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Inside this Issue

Thinking About Liquidated Damages in Premarital Agreements

By Kevin M. Corr

The Winter 2011 issue of the The Family Advocate, published by the ABA's Family Law Section, was devoted to "The Prenuptial Agreement." Volume 33, No. 3. In one of its pieces, "The Devil is in the Drafting," the authors suggest inclusion, *if allowed by the jurisdiction*, of an "Exit Bonus Forfeiture" – or a "liquidated damages" provision. Such a provision might apply, so the suggestion goes, "if either party attempts to challenge or set aside any term of this Agreement." Such a contest, if unsuccessful, might require the losing party to pay $x from his/her "Separate Estate" or, perhaps, the other's reasonable attorney's fees and costs incurred in the effort to enforce the agreement. The use of such provisions, it is said, may "enhance one's ability to get paid or provide a deterrent to litigation." Id. at 25-26.

In this context, the SJC's decision in *DeMatteo* ends in an interesting way. Although the agreement there (invalidated by the trial judge, but validated and enforced on appeal) provided that a party in breach of the agreement "shall indemnify the other party ... as if no such breach had occurred...," the Court upheld the trial judge's *sua sponte* award of fees to the wife who unsuccessfully contested it. DeMatteo v. DeMatteo, 436 Mass. 18, 38-39 (2002). The same paragraph provided that a party in breach "shall be liable for any attorneys fees, costs and expenses incurred by the other in attempting to enforce the provisions of this Agreement." That notwithstanding, under either G.L. c. 208, §17 and/or §38, "[t]he judge was well within her discretion in ordering the husband to pay the wife's attorney's fees during the pendency of the litigation to enable her to defend the action and to contest the validity and enforceability of the [premarital] agreement." Id. at 39. The Court does not explain why the indemnification or "liquidated damages" provisions of the agreement were, effectively, given no effect.

In the commercial context, "[i]t is well settled that 'a contract provision that clearly and reasonably establishes liquidated damages should be enforced, so long as it is not so disproportionate to anticipated damages as to constitute a penalty.'" NPS, LLC v. Minihane, 451 Mass. 417, 420 (2008), quoting from TAL Fin. Corp. v. CSC Consulting, Inc., 446 Mass. 422, 431 (2006). "Whether a liquidated damages provision in a contract is an unenforceable penalty is a question of law." Id. at 419-420 (the burden of showing unenforceabililty is on the contesting party). See Cummings Props., LLC v. National Communications Corp., 449 Mass. 490, 494 (2007) (where damages are easily ascertainable, and liquidated damages amount is grossly disproportionate to actual damages or unconscionably excessive, the court will award the aggrieved no more than its actual damages). "In assessing reasonableness [of the measure of anticipated or liquidated damages], we look to the circumstances at the time of contract formation; we do not take a 'second look' at the actual damages after the contract has been breached." NPS, LLC v. Minihane, 451 Mass. at 420, citing Kelly v. Marx, 428 Mass. 877, 878 (1999).

Apart from *DeMatteo*'s unexplained ending, there is not an appellate case in Massachusetts that analyzes the enforceability of "liquidated damages" or indemnification clauses in the context of premarital (or marital) agreements. In Lord v. Lord, 993 So.2d 562 (Fla. 5th DCA 2008) (wife appealed an award of attorneys' fees *pendente lite* to husband), the court struck this seemingly benign (and likely

common) premarital agreement provision: "*In the event of any separation, dissolution, or divorce proceedings, each party will pay his or her own attorneys' fees and costs*." That provision violated Florida's "long-standing policy against enforcing waivers of pre-dissolution support" (which includes fees awarded during the pendency of the litigation). Id. at 564. See Belcher v. Belcher, 271 So.2d 7 (Fla. 1972); Fernandez v. Fernandez, 710 So.2d 223, 225 (Fla. 2nd DCA 1998) (the law "requires one spouse, who has the ability, to support the other more needy spouse until a final judgment of dissolution is entered *even in the face of an antenuptial agreement to the contrary*") (emphasis added). Morgan, Waivers of Spousal Support in Antenuptial Agreements, 17 No 4 Divorce Litg. 62 (2005) ("A good number of states have held that spouses may not contract to waive temporary spousal support or attorneys fees, because such a waiver is in denigration of the duty of spouses to support each other during the marriage.")

It should be noted that Massachusetts has not clearly established any such bright line rule or policy. But see Osborne v. Osborne, 384 Mass. 591, 598 (1981) (though "[a premarital] contract settling the alimony and property rights of the parties *upon divorce* is not per se against public policy and may be specifically enforced", the Court "express[ed] no opinion on the validity of [premarital] contracts that purport to limit the duty of each spouse to support the other during the marriage."), citing Eule v. Eule, 24 Ill. App. 3d 83 (1974) (waiver of temporary support and alimony *pendent lite* held invalid), and Holliday v. Holliday, 358 So.2d 618 (La. 1978) (waiver of alimony *pendente lite* held void).

The *Lord* agreement, however, also contained a provision similar to that in *DeMatteo*: "*Should a party retain counsel for the purpose of enforcing or preventing the breach of any provision [of this agreement] ... the prevailing party will be entitled to be reimbursed by the losing party for all reasonable costs and expenses incurred, including, but not limited to, reasonable attorneys' fees and costs for the services rendered to the prevailing party.*" Lord v. Lord, 993 So.2d at 563. This sort of "prevailing party" provision, the Court reasoned, would not violate Florida's policy against waivers of pre-dissolution support/fees. See Lashkajani v. Lashkajani, 911 So.2d 1154 (Fla. 2005) (Florida Supreme Court answers in the affirmative to the question of "Whether prevailing party attorney's fee provisions in [premarital] agreements, concerning litigation over the validity of the agreements themselves, are enforceable."). Thus, "[w]hile the court may ultimately enforce the [*Lord* agreement's] prevailing party attorney's fee provision concerning litigation over the enforceability of the [premarital] agreement under *Lashkajani*, at this point [in the dissolution litigation] there is no prevailing party." Lord v. Lord, 993 So.2d at 565.

In such a case, how would or should a court structure the "prevailing party" fee award vis-à-vis the temporary or *pendente lite* fees previously awarded in favor or the unsuccessful contestant? In Langley v. Langley, 613 S.E.2d 614, 616-617 (Ga. 2005), involving a premarital agreement by which each party waived "any and all rights" to seek any form of alimony or attorney's fees, the Supreme Court of Georgia ruled that it was error for the trial judge to reduce (*entirely*) the wife's contractually due lump sum ($25,000) in order to account for temporary alimony and attorney's fees already paid by the husband during the litigation. "[T]o allow a setoff for Mr. Langley's payment of temporary alimony [and fees] would effectively allow [him] to use the terms of the agreement to place Ms. Langley in the untenable position of forfeiting her $25,000 entitlement or rendering herself financially, and thus legally, defenseless in the subsequent divorce action which proceeded to judgment." Id. at 616-617, citing Urbanek v. Urbanek, 484 So.2d 597 (Fla. 4th DCA 1986)

("A rule that permitted the husband to offset temporary support and attorney's fees against an agreed-upon lump sum ... would clearly fly in the face of public policy."; Florida law does not permit a husband to "contract away his responsibility" to support his wife while she is still married to him; offset provision held to be illegal and void *ab initio*).

On the other hand, in Scotto v. Scotto, 234 A.D.2d 442 (N.Y. App. Div. 2nd Dept. 1996), the appellate court found error in the trial court's refusal to enforce a *separation* agreement's "acceleration clause" that brought the husband's otherwise periodic support obligation of $1500 per week (capped at $1,000,000 total), due and payable in full (i.e. $1,000,000 less credit for payments made) if he defaulted and did not cure the default within 60 days. Id. at 443-444. Acceleration clauses, "quite common" and "generally enforced according to their terms," are "no less enforceable merely because they arise in the context of matrimonial actions or familial disputes...." Id. at 444. "[E]nforcement of the acceleration clause does not constitute a penalty...." Id. But see Anonymous v. Anonymous, 233 A.D.2d. 162 (1996) (Ellerin, J., concurring) (liquidated damages in the form of a $500,000-per-breach offset, contained in a confidentiality stipulation between spouses, "go[es] far beyond those which this Court has previously deemed enforceable.").

