

INTEREST OF THE AMICUS

The Massachusetts Bar Association (MBA) is a non-profit organization founded in 1910. The MBA serves the legal profession and the public in Massachusetts by promoting the administration of justice, legal education, professional excellence, and respect for the law. The MBA represents 18,500 attorneys, judges and other legal professionals across the Commonwealth. The MBA frequently takes positions on significant public policy issues and on legal questions whose proper resolution is important to the judicial system, to the public, and to members of the legal profession.

This appeal raises an issue of great importance to parents, children, families, attorneys, and judges throughout the Commonwealth. Specifically, this appeal addresses the legal standard that the Probate and Family Court should apply when parents share legal and physical custody of their children, but one parent wants to relocate and remove the children from the Commonwealth. This Court has recognized the importance of this issue by inviting amicus submissions. The MBA and its members have been involved in issues relating to child custody, removal and domestic relations in the context of legislation, education, litigation, and policy making for many years. The MBA has a strong

interest in the outcome of this appeal and expertise in the area of domestic relations. The MBA can offer relevant information and a perspective that should be of assistance to the Court in resolving this appeal.

STATEMENT OF THE ISSUE PRESENTED

The question presented is "the proper standard for evaluating a request for removal of the children in circumstances in which the parents share legal and physical custody: whether the standard is the 'real advantage' test of Yannas v. Frondistou-Yannas, 395 Mass. 704, 710-712 (1985), or the standard for modification of a child custody order pursuant to G.L. c. 209, § 28, without examining the interests of the parents." Supreme Judicial Court, Amicus Announcement (December 9, 2005).

STATEMENT OF THE CASE

The MBA confines its brief to the question on which this Court has invited amicus submissions. Accordingly, the MBA takes no position as to the procedural history presented by either party in their respective briefs or claims of error relating to the trial court's interpretation of the divorce decree, its findings of fact, or admission of certain documents into evidence. (Appellant's Brief at 17-27,30-32).

STATEMENT OF THE FACTS

The MBA confines its brief to the question on which this Court has invited amicus submissions. Accordingly, the MBA takes no position as to the facts presented by the parties in their respective briefs.

SUMMARY OF ARGUMENT

1. If there is an order for shared physical custody and neither parent is exercising the clear majority of custodial responsibilities, and the relocation makes it necessary to choose one parent to be the primary custodial parent, the court shall re-assess the custodial arrangements under the traditional best interests test.¹ In applying the best interests test to determine which parent shall be awarded physical custody, the court should consider all relevant facts, including, but not limited to the potential disruption and benefits of the relocation

¹ Unless otherwise noted, the term "shared physical custody" as used in this brief refers to a custody arrangement where the children live the same or nearly the same amount of the time with each parent, and the two parents share the same or nearly the same amount of responsibility for their children's daily care. An ample body of law already exists addressing removal when one parent is the sole or primary custodial parent of the children. See e.g. Charles Kindregan, Monroe Inker & Patricia Kindregan, 2A Mass. Practice, §§ 47.16, 47:19 (3d ed. 2003).

itself. (Pages 9-14).

2. If at the outset of the case or while re-assessing the issue of child custody, the judge is able to determine that the parent requesting removal is unable to establish the first prong of the real advantage test -- "a good, sincere reason for wanting to remove to another jurisdiction," the judge may deny the request for removal, which may obviate the need for modification of the custody order. (Page 14).

3. If the trial court awards custody to the parent who wishes to relocate, the court should allow that parent to relocate with the children provided that the parent also can demonstrate that the move will provide a real advantage under Yannas v. Frondistou-Yannas, 395 Mass. at 710-712. The trial court must also determine what parenting time and access to the child shall be awarded to the parent remaining in Massachusetts. (Pages 14-15).

ARGUMENT

I. THE COURT MUST REDETERMINE CUSTODY AND APPLY THE REAL ADVANTAGE TEST IF THE RELOCATION MAKES IT NECESSARY TO CHOOSE ONE PARENT TO BECOME THE CHILD'S PRIMARY CUSTODIAL PARENT.

