

## Domestic Relations

MONROE L. INKER\*  
PAUL P. PEROCCHI\*\*  
JOSEPH H. WALSH\*\*\*

**§4.1. Divorce: Jurisdiction of Probate Court to Grant Equitable Relief.** In *Wood v. Wood*,<sup>1</sup> the Supreme Judicial Court was called upon to determine the scope of the probate court's jurisdiction to grant equitable relief in controversies between divorced persons over property after a divorce decree has become final.<sup>2</sup> The plaintiff in *Wood* commenced an action in probate court against his former wife after the decree nisi granting their divorce had become absolute.<sup>3</sup> The complaint alleged that the defendant had violated the divorce decree by removing, intentionally damaging, and selling various items of real and personal property owned by the couple during their marriage. The plaintiff demanded money damages and the return of the items of personalty.<sup>4</sup> In addition, plaintiff requested an injunction against further removal or sale.<sup>5</sup> Since the defendant had left Massachusetts, plaintiff served process upon her pursuant to the Massachusetts Long Arm Statute.<sup>6</sup> The plaintiff also obtained an attachment of the defendant's remainder interest in a Worcester county farm that the couple had held in common. The probate court dismissed the action for lack of jurisdiction, and the plaintiff appealed.<sup>7</sup>

On appeal to the Supreme Judicial Court, the Court first addressed

---

\* MONROE L. INKER is a partner in the law firm of Crane & Inker, Boston, and is an Instructor in Law at Boston College Law School.

\*\* PAUL P. PEROCCHI is an associate in the law firm of Crane & Inker, Boston.

\*\*\* JOSEPH H. WALSH is an associate in the law firm of Crane & Inker, Boston.

The authors wish to gratefully acknowledge the research assistance of Lawrence A. Kestin and Eric H. Zagrans.

§4.1.<sup>1</sup> 1976 Mass. Adv. Sh. 371, 342 N.E.2d 712.

<sup>2</sup> *Id.* at 371, 342 N.E.2d at 713-14.

<sup>3</sup> *Id.* at 372, 342 N.E.2d at 714.

<sup>4</sup> *Id.* at 372-73, 342 N.E.2d at 714.

<sup>5</sup> *Id.*

<sup>6</sup> G.L. c. 223A, § 3.

<sup>7</sup> 1976 Mass. Adv. Sh. at 372, 342 N.E.2d at 714. The Supreme Judicial Court took the case on its own motion pursuant to G.L. c. 211A, § 10(A).

the issue of whether the suit was within the subject matter jurisdiction of the probate court. Relying on section 6 of chapter 215 of the General Laws, which section grants to the probate courts general equity jurisdiction, the Court held that there was subject matter jurisdiction.<sup>8</sup> Section 6 provides in part that “[p]robate courts . . . shall, after the divorce decree has become absolute, also have concurrent jurisdiction to grant equitable relief in controversies over property between persons who have been divorced.” Reading this provision in light of the general grant of equity jurisdiction to the probate courts, also contained in section 6, the Court held that the jurisdiction of the probate court does extend to controversies between divorced persons over ownership of property, over division of property held jointly or in common, and over wrongful taking, detention, disposition or other damage to property.<sup>9</sup> Additionally, the Court concluded that the probate court may also retain jurisdiction for the assessment of damages if equitable relief is not afforded or if justice requires both a legal and an equitable remedy.<sup>10</sup>

With respect to the use of the Massachusetts Long Arm Statute in *Wood*, the Court upheld the plaintiff’s resort to that statute to gain personal jurisdiction over the out-of-state defendant.<sup>11</sup> Section 3(c) of the Massachusetts Long Arm Statute provides that “[a] court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person’s . . . causing tortious injury by an act or omission in this commonwealth.”<sup>12</sup> The Court held that the defendant’s wrongful taking of the plaintiff’s property was such an act causing tortious injury, and therefore the statute applied.<sup>13</sup> In the few years since the enactment of the Massachusetts Long Arm Statute, section 3(c) has been used primarily to obtain jurisdiction over foreign corporations.<sup>14</sup> Thus while *Wood* does not represent a departure from previous Massachusetts law, it does mark the first reported instance where section 3(c) has been used to gain jurisdiction over an individual.

The Court also found that, besides the in personam jurisdiction conferred by the Long Arm Statute, the probate court possessed in rem jurisdiction by virtue of the attachment of the defendant’s interest in real estate.<sup>15</sup> Since the divorce changed the ownership of the property from a tenancy by the entirety to a tenancy in common, an

---

<sup>8</sup> 1976 Mass. Adv. Sh. at 378, 342 N.E.2d at 716.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 379, 342 N.E.2d at 717.

<sup>12</sup> G.L. c. 223A, § 3(c).

<sup>13</sup> 1976 Mass. Adv. Sh. at 379, 242 N.E.2d at 717.

<sup>14</sup> See, e.g., *Whittaker Corp. v. United Aircraft Corp.*, 482 F.2d 1079 (1st Cir. 1973) (personal jurisdiction conferred by G.L. c. 223A, § 3(c)); *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661 (1st Cir. 1972) (same); *Walsh v. National Seating Co.*, 411 F. Supp. 564 (D. Mass. 1976) (same).

<sup>15</sup> 1976 Mass. Adv. Sh. at 381, 342 N.E.2d at 717.

attachment of the defendant's interest was permissible.<sup>16</sup> The Court further held that, since the merger of law and equity effected by Rule 1 of the new Massachusetts Rules of Civil Procedure,<sup>17</sup> the holding of *Rosenthal v. Maletz*<sup>18</sup> that attachments did not provide a basis for jurisdiction in an equity court was no longer valid.<sup>19</sup> The judgment of the lower court was reversed and the case remanded.<sup>20</sup>

**§4.2. Divorce: Contempt.** In *Mills v. Mills*,<sup>1</sup> the Appeals Court held that contempt proceedings for violation of a divorce decree are an incident of a divorce action, and therefore a spouse has standing to seek enforcement of decree terms that only benefit the children, even if the children have attained majority.<sup>2</sup> The divorce decree in *Mills*, entered in 1966, incorporated a stipulation providing for the conveyance from the wife to her husband of all the wife's interest in certain real estate. The decree also stipulated that if the husband later sold the real estate, he was required to pay one-half of the proceeds from the sale, but not less than \$7,000, to the couple's two children. The stipulation further provided that if, upon the husband's death, the real estate had not yet been sold, such real estate would then be sold, with the same provisions for payment to the children.<sup>3</sup>

Subsequent to the decree, the defendant remarried and transferred the realty, without receiving consideration, to himself and his second wife as tenants by the entirety.<sup>4</sup> His first wife then instituted this action, charging that the husband was in contempt of the divorce decree because he had failed to pay the children \$7,000 after the transfer.<sup>5</sup> From an adjudication by the probate court that he was in contempt, the defendant appealed.<sup>6</sup>

The defendant contended that since the children were no longer minors, the plaintiff lacked standing to bring a contempt proceeding on the decree where the specified payment was to go to the children

---

<sup>16</sup> *Id.* at 380, 342 N.E.2d at 717.

<sup>17</sup> MASS. R. CIV. P. 1.

<sup>18</sup> 322 Mass. 586, 594, 78 N.E.2d 652, 657 (1948).

<sup>19</sup> 1976 Mass. Adv. Sh. at 380-81, 342 N.E.2d at 717.

<sup>20</sup> *Id.* at 381, 342 N.E.2d at 717.

§4.2.<sup>1</sup> 1976 Mass. App. Ct. Adv. Sh. 532, 345 N.E.2d 915.

<sup>2</sup> *Id.* at 534-36, 345 N.E.2d at 917-18.

<sup>3</sup> *Id.* at 532-33, 345 N.E.2d at 916.

<sup>4</sup> *Id.* at 533-34, 345 N.E.2d at 917.

<sup>5</sup> *See id.* at 532-34, 345 N.E.2d at 916-17.