New York law, however, often beats to a different drum than that of Massachusetts; and the SJC recently recounted the qualitatively differing standards of enforceability among premarital, marital and separation agreements. Ansin v. Ansin, 457 Mass. 283, 289-290 (2010) (separation agreement negotiated when marriage has failed and the spouses intend permanent dissolution). In Vakil v. Vakil, 450 Mass. 411 (2008), the SJC expressed a "public policy" concern about a premarital agreement provision that deprived the wife of any right to seek alimony "if she contest[ed] directly or indirectly the granting of a divorce to the [husband]." Id. at 412, 420-421 ("it is one-sided, imposing consequences solely on the wife for opposing a divorce sought by the husband and not the other way around, and because it discourages the parties from seeking to resolve their differences and save the marriage."). The analysis, unfortunately, went no further because neither party contested the agreement, and because the wife planned to not contest the husband's request for a divorce.

At this juncture in the evolution of premarital agreement law in Massachusetts, there is no true precedent on which to base any expectation or assumption as to whether the Massachusetts appellate courts will honor or frown upon liquidated damages-type provisions such as a monetary consequence for contesting or breaching a premarital agreement contracting parties or "prevailing party" fee awards. On the one hand, parties should have an expectation that an even-handedly negotiated provision of this sort, provided that it does not rise to "penalty" level, is something for which they should be free to contract. On the other hand, given that premarital agreements are not negotiated at arm's length in the manner of commercial contracts, it may be that yet-to-be-determined "special" rules and/or heightened scrutiny render limited utility to these types of provisions. It is, in any event, an issue ripe for determination when the appropriate case presents itself.

Dividing Retirement Assets on Divorce

By Carol E. Nesson

The Federal government wants everyone to save money for old age, and so makes it easy for people to put money away through a wide variety of tax–deferred schemes – among others, defined benefit pensions, 401(k)s for workers in private employment, 403(b) plans for employees of non-profits, and IRAs for those who set up their own plans. The general idea is that taxpayers can defer their obligation to pay income tax on allowable contributions to retirement plans until they retire (when their tax rate will presumably be lower) and then pay tax on any deferred amounts and on the earnings on those saved amounts or on pensions, as they receive the income. In Massachusetts, retirement benefits are usually treated as marital assets and are divided as part of the marital estate on divorce.

The Feds also make it very hard for people to take money out of retirement plans before they retire (or at least, reach age 59-1/2). ERISA (§206(d), 29 USC §1056(d)(1) and its regulations (26 C.F.R. §1.401(a)-13(b) and the Internal Revenue Code (26 USC §401(a)(13)) forbid assignment, anticipation, alienation, attachment, garnishment, levy, execution or other legal or equitable processes to transfer tax-qualified assets. Having forbidden alienation in most situations, the government has also created an exception - a special "tool" called a Qualified Domestic Relations Order (QDRO) that allows divorcing parties to transfer tax-qualified retirement assets from one party to the other. Massachusetts law has parallel restrictions on alienation of retirement plans and similar exceptions for court-ordered transfers on divorce (*see*, M.G.L. c. 235, Section 35A; M.G. L. c. 32, §19).

What's a QDRO?

A "QDRO" is a tool created by Federal law to get around the anti-alienation rule at divorce. It is defined by the IRC (26 USC §414(p)) and its parallel ERISA provision (29 USC §1056(d)(3)(B)(i)), as a "domestic relations order" that has been determined by a plan administrator to "qualify," that is, to meet the requirements of law. A "domestic relations order" is any judgment, decree or order (including approval of a property settlement) which relates to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, child or other dependent of the plan participant and recognizes an alternate payee's right to receive all or a portion of the benefits payable with respect to a participant under a pension plan, and includes certain information and meets certain other requirements. It must be made pursuant to a state domestic relations law and be issued by a court of competent jurisdiction. (Technically, the term "QDRO" applies only to court orders dividing ERISA-qualified plans, but similar instruments (with different names) are used to divide non-ERISA plans such as military and state and Federal governmental pension plans, church plans and the like.)

A separation agreement (or divorce judgment) sets out the terms of the parties' property division; the QDRO tells a third party – the retirement plan – how to carry out the terms of the division. It is, in effect, the voice of the judge saying to the plan administrator "I, the judge, have divorced the participant and the alternate payee, and I, the judge, am ordering you, Mr. Plan Administrator, to transfer ownership of some of the retirement benefits that you hold for the participant to the alternate payee. Here's what you must do…"

While a properly drafted separation agreement can, in theory, serve as a QDRO, the QDRO is usually a *separate* document signed by the judge (often filed after the divorce) that instructs the plan to pay part of the benefits accrued by the participant to the alternate payee (usually, the former spouse). The order must include the participant's and the alternate payee's names and addresses, the amount or percentage of the participant's benefits to be paid by the plan to the alternate payee, the number or period of payments, and the exact name of the plan. The order may not require a plan to provide benefits or options not otherwise provided under the plan, or provide increased benefits (determined on the basis of actuarial value), or require payment to an alternate payee of benefits which have already been assigned to another alternate payee. Most important: the order can only divide the benefits the plan provides; it cannot order the plan to do something it isn't set up to do.

Know What You're Dividing

Retirement plans generally fall into one of two broad categories: defined contribution plans (such as 401(k)s) and defined benefit plans (usually, pensions). A defined contribution plan can be treated essentially as a pile of dollars, with a specific number of dollars or a percentage assigned to the alternate payee, to be distributed as soon as the alternate payee wishes. It is usually transferred as a lump sum. In contrast, a defined benefit plan is usually a promise to pay income -- commonly, a percentage of pre-retirement income -- to the participant when he satisfies the age and service requirements. It is usually payable in the form of a monthly benefit, not as a lump sum (with certain exceptions), sometimes as early as the participant's 55th birthday but more often not until the participant retires at age 65. The most common error divorce practitioners make is not understanding the nature of the retirement assets held by a party, and entering a separation agreement that assigns to the alternate payee a lump sum when the plan can only pay a stream of income. The order has to fit the plan, so a QDRO dividing a pension CAN'T order the plan to pay a lump sum of cash to the alternate payee unless it could pay it to the participant.

Where a separation agreement assigns a percentage of the marital coverture portion of a defined contribution plan to a former spouse, the QDRO can track it – but few plan administrators will be able to tell what was in the account at the date of marriage. To do that, you'll either need a record of the date-of-marriage value (and assign, say, 50% of the difference between the value at divorce and the value at marriage), or you'll have to "guesstimate" the assigned amount by multiplying the date of divorce value by a marital coverture fraction. A QDRO can never assign more than is actually in the participant's account. When a percentage of a defined contribution account is assigned (often as of date of divorce), it is common practice to adjust the assigned share for investment gains or losses from date of divorce to the actual date of division. However, where a specific dollar amount is assigned to equalize other assets, the amount is not usually adjusted (this is an issue for the parties to negotiate; there is no hard and fast rule). The death of either party while the transaction is taking place does not change the outcome.

When you divide a defined benefit plan, you may be dissecting a very complex organism. The separation agreement – and its appurtenant QDRO – has to carefully divide the benefits the plan offers. Government pensions, both Massachusetts and Federal, can only be assigned on an "if, as and when" basis, so the alternate payee cannot begin to draw her share of the payments until the participant starts drawing his share. Most traditional craft unions (plumbers, carpenters, ironworkers, etc.) provide their members with both a defined benefit and a defined contribution plan. While the defined contribution plan (often called an "an-

nuity) can be divided immediately, the defined benefit plan usually cannot be divided until the participant reaches age 55.