The Massachusetts removal statute provides that "[a] minor child of divorced parents who is a native of or has resided five years within this commonwealth ...

shall not, if of suitable age to signify his consent, be removed out of this commonwealth without such consent, or, if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders." G.L. c. 208, § 30.² There are no reported decisions involving application of the removal statute to a shared physical custody arrangement, but the term "upon cause shown" has been interpreted many times where a parent with sole physical custody of the parties' children after a divorce seeks permission to remove the children outside the Commonwealth. See e.g. Rosenthal v. Maney, 51 Mass. App. Ct. 257 (2001); Williams v. Pitney, 409 Mass. 449 (1991). "The words 'upon cause shown' mean only that removal must be in the best interests of the child and thus the central question ... is how these 'best interests' are to be determined." Yannas v. Frondistou-Yannas, 395 Mass. 704, 711 (1985). (Emphasis added). Massachusetts employs a legal standard known as the "real advantage standard" or the "Yannas test" to determine a child's

² Not all disputed removals fall within the statute because the language of the statute excludes children of suitable age to signify their consent, and children born outside of Massachusetts who have not lived here for five years. G.L. c. 208, § 30.

best interests in removal cases. Id. at 710.³

The real advantage standard is a two-prong test. First, the parent seeking removal must establish a "good, since reason for wanting to remove to another jurisdiction." Yannas, 395 Mass. at 711. If the custodial parent establishes a good, sincere reason for wanting to remove to another jurisdiction, the judge conducts a "best interests" calculus that includes the interests of the child, the mother, and the father. Id. at 711-712. No single set of factors is controlling in deciding the best interests of the child as related to the proposed relocation, "but rather they must be considered collectively." Id.; Rosenthal v. Maney, 51

³ The real advantage standard is based on D'Onofrio v. D'Onofrio, 365 A. 2d 27 (N.J. 1976), perhaps one of the most frequently cited family court cases on the issue of removal. The D'Onofrio removal test "has been widely adopted" nationwide. American Law Institute, Principles of the Law of Family Dissolution, § 2.17, Comment c, 377 (2000). See Carol Bruch & Janet Bowermaster, The Relocation of Children and Custodial Parents: Public Policy, Past and Present, 30 Fam. L.Q. 245, 281-303 (1996) (describing New Jersey as a "trend setter in the area of relocation law," but noting variations in removal standards across the country). Commentators also note a national trend toward liberalization of removal rules when discussing traditional primary caretaker custody arrangements. Id. at 302-303; Charles Kindregan, Monroe Inker & Patricia Kindregan, 2A Mass. Practice § 47:16 (3d ed., 2003). States vary, nevertheless, as to applicable statutes and in their case law. See Bruch et al., supra at 271-303. There appears, however, to be no reported trend regarding shared physical custody cases.

Mass. App. Ct. 257, 268 (2001).

The second prong of the real advantage standard involves assessment of the child's and parent's interests. It begins with "evaluation of the best interests of the child [with] attention to 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." Yannas, 395 Mass. at 711.

Next, the trial court evaluates the interests of the parents. Id. This is where the major difference between traditional custody arrangements addressed in Yannas or its progeny, and shared physical custody cases becomes apparent. The real advantage test as applied to date requires the trial court to consider the "relative advantages to the custodial parent from the move, the soundness of the reason for moving, and the presence or absence of a motive to deprive the noncustodial parent of reasonable visitation [as] ...

likely to be relevant considerations." Id. (Emphasis added).⁴ "[B]ecause the best interests of a child are so interwoven with the wellbeing of the custodial parent, the determination of the child's best interest requires that the interests of the custodial parent be taken into account." Id. at 710 (Emphasis added). The judge also must consider "the reasonableness of alternative visitation arrangements" and the interests of the "noncustodial parent." Id. at 711 (Emphasis added). "If that parent is unfit or has not exercised his or her rights of visitation, the judge's problem is less difficult than in the case of a diligent noncustodial parent." Id. (Emphasis added). Therein lie the differences. In a shared physical custody situation, there is no "noncustodial parent" and each party is a "custodial parent."

