

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

Suffolk County, ss

Docket No. SJC-09625

JAMES R. MASON
Petitioner-Appellee

v.

BETSY SHANLEY COLEMAN
Respondent-Appellant

ON APPEAL FROM A JUDGMENT OF
THE MIDDLESEX PROBATE AND FAMILY COURT

BRIEF OF AMICI CURIAE ON BEHALF OF
FATHERS AND FAMILIES, INC.

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Dated: April 25, 2006

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IDENTITY OF AMICI CURIAE

Fathers & Families, Inc. (F&F) is the preeminent Massachusetts organization representing noncustodial parents and their children. F&F is a Massachusetts non-profit that advocates for the child's right to the love and care of both parents after divorce, with equal rights and responsibilities for mothers and fathers. F&F was established in 1998, and currently has approximately 2,200 members, most of whom are in Massachusetts. Approximately 300 of these members live in other states but have an interest in Massachusetts family law, either because their children relocated to Massachusetts, or because the member, who was previously married in Massachusetts, relocated. Hundreds more live under the shadow of a possible removal of their children out of the Commonwealth should their ex-partners decide to so. Approximately 40 percent of F&F's supporters are women.

F&F has engaged in lobbying (within the limits established by the Internal Revenue Service for 501 (c) 3 organizations), public education, member services, and other activities designed to awaken the family courts to the need to allow children the

involvement of both parents. F&F regards this as a national priority, because between 30 percent and 50 percent of all American children are functionally fatherless, the exact percentage depending on how one defines fatherlessness. The adverse effects of fatherlessness have been amply and repeatedly documented, perhaps beginning with the famous 1965 report of the late Senator Daniel Moynahan in which he painstakingly documented the devastating effect of fatherlessness on the African-American community. Ironically, fatherlessness has only worsened in that community since 1965, while the rest of the nation has "caught up" with that community's 1965 statistics on fatherlessness.

Ned Holstein, M.D., M.S. practices in the field of public health and preventive medicine, a field which includes the adverse effects of legal and cultural factors on health. Dr. Holstein is the author of a chapter entitled "Divorce and the Mental Health of Men" in a book currently in press with the American Psychiatric Association entitled The Mental Health of Men. He is a Clinical Assistant Professor at the Mount Sinai School of Medicine in New York City, where he was formerly a full-time researcher and

member of the faculty. His undergraduate education was at Harvard, and he also received a Master's degree in psychology from M.I.T. prior to attending medical school and graduating from Mount Sinai in 1971. Dr. Holstein is the founder of F&F, and currently serves as the Chair of the Board.

Daniel B. Hogan, J.D., Ph.D. holds both a law degree and a doctorate in psychology from Harvard. He is a member of the Massachusetts Bar Association and the Boston Bar Association. He is a fellow of the American Psychological Association, the Association for Psychological Science and the American Orthopsychiatric Association. His is the author of a four-volume series entitled "The Regulation of Psychotherapists: The Philosophy and Practice of Professional Regulation" that Contemporary Psychology has called "the most comprehensive and most stimulating publication on the matter." He has been the Guest Editor of a special double issue of Law and Human Behavior examining professional regulation and is the author of more than a dozen publications, including articles in the New York Times, the Harvard Journal on Legislation, and edited books. For many years, Dr. Hogan was consulting editor to Law and

Human Behavior and he is a past reviewer of books for Contemporary Psychology. He currently serves as Executive Director of F&F.

STATEMENT OF INTEREST

This appeal raises questions of great significance concerning the welfare of children. F&F's view is that children have not been well served by removal law as it is currently practiced in Massachusetts. Whatever the intent of the *Yannas* Supreme Judicial Court may have been, its practical effect has been to make proposed removals unopposable in the vast majority of cases. Most domestic relations attorneys advise their noncustodial parents that opposing a proposed removal is almost certain to be fruitless, and typically counsel their clients to attempt to negotiate advantages on minor and peripheral issues instead.

F&F believes that in order to protect children from the voluminously documented adverse effects of fatherlessness, it is first necessary to insure that the present case of first impression does not result in removals where there has been joint physical custody. F&F further believes that the Court has not been provided with the substantial evidence of

harm to children from removal when the noncustodial parent is engaged in the child's life, even if only on a schedule of a few days per month, and thus we urge the Court, after upholding the trial court in the present case, to grant review to a removal case involving a fit noncustodial parent who has remained engaged in the child's life. In this way, the Court will be enabled to consider the enormous advances in research-based knowledge about the healthy development of children that has accumulated in the thirty or forty years since the ideas on which *Yannas* was based were published.

F&F believes that removal is a very important cause of fatherlessness. The Massachusetts Office of Child Support Enforcement reports that approximately 35 percent of its collections come from out of state. Research shows various figures for the prevalence of removal after divorce, the variation depending primarily on how far a party must move for it to be counted as a removal, and on how long a period of follow-up was employed. In the study by Braver et al. reported at length near the end of this brief, 61 percent of college students whose parents had divorced had experienced a move of more than one hour's drive

by at least one parent at some time during their childhood. Sanford Braver et al., Relocation of Children After Divorce and Children's Bests Interests: New Evidence and Legal Considerations, Journal of Family Psychology, Vol. 17, 206-219, 2003. In short, fatherlessness in America cannot be addressed unless the courts carefully consider the new evidence connecting the welfare of children after divorce to the active involvement of two fit parents.

QUESTIONS PRESENTED

1. Whether the proper standard for deciding a removal case in which the parties share legal and physical custody is the "real advantage" test of *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 710-712 (1985), or the standard for modification of a child custody order pursuant to G. L. ch. 209, §28.

2. Whether, even if *Yannas* is the correct standard for deciding a removal case where the parties share legal and physical custody, the social science and child development research since *Yannas* was decided call for removal petitions to be denied in this case and in most cases in which both parents are fit.

ARGUMENT

I. The Trial Court Employed the Correct Standard of Law in Deciding the Case Because the Mother's Proposed Move Would Have Created a *De Facto* Modification of Joint Custody.....10

Amici adopt and incorporate Section I. of the argument in the Brief of the Appellee, James R. Mason, p. 17-26. Specifically, Amici adopt the Father's argument that the trial court correctly reasoned that the case was first and foremost a request to modify the parties' joint custody arrangement, and therefore was governed by G.L.c.208, §28, not the *Yannas* analysis.

II. Even If *Yannas* Were the Correct Standard For Deciding the Case at Bar, the Trial Court's Decision is the Correct One.

Massachusetts' removal statute, G.L.c.208, §30 reads in part that a "minor child of divorced parents who is a native of or has resided five years within this commonwealth, and over whose custody and maintenance a probate court has jurisdiction shall not, if of suitable age to signify consent, be removed out of this commonwealth without such consent, or if under that age, without the consent of both parents, unless the court upon cause shown otherwise orders." The words "upon cause shown" have been construed to

mean only that removal must be in the best interests of the child (*Rubin v. Rubin*, 370 Mass. 857, 346 N.E.2d 1919 [1976]; *Yannas v. Frondistou-Yannas*, 395 Mass. 704, 710-712, at 711 [1985]).

The purpose of the *Yannas* framework for deciding a removal case where there is sole physical custody to one parent, then, is to guide the trial court in its effort to identify the child's best interests. *Yannas* identifies several factors for the determination of the child's best interests in a sole physical custody removal case. These are: 1) a "good, sincere reason" for the move; 2) a "real advantage" for the children; 3) an improvement in the child's quality of life, including any improvement flowing from an improvement in the quality of life of the custodial parent; 4) "the possible adverse effect of the elimination or curtailment of the child's association with the noncustodial parent;" and 5) "the extent to which moving or not moving will affect the emotional, physical or developmental needs of the child." See *Yannas*, 395 Mass. At 711.

Yannas also holds that the interests of the custodial parent and the noncustodial parent must be considered. But, on the one hand, "That the move is

in the best interest of the custodial parent does not mean that it is automatically in the best interests of the child." On the other hand, "the fact that visitation by the noncustodial parent will be changed to his or her disadvantage cannot be controlling."