Because you are dividing a future stream of income, it is wise to pay careful attention to pre- and post-retirement distributions. If the participant dies before he retires, the alternate payee may be eligible for some or all of a pre-retirement benefit (in the private sector, a "QPSA – "qualified pre-retirement survivor allowance"). What happens to the alternate payee's income after the participant's death will depend on what plan, the separation agreement and the QDRO specify. If the alternate payee is to receive income for her whole lifetime, not just the participant's, careful drafting is needed. Federal law creates two very important property rights for spouses of participants in most plans: a *pre-retirement survivor annuity* (in case the participant dies before he retires) and a *joint and survivor annuity* (to provide lifetime benefits for a surviving spouse if the participant dies after retiring, leaving a surviving spouse). ERISA §205; IRC (26 U.S.C. §§401(A)(11), 417. These spousal rights *may* be preserved for a former spouse by means of a QDRO, depending on the pension plan and the way the rights are allocated between the parties.
If the alternate payee dies before starting to collect her share, however, her interest is usually not hereditable and may revert to the participant.

Property v. Income

Retirement plans are usually treated as marital property to be divided per M.G.L. c. 208, §34, even when the asset being transferred will be paid as a stream of income rather than a lump sum. While divided pensions usually produce a stream of eventual income, Massachusetts courts generally treat them as marital assets to be divided as part of the marital estate like defined contribution plans. *See*, *Casey v. Casey*, 79 Mass. App. Ct. 623 (2011). However, a courts occasionally treat the stream of income generated as income rather than as property, *see, Andrews v. Andrews*, 27 Mass. App. Ct. 759, 543 N.E.2d 31 (1989). While many Americans eagerly anticipate receiving Social Security benefits as part of their post-retirement income, Social Security benefits are not "property" and cannot be divided as part of the marital estate (but can be included in "stream of income" calculations. *Mahoney v. Mahoney*, 425 MA 441 (1997).

Whenever a plan administrator is willing to review a QDRO before a judge signs it, it is best to secure pre-approval as to form of a draft.

Major Types of Retirement Plans and QDRO's

Type of Plan	DB/ DC	Description	USE QDRO TO DIVIDE BENEFITS
Traditional pension	DB	Sponsored by union or employer: pays guaranteed annuitized benefits for life	Yes
Governmental	DB	For gov't employees; pays guaranteed annuitized benefits for life	Yes (ERISA exempt)
401(k)	DC	Employer-sponsored, employer & employee contribute; risk of poor yield on employee	Yes
Profit-sharing	DC	Employee can choose amount of savings	Yes
Money purchase pension plan	DC	Employer must make guaranteed annual contributions to employee's account	Yes
Target benefit	DC	Employer contributes when/if elects to	Yes
IRA (traditional)	DC	Individual tax-deferred savings account; subject to early withdrawal penalty and minimum distribution rules	No
403 (b)	DC	A tax-deferred annuity program for employees of non-profits, schools & colleges; employees make the contributions	Yes
457 (b)	DC	A deferred compensation plan for government workers	May use QDRO or "order"
SEP/SIMPLE	DC	Employer contributes to IRA for employee (for small employer/self-employed)	No
Non-qualified deferred comp/ "executive deferred comp"	various	Employer promises extra post-retirement pay to highly-compensated execs after they meet contract reqs	NOT qualified, so no QDRO. Not usually divisible or assignable but depends on plan.

Clear and Convincing Evidence: A Refresher on What It Is and Why It Is Important to Us

By Wendy O. Hickey

Thinking back to law school, I can see the professor standing in front of the class hands open, palms up in a mock weighing of justice. We can all visualize the common civil burden of proof of a preponderance of the evidence - fifty percent plus the weight of one feather. With certain limited exceptions, preponderance of the evidence is the standard most Massachusetts family law practitioners can relate to and are prepared to explain and argue at a moment's notice.

In 2009, the Supreme Judicial Court threw us a bit of a curve ball when *In re Birchall* came down. In *Birchall*, the SJC held that "a civil contempt finding be supported by clear and convincing evidence of disobedience of a clear and unequivocal command." 454 Mass. 837, 853 (2009). At the time *Birchall* was decided, the existing law was stated to be that "a judge may find a person in civil contempt if the judge concludes that it is more likely than not that the person clearly and undoubtedly disobeyed a clear and unequivocal command" – the old preponderance of the evidence we all know and love. *Id*.

The *Birchall* court went on to state that "[w]hile the judge must conclude by clear and convincing evidence that the petitioner is presently able to pay the judgment, in whole or in part, to find the petitioner in civil contempt, the judge need not identify with specificity which assets are available to the petitioner to pay the judgment." *Id*. at 853.

Putting together this language, the new standard of proof in a civil contempt action requires that the plaintiff present clear and convincing evidence of (1) a clear and unequivocal command of the court; (2) clear and undoubted disobedience of that command by the defendant; and (3) ability of the defendant to pay the required obligation. Of course this change only really affected a small part of the practice of family law. Personally, I have had to think about the issue four times since *Birchall* when filing and preparing to defend a contempt – not a big part of the practice.

So, you may ask, why is this important now - two years after *Birchall* was decided? The recent passage of the Alimony Reform Act of 2011 once again requires us to think about and understand this higher burden of proof. Beginning on March 1, 2012, when we have a client who wants to modify a general term alimony award, we will only be able to get it extended beyond the payor reaching full retirement age by proving a material change in circumstances which occurred after entry of the alimony judgment; and then only if "the reasons for the extension are supported by clear and convincing evidence" (Alimony Reform Act of 2011, M.G.L. ch. 208, §49(f)(2)(i) – (ii) emphasis supplied). We all know clear and convincing evidence is a higher burden of proof but what is it exactly and how do we prove it?

Although it is impossible to determine in the abstract exactly what would constitute clear and convincing evidence, the standard has been described as follows:

> In order to be clear and convincing, the "evidence must be sufficient to convey 'a high degree of probability' that the proposition is true. . . . The requisite proof must be strong and positive; it must be 'full, clear and decisive.'" *Adoption of Rhona,* 57 Mass. App. Ct. 479 (2003), quoting from *Adoption of Iris,* 43 Mass. App. Ct. 95, 105 (1997). "Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in crim-

> inal cases." *Custody of Eleanor,* 414 Mass. 795, 800 (1993), quoting from *Stone v. Essex County Newspapers, Inc.,* 367 Mass. 849, 871 (1975).

In re Adoption of Zoltan, 71 Mass. App. Ct. 185, 188 (2008).

An earlier case, which is frequently cited, described "clear and convincing" proof as:

> Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases. . . . It has been said that the proof must be "strong, positive and free from doubt" . . . and "full, clear and decisive."

Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 871 (1975) (citations omitted).

A number of other states apply the clear and convincing evidence standard. A sampling of cases follow starting with South Carolina which arguably has the most illustrative example I have found:

1. South Carolina

In *Cannon* despite knowing the circuit court's order prohibiting him from doing so, the defendant disregarded that order and amended tax returns with no authority. At the hearing to determine the willfulness of Cannon's failure to account and whether he had paid specified sums to an Estate, Cannon admitted he amended corporate tax returns which were filed September 26 and October 16, 2007, after his resignation as personal representative and trustee on August 10, 2007. When questioned, Cannon admitted he was aware of the circuit court's order relinquishing his duties effective upon his resignation and admitted, as well, that he did not have the authority to take the actions he took.

Cannon informed the circuit court "[he] knew that probably [he] would have to take the heat for [amending the tax returns without authority], but [he] would rather take the heat for doing it than not doing it." *Ex parte Cannon*, supra at 665 - 666, 685 S.E.2d at 826.

