MASSACHUSETTS BAR ASSOCIATION

SECTION REVIEW

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MAY/JUNE 2021

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CLOSE CORPORATION FREEZEOUT CLAIMS AND THE RIGHT OF REDEMPTION: FORBIDDEN FRUIT

BY MATTHEW J. GINSBURG

THE DEVIL IS IN THE DAMAGES

Closely held corporation freezeout claims are daily bread for many business litigators, or at least an occasional diversion from their steady diet of contract disputes, insurance coverage battles or license agreement quarrels.

For most business lit practitioners, the basic characteristics of a closely held corporation and the elements of a freezeout claim are well-trodden ground. However, deciding what remedies one should seek on behalf of a disadvantaged minority shareholder, and then making them stick, is a more nuanced and variable question. As a general matter, the courts have broad equity powers to fashion a remedy that restores to the minority the "reasonable expectations of benefit" withheld by the majority. *Brodie v. Jordan*, 447 Mass. 866, 870 (2006); *Zimmerman v. Bogoff,* 402 Mass. 650, 661 (1988). The options are numerous, and often depend on case-specific aspects of the relationship between the minority plaintiff and the corporation. Where the shareholder derived most of her benefit of ownership from employment, lost wages or reinstatement may be the best measure. *See, e.g., Wilkes v. Springside Nursing Home Inc.,* 370 Mass. 842, 854 (1976) (awarding minority shareholder damages for lost employment). In other scenarios, injunctive relief, a share of distributions withheld, diminution in value of the minority's shares, or disgorgement of excessive compensation might be the most apt forms of redress.

From the plaintiff's perspective, one of the simplest and most appealing remedies is the forced purchase of a frozen-out minority's stake, as it: amounts to a decisive and final dissociation from the majority; returns a guaranteed monetary value for the shares; protects the minority from the need for future litigation to enforce injunctive measures; prevents the majority from paying out corporate profits to themselves in surreptitious ways; and avoids the sharing of compelled distributions with the culpable majority that is common in derivative suits.

Interestingly, or confoundingly, perhaps, for those who tend to represent plaintiffs in such cases, the Massachusetts courts have rejected the forced share purchase as a permissible freezeout remedy. It has become clear over the decades since the freezeout claim was first recognized that only minority shareholders who reach a defined threshold of proportional ownership and can meet a demanding set of statutory criteria may force a "clean break" from an abusive majority.

CLOSE CORPORATION BASICS

Closely held corporations, which are sometimes referred to as "incorporated partnerships," are generally defined by three prominent traits: (1) a small number of shareholders, (2) the lack of a ready market for the corporation's shares, and (3) substantial majority shareholder participation in the management, direction and operations of the corporation. *See Donahue v. Rodd Electrotype Co. of New England Inc.,* 367 Mass. 578, 586 593, 328 N.E.2d 505 (1975). Close corporation stockholders owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another — that of the utmost good faith and loyalty. *See id.,* 367 Mass. at 593; *Cardullo v. Landau,* 329 Mass. 5, 9 (1952).

The Massachusetts Business Corporations Act (BCA), M.G.L. c. 156D, § 7.32 provides great flexibility to close corporation incorporators to tailor their rules of governance, and vary the corporate structure. For example, the corporate documents may eliminate the board of directors, reduce the board to one person, authorize distributions not in accordance with percentage ownership, or require dissolution at the request of one or more shareholders on particular terms. M.G.L. c. 156D, § 7.32.

DONAHUE AND PROGENY

In *Donahue v. Rodd Electrotype Co. of New England Inc.,* the Supreme Judicial Court (SJC) launched Massachusetts freezeout jurisprudence by describing the numerous ways in which the majority might oppress the minority:

> The squeezers [those who employ the freeze-out techniques] may refuse to declare dividends; they may drain off the corporation's earnings in the form of exorbitant salaries and bonuses to the majority shareholder-officers and perhaps to their relatives, or in the form of high rent by the corporation for property leased from majority shareholders . . . they may deprive minority shareholders of corporate offices and of employment by the company; they may cause the corporation to sell its assets at an inadequate price to the majority shareholders. . . .

367 Mass. 578, 588-89 (1975) (internal citations omitted).

The common denominator in such cases is the majority's whole or partial denial of the minority's right to receive his or her reasonably expected benefits of ownership. But the fact patterns vary. In *Donahue*, the defendants' principal offense was refusing to redeem the minority plaintiff's stock on equivalent terms as a member of the controlling majority had received. *Donahue*, 367 Mass. at 600. In *Wilkes v. Springside Nursing Home Inc.,* 370 Mass. 842, the majority removed the minority shareholder plaintiff and refused to rehire him as a salaried officer/director, while also failing to issue dividends. In *Rubin v. Murray,* 79 Mass. App. Ct. 64 (2011), minority freezeout took the form of payment of excessive compensation to controlling stockholders, and the accompanying failure to distribute profits. In *Brodie v. Jordan,* the plaintiff widow of a one-third owner who had served as president prior to his death claimed that the majority excluded her from corporate decision-making, denied her access to company financial information and refused

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her request that the majority comply with a stock transfer provision requiring the valuation of her shares. *See* 447 Mass. 866, 870-871 (2006).

As the *Donahue* court articulated, the freezeout is often followed by a "squeeze out." An oppressive majority may use the combination of its dominant position and the lack of a ready market for the minority's stock to force redemption on unconscionable terms:

> In a close corporation, the minority stockholders may be trapped in a disadvantageous situation. No outsider would knowingly assume the position of the disadvantaged minority [by purchasing her shares]. The outsider would have the same difficulties. To cut losses, the minority stockholder may be compelled to deal with the majority. This is the capstone of the majority plan. Majority 'freeze-out' schemes which withhold dividends are designed to compel the minority to relinquish stock at inadequate prices . . . When the minority stockholder agrees to sell out at less than fair value, the majority has won.

Donahue, 367 Mass. at 592.

BRODIE ELIMINATES THE FORCED REDEMPTION

In *Brodie*, the Superior Court ordered the majority to buy out the frozen-out minority's shares in the belief that this would remedy the defendant's mistreatment and reward her reasonable expectations as a shareholder. *See Brodie,* 66 Mass. App. Ct. 371, 385–86, *aff'd in part, rev'd in part,* 447 Mass. 866 (2006).[1] As explained by the Appeals Court in its affirmance of Judge Elizabeth Fahey's decision, the forced purchase was well within the court's broad equity powers to fashion appropriate relief, despite the absence of an explicit buy-sell provision in the corporation's organizing documents: "As is characteristic of equity practice, the final relief awarded in *Donahue*-type cases has been varied and creative, as trial judges (and, as necessary, appellate courts) have exercised their discretion to tailor their relief to the nearly limitless variety of fact patterns presented." *Id.*

The SJC saw things differently, drawing a clear boundary line on the courts' license to craft "creative" relief. While reaffirming the goal of "restor[ing] to the minority shareholder those benefits" reasonably expected but denied, and the courts' "broad equitable powers to fashion remedies," the court nonetheless cautioned against remedies that "grant the minority a windfall [or] excessively penalize the majority." *Id.* at 871. The lower court's order that the shares be bought out at an expert's estimated value had placed the plaintiff in a significantly better position than she would otherwise have been, the court found, because there was no buy-sell agreement requiring such a transaction. *Id.*

Surprisingly, the court then justified its decision based upon an idiosyncrasy of the close corporation that the freezeout claim was designed to mitigate: the absence of a ready market for the corporate stock. *See id.,* at 872. Because it was undisputed that no right to redemption existed in the corporate documents, the court found that "[in] ordering the defendants to purchase the plaintiff's stock at the price of her share of the company, the [Superior Court] judge created an artificial market for the plaintiff's minority share of a close corporation — an asset that, by definition, has little or no market value." *Id.* at 872. The "appealing" and expeditious "clean break" such a remedy provides must be resisted, as it "would require a forced share purchase in virtually every freeze-out case, given that resort to litigation is itself an indication of the inability of shareholders to work together." *Id.* at 872-73. The court also supported its ruling by distinguishing Massachusetts corporate dissolution statutes from those in other states, in which "statutes authorize the more drastic remedy of involuntary dissolution [for corporate freezeout], and thus courts have understandably inferred the power to order the lesser remedy of a buyout. In Massachusetts, by contrast, minority shareholders have no statutory right to involuntary dissolution of a corporation due to majority misconduct." *Id.* at 873 (internal citations omitted).