Each of the relevant factors identified in *Yannas* must be examined.

1. "Good, sincere reason"

"If the custodial parent establishes a good, sincere reason for wanting to remove to another jurisdiction, none of the relevant factors becomes controlling in deciding the best interests of the child, but rather they must be considered collectively." (*Yannas*, 395 Mass. at 712.) According to *Yannas*, determining whether a "good, sincere reason" exists for the proposed removal is simply a threshold determination, which, if satisfied, simply requires the court to carefully consider all the other relevant factors collectively, with no single relevant factor controlling the determination of the best interests of the child.

A "good, sincere reason" is a very low threshold indeed, as any petitioner represented by counsel or, even without representation, possessed of the

slightest degree of shrewdness, can construct a reason for the move that superficially appears "good, sincere." This is particularly true because it is generally beyond the ability of the party opposing the move or the court itself to truly determine whether purported career advancements have been realistically evaluated, job offers are firm and will withstand the delay of a court proceeding, distant amorous relationships are likely to prove long-lasting and/or beneficial, whether new homes, churches, communities and schools will or will not enhance the petitioner's life, familial support will materialize or will turn out to be illusory, and a host of similar considerations. Thus, lacking contrary information, the trial court must almost always accede to the assertion of a "good, sincere reason." This is particularly so because the court lacks any means of learning how its past endorsements of "good, sincere reason[s]" in other cases have turned out in actual practice.

A frequently stated reason for a proposed removal has been the availability of familial support for the custodial parent in the new location. Prior to the advent of child support guidelines in the late 1980s,

with their attendant drastic increases in the levels of child support ordered, familial support for the custodial parent, such as free housing provided by relatives, was often a financial necessity. Today, that situation is much less frequent.

Instead, familial support often means psychological support for the custodial parent, or help with childcare. The expectation of psychological support from the custodial parent's family is often an illusion. See, for instance, Kenneth Waldron, [A](#)

Review of Social Science Research on Post-Divorce

Relocation, Journal of the American Academy of

Matrimonial Lawyers, Vol. 19, 2005, footnote 30,

"Relocating near extended family, for example, can be a regression on the part of a parent going through the stress of a divorce, a likely impossible fantasy of returning to the comfort and dependency of childhood, which once disappointed, might lead to an additional relocation with the child." See also Richard Warshak,

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Quarterly, Vol. 34, 2000, at page 102, "Often, the

main goal of relocating parents is to get emotional

comfort from their own parents in the aftermath of the

divorce crisis. The irony is that they recognize the value, to themselves, of having their parents' support during difficult times, but do not afford the same privilege to their children. They create a situation where the children cannot turn to both parents for comfort." Moreover, in relocating to obtain familial support, they are losing the support of the noncustodial parent. There is no evidence in the child development literature that the assistance of grandparents or of secondary members of the family is superior to that of a biological parent who is willing and fit to assume childcare duties, as in the case at bar.

The Mother has apparently demonstrated a good, sincere reason for her request to remove the two minor children to Bristol, New Hampshire. In the absence of a removal of the minor children, it appears likely, although not inevitable, that she would need to live apart from her new husband for at least part of the week, continuing to reside in the vicinity of Chelmsford, MA at least during those days the minor children remain in her care. Alternatively, she would not move at all, which is what she has indicated in her testimony, with uncertain repercussions on her

current marriage. It is understandable that the Mother would wish to avoid either of these arrangements. It does not appear, to the extent the trial court could truly determine the matter, that the proposed move was motivated by a desire to interfere with the Father's relationship with the minor children.

If, on the other hand, the court were to grant the Mother's petition for removal, the effect would be that, instead of the Mother possibly traveling frequently between her husband in Bristol, New Hampshire and her children in the Chelmsford, Massachusetts area, the *children* would be required to travel frequently in order to see their Father. The Mother does not explain why it is in the best interests of the children for them to travel frequently over this large a distance rather than for her to do so.

The trial court did not find any "good, sincere reason" for the move other than the Mother's desire to live in Bristol, New Hampshire with her new husband. In particular, the trial court found that the economic advantages of the move are not obvious. See Finding of Fact 48. Nor is it evident that the Mother's

career prospects will be enhanced by a move to Bristol, New Hampshire; on the contrary, one would expect far greater opportunities in her field in the Chelmsford, Massachusetts area.

"The Mother has a familial support system in the Bristol, New Hampshire area." (Finding of Fact 49) With regard to familial support for the purpose of caring for the minor children, however, the Mother already has a familial support system in the Chelmsford, Massachusetts area, namely, the Father, who is eager and fit to assume a greater part of the childcare duties.

The fact that the Mother's sister-in-law is a nurse in Bristol, New Hampshire (Finding of Fact 49) is a slender reed upon which to construct a "good, sincere reason" for the move, since no evidence is given why the boys now of ages 14 and 12 or their infant half-sibling need a nurse nearby, don't already have a nurse nearby, or even that the sister-in-law is prepared to involve herself deeply in the lives of the two boys and their infant half-sibling.

As the trial court noted, the only "good, sincere reason" for the removal that withstands scrutiny is the Mother's understandable desire to live full-time

with her new husband in Bristol, New Hampshire, rather than living in the Chelmsford, Massachusetts area, presumably apart from him, either part-time or full-time. But, "The circumstances which could create a separation between the Mother and Jon Coleman are of their own making." (See Rationale, page 34) As a matter of public policy, it is disadvantageous to children, who generally benefit from the participation of both parents in their lives even after a divorce, for the courts to ratify a "good, sincere reason" for a removal because it solves a dilemma created by the petitioners' own choices. In the case at bar, the actions of the petitioner which created her dilemma were misguided but apparently benign. But in future cases, the trial court will have great difficulty determining whether a self-made dilemma that requires a removal for its solution was created in good faith or not.

2. "Real advantage"

Yannas adopts the "real advantage" standard. The origin of this standard appears to be the thirty year old case of *D'Onofrio v. D'Onofrio*, 144 N.J. super. 200, 365 A. 2d 27 aff'd per curiam, 144 N.J. super.

352, 265, A. 2d 716 (1976). In *D'Onofrio*, the court stated, "The fact remains that ordinarily the day-to-day routine of the children, especially young ones, and the quality of their environment and their general style of life are that which are provided by the custodial parent and which are, indeed, the custodial parent's obligation to provide. The children, after the parents' divorce or separation, belong to a different family unit than they did when the parents lived together. The new family unit consists only of the children and the custodial parent, and what is advantageous to that unit as a whole, to each of its members individually and to the way they relate to each other and function together is obviously in the best interests of the children. It is in the context of what is best for that family unit that the precise nature and terms of visitation and changes in visitation by the non-custodial parent must be considered."

This *D'Onofrio* language was cited approvingly in *Hale v. Hale*, 12 Mass. App. 812, 818-819, 429 N.E.2d 340 (1981).

The real advantage standard was then reformulated twenty-two years ago by the Supreme Court of New

Jersey in *Cooper v. Cooper*, 99 N.J. 42, 491, A. 2d 606 (1984). As reformulated in *Cooper* and quoted in *Yannas*, "The 'real advantage' test is grounded in the 'realization that after a divorce a child's subsequent relationship with both parents can never be the same as before the divorce...[and] that the child's quality of life and style of life are provided by the custodial parent.'" See *Yannas*, 395 Mass. at 710.

Yannas, then, has adopted the 30-year-old conceptual framework of *D'Onofrio/Hale/Cooper* which holds that the divorce creates a new family unit that "consists only of the children and the custodial parent" (*Hale*), and thus excludes one parent, typically the father. The intellectual provenance of this concept is found in the psychoanalytic school of thought that began with Sigmund Freud. The psychoanalytic tradition was not based in empirical research. Rather, it was based on theoretical conceptions of human behavior growing out of the experiences of psychoanalysts in treating severely disturbed patients. There was a particularly strong emphasis on mother-child interactions, originating in middle class, Jewish bourgeois patterns of life in Freud's Vienna, almost to the exclusion of father-

child interactions. There is a clear progression from the Freudian preoccupation with the mother-child relationship to the concept of the existence of only one psychological parent, to the concept that after divorce, only one relationship matters. Unfortunately, this line of thought is not grounded in empirical research data, but only in abstract psychoanalytic theory. For a broader cultural perspective than that of the psychoanalytic school, and one grounded in empirical studies, see Ronald P. Rohner and Robert A. Veneziano, The Importance of Father Love: History and Contemporary Evidence, Review of General Psychology, Vol. 5, 382-405, 2001, in which the authors conclude, "Overall, father love appears to be as heavily implicated as mother love in offsprings' psychological well-being and health, as well as in an array of psychological and behavioral problems."

