client, having been fully informed of his legal rights and obligations, and understanding their practical implications, tells his lawyer to accept a settlement offer which the lawyer feels is woefully inadequate and certainly less than what a court is likely to do under established applications of existing law and well short of what the lawyer has been consistently demanding on behalf of his client. Guess what: it's not the lawyer's decision. I tell them, "Read the rule."

> "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." Rule 1.2, Scope of Representation, Rule 3:07.

It's hard to be more clear than that. Webster's New International Dictionary Second Edition defines "abide" as, among other things, "to acquiesce in, to conform to, to accept as valid and take the consequences of; as, to abide by a decision."

The lawyer for a client in mediation is in the most difficult position of anyone in the case, torn between gladiator and rubber stamp. For example: lawyers who have carefully analyzed the unanimous opinion and remarkable footnotes of the SJC in their July, 2010 decision in *Ansin v. Craven-Ansin* see many complex criteria for defining what sort of marital agreement between spouses may or may not be enforceable later on. The lawyer needs to make sure the client is informed of the practical implications of signing a proposed marital agreement, and may disagree with what the client insists upon or accepts. Thus many experienced family lawyers make sure they write a letter to the client explaining his or her choices and the recommendation of the lawyer; some lawyers keep a copy of that letter signed by the client to acknowledge receipt and understanding of the advice.

The role of the lawyer is so complex that the American Bar Association is now sponsoring Moot Court competitions in law schools for lawyers in mediation and gives an award annually to the team that best represents their clients in mediation. In addressing this challenge, I hope that lawyers representing clients in mediation can find guidance and comfort by going back to what they do best: when in doubt, read the rule.

John A. Fiske is a partner of Healy, Fiske, Richmond and Matthew, a Cambridge law firm concentrating in family law and mediation.

Long Awaited Guidance on Post Nuptial Agreements in Massachusetts: A Dissection of Ansin v. Craven-Ansin

By Wendy O. Hickey, Esq.

The Massachusetts Family Law bar has been waiting for the answer to whether or not Massachusetts will recognize a post nuptial agreement since 1991 when the SJC left "to another day" the question of whether martial agreements were valid in Massachusetts. *Fogg v. Fogg*, 409 Mass. 531, 532 (1991). Since then, some practitioners have shied away from clients seeking post nuptial or marital agreements out of fear of the unknown and the potential for a malpractice claim.

On July 10, 2010 the SJC upheld the Worcester Probate and Family Court's decision to enforce a marital agreement entered into by Kenneth Ansin and Cheryl Craven-Ansin after both parties petitioned the SJC for direct appellate review. See, *Ansin v. Craven-Ansin*, MA SJC 10-548, July 16, 2010. The decision provided some much needed practical guidance for practitioners while at the same time raising new questions which remain for another day.

The Ansins executed their marital agreement in July, 2004 after nineteen years of marriage. Mr. Ansin requested the marital agreement after the parties experienced a difficult patch in their marriage, mainly for the purpose of protecting his minority interest in family owned and operated real estate in Florida. At first Mrs. Craven-Ansin rejected Mr. Ansin's request and the parties separated for six weeks. However, they continued to talk and Mrs. Craven-Ansin eventually agreed to the marital agreement. Both parties were represented by independent counsel while the agreement was being negotiated. Both parties had the opportunity to and did make changes to the agreement before it was signed. Both parties had free access to the parties' long time financial consultant at RINET during the course of their negotiations. The parties disclosed their assets to each other, albeit the number used by Mr. Ansin for his interest in the Florida property was a mere "placeholder" – a number obtained by asking Mr. Ansin's uncle who managed the property for an approximate value of Mr. Ansin's interest. Although imperfect, this is how the Florida property had been valued for years by the parties and RINET so there was nothing new or fraudulent about their valuation method.

The final product contained recitations of their intent, awareness of their statutory rights, a waiver of those rights, awareness of each other's income and assets, a waiver of the right to make further inquiry into finances, and a statement of mutual satisfaction with the final agreement. The financial provisions included a waiver of the assets by Mrs. Craven-Ansin in exchange for $5 million plus 30% of the increased value in the assets (excluding the FL property) and the right to remain in the marital home for a year at Mr. Ansin's sole expense. After it was signed, the parties resumed working on strengthening their marriage including, among other things, traveling, and marathon training together.

The first bump in the road came a month later when Mr. Ansin told Mrs. Craven-Ansin something which led her to believe the marriage was over. Because of the spousal communication exclusion, Mrs. Craven-Ansin was never permitted to testify about what Mr. Ansin said – something the SJC determined to be harmless error if it was an error. Despite Mrs. Craven-Ansin's claim the marriage continued. The parties purchased, renovated and moved into a new home. Then, in June, 2005 Mr. Ansin moved out at Mrs. Craven-Ansin's request. Finally, in November, 2006, Mr. Ansin filed for divorce and asked the court to enforce their marital agreement.