In *Brodie*, the court clearly intended to strike a blow in favor of close corporation continuity and stability. But in the process, the SJC arguably tilted the field sharply against the afflicted minority by ensuring that the majority has no risk of being compelled to pay fair value for the minority's shares, even where the majority has engaged in an intentional and insidious campaign to freeze them out of the business and squeeze them out of ownership. The ruling favors a sophisticated minority who has the foresight or opportunity to negotiate a buy-sell, as well as an employed minority stockholder, who receives the "value" of their ownership share in salary and thus has quantifiable losses. Conversely, *Brodie disfavors* a non-employed, passive shareholder (such as the widow/widower of the original shareholder, as in *Brodie*), a second-generation inheriting stockholder, a minority brought into the corporation under circumstances of unequal bargaining power, and an afflicted minority shareholder holding less than 40% of voting shares, who is thus without any opportunity to compel corporate dissolution under M.G.L. 156D § 14.30.

KOSHY V. SACHDEV AND SECTION 14.30

Far from swinging the pendulum back in favor of minority owners, the SJC has since explicitly affirmed its decision in *Brodie*, holding in *Pointer v. Castellani,* decided in 2009, that "we see no reason to revisit our holding in *Brodie*":

> [W]e conclude that the trial judge's order for a forced sale of FGC violated our holding in the *Brodie* decision. Because we held that a forced buyout of a shareholder was improper without some authorization from shareholders, it would be inconsistent for us now to hold that a forced sale is proper. *Brodie v. Jordan, supra* at 873 n. 7, 857 N.E.2d 1076 (calling involuntary dissolution "drastic remedy"). Nevertheless, Pointer is entitled to damages or other equitable relief from Castellani, Woodberry, Herbert, and Maurer, which will put him in the position he would have been in had the freeze-out not occurred, and compensates him for the denial of his reasonable expectations. *Id.* at 871, 873, 857 N.E.2d 1076.

Pointer v. Castellani, 455 Mass. 537, 559–60 (2009).

In *Pointer*, after finding in favor of the plaintiff, the Superior Court had ultimately ordered the parties to attempt to negotiate a buyout, with a liquidation to take place if they were unsuccessful. *See id*. Thus, in its wake, one could assume that neither a compelled buyout nor corporate liquidation was a remedy available to address claims of close corporate freezeout. *Brodie* even appears to have had a chilling effect with respect to remedies that, while not exactly a compelled buyout, come "perilously close to the buyout remedy . . . rejected in *Brodie* . . ." *Mallegni v. 57 E. Main St., LLC,* 84 Mass. App. Ct. 1129 (2014) (Superior Court rejected damages sought for majority's failure to accept third-party offers to purchase the corporation for certain value despite defendants' "proven breaches of fiduciary duty").

Until the SJC decided *Koshy v. Sachdev*

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in 2017, it was unclear whether a compelled buyout of shares was ***ever*** a viable remedy in any close corporation dispute. In *Koshy*, the SJC ruled that there was such a context, though not as a remedy for breaches of fiduciary duty or majority freezeout claims, but only where the plaintiff could successfully demonstrate "true deadlock" under M.G.L. c. 156D, § 14.30 — the corporate dissolution statute:

> The corporate dissolution statute provides that a Superior Court judge "may dissolve a corporation" if the three-part test for "true deadlock" set forth in § 14.30 (2) (i) is met. Given that the statute authorizes the "extreme" remedy of dissolution, see comment to M.G.L. c. 156D, § 14.30, 25A M.G.L. Ann. at 71-72, ***we conclude that it also authorizes lesser remedies, such as a buyout or the sale of the company as an ongoing entity***. *See Brodie v. Jordan,* 447 Mass. 866, 873 n.7, 857 N.E.2d 1076 (2006) ("In most of these States, statutes authorize the more drastic remedy of involuntary dissolution, and thus courts have understandably inferred the power to order the lesser remedy of a buyout").

Koshy, 477 Mass. 759, 771–72 (2017) (further internal citations omitted; emphasis supplied).

The *Koshy* ruling changes little for frozen-out minority shareholders who wish to force the redemption of their shares, unless they hold voting shares of at least 40% and can prove that:

> (1) "the directors are deadlocked in the management of the corporate affairs"; (2) "the shareholders are unable to break the deadlock"; and (3) "irreparable injury to the corporation is threatened or being suffered."

Koshy, 477 Mass. at 765, *quoting* M.G.L. c. 156D, § 14.30 (2) (i).

Many, or perhaps most, freezeouts do not also touch each of the stones required by Section 14.30, and the redemption remedy thus remains elusive. There are, of course, numerous ways to address this issue at the time of organization or when a minority shareholder buys into the company. But for those who lack the opportunity, bargaining power, sophistication or foresight to negotiate such protections, the fundamental vulnerabilities of the minority identified by the *Donahue* court persist. The majority's dominant position and the lack of a ready market for their stock may leave them "trapped," having to look to alternative damages theories or injunctive relief to help fulfill their "reasonable expectations" of ownership. ■

1. The citation provided is to the Appeals Court's affirmance of Associate Justice Fahey's decision in the Superior Court, as the Appeals Court provides a forceful defense of Judge Fahey's decision.

CURRENT COPYRIGHT LITIGATION INVOLVING EMBEDDED MEDIA

BY ANDREW T. WARREN

Several copyright cases involving embedded social media posts are being litigated into 2021. The topic remains unsettled law, but a pair of cases in the Southern District of New York may lead to increased clarity on the issue.

Embedding is a process in which a website, such as Instagram, provides for users to display a photo from that site elsewhere, such as on a personal or business website. Instagram uses an application programming interface, known as API, to give users this ability. The photo remains on the original server, so a technical copy is not made, but it is shared or displayed elsewhere. Two recent cases in the Southern District of New York highlight the legal issues that can emerge when one embeds the media of another.

Stephanie Sinclair, a professional photographer, brought suit against Mashable and its parent company, Ziff Davis LLC, for copyright infringement. Mashable sought to license a photo the plaintiff posted on her Instagram account for $50, but the offer was rejected. Mashable nevertheless proceeded to embed the photo into an article about female photographers. Sinclair filed suit and Mashable moved to dismiss the complaint, claiming it had a valid sublicense through Instagram. In April 2020, the court found that Instagram's Terms of Use granted Mashable the right to sublicense the photograph and dismissed the suit.[1]

In June 2020, the Southern District of New York reflected on the *Sinclair* ruling in *Elliot McGucken v. Newsweek LLC*.[2] The facts in *McGucken* were similar to those in *Sinclair*. A photographer posted a photograph of a lake on Instagram. Newsweek embedded that photo in an article about the lake without the copyright owner's consent. Newsweek claimed it had a valid sublicense through Instagram's Terms of Use. It also claimed the embedding of the image was fair use as an affirmative defense under the Copyright Act. Newsweek, like Mashable, moved to dismiss.