For the narrower perspective of the psychoanalytic school as applied to post-divorce life, see, for instance, Goldstein, Freud and Solnit, Beyond The Best Interests of the Child, 1973. The authors vigorously advance the notion that after divorce, there should be only one parent in charge. "Once it is determined who will be the custodial parent, it is

that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the noncustodial parent should have no legally enforceable right to visit the child, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits." (At p. 38)

Commenting on this point of view, Michael Lamb, recently the Head of the Section on Social and Emotional Development of the National Institute of Child Health and Human Development of the National Institutes of Health, has written, "Like the psychoanalysts Bowlby, Freud, and Spitz, many developmental psychologists, custody evaluators and judges have long focused exclusively on mothers and children, presuming fathers to be quite peripheral and unnecessary to children's development and psychological adjustment. Therefore, when parents separated, these professionals emphasized the importance of strengthening the relationship between young children and their primary caretakers (typically their mothers), frequently at the expense of the relationships between the children and their father...Such arrangements were often represented by

professionals as being 'in the best interests' of the children due to the mistaken belief that young children had only one significant attachment that needed protection. Consequently, continuity in child-father relationships was sacrificed." (Michael E. Lamb, Placing Children's Interests First: Developmentally Appropriate Parenting Plans, Virginia Journal of Social Policy and Law, Vol. 10, 2002, at p. 108)

Today, we have discarded many, if not most, of the original tenets of psychoanalytic theory. To give just one startling example, we no longer believe, as the Freudians did, that what a woman most desires in life is to possess a male sexual organ. This concept and many others have given way to the findings of empirical research.

Likewise, we must discard the Freudian concept that a child has only one psychological parent, typically the mother. Lamb summarizes a mass of research that has accumulated since the Freudian concept, and since *D'Onofrio*: "Most importantly, research indicates that children benefit from supportive relationships with both of their parents, whether or not those parents live together...Brief

dinners and occasional weekend visits do not provide a broad or extensive enough basis for such relationships to be fostered, whereas daytime and nighttime activities during both weekdays and weekends are important for children of all ages." (Id, at p. 118) Lamb also states, "The failure of policy and decision-makers to take advantage of a burgeoning and increasingly sophisticated understanding of child development is unfortunate and may threaten the quality of social policy." (Id, at p. 98)

The research of the last twenty or thirty years documents, among other things, that infants form attachments to both parents at about the same age, around six to seven months, even when only one parent is the primary caretaker. See Joan B. Kelly and Michael E. Lamb, Developmental Issues In Relocation Cases Involving Young Children: When, Whether and How?, Journal of Family Psychology, Vol. 17, 193-205, 2003. Kelly and Lamb then state, "Preference for primary caregivers diminishes with age and often disappears by eighteen months of age." (Id) They then state, "Relationships with parents continue to play a crucial role in shaping children's social, emotional, personal and cognitive development into middle

childhood and adolescence [citation omitted], and there is a substantial literature documenting the adverse effect of disrupted parent-child relationships on children's development and adjustment."

An extensive literature, much of which is reviewed in the citations quoted above, now establishes a different concept of the post-divorce family than that described in *D'Onofrio/Hale/Cooper/Yannas*. Rather than a nuclear family unit that excludes one parent, Constance Ahrons describes the post-divorce family as a binuclear one, involving two households. See Constance Ahrons, **Redefining The Divorced Family: A Conceptual Framework**, 25 Soc. Work 437 (1981). Many other researchers have also criticized the primary parent presumption, finding it a poor basis for custody or relocation decisions. See, for instance, Joan B. Kelly, **The Determination of Child Custody**, in 4 *The Future of Children*, Vol. 12, 130-131 (1994); Ross A. Thompson, **The Role Of The Father After Divorce**, in 4 *The Future of Children*, Vol. 210, 217-219 (1994); Richard A. Warshak, **Gender Bias In Child Custody Decisions**, 34 *Family and Conciliation Courts Review*, Vol. 396, 403-406 (1996); Richard A. Warshak, **The**

Primary Parent Presumption in 101+ Practical Solutions

For The Family Lawyer 101 (G. Herman ed., ABA, 1996);

Michael E. Lamb (ed.), **The Role of the Father in Child Development**, Third Edition, John Wiley & Sons, 1997.

And well-known researcher Judith Wallerstein has written, "Our findings regarding the centrality of both parents to the psychological health of children and adolescents alike lead us to hold that, where possible, divorcing parents should be encouraged and helped to shape post-divorce arrangements which permit and foster continuity in the children's relations with both parents." See Judith S. Wallerstein and Joan Berlin Kelly, **Surviving the Breakup**, 149, 311 (1980).

(In later writings, Wallerstein has endorsed a presumption that the custodial parent usually should be allowed to relocate, but has never reconciled her recent position with her extensive early writings emphasizing the importance of both parents and the suffering of children who have only limited contact with one parent. The contradictions between her early writings and her recent policy recommendations have been critiqued in detail by Warshak [see Richard A Warshak, **Social Science and Children's Best Interest in Relocation Cases: Burgess Revisited**, Family Law

Quarterly, Vol. 34, 2000.] And her policy recommendations also have been disavowed by her early collaborator, Joan B. Kelly [See Kelly, Joan B. and Lamb, Michael E. Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children, Family and Conciliation Courts Review, Vol. 38, 2000.] Even in Wallerstein's later writings, she specifically excludes cases of joint physical custody from her recommendation in favor of a presumptive right to relocate.)

Recently, the Chief Justice of the Massachusetts Probate and Family Courts Sean M. Dunphy encouraged the work of a special Massachusetts committee appointed to recommend parenting schedules after divorce. The committee was chaired by Hon. Arline S. Rotman, a retired judge of the Massachusetts Probate and Family Courts, and consisted of a sitting family court judge, two eminent members of the Massachusetts domestic relations bar, and four recognized experts in the psychology of children after divorce. It was, therefore, a collaborative effort of the legal and mental health communities. The result was a document entitled "Planning for Shared Parenting. A Guide for Parents Living Apart." (Available from the

Massachusetts Chapter of the Association of Family and Conciliation Courts, 2004) The Introduction states, "This guide combines recent developmental research about children and the impact of divorce on their lives..." Recognizing the research evidence demonstrating the centrality of both parents after divorce, the committee stated its first conclusion, "We now know that: children do best when both parents have a stable and meaningful involvement in their children's lives."

Thus, the *D'Onofrio/Cooper/Hale/Yannas* fundamental concept that the quality and style of life for the child are provided only by the custodial parent may still be partially true for the day-to-day routines of the child's life, such as meal preparation, taking to school, etc. But the thirty to one hundred year old concept that the child has only one psychologically important parent both before and after a divorce, and that the child's conception of his post-divorce family unit excludes one parent, has finally been put to the test of empirical research during the past twenty to thirty years, and has been found to be incorrect. Unfortunately, the courts have largely failed to absorb and respond to this

knowledge. The research indicates that from infancy through adolescence, most children develop strong attachments to both parents, that those attachments are important springboards for their social and psychological development, and that straining these attachments often entails serious sequelae for the child's development. Thus, the governing framework of Massachusetts' law on removal is fundamentally incorrect from the point of view of the child's psychology for essentially all cases of joint physical custody, as well as the large number of cases of sole physical custody in which the noncustodial parent remains involved in the child's life, even if only on an every-other-weekend basis.