Mrs. Craven-Ansin did her best to get out of the marital agreement. She argued that, in general such agreements should be declared void as against public policy. She claimed that marital agreements "are 'innately coercive,' 'usually' arise when the marriage is already failing, and may 'encourage' divorce." While the SJC did not find any support for these claims, they made clear that a marital agreement "will always be reviewed by a judge to ensure that coercion or fraud played no part

in its execution." *Ansin v. Craven-Ansin,* p. 3. In determining that Massachusetts should join the majority of states which recognize and permit post-nuptial agreements, the SJC made clear that a number of items must be scrutinized by the trial court prior to enforcing such an agreement. "[A]t a minimum, the court needs to determine whether (1) each party has had an opportunity to obtain separate legal counsel of their own choosing; (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce." *Id*. The SJC held that the party seeking enforcement of the agreement has the burden of proving these factors. *Id*. The court chose not to follow the lead of other states, some of whom chose to increase the burden of proof to a standard of clear and convincing evidence (See, for example, *Matter of Estate of Haber*, 104 Ariz. 79, 88 (1969)).

In a sense, the final factor for determining whether a post-nuptial agreement should be enforced brings us back to the old days of arguing for the enforcement of pre-marital agreements before *DeMatteo*. In *DeMatteo* we saw a shift in the scrutiny of a pre marital agreement from one of fair and reasonable at the time of execution with a second look to see if the agreement remained fair and reasonable at the time of enforcement, to a fair and conscionable standard at the time of enforcement. *DeMatteo v. DeMatteo*, 436 Mass. 18, 27 (2002). In setting the standard of fair and reasonable on execution and fair and reasonable on enforcement, the court rejected the standards proposed by Mr. Ansin.

Mr. Ansin argued the standard for enforcing pre nuptial agreements ought to apply to marital agreements. The problem with that idea is that a marital agreement is an entirely different animal than a pre marital agreement. If the parties to a pre nuptial agreement cannot agree on terms, either party is free to walk away and not get married. With a marital agreement, the parties are already married, the stakes are necessarily higher and, as a result, the parties owe each other statutory obligations born out of their marriage. As soon as a couple marries, they acquire rights under M.G.L. c. 208, §34 – rights that a couple negotiating a pre nuptial do not have – rights that they will have to be made aware of and specifically relinquish in their marital agreement if it is to be enforceable. In this sense, a marital agreement is more akin to a separation agreement. However, the court observed "parties to a marital agreement do not bargain as freely as separating spouses do … because a marital agreement is executed when the parties do not contemplate divorce and when they owe absolute fidelity to each other…" *Ansin v. Craven-Ansin*, p. 4 of 7.

Nevertheless, in evaluating whether a marital agreement is fair and reasonable at the time of divorce, the trial judge can satisfy the inquiry required by the SJC by examining the same factors examined in evaluating a separation agreement. *Id*, p. 5 of 7. So, the trial judge may consider: "(1) the nature and substance of the objecting party's complaint; (2) the financial and property division provisions of the agreement as a whole; (3) the context in which the negotiations took place; (4) the complexity of the issues involved; (5) the background and knowledge of the parties; (6) the experience and ability of counsel; (7) the need for and availability of experts to assist the parties and counsel; and (8) the mandatory and, if the judge deems it appropriate, the discretionary factors set forth in G.L. c. 208, §34." *Dominick v. Dominick*, 18 Mass. App. Ct. 85, 92 (1984). The trial judge in Ansin did just that and found the marital agreement to be fair and reasonable.

In upholding the trial court, the SJC set forth some clear and specific guidelines which will help practitioners navigate their way through drafting enforceable marital agreements and in litigating poorly drafted agreements. They were even helpful enough to suggest that if there had been a material change in circumstances between the time a marital agreement is executed and the time one side seeks to enforce it, that might make a difference in enforceability. So, now we can sit back and wait to see what kinds of case-specific "material" changes come down the pike which might be considered material enough so that an otherwise fair agreement will not be enforced. And, we have to consider if it is possible to draft around such future contingencies much the way many of us attempt to do so in our separation agreements.

Same Sex Marriage Update: Summer 2010

By Marcia Mavrides, Esq., and contribution by Anne O'Connell

There has been substantial judicial movement on the issue of gay marriage from coast-to-coast this summer. In the wake of U.S. District Court Judge Tauro's July 2010 decision that the Defense of Marriage Act (DOMA) was unconstitutional in Massachusetts, U.S. District Court Judge Vaughn Walker overturned California's ban on gay marriage in early August 2010.