In *McGucken*, the court recognized the dismissal in *Sinclair*, but allowed that Instagram's Terms of Use could be interpreted in different ways. The Instagram Terms of Use provided that "other Users may search for, see, use, or share any of your User Content that you make publicly available through" Instagram. But the court pointed to a different document, Instagram's Platform Policy, which instructs users to comply with usage restrictions imposed by owners and prohibits users from violating the intellectual policy rights of others. Although Instagram had the right to license the photograph under the Terms of Use, the court found there was no evidence that Newsweek had an express or implied sublicense through that policy.

Ultimately, the court concluded that the Terms of Use and the Platform Policy combined to make the issue unclear, and the case could not be dismissed on the pleadings. The court also rejected the affirmative defense of fair use because the photograph was not the subject of the news article, and thus was not transformed through mere token commentary. A few days later, Instagram entered the fray by stating to a tech website that users do not receive a copyright license from Instagram to embed photos.[3]

The Southern District of New York returned to the embedding issue again on June 24, 2020, when it reconsidered the dismissal of the complaint in *Sinclair*.[4] The court adhered to its prior ruling that Instagram had a right to sublicense the plaintiff's photograph to Mashable. However, following the reasoning of *McGucken*, the court revised its opinion to find the pleadings contained insufficient allegations that Instagram had granted a sublicense to Mashable.

The court observed that a "license must convey the licensor's 'explicit consent' to use a copyrighted work." In line with *McGucken*, the court held that Instagram's policies were not sufficiently clear to draw a conclusion as to whether a sublicense had been granted. Sinclair's motion for reconsideration was granted and the case resumed.

Most recently, on Feb. 9, 2021, *Sinclair* was dismissed following a settlement between the parties. While fortunate for those parties to conclude litigation, the result is unfortunate for those seeking clarity on the issue of embedded images in copyright law. *McGucken* continues on, and the possibility remains that the case could set precedent for courts to rely on throughout the country.

Users should be cautious both displaying copyrighted media on social media sites and using that media to embed elsewhere. A user gives up certain control over media once it is uploaded to a site like Instagram or Twitter. All users should read terms of service and site policies to be aware of those risks. Artists and professionals who rely on their media for their livelihood should be especially cautious.

Sinclair and *McGucken* are examples of users commencing costly litigation against large companies. Without clarity on the issue of embedded media, there are steps companies and individuals can take to avoid such costly litigation. One option for users is to license the media from the copyright owner before embedding it. Another is to rely on in-house media or an in-house artist to create media for a company. Finally, Creative Commons is a public license that allows free use of the works of creators who have approved of that public use. There are different versions of a Creative Commons license available that may limit or expand the rights of the license. Individuals and companies alike can utilize those options to mitigate risk until courts provide further direction. ■

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1. *Sinclair v. Ziff Davis, LLC*, 18-CV-790 — Document 31 (S.D.N.Y. 2020).
2. *McGucken v. Newsweek LLC, et al*, 19 Civ. 9617 — Document 35 (S.D.N.Y. 2020).
3. Timothy B. Lee, "Instagram Just Threw Users of its Embedding API Under the Bus," Ars Technica (June 4, 2020, 5:32 PM), arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-embedding-api-under-the-bus.
4. *Sinclair v. Ziff Davis, LLC*, 18-CV-790 — Document 41 (S.D.N.Y. 2020).

MBA URGES OVERHAUL OF CLEMENCY GUIDELINES AND PROCEDURES

BY SABRINA E. BONANNO AND PAULINE QUIRION ON BEHALF OF THE MBA CLEMENCY TASK FORCE*

The Massachusetts Bar Association (MBA) recently adopted the resolutions of the MBA Clemency Task Force ("Task Force") urging the governor, lawmakers and the Massachusetts Advisory Board of Pardons ("Board") to take steps to ensure that guidelines and procedures used in clemency matters are fair, result in timely decisions, and do not make clemency hearings or allowance of a clemency petition rare events, as has occurred over the last several decades. The Task Force co-chairs are Sabrina E. Bonanno and Pauline Quirion, and members include Hon. W. Travaun Bailey, Hon. Robert J. Cordy (ret.), Patricia A. DeJuneas, D'Andre Fernandez, Patricia Garin, Susan K. Howards, Professor Daniel S. Medwed, Shayla Mombeleur, Hema Sarang-Sieminski, Charu Verma and Ying Wang. Lee Gartenberg (former Parole Board member) served as a reviewer of the report. The resolutions address:

- Increasing the importance and sense of urgency given to clemency matters by decision-makers;
- Using clemency as a tool to mitigate racial disparities in sentencing and incarceration;
- Changing procedures that delay and impede access to hearings and clemency relief;
- Changing clemency guidelines substantively to ensure more fairness in the clemency process;
- Modernizing guidelines to consider age and lack of maturity for the offenses of young adults;
- Modernizing guidelines to consider the increased elderly population in prisons;
- Modernizing guidelines to consider special needs of women and LGBTQ+ populations;
- Expanding and broadening the composition of the Advisory Board on Pardons;
- Modernizing guidelines on the pardon process for more successful re-entry after prison; and
- Improving data collection.

"This report is about furthering equal justice under the law and the pivotal role that a well-run clemency process can play in both correcting systemic injustices and in creating hope and thereby encouraging positive rehabilitative conduct," says Justice Robert Cordy. "It identifies the challenges our current system faces and presents thoughtful and realistic opportunities for major improvements. It could not be more timely." Click to read the report of the Task Force.

REINVIGORATION OF CLEMENCY

"Clemency is a historic remedy designed to serve as a fail-safe to address miscarriages of justice, provide motivation for confined persons to utilize resources for self-improvement, adjust sentences that no longer serve justice, and to promote successful re-entry into the community" says Pauline Quirion. "The governor, however, has not granted any commutations or pardons, and only one clemency hearing was held between the time he took office in 2015 and the date of our report. The question of how to reinvigorate clemency in Massachusetts has become urgent in this age of mass incarceration of Black and Latinx people across the country, and a pandemic that puts those in prison at high risk of infection." Sabrina Bonanno adds that "Justice delayed is justice denied. It is unacceptable that petitions can languish for years. The right to request clemency is meaningful only if people have the opportunity to have decisions made in their cases at each step of the process within a reasonable amount of time."

PROMOTING FAIRNESS AND ADDRESSING RACIAL INJUSTICE

Patty DeJuneas emphasized that "Generally, Massachusetts has a low rate of incarceration compared to other states. Seen through the lens of racial justice, however, that low rate of incarceration does not apply to people who are Black or Brown: Massachusetts has the highest level of disparities for Latinx people and the 13th highest for Black people. Clemency can and should be used to correct these injustices." A recent Harvard study also showed that Black and Latinx defendants receive harsher sentences. DeJuneas states that "drastic steps must be taken to reduce unacceptably high levels of racial injustice in Massachusetts. Because racial discrimination is difficult to impossible to prove in individual cases, the clemency process should be used as a tool to combat systemic injustices."