In the case at bar, the "real advantage" standard, as adopted by *Yannas*, cannot be applied because it assumes that there is only one custodial parent, and that only one parent is pre-eminent in determining the child's successful and happy development, which is not true in this case of joint physical custody, nor is it true in many instances of sole physical custody. See also the trial court's Conclusions of Law 20b and 20c, holding that the

Yannas scheme is inapplicable to cases of either *de facto* or *de jure* shared physical custody.

3) An improvement in the child's quality of life, including any improvement flowing from an improvement in the quality of life of the custodial parent

The language of this factor is grounded in *Cooper*: "[B]ecause the best interests of the child are so interwoven with the well-being of the custodial parent, the determination of the child's best interests requires that the interests of the custodial parent be taken into account." *Cooper* at 54, 491 A.2d 606. *Cooper* and *Yannas* come very close to identifying the child's best interest with that of the custodial parent, notwithstanding the subsequent disclaimer, "That the move is in the best interests of the custodial parent does not mean that it is automatically in the best interests of the child." *Yannas* 395 Mass. at 711.

This formulation fails reality by ignoring the ways in which the child's best interests are interwoven with *both* parents. Also, despite the disclaimer, it overemphasizes the degree to which the child's wellbeing is dependent on the wellbeing of the custodial parent. (A similar statement concerning the

noncustodial parent would be an overemphasis too.) Neither *Yannas* nor subsequent cases provide guidance to the trial court on how to determine under what circumstances and to what extent an improvement in the quality of the custodial parent's life does or does not translate into improvement of the child's life. In the absence of such guidance, the trial courts have come to rather indiscriminately accept almost any improvement in the life of the custodial parent's life as constituting an advantage for the child.

This is a widely misunderstood area. On the one hand, there is ample support in the child development literature for the proposition that the children are disadvantaged if the custodial parent's quality of life is so poor that her mental health, and thus the quality of her parenting, is compromised. The research on this subject examines children's outcomes in cases in which the custodial parent's functioning is significantly compromised, such as cases in which she is unstable, psychologically disordered, chaotic, seriously depressed or anxious, dependent on drugs or alcohol, impoverished or seriously distracted from the welfare of the children. But the research has not demonstrated disadvantages to the child commensurate

with the disadvantages of a removal merely because the custodial parent is to some milder degree stressed, or dissatisfied, or lonely, or lacking career prospects. "An unsupported argument for relocation is that the satisfaction it will bring to the relocating parent somehow benefits the child. There is a sympathetic assumption that relocation will be rewarding for the parent who moves and that the moving parent's happiness will have a trickle down effect on the child's. Research does not support this assumption." (Kenneth Waldron, *supra* at 364)

Even more to the point, there is little evidence that the children benefit when an already *adequately-functioning* custodial parent subsequently improves her quality of life. Thus, there is little evidence that children benefit significantly when their custodial parent who enjoys adequate but not luxurious financial circumstances subsequently improves her financial condition, either through career advancement or through re-marriage. (See Kenneth Waldron, *supra* at 364, "Except when a move raises the socio-economic status of a parent from below to above the poverty line, research has found no link between economic status and child adjustment." On the same point, see

also Robert Emery, Marriage, Divorce and Children's Adjustment, 1988.) There is little child development literature indicating that children benefit significantly when a custodial parent who is functioning adequately despite stressors in her life subsequently is able to diminish her stress. There is little or no evidence in the child development literature that children benefit much when their custodial parent who is not clinically depressed subsequently enjoys greater happiness through remarriage or other changes in her life, or enjoys a better climate, or moves closer to friends or family.

The putative improvement in a child's life flowing from an improvement in a custodial parent's life is generally limited to those cases in which the improvement in the custodial parent's life is central to rescuing her from a *clinical* degree of dysfunction or dysphoria, meaning one serious enough to suggest treatment. "The notion that relocation would improve the general feelings of happiness in a parent is very different than the notion that relocation would improve the mental health of a parent." (Waldron, *supra* at footnote 48) Examples where relocation might benefit the child include rescue of the custodial

parent from severe depression, severe anxiety, a standard of living insufficient to meet the family's basic needs, or other severe stresses that result in obvious deterioration in the quality of parenting. In other cases, the benefit allegedly flowing to the children from an improvement in the custodial parent's general level of satisfaction is highly speculative.

Braver et al. conducted the first and only research study comparing outcomes in children of divorce one of whose parents move away to children of divorce whose parents stayed within a one hour drive of each other. They summarized, "[Our data] allow us to say, however, that there is no empirical basis on which to justify a legal presumption that a move by a custodial parent to a destination she plausibly believes will improve her life will necessarily confer benefits on the children she takes with her." Sanford

L. Braver et al., **Relocation of Children After Divorce and Children's Bests Interests: New Evidence**

and Legal Considerations, Journal of Family Psychology, Vol. 17, 206-219, 2003 The opposite conception has been given too much deference in the Massachusetts case law on removals, to the detriment of children when there are countervailing factors.

We have seen earlier that both parents are important to the child's well-being. Thus, even if the degree to which the child's and the parent's interests are interwoven is greater than argued here, the effect on the child of a change in the parent's wellbeing would occur regardless of which parent's well-being were affected. Thus, Warshak argues, "Because the wish to relocate a child will predictable generate anguish and hostility in the remaining parent, the motives for relocation should be weighed against the damage done to the parents' cooperative relationship and, derivatively, to the child's well-being." (Warshak, 2000, supra at 103)

As a matter of public policy, excessive deference should not be given to the custodial parent's desire to relocate when the noncustodial parent is fit and is engaged in the child's life, unless a major, unambiguous benefit to the child can be demonstrated. It is widely accepted that parents incur serious and long-lasting obligations to their children and to society when they create children. These obligations are frequently burdensome to the parents' other interests. For instance, the law instructs noncustodial parents that they have an obligation to

society and to their children to financially support their children whether or not doing so is a burden upon them. Similarly, given the benefit of having two fit parents organically engaged in the lives of their children, it is incumbent on both parents as a duty to their children and to society to at least refrain from obstructing the involvement of the other parent, and hopefully to foster and facilitate such involvement.

Yannas also requires "attention to whether the quality of the child's life may be improved by the change" independently of putative improvements flowing from an improvement in the life of the custodial parent. The Mother has failed to demonstrate any such improvements that can reasonably be anticipated should the removal be granted. There is no evidence that Bristol, New Hampshire schools would be better for the boys. There is no evidence that the boys' life would be improved by living mostly in a new family unit that would include Mr. Coleman and the boys' infant half-sibling. There is no evidence that the boys' material needs would be better provided for under the new arrangement. There is no evidence that the boys' new community would benefit them in some way compared to their current communities. There is no evidence that

their friendships or social lives would be enhanced by the proposed move.

The trial courts' Findings of Fact, on the other hand, indicate several reasons why the proposed move would likely be harmful to the children's quality of life. Findings of Fact 28 to 33 detail Thomas's various social adjustment problems and ADD, and the ways in which the McCarthy Middle School is helping him improve. See also Findings of Fact 17 to 21. Finding of Fact 20 states that "Chelmsford is one of the better school systems in the Commonwealth..." On the other hand, the Bristol, New Hampshire "middle school and elementary school both scored below the state average on New Hampshire's standardized testing." (Finding of Fact 32) Finding of Fact 32 points out that at the proposed school in New Hampshire, class periods last ninety minutes, a long period of time for a child with ADD. Finding of Fact 33 concludes that Thomas "would face the challenges of a new home, a new infant sibling, a new school environment, and a new parenting schedule that would drastically reduce the amount of time he would spend with his father. In Thomas's life, any one of these challenges could severely disrupt his developmental

process. Needless to say, facing all of these factors at once would not be in Thomas's best interests."

Finding of Fact 35 concludes that it would not be in the best interests of Silas, the younger child, "to have his relationship with his Father drastically altered."

