

Fall Institute
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MCFM Family Law Year in Review

Jonathan E. Fields, Esq.
Fields and Dennis, LLP
20 William Street – Ste. 165
Wellesley, MA 02481
jfields@fieldsdennis.com



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Reed v. Luther, *2011 Mass. Super.LEXIS 254* *(Nov 30, 2011)*

Don't Just Agree to Modify --- Go to Court!

- Pitfalls of informal modifications
- Informally agreeing to lower father's alimony payments
- Never brought to court
- The mother filed a complaint for contempt.
- The father brought a breach of contract action in Superior Court
- No freedom to privately contract with one another without court approval.



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WHAT IF?

...an Agreement contains language that authorizes the parties to modify portions of the Agreement without court



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Acheson v. Acheson, 2011 Mass. App. Unpub, LEXIS 1335

(December 21, 2011)



Language matters --- Don't draft in the hallway!

- Language matters
- Hallway revision of a Separation Agreement provided that the parties will “equalize IRA accounts.”
- Shortly after the Agreement was approved, the wife sought to modify the provision on the grounds that *WHAT THE PARTIES REALLY MEANT*
- The Probate and Family Court refused to modify, and on appeal, the Appeals Court affirmed the decision.



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L.J.S. v. J.E.S., 464 Mass. 346

(February 8, 2013)

Court Must Consider Tax Consequences if Presented.

- Under the IRC, alimony cannot be contingent on a child-related event lest it be re-characterized as non-deductible support.
- Father pays alimony until the youngest graduated from high school at which point alimony would be reduced
- Because the law requires a court to consider “income” when determining alimony and property division, that court must consider income tax consequences as well when such evidence is presented.



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Ulin v. Polansky, 83 Mass.App.Ct. 303

(February 19, 2013)



CASE LAW

IMPUTING INCOME: REASONABLE EFFORTS TO FIND EMPLOYMENT.

- The test for imputing income is a 2-part inquiry:
 - (1) whether the person has the present ability to obtain a particular job;
 - (2) whether the person exercised 'reasonable efforts' in the job search.



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Freddo v. Freddo, 83 Mass.App.Ct. 353

(February 26, 2013)



Modifying Age of Emancipation of an Out-of-State Child Support Order.

- Out-of-state divorce judgments.
- Massachusetts has one of the most generous emancipation statutes in the country.
- Out-of-state judgments often provide that support ends long before a child's 23rd birthday, depending on the state
- Mass could not modify the age of emancipation where it could not have been modified in Florida



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Morales v. Morales,
464 Mass. 507
(March 12, 2013)

Inconsistency Standard
v.
Material Change



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Standards of Review for Child Support Modifications

WHAT STANDARD DOES A PROBATE JUDGE
USE IN REVIEWING A CHILD SUPPORT MODIFICATION?

- Parties divorced
- Mother brought modification based on Father's increased income
- PFC: No material and substantial change in circumstances – mod. dismissed
- Appeals Court: Affirmed. Agreed with PFC on standard.



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INCONSISTENCY STANDARD

SJC: Inconsistency standard applies

G.L. c.208 s.28

Child support “shall be modified if there is an **inconsistency** between the amount of the existing order and the amount that would result from the application of the Child Support Guidelines.”



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WHAT DOES *MORALES* TEACH US?

- How does this case change our Agreements?
- When does it matter:
deviation from Guidelines



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SAMPLE LANGUAGE?

“...Any modification of this Agreement shall not be valid and binding unless it is in writing and signed by both parties and notarized and approved by a court of competent jurisdiction or by court order, in any event, only with respect to merged provisions **and based on a substantial and material change in circumstances.**”



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Iv v. Hang, 83 Mass.App.Ct. 598

(May 14, 2013)

Probate Court has Authority to Allocate Federal Dependency Exemptions.

- PROBATE COURT: The non-custodial parent father was “entitled to claim both the unemancipated children as dependents on his state & federal tax returns...”
- APPEALS COURT: a state court judge has authority to allocate federal tax exemptions.



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TECHNICALITY DRAFTERS SHOULD KEEP IN MIND....

...the Probate and Family Court should have placed an affirmative obligation on the mother, i.e. by directing her to execute and deliver to the father Form 8332 releasing her claim to the exemption.



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Cooper v. Keto, 83 Mass.App.Ct. 798

(June 26, 2013)



CASE LAW

“Agreed Upon Educational Expenses” and the Price of Silence

- Each party was to pay ½ of all agreed-upon educational expenses.
- The father admitted that no one prevented him from participating in the child’s application process; he also never objected to the child’s decision to apply to, accept or attend the college.
- His awareness, acquiescence, and ability to pay...was sufficient to constitute his agreement



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Agreement Language

“the failure to object to a written communication regarding the selection of a college within 7 days shall be deemed an acceptance.”

Language can also be used for extra-curricular activities.



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Green v. Green, 84 Mass.App.Ct. 1109

(August 30, 2013)



CASE LAW

Post- Retirement Alimony Obligations.