The Task Force concluded that present guidelines skew the results of requests for clemency in favor of denials of petitions. Patricia Garin, who has practiced before the Parole Board for over 30 years, explains that the guidelines "should focus on a person's circumstances and efforts at rehabilitation, including whether the person will pose an unreasonable risk to public safety upon release and reintegration into society." The current guidelines provide that a petitioner must have "clearly demonstrated acceptance of responsibility for the offense," but are unfair in that they equate an appeal, challenges to a conviction, raising of any defenses, or exercise of constitutionally protected rights related to the criminal prosecution, with a failure to accept responsibility. The Supreme Court has said, "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin,* 457 U.S. 368, 372 (1982). Garin said, "Thus, language to the effect that a pending appeal or challenge to a conviction or sentence is inconsistent with acceptance of responsibility should be removed from the guidelines. Otherwise, diligent representation tips the scales against allowance of clemency in most instances. The guidelines also should acknowledge that a person's unwillingness to accept responsibility in some cases may stem from the fact that they are actually innocent. In those cases, deserving petitioners should be considered for clemency. In the past, the guidelines provided that whether further incarceration would constitute gross unfairness in light of the basic equities involved in a case, including the severity of the sentence received as compared to sentences of other equally culpable and similarly situated defendants, was a ground for commutation. This earlier guideline, which allowed people to challenge sentences or convictions as racially disproportionate, should be reinserted in the guidelines."

Ying Wang, special assistant district attorney, states that "Given that so few programs are offered at prisons, petitioners should not be penalized for their inability to participate in unavailable programs. The

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guidelines criteria also should expand to include the effect of continued incarceration, including but not limited to the person's age, health, past trauma or victimization, socioeconomic history, disabilities, commitment to sobriety, personal growth, education and training certificates earned since the offense, and availability of treatment and opportunities to engage in efforts toward rehabilitation and self-improvement."

SURVIVORS OF ABUSE AND SPECIAL POPULATIONS

The Task Force concluded that the guidelines used in clemency need to be modernized to reflect the special needs of women and others who have histories of being victimized, the burgeoning elder prison population, and research on brain development related to people who committed offenses as young adults. "The vast majority of women in prison have experienced some form of sexual or domestic violence in their lifetime," says Hema Sarang-Sieminski, public policy director at Jane Doe Inc. (Massachusetts Coalition Against Domestic Violence and Sexual Assault). "Clemency for survivors of sexual and domestic violence acknowledges the impact of trauma on an individual's life and the capacity to heal, make amends and thrive with community-based care and support. Far too often, survivors of sexual and domestic violence are criminalized for acts they committed in order to survive. The trauma of prolonged incarceration intersects with the trauma of having survived sexual or domestic violence. Broader availability of clemency allows criminalized survivors to heal, rebuild relationships, and thrive toward the well-being of everyone in a community."

Pauline Quirion noted that "Recidivism declines with age, and the guidelines should be modernized to provide that age and lack of maturity at the time of an offense are mitigating factors that support clemency. While research continues, studies show that parts of the brain that control behavior are not fully developed until early adulthood and into a person's 20s. A person's age at the time of an offense is an important consideration. Similarly, advanced age, frailty, incapacity, or lack of access to an environment that is conducive to healing, recovery, or management of illness should be factors."

COMPOSITION OF THE BOARD AND DATA COLLECTION

The Task Force concluded that justice demands changes in the structural and institutional ways that clemency is administered. The Board should reflect not only the perspective of prosecutors and law enforcement, but also that of other stakeholders, such as defense attorneys; formerly incarcerated persons; experts in substance use disorders, mental health, aging and recidivism; and representatives from the LGBTQ+ community and low-income communities of color disproportionately affected by incarceration. "People bring their pre-existing views into the workplace, and those views can be sticky. A board dominated by law enforcement will inevitably inject a law-and-order mentality into clemency review and result in few grants," says Professor Daniel Medwed. Patricia Garin noted that the Board should be expanded from seven to nine members and reflect the following constituencies to provide essential perspectives that the Board currently lacks:

- No more than three members of the Board should have experience as district attorney office employees, law enforcement or corrections personnel;
- Two members should have expertise in mental health, substance abuse, aging, recidivism, and/or brain development, with at least one of them being a licensed mental health professional;
- One member should be nominated by Prisoners' Legal Services of Massachusetts;
- One member should be a practicing member of the criminal defense bar nominated jointly by the Committee for Public Counsel Services, the Massachusetts Association of Criminal Defense Lawyers and the MBA;
- One member should be nominated by the NAACP; and
- One member should be a formerly incarcerated person.

Charu Verma added that collection and analysis of demographic data about petitioners seeking clemency would (a) lead to more informed discussions regarding biases, (b) identify and expose patterns of racism, and (c) help shape policy decisions. After the death of George Floyd and others, public confidence in the criminal legal system has been shaken, and to the degree that restoration of clemency relief may restore some public trust in communities of color, that would be beneficial.

PARDONS

"Pardons are rarely granted and the guidelines are unrealistic," says Pauline Quirion, who directs a criminal record-sealing project. "The requirement that a person seeking a pardon must produce written documentation that the conviction is blocking a particular opportunity should be eliminated. Many employers do not contact applicants, let alone send a rejection letter after conducting a CORI check. The Supreme Judicial Court declined to require such proof from applicants trying to seal their criminal records. *Com. v. Pon,* 469 Mass. 296, 320 (2014). Consistent with existing case law, the guidelines should be revised to require that the Board recognize that any criminal record poses a potential barrier to jobs and opportunities, and that the commonwealth has a compelling interest in reducing recidivism." ■

*The MBA Clemency Task Force Report and this article are a collaborative effort from the task force. Members include:

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FAMILY LAW

THE COLLEGE EXPENSE/CHILD SUPPORT CONUNDRUM

BY NICOLE BARRASSO

An ounce of prevention is worth a pound of cure, so they say, and when it comes to child support and college expenses in Massachusetts, it might be worth quite a bit more. This article analyzes, and suggests solutions to, the unfair paradigm the Massachusetts Child Support Guidelines ("Guidelines") and M.G.L. c. 208, s. 28 establish with regard to child support and college expenses. As it stands, a parent who is contributing toward a child's college expenses is required to continue paying child support even after the child matriculates at college and ceases to reside at home for nine or more months out of the year.

M.G.L. c. 208, s. 28 empowers, but does not require, a court to make "appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent and is principally dependent upon said parent for maintenance." A court also may make such orders for a child aged 21 to 23, so long as the child is enrolled in an educational program (other than a postgraduate program). "Domicile" can have a particular legal meaning. For example, Black's Law Dictionary defines domicile as a "legal" and "permanent" home to which a person intends to return, even if the person actually resides elsewhere (*see* Black's Law Dictionary (6th ed. 1991)), and this definition is commonly used in cases about jurisdiction. However, in other circumstances, domicile can be equated with residence. *See, e.g., Shepard v. Finance Assoc. of Auburn Inc.,* 366 Mass. 182, 190 (1974).

The Guidelines hint at a recognition that child support for a child over age 18 who no longer lives at home is not appropriate. First, the Guidelines recite that the court has statutory discretion "to order or decline to order" such support, and state that in making a decision on the question, the court "shall consider the reason for the child's *continued residence with* and *principal dependence on* the recipient, the child's academic circumstances, the child's living situation, the available resources of the parents, and each parent's contribution to the costs of post-secondary education for the child and/or other children of the family … [and] any other relevant factors." *See* C.S.G. Section 2 (F), pars. 1 and 3 (emphasis added). It is notable that the Guidelines Task Force ("Task Force") apparently chose to equate the "domicile" requirement of M.G.L. c. 208, § 28 with residency. Given this choice, as well as requiring principal dependence on the recipient, the Task Force perhaps sought to prevent the inequity of a court ordering a parent to pay child support to the other while also paying room and board for the child who no longer lives with the recipient nine or more months out of the calendar year.

