

Fall Institute  
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## **MCFM Family Law Year in Review**

*A Review of Recent Case Law Affecting Family Mediators*

Jonathan E. Fields, Esq.  
Fields Dennis & Cooper, LLP  
80 William Street, Ste. 210  
Wellesley, MA 02481  
jfields@fdcattorneys.com  
781-489-6776

FIELDS DENNIS & COOPER<sup>LLP</sup>  
*Attorneys at Law*

# Rosen v. Rosen

90 Mass.App.Ct 677 (2016)

“My ex-wife and I made a deal to change the support. My salary decreased and she agreed to take less support. We didn’t file anything in court and now she wants to hold me to the original support number.”

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*Attorneys at Law*

# Statutory Framework

Prohibition against retroactive modification of child support except when a complaint for modification is pending. G.L. c.119A s.13(a)

# What about equity?

Here, Probate Court gave father some credit for certain periods of time that he had one or more children in his custody even though no modification was pending. Mother appealed, claiming violation of G.L. 119A.

# Father wants this to be the Test

Father: Court should adopt the rule that “in compelling circumstances” where equitable, a Court can grant a credit even during a period where there was no pending complaint for modification.

# Appeals Court Makes it Really Really Hard for Judges to Use Equity

To receive an equitable credit against a child support arrearage, the support payor must demonstrate that:

- (1) the support recipient agreed
  - (a) to transfer custody of the child to the payor for an extended period of time not contemplated in the original custody order, and
  - (b) to accept the payor's direct support of the child as an alternative method of satisfying the payor's child support obligation [continued next slide]

# Really Really Hard Rule (cont'd)

- (2) The custody transfer was not the result of duress, coercion, or undue influence exerted by the payor against either the recipient or the child;
- (3) The payor provided the child with adequate support and maintenance while the child was principally domiciled in the payor's home;
- (4) The recipient was relieved of supporting the child during the period in question;
- (5) The alternative support arrangement was not contrary to the child's best interests; and [continued on next slide]

**(cont'd)**

(6) Granting a credit to the payor for his or her direct support of the child would not result in injustice or undue hardship to the recipient.



# Gravlin v. Gravlin,

89 Mass.App.Ct. 363 (2016)

Modification of child support action.

Parties submitted it to arbitration waving  
right to trial and appeal.

Appeals Court upheld the Probate Court's  
confirmation of the Arbitration award.

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# What do we learn from Gravlin?

1. Arbitration has long been recognized as a valid means of resolving disputes between divorcing parties.
2. Must be voluntary – judge cannot force it. Otherwise, it is an improper delegation.
3. Valid agreement to arbitrate.

## Gravlin (cont'd)

4. After the award, judge retains the final and nondelegable authority to make the decision at a confirmation hearing.

# Gravlin (cont'd)

## 5. Judicial review of award is narrow.

- did arbitrator exceed authority by granting relief outside scope of agreement or by awarding relief prohibited by law?
- did arbitrator decide matter based on fraud, arbitrary conduct, or procedural irregularity?

## Gravlin (cont'd)

6. Findings of fact and conclusions of law.  
Typically, no inquiry is made into whether the arbitrator made erroneous findings of fact or conclusions of law.
7. May be advisable that both parties have the advice of counsel before submitting a matter to arbitration.

## Gravlin (cont'd)

### 8. Family law arbitration awards retain “one unique characteristic.”

“[They] cannot bind the parties in perpetuity as to issues of child custody, child support, or merged alimony provisions, as they remain subject to modification under the applicable standards. The division of assets, however, survive the entry of judgment and, therefore, are not subject to modification.”

# George v. George,

476 Mass. 65 (2016)

Parties divorced in 2002 after a 13 yr marriage.

Merged alimony provision in agreement:

“earlier of” his death, her death, her remarriage and July 30, 2026.

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# Probate Court was Interested in Justice

Denied husband's modification. Held that,  
per G.L. c.208, s.49(b), deviation was  
appropriate because it was in the "interest of  
justice."



# Was the Appeals Court Interested in Justice?

1. No evidence in the record that she would have negotiated a different property division.
2. The judge should evaluate circumstances as they exist at the time deviation is sought not at the time of the divorce.

# Duff-Kareores v. Kareores, 474 Mass. 528 (2016)

Second marriages:

“The triumph of hope over experience.”

