COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC NO. 12018
A.C. NO. 2015-P-1510

KAREN PARTANEN,

Plaintiff-Appellant

v.

JULIE GALLAGHER,

Defendant-Appellee

DIRECT APPELLATE REVIEW OF A JUDGMENT OF
THE MIDDLESEX PROBATE AND FAMILY COURT

BRIEF OF THE APPELLEE, JULIE GALLAGHER

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2. Whether a petitioner may utilize G.L. c. 209C to establish parentage of two children where the petitioner lacks any biological connection to the children, over the objection of the biological parent?
3. Whether the broad equity powers conferred upon the Probate & Family Court by G.L. c. 215, § 6 permit the court to extend the remedy of full parentage to a unmarried person with no biological connection to the children over the objection of the biological parent?

STATEMENT OF THE CASE

This is an appeal of the Trial Court's dismissal of Appellant Karen Partanen's "Verified Complaint in Equity Pursuant to G.L. c. 215, § 6, G.L. c. 209C, and G.L. c. 46, §4B to Establish Parentage and for Other Relief." At the hearing on Appellee Gallagher's

Motion to Dismiss, the lower court judge, Abber, J., reviewed only the facts alleged in Partanen's Complaint. (R. 62-63) No stipulations of fact were presented to the trial court, and reversal of the lower court's ruling will require a remand for determination of the facts relevant to the specific relief sought in the complaint.

STATEMENT OF THE FACTS

Julie Gallagher is the biological mother of Jo and Ja, ages seven and three. (R. 4) In December of 2007, while Gallagher and Partanen were living together in Florida and in a relationship, Gallagher became pregnant with Jo using donor sperm.(Id.) In 2011, when the parties were again living together in Florida, Gallagher became pregnant with Ja using donor sperm.(Id.) Partanen and Gallagher are not married, and have never been married to each other.(R. 11) Partanen and Gallagher never legally entered into a domestic partnership. (Id.) Partanen and Gallagher never legally entered into a civil union. (Id.) Partanen and Gallagher do not share a surname. (R. 12) Partanen has no biological relationship with Jo or Ja. (Id.) Partanen and Gallagher never entered in a formal surrogacy agreement. (Id.) Partanen is not named on

either child's birth certificate. (Id.) Partanen's name is not part of either child's name. (Id.) Partanen never initiated adoption proceedings for either child, in either Florida or Massachusetts. (Id.) Partanen is not the adoptive parent of either child. (Id.)Partanen does not have, and never had, guardianship of either child. (Id.) At the time of filing of the instant Complaint, Partanen did not reside with the children and Gallagher. (Id.)

SUMMARY OF THE ARGUMENT

The lower court properly dismissed Partanen's complaint, as there is no combination of the facts alleged which entitles her to the relief sought. Partanen does not meet the statutory requirements to establish parentage under either G.L. c. 46 §4b or c. 209C, and the court's equity jurisdiction cannot properly be extended to grant her legal parentage of the children.

Pursuant to Mass. R. Dom. Rel. P. 12(b)(6), a party may move to dismiss a complaint for failure to state a claim upon which relief may be granted. A motion to dismiss under rule 12(b)(6) may be granted where a plaintiff fails to provide factual allegations sufficient to raise her right to relief above a

speculative level. Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-636 (2008) (citing Bell Atlantic v. Twombly, 550 U.S. 544, 555 (2007). In examining these allegations, the court must examine them and the inferences drawn from them, in the light most favorable to the plaintiff. Blieden v. Blieden, 14 Mass. App. Ct. 959 (1982). However, "[the court does] not accept legal conclusions cast on the form of factual allegations." Berkowitz v. President & Fellows of Harvard College, 58 Mass.App.Ct 262, 270 (2003)(citing Schaer v. Brandeis University, 432 Mass. 474, 477 (2000)). Here, Partanen did not allege that she was either married to Gallagher or joined to her by a domestic partnership conveying the same rights and obligations as marriage, and therefore, she cannot be granted legal parentage to Gallagher's children under c. 46 §4b. (pp 5-20)

Partanen also does not (and cannot) allege that she is either a biological parent, or someone who has executed an unrescinded voluntary acknowledgment of parentage, such that her claim of parentage of the children cannot be rebutted by her lack of biological connection. (pp. 21-33) Partanen cannot, therefore, establish her parentage under c. 209C.

The lower court correctly concluded that the statutes challenged by Partanen do not violate Partanen's right to equal protection of the laws. Both of the statutes under which Partanen seeks relief are gender neutral in their application. Partanen is not discriminated against on the basis of either her gender or her sexual orientation, and the challenged laws are substantially related to legitimate government purposes such that they withstand the applicable scrutiny. Partanen's status as an unmarried person with no biological connection to the children does not place her in a protected class for purposes of a an equal protection analysis. Further, the claim that the children are discriminated against based upon their illegitimacy and denied access to a second legal parent is not supported by the facts. The children were born to a single woman, a woman who, by choice, chose to become pregnant via artificial insemination while unmarried. The children have one legal parent, and have not been denied the protection of any laws based upon that status. (pp. 29-33)

Finally, with no statute permitting her to establish parentage, Partanen may not utilize the courts' equity powers to obtain that status. While

the court may use its equity powers to enforce existing rights and obligations, it cannot use that power to create them. The court may not use is parens patriae powers to create a second legal parent for the children, over the objection of their birth mother, simply because the court thinks it might be better for the children in the future. The comprehensive statutory scheme for establishing parenthood and the obligations that stem therefrom does not permit it. (pp. 33-39)

ARGUMENT

I. Partanen is not entitled to claim legal parentage of the children based upon the clear statutory language of G.L. c. 46, §4B and the corresponding Florida Statute.

It is undisputed that Gallagher was unmarried when she gave birth to her children. Both G.L. c. 46, §4B and Fla. Stat. §742.11 require the mother to be married to establish the mother's spouse as the child's legal second parent. These statutes cannot, therefore, apply to either Jo or Ja, as neither child can meet the statutory requirement of having been "born to a married woman." A gender neutral reading of the statutory language does not change the analysis, and Massachusetts courts have already extended §4B to

apply to same sex couples. Della Corte v. Ramirez, 81 Mass. App. Ct. 906 (2012) There is no combination of the facts alleged in Partanen's complaint which would permit the court to determine that she was either a) married to Gallagher or b) joined to Gallagher by virtue of a registered same sex domestic partnership "providing rights and responsibilities identical to marriage" (Hunter v. Rose, 463 Mass. 488 (2012)) and, therefore, the statute does not apply to Partanen.

A. Partanen's alleged consent to Gallagher's ART was insufficient as a matter of Florida law, regardless of the parties' marital status.

Both Jo and Ja were conceived via artificial insemination in Florida and born in Florida. There is no suggestion in the record that the negotiation of Partanen's alleged consent occurred anywhere other than Florida. The actual performance of the ART occurred in Florida and the actual birth of both children occurred there. (R. 4) Massachusetts is not, therefore, the state where the parties to the "contract" resided, where the agreement or negotiation occurred, or where the contract was performed. It is

merely the place that the parties resided when the alleged agreement and its effect came into dispute.[1]

Florida law should apply, in accordance with functional conflict of law principles[2], in determining

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[1] The Restatement (Second) Conflict of Laws §188 (1971) states: LAW GOVERNING IN ABSENCE OF EFFECTIVE CHOICE BY THE PARTIES. (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in s 6. (2) In the absence of an effective choice of law by the parties . . .the contacts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:(a) the place of contracting,(b) the place of negotiation of the contract,(c) the place of performance,(d) the location of the subject matter of the contract, and(e) the domicil, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue.(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in ss 189-199 and 203.

[2] Restatement (Second) Conflict of Laws §6 (1971) provides, in pertinent part, that where there is no statutory directive "the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied."

the parentage of children born via artificial insemination in that state.[3] Florida has a clear and important state interest in both establishing the consent requirements of contracts made in that state, as well as determining the parentage of children born in Florida, and there is no justification for substituting Massachusetts law. The issue of the effect of Partanen's consent is properly analyzed under the law of the state where the parties resided, where the alleged consent was given, in order to effectuate the justified expectations of the parties, and to provide uniformity in the application of Florida's statute. To do otherwise would allow parties to a contract created and performed in Florida to achieve a result impermissible under Florida law simply by virtue of bringing the contractual litigation in a different state. Taking these factors into consideration, Florida clearly has the closest relationship to this transaction. Florida's statute is so similar in nature to the Massachusetts' statute

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[3] While this issue was not specifically developed in Gallagher's motion to dismiss, it was addressed by both parties at oral argument. (R. 55, 57) "An appellee may generally argue any issue, fairly open on the record, that supports the decision below." New England Tel. & Tel. Co. v. Gourdeau Constr. Co., 419 Mass. 658, 662 n. 5 (1995)

that it cannot be alleged to offend Massachusetts' public policy. Furthermore, the application of Florida law in this context is consistent with Massachusetts' treatment of out of state acknowledgments of parentage. G.L. c. 209C § 11(d) ("A voluntary acknowledgment of parentage taken outside of the commonwealth shall be valid for the purposes of this section if it was taken in accordance with the laws of the state or the country where it was executed.")(emphasis added))

Florida's statute regarding parentage of children conceived through ART requires the written consent of both married parties to create an irrebuttable presumption of parentage. (Fla. Stat. §742.11) Utilizing a gender-neutral reading of that statute, not only does the statute not apply to Partanen because she was not married to Gallagher, but also because the parties never executed the requisite written consent. Partanen cannot be declared a legal parent pursuant to the applicable Florida law.

B. Partanen cannot be declared a legal parent pursuant to c. 46, §4B, as she never married Gallagher.

Even if this Court determines that Massachusetts law is the appropriate choice due to the children and

parties' current domicile here, Partanen cannot establish legal parentage under c. 46 §4B either. Unlike c. 209c, which appears in the Massachusetts statutes under "Part II, Real and Personal Property and Domestic Relations, Title III, Domestic Relations", Chapter 46 appears under "Title I, Administration of the Government, Title VII, Cities, Towns and Districts." Chapter 46 prescribes, among other things, the procedural framework for the administrative task of the issuance of birth certificates by city and town clerks. (G.L. c. 46 §2) Section 4B extends the presumption of legal parentage already granted to the children of married parents by G.L. c. 209C §6(a)(1)and establishes legal parentage where consent to ART occurs between married parties.

Chapter 46 §4B's establishment of legal parentage instead of simply the presumption of parentage granted under c. 209C reflects the indisputable fact that, unlike biological parentage created by intercourse, there can be no challenge to the presumed parentage of the non-birth spouse in the context of ART. It is clearly unnecessary, where spousal consent has been given to ART, to leave open the possibility of

rebuttal as Massachusetts has already excluded sperm donors as legal parents. See, G.L. c. 210, §2.