The problem is that in real-world practice, the operating assumption among many practitioners and courts is that child support continues even when the offspring heads away to college, even though under M.G.L. c. 208, § 28, for a child support order to be proper, said child must be "principally dependent" upon the recipient parent for maintenance. Rarely, it seems, is there a meaningful analysis as to whether there is, in fact, the requisite "continued residence with" and "principal dependence on" the recipient. *Larson v. Larson,* 28 Mass. App. Ct. 338, 341–42 (1990), sets forth a multi-factor analysis for "principal dependence," and makes it clear that financial support alone is not the benchmark. However, *Larson* is over 30 years old: shared physical custody is more common today, and it is also more common that *both* parents provide many forms of the sort of non-financial support identified as factors in *Larson*. This reality is rarely considered, if at all.

Too often, payors find themselves stuck in the unfortunate circumstance of continuing to pay a substantial amount of child support as well as a substantial amount, if not all, of a child's college expenses (including room and board), with modification actions providing slow, untimely, expensive and unsatisfactory relief. College acceptance letters go out in April, with deposits due in June: the wheels of justice simply do not turn quickly enough to offer any real relief to the payor.

While the Task Force did reduce the amount of child support for children over 18 by 25%, its logic with respect to children who are away at college is problematic and, overall, the Guidelines simply do not go far enough in addressing the problem at hand. Per the Commentary to Section 2 (F), third par., the Task Force's rationale behind the reduction for children who are still living at home but not enrolled in college is sensible: those adults would be working and thus contributing to household expenses. With respect to children who are in college, the Task Force wrote, "the child may be living away at school thereby reducing some of the household expenses." The crux of the problem here is that there is a financial world of difference between children who live away at college and those who continue to live at home during college. Further, as demonstrated below, the painfully minimal reduction in support bears no relationship to reality.

The mathematical analysis of how support changes when a child is added to a family, or turns 18, reflects how ar bitrary the calculations can be. Assume that the payor parent earns $100,000 per year, the recipient earns $50,000 per year, and the recipient has two-thirds of the parenting time (for the sake of simplicity, this example does not factor in a health insurance expense). If those parents have only one child under 18, the support order under the Guidelines would be $366; once that child turns 18, the order drops by $92 per week to $274. If that child is living away at college nine months out of the year, does the recipient really need $274 per week ($14,248 per year) to care for the child?

If that same family has two children under 18, the support order would be $458 per week (an increase of $92 over the family with only one child under 18). When the eldest child in that two-child family turns 18, the support drops by only $23 to $435 per week. If the eldest child is living away at college, why does the payor get a break of only $23

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per week, especially since the Guidelines presume the need increases by $92 when a second child is added to the family, and there is a $92 reduction when the child in the one-child family turns 18?

The math becomes more challenging when one factors in college expenses. Assume that the eldest child of the two-child family attends UMass at Amherst and the parties' separation agreement obligates each parent to contribute one-third of educational expenses (a fairly common default in separation agreements). Currently, the annual expenses for UMass at Amherst are almost $30,000: this translates to each parent owing $10,000, i.e., a weekly expense of $192. If the payor was lucky enough to have a successful modification to reduce the weekly child support order to the presumptive $435, the payor will now be paying out $627 per week, almost one-third of the payor's gross income. Under this scenario, the payor is essentially subsidizing the recipient's share of college expenses.

As noted, the Task Force may have recognized there is a problem with regard to ordering child support when the child has gone off to college. The commentary notes that between 1976 and 2017, expenses for public and private four-year schools increased 250%. Per a Dec. 17, 2020, Massachusetts Continuing Legal Education (MCLE) panel titled "Reoccurring Issues with Child Support and College," the Task Force recognized that a "one size fits all approach" would not be appropriate and sought to encourage deviations and flexibility. The commentary to the principles underscores this intention: "The Task Force included Principle 5 regarding deviation to highlight that, where appropriate, the Court should deviate from the presumptive child support order amount … The Task Force acknowledged the sentiments expressed by attorneys and litigants that there may be hesitation by the Court to deviate from the presumptive child support order."

The practical problem, as Judge Edward F. Donnelly Jr. noted in the aforementioned MCLE program, is that deviations, in practice, are rare, and there is no clear guidance in the Guidelines as to what happens at the intersection of child support and college. For example, paragraph 4 of Section 2 (G) mandates that a court, which is exercising its discretion to order support for a child over age 18 and contribution to the child's postsecondary educational expenses, "consider the combined amount" of both orders: but what exactly does this mean? How is a court to "consider the combined amount" of such orders?

Most, if not all, practitioners wish they had a dollar every time a client said that he or she would gladly pay money directly toward a child's benefit (e.g., college) rather than pay child support to the recipient. Whether justified or not, there is a psychological cost for payors whose child support obligation does not change, or changes only minimally, upon a child's attaining age 18 and departure for college. Until the Guidelines change, a forward-looking approach when drafting separation agreements should be employed to protect a payor client's finances, and overall sense that some fairness has been done, when children turn 18 and head off to college. Simply telling a client that he or she can file a modification action when the time comes does a disservice to the client. Even if modification actions resulted in meaningful financial relief (a dubious proposition given that deviations are, in practice, viewed as rare and extraordinary), no relief will be timely. Further, any gains achieved in litigation may well be outweighed by the associated costs.

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A drafter of a separation agreement must consider and address directly the college expense/child support conundrum. Of course, given the ingrained practice that child support presumptively will continue (with minimal or no reduction) after a child heads off to college, one will have to offer a carrot to the recipient. Creativity may be required. An agreement that automatically reduces or terminates child support upon a child's matriculation at college, but that also provides for the payor to take on a greater share of college expenses in lieu of child support, may strike a balance that both parties can tolerate. The agreement might perhaps also provide for child support to resume during any time the child resumes living with the recipient (e.g., winter or summer breaks) and, in so doing, account for the reality that many college students do not strictly adhere to a parenting plan and instead come and go from both parents' homes as they please. At a minimum, an agreement should contain triggers for automatic review that align with upcoming life changes (e.g., at the beginning of the child's senior year of high school when the college application process begins) as well as an alternative dispute resolution clause to avoid the expensive and inefficient modification process.

Child support is supposed to be, at least somewhat, rooted in genuine need. *See Macri v. Macri,* 96 Mass. App. Ct. 362, 368 (2019), *citing Brooks v. Piela,* 61 Mass. App. Ct. 731, 737 (2004). Until the Guidelines are amended to take a more real-world approach to how support needs to change when a child heads away to college, it is up to attorneys to take a proactive approach to ensure that their clients pay support in line with this principle. ■

JUDICIAL CONSTRAINT AND PARENTING TIME IN MASSACHUSETTS: HOW THE LAW PREVENTS JUVENILE COURTS FROM PROTECTING FAMILIES AGAINST AN OVERBEARING DEPARTMENT

BY SIMON DAILLIE

It has long been recognized that people have a right to familial cohesion while the government has the capacity and responsibility to interfere with the integrity of the family when necessary. Laws that intrude on family life are ostensibly intended to strike a balance between these two principles. When the government removes a child from a parent, the extent and conditions of contact between that child and his or her parents must be arranged. The circumscription of child-parent contact is a parameter of the ongoing removal. The harmful impact of separation is defined, in large part, by the extent to which subsequent child-parent access is restricted. When a child is placed with strangers, the harm of separation on the child is intensified. To ameliorate the trauma, the state must ensure the provision of appropriate parenting time. The executive, judicial and legislative branches all play roles in how parenting time is decided after a removal.

