MASSACHUSETTS FAMILY LAW: A 2007 REVIEW

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Editor's Note: *This article inaugurates a column offering synopses & comments on cutting edge changes in Massachusetts family law that affect mediators and their clients. This first column offers a chronological retrospective of the most significant cases in 2007. Jon's future columns will provide quarterly reviews.*

Personal Jurisdiction Over Nonresident Spouse The parties were married and lived briefly in New Jersey, moved to Massachusetts for ten (10) years and then to Arizona for fifteen (15) years when, for health reasons, the wife moved back to Massachusetts with the four (4) children born of the marriage. The wife filed a complaint for divorce in Massachusetts in 2005 and the husband, an Arizona resident, filed a motion to dismiss for lack of personal jurisdiction in the Probate and Family Court. The trial judge found that the cause of divorce occurred in Massachusetts based, in part, on conversations that the parties had in the state. Ultimately, the Supreme Judicial Court held that the husband and wife are not required to be domiciled in Massachusetts at the time that the cause for divorce occurred. The SJC found it was sufficient that the husband committed an act in Massachusetts — a conversation — that caused the marital breakdown. *Miller v. Miller*, 448 Mass. 320 (February 9, 2007)

Foreign Custody Determinations In a custody dispute involving courts in Massachusetts and China, the Probate and Family Court judge determined that Massachusetts was not the "home state" of the child, pursuant to GL c. 209B s.1, because the child had not lived in the state for six (6) consecutive months immediately prior to the commencement of the proceeding. *Qiuyue Shao v. Yue Ma*, 68 Mass.App.Ct. 308 (February 22, 2007)

Alimony – Modification Upon Retirement The Appeals Court reversed a Probate and Family Court order reducing the alimony obligation of a divorced man who had retired a few months short of his 65th birthday. According to the Appeals Court, where the ex-husband had "the ability to meet his alimony obligations from income generated by his retirement assets … or out of investment assets … without affecting his own standard of living, the fact that he has retired is not a sufficient basis to reduce the alimony award." *Greenberg v. Greenberg*, 68 Mass.App.Ct. 344 (Feb. 28, 2007)

Removal – Interview with Child in Judge's Chambers The Appeals Court overturned a Probate and Family Court order denying a mother's request to allow her to remove the child to Arizona with her. The Court was concerned with the fact that the trial judge had an unrecorded in camera interview with the child in his chambers and found that his opinion was based largely on the child's statements.

Henceforth, the Appeals Court held, any such in camera interviews "must be electronically recorded and that record made available to the parties." *Abbott v. Virusso,* 68 Mass.App.Ct. 326 (February 28, 2007), *rev. granted* 449 Mass. 1101 (May 2, 2007)

Support Judgments – Delay in Bringing Claim The ex-wife filed a complaint for contempt against the husband regarding a child support and alimony arrearage. The Appeals Court rejected the ex-husband's laches defense for the child support claim (*i.e.* an unreasonable and prejudicial delay in bringing suit), stating that since each child support is a judgment on the date after it is due, pursuant to GL c.119A s.13(a), the defense was not available to him. *Lombardi v. Lombardi*, 68 Mass.App.Ct. 407 (March 12, 2007)

Child Support – "Three Pony Rule" Where the Probate and Family Court found no disparity in the standards of living of both the custodial and non-custodial parent and where the children's needs were "well met," the Appeals Court found no abuse of discretion in the denial of a complaint for modification to increase child support to the custodial parent even though the custodial parent had enjoyed a substantial increase in income since the divorce. The decision recites the declared public policy of the Commonwealth that "children are entitled to participate in the non-custodial parent's *higher* standard of living when available resources permit." It also reminds practitioners of the majority U.S. rule — that a support award must be based on the needs of the children and that child support awards in excess of those needs (the "three pony rule" as it is colloquially known) can have the effect of masking a disguised alimony award and, in the case of a modification, of improperly redistributing the marital estate. *Smith v. Edelman*, 68 Mass.App.Ct. 549 (April 2, 2007)