<sup>6</sup> *Id.* at 532, 345 N.E.2d at 916.

and not to her.<sup>7</sup> The Appeals Court rejected this assertion.<sup>8</sup> It held that “a party to the divorce decree . . . acquired whatever rights the decree created against [the other party and that] among them was the right to have the payment made as stipulated.”<sup>9</sup> Such rights, the court stated, did not lapse when the children benefiting reached majority, at least where the decree was clearly intended to last indefinitely.<sup>10</sup> The court analogized the situation to a third-party beneficiary contract, stating that whatever the standing of the third-party to enforce the contract’s provisions, a party to the contract may certainly enforce them.<sup>11</sup>

**§4.3. Divorce: Arbitration of Separation Agreement.** In *Kutz v. Kutz*,<sup>1</sup> the Supreme Judicial Court concluded that in the absence of a specific clause detailing a procedure for the performance of the terms of a separation agreement, an arbitrator may pursuant to an arbitration clause establish the means for implementing the agreement’s terms.<sup>2</sup> In *Kutz*, the separation agreement provided, *inter alia*, that the husband was to reimburse the wife for household expenses on a monthly basis.<sup>3</sup> The husband demanded an “exact accounting,” and when the parties could not agree on expense figures the issue was

---

<sup>7</sup> *Id.* at 534, 345 N.E.2d at 917. The defendant also argued that even if the plaintiff did have standing, there was no violation of the decree because the transfer to himself and his wife was not a sale. *Id.* With respect to this argument, the Appeals Court affirmed the trial court’s finding that the defendant “intended to give his wife her interest as a gift.” *Id.* at 536, 345 N.E.2d at 918. Additionally, the Appeals Court found “the defendant’s testimony . . . competent to show that no consideration actually passed.” *Id.* at 537, 345 N.E.2d at 918. Therefore, the court determined that there was no justification for an order under paragraph 8—the paragraph containing the stipulations relating to sales of the real estate—requiring the defendant to pay \$7,000 to the children. *Id.* However, the Appeals Court went on to state that its finding with respect to the order under paragraph 8 did not mean that the defendant could not be found guilty of contempt in making the transfer. In this context, the court pointed to other paragraphs of the stipulation that would prohibit the transfer. *Id.* Since, however, the plaintiff’s petition only charged a violation of paragraph 8 and, therefore, other violations could only be considered if the petition was amended to include such violations and the defendant given an opportunity to defend against them, the Appeals Court reversed and remanded the case to the probate court. *Id.* at 538, 345 N.E.2d at 919. The Appeals Court included in its remand, instructions to the effect that if the plaintiff moved within 60 days after the date of the opinion to amend the petition to include charges of violations of other paragraphs, such motion was to be allowed and the matter to stand for other proceedings. *Id.* at 538-39, 345 N.E.2d at 919.

<sup>8</sup> *Id.* at 534, 345 N.E.2d at 917.

<sup>9</sup> *Id.*, citing *Parker v. United States*, 153 F.2d 66, 70 (1st Cir. 1946) (civil contempt proceedings are between original parties and are part of the main action); *New England Overall Co. v. Woltmann*, 343 Mass. 69, 80, 176 N.E.2d 193, 200 (1961) (civil contempt proceedings are an incident of the principal suit).

<sup>10</sup> 1976 Mass. App. Ct. Adv. Sh. at 535, 345 N.E.2d at 917.

<sup>11</sup> *Id.* at 536, 345 N.E.2d at 918.

§4.3.<sup>1</sup> 1976 Mass. Adv. Sh. 421, 341 N.E.2d 682.

<sup>2</sup> *Id.* at 421-22, 341 N.E.2d at 683.

<sup>3</sup> *Id.* at 421, 341 N.E.2d at 683.

submitted to arbitration pursuant to the separation agreement.<sup>4</sup> The arbitrators determined that the demand of the husband for such "exactness" was designed only to harass the wife. The arbitrators then fixed a monthly rate to be paid by the husband by considering the wife's expenses in light of the size and quality of the marital home and the station in life to which the family had become accustomed prior to the divorce.<sup>5</sup>

The superior court denied the husband's motion to vacate the arbitrators' award and the husband appealed contending that the arbitrators had exceeded their power by modifying the terms of the separation agreement by substituting a monthly rate for a "dollar and cents" accounting.<sup>6</sup> The Supreme Judicial Court affirmed.<sup>7</sup> While the Court held that the separation agreement did not call for a detailed accounting, the Court went on to state, however, that some procedure had to be employed in order to effectuate the agreement.<sup>8</sup> Since the arbitration clause extended to disputes regarding the performance of the agreement, the arbitrators were authorized to formulate such a procedure.<sup>9</sup> The Court thus construed both the arbitration clause and the rest of the separation agreement liberally, and in so doing avoided the question of what effect a modification of a contract by an arbitrator would have on an award under it.<sup>10</sup>

**§4.4. Divorce: Equal Protection.** In *Saraceno v. Saraceno*,<sup>1</sup> the Supreme Judicial Court rejected equal protection challenges by a husband to sections 34 and 37 of chapter 208 of the General Laws, the alimony and alimony revision provisions.<sup>2</sup> The husband in *Saraceno* had filed a petition seeking to terminate support orders for his former wife. The probate court dismissed his petition and instead ordered an upward modification of the outstanding support order.<sup>3</sup> The husband appealed, contending that both sections 34 and 37 of chapter 208 were unconstitutional because they discriminated against husbands.<sup>4</sup>

The Supreme Judicial Court, in a rescript opinion, dismissed the

---

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* G.L. c. 251, § 12(a)(3), provides that a court shall vacate an arbitrator's award if "the arbitrators exceeded their powers."

<sup>7</sup> 1976 Mass. Adv. Sh. at 422, 341 N.E.2d at 683.

<sup>8</sup> *Id.* In dicta, the Supreme Judicial Court also indicated that a superior court has jurisdiction to vacate an arbitration award made pursuant to a separation agreement incorporated in a probate court's decree of divorce. *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See *id.* at 421, 341 N.E.2d at 683.

§4.4.<sup>1</sup> 1976 Mass. Adv. Sh. 294, 341 N.E.2d 261.

<sup>2</sup> *Id.*, 341 N.E.2d at 261-62.

<sup>3</sup> *Id.*, 341 N.E.2d at 261.

<sup>4</sup> *Id.*, 341 N.E.2d at 261-62.

husband's claims.<sup>5</sup> Prior to a 1974 amendment,<sup>6</sup> the Massachusetts alimony statute spoke only of decreeing alimony to a wife.<sup>7</sup> Noting that the 1974 amendment eliminated any unequal treatment by providing for payment to either of the parties to a divorce,<sup>8</sup> the Court in *Saraceno* stated that any claim of discrimination against the current statute was "wholly without merit."<sup>9</sup> The Court did, however, leave a narrowly defined area in which attacks on support orders issued under the pre-1974 statute could be made.<sup>10</sup>

In *Saraceno*, the Court dismissed the husband's challenge to a support order issued under the pre-1974 version of the alimony statute for lack of standing. The Court reasoned that since the husband had not applied for and been denied alimony under section 34 he was not an aggrieved person and therefore had no right to challenge the statute's constitutionality.<sup>11</sup> To the extent that the husband's claim of discrimination was based on the theory that he should be entitled to alimony under section 34, the Court's position is correct. However, a challenge to the statute by a husband based on a claim that the sexual discrimination in the statute gives an unconstitutional preference to females in receiving alimony cannot be so easily dismissed.

The Court also dismissed Mr. Saraceno's challenge to section 37 of chapter 208—the alimony revision statute—which section on its face allows revisions only to a wife.<sup>12</sup> The Court here, however, did not specifically confirm the constitutionality of the statute. Rather, after first questioning the husband's standing to challenge the constitutionality of section 37, the Court stated that if the section were facially discriminatory the appropriate response would not be to strike it down, but to construe it to apply to either spouse.<sup>13</sup>

---

<sup>5</sup> *Id.*

<sup>6</sup> Acts of 1974, c. 565.

<sup>7</sup> G.L. c. 208, § 34, as in effect prior to Acts of 1974, c. 565, stated: "Upon a divorce, or upon petition at any time after a divorce, the court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband."