JUDICIAL DEFERENCE TO THE DEPARTMENT

In Massachusetts, the Department of Children and Families has initial "jurisdiction" over parenting time in care and protection cases filed in Juvenile Court. Courts in the commonwealth only modify the department's parenting time plan if it is deemed an abuse of discretion. In the typical case when a child is in stranger foster care, parents are relegated to a singular one-hour visit each week at the department's offices for at least six months with little chance for a modification. A combination of case law, statute and policy has led to this imbalance of power on parenting time.

The term "custody" is defined within the General Laws to include the "power" to "control visits to a child." Under this definition, a parent who "objects to the carrying out of any power conferred" therein "may take application to the committing court and the court shall review and make an order on the matter." M.G.L. c. 119, § 21. The statute does not provide any standard for determining the conditions and circumstances of parenting time orders and lacks any instruction as to what level of scrutiny is to be applied when reviewing the department's provision of familial contact.

In 1984, the Supreme Judicial Court (SJC) issued two decisions that addressed judicial discretion and departmental control over parenting time. In *Care and Protection of Three Minors,* the court held that the department has "virtually free rein" over the conditions of parenting time "subject only to a petition for review." 392 Mass. 704, 718 (1984). While accepting its deferential position, the court did acknowledge a critique of its own position: "'[t]he paternalistic justification for this broad discretion — that the professionals and not the parents always know what is best for children — underlies most of what is wrong with the present system. Thus, reform that fails to end the blind deference to professionals will be inadequate.'" *Id. (quoting* R.R. McCathren, "Accountability in the Child Protection System: A Defense of the Proposed Standards Relating to Abuse and Neglect," 57 B.U.L. Rev. 707, 731 (1977)).

In *Custody of a Minor (No. 2),* the court clarified the standard where the department seeks to terminate parent-child contact. 392 Mass. 719, 725 (1984). "[B]efore terminating visitation rights, a judge must make specific findings demonstrating that parental visits will harm the child or the public welfare." *Id.* To support this encroachment on department discretion, the court quotes M.G.L. c. 119, § 35, as giving parents "the right to visit their children if 'the welfare of the child and the public interest will not be injured.'" *Id.* This reliance on Section 35 fails to include surrounding language that assigns the court seemingly greater authority over parenting time. Section 35 provides that the court may require the department to permit parents "to visit the child at such times and under such conditions as the court orders" and "may revise its order or make new orders or decrees as the welfare of the child and the public interest may require." M.G.L. c. 119, § 35. Section 35, however, authorizes the "probate court for the county," and not the Juvenile Court, to issue such orders, thus creating potential doubt as to the section's application in Juvenile Court, where nearly all child protective cases are heard. *Id.*

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In 1995, the SJC decided two cases on judicial discretion over custodial decisions by the department. The court addressed the statutory requirement, pursuant to M.G.L. c. 119, § 21, that the Juvenile Court must "review" any petition filed by a parent objecting to the department's execution of its custodial powers. As parenting time is one of the statutorily defined custodial powers granted to the department, it is broadly accepted that these decisions apply to the parenting time context even though both cases related to foster care placements.

In *Care and Protection of Isaac,* the court addressed the implications of the word "review" in Section 21. 419 Mass. 602, 610 (1995). "The word 'review' requires, in the context of judicial consideration of an administrative decision, a reexamination of an agency's actions, and not a *de novo* consideration of the merits of the parties' positions." *Id.* The court looked to precedent outside of child welfare to determine the level of scrutiny warranted by the term "review." When a business entity sought legal relief after a request for a license to open a video-game arcade was denied, the SJC held that the appropriate level of judicial review would be the "'arbitrary and capricious' test." *Caswell v. Licensing Commission for Brockton,* 387 Mass. 864, 878 (1983). The court in *Isaac* held that the same legal standard as applied in *Caswell*, "arbitrary and capricious," must be applied by trial courts in reviewing the department's custodial actions due to "[c]ompelling policy considerations." *Id.* The commanding policy consideration was a legisla-

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tive mandate that the department administer a "complex social services program within the constraints of a finite annual appropriation." *Isaac*, 419 Mass. at 611. The reasoning for this deferential level of judicial review of all custodial decisions regarding children in foster care was articulated in three sentences about the judiciary refraining from "impinging" upon "executive functions." *Id.* Left unaddressed were the constitutional and policy counter arguments against this approach.

There is an unsaid but crucial distinction between the cases relied upon in *Isaac* and the context of a child protective filing in Juvenile Court. Decisions such as *Caswell* and *Roslindale Motor Sales Inc. v. Police Commissioner of Boston* involve administrative actions taken prior to and independent of court involvement. 405 Mass. 79, 84 (1989). In *Caswell* and *Roslindale Motor Sales*, the judicial involvement arises only after the executive agency has denied a license. In the typical department-initiated child removal case, the department's authority to make custodial decisions commences only after the court takes underlying jurisdiction over the matter first and then grants the department temporary custody. The department's custodial powers are dependent upon, and a function of, the court's authority.

In *Isaac*, the appeal regarding the child's placement was filed after the child was adjudicated in need of care and protection and committed to the department's permanent custody. The court in *Jeremy* ruled that the "arbitrary and capricious" standard adopted in *Isaac* would also apply to pre-fact-finding custodial decisions made by the department while the child was in its "*temporary* custody." *Care and Protection of Jeremy,* 419 Mass. 616, 618 (1995). The distinction between a pre- and post-adjudicatory posture is that in the latter, the department has proven by clear and convincing evidence that the parent is unfit "to further the welfare and best interests of the child," while in the former, it has proven nothing. *See Custody of a Minor,* 389 Mass. 755, 766 (1983) (*quoting Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption,* 383 Mass. 573, 589 (1981)). The court decided in *Jeremy* that this distinction has no effect on the scope of judicial review because it finds no statutory language indicating that the "definition of 'custody' set out in Section 21" is inapplicable prior to an adjudication. 419 Mass. 616, at 619. The court hands the department carte blanche over all custodial decisions about a child whose parents have not been proven unfit, subject only to a meager "arbitrary and capricious" review. *Id.* at 623. In its conclusion, the court "recognize[s] that the statutory scheme is, in some respects, unclear and leaves room for" opposing parties to "make conflicting arguments about the proper role of a court in reviewing the department's placement decisions" and suggests that the "Legislature may wish to examine the statute to state more definitively the scope of a court's authority when passing on those decisions." *Id.* Over 25 years later, the Legislature has done nothing of the sort.

JUDICIAL CONSTRAINT AS A VIOLATION OF PROCEDURAL DUE PROCESS

What process is due to a parent or child who seeks to challenge a department decision to provide one hour of family time per week at an agency office? The 14th Amendment provides that the state shall not deprive any individual of their "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Is the "arbitrary and capricious" test sufficient process for parents and children seeking family time orders in Juvenile Court?

The test for evaluating if the process provided is sufficient was established in *Mathews v. Eldridge.* 424 U.S. 319 (1976). The three factors laid out by *Eldridge* are: (1) the private interest impacted by state conduct; (2) the "risk of erroneous deprivation of such interest" and the "probable value, if any, of additional or substitute procedural safeguards;" and (3) the interest of the state, including the "function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335. The three-part analysis was adopted in the context of state intervention within the family domain in *Lassiter v. Department of Social Services of Durham County.* 452 U.S. 18, 27 (1981).