Findings of Fact 50 through 59 detail one or more incidents in which Brad Coleman, Thomas's step-brother, engaged in "sexual touching" of Thomas. In Finding of Fact 54, the trial court concluded, "Unfortunately, at the Mother's household, Thomas was put in a confrontational situation with Brad Coleman in which Thomas could not say that anything sexually inappropriate had occurred between the two boys." In Finding of Fact 55, the trial court stated, "Thomas felt that he was in serious trouble with the Mother and Jon Coleman for making allegations of sexual abuse." In Finding of Fact 66, the trial court found concerning Thomas "that Jon Coleman sometimes makes him scared." The sexual abuse came to light only because Thomas confided in Linda Mason (the Father's second wife). Thus, if the removal petition were granted, Thomas would live most of the time in a household in which he had experienced sexual abuse

from an older child, in which his step-father "sometimes makes him scared," and in which he would be frightened to tell his Mother about any new instances of abuse. Meanwhile, he would have recourse to the protective aura of his father's household only infrequently.

The Appellant mother's brief argued mainly that there would be no *harm* in the move, rather than establishing a positive benefit for the boys. (Pages 19-22, 24-25, and 29-30) For instance, the Mother cites the boys' treating psychologist "who did not think the move would be detrimental." (Page 21) The one exception to this pattern is the opinion of the GAL, who recommended the move. But, as pointed out in the brief of the Father, "... the GAL reported that the move would not be in the children's best interests, *but for the impact of the Coleman/Blomstedt plan upon the Coleman's family.* At trial, the G.A.L. acknowledged that her ultimate recommendation would have been different if it were not for the Coleman/Blomstedt plan." (P. 46, emphasis in original)

4) The possible adverse effect of the elimination or curtailment of the child's association with the noncustodial parent

There is a large empirical literature demonstrating that one of the important determinants of how children fare after divorce is the degree to which they are allowed to experience the active involvement of both their parents. There is an equally large literature claiming that there is no consistently demonstrable effect of the noncustodial parent for good or ill. A careful look at the deficiencies of the latter body of research resolves the apparent contradictory findings in favor of an active role by both parents.

The opposing sides in this debate are best epitomized by the writings of Warshak and Waldron on one side, and Wallerstein on the other. The two most comprehensive reviews of this subject in the specific context of removal are Warshak 2000 (supra) and Waldron 2005 (supra). Waldron concludes, "In this article, I present the basic findings from over seventy studies and literature reviews. The bulk of these findings contraindicate relocation in most cases." (Waldron supra at 341) Warshak summarizes, "In

contrast, I believe that a comprehensive and critical reading of over seventy-five studies in the social science literature, including Wallerstein's earlier reports, generally supports a policy of encouraging both parents to remain in close proximity to their children." (Warshak 2000 supra at 83)

Special attention must be given to the work of Judith S. Wallerstein. She is probably the best known researcher in the United States on the impacts of divorce, primarily because she is an eloquent writer who has popularized her findings in a series of books. She is the most vigorous champion of the custodial parent's presumptive right to relocate. Her views were comprehensively laid out in her *amica curiae* brief in *In re Marriage of Burgess*, the influential 1996 case decided by the California Supreme Court (913 P.2d 473 Cal. 1996), whose decision closely echoed Wallerstein's brief. Her argument was subsequently published. See Judith S. Wallerstein Wallerstein and Tony J. Tanke, **To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce**, 30 Family Law Quarterly 305, 1996. Her views are captured in the following quotations. "All our work shows the centrality of the well-

functioning custodial parent-child relationship as the protective factor during the post-divorce years."

(Burgess amica curiae brief) "While the psychological adjustment of the custodial parent has consistently been found to be related to the child's adjustment, that of the non-custodial parent has not." (Burgess amica curiae brief, supra) It should be recalled that Wallerstein specifically excludes cases of joint physical custody from the conclusions stated above.

(Wallerstein and Tanke, supra)

But the persuasiveness of her views is seriously undermined by three factors. First, as mentioned above and extensively documented and critiqued in Warshak 2000 (supra), she fails to provide a cogent explanation why her views in *In re Marriage of Burgess* so radically contradict her extensive early writings, in which she repeatedly pointed to the beneficial effects of father-involvement, and the sadness of children who were deprived of much contact with their fathers. Second, her choice of studies to support her point of view in the Burgess brief was extremely narrow and selective. She relied on a total of only ten studies, seven of which were authored by herself or her immediate colleagues, leaving only three

authored by researchers independent of her. Finally, her research is not based on a sample of ordinary people. Instead, all of her original research is based on people who chose to seek counseling at her mental health facility in Marin County, California. As she herself has written, half of the men in her research sample were "moderately disturbed or frequently incapacitated by disabling neuroses and addictions," including "chronically depressed, sometimes suicidal individuals ... or those with long-standing problems in controlling their rage or sexual impulses." An additional 15 percent of the men in her sample were "severely troubled," meaning that they had histories of significant mental illness, such as a general inability to cope with the demands of adult life, paranoia, and bizarre behavior. Wallerstein and Kelly 1980 supra at 330-331. Thus, two-thirds of her sample of men had serious issues of mental illness. No matter how elegantly Wallerstein may have conducted and written about her research on such a sample, the findings simply cannot be extrapolated to ordinary, fit parents.

In 2001, the New Jersey Supreme Court decided the Baures v. Lewis removal case, and Wallerstein's

influence was again evident. The Court purported to examine the social science literature, but reverted to *Cooper* (supra) and the outmoded "new family unit" concept "...social science research links a positive outcome for children of divorce with the welfare of the primary custodian and the stability and happiness within that newly formed post-divorce household."

(**Baures v. Lewis**, 167 N.J. 91; 770 A.2d 214, 2001) But an examination of the sources it relied upon shows that except for one minor exception from 1978, it confined itself to the publications cited by Wallerstein and Tanke (supra, 1996), all but three of which came from Wallerstein's Center.

Wallerstein restated her views in an *amici curiae* brief in ***In re Marriage of LaMusga*, (2004) 32 Cal.4th 1072**. In response, Warshak and 27 other well-known, leading experts filed an *amici curiae* brief on behalf of the minor children in the same case, arguing against removal. In it, the authors stated, "Amici are 18 social science researchers and authors, and 10 mental health forensic practitioners, (many of whom are also accomplished authors) of great experience and accomplishment." "We are united in our judgment that the Wallerstein et al. Brief offers a skewed and

misleading account of the social science evidence relevant to this case. Although it purports to be an objective summary of knowledge, the brief runs counter to the prevailing opinions of the majority of experts who conduct divorce research and of those who apply this research to their clinical and forensic practices. We make this statement notwithstanding the fact that several of the current co-Amici are former collaborators and co-authors with Wallerstein. Others are the authors or investigators Dr. Wallerstein cites in support of her position; the authors themselves, instead, view their work as portrayed here."

It is useful to explore beyond the statements of the leading protagonists summarized above. Wallerstein is correct that a body of research exists failing to show much of a connection between children's adjustment after divorce and such factors as whether their noncustodial parents "visited" frequently or infrequently, were well adjusted or poorly adjusted, were sensitive parents or not, employed appropriate disciplinary measures or not, etc. For instance, see E. Mavis Heatherington and Margaret S. Hagen, **Divorced Fathers: Stress, Coping, and Adjustment**, in The Father's Role: Applied Perspectives 103, 117 (Michael

Lamb, ed., 1986; Frank F. Furstenberg, Jr et al., **The Life Course of Children After Divorce: Marital Disruption and Parental Contact**, 48 Am. Soc. Rev. 656, 1983.