<sup>8</sup> 1976 Mass. Adv. Sh. at 294, 341 N.E.2d at 261-62. G.L. c. 208, § 34, currently states: "Upon a divorce or upon motion in an action brought at any time after a divorce, the court may make a judgment for either of the parties to pay alimony to the other."

<sup>9</sup> 1976 Mass. Adv. Sh. at 294, 341 N.E.2d at 261.

<sup>10</sup> See *id.*, 341 N.E.2d at 262.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* The statute, G.L. c. 208, § 37, provides:

After a judgment for alimony or an annual allowance for the wife or children, the court may, from time to time, upon the action for modification of either party, revise and alter its judgment relative to the amount of such alimony or annual allowance and the payment thereof, and may make any judgment relative thereto which it might have made in the original action.

<sup>13</sup> 1976 Mass. Adv. Sh. at 294, 341 N.E.2d at 262.

**§4.5. Divorce: Incorporation of Separation Agreement.** In *Salvesen v. Salvesen*,<sup>1</sup> the Supreme Judicial Court held that a separation agreement that was referred to by and incorporated in a divorce decree became part of that decree, and therefore a violation of the terms of that agreement would support an action for contempt.<sup>2</sup> This decision effectively overruled the 1975 Appeals Court decision in *Gunter v. Gunter*.<sup>3</sup>

In *Salvesen*, the parties had entered into a separation agreement providing for monthly support payments to the wife and children. The divorce decree issued by the probate court awarded custody of the couple's children to the wife. The decree further stated that "all other provisions are provided for in an agreement dated February 11, 1970 incorporated and filed herewith," i.e., in the separation agreement.<sup>4</sup> Thereafter, the husband failed to pay support under the terms of the agreement, and the wife, alleging a violation of the decree, instituted an action for contempt.<sup>5</sup> The husband countered with a motion for modification of the order. The lower court found the husband in contempt of its order to pay support and, as a matter of law, denied the husband's motion for modification.<sup>6</sup> The husband appealed both rulings.<sup>7</sup>

The Supreme Judicial Court held that the language of the *Salvesen* decree was sufficient to incorporate the terms of the agreement into the decree of the probate court.<sup>8</sup> In this context, the Court stated that when a decree purports to incorporate an agreement by reference, the terms of that agreement become part of the decree.<sup>9</sup> In *Gunter*, the Appeals Court had examined the reason for including the incorporation language in the decree, and upon finding that such language had been included merely to explain the absence of any other support provision rather than to effect a completed incorporation, the court held that no incorporation took place.<sup>10</sup> Disagreeing with the *Gunter* court's approach, the Supreme Judicial Court in *Salvesen* held that incorporation would result irrespective of the reason for the language's inclusion.<sup>11</sup> Therefore, the provision in the *Salvesen* decree relative to support for the wife and children was a part of the court's decree, and a failure by the husband to comply with its terms constituted a

---

§4.5.<sup>1</sup> 1976 Mass. Adv. Sh. 1746, 351 N.E.2d 499.

<sup>2</sup> *Id.*

<sup>3</sup> 1975 Mass. App. Ct. Adv. Sh. 463, 325 N.E.2d 297, *appeal denied*, 1975 Mass. Adv. Sh. 1281. For a further discussion of *Gunter*, see Inker, *Domestic Relations*, 1975 ANN. SURV. MASS. LAW § 6.3, at 90-91.

<sup>4</sup> 1976 Mass. Adv. Sh. at 1747, 351 N.E.2d at 500.

<sup>5</sup> *Id.* at 1747-48, 351 N.E.2d at 500.

<sup>6</sup> *Id.* at 1748, 351 N.E.2d at 500.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1748-49, 351 N.E.2d at 500.

<sup>9</sup> *Id.*

<sup>10</sup> 1975 Mass. App. Ct. Adv. Sh. at 463, 325 N.E.2d at 298.

<sup>11</sup> 1976 Mass. Adv. Sh. at 1749, 351 N.E.2d at 500.

violation of that decree, subjecting the husband to the sanction of an action for contempt.<sup>12</sup>

The Supreme Judicial Court in *Salvesen* also reaffirmed the probate court's longstanding power to modify a divorce decree even when it is based on a separation agreement.<sup>13</sup> The *Gunter* decision had cast doubt upon this rule and, apparently in reliance on *Gunter*, the trial court in *Salvesen* had held that it could not, as a matter of law, modify the decree.<sup>14</sup> The Supreme Judicial Court reversed this decision.<sup>15</sup> It should be noted, however, that such modification does not preclude an action for breach of contract on the original agreement.<sup>16</sup>

The Supreme Judicial Court's disapproval in *Salvesen* of the *Gunter* case should come as a welcome announcement to practitioners. Many of the precautions necessary after *Gunter* to protect the expectations of the parties and their attorneys, such as a specific request in the agreement that its provisions be incorporated into the decree, and that a court ratify, approve, and incorporate the agreement's provisions and expressly order the parties to comply therewith, may now safely be eliminated.<sup>17</sup>

**§4.6. Divorce: Conveyance of Property.** In *Ricciardelli v. Ricciardelli*,<sup>1</sup> the Appeals Court held that it is within the power of a probate court to order the conveyance of real estate in lieu of alimony, even in the absence of a specific request for such a conveyance in the pleadings.<sup>2</sup> In *Ricciardelli*, the probate court had ordered the husband, as part of a divorce decree, to convey real estate to his wife.<sup>3</sup> On appeal the husband argued that the order contravened Rule 14 of the Uniform Practices of the Probate Courts in Massachusetts,<sup>4</sup> since the wife's complaint had not contained a specific prayer for a conveyance of real estate.<sup>5</sup> Rule 14 states in part: "No conveyance of real estate pursuant to General Laws, Chapter 208, sec. 34A . . . shall be entered in any order or judgment of divorce or separate support unless a specific demand therefor has been made in the complaint of which the defendant has received actual notice. . . ."<sup>6</sup>

The Appeals Court rejected the husband's argument and held that the failure to comply with the dictates of Rule 14 did not affect the

---

<sup>12</sup> *Id.* at 1748-49, 351 N.E.2d at 500.

<sup>13</sup> *Id.* at 1749, 351 N.E.2d at 500-01. For cases defining this power, see *Smith v. Smith*, 358 Mass. 551, 553, 265 N.E.2d 858, 859 (1971); *Wilson v. Caswell*, 272 Mass. 297, 302, 172 N.E. 251, 253 (1930).

<sup>14</sup> See 1976 Mass. Adv. Sh. at 1749, 351 N.E.2d at 501.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* See *Freeman v. Sieve*, 323 Mass. 652, 657, 84 N.E.2d 16, 19 (1949).

<sup>17</sup> See *Inker, Domestic Relations*, 1975 ANN. SURV. MASS. LAW § 6.3, at 91.

§4.6.<sup>1</sup> 1976 Mass. App. Ct. Adv. Sh. 232, 343 N.E.2d 433.

<sup>2</sup> *Id.* at 236, 343 N.E.2d at 435.

<sup>3</sup> *Id.* at 232, 343 N.E.2d at 434.

<sup>4</sup> Rule 14, Uniform Practices of the Probate Courts in Massachusetts (1974).

<sup>5</sup> 1976 Mass. App. Ct. Adv. Sh. at 235, 343 N.E.2d at 435.

<sup>6</sup> Rule 14, Uniform Practices of Probate Courts in Massachusetts (1974).



power of the probate court to originally order the conveyance, but was rather concerned only with the vesting of title by the filing of the decree in the registry of probate.<sup>7</sup> The power to grant alimony, and to order conveyances of real estate as an incident of that grant, is conferred on the court by section 34 of chapter 208.<sup>8</sup> Section 34A deals solely with providing the court with a means for effecting a transfer of title where a party fails to convey in compliance with the decree.<sup>9</sup> Rule 14, therefore, in referring solely to section 34A, does not act as a limitation on the probate court's power to order a conveyance. The purpose of the rule is to afford "the parties an opportunity to provide the court with a description of property which the judge might order conveyed that would be legally sufficient to convey the real estate."<sup>10</sup> The Rule is thus designed to provide administrative assistance to the probate court in its formulation of decrees.