One year after *Lassiter*, the Supreme Court held that procedural due process requires that a termination of parental rights be based on a "clear and convincing evidence standard of proof." *Santosky v. Kramer,* 455 U.S. 745, 769 (1982). In a shift from the majority in *Lassiter*, Justice Harry Blackmun in *Santosky* progresses the state interest in the welfare of the child by attaching an ongoing presumption in favor of family integrity. "[W]hile there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae* interest favors preservation, not severance, of natural family bonds." *Id.* at 766-767.

The "Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois,* 405 U.S. 645, 656 (1972). Amongst those "values" should be a child's and parent's interest in spending time with one another while custody of the child has been temporarily granted to the state. Due process was "designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy." *Id.* An "overbearing concern for efficiency and efficacy" is found in the nearly automatic cookie-cutter visitation plans being manufactured for families in Massachusetts. The parameters of parent-child contact merit a *de novo* judicial review, and the state's concern for efficiency should pose no obstacle. That *Stanley* ought to imply greater due process is little consolation for families until that precedent is brought to bear on the department.

PARENTING TIME LAW IN THE OTHER 49 STATES

Forty-seven states have established a legal framework that permits the court to conduct a *de novo* review of parenting time. Only Massachusetts, Kentucky and North Dakota restrain the Trial Court from addressing parenting time unless the plan is so irrational as to be deemed an abuse of discretion. These states, constituting less than 4% of the national population, are outliers from the nearly unanimous national preference that courts have the authority to grant and modify parenting time orders based on the merits.

Most states have enacted laws that assign trial courts the authority to define parenting time during a child protective case. Virginia unequivocally assigns broad judicial discretion over parenting time, authorizing the court to "grant visitation rights" and to "state the nature and extent of any visitation rights granted." VA Code Ann. § 63.2-912. The Nebraska Supreme Court provides guidelines on parenting time, which recommend that parents receive robust time with their children, including a minimum of five visits per week when the child is under 18 months; four visits per week when the child is between 18 months and 3 years old; three times per week when ages 3 to 8; and twice a week when ages 8 to 14. "Guidelines for Parenting Times for Children in Out of Home Care," Nebraska Supreme Court Commission on Children in

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the Courts (June 12, 2009).

In Maryland, courts have held that a trial court "may not delegate judicial authority to determine the visitation rights of parents to a non-judicial agency or person." *In Re Mark M.,* 365 Md. 687, 704 (Md. 2001). In *Mark M.*, the court noted that it "would be an improper delegation of judicial authority to allow the Department to determine the minimal level of access to a child." *Id.* The contradiction inherent in asking a court to take jurisdiction over a child by filing a petition but then immediately relinquish it regarding parenting time was not lost on a Connecticut court that soundly rejected the department's argument for judicial deference. *In re Christopher M.,* 2008 WL 249744, *4, 44 Conn. L. Rptr. 782 (Conn. Super. Ct. 2008).

CONCLUSION

There are various paths toward protecting parenting time from within the child welfare system. However, parenting time is a community and political issue that requires legislative involvement in Massachusetts. Lawmakers can enact parenting time frameworks for state intervention cases. The statute should grant the judiciary the authority to issue parenting time orders on a *de novo* basis without deference to the department. The new law should permit the judge to address parenting time frequency, duration, location, and supervision requirements within its orders. The legislation should follow the example of Michigan and incorporate basic minimums for parenting time frequency and length into the law.

The United States has a history of policies that have removed children from their parents in oppressed communities on a variety of legal grounds. Many fathers "did not walk out on their families voluntarily; they were taken away in handcuffs, often due to a massive federal program known as the War on Drugs," noted Michelle Alexander in *The New Jim Crow.* The formerly legal but hideous institution of slavery also separated families. And with the enforcement of child welfare laws, the families that are broken apart are poor and working class and disproportionately Black or Hispanic. This is not to conflate all forms of state-mandated parent-child separation, but rather to suggest that history requires a closer scrutiny of legal child removal, and all its features, than we may otherwise be inclined to undertake. ■

PROBATE LAW

CASE SUMMARY: *FOISIE V. WORCESTER POLYTECHNIC INSTITUTE* (1ST CIR. 2020). NO. 19-2090

BY ANTHONY GEMMA

The U.S. 1st Circuit Court of Appeals recently reviewed a District Court decision in which the ex-husband's alleged conduct inspired them to quote Sir Walter Scott: "what a tangled web we weave . . . when first we practice to deceive."

In 2010, Janet and Robert Foisie decided to end their long-term marriage. They hired a private mediator and reached a divorce settlement agreement ("Agreement") in which each of them kept roughly $20 million in assets. As part of the negotiation and agreement, both certified to one another and to their mediator that each had fully disclosed all of their assets. In 2011, Janet filed a marital dissolution action in their home state of Connecticut. In that action, Janet and Robert submitted their Agreement to the court, together with their financial statements. Both affirmed before the court that the financial disclosures were accurate and consistent with their Agreement. At their request, the court entered a stipulated judgment of dissolution of their marriage pursuant to the terms of the Agreement.

In 2015, suspecting that Robert had not told her everything about assets he owned at the time of their divorce, Janet engaged in further civil discovery of Robert's finances. Through Robert's responses, Janet came to learn that Robert lied during their divorce about his ownership of substantial undisclosed overseas assets and rights to payment under numerous loan agreements. These undisclosed additional assets amounted to at least $39 million in value. Janet further alleged that Robert later transferred those assets as charitable gifts to his alma mater, Worcester Polytechnic Institute (WPI), following their divorce, in an effort to defraud her. Based on these discoveries, Janet sought to reopen the divorce case and brought a parallel civil action in tort and contract claims against Robert. Basing her claim under the Massachusetts Uniform Fraudulent Transfer Act (UFTA), Janet also filed the instant action seeking to avoid the transfers Robert (a non-party) made to WPI after their divorce, and to recoup those assets as part of the marital estate to which she was entitled.

WPI defended the action by way of a motion to dismiss alleging a number of different grounds. Among those grounds, WPI argued that Janet as a plaintiff did not qualify as a "creditor" of Robert (the debtor who made allegedly fraudulent transfers) and therefore did not have such standing as a "creditor" entitled to relief.

Under the UFTA, a "creditor" is defined as "a person who has a claim." A "claim" is defined to include a right to payment, whether or not that right is reduced to judgment, legal or equitable in nature, contingent or disputed. Applying these definitions to the facts, the court found that Janet adequately presented a "claim" where she alleged she had a right to payment from Robert at the time of the transfers, both through her motion to reopen the divorce and her parallel civil action. The fact that her claims were disputed, unresolved and not reduced to judgment did not prevent her from meeting the requisite definition of a "claim" to have standing as a creditor entitled to relief under the UFTA.

WPI countered that an earlier Massachusetts case, *Welford v. Nobrega,* narrowed the definition of "creditor" such that Janet lacked standing. *Welford v. Nobrega,* 565 N.E. 2d 1239, 30 Mass. App. Ct. 92 (Mass. App. Ct. 1991), *aff'd,* 586 N.E.2d 970, 411 Mass. 798 (Mass. 1992). In *Welford*, 11 years after the couple's divorce, the ex-husband purchased a winning lottery ticket with his companion and thereafter transferred the winnings to a trust. The ex-wife claimed that she was entitled to an adjustment of alimony and support based on the winnings and sought to avoid the transfer to trust under the UFTA. The Probate Court sided with the ex-wife's claim that the ticket proceeds were fraudulently transferred, but the Massachusetts Appeals Court reversed. On appeal, the Appeals Court found that the ex-wife was not a creditor of her ex-husband or entitled to relief under the UFTA. While spouses may qualify as creditors with respect to transfers that occur when divorce is imminent, no Massachusetts case had allowed a divorced spouse creditor status when seeking modification of outstanding orders after the divorce became final. In order for the ex-wife to be a creditor of her ex-husband for her lifetime, special circumstances must exist unrelated to the prior marriage.