These and a large swath of similar research findings are best explained by realizing the simple fact that very few of the children in these studies enjoyed much time at all with their noncustodial parents. In Furstenberg's widely cited study of divorces in the 1960's, for instance, only one-sixth of the children saw their noncustodial fathers once a week or more, and 49 percent had not seen their fathers within the past year. Further vitiating any potential impact of father involvement was the fact that Furstenberg lumped together divorce cases with never-married cases, in which the children may never have lived with and attached to their fathers. And in another well-known study, the Stanford Child Custody Project studying divorces in the 1970's, there were no court orders at all for "visitation" for 26 percent of the children, there were no court orders for overnight visits for an additional 18 percent, and only about 25 percent had court orders specifying at least three

nights out of every 14 with their noncustodial parents. (Lamb 2002 supra at p. 107)

It should not be surprising, given the low levels of contact with noncustodial parents in almost all of these studies, that it did not make much difference for children's outcomes whether their fathers, who in a large proportion of the samples were essentially strangers, were skillful parents or not, loving or not, etc. These studies tell us only that if fathers are largely absent, they do not much affect how their children fare. *They do not tell us how their children would have fared if they had had ample contact with their fathers, which, according to other research reviewed below, would on average be better.* It is as if a large drug trial were conducted to test the effectiveness of a drug that had shown promise in preliminary trials; but subjects ingested only one-tenth of the prescribed dose. Not surprisingly, such a trial would show that the drug produced neither benefits nor toxic side effects.

There is now a large literature that has overcome some of the deficiencies of the earlier studies just mentioned, and which show positive relationships between the frequency of children's contact with their

divorced fathers and a whole range of measures of wellbeing, such as performance in school, satisfaction with living arrangements, emotional health, social adjustment, frequency of drug or alcohol abuse, frequency of involvement with gangs or the law, teenage sexual activity, etc. As summarized by Waldron after a comprehensive review of over 70 articles in the social science literature, "A review of the research on the effects of increased father involvement is unambiguous: a child does better in every aspect of adjustment that has been measured, both long-term and short-term, if there is active father involvement." (Waldron, supra at p. 359) See, for instance, Lise M. C. Bisnaire et al., **Factors Associated with Academic Achievement in Children Following Parental Separation**, 60 Am. J. Orthopsychiatry 75, 1990; John Guidubaldi and Joseph Perry, **Divorce, Socioeconomic Status, and Children's Cognitive-Social Competence at School Entry**, 54 Am. J. Orthopsychiatry 459, 1984; J. M. Healy Jr., et al., **Children and Their Fathers After Parental Separation**, 60 Am. J. Orthopsychiatry 531, 1990; Eleanor E. Maccoby et al., **Postdivorce Roles of Mothers and Fathers in the Lives of their Children**, 7 J. Fam.

Psychol. 24, 1993; Jessica Pearson and Nancy Thoennes, **Custody After Divorce: Demographic and Attitudinal Patterns**, 60 Am. J. Orthopsychiatry 233, 1990; Rhona Rosen, **Children of Divorce: What They Feel About Access and Other Aspects of the Divorce Experience**, 6 J. Clin. Child Psychology 24, 1977; Christine W. Nord, et al., **Fathers' and Mothers' Involvement in Their Children's Schools by Family Type and Resident Status**, National Center for Education Statistics, US Department of Education, Statistical Analysis Report, NCES 2001-032, 2001; Marion Gindes, **The Psychological Effects of Relocation for Children of Divorce**, 10 Am. Acad. Matrim. Law 119, 1998 and Richard A. Warshak, **The Custody Revolution**, 1992, among others.

The above evidence establishes the positive effects of noncustodial parent involvement. Research findings are strengthened when issues are looked at from several angles and congruent results emerge. So it is relevant that there is a large body of converse evidence, in other words, evidence that father *absence* is accompanied by a host of ills for children. As Joan Kelly and Michael Lamb have written, "Indeed, children in both two- and single-parent families appear better adjusted when they enjoy warm positive relationships

with two actively involved parents." And, "Children growing up in fatherless families are disadvantaged relative to peers growing up in two-parent families with respect to psychosocial adjustment, behavior and achievement at school, educational attainment, employment trajectories, income generation, involvement in anti-social and even criminal behavior, and the ability to establish and maintain intimate relationships." Also, "... there is substantial evidence that children are more likely to attain their psychological potential when they are able to develop and maintain meaningful relationships with both of their parents, whether or not the two parents live together." Joan B. Kelly and Michael E. Lamb,

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It is beyond the scope of this brief to describe the large body of research findings indicating harm to children when they are deprived of the involvement of one parent. A thorough review has been written by Henry B. Biller, **Fathers and Families: Paternal Factors in Child Development**, 1993. See also P. R. Amato and J. G. Gilbreth. **Nonresident fathers and**

children's well-being: A meta-analysis. J. of Marriage and the Family, 61, 557-573, 1999.

Looking at the research data in still another way, we find that no study has shown that children do better when they have less contact with fit fathers.

With increased efforts to study the impact of the noncustodial parent on children's development, it has also become clear that not only is the *quantity* of time children spend with their noncustodial parents important, but so also is the *quality* of time. This has direct implications for the patterns of parenting time after divorce. The optimum arrangement is one that allows what has come to be called "full service parenting."

Full service parenting consists of being involved with all the important activities and rituals of the child's daily life, such as bedtime and waking rituals, story-telling, praying, recreational activities, taking to school and picking up, eating together, bathing young children, soothing them, helping with homework, counseling them when tormented by bullies or gossips, setting limits and disciplining them, and all the other small, everyday interactions that together create the rich tapestry of a parent-

child bond. See, for instance, Joan Kelly and Michael Lamb supra 2000; and K. Alison Clarke-Stewart and Craig Hayward, Advantages of Father Custody and Contact for the Psychological Well-Being of School-Age Children, 17 J. Applied Dev. Psychol. 239, 1996.

The implication of this finding is that parenting time is not fungible, nor postponeable. For instance, blocks of parenting time during the summer, in a place far away from the child's friends, activities and community, does not adequately substitute for parenting time during the weekdays and weekends of the school year. Parenting time confined to weekends is not as beneficial as parenting time during both weekdays and weekends. Extra parenting time a month or a year from now cannot substitute for distributed parenting time now. Of course, the court cannot mandate that a parent fulfill the "full service" role, but it should try to avoid decisions that preclude it.

In the case at bar, the Father is not a non-custodial parent. Still, the logic of the *Yannas* standard can be applied to see what result it would yield. There is ample evidence that curtailment of the children's association with the Father would probably entail significant adverse effects for them.

The Father was the stay-at-home parent for the first five years of Thomas's life and the first three years of Silas's life. (Finding of Fact 5) Finding of Fact 16 details that the Father is deeply involved in the lives of the children as a *de facto* as well as *de jure* joint custodial parent. And the G.A.L. report states that "... Mr. Mason is very much the joint custodial parent." (p. 21) The trial court further stated, "The Father is integral in assuring Thomas's and Silas's health, general welfare, safety, moral development, social development, happiness, and general best interest." (p. 32) It is clear, moreover, that he has met the definition of a "full service parent" since the divorce.

Thus, according to the research reviewed above, the children enjoy the optimal arrangement of two fit, actively-involved parents; it follows that curtailment of their relationship with their father would be a change to a less-than-optimal arrangement. The trial court too identified "a new parenting schedule that would drastically reduce the amount of time he would spend with his father" as an adverse factor for Thomas. (See Finding of Fact 33) The trial court also found that Silas "adapts well when moving between

the Mother's home and the Father's home." (See Finding of Fact 34) This successful adaptation to the divorce would be imperiled by curtailing Silas's time with his father. In Finding of Fact 35, the trial court found concerning Silas, "It is not in his best interest to have his relationship with his father drastically altered." As detailed above, the current parenting schedule allows Thomas in particular to confide matters such as the sexual abuse he experienced in the Coleman household to his Father or his stepmother, an important safety valve, since he felt that he could not tell his Mother about the abuse, and since he is sometimes fearful of Mr. Coleman. (See Findings of Fact 57 and 66) And Thomas, who is now "of suitable age to signify consent" (or dissent) to the proposed removal (G.L. c. 208, § 30), has asked for the parenting schedule to be more evenly divided between his parents. In other words, he craves *more* time with his Father, rather than *less* time, as would occur if the proposed removal were granted. Finally, in its Rationale, the court stated in Factor Number 3, "It would not be in Silas's or Thomas's best interest to reduce the Father's parenting time." The trial court elaborated on Factor

Number 3 in the following paragraph, stating that "their father's presence will be critical," and, "... the children have expressed a sincere love of their father, and a desire to spend more (not less) time with him."