The removal statute does not distinguish between types of custody arrangements, nor does it contain an exclusion for shared physical custody orders. G.L. c. 208, § 30. In addition, the statute trumps contractual

⁴ Nevertheless, "[t]hat the move is in the best interests of the custodial parent does not mean that it is automatically in the best interests of the child." Id. at 711. Similarly, "t]he fact that visitation by the noncustodial parent will be changed to his or her disadvantage cannot be controlling." Id.

agreements between divorced spouses relating to removal of their children. Williams v. Pitney, 409 Mass. 449, 454 (1991). Thus, what constitutes "cause" for removal when relocation by one parent makes it no longer feasible for the child to live half or nearly half of the time with each parent, or for the parents to share the same or nearly the same responsibility for the child's daily care, is a matter of first impression for this Court.

A. The Court Must Redetermine Child Custody if the Relocation Makes it Necessary to Choose One Parent to Become the Child's Primary Custodial Parent.

The Appeals Court has recognized that shared physical custody arrangements by their very nature present "potential practical difficulty" should a parent decide to move out of their children's school district. Freedman v. Freedman, 49 Mass. App. Ct. 519, 522 (2000). This is because the parents' ability to share and coordinate responsibility for the child usually depends on geographical proximity between their homes so that the children may transition to each residence without undue disruption; parents also need sufficient flexibility to perform their daily child-related duties. See e.g. Hosein v. Hosein, 785 So.2d 703, 704 (Fla. 2001) (proximity of the parents'

residences and potential disruption to the child are factors in determining whether to "rotate" the child's residence); Massachusetts Association of Family and Conciliation Courts, Planning for Shared Parenting, 5(2005) (distance between each parent's home and children's schools and workplace, and flexibility in each parent's schedule are factors impacting parents' ability to share custody).⁵ Thus, it is not surprising that the Appeals Court assumed that shared physical custody orders depend on the parents' physical

⁵ There appear to be no statistics on the prevalence of shared physical custody orders. Some commentators describe these orders as "rare" noting that often "as a practical matter only one of the separated or divorced parents is able to function as the day-to-day primary caretaker of the child." Charles Kindregan et al., supra at § 47.1. Others opine that while such orders may be controversial, "an emerging shift in viewing shared parenting as a desirable alternative ... may ultimately result in less conflict and costly litigation for divorcing parents and much less disruption for the children of divorced parents." Christine Anthony et al., Mass. Divorce Law Practice Manual vol. 1, § 11.4 (2d ed., MCLE 2000 & Supp. 2005). "Proponents claim that children are enriched by having equal access to both parents and that the transitions between parents work to the children's advantage if they are handled properly and without conflict." Id. "Critics argue that children need one home base and that it is too disruptive for children to move from one residence to another on a daily or weekly basis." Id. There is no legal presumption in favor of shared physical custody orders, G.L. c. 208, § 31, but there is a presumption against shared physical or shared legal custody when there is a serious incident or pattern of domestic abuse. G.L. c. 208, § 31A.

proximity to the child and "create pressure for the parents to stay geographically close to each other." Freedman v. Freedman, 49 Mass. App. Ct. at 522.

The Appeals Court has held that "a request for modification of custody is distinct from a request to relocate and must be based on a material and substantial change in circumstances other than the move...." Rosenthal v. Maney, 51 Mass. App. Ct. 257, 261 (2001). See also D.C. V. J.S., 58 Mass. App. Ct. 351, 357 (2003).⁶ Any removal case involving parents who share equal or nearly equal physical custody, however, should be distinguished from more traditional custody arrangements addressed by Rosenthal and the ample body of case law on application of real advantage standard. "If neither parent has been exercising a clear majority of custodial responsibility for the child, the court should modify the [custody order] in accordance with the child's best interests, taking into account all the relevant factors including the effects

⁶ The Rosenthal case appropriately avoids the burden and hardship placed on children and parties' related to frivolous or unwarranted custody modification actions. A removal case when one parent has custody, however, is much different than when parents equally share physical custody of their children. By necessity, custody must be redetermined if the relocation will make shared physical custody unworkable.