The language of §4B is substantially related to the state's interest in the orderly conduct of government, in promptly recording birth data, in maintaining its databases and eliminating delay in establishing the parentage of children born to those who have already been joined legally through marriage or its equivalent. Further, §4B must be read in conjunction with section one of Chapter 46, establishing the protocol for issuance of birth certificates for marital children and prohibiting the inclusion of a second parent's name on a nonmarital child's birth certificate prior to compliance with G.L. c. 209C, §2.[4]

Essentially, §4B acknowledges the enforceability of an agreement to have children made by those who are

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[4] G.L. C. 209C, §2, "In the record of births, date of birth, place of birth, name and sex of child; names, places of birth, and dates of birth of both parents; and residence and birth surname of the child's mother. In the record of birth of a child born to parents not married to each other, the name of and other facts relating to the father shall not be recorded except as provided in section 2 of chapter 209C where paternity has been acknowledged or adjudicated under the laws of the commonwealth or under the law of any other jurisdiction.

already parties to the contract of marriage. There is no similar presumption of parentage created by the birth of a child to an unmarried couple, regardless of how the child is conceived, and, if either member of the couple chooses not to execute a voluntary acknowledgement of parentage, a proceeding to adjudicate parentage is necessary.(pp. 24-27)

Section 4B must not be read in isolation and therefore as exclusionary, but rather as one part of a complete statutory scheme for both identifying the parentage of children born under various circumstances and the generation of the birth certificates for those children. This statutory approach is consistent with the Massachusetts law of adoption. Just as in c. 46, married and unmarried couples are treated differently in the adoption context, where c. 210 § 1 requires that a petitioner obtain the consent of his or her spouse so that the child "shall" be the child of both (or that the petition "may" be granted if the petitioner can establish certain facts justifying the exclusion of the spouse).[5] There is no such second

[5]G.L. c. 210 § 1, "If the petitioner has a husband or wife living, competent to join in the petition, such husband or wife shall join therein, and upon adoption the child shall in law be the child of both . . ."

parent requirement for a unmarried petitioner, and no extension of parentage to the significant other of a unmarried petitioner.

C. Partanen's alleged consent to Gallagher's ART procedures does not create an enforceable contract entitling her to a declaration of parentage.

Partanen's alleged "consent" to Gallagher's decision to conceive does not render the statute applicable to her. The issue of consent to ART is only relevant in the context of marriage. Section 4B's marriage requirement does not discriminate against Partanen on the basis of her sexual orientation, as the parties were free to marry under Massachusetts law as of 2004. Goodridge v. Dep't. of Public Health, 440 Mass. 309 (2003) Nor does the marriage requirement discriminate against her on the basis if her sex, as the requirement excludes all unmarried persons, regardless of their gender.

The unmarried Gallagher's decision to conceive a child by ART did not create any presumption of parentage in Partanen under c. 209C, as it would have done had the parties chosen to marry. The unmarried

Gallagher certainly never required Partanen's consent to undergo assisted reproduction, and Partanen herself was never in any danger of having the obligations of parenthood presumptively laid upon her by her conduct or any implied contract between the parties. ""Parenthood by contract" is not the law in Massachusetts, and to the extent the plaintiff and the defendant entered into an agreement, express or implied, to coparent a child, that agreement is unenforceable." T.F. v. B.L., 442 Mass. 522, 530 (2004)

The T.F. court cited with approval the Court's earlier public policy analysis, stating, "in order to protect the "freedom of personal choice in matters of marriage and family life," A.Z. v. B.Z., 431 Mass. 150, 162 (2000), quoting Moore v. East Cleveland, 431 U.S. 494, 499 (1977), "prior agreements to enter into familial relationships (marriage or parenthood) should not be enforced against individuals who subsequently reconsider their decisions." T.F. at 529. Partanen's alleged consent did not expose her to any enforceable obligation to Gallagher or her children under Massachusetts (or Florida) law, and she should not now

be permitted to use that consent to enforce an alleged contract to parent against Gallagher.

No Massachusetts court has held that consent to ART grants legal parentage outside of a marriage or documented marital relationship. See Della Corte (c. 46 §4B applies to married couples regardless of sexual orientation); Hunter at 489 (c. 46 §4B applies to registered domestic partnership) As Massachusetts has explicitly rejected common law marriage, Partanen should not be permitted to use the parties conduct alone (the "holding out" argument) to establish the necessary legal relationship between the adult parties for application of the presumptions created by either statute. Collins v. Guggenheim, 417 Mass. 615, 618 (1994); Feliciano v. Rosemar Silver Co., 401 Mass. 141, 142(1987).

Here, Partanen and Gallagher were free to marry in Massachusetts for years prior to Gallagher's decision to undergo ART, and they made the deliberate choice not to marry. In making this decision, both parties chose to forego the rights, obligations and protections afforded to all Massachusetts married couples, including the irrebuttable presumption of legal parentage of any children consensually conceived

through ART. "Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage." Wilcox v. Trautz, 427 Mass. 326, 334(1998). The choices parties make dictate the laws that apply to them, and here, Partanen and Gallagher's decision not to marry results in both parties losing the protections provided by the marital state, including presumptive parentage of children born to either party during the relationship.

Having deliberately chosen to forego the act which bestows these legal benefits, Partanen now claims to have achieved them by estoppel, arguing that Gallagher, an unmarried woman conceiving children through ART, waived her right to sole legal custody of her children by accepting Partanen's acquiescence to her decision to conceive and by permitting Partanen to develop a de facto parental relationship with them. Partanen's argument fails. While Massachusetts cases have developed and defined de facto parenthood, there has been no adoption of the concept of "de facto spouse".

The parties' intent to refrain from creating a legal relationship between Partanen and the children

is evidenced by their deliberate choices to exclude Partanen's name or any version of her surname from the children's birth certificates (R. 12), to not seek adoption or any form of guardianship by Partanen (Id.), and, most recently, by Partanen's filing of a complaint that did not seek to establish her obligation to support the children. (Id. at 3-10) "There is no surer way to find out what parties meant, than to see what they have done." T.F. v. B.L. at 525, quoting Martino v. First Nat'l Bank, 361 Mass. 325, 332 (1972), quoting Pittsfield & N. Adams R.R. v. Boston & Albany R.R., 260 Mass. 390, 398 (1927). While the record here establishes the parties' intent for Partanen to establish a relationship with the children, there is no evidence that the parties' intended that relationship to be of a permanent, legal nature.

Partanen attempts to cast the administrative law captured in c. 46 as a discriminatory statute creating substantive rights in the children of married parents while neglecting children born to an unmarried woman. The protections which are allegedly denied Jo and Ja are the protections of legal parentage by their mother's former girlfriend. Gallagher has no spouse,

and no spousal equivalent. The children are not being denied protection by that second parent; that second parent does not presumptively exist, as a matter of law. To adopt Partanen's reading of the statute, the significant other (male or female) of a woman who chooses to conceive a child via artificial insemination would be entitled to a stronger claim to legal parenthood than is extended to an actual biological non-married parent pursuant to c. 209C. Such a reading of the statute creates an absurd result and clearly exceeds the administrative purposes of c. 46.

II. Partanen may not utilize G.L. c. 209C to establish parentage, over the objection of the biological parent, where she lacks any biological connection to the children.

The lower court properly dismissed Partanen's complaint to establish parentage pursuant to Ch. 209C. While it is undisputed that section one of c. 209C assures children born of unmarried parents the same rights and protections of the law as all other children, Partanen attempts to utilize this language to grant herself the protection of c. 209C, and grant herself the right to be declared a legal parent. That is, Partanen seeks to use the principle of protection

from discrimination against children on the basis of legitimacy (a shield for those children) as a sword in the hands of an individual who is a legal and biological stranger to them. While the legislature certainly could have crafted a law designed to grant those in unmarried relationships the same rights as married couples, it has not done so.

There is no evidence before the Court that Jo and Ja are being denied the rights and protections of the law in any context. Partanen alleges that if she is not granted the relief sought, the children will be denied the right to inherit from her estate under the laws of intestacy, although she points to no authority which prevents her from granting the children full inheritance rights under her will. She alleges that the children will be without a caretaker in the event of the death of their single parent, if she is not declared a parent, although she points to no evidence that Gallagher has failed to make an appropriate plan for their care in the event of her death or disability.

A. Gallagher's single parent status does not automatically render her unable to meet her children's best interests.

There is no context under Massachusetts law whereby self-supporting single parents (whether single by choice or circumstance) are required to identify either a proposed caretaker or a secondary source of support. There are multiple instances where an individual, either by choice or by circumstance, assumes single parenthood. Widows and widowers are not required by law to remarry under Massachusetts law, nor are they required by law to identify a guardian for their children. Single women are permitted to have children utilizing ART or other means, and are permitted to live their lives free of state intrusion, absent a showing of financial dependency. No single parent is required to produce evidence of a second non-indigent parent or else suffer the invasion of the government into his or her parental relationship. The only state intervention into that private custodial relationship of the single parent described above occurs when that parent either seeks state assistance or loses custody of the child to the state. Section 5 of c. 209C states,

> "Complaints under this chapter . . . may be commenced . . .by the authorized agent of the department of children and families or any agency licensed under chapter 15D provided that the child is in their custody; or, if the child is or

> was a recipient of any type of public assistance, by the IV-D agency as set forth in chapter 119A on behalf of the department of transitional assistance, the department of children and families, the division of medical assistance or any other public assistance program of the commonwealth . . ."

It is undisputed that neither Jo nor Ja is or has been the recipient of any type of public assistance that would justify the state's invasion into Gallagher's private custodial relationship with her children, "perhaps the oldest of the fundamental liberty interests." Troxel v. Granville, 530 U.S. 57, 65 (2000)

The Massachusetts legislature has secured the right of a single woman to have a child by scientific means as evidenced by the insurance statutes requiring coverage for fertility treatments regardless of the mother's marital status. (See G.L. c. 175 §47H; G.L. c. 176A, §8K; G.L. c. 176B §4J; G.L. c. 176G §4) There is no eligibility requirement for this coverage that the single mother designate a second parent for purposes of support or substitute care. These statutes demonstrate the Commonwealth's respect for the privacy right of a single woman to give birth to a child into a family framework of her own choosing and is a clear legislative rejection of Partanen's argument that

there is an over-arching public policy regarding the best interests of the children that allows the mother's liberty interest to be invaded absent a showing of unfitness.

Children do not have a "fundamental right" to two parents that is entitled to greater protection than an individual's fundamental right to decide whether to marry or whom to marry or how to procreate. To qualify as "fundamental", an asserted right must be "objectively, deeply rooted in this Nation's history and tradition." Moore at 503 (1997) "Rights that are not considered fundamental merit due process protection if they have been irrationally burdened," Goodridge, (Spina, dissenting) at 354, citing Mass. Fed'n of Teachers v. Bd. of Educ., 436 Mass. 763, 777-779 & n.14 (2002) Gallagher's decision whether to marry ("among life's momentous acts of self-definition," Goodridge, at 322) is such a fundamental right.