The record contained clear and convincing evidence that Cannon was in contempt of the circuit court's August 10, 2007 order; and Cannon failed to carry his burden of proving a defense for his actions. Consequently, there was no abuse of discretion in the circuit court's finding of contempt. *Id.*

2. New York

To sustain a finding of civil contempt based upon a violation of a court order, it is necessary to establish that a lawful court order clearly expressing an unequivocal mandate was in effect and the person alleged to have violated the order had actual knowledge of its terms (*see* Judiciary Law ' 753; *Delijani v. Delijani,* 73 A.D.3d 972, 973, 901 N.Y.S.2d 366; *Dankner v. Steefel,* 41 A.D.3d 526, 527 - 528, 838 N.Y.S.2d 601). The moving party bears the burden of proving contempt by clear and convincing evidence (*see Dankner v. Steefel,* 41 A.D.3d at 528, 838 N.Y.S.2d 601; *Vujovic v. Vujovic,* 16 A.D.3d 490, 491, 791 N.Y.S.2d 648).

Schwartz v. Schwartz, 79 A.D.3d 1006, 1009, 913 N.Y.S.2d 313, 316 - 317 (N.Y. App. Div. 2010).

3. Rhode Island

"The authority to find a party in civil contempt is among the inherent powers of our courts." *Now Courier, LLC v. Better Carrier Corp.,* 965 A.2d 429, 434 (R.I.2009). Such a finding requires a demonstration, by clear and convincing evidence, that a sufficiently specific order of the court has been violated. *Id.* (citing *State v. Lead Industries Association,* 951 A.2d 428, 464 (R.I.2008)).

Town of Coventry v. Baird Properties, LLC., 2011 WL 365216, *5 (R.I. 2011).

4. Maine

[& 11] For a court to find a party in contempt, the complaining party must establish by clear and convincing evidence that the alleged contemnor failed or refused to comply with a court order and presently has the ability to comply with that order.

Efstathiou v. Efstathiou, 2009 ME 107, 982 A.2d 339, 342 (2009).

5. Oklahoma

& 13 "Indirect contempts of court shall consist of willful disobedience of any process or order lawfully issued or made by court; . . . ." 21 O.S.2001 ' 565. Indirect contempt must be shown by clear and convincing evidence. ". . . (A)wards for alimony . . . temporary or permanent, . . . are excluded from the definition of 'debt' . . . [and] may be enforced by contempt because of express statutory authority." *Potter v. Wilson,* 1980 OK 51, 609 P.2d 1278, 1281.

In re Marriage of Boeckman, 241 P.3d 296, 300, 2010 OK CIV APP 106, (2010).

6. Washington, DC

"For the trial court to issue a civil contempt order, the movant must make a clear and convincing showing that (1) the alleged contemnor is subject to a court order, and that (2) he or she has failed to comply with that order."

Bansda v. Wheeler, 995 A.2d 189, 195 - 196 (D.C. 2010) (*quoting Wagley v. Evans,* 971 A.2d 205, 210 (D.C. 2009)).

7. Ohio

{& 47} "Violations which are primarily offenses against the party for whose benefit the order was made, and where the primary purpose of the punishment is remedial or coercive and for the benefit of the complainant, are civil contempts, and the sanction must afford the contemnor the opportunity to purge himself of his contempt." . . . Unlike civil contempt, which may be proven by clear and convincing evidence, criminal contempt must be proven beyond a reasonable doubt.

Ohio Dept. of Taxation v. Kunkle, 179 Ohio App.3d 747, 753, 903 N.E.2d 692, 696, 2008 -Ohio- 6393 (2008).

While the above cases refer to the clear and convincing evidence standard in civil contempt actions, it is the same standard required by The Alimony Reform Act for extending a general term alimony order beyond the payor's retirement age. We are all still digesting the terms of the Alimony Reform Act - a very long bill requiring family law practitioners to implement many changes to the way they advise clients. The clear and convincing evidence requirement to modify a general term alimony order is just one small point which will require further inquiry and, perhaps, clarification by appellate courts. Until then, it is hoped this refresher is helpful to those who encounter the need to present clear and convincing evidence arguments.

Spotlight on Pro Bono Opportunities: Metrowest Legal Services

By Melinda Markvan

Before landing my first real associate position practicing family law, I decided to get my feet wet by taking a pro bono simple divorce case. Metrowest Legal Services offered three free divorce law training sessions taught by panels of local judges and attorneys, complete with forms and a manual on Family Law Advocacy for Low and Moderate Income Litigants. By attending the training, I agreed to take two pro bono cases in the next year. The trainings were filled, in fact, a few of my law school classmates were also in attendance. My first client was young, responsive and thankful for my time. Opposing counsel was helpful and accommodating. The staff at Metro West Legal Services answered my questions and provided access to their research databases and conference rooms. It was a positive and rewarding experience that gave me the confidence to continue in the area of family law.

Metrowest Legal Services offers free Divorce Law & Bankruptcy training and has many cases to suit all levels of experience. Their mission is to make sure that the attorney has a good volunteer experience, as well as making sure that the client's needs are served. Megan Christopher and Cheryl Palmieri are happy to talk about other volunteer opportunities, as well. For more information, please check their website: http://www.mwlegal.org or email: mchristopher@mwlegal.org or cpalmieri@mwlegal.org.

Recent Case Law Summaries

By Theresa B. Ramos, Kristine Ann Cummings, and Alexis Kaplan

Deanne E. CASEY vs. Michael S. CASEY
Decided June 7, 2011
79 Mass.App.Ct. 623

In this case, a former wife appealed from a judgment of divorce wherein the trial court judge elected to treat the husband's military pension as a stream of income, as opposed to a marital asset subject to equitable distribution, without in some way compensating the wife for taking that asset out of the division of marital property by either an award of alimony or the allocation of other assets. The Appeals Court reversed, holding that the trial judge's financial disposition resulted in an inequitable award to the wife and left the parties in significantly disparate circumstances; the husband was virtually guaranteed continued enjoyment of the secure, comfortable marital lifestyle, whereas the wife had no such guarantee.

The primary issue in this case involves whether a husband's military retirement pay should have been treated as a stream of income or as a marital asset subject to equitable distribution. At the time of trial, the parties had been married nearly twenty years and had one unemancipated child, then age fifteen. The husband, age fifty-one, had retired from a lengthy career in the United States Air Force approximately ten years prior; he worked full time as a defense contractor and earned a gross income of $112,000. His net income, which included $867 per week from his military pension and $29 per week in veteran's disability pay, totaled $2,496.72 per week. The wife, age forty-five, worked twenty-eight hours per week as a nurse coordinator; her net weekly income, not including the temporary child support order, was $695.07. The wife served as the primary caregiver for the child during the marriage and at the time of trial; she resided in Massachusetts while the husband traveled extensively for business and resided in Florida.

The most significant issue at trial was the treatment of the husband's military pension: the wife argued that the pension should be treated as a marital asset, subject to equitable distribution whereas the husband argued that it was a stream of income. Citing Andrews v. Andrews, 27 Mass. App.Ct. 759, 761 (1989), and the factors under G.L. c. 208, § 34, the judge concluded that it was more appropriate to treat the pension as income. He noted that treating the pension as a source of income entitled the wife to a greater child support award and could be taken into consideration should the wife seek a modification to provide alimony. He did not award the wife alimony after trial, but ordered the husband to pay $589 per week in child support. Although it was not disputed that the wife's weekly hours had been involuntarily reduced from 35 to 28 by her employer, the judge attributed income to her after finding that she was capable of working forty hours per week. The remainder of the parties' assets were divided equally by stipulation.

The Appeals Court reversed, holding that the financial award as a whole, including the treatment of the husband's military pension as a stream of income, the failure to award any alimony, and errors made in attributing income to the wife and in establishing the child support order, was inequitable. With respect to the pension, the Court stated "We have found no case, and the husband has brought no case to our attention, that treats a military pension as a stream of income without in some way compensating the other spouse for taking that asset out of the division of marital property by either an award of alimony or the allocation of other assets." The Court distinguished Andrews, holding that in that case, where it was uncertain whether the wife would ever work due to health issues, it was appropriate for the court to order thirty percent of the husband's pension as alimony when the wife received sixty-five per-

cent of the other marital assets and the financial provisions were "adequate."