- 47-year marriage and two 68-year old spouses
- PFC ordered a roughly equal division of assets and even though the husband had reached retirement age, payment of alimony until actual retirement
- PFC deviated from the presumption in the new law that alimony terminate on the payor's retirement age
- Appeals Court upheld husband's obligation to pay alimony past retirement age
- The PFC had considered the relevant deviation factors: poor health, age, and lack of employment opportunity



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THE DOLAN
COMPANY

Judge can appoint 'parent coordinator'

Appeals Court: even
if one spouse objects

By Eric T. Berkman

A separation agreement in which a divorced couple agreed to use a parenting coordinator for a year to help resolve disputes over their children gave the Probate & Family Court the power to appoint such a coordinator after the year was up even if one of the parties objected, the Appeals Court has ruled in an unpublished decision.

The agreement stated that the parenting coordinator would serve a one-year term, renewable by agreement of the parties. It also stated that if the parties could not reach agreement, the parenting coordinator "will be determined" by the Probate Court.

More than a year later, the mother stopped acknowledging the coordinator, and the father moved to have another one appointed over the mother's objection.

The mother argued that the

agreement required the use of a parenting coordinator only for a year, thus the court had no authority to appoint one after that year was up.

But a three-judge panel of the Appeals Court was not persuaded, noting that the agreement declared that a coordinator would be determined by the Probate Court if the parties disagreed over the renewal

of the original coordinator, leaving no judicial discretion as to whether a parenting coordinator would be appointed under such circumstances.

"If, as the mother contends, the continued use of a parenting coordinator depends on the mutual agreement of the parties, this would only invite the exact type of impasse that both the parent coordinator, and the separation agreement as a whole, intend to avoid," the court wrote. "This, again, is not a plausible reading of the separation agreement."

The five-page decision is *Ruddy v. Ruddy*, Lawyers Weekly No. 81-902-13. The full text of the ruling

Continued on page 28

The full text of the ruling in
Ruddy v. Ruddy can be ordered
at masslawyersweekly.com.

Political affiliation bias suit dismissed

Probation officer's
complaint targeted
O'Brien, Mulligan

By David E. Frank

david.frank@lawyersweekly.com

A probation officer's political affiliation bias suit involving former Chief Justice for Administration and Management Robert A. Mulligan and his alleged role in the state's probation scandal failed to establish the existence of a First Amendment violation, a U.S. District Court judge has ruled in dismissing the complaint.

The probation officer, Joseph Zavatsky, accused Mulligan, ex-Probation Commissioner John J. O'Brien and others of improperly advancing applicants affiliated with state legislators who were in a position to influence the funding of the Trial Court.

Zavatsky, who had applied for an assistant chief probation officer position in Barnstable in 2005, claimed he was discriminated against on the basis of his political non-affiliation.

But Judge Nathaniel M. Gorton disagreed.



MULLIGAN O'BRIEN
Co-defendants in federal case

"[A]n employment decision motivated by cronyism, rather than discrimination, is 'lawful, though perhaps unsavory.'"

— Judge Nathaniel M. Gorton

represented Mulligan and the Trial Court in civil litigation brought after the 2010 findings of independent counsel Paul F. Ware Jr., who was appointed by the Supreme Judicial Court to investigate improprieties in the Probation Department.

"Notably absent from plaintiff's allegations is any discussion of political activity or 'debate on public issues,' the protection of which motivates the doctrine of political affiliation discrimination," Gorton wrote. "Instead, [the plaintiff] avers that the decision of Department employees to affiliate with certain legislators, and his decision not to, had everything to do with their desire to obtain a promotion. The desire to 'curry favor' with one's superiors, and, necessarily, the desire not to do so, are not political activities protected by the First Amendment."

The 13-page decision is *Zavatsky v. O'Brien, et al.*, Lawyers Weekly No. 02-495-13. The full text of the ruling can be found at masslawyersweekly.com.

'Second try'

Boston lawyer Stephen Wald

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Ruddy v. Ruddy, 84 Mass.App.Ct.1110

(September 16, 2013)



CASE LAW

PC AGREEMENT HELD ENFORCEABLE

An agreement to use a PC was enforceable, even where one party does not want to use one anymore.



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Bower v. Bournay-Bower

SJC-11478

Whether a Probate and Family Court judge exceeded her authority by appointing a Parenting Coordinator who would have “**BINDING AUTHORITY**” to issue rulings concerning disputes brought to her...



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DOMA

United States v. Windsor, 570 U.S. ____ (2013)

A LANDMARK DECISION...

- Legally married same-sex couples will have access to all federal benefits
- Over 1,000 federal rights and benefits impacted – three examples:
 - (1) Transfers of property – non taxable
 - (2) Retirement assets – transfer by QDRO
 - (3) Alimony – deductible/includible



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WHAT HASN'T BEEN RESOLVED...

ESTABLISHING PARENTAGE

- MA – Same Sex Couple
- Birth Certificate Reflects Both Parents
 - Move to Non-Recognition State



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Elaine Holmes v Kenneth Holmes

SJC-11538

- Argument is scheduled for 12/3/13.
- Whether the GTA periods set forth in G.L. c.208, s.49 added by St.2011, c.124, s.3 begin running as of the date of the divorce judgment or as of the date the divorce complaint is served
- Husband was ordered to and did pay temporary alimony during the pendency of the divorce proceedings



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The New Child Support Guidelines



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