Even if there is a public policy in favor of children having two parents, that policy cannot be used to create a legal (as opposed to de facto) relationship without the consent of the child's birth mother, who, by law, has sole legal and physical

custody of any child born out of wedlock. G.L. c. 209C §10(b). Although the "best interests" standard is used for various determinations involving the well being of a child, it should not be a factor in defining parenthood.

B. Chapter 209C has a clear biological component.

Multiple sections of c. 209C evidence the Legislature's intent to restrict the statute's application, absent mutual consent of the parties, to establishing the rights and obligations of those with a biological connection to a child born outside of a marriage. Section 11(a) of 209C clearly establishes that parties may, by agreement, file "an acknowledgment of parentage" which has the effect of a judgment without the need for judicial ratification."[6] After the filing of such an acknowledgment, the statute establishes a short time period to rescind the acknowledgment, and requires that prior to allowing

[6] While c. 209C §11(a) refers to a putative father, it must be read in conjunction with §21, "Insofar as practicable, the provisions of this chapter applicable to establishing paternity shall apply to actions to establish a mother and child relationship."

the rescission, the court order genetic testing.[7] Id.: Clearly, absent the continued assent of both parties, the Court must look to a genetic relationship between the child and the parents to support an adjudication of parentage. Here, Partanen cannot claim to have acknowledged her parentage of the children in any way contemplated by the statute. Partanen and Gallagher did not execute a voluntary acknowledgment of parentage, as they certainly could have based upon the plain language of the statute.

Chapter 209C, §8 also requires proof of a biological connection, as an affidavit alleging sexual intercourse during the time of conception (and therefore an allegation of a biological relationship) remains the only means by which a default judgment may enter under Chapter 209C.[8]

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[7] "If either party rescinds the acknowledgment in a timely fashion, the court shall order genetic marker testing and proceed to adjudicate paternity or nonpaternity in accordance with this chapter." c. 209C §11(a) (emphasis added)

[8] "Upon default of the defendant or his failure to personally appear, the court shall make a judgment establishing paternity if a showing is made that the complaint was served in accordance with the applicable rules of court and that the mother or putative father submits that sexual intercourse between the parties occurred during the probable period of conception." G.L. c. 209C §8

A claim by a "holding out" parent is rebuttable by proof of a lack of a biological connection. To suggest, as Partanen does, that the holding out provision cannot be rebutted by genetic evidence but that a signed acknowledgment can be so rebutted would grant private, informal conduct greater protection from challenge than public conduct which has the "same force and effect as a judgment of paternity." G.L. c. 209C §11(a)

The cases cited by Partanen which closed the door on biological rebuttal after holding out involve significant procedural issues absent which the court clearly stated genetic rebuttal could have been utilized. Paternity of Cheryl, 434 Mass. 23 (2001) actually stands for the proposition that an untimely Mass. R. Civ. P. 60(b) motion alleging a lack of biological connection will not be allowed, where the father declined genetic testing and eleven years before signed a voluntary acknowledgement of paternity (VAP) that was not rescinded within the time period allowed by either c. 209C §11 or the rule. To extend that holding to stand for the proposition that a claim of holding out can never be rebutted by genetics, even where there was no VAP or judgment of paternity,

carries it too far. Indeed, that claim is specifically rejected by this court's holding in A.R. v. C.R., 411 Mass. 570 (1992) (where plaintiff was not biological father of two children, he could not be equitably estopped from denying paternity based on representations he made to the mother). Partanen's claim of holding out is rebuttable by genetics, as she never formalized her claim of parentage by any of the legal means afforded to her.

C. Rebuttal of Partanen's claim of holding out parentage by genetics does not violate Partanen's Equal Protection rights.

Allowing rebuttal of a claim of parentage by genetic testing does not constitute sex discrimination. Either a male or female's claim to parentage of a child can be rebutted by establishing the lack of genetic connection between the parent and the child. Partanen is not prevented from establishing her biological parentage of the children because of her sex, but because she neither gave birth to the children nor contributed her genetic material to their conception. Gallagher chose to become pregnant without utilizing Partanen's genetic material, a choice that Gallagher was free to make

without interference or intrusion. A male "holding out parent" receives the same treatment under c. 209 that Partanen receives; absent the consent of the mother, his claim of parentage is rebuttable by genetics. C.M. v. P.R., 420 Mass. 220, 223 (1995)("By definition, a person who is not the biological father cannot establish his paternity.")

Further, a statutory classification reflecting biological differences between males and females is not unlawful sex discrimination. See Michael M. v. Superior Court of Sonoma County, 450 U.S. 464, 469 (1981) "[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances." Chapter 209C reflects the fact that biology plays a fundamental role in the determination of legal parentage and the imposition of an obligation of support. "[T]he issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the . . . [l]egislature are within constitutional limitations." Kahn v. Shevin, 416 U.S. 351, 356, n. 10 (1974) Here, Partanen's claim that c. 209C violates her Equal

Protection rights must fail, as the plain language of the statute requires a gender neutral reading and the application of the statute's language applies equally to persons similarly situated to Partanen, regardless of gender.

This Court's holding in C.C. v. A.B., 406 Mass. 679 (1990) does not alter this analysis. The substantial relationship test was not developed in a vacuum, but rather in response to a putative father's attempt to establish paternity to a child born to a married woman that he had identified as his (child had his last name and putative father was listed as child's father on the birth certificate) and with whom he had lived for some time after birth. The court articulated the test as the "controlling factor in determining whether this plaintiff may pursue his claim," (Id. at 689)(emphasis added) The Court went on to explain that the specific circumstances presented, (i.e., the putative father was attempting to assert his rights and intrude into a marital family) required the existence of the substantial parent-child relationship to justify that intrusion. (Id., at 691) No putative father has been required to show a substantial parent-child relationship prior to

establishing paternity where the mother was unmarried at the time of the birth. Where the mother is not married, the putative father may bring the claim and his claim of paternity remains provable or rebuttable by genetic marker testing, absent the mother's consent to an acknowledgment of paternity. (G.L. c. 209C, §5)

The Massachusetts Legislature chose not to adopt the "presumed parent" and "intended parent" language of the Uniform Parentage Act, although, of course, it was free to do so. The California cases cited by the appellant and amici are therefore, inapposite, as California's legislature has adopted a definition of parent rejected by Massachusetts.[9] Likewise, reliance on the jurisprudence from Delaware cannot assist the discussion here, as Delaware's Legislature specifically included the de facto parent within the

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Cal. Fam. Code, §7613 (a) If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived. The other intended parent's consent shall be in writing and signed by the other intended parent and the woman conceiving through assisted reproduction.

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category of those who may become legal parents under its parentage statute.[10]

"When the elected representatives of the people have declared the Commonwealth's policy on a matter within their jurisdiction, the court exceeds its lawful powers by announcing an inconsistent policy." C.C., at 695, (O'Connor, J. dissenting) The relief sought by Partanen requires that this Court discard the definition of parentage adopted by Massachusetts' legislature and substitute a new, broader meaning that is expressly contradicted by the Legislature's chosen language under c. 209C, c. 46 and c. 209B[11].

III. The Trial Court's denial of Partanen's request to be declared a parent does not violate Partanen's Equal Protection rights.

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[10] Del. Code Ann. Tit. 13,§ 8-201(a) The mother-child relationship is established between a woman and a child by: (4) A determination by the court that the woman is a de facto parent of the child; or(6) The woman's having consented to assisted reproduction by another woman under subchapter VII of this chapter which resulted in the birth of the child.

[11] G.L. c. 209B, 1, ''Person acting as parent'', a person other than a parent who has physical custody of a child and who has either been awarded custody of a child or claims a legal right to custody and includes an authorized social service agency exercising legal or physical custody of a child; and ''Parent'', a biological, foster, or adoptive parent whose parental rights have not previously been terminated; . . ."

As a third party with no biological relationship to the children, Partanen still has the right to assert a common law claim of de facto parentage. The de facto parenting analysis applied in cases presenting similar fact patterns amply protects the rights of children to maintain the type of relationship alleged by Partanen. In applying the de facto parenting analysis, the court analyzes similar factors to a court evaluating a substantial relationship in the paternity context. Further, one of the equal protection arguments advanced here, that the children are being denied access to two parents due to their status as children born via ART to an unmarried woman, assumes the answer to the issue, by asserting first that the children have two parents and then concluding that the children are being denied access to one of them. Whether Partanen can establish her parentage at law or in equity is the actual question presented, and any equal protection argument that assumes her parentage does not advance the analysis of the issue.

A. Partanen does not have standing to challenge the application of these statutes on behalf of the children.

The Court must review the validity of the statute on equal protection grounds only as it pertains to the class in which the appellant belongs; that is, an alleged de facto parent of children born out of wedlock, living apart from the children's mother. There is no reason in this case to depart from the established rule, followed both in Massachusetts and Federal courts, that, "[o]rdinarily one may not claim standing ... to vindicate the constitutional rights of some third party." Slama v. Attorney Gen., 384 Mass. 620, 624 (1981),quoting Barrows v. Jackson, 346 U.S. 249, 255, (1953). Representative standing is generally limited to cases in which it is difficult or impossible for the actual rightholders to assert their claims. See New York v. Ferber, 458 U.S. 747, 767-768 & n. 20, (1982); United States v. Raines, 362 U.S. 17, 21, (1960). Stated somewhat differently in Mass. Comm'n Against Discrimination v. Colangelo, 344 Mass. 387, 390, 182 N.E.2d 595 (1962), "[o]nly one whose rights are impaired by a statute can raise the question of its constitutionality, and he can object to the statute only as applied to him." Here, Partanen argues that both c. 46 §4b and c. 209C discriminate against nonmarital children by preventing the children

access to two parents. Partanen is not a child born out of wedlock, and cannot challenge either statutes' application to a protected class to which she does not belong.

As applied to Partanen, neither statute discriminates against her on the basis of her membership in any protected class. She is not prevented from marrying, and receiving the protections of c. 46 4B; rather, she exercised her right to forgo those protections by choosing not to marry. The application of c. 209C to Partanen is likewise nondiscriminatory. Partanen is free to assert her parentage through all of the mechanisms identified in that statute, and her success in doing so is only precluded by the choices made by individuals exercising personal liberty interests, not by the terms of the statute itself.