With respect to the issue of imputing income, the Appeals Court held that it was inappropriate to impute income to the wife where her part-time employment was not voluntary, there was no reason to believe that she would be able to work more hours at the same job, nor was there evidence about the availability of other full-time or part-time employment in the same geographic area. Finally, the court set aside the child support order where it was based on treating the husband's pension as a stream of income, the trial judge failed to consider the husband's travel reimbursements or veteran's disability pay as part of his income, and it was error to apply the Child Support Guidelines, which presume that the child is with the non-custodial parent one-third of the time, where the husband only saw the child five times in two years.

C. Michael WOODSIDE vs. Sharry A. WOODSIDE
79 Mass.App.Ct. 713
Decided June 24, 2011

In a divorce and removal action where the parties eschewed traditional custodial terminology in their agreement, the trial judge properly conducted a factual inquiry to determine whether the custodial arrangement approximated sole physical custody or shared physical custody. After concluding that the mother was the primary caregiver, the judge correctly applied the "real advantage" test, employed when the parent seeking removal has sole custody, rather than the "best interests of the child" test, which is used when the parties share physical custody.

The parties were divorced after a marriage of approximately fifteen years which produced two children. The parties reached an agreement with respect to custody and visitation which was incorporated into a "Bifurcated Judgment of Divorce Nisi" (first judgment). The agreement provided for joint legal custody and stated that "the children shall reside primarily with the wife." The parenting schedule afforded the father visitation two weeknights each week, alternating weekends, alternate holidays, and two weeks of vacation time.

The issues of property division and support were reserved for trial, which commenced approximately six months later. Prior to trial, the wife filed a complaint for removal seeking permission to move with the children to Maine; this action was consolidated and heard, by agreement, with the property and support issues. After trial, a second "Bifurcated Judgment of Divorce" (second judgment), amended the first judgment by allowing the mother's petition for removal, and ordered the father to make a weekly family support payment of $900, of which $500 was designated as alimony and $400 as child support in order to provide the father some tax relief.

The father appealed from the portion of the judgment allowing removal of the children, asserting that it was error to apply the "real advantage" test when the mother was not designated the "sole physical custodian" of the couple's children. Further, he claimed that even if the real advantage test was the correct standard, the judge improperly concluded that the mother demonstrated a good faith reason for the move and that she was not motivated by a desire to deprive the father of his relationship with the children. Finally, the father challenged the alimony award on the grounds that it forced him to spend more than he earned and that the judge did not properly account for the mother's ability to earn income as a massage therapist.

The trial judge's decision was affirmed on appeal. It is well-settled law that when a divorced parent seeks to relocate from the state, the physical custodial arrangements will dictate which legal analysis is applied by the court. When a parent with sole physical custody of a child seeks to relocate the child outside the Commonwealth, the court will apply the "real advantage test" set forth in Yannas v. Frondistou-Yannas, 295 Mass. 704, 710-712 (1985). The judge must first

consider whether the custodial parent is able to demonstrate "a good, sincere reason for wanting to remove to another jurisdiction" and "the presence or absence of a motive to deprive the non-custodial parent of reasonable visitation." If the custodial parent sustains that burden, the second prong of consideration is whether the move is in the best interests of the child. The judge must consider "whether the quality of the child's life may be improved by the change (including any improvement flowing from an improvement in the quality of the custodial parent's life), the possible adverse effect of the elimination or curtailment of the child's association with the noncustodial parent, and the extent to which moving or not moving will affect the emotional, physical, or developmental needs of the child." However, if the parent seeking removal from the Commonwealth shares physical custody with the other parent, the advantage to the moving parent becomes merely a relevant factor in the over-all inquiry of what is in the child's best interests, and the Court will apply the "best interests of the child" test.

In the present case, where the parties eschewed traditional custodial terminology in their agreement, the Appeals Court held that the trial judge properly conducted a "factual inquiry" to determine the approximate custodial arrangement, and correctly applied the corresponding "real advantage" test after concluding that the mother was the primary caregiver. The Appeals Court specifically noted that "[a]lthough the presence of a categorical custodial determination will trigger one of the two approaches, nothing in our case law requires that either analysis be employed solely where the parents have adopted a particular custodial label." The Court held that the trial judge properly concluded that the mother had a good faith reason for the requested move where she would benefit from accelerated job training opportunities and the potential for higher future earnings and her quality of life would be improved by having the support of nearby relatives who could assist her with childcare. The judge further found that the mother was not motivated by an intent to deprive the father of his relationship with their two daughters. In addition, there was no error in the judge's consideration of the best interests of the children and her conclusion that removal would have a positive impact on their emotional, physical, and developmental needs. The judge based her conclusion in part on her findings that the move would result in an improvement in the mother's quality of life that in turn would benefit the children, and that the proximity to the mother's family members, who could assist in caretaking, would also benefit the children. The judge also considered the impact of removal on the children's relationship with the father and the deleterious effects of increased travel, and adjusted the visitation schedule to increase the children's time spent with the father during the weekends, summer, and other school vacations.

With respect to the alimony award, the Appeals Court held that the trial judge made numerous findings, supported by the record, regarding the statutory considerations of G.L. 208 §34, and properly concluded that the mother required assistance in meeting her weekly expenses for herself and the parties' children, and the father had the ability to contribute to the expenses of the mother and the children. Further, where applying the child support guidelines resulted in a weekly child support payment of $647, it was not an abuse of discretion for the judge to instead order the father to make weekly payments totaling $900, of which $400 was designated as child support and $500 as alimony "in order to provide the father some tax relief especially during this time when the mother has little or no taxable income." Finally, the judge was not obligated to attribute to the mother earnings she could potentially have as a massage therapist when the mother, who worked as a massage therapist in the early years of the parties' marriage, had not worked in such a capacity in many years, was not licensed in either Massachusetts or Maine, and was earning approximately $50 to $70 per week from part-time employment as a medical transcriptionist in training at the time of trial. Further, the total support award did not exceed the father's income at the time of trial, as any

temporary "deficit" spending was created by the father by his voluntary decision to make substantial payments toward his debt.

B.K. v. Department of Children and Families
79 Mass. App. Ct. 777 (2011)
July 13, 2011

Father appeals from a Department of Children and Families (DCF) determination that he emotionally neglected his daughter due to his repeated violations of a Probate and Family Court judge's order prohibiting him from contacting his children or from going to their school.

The parents were involved in a custody dispute over their two children, and the daughter's therapist testified that daughter was withdrawn, as she did not want to take sides in the situation. When the Probate and Family Court judge ordered physical custody to the mother, the judge also prohibited father from contacting the daughter or from going to her school.

Several days later DCF received a 51A report alleging neglect and sexual abuse by father of daughter, with the allegation of sexual abuse coming from a report by mother on daughter's actions.

Around this time period, father went to the daughter's school and gave a letter for the daughter to the principal, who then gave the letter to daughter. In addition to that, he sent his children an email message three months later and would also send gifts to his children using parents of their classmates. Father would also frequently call mother's home.

Though father's actions were contradictory to the judge's orders, he disagrees with DCF that his actions of contacting daughter were "neglect." The language defining neglect cites "failure by a caretaker, either deliberately or through negligence or inability to provide a child with minimally adequate...emotional stability and growth."

The DCF's determinations and assessments are generally deferred to unless there is a showing of substantial evidence to the contrary, and none was shown here. In this case, DCF's determination of emotional neglect by the father was then upheld.

Father's actions were found to put daughter at risk of feeling vulnerable while at school due to father's attempts to contact her through means related to the school. Father's actions were also found to be attempts at potentially currying favor with daughter and attempting to manipulate daughter through gifts and the promise of a pet dog. All of this despite the fact that daughter was trying to shelter herself emotionally from her parents' divorce and not to be part of it.

Through father's actions and attempts at contacting daughter he was found to have neglected what the judge had found was in his daughter's best interests.

Additionally, even though DCF did not follow its own time standards in conducting a hearing of the issue, DCF's findings will still be upheld as father cannot show prejudice against him because of DCF's delay.