DOMA Ruled Unconstitutional in Massachusetts

In 1996, Congress adopted the Defense of Marriage Act, or "DOMA", which is a federal law that defines marriage as a legal union between one man and one woman. However, DOMA also reaffirms the power of the states to make their own decisions about marriage. In Massachusetts, both the Attorney General's office and Gay & Lesbian Advocates & Defenders (GLAD) successfully challenged DOMA as unconstitutional.

On July 8, 2010, Judge Joseph Tauro ruled that Section 3 of DOMA is unconstitutional, because this federal law violates both the Equal Protection Clause of the 14th and 10th Amendments of the U.S. Constitution. [1]

DOMA potentially affects the application of 1,138 federal statutory provisions in the U.S. Code in which marital status is a factor, including copyright protections, provisions relating to leave to care for a spouse under the Family and Medical Leave Act and testimonial privileges

Under this latest court ruling, gay married couples are entitled to the same federal spousal benefits and protections as every other married couple.

Read Judge Tauro's Order here: http://www.mass.gov/Cago/docs/civilrights/DOMA%20Decision.pdf

As of February 12, 2010, Massachusetts had issued marriage licenses to at least 15,214 same-sex couples. But, as Section 3 of DOMA bars federal recognition of these marriages, Attorney General Martha Coakley argued in *Commonwealth of Massachusetts v. Health and Human Services*, DOMA has denied federal benefits to these couples. For example, the Department of Veterans Affairs informed the Commonwealth that the federal government is entitled to "recapture" almost $19 million in federal grants if and when the Commonwealth opts to bury the same-sex spouse of a veteran in one of the state veterans' cemeteries in Agawam or Winchendon. Here, DOMA is inducing the Commonwealth to violate the equal protection rights of its citizens. As DOMA imposes an unconstitutional condition on the receipt of federal funding, the court found that DOMA contravenes a well-established restriction on the exercise of Congress' spending power.

DOMA also penalizes the state and its citizens in the context of healthcare. Under the MassHealth Equality Act, the Commonwealth is required to afford same-sex spouses the same benefits as heterosexual spouses. Yet the Health and Human Services Centers for Medicare & Medicaid Services states that the federal government will not provide federal funding participation for same-sex spouses because DOMA does not recognize the marriage of same-sex couples. Consequently, the Commonwealth has incurred over $640,000 in additional costs and over $2 million in lost federal funding. Additionally, the Commonwealth has incurred additional tax liability because the health benefits afforded to same-sex spouses of Commonwealth employees must be considered taxable income and the Commonwealth is required to pay Medicare tax for each employee hired after April 1, 1986, in the amount of 1.45% of each employee's taxable

income.

In the companion case to *Commonwealth of Massachusetts v. Health and Human Services*, GLAD asked Judge Tauro to consider whether DOMA violates the right of seven married same-sex couples and three widowers from Massachusetts to equal protection of the law in *Gill v. Office of Personnel Management*. The *Gill* case was filed by individual Massachusetts plaintiffs who sought to end the federal government's discriminatory refusal to acknowledge their existing marriages. Some have been denied social security protections, or job protections, typically available to married couples. They have also been forbidden from filing their federal income taxes jointly. GLAD argued that the federal government's different treatment of married heterosexual couples violates the plaintiffs' equal protection rights under the 5th Amendment. [2]

Rather than declare homosexuals to be a "suspect class" and therefore subject DOMA to strict scrutiny review, the ruling said that was unnecessary because DOMA fails to even pass the more lenient "rational basis" test.

Read the decision here: http://www.scribd.com/doc/34073588/Decision-in-Gill-v-OPM

Proposition 8 Overturned in California

Proposition 8, also known as California's Marriage Protection Act, was a ballot proposition and constitutional amendment passed in November 2008 which provided that California only recognize marriage as between one man and one woman.

On August 4, 2010 U.S. District Court Judge Vaughn Walker in California concluded that Proposition 8 banning gay marriage violates both the Due Process Clause and the Equal Protection Clause of the 14th Amendment. [3]

Judge Walker determined that "Proposition 8 both unconstitutionally burdens the exercise of the fundamental right to marry and creates an irrational classification on the basis of sexual orientation." Because the plaintiffs in *Perry v. Schwarzenegger* sought to exercise the fundamental right to marry, their claim was subject to strict scrutiny. However, as Judge Tauro did in the *Gill* case, Judge Walker noted higher standard of "strict scrutiny" is unnecessary because Proposition 8 fails to pass the more lenient "rational basis" test. Therefore, Proposition 8 cannot withstand any level of scrutiny under the Equal Protection Clause, because excluding same-sex couples from marriage is not rationally related to a legitimate state interest.