Given the findings of the trial court and the research reviewed above, there is ample reason to expect adverse effects if the children's association with their Father were curtailed.

5) The extent to which moving or not moving will affect the emotional, physical or developmental needs of the child

Previous sections have established that loss of regular and frequent parenting time by the noncustodial parent is usually harmful to children. Therefore, this section will not repeat that discussion, but will focus on other factors related to relocation that may affect the children's "emotional, physical or developmental needs."

Children are considered resilient. In the past, relocation has been thought of as a transient discomfort for the resilient child, posing no long-term risks to the child's adjustment in the majority of cases. Experts who have reviewed the

literature on this subject now frame the matter differently. Relocation is now considered always to pose risks to children's adjustment that may in certain defined circumstances be avoided or minimized. For instance, Waldron states, "It is inaccurate to say relocation is in a child's best interest. It might be possible to say that under some conditions, a move might positively influence the adjustment of a child or at least might reduce the chance that the move will have a detrimental effect on the child's adjustment. In other words, a move will always create risks to both the short-term and long-term adjustment of the child." (Waldron supra p. 369) He has also written, "At this state of the social science research and literature, findings are consistent with and supportive of a conclusion that is also intuitive, that is that relocation is, in a probabilistic sense, more harmful to children than good for them." (See Waldron supra, p. 372)

One reason for this is "a child's need for stability and continuity in established patterns of care and emotional bonds." (Wallerstein, Burgess amica curiae brief, supra at 13) In both custody matters and removals, the Massachusetts courts have

given great deference to "a child's need for stability and continuity in established patterns of care..." For this reason, custody has often been awarded to primary caretakers, temporary custody orders have often been converted into permanent custody orders, and modifications of custody have been only infrequently granted.

But the courts, by the same actions, have typically failed to give deference to the need for stability and continuity in established "emotional bonds." Failure to honor children's "emotional bonds" as strongly as their "patterns of care" has disadvantaged many children by straining or breaking their emotional bonds with a beloved parent whose parenting time is greatly reduced when he is adjudicated a noncustodial parent or when a removal is granted to a custodial parent. The emotional needs of children are not well served in the typical removal case because, as amply demonstrated by research of the past twenty years, children attach strongly to both parents in infancy, and maintain those attachments into adulthood. While many do well even when such attachments are strained or broken by the actions of

the their parents or the courts, a substantial number do not do well.

"Not doing well" when emotional bonds are strained or broken can be manifested in two ways: in observable behavior, and in reported emotions. It is generally accepted that in two-parent families, about ten percent of children exhibit serious adjustment or developmental disorders. Examples include sadness, clinical depression, underachievement or dropout at school, character disorders, alcohol or drug use, gang involvement, involvement with the law, truancy, and teenage pregnancy. From a baseline of about ten percent in intact families, these problems increase to about 25 percent among children of divorce. (E. Mavis Heatherington, What Matters? What Does Not? Five Perspectives on the Association between Marital Transitions and Children's Adjustment, 53 Am. Psychol. 167, 1998) While numerous factors contribute to this 150 percent increase in poor outcomes, the straining or severing of emotional bonds with the noncustodial parent, typically the father, is increasingly viewed as an important contributor.

One way we know this is that children tell us. Fabricius and Hill surveyed over 800 college students

whose parents had divorced. These young adults were old enough to form mature judgments free of parental manipulation, yet young enough to remember their childhood. They expressed persistent feelings of sadness and loss because they had been deprived of adequate contact with their fathers. When asked to name the best arrangement for children of divorce, 75 percent responded, "equal time with both parents." And among those who had grown up with a shared parenting arrangement, 93 percent endorsed this as the best arrangement. See William V. Fabricius and Jeff A. Hall, Young Adults' Perspectives on Divorce Living Arrangements, Fam. and Concil. Courts Rev., Vol. 38, 446-461, 2000. Researcher Robert Emery carried out a survey of young adults whose parents had divorced. They too expressed persistent feelings of sadness, emptiness, and of having missed out on a better life because of limited time with their fathers that had been imposed on them as children. See Lisa Laumann-Billings and Robert E. Emery, Distress Among Young Adults From Divorced Families, J. of Fam. Psychol., Vol. 14, 671-687, 2000. Summarizing, Warshak writes, "... we should recall that in eight separate studies cited above, including Wallerstein's own, children

indicated their desire for more contact [with their fathers] and were most satisfied when the contact was more frequent than is possible with a large geographical separation." Warshak, supra 2000, at p. 96.

Other researchers have found that the greater the number of stressors to which children are subjected, the more likely that they will suffer adjustment or developmental disorders. Totally aside from the emotional consequences of leaving one parent behind, relocation is consistently listed among the stressors that are related to poor outcomes, both in intact families and in divorced families. See William F. Hodges et al., The Cumulative Effect of Stress on Preschool Children of Divorced and Intact Families, 46 J. Marriage and Fam., 611, 1984; C. Humke, and C. Schaeffer, Relocation: a Review of the Effects of Residential Mobility on Children and Adolescents, Psychology: A J. of Human Behavior, 32, 16-24, 1995; D. Stokols, and S. A. Schumaker, The Psychological Context of Residential Mobility and Well-Being, J. of Social Issues, 38, 149-171, 1982; J. Tucker, et al., "Moving On": Residential Mobility and Children's School Lives. Sociology of Education, 71, 111-129,

1998; M. Levine, Residential Change and School Adjustment, Community Mental Health Journal, 2, 61-69, 1966; Jessica Pearson and Nancy Thoennes, The Denial of Visitation Rights: A Preliminary Look at Its Incidence, Correlates, Antecedents, and Consequences, 10 Law and Policy 363, 1988; W. J. Jordan et al., Exploring the Causes of Early Drop-out Among Race-ethnic and Gender Groups, Youth and Society, 28, 62-94, 1996; Marion Gindes, The Psychological Effects of Relocation for Children of Divorce, 10 Am. Acad. Matrim. Law 119, 1998; and Arnold Stolberg and James Anker, Cognitive and Behavioral Changes in Children Resulting from Parental Divorce and Consequent Environmental Changes, 7 J. of Divorce 23 (1983).

In the case at bar, the children have already experienced a relocation from New Hampshire to Massachusetts after the divorce in 1998, a move by the Mother in 2000, and a move by the Father back to New Hampshire in 2002, not to mention the acquisition of two stepparents and an infant half-sibling. See Findings of Fact 10, 13, 22 and 23. These already constitute numerous stressful changes such that additional disruptions are unwarranted.

The boys' ages are another reason why a relocation at this time poses greater-than-average risks. Between ages ten and thirteen, a dramatic shift occurs in which children's attention permanently shifts more and more decisively to influences outside of the home. Children become extremely attentive to their friendships and other peer relationships, their schools, their extracurricular activities and their social lives. As Waldron summarizes, "In general, moves in this age group are very disruptive to the child's adjustment outside of the home." (Waldron supra at p. 354) This concern is in addition to the special needs tying Thomas to his home community.

Still another factor weighing against the proposed relocation is the sex of the minor children. Researchers have demonstrated the importance for teenagers of having ample involvement with their parent of the same gender. John W. Santrock, and Richard A. Warshak, **Father Custody and Social Development in Boys and Girls**, 35 J. Soc. Issues 112, 1979.

We now come to the only study that has directly compared outcomes among children of divorced parents, one of whom moved away, to children of divorced

parents who stayed within a one hour drive of each other. This study was published subsequent to Burgess, Baures, Yannas and Rosenthal v. Maney (**Rosenthal v. Maney, 51 Mass. App. Ct. 257 2001**). The sample was large, constituting 602 children. They were surveyed after they had enrolled in college, so that the interval between their parents' divorce and the survey was many years in most cases, meaning that the observed effects were not transient. Moreover, the fact that they were college students biases the study towards finding less severe effects of relocation, since college students on the whole represent more successful development than children who do not attend college. Because the researchers defined a move as any relocation entailing driving time of greater than one hour, they again biased the study against finding significant effects, since one would expect longer moves to have more significant impacts on children. In 82 percent of the families that relocated, the move took the child away from the father, either because the mother moved away with the child, or the father moved away alone.