College Expenses – Premature Order The Appeals Court vacated an order mandating the parties to contribute equally (in excess of the funds in certain educational trusts) to the college expenses of the children. Relying on precedent, the Appeal Court held that the order was premature because the children, ages 11, 10 and 6 at the time of the trial, were too young and there were no "special circumstances" warranting such an order. Although the Appeals Court does not elaborate on the "special circumstances" exception, such cases involve, for example, "children with special needs or profligate parents." *Braun v. Braun*, 68 Mass.App.Ct. 846 (May 4, 2007)

Life Insurance to Secure Alimony Obligation The trial judge ordered the husband to maintain $500,000 in life insurance for the benefit of the three children but made no provision to secure the wife's alimony award although, as the Appeals Court noted, she had authority to do so. The Appeals Court found that the judge did not abuse her discretion as to the amount of the life insurance obligation. The Appeals Court was impressed, however, with the vast disparity in the incomes of the parties and

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the wife's dubious prospects for meaningful employment in the future. Accordingly, the Appeals Court remanded to the trial judge for further consideration the issue of whether the husband should be required to maintain and fund life insurance as security for his alimony obligation and "if she denies the wife any security, to explain her decision." *Braun v. Braun*, 68 Mass.App.Ct. 846 (May 4, 2007)

Pretrial Agreement – Enforceability Where the parties entered into a pretrial agreement purporting to establish their respective rights to the marital home but the agreement was never presented to the court, the judge was not required to abide by the agreement in his judgment resulting from a subsequent divorce trial. *Britton v. Britton*, 69 Mass.App.Ct. 23 (May 11, 2007)

Support – Need and Ability to Pay In allowing summary judgment for the ex-wife upon the husband's complaint for a downward modification of support, the Probate and Family Court judge improperly focused solely on the husband's ability to pay without considering the need of the ex-wife and her own increased income, the Appeals Court held. *Kernan v. Morse,* 69 Mass.App.Ct. 378 (June 20, 2007)

***De Facto* Parent** The Appeals Court found no abuse of discretion where a Probate and Family Court Judge dismissed a complaint of a woman seeking to be adjudged a *de facto* parent of the adopted child of her former same sex partner. Applying the *de facto* parenting test enunciated in prior case law, the judge had determined that the woman had satisfied the "pre-existing relationship" requirement for *de facto* parent status but found that the child would not be harmed by the disruption of that relationship and, further, that the parties did not intend to co-parent prior to the dissolution of the relationship. The Appeals Court also noted that, standing alone, the "failure of the parties to co-adopt or execute a parenting agreement" was not dispositive. *Smith v. Jones*, 69 Mass.App.Ct. 400 (June 22, 2007)

Life Insurance Proceeds During a pending divorce, a dying husband received permission from the Probate and Family Court judge to amend his life insurance policy (which named his estranged wife as the sole beneficiary) to include his two children from a previous marriage as additional beneficiaries. The husband and wife signed the insurance company form but it was never sent to the company and, although the husband's signature was witnessed, the witness did not affix her signature to the form in accordance with GL c.175 s. 123. The husband died and the insurance company disbursed all proceeds to the wife who refused to share them with the children. The children brought suit in Superior Court. The Appeals Court reversed the Superior Court's allowance of the wife's summary judgment motion ruling that the children should not be barred from proceeding on a contract, and other related claims, against the wife. *Cannon v. Cannon*, 69 Mass.App.Ct. 414 (June 25, 2007)

Corporate Valuations – Post-Trial Motions / Date of Valuation The Appeals Court found no abuse of discretion in the Probate and Family Court judge's denial of the wife's motions, noting that "[i]t is not uncommon for post-trial events to change the value of a marital asset," and that the judge had the authority to "consider the interests of the court and the husband in bringing closure to the matter." The Appeals Court also set forth that the general rule in Massachusetts is to value the marital estate as of the date of the trial. *Caffyn v. Caffyn*, 70 Mass.App.Ct. 37 (August 31, 2007)