Partanen's argument that she is "categorically barred" from making her claim as a holding out parent is incorrect. She is free to claim she is a holding out parent, and, had she and Gallagher chosen to utilize Partanen's ovum in the creation of the children born by Gallagher, Partanen then could withstand rebuttal on the grounds of genetics. As the

court noted in C.M. v. P.R., the "holding out" parent is merely a presumption created under the joinder provisions of the statute, and is not an absolute path to establishing parenthood, regardless of the holding out parent's gender.[12]

IV. The court may not utilize its equitable powers to create a new path to legal parentage.

The lower court correctly denied Partanen's request to utilize the equity powers conveyed by C. 215 § 6 to grant her legal parentage. "The equity powers conferred by the Legislature on the Probate and Family Court are intended to enable that court to provide remedies to enforce existing obligations; they are not intended to empower the court to create new obligations." T.F. at 532. In T.F., the court expressly rejected the concept of the creation of legal parenthood by implied contract or conduct, even where, unlike here, the parties had participated in a civil commitment ceremony and marriage was not

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[12] "The plaintiff notes that a paternity action commenced by another would require his joinder because he and the mother received the child into their home and held her out as their child, and because he is named as the father on the child's birth certificate. G.L. c. 209C, §6(a) (1992 Ed.) This is irrelevant. Such joinder is based on a presumption of paternity. Id. the plaintiff is admittedly not the father." C.M. at 223 n. 6. There is no claim that Partanen is named on the children's birth certificates.

available to same sex couples at the time the child was born.

This case involves competing public policies in an arena with specific legislative action. "We determine public policy by looking to the expressions of the Legislature and to those of this court." Id. at 529, quoting Capazzoli v. Holzwasser, 397 Mass. 158, 160 (1986).

A. The Court cannot use its equitable powers to circumvent the legislature and create a new form of "legal parent".

A legal parent has both rights to a child that are constitutionally protected, and duties and obligations to a child that are imposed by statute. A legal parent has a fundamental right to a custodial relationship with the child that cannot be abrogated absent the legal parent's consent or a showing of unfitness. Santosky v. Kramer, 455 U.S. 745 (1982) Along with these rights come legal duties and obligations to provide support to a minor child (whether from the parent's income, from the parent's estate after death, or, indirectly, from a tortfeasor pursuant to the wrongful death statute). An individual achieves legal parenthood by 1) giving

birth to a child (a "natural mother"); or 2) marriage at the time of birth to the natural mother and i) no renunciation of parenthood on the basis of a lack of genetic connection, or ii) consent to ART (chapters 209C, §6 and c.46, §4B); or 3) establishment of paternity through genetic testing (c. 209C); or 4) execution of a voluntary acknowledgment of parentage signed, before a notary, by the natural mother and the other parent (c. 209C, §11); or 5) adoption (c. 210).

There is no gap in the legislation causing Gallagher's children to be denied the equal protection of our laws. Gallagher's children are not being denied access to their second legal parent due to the language or application of either c. 46 or c. 209C. Jo and Ja were born to an unmarried woman utilizing artificial insemination, and they, therefore, as a matter of law, do not have a second legal parent. This Court must not ignore the statutory requirements for establishing legal parenthood and create one for them based upon a patriarchal belief that Gallagher will need the assistance of a second parent to effectively support and raise her children.

Partanen seeks to create a sixth path to legal parentage, one which does not require marriage to the

natural mother, does not require a biological connection to the child, does not require adoption, and not only does not require the consent of the legal parent but which can be granted over the objection of a fit legal parent. "[E]quity must follow the law. 2 Pomeroy, Equity Jurisprudence § 425 (5th ed. 1941). This centuries-old principle holds that, where the law (either common or statutory) provides a remedy bounded by restrictions . . . a court may not act in equity either to extend or supplement that remedy." Eccleston v. Bankosky, 438 Mass. 428, 440 (Cowin, J., dissenting)(2003), citing Hedges v. Dixon County, 150 U.S. 182, 192 (1893); Freeman v. Chaplic, 388 Mass. 398, 406 n. 15 (1983) ("a grant of equitable powers does not permit a court to disregard statutory requirements"); Heard v. Stanford, 25 Eng. Rep. 723, 723-724 (1736). The Court should decline to invade the province of the legislature and create new law in this instance.

The vehicle by which Partanen seeks to take this path is a public policy argument that the best interests of children are served by having two parents. "It is axiomatic that the touchstone of our child welfare laws is the best interests of the child

. . .however, [it is] not a catch-all vessel into which any assertion of rights to the care and custody of a child is entitled to flow." A.H. v. M. P. 447 Mass. 828, 837 at n. 12 (2006)

The children's personal privacy interests in their right to maintain the relationship created with Partanen, shielded by the Due Process Clause, are amply protected by application of Massachusetts' common law of de facto parentage. This common law right thoroughly serves the purpose articulated by the United States Supreme Court in Lehr v. Robertson by preserving the "emotional bonds that develop between family members as a result of shared daily life." Lehr v. Robertson, 463 U.S. 248, 261 (1983) The de facto parent determination is an acknowledgment that legal parents, by their conduct, can create relationships of such value to a child that the legal parent cannot sever the relationship without causing harm. E.N.O. v. L.L.M., 429 Mass. 824 (1999) While the court's protection of the de facto parent relationship is an acknowledged invasion of the presumptive rights of legal parents, it is a minimal invasion, and one predicated upon the child's best interests, and does

not strip the legal parent of any other substantive rights to the child. E.N.O. at 833.

However, the relief sought here, a grant of legal parentage to an alleged de facto parent over the objection of the natural parent, is the "most dramatic intrusion into the rights of fit parents." A.H. v. M.P. at 843. Partanen and Gallagher's private agreement to hold themselves out as a family for the duration of their relationship "does not create full parental rights in one who is not the child's biological or adoptive parent." Id. at 843-844. Gallagher's agreement to Partanen's formation of an emotional relationship with her children should not act as a waiver of her right to maintain sole legal parentage of them.

B. The common law doctrine of de facto parentage secures the children's rights to maintain their relationship with Partanen and protects that relationship from termination or disruption.

Acknowledgment of Partanen's de facto status will secure the children's rights to maintain that close relationship, while securing Gallagher's right to sole custody of her children, absent a showing of her unfitness. "We decline the Plaintiff's invitation to

erase the distinctions between biological and adoptive parents, on the one hand, and de facto parents, on the other, and to apply estoppel principles to intrude into the private realm of an autonomous, in nonintact, family in which the child's best interests are appropriately taken into consideration." A.H. v. M.P. at 830.

The de facto parent doctrine constitutes a balancing act between the rights of children on the one hand and their parents' rights on the other, and rejects the notion that a fit parent, such as Gallagher, is presumptively required to extend legal parentage to an individual to whom she is not married and who has not adopted her children. ""[O]n marriage, the parties assume []new relations to each other and to the state." Goodridge, at 321, quoting Smith v. Smith, 171 Mass. 404, 409 (1898) The decision to marry and thereby extend legal rights over one's children to another is at the core of an individual's personal autonomy, and is an interest that deserves this court's protection.

As argued above, the majority of the cases cited by Appellant from other jurisdictions which have granted legal parenthood to de facto parents are

distinguishable, either due to explicit statutory language granting a de facto parent legal status or unique fact patterns not relevant here. Massachusetts explicitly refused to adopt the parent by estoppel theory advanced by Partanen, holding that it was unnecessary, as same sex couples, like heterosexual couples, are free to adopt the children of their partners. See, A.H. v. M.P. at 843. See also, Adoption of Tammy, 416 Mass. 205 (1993). Where parties in Massachusetts may either marry or adopt each other's children when they wish to create and preserve legal relationships between their children and those with no biological connection, the courts must not interfere when the parties exercise their rights not to take those steps.

CONCLUSION

For the foregoing reasons, the judgment of the trial court should be affirmed as to all counts of the complaint.

Respectfully submitted,
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By her attorney,

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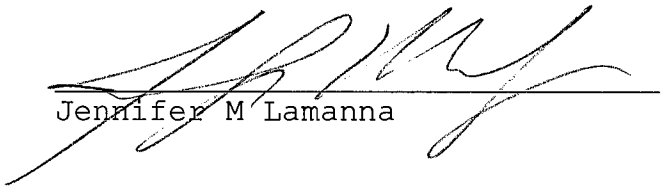
CERTIFICATE OF COMPLIANCE

I, Jennifer M. Lamanna, Esq., hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to, Mass. R. A. P. 16(e) (references to the record); Mass. R. A. P. 16(f) (reproduction of statutes, rules and regulations); Mass. R. A. P. 16 (h) (length of briefs); Mass. R. A. P.20 (form of briefs, appendices and other papers).



Jennifer M Lamanna

Dated: March 22, 2016

CONSTITUTIONAL PROVISIONS, STATUTES & RULES ADDENDUM

TABLE OF CONTENTS FOR CONSTITUTIONAL PROVISIONS, STATUTES & RULES ADDENDUM PURSUANT TO MASS. R. A. P. 16(f)

FAMILY CODE - FAM

DIVISION 12. PARENT AND CHILD RELATIONSHIP [7500 - 7961] *(Division 12 enacted by Stats. 1992, Ch. 162, Sec. 10.)*

PART 3. UNIFORM PARENTAGE ACT [7600 - 7730] *(Part 3 enacted by Stats. 1992, Ch. 162, Sec. 10.)*

CHAPTER 2. Establishing Parent and Child Relationship [7610 - 7614] *(Chapter 2 enacted by Stats. 1992, Ch. 162, Sec. 10.)*

7613. (a) If a woman conceives through assisted reproduction with semen or ova or both donated by a donor not her spouse, with the consent of another intended parent, that intended parent is treated in law as if he or she were the natural parent of a child thereby conceived. The other intended parent's consent shall be in writing and signed by the other intended parent and the woman conceiving through assisted reproduction.

(b) (1) The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction by a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child.

(2) If the semen is not provided to a licensed physician and surgeon or a licensed sperm bank as specified in paragraph (1), the donor of semen for use in assisted reproduction by a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived if either of the following are met:

(A) The donor and the woman agreed in a writing signed prior to conception that the donor would not be a parent.

(B) A court finds by clear and convincing evidence that the child was conceived through assisted reproduction and that, prior to the conception of the child, the woman and the donor had an oral agreement that the donor would not be a parent.

(3) Paragraphs (1) and (2) do not apply to a man who provided semen for use in assisted reproduction by a woman other than the man's spouse pursuant to a written agreement signed by the man and the woman prior to conception of the child stating that they intended for the man to be a parent.

(c) The donor of ova for use in assisted reproduction by a woman other than the donor's spouse or nonmarital partner is treated in law as if she were not the natural parent of a child thereby conceived unless the court finds satisfactory evidence that the donor and the woman intended for the donor to be a parent.

(Amended by Stats. 2015, Ch. 566, Sec. 1. Effective January 1, 2016.)

ADD 1

TITLE 13

Domestic Relations

CHAPTER 8. UNIFORM PARENTAGE ACT

Subchapter II. Parent-Child Relationship

§ 8-201 Establishment of parent-child relationship.