The Appeals Court's interpretation of Rule 14 may make sense in terms of providing notice to the parties since knowledge of the divorce proceeding itself ought to be sufficient. However, the decision seems to create problems in the enforcement of probate court orders. If *Ricciardelli* is read as holding that a failure to request a conveyance in the pleadings does not act as a bar to the court's actual transfer of the property, pursuant to section 34A, then the decision seems to disregard the clear language of the Rule, which language states that "[n]o conveyance . . . shall be entered in any order . . . unless a specific demand therefore has been made in the complaint . . ."<sup>11</sup> If, as seems more likely, the case stands for the proposition that an inadequate pleading does not bar a court from ordering a conveyance, but will act to prevent that court from itself conveying the property upon noncompliance with its order, then probate courts are left in a difficult position. The authority of their decrees will be undermined. Perhaps the better view would be to require the pleading at the outset so that once an order to convey is entered, full enforcement powers will be available to insure compliance.

---

<sup>7</sup> 1976 Mass. App. Ct. Adv. Sh. 235-37, 343 N.E.2d at 435-36.

<sup>8</sup> *Id.* at 236, 343 N.E.2d at 435-36.

<sup>9</sup> *Id.*, 343 N.E.2d at 436. G.L. c. 208, § 34A provides:

Whenever a judgment for alimony shall be made in a proceeding for divorce directing that a deed, conveyance or release of any real estate or interest therein shall be made such judgment shall create an equitable right to its enforcement, subject to the provisions for recording of notice in section fifteen of chapter one hundred and eighty-four, in the party entitled thereto by the judgment, and if the judgment has not been complied with at the time the judgment of divorce becomes absolute, and is thereafter recorded in the manner provided by section forty-four of chapter one hundred and eighty-three, then the judgment shall operate to vest title to the real estate or interest therein in the party entitled thereto by the judgment as fully and completely as if such deed, conveyance or release had been duly executed by the party directed to make it.

<sup>10</sup> 1976 Mass. App. Ct. Adv. Sh. at 236-37, 343 N.E.2d at 436.

<sup>11</sup> Rule 14, Uniform Practices of Probate Courts in Massachusetts (1974).

**§4.7. Divorce: Counsel Fees Not Dischargeable in Bankruptcy.** In *Goldman v. Roderiques*,<sup>1</sup> the Supreme Court held that a person's obligation to pay the counsel fees of his or her spouse in domestic litigation is not a debt dischargeable in bankruptcy.<sup>2</sup> In *Goldman*, the probate court granted a decree nisi to the wife and ordered the husband to pay \$750.00 to her for counsel fees. Following the order, the husband obtained a discharge in bankruptcy. Thereafter, the husband failed to pay the counsel fees as ordered, and the wife instituted a contempt action against him. The probate judge dismissed the action, taking the view that the husband's discharge in bankruptcy relieved him of his obligation to pay his wife's counsel fees.<sup>3</sup>

The Supreme Judicial Court disagreed. Relying on the exception contained in section 17a of the Bankruptcy Act, which provides that "[a] discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (7) are for alimony due or to become due, or for maintenance or support of wife or child . . .,"<sup>4</sup> the Court stated that "a spouse's need for adequate legal representation in a lawsuit affecting the marital status is not materially different from those other needs—from subsistence to the education of children—which fall within the more common meaning of alimony or support, so that a like policy as to discharge in bankruptcy should apply to all."<sup>5</sup> Therefore, the Court held that the section 17a exception would apply to an obligation to pay counsel fees as well as to pay alimony.<sup>6</sup> The Court found support for its decision in the fact that the statute authorizing a probate court to order the payment of counsel fees also authorizes the probate court to order the payment of alimony or support.<sup>7</sup> In light of the fact that the authority to order both counsel fees and alimony or support derives from the same stat-

---

§4.7.<sup>1</sup> 1976 Mass. Adv. Sh. 1485, 349 N.E.2d 335.

<sup>2</sup> *Id.* at 1489, 349 N.E.2d at 337.

<sup>3</sup> *Id.* at 1485-86, 349 N.E.2d at 335. The probate judge reasoned that counsel fees were determined as an item separate and distinct from alimony or support and hence were not "alimony due or to become due" or "for maintenance or support of wife or child" so as to fall within the exception to the general discharge of debts by a bankruptcy judgment. *Id.* The Supreme Judicial Court noted that while procedurally counsel fees are determined separately and that in fixing an allowance for counsel fees the court may consider factors apart from those relevant to alimony, these principles are not controlling with respect to the question of whether the obligation to pay counsel fees should be assimilated to alimony for bankruptcy purposes. *Id.* at 1486-87, 349 N.E.2d at 335-36, *citing* Densten v. Densten, 280 Mass. 48, 50, 181 N.E. 714, 715 (1932).

<sup>4</sup> 11 U.S.C. § 35(a) (1970).

<sup>5</sup> 1976 Mass. Adv. Sh. at 1487-88, 349 N.E.2d at 336.

<sup>6</sup> *Id.* at 1489, 349 N.E.2d at 337.

<sup>7</sup> *Id.* at 1487, 349 N.E.2d at 336. The statute referred to, G.L. c. 208, § 17, provides:

The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action, and to pay to him alimony during the pendency of the action.

ute, the Court reasoned that the two types of payment should be treated similarly.<sup>8</sup> The Court also relied for support on certain similarities between alimony and support orders and orders to pay counsel fees. In this context, the Court pointed out that both duties arise from a status rather than from a contract, that in measuring both duties the factors of need and relative economic position are relevant, and that the means for enforcing an order for counsel fees corresponds with the means for enforcing alimony and support orders.<sup>9</sup> Thus, the Supreme Judicial Court in *Goldman* expanded the support and maintenance exception beyond the literal terms of section 17a of the Bankruptcy Act.<sup>10</sup> While an allowance for counsel fees is technically neither "alimony due or to become due,"<sup>11</sup> nor a debt "for maintenance or support of wife or child,"<sup>12</sup> the Court reasoned that orders for the payment of counsel fees were of a sufficient similarity to warrant the same treatment as alimony or support.<sup>13</sup>

While the Supreme Judicial Court's holding in *Goldman* clearly applies to both temporary and permanent counsel fees in a divorce case,<sup>14</sup> the Court did not expressly hold that its decision also applied to orders for temporary and permanent counsel fees in actions for separate support.<sup>15</sup> It appears, however, that *Goldman* would be ap-

---

<sup>8</sup> 1976 Mass. Adv. Sh. at 1487, 349 N.E.2d at 336.

<sup>9</sup> *Id.* at 1488-89, 349 N.E.2d at 336.

<sup>10</sup> The relevant language of section 17a is set forth in the text at note 4 *supra*.

<sup>11</sup> 11 U.S.C. § 35(a) (1970).

<sup>12</sup> *Id.*

<sup>13</sup> 1976 Mass. Adv. Sh. at 1487-88, 349 N.E.2d at 336.

<sup>14</sup> The Court cited both G.L. c. 208, § 17, relative to temporary counsel fees, and G.L. c. 208, § 38, relative to counsel fees after a hearing on the merits, in its discussion of the similarity between alimony orders and orders for counsel fees. 1976 Mass. Adv. Sh. at 1487-88 n.2, 349 N.E.2d 366 n.2.

<sup>15</sup> The allowance of counsel fees in actions for separate support is governed by G.L. c. 208, § 33. *Sack v. Sack*, 328 Mass. 600, 605, 105 N.E.2d 371, 374 (1952). This section provides:

If a husband fails, without justifiable cause, to provide suitable support for his wife, or deserts her, or if the wife has justifiable cause for living apart from her husband, or if the husband is deserted by his wife or has justifiable cause for living apart from his wife, whether or not he or she is actually living apart, the probate court may, upon his or her complaint, or if he or she is incompetent due to mental illness or mental retardation, upon complaint of the guardian or next friend, prohibit the husband or wife from imposing any restraint on the personal liberty of the other during such time as the court by its order may direct or until further order of the court thereon and upon the complaint of any such party or guardian of a minor made in accordance with the Massachusetts Rules of Civil Procedure the court may make further orders relative to the support of the wife and the care, custody and maintenance of their minor children, may determine with which of their parents the children or any of them shall remain and may, from time to time, upon similar complaint revise and alter such judgment or make a new order or judgment as the circumstances of the parents or the benefit of the children may require.