Fathers and Families, Inc. & others vs. Chief Justice for Administration
and Management of the Trial Court & Others
SJC-10786
September 1, 2011

The plaintiffs in this case challenged the constitutionality of the 2009 Child Support Guidelines. The plaintiffs filed a complaint in the Superior Court, and as basis for their claim, stated that they were subject to higher child support payments as a consequence of the new child support guidelines. The plaintiffs sought a "declaratory and injunctive relief against [the CJAM], and the Justices of the Trial Court of Massachusetts...to enjoin the mandatory use of [the new guidelines] until the defendants comply with the laws and Constitution of the United States and Massachu-

setts." The defendants' filed a motion to dismiss on the grounds that the plaintiffs' complaint failed to state a claim on which relief can be granted, which was allowed. The plaintiffs appealed from this dismissal and the SJC, on their own motion, transferred the case.

The SJC held that declaratory relief statute, M.G.L.A. c. 231A, prohibits actions for declaratory relief against judicial departments, and that the plaintiffs' complaint was properly dismissed. The SJC further held that plaintiffs may raise their constitutional rights as their individual cases are heard before the Probate & Family Court. If plaintiffs are dissatisfied with the outcomes of their cases, they may file an appeal.

Freidus v. Hartwell
No. 10-P-210
September 28, 2011

The issue on appeal is whether the wife was entitled attorney's fees and costs incurred in "instituting and prosecuting" her complaint for contempt. The parties were divorced on April 10, 2007, and their separation agreement was incorporated, but not merged, into the judgment of divorce and survived with independent, legal significance. The relevant provisions of the parties' separation agreement in this matter are: 1) the parties intend to divide their tangible personal property with the assistance of a special master; 2) the husband shall retain his right, title and interest in the property located at Felton Street, and the wife shall receive $216,000 from the husband as her interest in Felton Street; and 3) the parties agreed to a "Costs in Case of Breach" provision that would allow a party to recoup attorney's fees and costs incurred for "instituting and prosecuting" an action if the other party is "judicially determined to be in breach" of the separation agreement.

On June 21, 2007 and July 5, 2007, the husband and the wife, respectively filed cross-complaints for contempt. The husband alleged that the wife refused to cooperate with the special master in dividing the personal property, and the wife alleged that the husband failed to comply with various orders of the divorce judgment. The parties prepared inventory lists for the special master. The husband also presented photographs to the special master (in the wife's absence) that represented items in the wife's apartment but that were now missing or damaged. The wife denied all allegations of taking or destroying the property. As a result, the special master refused to continue his engagement with the parties because of the personal property dispute. The husband filed an emergency motion to stay judgment of nisi to delay payment to the wife on the grounds that the special master "made a finding" that the wife removed property from Felton Street home. The husband' motion was denied, the wife was ordered to receive a portion of her payment forthwith, with the balance to remain in escrow pending the outcome of the case.

In June 2008, a mistrial was declared because the presiding judge was not able to conclude the trial prior to his retirement. The parties were able to resolve a substantial portion of the husband's contempt issues. In April 2009, a three-day trial was conducted and the issues for trial were: "the husband's allegation that the wife failed to cooperate with the special master; the division of the parties' tangible personal property; the payment of the $200,000, plus interest, that was escrowed and the remaining amount owed to the wife for her interest in the Felton Street property; and damages, including attorney's fees and costs."

The judge found that there was no evidence to show when the husband's photographs were taken or when the parties were in possession of the items contained in the photographs. The judge also found that the husband had opportunities to take these pictures and then later sell, trade or remove these items from the Felton Street property. It is also noted that the husband failed to prove that the wife was uncooperative with the special master. In fact, the evidence showed that the wife was cooperative.

The wife claimed that since the judge found that the husband could not prove she had taken or removed the items contained in the photograph that it was the husband who was in possession of said items. As such, the wife claimed that she was entitled to one-half of the value of those items; however, at trial she objected to the value of those items as stated by the husband because of his inability to value said items. As a result, the judge found that neither party was able to value the personal property. Since the parties' separation agreement, as signed by both of them, lacked an itemized list of personal property and value, there could be no finding of contempt. As such, neither party was entitled to attorney's fees and costs. The wife filed a motion for reconsideration pertaining to the attorney's fees and costs that was denied, and the wife filed a notice of appeal.

The trial judge's decision was affirmed. The wife argued that the judge "effectively determined" that the husband was in breach of their separation agreement by trying to litigate his contempt on an issue that they resolved by agreement. However, the appellate court reasoned that there was no finding that husband was "judicially determined to be in breach." In addition, it could not be implied from the trial judge's findings and rationale that the husband was "judicially determined to be in breach." Furthermore, the trial judge has broad discretion in awarding attorney's fees, and based on the trial judge's findings and rationale, she did not abuse her discretion by declining to award any attorney's fees to either party.

Rule 1:28 Decision Case Summaries

By Rosanne Klovee

Curtis v. Presutti, 10-P-1926
June 1, 2011

Instead of depositing cash into the children's educational accounts, the Father deposited stocks when he lost his job and his savings. The Mother appealed the trial court's finding that the Father was not in contempt. The trial court found that the Father's actions benefitted the children's accounts by increasing their value and that the father's substitution of stock for cash was justified by his loss of job and savings. Judgment affirmed.

Brand v. Bertrand, 10-P-2044
June 6, 2011

The parties' joint petition for divorce granted them joint legal and physical custody of the minor children. Prior to the entry of the judgment of divorce nisi, the mother was granted a restraining order against the father by the District Court which awarded her sole legal custody and prevented the father from having any contact with the children. The father was subsequently found not guilty of assault and battery on a child after trial. After a trial on the mother's Complaint for Modification, she was granted sole legal and primary physical custody of the children with visitation rights and child support obligations for the father. The father then appealed. The Appeals Court upheld the trial court stating that joint legal custody is only appropriate when the parties demonstrate a desire to cooperate amicably and are able to effectively communicate with each other. "Where the parties' relationship is 'dysfunctional, virtually nonexistent, and one of continuous conflict,' joint custody is not appropriate." In this case, there was a complete breakdown of trust between the parties.

Kutzko v. Lepine, 10-P-1653
June 8, 2011

Judgment increasing the Mother's alimony affirmed. The Father argued that the judge erred in awarding increased alimony to the mother where the only change of circumstances was the loss of child support at the time of emancipation of the youngest child. The parties divorce judgment expressly contemplated the possibility of a modification of alimony based upon the exchange of financial information. The father's income had increased considerably while the mother's income remained much lower than the father's. The Appeals Court reiterated "'we perceive no sound reason why a child's emancipation, and the resulting loss of child support to a party, may not, in circumstances such as those presented her, be considered by a judge in determining whether there has been a material change in circumstances that would warrant the imposition of (or increase in) an order of alimony.'"

Reinhart v. Petchel, 10-P-271
June 17, 2011

After one month of marriage, the Wife discovered that the Husband had opened nine credit cards in her name and that he was withdrawing significant cash at racetracks. The Wife stayed in the marriage and remained responsible for all household expenses while the Husband paid for incidentals. The Husband stopped working outside the home two years after the parties were married and while he cared for the child while the Wife worked, she took over the parenting responsibilities when she returned home. The Wife placed the marital home and other assets in trust and provided for the support of the Husband and child in the event of her death. The Wife had an affair starting when the mar-

riage was deteriorated. The Husband once again obtained unauthorized access to the Wife's accounts withdrawing funds. The trial judge found that the Husband chose to be unemployed, that the Wife was committed to the care of the child and that the parties were unable to communicate effectively concerning the child. The Wife was awarded sole legal and physical custody of the child and was ordered to pay alimony to the Husband. The court found that the Husband's contributions to the marriage were limited and considered the Husband's use of marital funds during the marriage for his own purposes. The court further found that the marriage was not a true partnership and upheld the division of assets and alimony order. The only order vacated was the trial court's order that the Wife maintain an eTrade account for the benefit of the minor child when this account was listed in the Wife's name for the benefit of the daughter and had been used for purposes unrelated to the child. The Appeals Court stated that this account stands on different footing than the child's UTMA and U Fund accounts and may be subject to marital division once proper findings issue regarding the account.