(a) The mother-child relationship is established between a woman and a child by:

(1) The woman's having given birth to the child, unless she is not the intended parent pursuant to a gestational carrier arrangement;

(2) An adjudication of the woman's maternity;

(3) Adoption of the child by the woman;

(4) A determination by the court that the woman is a de facto parent of the child; or

(5) The woman's intending to be the mother of a child born pursuant to a gestational carrier arrangement; or

(6) The woman's having consented to assisted reproduction by another woman under subchapter VII of this chapter which resulted in the birth of the child.

(b) The father-child relationship is established between a man and a child by:

(1) An unrebutted presumption of the man's paternity of the child under § 8-204 of this title;

(2) An effective acknowledgment of paternity by the man under subchapter III of this chapter, unless the acknowledgment has been rescinded or successfully challenged;

(3) An adjudication of the man's paternity;

(4) Adoption of the child by the man;

(5) The man's having consented to assisted reproduction by a woman under subchapter VII of this chapter which resulted in the birth of the child; or

(6) A determination by the court that the man is a de facto parent of the child

(c) De facto parent status is established if the Family Court determines that the de facto parent:

(1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;

(2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and

(3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.

74 Del. Laws, c. 136, § 1; 70 Del. Laws, c. 186, § 1; 77 Del. Laws, c. 97, §§ 1-3; 79 Del. Laws, c. 88, § 3.;

§ 8-202 No discrimination based on marital status.

A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.

74 Del. Laws, c. 136, § 1.;

§ 8-203 Consequences of establishment of parentage.

Unless parental rights are terminated, a parent-child relationship established under this chapter applies for all purposes, except as otherwise specifically provided by other law of this State.

74 Del. Laws, c. 136, § 1.;

§ 8-204 Presumption of paternity in context of marriage.

(a) A man is presumed to be the father of a child if:

(1) He and the mother of the child are married to each other and the child is born during the marriage;

(2) He and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce;

(3) Before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity or divorce;

(4) After the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:

(i) The assertion is in a record filed with the Office of Vital Statistics;

(ii) He agreed to be and is named as the child's father on the child's birth certificate; or

(iii) He promised in a record to support the child as his own; or

(5) For the first 2 years of the child's life, he resided in the same household with the child and openly held out the child as his own.

(b) A presumption of paternity established under this section may be rebutted only by an adjudication under subchapter VI of this chapter.

74 Del. Laws, c. 136, § 1; 70 Del. Laws, c. 186, § 1.;

Select Year: 2015 Go

The 2015 Florida Statutes

Title XLIII
DOMESTIC RELATIONS

Chapter 742
DETERMINATION OF PARENTAGE

View Entire Chapter

742.11 Presumed status of child conceived by means of artificial or in vitro insemination or donated eggs or preembryos.—

(1) Except in the case of gestational surrogacy, any child born within wedlock who has been conceived by the means of artificial or in vitro insemination is irrebuttably presumed to be the child of the husband and wife, provided that both husband and wife have consented in writing to the artificial or in vitro insemination.

(2) Except in the case of gestational surrogacy, any child born within wedlock who has been conceived by means of donated eggs or preembryos shall be irrebuttably presumed to be the child of the recipient gestating woman and her husband, provided that both parties have consented in writing to the use of donated eggs or preembryos.

History.—s. 1, ch. 73-104; s. 5, ch. 90-139; s. 1, ch. 93-237.

ADD 4

Print

PART I ADMINISTRATION OF THE GOVERNMENT

TITLE VII CITIES, TOWNS AND DISTRICTS

CHAPTER 46 RETURN AND REGISTRY OF BIRTHS, MARRIAGES AND DEATHS

Section 2 Separate registries for births, deaths and marriages

Section 2. Separate indexes of births, marriages and deaths shall be kept, and each entry shall be numbered in its order. The town clerk shall preserve all returns of births, marriages and deaths and shall conveniently arrange them for examination. He may record in separate columns the facts of such births, marriages and deaths.

ADD 5

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE VII CITIES, TOWNS AND DISTRICTS

CHAPTER 46 RETURN AND REGISTRY OF BIRTHS, MARRIAGES AND DEATHS

Section 4B Artificial insemination

Section 4B. Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.

ADD 6

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XXII CORPORATIONS

CHAPTER 175 INSURANCE

Section 47H Infertility, pregnancy-related benefits

Section 47H. Any blanket or general policy of insurance, except a blanket or general policy of insurance which provides supplemental coverage to medicare or other governmental programs, described in subdivisions (A), (C) or (D) of section one hundred and ten which provides hospital expense or surgical expense insurance which includes pregnancy-related benefits and which is issued or subsequently renewed by agreement between the insurer and the policyholder, within or without the commonwealth, while this provision is effective, or any policy of accident and sickness insurance as described in section one hundred and eight which provides hospital expense or surgical expense insurance which includes pregnancy-related benefits and which is delivered or issued for delivery or subsequently renewed by agreement between the insurer and the policyholder in the commonwealth while this provision is effective, or any employees' health and welfare fund which provides hospital expense and surgical expense benefits which includes pregnancy-related benefits and which is promulgated or renewed to any person or group of persons in the commonwealth while this provision is effective shall provide, to the same extent that benefits are provided for other pregnancy-related procedures, coverage for medically necessary expenses of diagnosis and treatment of infertility to persons residing within the commonwealth. For purposes of this section, 'infertility' shall mean the condition of an individual who is unable to conceive or produce conception during a period of 1 year if the female is age 35 or younger or during a period of 6 months if the female is over the age of 35. For purposes of meeting the criteria for infertility in this section, if a person conceives but is unable to carry that pregnancy to live birth, the period of time she attempted to conceive prior to achieving that pregnancy shall be included in the calculation of the 1 year or 6 month period, as applicable.

ADD 7

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XXII CORPORATIONS

CHAPTER 176A NON-PROFIT HOSPITAL SERVICE CORPORATIONS

Section 8 Conditions to issuance or delivery of contract

Section 8. No contract between the subscriber and the corporation shall be issued or delivered in the commonwealth which provides full room and board benefits in an extended care facility for other than the period of hospitalization coverage provided, or which provides benefits for any service which is not medically necessary. No contract between the subscriber and the corporation shall be issued or delivered in the commonwealth unless it contains in substance the following provisions:

(a) A statement of the hospital services and reimbursement for other health services to be furnished by the corporation or its participating hospitals and the period during which they will be furnished, and, if any hospital services are excluded, a statement of such exception.

(b) A statement of the period of grace which will be allowed for making any payment due from the subscriber under its contract, which in any event shall not be less than ten days.

(c) A provision that the subscriber or any person claiming under a subscriber's contract shall have a period of at least two years from the time the cause of action arises to bring suit thereon.

(d) A provision that any child who is mentally or physically incapable of earning his own living, who is covered under the membership of his parent as a member of a family group, shall be covered under the membership of his parent as a member of such family group so long as he continues to be mentally or physically incapable of earning his own living, without any limitation as to age, subject however, to such rules and regulations, premiums or additional premiums as the commissioner of insurance may approve.

(e) A statement that within fifteen days after the receipt by the corporation of notice by a subscriber, or someone acting on his behalf, that such subscriber or a covered dependent of such subscriber has received services for which the subscriber is entitled to direct payment of benefits under a contract, the corporation shall furnish the subscriber such forms as are usually furnished by it to establish a subscriber's entitlement to such benefits; and that within forty-five days after the receipt by the corporation of completed forms for such benefits, the corporation will (i) make payments for such benefits, (ii) notify the subscriber in writing of the reason or reasons for nonpayment, or (iii) notify the subscriber in writing of what additional information or documentation is necessary to establish entitlement to such benefits. If the nonprofit hospital service corporation fails to comply with the provisions of this paragraph, said corporation shall

AD 8

pay, in additional to any benefits which inure to such subscriber or provider, interest on such benefits which shall accrue beginning forty-five days after the corporation's receipt of notice of claim at the rate of one and one-half percent per month, not to exceed eighteen percent per year. The provisions of this paragraph relating to interest payments shall not apply to a claim which a nonprofit hospital service corporation is investigating because of suspected fraud.

(f) To the extent that this section is inconsistent with the provisions of chapter one hundred and seventy-six K and any regulations promulgated thereunder, medicare supplement insurance and medicare select insurance plans as defined in said chapter one hundred and seventy-six K shall be subject to the provisions of said chapter one hundred and seventy-six K and any regulations promulgated thereunder.

(g) To the extent that this section is inconsistent with the provisions of chapter one hundred and seventy-six M and any regulations promulgated thereunder, any nongroup plan that is within the definition of a guaranteed issue health plan in said chapter one hundred and seventy-six M shall be subject to the provisions of said chapter one hundred and seventy-six M and any regulations promulgated thereunder.

ADD 9

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XXII CORPORATIONS

CHAPTER 176B MEDICAL SERVICE CORPORATIONS

Section 4J Infertility diagnosis and treatment benefits

Section 4J. Any subscription certificate under an individual or group medical service agreement, except certificates which provide supplemental coverage to medicare or other governmental programs, which is delivered, issued for delivery or renewed in the commonwealth while this section is effective shall provide as a benefit for all individual subscribers or members within the commonwealth and all group members having a principal place of employment within the commonwealth, to the same extent that benefits are provided for other pregnancy-related procedures and subject to the other terms and conditions of the subscription certificate, coverage for medically necessary expenses of diagnosis and treatment of infertility. Said infertility benefits shall meet all other terms and conditions of the subscription certificate. For purposes of this section, 'infertility' shall mean the condition of an individual who is unable to conceive or produce conception during a period of 1 year if the female is age 35 or younger or during a period of 6 months if the female is over the age of 35. For purposes of meeting the criteria for infertility in this section, if a person conceives but is unable to carry that pregnancy to live birth, the period of time she attempted to conceive prior to achieving that pregnancy shall be included in the calculation of the 1 year or 6 month period, as applicable.

ADD 10

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PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XXII CORPORATIONS

CHAPTER 176G HEALTH MAINTENANCE ORGANIZATIONS

Section 4 Required coverage for certain conditions and groups

Section 4. A health maintenance contract shall provide coverage for:

(a) pregnant women, infants and children as set forth in section 47C of chapter 175;

(b) cardiac rehabilitation as set forth in section 47D of chapter 175;

(c) prenatal care, childbirth and postpartum care as set forth in section 47F of chapter 175;

(d) cytologic screening and mammographic examination as set forth in section 47G of chapter 175;

(e) diagnosis and treatment of infertility as set forth in section 47H of chapter 175; and

(f) services rendered by a certified registered nurse anesthetist or nurse practitioner as set forth in section 47Q of chapter 175, subject to the terms of a negotiated agreement between the health maintenance organization and the provider of health care services.