Upon request by the court, the state police, local police or probation officers shall make an investigation in relation to any proceedings and report to the court.

plicable in actions for separate support, insofar as each of the points raised by the Court to justify its inclusion of orders for divorce litigation counsel fees within the exception to a bankruptcy discharge applies with equal force to such orders in the context of actions for separate support.

**§4.8. Divorce: Removal of Minor Child from Commonwealth.** Two cases—*Rubin v. Rubin*<sup>1</sup> and *Masters v. Craddock*<sup>2</sup>—dealing with removal of minor children from the Commonwealth were decided during the *Survey* year.

In *Rubin v. Rubin*,<sup>3</sup> the wife petitioned to modify a decree of divorce which provided, *inter alia*, that she and the minor children would reside in the Commonwealth within a given radius of Worcester. She asked to be allowed to move to New York City to live with her infirm mother. After a hearing, the probate court did modify the petition to allow removal of the children from the Commonwealth on court order or with the permission of the husband.<sup>4</sup> The wife appealed the decision.<sup>5</sup> In affirming, the Supreme Judicial Court held that the lower court could properly have found that an unrestricted right of removal was not in the best interests of the children and therefore that cause as required by the relevant statute, section 30 of chapter 208 of the General Laws,<sup>6</sup> had not been shown.<sup>7</sup>

The second case decided during the *Survey* year, *Masters v. Craddock*,<sup>8</sup> illustrates the difficulties of enforcing the removal statute, section 30 of chapter 208,<sup>9</sup> in the absence of adequate safeguards having been taken in the formulation of the decree. In that case the mother, who had been awarded custody of the minor children by a decree of divorce, removed the children from the Commonwealth to

---

Every such report shall be in writing and shall become part of the records of such proceedings.

§4.8.<sup>1</sup> 1976 Mass. Adv. Sh. 1196, 346 N.E.2d 919.

<sup>2</sup> 1976 Mass. App. Ct. Adv. Sh. 784, 351 N.E.2d 217.

<sup>3</sup> 1976 Mass. Adv. Sh. 1196, 346 N.E.2d 919.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, 346 N.E.2d at 919-20.

<sup>6</sup> G.L. c. 208, § 30, provides:

A minor child of divorced parents who is a native of or has resided five years within this commonwealth and over whose custody and maintenance the superior court or a probate court has jurisdiction 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. The court, upon application of any person in behalf of such child, may require security and issue writs and processes to effect the purposes of this and the two preceding sections.  
(emphasis added).

<sup>7</sup> 1976 Mass. Adv. Sh. at 1196, 346 N.E.2d at 920.

<sup>8</sup> 1976 Mass. App. Ct. Adv. Sh. 784, 351 N.E.2d 717.

<sup>9</sup> For the text of § 30, see note 6 *supra*.

North Carolina in violation of the decree.<sup>10</sup> Upon the petition of the husband, the probate court modified the divorce decree and awarded custody of the children to him. The husband then commenced a habeas corpus action in North Carolina for the children. The petition was denied, and custody was awarded to the wife, with the husband receiving visitation rights.<sup>11</sup> The husband returned with the children to Massachusetts allegedly to exercise visitation, but thereafter refused to return the children to their mother.<sup>12</sup> The wife then petitioned the Massachusetts probate court to modify the decree that had awarded custody of the children to their father. The wife's petition for modification was allowed, she was awarded custody, and the husband appealed.<sup>13</sup>

In affirming the modification, the Appeals Court relied on the settled rule that controversies over custody are to be decided by a consideration of the best interests of the children.<sup>14</sup> In this context, the court stated that "the children are not to be penalized by the failure of either of their parents to adhere to the terms of a court decree, in this instance their removal to North Carolina by their mother (see G.L. c. 208, § 30) and the failure of their father to return them to North Carolina following their visit with him."<sup>15</sup> The court further held that a probate court, regardless of the existence of an agreement between the parties, has continuing jurisdiction over the custody of the children and may alter its decree in accordance with the children's best interests.<sup>16</sup>

*Masters* illustrates a common problem regarding the care and custody of minor children, *i.e.*, how best to enforce the provisions of section 30 of chapter 208 prohibiting the removal of minor children from the Commonwealth. The most practicable way to avoid removal in violation of section 30 is to prepare for the contingency by (1) requesting the court to insert an order in the decree restraining the custodial parent from removing the child from the Commonwealth, and (2) requesting that a bond be posted to effect a return of the child to the Commonwealth whenever necessary so as to prevent orders of the court from being flouted with impunity.<sup>17</sup> Sanctions, such as refusing to enter judgments for arrears of child support or alimony, may be imposed after the fact,<sup>18</sup> but such sanctions suffer the infirmity of

---

<sup>10</sup> 1976 Mass. App. Ct. Adv. Sh. at 784-85, 351 N.E.2d at 218.

<sup>11</sup> *Id.* at 785, 351 N.E.2d at 218.

<sup>12</sup> *Id.* at 785-86, 351 N.E.2d at 218.

<sup>13</sup> *Id.* at 786, 351 N.E.2d at 218.

<sup>14</sup> *Id.* at 786-87, 351 N.E.2d at 218-19.

<sup>15</sup> *Id.* at 786, 351 N.E.2d at 218.

<sup>16</sup> *Id.* at 788, 351 N.E.2d at 219.

<sup>17</sup> These mechanisms are provided by the statute itself. See note 6 *supra*.

<sup>18</sup> See, *e.g.*, *Dunne v. Amerigian*, 354 Mass. 368, 372, 237 N.E.2d 689, 691 (1968) (court refused to find husband in contempt for being in arrears in child support where wife refused husband visitation). See *generally* Annot., 95 A.L.R.2d 118 (1964), which

penalizing the children for the parent's wrongdoing.

**§4.9. Divorce: Visitation.** During the *Survey* year, the Appeals Court held that a habeas corpus action is not the proper action in which to challenge the suspension of visitation rights.<sup>1</sup> In *Donnelly v. Donnelly*,<sup>2</sup> a divorced father of three minor children petitioned for a writ of habeas corpus under section 1 of chapter 248 of the General Laws<sup>3</sup> in an attempt to restore his rights of visitation.<sup>4</sup> The superior court dismissed the petition for failure to state a claim upon which relief could be granted.<sup>5</sup> In affirming, the Appeals Court noted that habeas corpus is available only to grant a discharge from some form of unlawful detention.<sup>6</sup> The petition in *Donnelly*, however, sought only to challenge the denial of the father's visitation rights, not the validity of the decree granting custody of the children to the mother. Habeas corpus relief was, therefore, not appropriate.<sup>7</sup>

The Appeals Court also rejected a claim by the petitioner that, as a parent, he possessed an immutable right to association with his children.<sup>8</sup> The court stated that a parent's right must yield to the best interests and welfare of the children, even if the result is the complete

---

discusses the violation of a custody or visitation provision of a decree as affecting child support payments.

§4.9. <sup>1</sup> *Donnelly v. Donnelly*, 1976 Mass. App. Ct. Adv. Sh. 320, 322, 344 N.E.2d 195, 196.

<sup>2</sup> 1976 Mass. App. Ct. Adv. Sh. 320, 344 N.E.2d 195.

<sup>3</sup> G.L. c. 248, § 1, provides: "Whoever is imprisoned or restrained of his liberty may, as of right and of course, prosecute a writ of habeas corpus, according to this chapter, to obtain release from such imprisonment or restraint, if it proves to be unlawful. . . ."