-Samuel Johnson

# The Facts

1. Parties were divorced and later remarried.
2. While divorced, they cohabited.
3. During cohabitation, husband continued paying alimony to the wife.
4. They remarried – and separated shortly after.

She was counting the days.

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# How to Calculate

The SJC:

Period of first marriage +  
period of cohabitation +  
period of second marriage =

Trust your first instincts.

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# Hoegen v. Hoegen,

89 Mass.App.Ct. 6 (2016)

Mother's Modification of Child Support:  
Should Father's Restricted Stock Units that he gets through work be included as income for purposes of support?

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# Probate Court

Increased support but did not include income from Father's RSU. Found that the Mother waived it when she waived all right, title, and interest to it in the property division section. Mother appealed.

# No Waiver

“It is clear that her waiver cannot operate to waive her children's right to appropriate child support pursuant to the guidelines. “[I]t is axiomatic under Massachusetts law that ‘[p]arents may not bargain away the rights of their children to support from either one of them.’”

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# Fehrm-Cappuccino v. Cappuccino,

90 Mass.App.Ct. 525 (2016)

Trial: I tried the case. And won.

Appeal: I argued the appeal. And lost.

Agreement: I didn't draft it.

Child Support: For two years, at \$577/week in the form of a prepayment in exchange for Father granting Mother part of his equity in the marital home.

After 2 years: support would be based on the parties economic circumstances and employment at that time.

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# Definition of Income

No definition of Income

Father had 2 sources of income:

- employment income
- income from LP interest in rental real estate

After 2 years, Father filed a modification.

# Exclusion of Father's Rental Income

Father argued:

His rental income should not be included because Mother, in property division, waived “all right title and interest to it” and that this was a survived provision. Therefore, it shouldn't count even for child support.

Probate Court: agreed.

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# Appeals Court Disagreed.

CSG presumptively apply to modification actions. Income defined very broadly in CSG and includes rental real estate income.

No Waiver: Assuming Mother waived her interest in the income, that waiver cannot operate to waive children's right to receive child support.

# The Boyfriend's Income

Line II(p) of R.401 Financial Statement, under Income: “Contribution from household member(s)”

CSG: Not expressly included in income but could be considered under catch-all

# Attribution of Boyfriend's Income to Mother

Probate Court attributed boyfriend's contribution to Mother as income.

Appeals Court – remanded to the Probate Court for additional findings.

# Detailed Findings Required

Judge must make detailed findings to justify including contributions from a household member in the Mother's income.



# Findings should include:

- the lack of an obligation of the boyfriend to support the children. (?)
- manner in which the kids and mother's lifestyles are altered by these funds
- discretion that the boyfriend maintains in payment of these funds
- manner in which the mother would support the household absent these funds.

# Earning Capacity of Mother

Mother had no college degree, and did not work during the marriage.

After divorce: worked as an independent contractor for \$25/hour. Her financial statement stated \$47/week in employment income.

# Appeals Court

- Attribution of \$750 in income was an abuse of discretion considering her employment history and education level and
- No evidence that 30 hrs/wk is available to her
- 4 children are in her care all but 2 weekends per month per the agreement.

# P.F. v. Dept. of Revenue

-----Mass.App.Ct.----- (2016)

H+W divorced 2004 / 1 child

H's Child support obligation: \$72/week

H convicted in 2010 of sexual abuse of the child and goes to prison.

In 2012, H brings modification to reduce/eliminate support.

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# Probate Court

Probate Court denied the modification.

Rationale: attributed income to him because his loss of employment was a “foreseeable consequence” of his crime against the child.

# Appeals Court

Appeals Court: the relevant inquiry is whether he can obtain employment through reasonable efforts.

And he can't. Because he's in prison.

# ***Pfannenstiehl I + II***

88 Mass. App. Ct. 121 (2015) /  
475 Mass 105 (2016)

Can the court include in the marital estate this  
spouse's beneficial interest in this particular  
irrevocable trust?

Appeals Court-YES/ SJC- NO

Is the interest a **fixed and enforceable** property right  
or rather **too remote and speculative** for inclusion?

Appeals Court- fixed and enforceable

SJC – too remote and speculative

# What happens if the Court doesn't include the trust interest?

It's a "mere expectancy."