The dependent coverage of any such policy shall also provide coverage for medically necessary early intervention services delivered by certified early intervention specialists, as defined in the early intervention operational standards by the department of public health and in accordance with applicable certification requirements. Such medically necessary services shall be provided by early intervention specialists who are working in early intervention programs certified by the department of public health, as provided in sections 1 and 2 of chapter 111G, for children from birth until their third birthday. Reimbursement of costs for such services shall be part of a basic benefits package offered by the insurer or a third party and shall not require co-payments, coinsurance or deductibles; provided, however, that co-payments, coinsurance or deductibles shall be required if the applicable plan is governed by the Federal Internal Revenue Code and would lose its tax-exempt status as a result of the prohibition on co-payments, coinsurance or deductibles for these services.

ADD 11

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209B MASSACHUSETTS CHILD CUSTODY JURISDICTION ACT

Section 1 Definitions

Section 1. As used in this chapter the following words, unless the context requires otherwise, shall have the following meanings:—

"Contestant", a person who claims a legal right to custody or visitation with respect to a child;

"Custody determination", any court order, instruction or judgment, whether temporary or final, providing for the custody of or visitation rights with a child; it shall not be deemed to include any order or judgment concerning other child-related matters except to the extent such order of judgment contains a custody determination as above-stated;

"Custody proceeding", includes proceedings in which a custody determination is one of several issues presented for resolution, such as an action for divorce or separation, guardianship, and care and protection;

"Judgment" or "Custody judgment", a custody determination made in a custody proceeding, and includes an initial judgment and a modification judgment;

"Home state", the state in which the child immediately preceding the date of commencement of the custody proceeding resided with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6–month or other period;

"Initial judgment", the first custody determination concerning a particular child;

"Modification judgment", a custody determination which modifies or replaces a prior custody determination, whether made by the court which rendered the prior determination or by another court;

"Physical custody", actual possession and control of a child;

"Person acting as parent", a person other than a parent who has physical custody of a child and who has either been awarded custody of a child or claims a legal right to custody and includes an authorized social service agency exercising legal or physical custody of a child; and

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"Parent", a biological, foster, or adoptive parent whose parental rights have not previously been terminated;

"State", any state, territory, or possession of the United States, the Commonwealth of Puerto Rico, and the District of Columbia.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 1 Declaration of purpose; definition; responsibility for support

Section 1. Children born to parents who are not married to each other shall be entitled to the same rights and protections of the law as all other children. It is the purpose of this chapter to establish a means for such children either to be acknowledged by their parents voluntarily or, on complaint by one or the other of their parents or such other person or agency as is authorized to file a complaint by section five, to have an acknowledgment or adjudication of their paternity, to have an order for their support and to have a declaration relative to their custody or visitation rights ordered by a court of competent jurisdiction. For the purpose of this chapter, the term "child born out of wedlock" shall refer to any child born to a man and woman who are not married to each other and shall include a child who was conceived and born to parents who are not married to each other but who subsequently intermarry and whose paternity has not been acknowledged by word or deed or whose paternity has not been adjudicated by a court of competent jurisdiction; and a child born to parents who are not married to each other whose paternity has been adjudicated by a court of competent jurisdiction, including an adjudication in a proceeding pursuant to this chapter or prior law. Every person is responsible for the support of his child born out of wedlock from its birth up to the age of eighteen, or, where such child is domiciled in the home of a parent and principally dependent upon said parent for maintenance, to age twenty-one. Each person charged with support under this section shall be required to furnish support according to his financial ability and earning capacity pursuant to the provisions of this chapter.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 2 Paternity; acknowledgment or adjudication; statistical information of parties; transmission to registrar

Section 2. Paternity may be established by filing with the court, the clerk of the city or town where the child was born or the registrar of vital records and statistics an acknowledgment of parentage executed by both parents pursuant to section 11 or pursuant to an action to establish paternity filed pursuant to this chapter; provided, however, that if a judgment or finding of paternity has been issued by a court or administrative agency of competent jurisdiction under the law of another state or foreign country or if both parents executed a voluntary acknowledgment of parentage in accordance with the law of another state or foreign country, such judgment, finding or voluntary acknowledgment shall be accorded full faith and credit and paternity shall not be relitigated. Upon receipt of an acknowledgment of paternity, the clerk of such city or town shall forward the original acknowledgment to said registrar as provided in chapter 46. Upon receipt of an acknowledgment of parentage or upon an adjudication of paternity under this chapter, the court shall transmit to the registrar of vital records and statistics a certified copy of the acknowledgment or order establishing paternity, together with such statistical information as said registrar may require, upon such form and in such format as designated by said registrar, which shall include the name, residence, date of birth, place of birth and social security number of each of the parties and the child, the sex of the child, and such additional information as the commissioner of public health deems useful for statistical and research purposes. Actions to establish support obligations or for custody or visitation rights may also be filed pursuant to this chapter.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 5 Persons entitled to maintain actions or execute voluntary acknowledgment of parentage; parties

Section 5. (a) Complaints under this chapter to establish paternity, support, visitation or custody of a child may be commenced by the mother, whether a minor or not; by a person presumed to be or alleging himself to be the father, whether a minor or not; by the child, whether a minor or not; by the child's guardian, next of kin, or other person standing in a parental relation to the child; by the parent or personal representative of the mother if the mother has died or has abandoned the child; by the parent or personal representative of the father if the father has died; by the authorized agent of the department of children and families or any agency licensed under chapter 15D provided that the child is in their custody; or, if the child is or was a recipient of any type of public assistance, by the IV–D agency as set forth in chapter 119A on behalf of the department of transitional assistance, the department of children and families, the division of medical assistance or any other public assistance program of the commonwealth; provided, however, that if the mother of the child was or is married and the child's birth occurs during the marriage or within three hundred days of its termination by death, annulment or divorce, complaints to establish paternity under this chapter may not be filed by a person presumed to be or alleging himself to be the father unless he is or was the mother's husband at the time of the child's birth or conception.

(b) Voluntary acknowledgments of parentage may be executed by the mother and the putative father, whether either or both is a minor, and may be registered pursuant to section 11 only if the signatures of the mother and the father are notarized. If the mother of the child was or is married and the child's birth occurs during the marriage or within 300 days of its termination by divorce, a voluntary acknowledgment of parentage naming the putative father may be executed by the mother and the putative father only if the mother and the person who was the spouse of the mother at the time of the child's birth or conception sign an affidavit denying that the spouse is the father of the child; provided, however, that where the marriage has been terminated by annulment or by the death of either spouse, paternity of the putative father may only be established by filing a complaint to establish paternity as provided in this chapter. A mother and a putative father signing a voluntary acknowledgment of parentage at the hospital or thereafter at the office of the city or town clerk as part of the birth registration process pursuant to section 3C of chapter 46, with the department of transitional assistance, with the IV–D agency set forth in chapter 119A, with any agency designated by the federal Secretary of Health and Human Services or with any official of a court shall receive notice orally, or through the use of video or audio equipment, and in writing of alternatives to signing the acknowledgment, including the

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availability of genetic marker testing, as well as the benefits and responsibilities with respect to child support, custody and visitation that may arise from signing the acknowledgment, and subsequently filing the acknowledgment with the court or with the registrar of vital records and statistics as provided in this chapter.

(c) Any agency or person living with such child who is actually furnishing support to the child or, if the child who is the subject of an action under this chapter is a recipient of public assistance, the department of transitional assistance, shall be made a party to any action for paternity or support under this chapter.

(d) The IV–D agency as set forth in chapter 119A on behalf of the department of transitional assistance, the department of children and families, the division of medical assistance or any other public assistance program may not file complaints solely for custody or visitation, but shall be permitted to file actions for paternity or support; provided, however, that said IV–D agency shall be permitted to maintain an action for paternity or support even if issues related to custody or visitation are raised.

(e) In actions under this chapter relative to custody or visitation, the child, if the child is fourteen years of age or older, shall be made a party to such action.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 6 Presumption of paternity; mandatory joinder

Section 6. (a) In all actions under this chapter a man is presumed to be the father of a child and must be joined as a party if:

(1) he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce; or

(2) before the child's birth, he married or attempted to marry the mother by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and the child was born during the attempted marriage or within three hundred days after its termination; or

(3) after the child's birth, he married or attempted to marry the mother by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and

(i) he agreed to support the child under a written voluntary promise, or

(ii) he has engaged in any other conduct which can be construed as an acknowledgment of paternity; or

(4) while the child is under the age of majority, he, jointly with the mother, received the child into their home and openly held out the child as their child; or

(5) he has acknowledged paternity in a parental responsibility claim as provided in section four A of chapter two hundred and ten and the mother, having received actual notice thereof, has failed within a reasonable time, to object thereto; or

(6) with respect to a child born before April 13, 1994, with his consent and the consent of the child's mother, he is named as the child's father on the birth certificate as provided in section one of chapter forty-six.

(b) Notwithstanding the provisions of subsection (a), a husband or former husband shall not be required to be joined as a party if non-paternity of the child has previously been adjudicated in a proceeding between the husband and the mother of such child in a court or administrative

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agency of competent jurisdiction.

(c) Notice to a party joined as herein provided shall be sufficient if the summons is mailed to the last known address by a form of mail requiring a receipt and, if actual notice shall not be made as aforesaid, by publishing a copy of the notice once in each of three successive weeks in a newspaper designated by the court.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 8 Judgment of paternity; age of father; notice

Section 8. On complaint to establish paternity, the court shall make a judgment establishing or not establishing paternity which shall be determinative for all purposes. Upon default of the defendant or his failure to personally appear, the court shall make a judgment establishing paternity if a showing is made that the complaint was served in accordance with the applicable rules of court and that the mother or putative father submits that sexual intercourse between the parties occurred during the probable period of conception. For good cause shown, the court may set aside an entry of default and, if a judgment has been entered, may likewise set it aside in accordance with rule 60(b) of the Massachusetts Rules of Domestic Relations Procedure. The age of the person alleged to be the father or mother in any action under this chapter, including a filing of a voluntary acknowledgment of parentage, shall not be a bar to the establishment of paternity or entry of a support order pursuant to section nine. If the child or the mother on behalf of the child is a recipient of public assistance and if the department of transitional assistance, the department of children and families, the division of medical assistance or any other public assistance program has not been made a party as required by section five, the court shall notify the IV–D agency as set forth in chapter 119A of the judgment. If the judgment is at variance with the child's birth certificate, the court shall order that a new birth certificate be issued under section thirteen of chapter forty-six.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 10 Award of custody; criteria

Section 10. (a) Upon or after an adjudication or voluntary acknowledgment of paternity, the court may award custody to the mother or the father or to them jointly or to another suitable person as hereafter further specified as may be appropriate in the best interests of the child.

In awarding custody to one of the parents, the court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent. The court shall also consider where and with whom the child has resided within the six months immediately preceding proceedings pursuant to this chapter and whether one or both of the parents has established a personal and parental relationship with the child or has exercised parental responsibility in the best interests of the child.

In awarding the parents joint custody, the court shall do so only if the parents have entered into an agreement pursuant to section eleven or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interests.