<sup>4</sup> 1976 Mass. App. Ct. Adv. Sh. at 320, 344 N.E.2d at 196. By the terms of the decree of divorce the wife was awarded custody and petitioner was afforded visitation. *Id.* at 321, 344 N.E.2d at 196. After petitioner's visitation rights were suspended he moved to vacate the order and the motion was denied. *Id.* at 321-22, 344 N.E.2d at 196. Petitioner then brought a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts. *Id.* at 322 n.2, 344 N.E.2d at 196 n.2. The United States Court of Appeals for the First Circuit affirmed the district court's dismissal of the writ, stating that habeas corpus relief was not the proper remedy. *Donnelly v. Donnelly*, 515 F.2d 129, 130 (1st Cir. 1975). Petitioner then brought the petition in the Supreme Judicial Court and, upon transfer to superior court, it was dismissed for failure to state a claim. 1976 Mass. App. Ct. Adv. Sh. at 320, 344 N.E.2d at 196.

<sup>5</sup> 1976 Mass. App. Ct. Adv. Sh. at 320, 344 N.E.2d at 196.

<sup>6</sup> *Id.* at 322, 344 N.E.2d at 196-97. The court, quoting two federal cases on the scope of habeas corpus relief, stated:

"[C]ustody in the sense of restraint of liberty is a prerequisite to habeas, for the only remedy that can be granted on habeas is some form of discharge from custody." *Fay v. Noia*, 372 U.S. 391, 427, n.38 (1963). "From the beginning habeas corpus has been the means by which one who claims to have been held in illegal custody of another has the right to have the legality of his custody determined. The writ proceeds against the custodian." *United States v. Hendricks*, 213 F.2d 922, 926 (3d Cir. 1954), *cert. den.* 348 U.S. 851 (1954).

1976 Mass. App. Ct. Adv. Sh. at 322, 344 N.E.2d at 196-97.

<sup>7</sup> 1976 Mass. App. Ct. Adv. Sh. at 322, 344 N.E.2d at 196-97.

<sup>8</sup> *Id.* at 323, 344 N.E.2d at 197.

termination of visitation.<sup>9</sup> It is precisely for this reason that orders for care and custody of minor children are interlocutory in nature and subject to revision upon a showing of changed circumstances.<sup>10</sup>

**§4.10. Divorce: Child Support.** In two cases decided during the Survey year, *Orlandella v. Orlandella*<sup>1</sup> and *Manes v. Manes*,<sup>2</sup> the Supreme Judicial Court addressed the question of the effect of the new age of majority<sup>3</sup> on probate court orders for the support of minor children. Specifically, both cases addressed the issue of whether an order for support of minor children was automatically modified so as to extend only until the children became eighteen, when that age became the age of majority.

In *Orlandella*, the parties were divorced in 1972<sup>4</sup> and the husband was ordered to pay \$45 per week "for the support of [the wife] and . . . minor child."<sup>5</sup> Thereafter, the provision of the General Laws defining statutory terms for construction purposes, section 7 of chapter 4, was amended, effective January 1, 1974, so as to reduce the age of majority from twenty-one years of age to eighteen years.<sup>6</sup> In the process, the amendment defined minor to be "any person under eighteen years of age."<sup>7</sup> On April 5, 1974, the *Orlandella* child became eighteen. The husband filed a petition with the probate court to determine whether the statutory amendment terminated his obligation to con-

<sup>9</sup> *Id.* The Massachusetts custody statute, G.L. c. 208, § 31, provides:

In making an order or judgment relative to the custody of children pending a controversy between their parents, or relative to their final possession, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody or possession.

See *Heard v. Heard*, 323 Mass. 357, 377, 82 N.E.2d 219, 231 (1948) (governing principle in matters relating to custody is child's welfare); *Jenkins v. Jenkins*, 304 Mass. 248, 250, 23 N.E.2d 405, 406 (1939) (same).

<sup>10</sup> See, e.g., G.L. c. 208, § 19 (modification of custody during pendency of libel); G.L. c. 208, § 28 (modification of custody after decree of divorce); G.L. c. 208, § 29 (modification of foreign custody decree); G.L. c. 209, § 37 (modification of custody in separate support proceeding).

§4.10.<sup>1</sup> 1976 Mass. Adv. Sh. 1159, 347 N.E.2d 665.

<sup>2</sup> 1976 Mass. Adv. Sh. 1174, 347 N.E.2d 668.

<sup>3</sup> G.L. c. 4, § 7, provides definitions for use in construing the General Laws. In 1973, the section was amended by Acts of 1973, c. 925, § 1, and the following definitions were added:

"Minor". Forty-eighth, "Minor" shall mean any person under eighteen years of age.

"Full age". Forty-ninth, "Full age" shall mean eighteen years of age or older.

"Adult". Fiftieth, "Adult" shall mean any person who has attained the age of eighteen.

"Age of majority". Fifty-first, "Age of majority" shall mean eighteen years of age.

<sup>4</sup> 1976 Mass. Adv. Sh. at 1159, 347 N.E.2d at 665.

<sup>5</sup> *Id.* at 1161, 347 N.E.2d at 666.

<sup>6</sup> *Id.* at 1159, 347 N.E.2d at 665. The amending statute was Acts of 1973, c. 925, § 1. For the text of the amendment, see note 3 *supra*.

<sup>7</sup> G.L. c. 4, § 7.

tinue to pay child support.<sup>8</sup> The probate judge reported the question to the Appeals Court, and the Supreme Judicial Court transferred the case to itself on its own motion.<sup>9</sup>

After the question had been presented to the Supreme Judicial Court, the Court held that the statutory change neither automatically affected decrees entered prior to the effective date of the amendment, nor compelled their modification by a probate court.<sup>10</sup> Rather, the Court found that modification was still a matter within the discretion of the probate judge,<sup>11</sup> and the change in the legal environment worked by the new age of majority was just one factor for a probate court to consider when entertaining a petition for modification.<sup>12</sup>

The decision of the Supreme Judicial Court was based on its reading of the legislative intent as reflected by other statutory enactments. The Court noted that the jurisdiction of a probate court to order payment of support is completely statutory and is limited to providing maintenance for the "minor children of the parties."<sup>13</sup> The Court further noted that in 1975 the Legislature amended this support provision to allow a probate court to order maintenance for a child between the ages of eighteen and twenty-one where certain other conditions existed.<sup>14</sup> Thus, the Court held that the Legislature clearly intended that a probate court was not to enter decrees after January 1, 1974 requiring support payments to children eighteen years of age or older absent such special conditions.<sup>15</sup> The situation was different, however, for decrees entered prior to the effective date of the new age of majority. The Court stated, without a significant explanation of its reasoning, that the legislative purpose of the redefinition was not

---

<sup>8</sup> 1976 Mass. Adv. Sh. at 1160, 347 N.E.2d at 666.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 1167, 347 N.E.2d at 668.

<sup>13</sup> *See id.* at 1164-66, 347 N.E.2d at 667-68. G.L. c. 208, § 28, is the statutory authority for a probate court's support decrees. It provides:

Upon a judgment for divorce, or an action of either parent, or of a next friend in behalf of the children, after notice to both parents, after such judgment, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties, and may determine with which of the parents the children or any of them shall remain, or may award their custody to some third person if it seems expedient or for the benefit of the children: and, afterward may from time to time, upon the action of either parent, or of a next friend, revise and alter such judgment or make a new judgment, as the circumstances of the parents and the benefit of the children may require. The court may make appropriate orders of maintenance of any child who has attained age eighteen years but who has not attained the age of twenty-one years and who is living in the home of a parent, and is principally dependent upon said parent for maintenance.

<sup>14</sup> 1976 Mass. Adv. Sh. at 1166, 347 N.E.2d at 668. The amendment, Acts of 1975, c. 661, § 1, added the last sentence to G.L. c. 208, § 28, as set forth in note 14 *supra*.