# The Trust

Irrevocable / Settled by Husband's father.  
11 beneficiaries including Husband.

# Ascertainable Standard

In making distributions, the Trustee must consider the needs of the beneficiaries....

# Wholly Discretionary

In making distributions, the trustee shall have sole and unreviewable discretion.

# The Shenanigans

Not very subtle divorce planning?

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“Woven into the fabric of the marriage”

# Probate Court decision/ Appeals Court affirmed

3 factors:

- Shenanigans
- Woven into fabric
- Ascertainable Standard

# SJC Reverses

Husband's interest too remote and  
speculative for inclusion

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# The “Open Class” Problem

An open class of beneficiaries is one in which the interests of currently living beneficiaries are subject to partial reduction in favor of persons born after the creation of the trust who, under its terms, are entitled to share as members.”

# The Unequal Distribution Problem

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# Heystek v. Duncan

90 Mass.App.Ct. 1116 (Unpub. 2016)

Do we care about “mere expectancies”?

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**“My husband gets all these gifts from his family and he’ll always get them.”**

Wife appealed a property division for a number of reasons, and the Appeals Court sent the case back to the Probate Court for:

Failure to consider the Husband’s *likely opportunity for future acquisition of capital assets and income in the form of gifts and inheritances from his family.*

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“We are concerned... by the judge’s apparent failure to place any identifiable weight on the husband’s likely opportunity for acquisition of capital assets or income in the form of future gifts or inheritance from his mother.”

# **“But they’re just gifts, they’re not guaranteed.”**

“Though it is .. true [he] holds no enforceable right to receive any such gifts.. the foundational reality of the parties’ financial circumstances throughout their marriage was their life-style relied to a significant degree on a fairly steady stream of such largesse, and it would ignore that reality to anticipate that the husband would not continue to benefit from similar generosity following dissolution of the marriage.”

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**“It was pretty even. I got the house  
and he got all the cash”**

Court also sent the case back to consider the  
fact that the Wife’s division of assets was  
illiquid.

# Frost-Stuart v. Stuart,

90 Mass.App.Ct. 366 (2016)

Agreement entered in 2010 prior to the ARA:

\$5,250/mo. Alimony

\$4,750/mo. Child Support

Wife began cohabiting a few months later.

Husband, in 2013, brought a modification seeking elimination of alimony based on ARA cohabitation provision.

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# Probate Court

- terminated Husband's alimony obligation pursuant to ARA  
and
- Increased child support payments an additional \$779/week

# Appeals Court

Termination of alimony per ARA  
inappropriate because the divorce judgment  
predated ARA.

*Chin v. Merriott* – ARA's cohab. provisions  
apply to judgments est'd after 3/1/12.



# What is the correct standard for pre-ARA orders?

Cohabitation itself is not sufficient because ARA does not apply. Look to the old rules. Must prove material change and a positive economic impact.

“If, as a result of cohabitation, the recipient spouse’s economic circumstances have materially changed, then the court may alter or eliminate alimony,”  
*Gottsegen v. Gottsegen*, 397 Mass. 617, 625 (1986)

**“Sure, decrease the alimony. I’ll get it back in increased child support.”**

Probate Court: Increased child support *based in part on termination of Father’s alimony obligation.*

Appeals Court: Inappropriate rationale to increase child support.

# Attribution of Boyfriend's Income to Mother's Income

Probate Court: Boyfriend's social security disability benefits of \$27,000 attributed to Mother.

Appeals Court: No.

# Partanen v. Gallagher,

## 475 Mass. 632 (2016)

Jo – age 7, and Ja – age 4.

Parents – Karen Partanen and Julie Gallagher who were together 13 years.

Had the kids using artificial insemination with full participation and consent of both.

Julie- birth mother

Karen- non-birth mother

Represented themselves publicly as the parents.

Jointly raised the children until their separation.

Julie and Karen never married. Karen never adopted.

They break up.

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## G.L. c. 209C – Establishment of Paternity (and Maternity)

Karen seeks a declaration of parentage under 209C. This means, using gender neutral terms, she must show:

that the children were *born to* Karen and Julie

and

both received the children into their home and *openly held out the children as theirs*.

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# Doesn't the Statute Require a Biological Connection?

Basically, according to the SJC:

No.