Mitchell v. Lynch, 10-P-1277
June 20, 2011

When the parties were divorced in 2006, their agreement provided that they would share legal custody of the minor child and the Mother would have physical custody. The agreement further provided that neither party would operate a motor vehicle with the child as a passenger while under the influence of drugs or alcohol and that neither would expose the child to firearms. Two years later, each parent filed complaints for contempt and modification alleging misconduct by the other regarding, among other things, intoxication issues. The parties engaged in extensive litigation thereafter and a guardian ad litem was appointed by the court. After the Mother was found to have locked the minor child in her home while she went to a local bar, the Court granted the Father physical custody of the child on an emergency basis. After a six day trial, the Father was awarded sole legal and physical custody of the minor child. The Mother was granted limited unsupervised visitation and telephone contact. The mother's appeal was denied with the Appeals Court finding that the trial court had committed no error and that extensive findings were issued revealing troubling behavior by the mother dating back several years, including unsubstantiated allegations by the Father. The trial court properly granted the father sole legal custody as the mother was found incapable of working cooperatively with the father.

Ingleman v. Ahlberg, 10-P-1749
July 11, 2011

The trial court denied the Father's complaint for modification seeking to remove the minor child to Buffalo. The evidence did not support a finding that the Father could not find similar employment in Massachusetts that he had just potentially secured in Buffalo. In addition, the Father and his partner provided more than adequate support for the child so family support was not a factor. Lastly, there was no evidence that the schools in Buffalo were superior to the child's schooling options in Massachusetts. There was also evidence that the Father had attempted to influence the child in stating her desire to move and had tracked the Mother and child using G.P.S. through the child's phone and by secretly placing a G.P.S in the Mother's car. Judgment affirmed.

Alvarado v. Mercado, 09-P-2237
July 12, 2011

The Mother sought to remove the minor child to London shortly after marrying her second husband. Her request was denied. The evidence showed that the Mother met her husband on an on-line dating service and married him two months later in Las Vegas. The Mother argued that she then lost her job and was financially dependent on her new husband. The trial judge found that the Mother had a sincere reason for

wanting to move but had concerns as to the stability of the Mother's new relationship. The trial judge further found that the move would not be in the best interests of the child and would negatively impact her emotional, physical and development needs. The child had ADHD and the Mother was not always compliant with insuring that the child took his medication. The judge agreed with the GAL that the move would isolate the child and given his attention issues, would make him an "at risk" child. Judgment affirmed.

O'Neil v. O'Neil, 10-P-774
July 20, 2011

The Wife's alimony was reduced when the Husband's business partnership was terminated and he lost his principal source of unearned income. In their Separation Agreement, the Wife had released any claims against the business and received a payment of $200,000.00. The trial judge properly excluded from consideration as income any of the funds the Husband received from the sale of his business when determining the reduced alimony order.

Sullivan v. Sullivan, 10-P-1531
July 20, 2011

The Wife was granted a divorce on the grounds of adultery, the marital assets were equally divided and the Husband was ordered to pay child support. There were two children born of the marriage, both with medical conditions. The Wife discovered the Husband was having an affair and the parties separated. The Husband then left the marital home and withdrew more than $40,000 from marital fund without the Wife's knowledge for the down payment on a condominium. The parties attempted to reconcile and were intimate with each other. The Husband argued on appeal that the Wife forgave his affair and should not have been granted a divorce on the adultery grounds. The Husband pleaded the affirmative defense of condonation but the trial court found that the Wife never condoned the Husband's affair and that her attempts at reconciliation were for family stability rather than about forgiveness. During the trial, the judge sanctioned the Husband for his incomplete answers to interrogatories and barred him from testifying about the inadequately answered sections. The Appeals Court found that several answers were plainly incomplete and that the trial judge did not abuse her discretion in sanctioning the Husband. The Appeals Court further found that the trial court did not abuse her discretion in finding that the Husband had dissipated assets where he had withdrawn large sums of money that the Wife was unaware of until revealed through discovery. The Husband was unable to track the money so the judge was within her discretion to infer that the Husband was depleting marital funds for his own personal use. The trial court's order that one half of the amount the Husband dissipated be subtracted from his share of the assets and added to the Wife's share was also upheld as were the other asset division orders but the amount dissipated was inadvertently counted twice and corrected by the Appeals Court. With regard to the child support order, the trial judge was within her discretion to depart from the guidelines in consideration of the children's disabilities and the Wife's diminished ability to work so she can meet their needs but the judge was erroneous in her finding that the Husband was underemployed and the case was remanded for reconsideration and clarification on that issue. The Appeals Court found that the trial judge did not properly consider the "dire economic times" suffered in the Husband's real estate industry when averaging his income over the prior five years. There was no finding that the Husband was voluntarily earning less than he was capable of earning.

Cesso v. Cesso, 10-P-355
July 21, 2011

This case involves a three year marriage with one child. The Husband's past four year average income was $556,000.00 but at the time of trial, he reported income of $1,307.00 per week. The trial court found that his true earning capac-

ity was much higher than his stated income. The Wife stopped working after the birth of the minor child and suffered from anxiety, including panic attacks. The Wife was the primary caretaker of the child. At trial, the Husband claimed that the Wife was a chronic alcoholic and was thus incapable of caring for the child. The Husband hired a private investigator and the trial judge found that the Husband paid the investigator $450,000.00 from marital funds. The court credited the Wife's testimony that her use of alcohol had not affected the child and the GAL found no support for the Husband's claim that the Wife was an alcoholic. The Wife was awarded sole legal and physical custody. The trial judge's asset division awarded the Husband two properties he owned prior to the marriage and remaining assets were divided on a 55/45 basis in favor of the Husband taking into consideration what the trial court found to be the Husband's waste of marital assets in his payment of private investigator services. The Wife was also awarded child support and alimony. The Husband argued on appeal that the trial judge failed to consider domestic violence the Wife perpetrated upon him which should have affected the custody orders. He also argued that the judge failed to give proper weight to the video surveillance of the Wife's drinking. The Appeals Court upheld the custody orders as the trial judge was within her discretion to credit the Wife's testimony, including her acknowledgement of her poor decisions regarding alcohol and her significant efforts to address the issue. The Husband failed on appeal to address the support orders and the issue of earning potential and attribution of income so the support orders were also upheld. The Appeals Court did not find that the trial court erred in treating the sums the Husband spent on the private investigator as dissipation of marital assets. However, the court's arrival at the figure of $450,000.00 as the amount of dissipation was unsupported by the record. The Appeals Court declined to treat the Husband's proposed findings as an admission. The issue was remanded to the Probate Court to redetermine the amount of the waste and, if necessary, adjust the property division.

M.J. v. C.L., 10-P-646
August 18, 2011

In this modification judgment, the Father was awarded custody of the minor child despite the Mother's early primary custody when the Father showed little interest in the child. Once paternity was established, the Mother made numerous and serious efforts to restrict the Father's access to the child, including disregarding numerous court orders of visitation, and threatening to kill the Father. The trial court found that the child's best interests would be served by the Father having primary custody as the Mother was unwilling to permit him to develop a relationship with the child and because the Father had made a commitment to his son and was fulfilling his the role of a good father. It was not an allegation of the Mother's reduced ability to care for the child that warranted the change in custody but her resistance to the child having a relationship with the Father that qualified as the material change in circumstances.