The researchers utilized fourteen measures of well-being among the students. They concluded as

follows, "We find a preponderance of negative effects associated with parental moves by mother or father, with or without the child, as compared with divorced families in which neither parent moved away. On eleven of the fourteen variables, there were significant (or, in one cases, near significant, $p = .06$) differences. As compared with divorced families in which neither parent moved, students from families in which one parent moved received less financial support from their parents (even after correcting for differences in the current financial conditions of the groups), worried more about that support, felt more hostility in their interpersonal relations, suffered more distress related to their parents' divorce, perceived their parents less favorably as sources of emotional support and as role models, believed the quality of their parents' relations with each other to be worse, and rated themselves less favorably on their general physical health, their general life satisfaction, and their personal and emotional adjustment ($p = .06$)."

Sanford Braver et al., **Relocation of Children After Divorce and Children's Bests Interests: New Evidence and Legal**

Considerations, Journal of Family Psychology, Vol. 17, 206-219, 2003.

In this one and only research study of the outcomes among children whose divorced parents relocated, the authors concluded, "On most child outcomes, the ones whose parents moved are significantly disadvantaged." (Braver et al., supra, in the abstract) The authors also concluded, "From the perspective of the child's interests, there may be real value in discouraging moves by custodial parents, at least in cases in which the child enjoys a good relationship with the other parent and the move is not prompted by the need to otherwise remove the child from a detrimental environment." Braver et al. supra at p. 216.

6) Interests of the custodial parent

The interest of the custodial parent is one of the *Yannas* factors, and in this case is essentially identical to the "good, sincere reason" offered for the removal, which has been dealt with above.

7) Interests of the noncustodial parent

Although the Father is not a noncustodial parent at the present time, he would in essence become one if the removal petition were granted. The courts have

often underestimated the anguish of fathers who lose day-to-day contact with their children, or are simply threatened with such loss. Many such fathers experience intense distress. See Ned Holstein et al, **Divorce and the Mental Health of Men, in The Mental Health of Men**, Jon Grant (ed.), American Psychiatric Association, in press; James R. Dudley, **Noncustodial Fathers Speak About Their Parental Role**, 34 Family and Conciliation Courts Review 410, 1996; John W. Jacobs, **Involuntary Child Absence Syndrome: An Affliction of Divorcing Fathers**, in Divorce and Fatherhood: The Struggle for Parental Identity, John W. Jacobs, ed., 1986; Joyce Arditti and Katherine Allen, **Understanding Distressed Fathers' Perceptions of Legal and Relational Inequities Postdivorce**, Family and Conciliation Courts Review, Vol 31, 461-476, 1993; and Edward Kruk, **The Disengaged Noncustodial Father: Implications for Social Work Practice with the Divorced Family**, Social Work, Vol. 39, 15-25, 1994, in which Kruk presents data showing that fathers who are the most involved with their children pre-divorce adapt to the pain of their reduced parenting role by disengaging the most from parenting after divorce. Because of multiple stressors, among which the reduced

parenting role of divorced fathers is very prominent, the suicide rate of divorced men is approximately eight times that of divorced women. See Kposowa,

Marital status and suicide in the National

Longitudinal Mortality Study, J. of Epidemiology and Community Health, Vol. 54, 254-261, 2000.

The interests of the Father in this case are clearly damaged by the proposed removal, both by the psychological issues mentioned above, and by practical factors. Since the trial court found that the Father was closely involved in the lives of his children (Finding of Fact 16), and judging by his tenacity in opposing the removal, it is clear that he would be hurt by the loss of his close and loving relationships with his boys were the removal to be granted.

Practical issues would also work to his disadvantage if the removal were granted. At the time of trial, the Father lived approximately seventy miles from Bristol, New Hampshire, and worked at a location an additional thirty miles in the opposite direction (Lexington, Massachusetts). Thus, weekday parenting time would require a trip to Bristol, New Hampshire of approximately one hundred miles, and a return home of an additional seventy miles. Traveling north from the

Boston metropolitan area at the end of an ordinary workday typically involves extensive traffic jams, meaning that the trip would most likely take over two hours, with the return trip probably requiring close to one and one-half hours. Even if this trip could be managed on a weekday evening, where would the father take the children? If this parenting time could be managed at all, it would inevitably consist of nothing more than dinner at McDonald's. The typical and critical functions of parenting, such as help with schoolwork, moral guidance, teaching of limits within a household setting, and all the other activities that constitute true parenting would be impossible. More likely, the Father's parenting time would be reduced to weekends.

Yet this too would be problematic, due to the Father's part-time work on weekends as a ski instructor. See Finding of Fact 63: "As a ski instructor, the Father travels up to the ski area on Saturday and returns on Sunday. It would be difficult for the Father to have parenting time with his children during the ski season, if his parenting time were to be reduced primarily to weekends."

Weekend parenting time, if it could be arranged, and if spent at the Father's home in Chelmsford, Massachusetts, would entail two round-trips for the Father, with total traveling time of close to six hours, and one round trip for the boys, with total traveling time of close to three hours. The boys, now ages fourteen and twelve, would be caught in the typical dilemma of children that age whose parents have divorced and who live at a distance from one another. While they undoubtedly love their Father and wish to see him, they are both at ages at which peers and weekend activities are of great interest to them. They will be torn between traveling with their Father to Chelmsford, Massachusetts, or engaging in the typical activities in Bristol, New Hampshire of children their ages.

The Father will also face a dilemma. If he brings the children to Chelmsford, Massachusetts, he will be responsible for disappointing their desires to be with friends and engage in weekend activities. If he exercises his parenting time in Bristol, New Hampshire, he will presumably need to pack himself and the boys into a motel. His interactions with them will lose all the authenticity of a true home

environment, which will be replaced by the artificial and sterile experience of meals at restaurants, and a motel room equipped only with a television. There will be no "full service parenting."

Yannas requires that all the relevant variables be considered collectively, with none of the factors controlling. Having examined all the relevant factors identified in *Yannas*, we conclude that removal is not in the best interest of children in most cases, certainly not in cases of joint physical custody, but also not in cases of sole physical custody in which a fit noncustodial parent is actively engaged in the lives of the children, even if only a few times per month. This is because the children form and maintain strong emotional bonds to that parent, who continues to provide psychological and other benefits to the children. We have also found that in the specific facts of the case at bar, the trial court was correct in concluding that the proposed removal would not be in the best interests of the minor children.

Fortunately, these children may be able to enjoy the best of both worlds - both parents remaining deeply and lovingly engaged in their lives. This is

because the Mother's own testimony indicates that if a removal is not granted, she would remain in the Chelmsford, Massachusetts area. This is in keeping with research findings showing that in about two-thirds of cases, custodial parents would choose to remain if their requested removal were denied. Sanford Braver et al., Experiences of Family Law Attorneys with Current Issues in Divorce Practice, Fam. Relations 51, 325-334, 2002. The stability and continuity offered to the children by this arrangement should not be disrupted by the Court. On the other hand, the trial court's changes to the parenting schedule are appropriate to the ages, sex and wishes of the children and are in conformity with their best interests.

In the case at bar, the trial court has wisely refrained from making any orders infringing the Mother's own relocation, nor has it ordered a modification of custody, but only of the parenting schedule. Its prudent and restrained decision will benefit Thomas and Silas, if the present Court upholds her decision.

CONCLUSION

For all of the foregoing reasons, the Probate and Family Court's ruling denying the removal of the minor children, keeping them enrolled in the Chelmsford Public Schools, maintaining both parents' joint legal and joint physical custody of the minor children, and modifying the parenting schedule should be upheld.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify under penalties of perjury that I sent 2 copies of this brief to counsel of record: Adam A. Rowe, Crowe & Dunn, 141 Tremont Street, 8th Floor, Boston, MA 02111 and Attorney John P. Ouderkirk, Jr., 116 High Street, Suite 112, Westerly, RI 02891-1891.

April 25, 2006