of relocation." American Law Institute Principles of the Law of Family Dissolution, § 2.17(4) (c), 355-356 (2000). See also Charles Kindregan et al., supra at § 47.19 ("When parents have shared physical custody of children and one parent proposes to move a substantial distance from the other, it will be necessary to revise the shared custody order unless the parents can agree on a new arrangement."). The relocation of a parent in this context constitutes a substantial change in circumstance because the proposed relocation significantly impairs the parents' abilities to exercise parenting responsibilities under the parties' existing parenting plan. American Law Institute Principles of the Law of Family Dissolution at § 2.17 (1). In sum, a relocation action is also an action for modification of custody when neither parent has primary or sole physical custody.

In a modification case that also involves removal and shared physical custody, the court should re-assess the custodial arrangement under the traditional best interests test. Id. at § 2.17(4). In applying the best interests test to determine which of the parents shall be awarded physical custody, the court should consider all the relevant factors related to the child,

including, but not limited to the potential disruption and benefits of the relocation itself. R.H. V. B.F., 39 Mass. App. Ct. 29, 39 (1995) (best interests analysis “leave[s] it to the trial judge to identify and weigh any factors found pertinent to those interests”). See generally, Kindregan et al., Factors Considered in Child Custody Disputes between Parents, supra at § 47:12; G.L. c. 208, §§ 31-31A. In essence, the custody claims of the parents are considered “in light of established principles governing custody determinations.” Rosenthal v. Maney, 51 Mass. App. Ct. at 261.

The Yannas case is a good example of this approach. In Yannas, there was no judgment to modify and the judge first awarded the wife sole physical custody as part of the divorce judgment based on a traditional best interests tests that included a discussion of the children possibly living with the mother in Greece. Yannas v. Frondistou-Yannas, 395 Mass. at 708-710. After custody was awarded to the mother, the real advantage standard was applied. Id. at 710-712. This approach is faithful to this Court’s admonition that “[t]he judicial safeguard of [the child’s best] interests lies in careful and clear fact-

finding and not in imposing heightened burdens of proof." Yannas, 395 Mass. at 712.⁷

B. If It is Evident at the Outset or in the Course of the Modification Action That the Parent Seeking to Remove the Child Lacks A Good, Sincere Reason for Removal of the Children to Another Jurisdiction, the Judge May Deny the Removal Request.

If the judge is able to determine at the outset of the case or while assessing the issue of custody that the parent requesting removal is unable to establish the first prong of the real advantage test -- "a good, sincere reason for wanting to remove to another jurisdiction," the judge should make appropriate findings and enter a judgment denying the parent's request for removal. This may obviate the need for a re-determination or modification of custody.

C. If the Court Awards Custody to the Parent Who Wishes to Relocate, That Parent May Relocate if the Relocation Will Provide a Real Advantage.

If the trial court awards custody to the parent who wishes to relocate, the court should allow that parent to relocate with the children provided that the parent also can demonstrate that the move will provide a real advantage under Yannas v. Frondistou-Yannas, 395

⁷ A consequence of placing heightened legal burdens on parents who wish to relocate may be that some parents will avoid or resist entering into agreements for shared parenting in the first place.

Mass. at 710-712. The Court will also need to address what schedule of parenting time and the types of access by the parent remaining in Massachusetts are in the children's best interests. G.L. c. 208, §§ 31-31A; Yannas, 395 Mass. at 711 (Reasonableness of alternative child access arrangements should be assessed).

CONCLUSION

The Supreme Judicial Court should clarify that when children reside the same or nearly the same amount of time with their parents, who share equal or nearly equal responsibility for the children's care, the real advantage standard still applies, but the trial court must first re-determine the issue of custody.

MASS. R. A. P. 16(k) CERTIFICATION

The undersigned certify that this brief complies with the Massachusetts Rules of Appellate Procedure.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Pauline Quirion, hereby certify under penalties of perjury that I served two copies of this Brief of the Amicus Curiae by delivering said copies by first-class mail postage prepaid (and Express Mail) to counsel of record as follows:

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