Corporate Valuation A must read opinion for lawyers, mediators, and business appraisers interested in corporate valuations in the divorce context is treated in this edition of the FMQ, see page 12, *Bernier v. Bernier*, 449 Mass. 774 (September 14, 2007)

Grandparent Visitation A maternal grandmother, whose daughter had mysteriously disappeared, filed a complaint in Probate and Family Court against her son in law seeking visitation with her grandson even though she had no pre-existing relationship with him. In an affidavit filed with the complaint, the grandmother blamed her estrangement from the grandson on her son-in-law who had allegedly isolated the child from the family, perpetrated serious physical violence against her daughter and, the grandmother suggested, was responsible for his daughter's disappearance. The Probate and Family Court allowed the father's motion to dismiss and the Appeals Court reversed, holding that the grandmother's complaint and affidavit were sufficient to meet the stringent pleading requirements set forth in *Blixt v. Blixt*, 437 Mass. 649 (2002). Although the grandmother had no prior relationship with her grandson, under *Blixt*, the Appeals Court reminded, she may have rights to visitation upon a showing that such visitation is "necessary to protect the child from significant harm." The Appeals Court found that it could be inferred from the pleadings that the grandson was exposed to domestic violence which, Massachusetts law recognizes, causes "significant harm" to children. It, therefore, followed that visitation with a grandparent may be necessary to protect the child from further significant harm. Since grandmother's allegations rebut the presumption of the father's fitness to decide whether to permit visitation, the Appeals Court found that it was error for the trial court to allow the father's motion to dismiss. *Sher v. Desmond*, 70 Mass.App.Ct. 270 (September 27, 2007)

Child Support – No Automatic Termination at Eighteen When a father stopped paying child support after the youngest of his children reached his eighteenth (18th) birthday, the Appeals Court found that MGL c.208 s.28 did not provide for automatic termination of a child support obligation at age eighteen (18). The mother, according to the Appeals Court, was not required to file a complaint for modification "to establish the father's continued obligation for child support." In the course of the opinion, the

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Appeals Court also reminds the practitioner of prior case law which holds: (1) that child support obligations do not terminate on the death of the payor; (2) that a provision in a judgment permitting the custodial parent to remain in the marital home with the children is a child support provision and (3) that a court has the authority to modify a support obligation after a hearing on a contempt action. *Tatar v. Schuker*, 70 Mass.App.Ct. 436 (October 9, 2007)

Contempt – Ability to Pay The requirement that a defendant have a present ability to pay in order to be found in contempt does not necessarily mean that s/he have an ability to pay the entire arrearage, according to the Appeals Court. Further, if a judge orders a defendant in a contempt action to make payments over time to reduce the arrearage, the judge is not also compelled to hold that person in contempt. *Poras v. Pauling*, 70 Mass.App.Ct. 535 (October 19, 2007)

Child Support – Impact of SSI Benefits The Appeals Court, in a decision consistent with that of most, if not all, judicial authority from other states, held that a noncustodial parent is not entitled to a child support credit based upon a dependent child's receipt of SSI benefits. *Martin v. Martin*, 70 Mass.App.Ct 547 (October 19, 2007)

Guardianship – Fit Parent Cannot Share Custody with Others The Appeals Court held that a Probate and Family Court Judge was not empowered to split a guardianship of a child between her father and the maternal aunt and uncle who had raised her since infancy. "Custody of a child belongs to a parent," reiterated the Court, "unless that parent is unfit." The Appeals Court noted that the trial judge, on remand, could find that the aunt and uncle were *de facto parents* which would give them continued access to the child. *Guardianship of Estelle*, 70 Mass.App.Ct. 575 (October 29, 2007)

"The only thing a lawyer won't question is the legitimacy of his mother."

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