<sup>15</sup> 1976 Mass. Adv. Sh. at 1165, 347 N.E.2d at 667.



to modify previously entered decrees.<sup>16</sup> Therefore, modification of these remained a discretionary matter for the probate court judge.<sup>17</sup>

The *Manes* case carried this holding one step further. In *Manes*, the divorce decree providing for support for "minor children" and entered prior to January 1, 1974 was based upon a separation agreement entered into by the parties.<sup>18</sup> In 1975 a probate judge, on petition by the husband, modified the decree so that the husband's duty to support terminated upon the eighteenth birthday of each child.<sup>19</sup> The wife appealed,<sup>20</sup> contending that the independent contract between the ex-spouses took priority over any statutory change and that, therefore, the probate judge was without authority to modify the decree.<sup>21</sup> The Supreme Judicial Court rejected this argument and held that the settled rule that a probate court could modify a decree based on a separation agreement extended to situations governed by *Orlandella*.<sup>22</sup>

Thus, the *Orlandella* and *Manes* cases clarify several points with respect to the effect of the new age of majority statutes in Massachusetts on child support obligations. The change in the age of majority does not automatically modify decrees entered before January 1, 1974.<sup>23</sup> Such decrees continue to be enforceable until the child in question reaches twenty-one. However, after January 1, 1974, the payor spouse may apply to the probate court for a modification of a pre-1974 decree. Upon an application for modification, the probate judge may, in his discretion, "give such weight as he [sees] fit to the change in the legal climate,"<sup>24</sup> including the new age of majority. However, the statutory amendments do not compel such a modification. Thus, the probate court may either grant a modification of the pre-1974 decree, even as to accrued arrears,<sup>25</sup> or enforce the decree according to its terms and the law as it stood prior to January 1, 1974.

Decrees or judgments for child support entered after January 1, 1974 are governed by the new age of majority statutes.<sup>26</sup> Decrees for child support entered from January 1, 1974 to January 20, 1976, when the amendment to section 28 of chapter 208 of the General Laws allowing maintenance for children up to age twenty-one became effective,<sup>27</sup> can only compel a payor spouse to pay for child support

---

<sup>16</sup> *Id.* at 1166, 347 N.E.2d at 668.

<sup>17</sup> *Id.* at 1167, 347 N.E.2d at 668.

<sup>18</sup> 1976 Mass. Adv. Sh. at 1174-75, 347 N.E.2d at 669-70.

<sup>19</sup> *Id.* at 1175, 347 N.E.2d at 670.

<sup>20</sup> *Id.*

<sup>21</sup> *See id.* at 1176-77, 347 N.E.2d at 670.

<sup>22</sup> *Id.*

<sup>23</sup> *Orlandella*, 1976 Mass. Adv. Sh. at 1166, 347 N.E.2d at 668.

<sup>24</sup> *Id.* at 1167, 347 N.E.2d at 668.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 1165, 347 N.E.2d at 667.

<sup>27</sup> See notes 13-14 *supra*.

until the child reaches age eighteen.<sup>28</sup> However, after January 20, 1976, a recipient of child support may request the court to issue a new order pursuant to section 28 for the support of a child who is between the ages of eighteen and twenty-one if the child (1) is living in the home of a parent, and (2) is principally dependent upon said parent for maintenance.<sup>29</sup>

**§4.11. Divorce: Cross-Examination of Guardian Ad Litem.** In *Gilmore v. Gilmore*,<sup>1</sup> the Supreme Judicial Court, in a case of first impression, held that a probate court's failure to allow a party to cross-examine the guardian ad litem in a custody case constituted error.<sup>2</sup> In *Gilmore*, both parties filed libels and both were awarded divorces.<sup>3</sup> During the pendency of the proceeding, the trial judge had appointed a guardian ad litem pursuant to section 56A of chapter 215 of the General Laws<sup>4</sup> to investigate the couple's family situation and report to the judge on visitation rights.<sup>5</sup> In apparent reliance upon the guardian ad litem's report, the judge awarded custody of the parties' three minor children to the husband.<sup>6</sup> Because she was denied an opportunity to cross-examine the guardian, the wife appealed,<sup>7</sup> contending that her due process rights had been violated.<sup>8</sup>

The Supreme Judicial Court agreed with the wife and remanded.<sup>9</sup> The Court reasoned that in a custody proceeding where the best interests of a child are being determined, "accurate, objective information is of foremost importance."<sup>10</sup> In order to insure such information, cross-examination of the investigator should be allowed in order to test his credibility and prejudices.<sup>11</sup> This rule, the Court held,

<sup>28</sup> See *Orlandella*, 1976 Mass. Adv. Sh. at 1165-67, 347 N.E.2d at 667-68.

<sup>29</sup> G.L. c. 208, § 28. For the text of § 28, see note 13 *supra*.

§4.11.<sup>1</sup> 1976 Mass. Adv. Sh. 269, 341 N.E.2d 655.

<sup>2</sup> *Id.* at 278, 341 N.E.2d at 659.

<sup>3</sup> *Id.* at 269, 341 N.E.2d at 656.

<sup>4</sup> G.L. c. 215, § 56A, provides in part:

Any judge of a probate court may appoint a guardian ad litem to investigate the facts of any proceeding pending in said court relating to or involving questions as to the care, custody or maintenance of minor children and as to any matter involving domestic relations . . . . Said guardian ad litem shall, . . . report in writing to the court the results of the investigation, and such report shall be open to inspection to all the parties in such proceeding or their attorneys.

<sup>5</sup> 1976 Mass. Adv. Sh. at 269-70, 341 N.E.2d at 656.

<sup>6</sup> *Id.* at 269, 278, 341 N.E.2d at 656, 659. The admissibility of guardian ad litem reports is firmly established by several Massachusetts opinions. See, e.g., *Jones v. Jones*, 349 Mass. 259, 264, 207 N.E.2d 922, 926 (1965); *Jenkins v. Jenkins*, 304 Mass. 248, 253, 23 N.E.2d 405, 407-08 (1939).

<sup>7</sup> 1976 Mass. Adv. Sh. at 269-70, 341 N.E.2d at 656.

<sup>8</sup> See *id.* at 277, 341 N.E.2d at 658-59.

<sup>9</sup> *Id.* at 278-80, 341 N.E.2d at 659-60.

<sup>10</sup> *Id.* at 279, 341 N.E.2d at 659.

<sup>11</sup> *Id.*

would apply whether or not the parties consented to the investigation.<sup>12</sup>

**§4.12. Divorce: Dismissal of Libel.** During the *Survey* year, two Appeals Court cases decided on the same day—*Hinds v. Hinds*<sup>1</sup> and *Fabrizio v. Fabrizio*<sup>2</sup>—involved an interpretation of the probate court's power to deny a libellant's motion to dismiss his libel during the nisi period.

In *Hinds*, a decree nisi had been entered in favor of the husband upon his libel for divorce. By the terms of the decree the husband was ordered to convey the marital home to the wife.<sup>3</sup> Prior to the decree's becoming absolute, the wife brought a petition for contempt alleging that the husband had violated the order by failing to effect the conveyance. The husband countered with a motion to dismiss his libel, which motion was denied.<sup>4</sup> He appealed, asserting that a probate judge was without authority to deny a libellant's motion to dismiss his libel.<sup>5</sup>

In affirming the probate court's denial of the husband's motion to dismiss, the Appeals Court scrutinized the language of section 21 of chapter 208 of the General Laws,<sup>6</sup> which section prescribes the conditions for the dismissal of libels.<sup>7</sup> The court first stated that as a general rule "... a person entitled to a divorce but not wanting one ought not to be compelled to accept one."<sup>8</sup> The court held, however, that section 21 did not confer upon the libellant an absolute right to dismissal.<sup>9</sup> Rather, "[t]hat right must be considered in light of the

---

<sup>12</sup> *Id.* In several jurisdictions courts have held that a party should be afforded an opportunity to cross-examine not only the author of an independent report received into evidence, but also any person from whom the author obtained information incorporated therein. *See, e.g.,* *People v. Bicek*, 405 Ill. 510, 526, 91 N.E.2d 588, 596 (1950); *Stanford v. Stanford*, 266 Minn. 250, 258, 123 N.W.2d 187, 192 (1963); *Holland v. Holland*, 49 Ohio L. Abs. 237, 242, 75 N.E.2d 489, 492 (App. Ct. 1947); *Commonwealth ex rel. Mark v. Mark*, 115 Pa. Super. Ct. 181, 182, 175 A. 289, 289 (1934).

§4.12.<sup>1</sup> 1976 Mass. App. Ct. Adv. Sh. 115, 341 N.E.2d 702.