Elliott v. Elliott, 10-P-1244
September 6, 2011

The parties were married for fourteen years. The Wife was awarded a portion of the Husband's interest in an LLC in which the primary asset was a vacation property the Husband had a 25% interest with his siblings. The Husband could not transfer any part of his share to the Wife after divorce. The trial judge awarded the Wife $360,000.00 as her share of his 25% interest in the LLC and valued the Husband's interest as $1.6 million. The trial court found that the vacation property was unlikely to ever be sold given the structure of the LLC and that the Husband was unlikely to ever receive any money from his interest. The judge ordered a present distribution to the Wife rather than have her wait for future disbursements of monies that were unlikely to ever be realized. On appeal, the Husband

challenged the court's valuation of his interest in the LLC. The Appeals Court remanded the case because there was little evidence about the value of the Husband's interest in the LLC rather than the market value of the property which in itself was contradictory since the trial court concluded that the property would likely never be sold, mortgaged or generate income for the Husband. On remand, the trial judge could determine whether a present division is reasonable once the judge assigns a fair value to the Husband's interest in the LLC. The Appeals Court, quoting *Adams v. Adams*, noted that a present division is always preferable but that "'where a present valuation of an inchoate interest could provide hardship on either spouse, that may operate as a 'controlling factor,' and the 'if and when' received distribution method becomes a viable option.'"

Jennings v. Jennings, 10-P-937
September 8, 2011

After trial, the court found that the property held in the Husband's mother's name was treated by the parties as theirs during the marriage and that the expectancy of the acquisition of title to the property was woven into the fabric of the marriage. The Husband's mother died prior to trial leaving a will that confirmed a devise of the property into the Husband's name. The remaining assets included trusts, retirement accounts, artwork, property, and the Husband's interest in his businesses. The trial court's division of assets was upheld. While the Husband argued on appeal that one of the trusts was not his asset, he signed several Rule 401 Financial Statements identifying the trust as an asset and changing the value of same. With regard to one of the Husband's businesses, the Husband argued that the trial court erred in finding that he had a present ownership interest in the business and that his testimony regarding the markup of the inventory sale prices was merely speculative. The Appeals Court found no error. With regard to the property the Husband inherited from his mother, the Appeals Court reiterated that Massachusetts has no hard and fast rules regarding the division of inherited assets. The trial judge properly considered all of the facts related to the property, including the parties' prior occupancy of the property, their joint expectation that they would acquire title, and the Wife's valuable contributions to the maintenance of the property. The Appeals Court also upheld the trial court's order that the Husband pay $100,362.11 of the Wife's attorney's fees and that the Wife be responsible for the balance of $50,176.00. There was no evidence that the Husband had requested an evidentiary hearing on the issue of attorney's fees. In addition, the Appeals Court did not agree with the Husband that the award of legal fees to the Wife was designed to punish the Husband for proceeding to trial as the trial court recognized in her findings the Husband's right to have a trial. The trial judge was within her discretion to find, however, that the Husband's strategies and positions taken at trial were unreasonable.

Editors

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Theresa B. Ramos, Esq. is an associate at Rosenberg, Freedman & Goldstein LLP, concentrating in family law, since 2005. Prior to joining RF&G LLP, Ms. Ramos was an associate at Partridge, Ankner & Horstmann, LLP and Of Counsel to Lisa A. Greenberg, where she focused on family law. In addition, Ms. Ramos served as a Law Clerk to the Justices of the Massachusetts Probate and Family Court. She is a member of the Massachusetts Bar Association and the Boston Bar Association. Additionally, Ms. Ramos is the current co-chair of the BBA Family Law Newsletter, past co-chair of the New Lawyers sub-committee of the Family Law Steering Committee, and a past member of the MBA Family Law Section Council. She also participates in the Limited Assistance Representation program through the Suffolk Probate Court. Ms. Ramos graduated from the University of North Carolina at Greensboro (B.A., 1994/ Political Science & Sociology) and Suffolk University Law School (J.D., 2001). Ms. Ramos has been named a "Rising Star" in Boston Magazine and Law & Politics, Massachusetts Super Lawyers, 2009 and 2010.

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Kevin M. Corr is a cum laude graduate of Suffolk University Law School (1992) and Syracuse University (1988). A member of the Massachusetts, New York and Connecticut State bars, he has been engaged in the practice of Family Law for more than nineteen years, and was recently appointed to the MBA's Family Law Section Council (2010-2011). Mr. Corr is a Fellow of the American Academy of Matrimonial Lawyers (AAML), currently serving on the local Chapter's Board of Managers.

Mr. Corr's practice covers all areas of Family Law with a focus on divorce, property division and support issues. He has been recognized as one of Massachusetts' "Super Lawyers" (2008-2010) by Boston Magazine, and as a "Rising Star Super Lawyer" in 2005.

Mr. Corr and David H. Lee successfully co-counseled the trial (2008) and appeal (2009-2010) that led to the Supreme Judicial Court's decision in Ansin v. Craven-Ansin, 457 Mass. 283 (July 2010), a case of first impression in which the SJC approved the use of mid-marriage (post-nuptial) agreements between spouses. For his work in that case, Mr. Corr was recognized by Massachusetts Lawyers Weekly as one of the 2010 "Lawyers of the Year."

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Kristine is an associate with the law firm of Sally & Fitch LLP. Her practice encompasses all aspects of family law and probate litigation, including divorce, custody, modification, removal, domestic violence and paternity issues, as well as equity actions, guardianship and fiduciary litigation of trust and estate matters. Kristine regularly handles cases that involve complex financial and tax issues such as business and asset valuation, alimony and child support structured payments for tax deductibility and capital gains tax issues.

Kristine presently serves on the Steering Committee of the Family Law Section of the Boston Bar Association, and holds the position of Pro-Bono Committee Co-Chair. She has lectured on general issues raised by military service in the context of domestic relations matters in connection with pre-deployment seminars for service members. Kristine is steadfastly committed to pro bono work and regularly represents victims of domestic violence through the Women's Bar Foundation. Kristine also provides legal assistance to low-income residents of Greater Boston through the Volunteer Lawyers Project of the BBA.

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Alexis B. Kaplan is an associate at McCaig Law Offices, a family law firm in Boston. A 2010 graduate of Suffolk University Law School, Ms. Kaplan has been active with VLP since August 2010. She also serves as a member on the BBA New Lawyers Section Pro Bono Subcommittee and the BBA Family Law Section Newsletter Subcommittee.

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Rosanne Klovee is a partner in the law firm of Carney & Bassil focusing her practice on family law, including divorce, modifications, paternity, and custody disputes. She is also a trained family law mediator.

Rosanne graduated cum laude from Suffolk University Law School in 2001. She has been recognized as a Rising Star by Boston Magazine and Super Lawyers Magazine for the past several years. She is an active member of the Boston Bar Association, the Massachusetts Probate and Family Inns of Court and serves on the Advisory Committee for the Family Law Section of MCLE.

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Melinda J. Markvan (Mindy) recently joined Lewis & Leeper in Framingham, MA as an associate in their family law practice group. She is a graduate of Massachusetts School of Law at Andover (J.D., 2010) and Goucher College in Baltimore (B.A., 2001). During law school, Mindy attended evening classes and worked full time as a paralegal and law clerk for Nissenbaum Law Offices (2003-2010).

Mindy's practice encompasses all aspects of family law. She handles a wide range of domestic relations cases involving complex financial and tax issues, as well as short-term marriages with relatively few assets. Mindy is passionate about helping families in need and is committed to pro bono work.

Mindy presently serves on the Steering Committee of the Family Law Section of the Boston Bar Association. She also is an active member of the Newsletter Committee of the Boston Bar Association and writes for the quarterly Family Law Newsletter.

Carol E. Nesson

Carol E. Nesson practices pension and retirement law in Needham, much of it assisting other lawyers in pension division and QDRO drafting. She was general counsel to the Boston Retirement Board and a special assistant corporation counsel for the city of Boston for many years, and is an expert on the Massachusetts public pension system. A founder and first president of the Massachusetts Association of Public Pension Attorneys (MAPPA), she is a frequent speaker at MCLE and public pension law conferences. She has completed the certified financial planner program at Boston University. A graduate of Simmons College and Boston University School of Law, she is an active volunteer for Rosie's Place, her local library and Simmons.

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