(b) Prior to or in the absence of an adjudication or voluntary acknowledgment of paternity, the mother shall have custody of a child born out of wedlock. In the absence of an order or judgment of a probate and family court relative to custody, the mother shall continue to have custody of a child after an adjudication of paternity or voluntary acknowledgment of parentage.

(c) If either parent is dead, unfit or unavailable or relinquishes care of the child or abandons the child and the other parent is fit to have custody, that parent shall be entitled to custody.

(d) If a person who is not a parent of the child requests custody, the court may order custody to that person if it is in the best interests of the child and if the written consent of both parents or the surviving parent is filed with the court. Such custody may also be ordered if it is in the best interests of the child and if both parents or the surviving parent are unfit to have custody or if one is unfit and the other files his written consent in court.

(e) In issuing any temporary or permanent custody order, the probate and family court shall consider evidence of past or present abuse toward a parent or child as a factor contrary to the best interest of the child. For the purposes of this section, "abuse" shall mean the occurrence of ADD 21

one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing bodily injury; or (b) placing another in reasonable fear of imminent bodily injury. "Serious incident of abuse" shall mean the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress. For purposes of this section, "bodily injury" and "serious bodily injury" shall have the same meanings as provided in section 13K of chapter 265. For the purposes of this section, if the child was conceived during the commission of a rape and the parent was convicted of said rape, under sections 22 to 23B, inclusive, of chapter 265 or section 2, 3, 4 or 17 of chapter 272, said conviction shall be conclusive evidence of a serious incident of abuse by the convicted parent.

A probate and family court's finding by a preponderance of the evidence, that a pattern or serious incident of abuse has occurred shall create a rebuttable presumption that it is not in the best interests of the child to be placed in sole custody, shared legal custody, or shared physical custody with the abusive parent. Such presumption may be rebutted by a preponderance of the evidence that such custody award is in the best interests of the child. For the purposes of this section, an "abusive parent" shall mean a parent who has committed a pattern of abuse or a serious incident of abuse.

For the purposes of this section, the issuance of an order or orders under chapter 209A shall not in and of itself constitute a pattern or serious incident of abuse; nor shall an order or orders entered ex parte under said chapter 209A be admissible to show whether a pattern or serious incident of abuse has in fact occurred; provided, however, that an order or orders entered ex parte under said chapter 209A may be admissible for other purposes as the court may determine, other than showing whether a pattern or serious incident of abuse has in fact occurred; provided further, that the underlying facts upon which an order or orders under said chapter 209A was based may also form the basis for a finding by the probate and family court that a pattern or serious incident of abuse has occurred.

If the court finds that a pattern or serious incident of abuse has occurred and issues a temporary or permanent custody order, the court shall within 90 days enter written findings of fact as to the effects of the abuse on the child, which findings demonstrate that such order is in the furtherance of the child's best interests and provides for the safety and well-being of the child.

If ordering visitation to the abusive parent the court shall provide for the safety and well-being of the child, and the safety of the abused parent. The court may consider:

(a) ordering an exchange of the child to occur in a protected setting or in the presence of an appropriate third party;

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(b) ordering visitation supervised by an appropriate third party, visitation center or agency;

(c) ordering the abusive parent to attend and complete, to the satisfaction of the court, a certified batterer's treatment program as a condition of visitation;

(d) ordering the abusive parent to abstain from possession or consumption of alcohol or controlled substances during the visitation and for 24 hours preceding visitation;

(e) ordering the abusive parent to pay the costs of supervised visitation;

(f) prohibiting overnight visitation;

(g) requiring a bond from the abusive parent for the return and safety of the child;

(h) ordering an investigation or appointment of a guardian ad litem or attorney for the child; and

(i) imposing any other condition that is deemed necessary to provide for the safety and well-being of the child and the safety of the abused parent.

Nothing in this section shall be construed to affect the right of the parties to a hearing under the rules of domestic relations procedure or to affect the discretion of the probate and family court in the conduct of such hearing.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 11 Acknowledgment of parentage; approval; parental agreements regarding custody, support and visitation

Section 11. (a) A written voluntary acknowledgment of parentage executed jointly by the putative father, whether a minor or not, and the mother of the child, whether a minor or not, and filed with the registrar of vital records and statistics or with the court shall be recognized as a sufficient basis for seeking an order of support, visitation or custody with respect to the child without further proceedings to establish paternity, and no judicial proceeding shall be required or permitted to ratify an acknowledgment that has not been challenged pursuant to this section. A report, prepared on an electronic system of birth registration approved by the commissioner of public health and indicating that an acknowledgment pursuant to this chapter has been executed in accordance with section 3C of chapter 46 and filed with the registrar of vital records and statistics, shall be presumed to be a sufficient basis for seeking an order of support, visitation or custody without further proceedings to establish paternity. The voluntary acknowledgment shall be attested to before a notary public and shall have the legal effect as provided in this section. Unless either signatory rescinds the acknowledgment within 60 days of the date of signing as provided in this section, the acknowledgment shall establish paternity as of the date it has been signed by such putative father and mother and shall have the same force and effect as a judgment of paternity, subject to challenge within one year only on the basis of fraud, duress or material mistake of fact; provided, however, that if, prior to the expiration of the 60-day period, the signatory is a party to an administrative or judicial proceeding related to the child, including a proceeding to establish child support, visitation or custody, and fails to rescind the acknowledgment at the time of such proceeding, the acknowledgment shall thereafter have the same force and effect as a judgment, subject to challenge only as provided in this section. The person seeking to rescind the acknowledgment shall, within 60 days of signing the acknowledgment, file a petition in the probate and family court in the county in which the child and one of the parents resides seeking to rescind the acknowledgment, with notice to the other parent. If neither of the parents lives in the same county as the child, then such complaint shall be filed in the county where the child lives. If the child whose paternity is challenged is a recipient of public assistance and the department of transitional assistance, the department of children and families, the division of medical assistance or any other public assistance program has not been made a party, or if the child is receiving child support enforcement services from the IV–D agency pursuant to chapter 119A, the court shall notify the IV–D agency. The person seeking to rescind the acknowledgment shall bear the burden of proof in such proceeding. The responsibilities of a signatory arising from the acknowledgment shall not be suspended during the pendency of such challenge unless the court so orders for good cause shown. If either party

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rescinds the acknowledgment in a timely fashion, the court shall order genetic marker testing and proceed to adjudicate paternity or nonpaternity in accordance with this chapter; provided, however, that the rescinded acknowledgment shall constitute the proper showing required for an order to submit to such testing; and provided further, that the rescinded acknowledgment shall be admissible as evidence of the putative father's paternity and shall serve as sufficient basis for admitting the report of the results of genetic marker tests. Upon adjudication of nonpaternity, the court shall instruct the registrar of vital records and statistics as provided in section 13 of chapter 46 to amend the birth record of the child in accordance with the order of the court.

(b) If a mother and father execute a voluntary acknowledgment of parentage as provided in (a), they may also make agreements regarding custody, support and visitation. Such agreements may be filed with any court with jurisdiction pursuant to this chapter; provided, that any such agreement which includes issues of custody or visitation must be filed with a division of the probate and family court department in the judicial district or county in which the child and one of the parents lives. Such agreements, if filed with and approved by the court shall have the same force and effect as a judgment of the court; provided, however, that the court shall have the same power to investigate the facts regarding custody, support and visitation prior to entering an order relative to those issues as it would have if no agreement had been filed; and provided further, that an agreement regarding custody and visitation shall be approved only if the court finds it to be in the best interests of the child.

(c) Voluntary acknowledgments and agreements made pursuant to this chapter shall be acknowledged in the presence of a notary public and shall include the residence addresses and social security numbers of each of the parents, the residence address of the child and, if available, the social security number of the child.

(d) A voluntary acknowledgment of parentage taken outside of the commonwealth shall be valid for the purposes of this section if it was taken in accordance with the laws of the state or the country where it was executed.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 209C CHILDREN BORN OUT OF WEDLOCK

Section 21 Action to determine mother and child relationship

Section 21. Any interested party may bring an action to determine the existence of a mother and child relationship. Insofar as practicable, the provisions of this chapter applicable to establishing paternity shall apply.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 210 ADOPTION OF CHILDREN AND CHANGE OF NAMES

Section 1 Nature of adoption; district or juvenile court

Section 1. A person of full age may petition the probate court in the county where he resides for leave to adopt as his child another person younger than himself, unless such other person is his or her wife or husband, or brother, sister, uncle or aunt, of the whole or half blood. A minor may likewise petition, or join in the petition of his or her wife or husband, for the adoption of a natural child of one of the parties. If the petitioner has a husband or wife living, competent to join in the petition, such husband or wife shall join therein, and upon adoption the child shall in law be the child of both; provided, however, that the prayer of the petition may be granted although the spouse of the petitioner is not a party to the petition if the court finds: (i) the failure of the spouse to join in the petition or to consent to the adoption is excused by reason of prolonged unexplained absence, legal separation, prolonged separation, incapacity or circumstances constituting an unreasonable withholding of consent; (ii) the husband and wife are not in the process of an ongoing divorce; and (iii) the granting of the petition is in the best interests of the child. If a person not an inhabitant of this commonwealth desires to adopt a child residing here, the petition may be made to the probate court in the county where the child resides.

The district or juvenile court may, if it appears necessary or convenient, exercise the powers authorized by this chapter, but only in respect to a pending proceeding before such district or juvenile court.

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PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE III DOMESTIC RELATIONS

CHAPTER 210 ADOPTION OF CHILDREN AND CHANGE OF NAMES

Section 2 Written consent of certain persons; form of consent; identification of father

Section 2. A decree of adoption shall not be made, except as provided in this chapter, without the written consent of the child to be adopted, if above the age of twelve; of the child's spouse, if any; of the lawful parents, who may be previous adoptive parents, or surviving parent; or of the mother only if the child was born out of wedlock and not previously adopted. A person whose consent is hereby required shall not be prevented from being the adoptive parent.

Such written consent shall be executed no sooner than the fourth calendar day after the date of birth of the child to be adopted. It shall be attested and subscribed before a notary public in the presence of two competent witnesses, one of whom shall be selected by said person. The agency or person receiving custody shall act as guardian of the child until such time as a court of competent jurisdiction appoints a guardian or grants a petition for adoption. Execution of such consent shall be carried out in a manner which shall preserve privacy and confidentiality. A copy of said consent shall be filed with the department of children and families. A consent executed in accordance with the provisions of this section shall be final and irrevocable from date of execution.

The form of such consent shall be as follows:—

I, as the (relationship) of (name of child), age , of the sex, born in (place of birth), on (date of birth), do hereby voluntarily and unconditionally surrender (child) to the care and custody of (agency or person receiving custody) for the purpose of adoption or such other disposition as may be made by a court of competent jurisdiction. I waive notice of any legal proceeding affecting the custody, guardianship, adoption or other disposition of (child).