<sup>2</sup> 1976 Mass. App. Ct. Adv. Sh. 121, 341 N.E.2d 691.

<sup>3</sup> 1976 Mass. App. Ct. Adv. Sh. at 115, 341 N.E.2d at 702.

<sup>4</sup> *Id.* at 115-16, 341 N.E.2d at 703.

<sup>5</sup> *Id.* at 116-17, 341 N.E.2d at 703.

<sup>6</sup> G.L. c. 208, § 21, provides:

Judgments of divorce shall in the first instance be judgments nisi, and shall become absolute after the expiration of six months from the entry thereof, unless the court within said period, for sufficient cause, upon application of any party to the action, otherwise orders. After the entry of a judgment nisi, the action shall not be dismissed or discontinued on motion of either party except upon such terms, if any, as the court may order after notice to the other party and a hearing, unless there has been filed with the court a memorandum signed by both parties, wherein they agree to such disposition of the action.

<sup>7</sup> 1976 Mass. App. Ct. Adv. Sh. at 117-18, 341 N.E.2d at 704.

<sup>8</sup> *Id.* at 117, 341 N.E.2d at 704, quoting *Sheffer v. Sheffer*, 316 Mass. 575, 579, 56 N.E.2d 13, 16 (1944).

<sup>9</sup> 1976 Mass. App. Ct. Adv. Sh. at 118, 341 N.E.2d at 704.

equities of the situation with a view to protecting the interests of the libellee and of the Commonwealth.”<sup>10</sup> Because in *Hinds* there was no report of material facts, voluntary findings of fact, or report of the evidence, the sole question presented was whether the action taken by the court was within the scope of the pleadings.<sup>11</sup> Since the Appeals Court was required to assume every fact necessary to support the lower court’s order, it held that it could not conclude that the trial court’s denial was erroneous.<sup>12</sup>

In *Fabrizio*,<sup>13</sup> the Appeals Court held that a libellant may move to dismiss a libel without conforming with the procedural requirements of Rule 45 of the Rules of the Probate Courts (1959).<sup>14</sup> In that case the libellant, after the decree nisi had been granted, brought a petition to revoke the decree nisi and dismiss her libel and, later, filed a motion to dismiss the libel.<sup>15</sup> The trial court both dismissed her petition and denied her motion because the petition failed to comply with Rule 45,<sup>16</sup> which requires that a petition be verified by affidavit and that notice of its filing be given and filed.<sup>17</sup>

In reversing the probate court’s dismissal of the petition and denial of the motion to dismiss the libel,<sup>18</sup> the Appeals Court stated that a libellant has two alternatives available to prevent the decree nisi from becoming absolute.<sup>19</sup> He can either file a petition to stay the decree absolute in compliance with Rule 45, or file a motion to dismiss the libel pursuant to section 21 of chapter 208 of the General Laws.<sup>20</sup> Since the libellant had filed a section 21 motion to dismiss the libel, the probate judge’s denial for failure to comply with Rule 45 was an error.<sup>21</sup> The Appeals Court, therefore, remanded the case to the

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 116, 341 N.E.2d at 703.

<sup>12</sup> *Id.* at 119, 341 N.E.2d at 704.

<sup>13</sup> 1976 Mass. App. Ct. Adv. Sh. 121, 341 N.E.2d 691.

<sup>14</sup> *Id.* at 124-25, 341 N.E.2d at 692. For the text of Rule 45, see note 17 *infra*.

<sup>15</sup> 1976 Mass. App. Ct. Adv. Sh. at 121, 341 N.E.2d at 691.

<sup>16</sup> *Id.* at 122, 341 N.E.2d at 692.

<sup>17</sup> Rule 45 of the Rules of the Probate Courts (1959), provides:

At any time before the expiration of six months from the granting of a decree of divorce nisi, the libellee, or any other person interested, may file in the registry of probate a statement of objections to the decree becoming absolute, which shall set forth specifically the facts on which it is founded and shall be verified by affidavit. Notice of the filing of said objections shall be given to the libellant or libellee or his attorney not later than the day of filing said objections, and an affidavit of such notice shall be filed together with the objections. The decree shall not become absolute until such objections have been disposed of by the court. If said petition to stay the decree absolute is subsequently dismissed by the court the decree shall become absolute as of six months from the date of the decree nisi.

Rule 45 has been substantially incorporated into MASS. R. DOM. REL. P. 58(c).

<sup>18</sup> 1976 Mass. App. Ct. Adv. Sh. at 125, 341 N.E.2d at 693.

<sup>19</sup> *Id.* at 123-25, 341 N.E.2d at 692.

<sup>20</sup> *Id.* For the text of G.L. c. 208, § 21, see note 6 *supra*.

<sup>21</sup> 1976 Mass. App. Ct. Adv. Sh. at 125, 341 N.E.2d at 693.

probate court for a hearing on the motion.<sup>22</sup>

**§4.13. Right of Father of Illegitimate Child to Visitation.** In *Gardner v. Rothman*,<sup>1</sup> the Supreme Judicial Court held that it was within the power of a probate court to grant visitation rights to a father of an illegitimate child.<sup>2</sup> In that case, the acknowledged father of an illegitimate child had brought a complaint seeking a declaration of his rights to visitation.<sup>3</sup> The mother's motion to dismiss the complaint was denied and the Supreme Judicial Court accepted direct appellate review.<sup>4</sup>

In affirming the lower court's denial of the mother's motion to dismiss the complaint,<sup>5</sup> the Supreme Judicial Court first held that the probate court had jurisdiction over the subject matter of the controversy under the grant of general equity powers conferred by section 6 of chapter 215 of the General Laws.<sup>6</sup> The Court noted that section 37 of chapter 209 of the General Laws, which section relates to custody of minor children whose parents live apart, was not the conferring jurisdictional source since that section "contemplates the existence of the marital relation between the parents."<sup>7</sup>

The Court then addressed the primary question of whether the father of an illegitimate child may be granted visitation rights or whether visitation is solely within the discretion of the mother. The issue was one of first impression in Massachusetts.<sup>8</sup> The Supreme Judicial Court followed the great weight of authority from other states<sup>9</sup> and held that there exists judicial power to grant visitation rights to the father of an illegitimate child.<sup>10</sup> As in other custody and visitation questions,<sup>11</sup> the standard for the court to apply is whether visitation by the father will be in the best interests of the child.<sup>12</sup>

---

<sup>22</sup> *Id.*

§4.13.<sup>1</sup> 1976 Mass. Adv. Sh. 922, 345 N.E.2d 370.

<sup>2</sup> *Id.* at 923-25, 345 N.E.2d at 371-72.

<sup>3</sup> *Id.* at 922, 345 N.E.2d at 371.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 923-24, 345 N.E.2d at 371-72. G.L. c. 215, § 6, provides in part: "Probate courts shall have original and concurrent jurisdiction with the supreme judicial and superior courts of all cases and matters of equity cognizable under the general principles of equity jurisprudence and, with reference thereto, shall be courts of general equity jurisdiction . . . ."

<sup>7</sup> 1976 Mass. Adv. Sh. at 923, 345 N.E.2d at 371.

<sup>8</sup> *Id.* at 925, 345 N.E.2d at 372.

<sup>9</sup> See, e.g., *Bagwell v. Powell*, 267 Ala. 19, 21-22, 99 So. 2d 195, 197 (1957) (visitation allowed to father of illegitimate child); *Strong v. Owens*, 91 Cal. App. 2d 336, 341, 205 P.2d 48, 51 (1949) (no reason for denying the father visitation with his illegitimate child); *People ex rel. Francois v. Ivanova*, 14 App. Div. 2d 317, 318, 221 N.Y.S.2d 75, 76-77 (1961) (order granting visitation rights to the putative father affirmed).

<sup>10</sup> 1976 Mass. Adv. Sh. at 925, 345 N.E.2d at 372.

<sup>11</sup> See, e.g., G.L. c. 208, § 31, which provides in part: "the happiness and welfare of the children shall determine their custody or possession."

<sup>12</sup> 1976 Mass. Adv. Sh. at 926, 345 N.E.2d at 372.