Read Judge Walker's decision here: http://www.scribd.com/doc/35374462/Prop-8-Ruling-FINAL

While the decisions from this summer symbolize great strides for gay marriage rights, many legal commentators foresee these cases being appealed to the U.S. Supreme Court. We will have to wait to see what the new season brings.

Endnotes

1 The 14th Amendment "requires that all persons subjected to... legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed'" and where "those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being treated alike, under like circumstances and conditions." The 10th Amendment states that rights not explicitly granted to the federal government, or denied to the states, belong to the states. The Spending Clause declares that Congress "shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

2 Under the Due Process Clause of the 5th Amendment, the federal government shall not deprive any person of life, liberty, or property without due process of law. If the governmental action infringes on a fundamental right, the law or act must pass strict scrutiny review, meaning that it must be narrowly tailored to further a compelling government interest. If the government restriction does not implicate a fundamental right, it must survive rational basis review, meaning the law or act is rationally related to a legitimate government interest.

3 The Due Process Clause of the 14th Amendment provides that states shall not "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law."

Pro Bono Opportunity: KIND

Ann Cooper recently spoke at the Family Law Section Steering Committee meeting last spring on behalf of KIND. She is looking for family law attorneys to pair up with immigration law attorneys to help unrepresented immigrant children. The commitment can be anywhere from accepting a case to mentoring other lawyers on how to proceed in the probate and family court on certain actions like paternity or guardianship proceedings.

Kids in Need of Defense (KIND) was founded by the Microsoft Corporation and actress and humanitarian Angelina Jolie to create a pro bono movement of law firms, corporate law departments, NGOs and volunteers committed to providing fair, competent and compassionate legal counsel to unaccompanied immigrant children in the U.S.

More than 8,000 children come to the United States each year without a parent or legal guardian and are put into the custody of the U.S. government; numerous others enter alone but live "underground" in secrecy and deprivation in a desperate attempt to evade U.S. authorities. Many of these children are fleeing severe abuse or persecution, others are victims of trafficking for forced prostitution. The majority must face immigration court proceedings alone - without the help of a lawyer.

KIND works closely with the children by listening to their stories describing what drove them to leave their homes and make the desperate and dangerous journey to the United States alone. After evaluating their legal options, KIND places them with a pro bono attorney who will provide legal representation for their family law and immigration cases. KIND provides training and mentoring to pro bono attorneys who volunteer to represent these unaccompanied children.

KIND recently added an office in Boston. There are also field offices in Baltimore, Houston, Los Angeles, Newark, New York City, and Washington, DC. KIND also advocates for changes in policies to better protect the rights of unaccompanied children. If you would like more information on how you can get involved with KIND in Boston, please contact KIND's Pro Bono Coordinator in Boston, Ann Cooper at acooper@supportkind.org or 617-470-8536 and visit the website at www.supportkind.org.

One year ago, on May 1, 2009, Limited Assistance Representation (LAR)—once a pilot program in Hampden, Norfolk, and Suffolk—was instituted in all divisions of the Probate and Family Court, yet many family law attorneys still are not familiar with the program and its benefits.

Family Law Section Joins in Support of Active Duty Military, Veterans, and Family

This past August, the BBA Council approved an initiative designed to serve active duty members of the military, veterans of recent wars and their respective family members. This initiative has resulted in the creation of the Committee on Active Duty Military, Veterans and Family Members within the Delivery of Legal Services Section (the "DLS Committee") which is currently co-chaired by Sue Finegan and Lynn Girton.

Members of the Family Law section, together with members of the Bankruptcy, Trusts and Estates and Labor and Employment sections, are working with the DLS Committee to staff events organized by the military as part of the Yellow Ribbon Reintegration Program. For over a year, members of our section have volunteered their time at "Yellow Ribbon" events organized for service members mobilizing for Overseas Contingency Operations. At these events, volunteers provide service men and women with legal information they need concerning family law issues that arise in connection with military service, including the impact deployment has upon divorce, child support, custody and parenting plans. We welcome new volunteers for upcoming Yellow Ribbon events, the next of which is scheduled to occur on Saturday, December 11, 2010.

The DLS Committee has also been working to create and implement an infrastructure that will allow the identification of active duty military, veterans and their family members who need legal assistance and match those persons with an appropriate *pro bono* volunteer. The Pro-Bono Committee will be recruiting volunteers over the next few weeks to serve on this important and immensely rewarding panel. In order to educate "civilian" practitioners on the unique military issues that may arise in the context of such cases, staff from Shelter Legal Services and members of the Judge Advocate General's Corps will be providing a special training for members of our section in January 2011. We hope that you will join us in supporting this effort.

For more information, please contact the Pro-Bono Committee Co-Chairs as follows:
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You are all invited and encouraged to contribute an article on any subject of interest. Please contact, **Wendy Hickey, wendy@nissenbaumlaw.com,** to pursue this further.