I UNDERSTAND THAT THIS SURRENDER IS FINAL AND CANNOT BE REVOKED.

/s/ (person giving consent)

On this day of (insert year), before me personally came and appeared and in my presence duly executed the foregoing instrument, and (he, she) acknowledged to me that (he, she) executed the same as (his, her) free act and deed, fully cognizant of its irrevocability.

Date

State of

Notary Public

County of

Signed by (name of person giving consent) as (his, her) freely executed consent in the presence of each of us, and of each other, who thereafter have hereunto signed our names as witnesses.

/s/

Address

/s/

Address

Any surrender given outside of the commonwealth shall be valid for the purpose of this section if it was taken in accordance with laws of the state or the country where it was executed.

If an agency or person receiving a child born out of wedlock for purposes of a subsequent adoption receives from the child's mother an executed consent form as prescribed by this chapter, and no person has acknowledged paternity of the child in accordance with chapter two hundred and nine C or has been adjudicated the father of the child by any court of competent jurisdiction, then the person or agency shall request that the mother voluntarily provide a sworn written statement, executed before a notary and in the presence of two competent witnesses, one of whom shall be selected by the mother, that identifies the child's father and his current or last known address. Any such statement shall be used solely for the purpose of notifying the person named as the father of the status of the child.

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PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

TITLE I COURTS AND JUDICIAL OFFICERS

CHAPTER 215 PROBATE COURTS

Section 6 Equity jurisdiction

Section 6. The probate and family court department shall have original and concurrent jurisdiction with the supreme judicial court and the superior court department 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, except that the superior court department shall have exclusive original jurisdiction of all actions in which injunctive relief is sought in any matter growing out of a labor dispute as defined in section twenty C of chapter one hundred and forty-nine.

Probate courts shall also have jurisdiction concurrent with the supreme judicial and superior courts, of all cases and matters in which equitable relief is sought relative to: (i) the administration of the estates of deceased persons; (ii) wills, including questions arising under section twenty of chapter one hundred and ninety-one; (iii) trusts created by will or other written instrument; (iv) cases involving in any way the estate of a deceased person or the property of an absentee whereof a receiver has been appointed under chapter two hundred or the property of a person under guardianship or conservatorship; (v) trusts created by parol or constructive or resulting trusts; (vi) all matters relative to guardianship or conservatorship; and (vii) actions such as one described in clause (11) of section three of chapter two hundred and fourteen and of all other matters of which they now have or may hereafter be given jurisdiction. They shall also have jurisdiction to grant equitable relief to enforce foreign judgments for support of a wife or of a wife and minor children against a husband who is a resident or inhabitant of this commonwealth, upon an action by the wife commenced in the county of which the husband is a resident or inhabitant. They shall, after the divorce judgment has become absolute, also have concurrent jurisdiction to grant equitable relief in controversies over property between persons who have been divorced. They shall also have jurisdiction of an action by an administrator, executor, guardian, conservator, receiver appointed as aforesaid or trustee under a will to enjoin for a reasonable period of time the foreclosure, otherwise than by open and peaceable entry, of a mortgage on real estate, or the foreclosure of a mortgage on personal property, which real estate or personal property is included in the estate or trust being administered by such fiduciary, if in the opinion of the court the proper administration of the estate or trust would be hindered by such foreclosure. They shall also have jurisdiction, concurrent with the superior court, of proceedings in which equitable relief is sought under sections seven to twelve, inclusive, of chapter one hundred and seventeen and section twenty-six of chapter one hundred and twenty-three.

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Notwithstanding any contrary or inconsistent provisions of the General Laws, procedure in cases in the probate court within the jurisdiction granted by this section shall be governed by the Massachusetts Rules of Civil Procedure.

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REST 2d CONFL s 6
Restatement (Second) of Conflict of Laws s 6 (1969 Main Vol.)

Restatement of the Law Second **Conflict** of **Laws** 2d Chapter 1. Introduction Copyright (c) 1971 The American Law Institute

s 6. CHOICEOFLAW PRINCIPLES TEXT

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

COMMENTS

Comment on Subsection (1):

a. Statutes directed to choice of law. A court, subject to constitutional limitations, must follow the directions of its legislature. The court must apply a local statutory provision directed to choice of law provided that it would be constitutional to do so. An example of a statute directed to choice of law is the Uniform Commercial Code which provides in certain instances for the application of the law chosen by the parties (s 1105(1)) and in other instances for the application of the law of a particular state (ss 2402, 4 102, 6102, 8106, 9103). Another example is the Model Execution of Wills Act which provides that a written will subscribed by the testator shall be valid as to matters of form if it complies with the local requirements of any one of a number of enumerated states. Statutes that are expressly directed to choice of law, that is to say, statutes which provide for the application of the local law of one state, rather than the local law of another state, are comparatively few in number. b. Intended range of application of statute. A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue. On the other hand, the court will constantly be faced with the question whether the issue before it falls within the intended range of application of a particular statute. The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the outofstate facts involved, the court should so apply it unless constitutional considerations forbid. On the other hand, if the legislature intended that the statute should be applied only to acts taking place within the state, the statute should not be given a wider range of application. Sometimes a statute's intended range of application will be apparent on its face, as when it expressly applies to all citizens of a state including those who are living abroad. When the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction. Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choiceoflaw principles.

COMMENTS

Comment on Subsection (2):

c. Rationale. Legislatures usually legislate, and courts usually adjudicate, only with the local situation in mind. They rarely give thought to the extent to which the laws they enact, and the common law rules they

REST 2d CONFL s 188

Restatement (Second) of Conflict of Laws s 188 (1969 Main Vol.)

Restatement of the Law Second

Conflict of Laws 2d

Chapter 8. Contracts

Topic 1. Validity of Contracts and Rights Created Thereby

Title A. General Principles

s 188. LAW GOVERNING IN ABSENCE OF EFFECTIVE CHOICE BY THE PARTIES

TEXT

(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in s 6.

(2) In the absence of an effective choice of law by the parties (see s 187), the contacts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and

(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in ss 189-199 and 203.

COMMENTS

Comment:

a. Scope of section. The rule of this Section applies in all

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situations where there has not been an effective choice of the applicable law by the parties (see s 187).

COMMENTS

Comment on Subsection (1):

b. Rationale. The principles stated in s 6 underlie all rules of choice of law and are used in evaluating the significance of a relationship, with respect to the particular issue, to the potentially interested states, the transaction and the parties. The factors listed in Subsection (2) of the rule of s 6 can be divided into five groups. One group is concerned with the fact that in multistate cases it is essential that the rules of decision promote mutually harmonious and beneficial relationships in the interdependent community, federal or international. The second group focuses upon the purposes, policies, aims and objectives of each of the competing local law rules urged to govern and upon the concern of the potentially interested states in having their rules applied. The factors in this second group are at times referred to as "state interests" or as appertaining to an "interested state." The third group involves the needs of the parties, namely the protection of their justified expectations and certainty and predictability of result. The fourth group is directed to implementation of the basic policy underlying the particular field of law, such as torts or contracts, and the fifth group is concerned with the needs of judicial administration, namely with ease in the determination and application of the law to be applied.

The factors listed in Subsection (2) of the rule of s 6 vary somewhat in importance from field to field and from issue to issue. Thus, the protection of the justified expectations of the parties is of considerable importance in contracts whereas it is of relatively little importance in torts (see s 145, Comment b). In the torts area, it is the rare case where the parties give advance thought to the law that may be applied to determine the legal consequences of their actions. On the other hand, parties enter into contracts with forethought and are likely to consult a lawyer before doing so. Sometimes, they will intend that their rights and obligations under the contract should be determined by the local law of a particular state. In this event, the local law of this state will be applied, subject to the qualifications stated in the rule of s 187. In situations where the parties did not give advance thought to the question of which should be the state of the applicable law, or where their intentions in this regard cannot be ascertained, it may at least be said, subject perhaps to rare exceptions, that they expected that the provisions of the contract would be binding upon them.

The need for protecting the expectations of the parties gives importance in turn to the values of certainty, predictability and uniformity of result. For unless these values are attained, the expectations of the parties are likely to be disappointed.

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Massachusetts General Laws Annotated
Massachusetts Rules of Domestic Relations Procedure (Refs & Annos)
III. Pleadings and Motions

Massachusetts Rules of Domestic Relations Procedure(Mass.R.Dom.Rel.P.), Rule 12

Rule 12. Defenses and Objections--When and How Presented--by Pleading or Motion

Currentness

(a) When Presented

(1) After service upon him of any pleading requiring a responsive pleading, a party shall serve such responsive pleading within 20 days unless otherwise directed by order of the court.

(2) The service of a motion permitted under this rule alters this period of time as follows, unless a different time is fixed by order of the court:

(i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action;

(ii) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement. *Identical to Mass.R.Civ.P. 12(a).*

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter;

(2) Lack of jurisdiction over the person;

(3) Improper venue;

(4) Insufficiency of process;

(5) Insufficiency of service of process;

(6) Failure to state a claim upon which relief can be granted;

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(7) Failure to join a party under Rule 19;

(8) Misnomer of a party;

(9) Pendency of a prior action in a court of the Commonwealth.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on any motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A motion, answer, or reply presenting the defense numbered (6) shall include a short, concise statement of the grounds on which such defense is based. *Identical to Mass.R.Civ.P. 12(b).*

(c) [Deleted]. (Motion for Judgment on the Pleadings.)

(d) **Preliminary Hearings.** The defenses specifically enumerated (1)-(9) in subdivision (b) of this rule, whether made in a pleading or by motion shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) **Motion for More Definite Statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. *Identical to Mass.R.Civ.P. 12(e).*

(f) **Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may after hearing order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter. *Identical to Mass.R.Civ.P. 12(f).*

(g) **Consolidation of Defenses in Motion.** A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted.

(h) **Waiver or Preservation of Certain Defenses.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, misnomer of a party, or pendency of a prior action is waived (A) if omitted from a motion in the circumstances described

in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) [Deleted].

(3) Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Massachusetts Rules of Domestic Relations Procedure (Mass. R. Dom. Rel. P.), Rule 12, MA ST DOM REL P Rule 12
Current with amendments received thru January 15, 2016.

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Massachusetts General Laws Annotated
Massachusetts Rules of Domestic Relations Procedure (Refs & Annos)
VII. Judgment

Massachusetts Rules of Domestic Relations Procedure(Mass.R.Dom.Rel.P.), Rule 60

Rule 60. Relief From Judgment or Order

Currentness

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court. *Identical to Mass.R.Civ.P. 60(a).*

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation.

This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of review, of error, of audita querela, and petitions to vacate judgment are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. *Identical to Mass.R.Civ.P. 60(b).*

Massachusetts Rules of Domestic Relations Procedure (Mass. R. Dom. Rel. P.), Rule 60, MA ST DOM REL P Rule 60
Current with amendments received thru January 15, 2016.

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