WPI's argument did not persuade the federal court. The court found the language of *Welford* to be both dicta, and distinguishable from the facts of Janet's claims. In *Welford*, the assets in question, the alleged fraudulent transfer and the plaintiff's claim to the assets all developed long after the divorce. By contrast, Robert's hidden assets, Janet's claim to the assets and her right to payment existed at the time of their divorce proceeding and therefore entitled her to standing as a creditor.

The court held that Janet's UFTA and common-law claims were adequately pleaded, vacated the lower court judgment of dismissal against her, and remanded the case to the District Court for further proceedings, including a redetermination of the law that governed. The court found that both Massachusetts and Connecticut had significant relationships to the litigation, and asked that the issue be revisited after the parties completed their discovery and brought more information before the court.

Here, WPI is not alleged to have done anything wrong. In light of this decision, it seems prudent for donees to continue to closely scrutinize the circumstances in which large gifts are received, particularly in the context of a gift from a recently divorced donor. As the court did in this case, a donee may continue to look for so-called "badges of fraud" evidencing "circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent." Examples in this case included that Robert concealed assets from Janet during their divorce in his financial representations, and that he transferred substantially all of his assets to WPI, making himself insolvent. ■

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Prior to starting his civil practice, he served as an assistant district attorney in the Norfolk County District Attorney's Office and the Middlesex County District Attorney's Office, where he tried numerous Superior Court jury trials.

Gemma has made annual presentations to local councils on aging concerning elder law and topical issues affecting seniors. He is a member of the Massachusetts Bar Association's Elder Law Advisory Committee and Probate Law Section.

ENGLISH LANGUAGE PROFICIENCY: AN UNDEREXPLORED APPELLATE BASIS TO INVALIDATE AN ESTATE PLAN

BY HON. GEORGE F. PHELAN

There is a long-standing presumption in Massachusetts that when a testator signs a will, he/she knows its contents. *Richardson v. Richards,* 226 Mass. 240 (1917). The presumption is rebuttable. *Dobija v. Hopey*, 353 Mass. 600 (1968). But there is no Massachusetts case explaining the required standard of proof to overcome the presumption. *Barounis v. Barounis and another,* 87 Mass. App. Ct. 667 (2015) discussed preponderance of the evidence in other states but also talked about "clear" or "satisfactory" evidence without ever stating whether clear evidence should be the new standard or is a standard. The standard of proof becomes significant when wrestling with issues of English language proficiency in the execution of wills and trusts. According to the Massachusetts Trial Court Office of Language Access (formerly Office of Court Interpreter Services), in-court interpreter services are offered in more than 60 languages (or 113, according to another page on the website) and produced 90,730 interpreter events in FY 2012 (latest data posted to website). Given the influx of immigration, imported cultures and languages to Massachusetts and around the country, language proficient to understand the will's contents remains a fertile basis for will contests, yet it has rarely been invoked in our appellate decisions.

Haddad & Another v. Haddad, Individually and as Trustee, 99 Mass. App. Ct. 59 (2021) was a Superior Court lawsuit involving three brothers fighting over their father's estate. Allegations made were fraud, deceit, conversion, unjust enrichment, lack of testamentary capacity in executing the will, and undue influence. In addition to invalidating the will, the plaintiffs also sought an accounting and declaration of a constructive trust. The only theories presented at trial were lack of testamentary capacity and undue influence. The only issue raised on appeal was testamentary capacity. However, there was significant evidence that warranted another basis to invalidate the will: lack of knowledge of its contents where a testator primarily dealt with life in a language other than English.

The testator/father was an immigrant to the United States some 39 years before his death in 2017. He had three sons, two of them were the plaintiffs and the third was the defendant in the case. The defendant/son was single, had always lived in the family home and claimed that he became the testator's primary caretaker. The testator's primary and daily language was Arabic, and his English was limited. But he had proficiency to permit him to function to the degree needed for his daily activities and his work as a watch repairman. He needed the translation of his sons for more complicated matters like medical appointments and legal issues.

In 2004, the testator and his three sons together went to an attorney to establish the testator's estate plan that included a will and a trust to hold the house. Under both instruments, the testator was the sole beneficiary during his lifetime, and other provisions called for the three sons to be equal beneficiaries under both the trust and the will when the testator died. The testator's health declined after brain surgery in 2010. The defendant/son continued to be the testator's primary caretaker.

The testator had begun a long, slow health decline. Four months before July 2011, he had surgery on his hip and leg, became more confused and his English at that point was minimal. Hospital notes from March 2011 indicated no evidence of a dementing process, although he performed poorly on a mini mental status examination.

On June 14, 2011, the defendant/son took the testator to meet a lawyer arranged for by the testator's brother-in-law. The two plaintiff sons were not told. The brother-in-law as well as the defendant/son translated for the testator and the lawyer. The essence of the meeting with the lawyer was to make the defendant/son the sole beneficiary of the testator's estate plan (a will and an amended trust) as well as personal representative under the will and trustee of the trust. A power of attorney and health care proxy were also discussed, with the defendant/son as agent.

On July 12, 2011, the defendant/son (without the testator's brother-in-law) transported the testator to the attorney's office. The attorney asked a series of questions in English and claimed to be satisfied that the testator had the requisite mental state. The will, trust amendment, power of attorney and health care proxy were executed.

Two years later, the primary care physician noted that the testator was having memory issues. On June 14, 2013, nearly two years post-execution, a consulting neurologist concluded that the testator had "profound dementia" and pointed to the results of an EEG showing severely reduced brain transmission. The neurologist was later permitted at trial to interpret brain scans and testify about the testator's mental health in 2010 and 2011 before the instruments were executed. However, at that time, the neurologist was not the physician treating the testator. The testator died in 2017 at the age of 88.

The Appeals Court emphasized that it was only the date and moment of execution that mattered with respect to capacity. Thus, even hallucinations and delirium weeks before execution of the will are not enough to rebut the presumption of capacity. There was no evidence about capacity on the day of execution, and thus, the presumption of capacity was not rebutted and the plaintiffs did not carry their burden of proof.

The Appeals Court made multiple references to "testamentary" capacity as the applicable standard of proof yet did not differ-

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English Language Proficiency
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entiate whether a different capacity standard applied to the execution of the trust amendment, power of attorney and health care proxy. *Black's Law Dictionary* equates "testamentary" only to instruments disposing of property. Given that the trust in this case appeared to already hold title to the decedent's house even before the trust amendment was executed, it is curious why the court referred to only one capacity standard as covering the entire "estate plan." It was unclear from the opinion whether there was other valuable probate property that passed through the will, a material fact given that the trust already owned the decedent's house.

Now, the language issue: the Appeals Court aptly pointed out that the attorney who drafted the instruments and handled the execution ceremony did not speak the testator's language, and the defendant/son was not an independent translator. But lack of knowing a will's contents due to language deficiency does not bear on testamentary capacity, which was the only issue pursued on appeal. The issue of lack of English proficiency was at least viable and may have been the stronger theory of the case to invalidate the will on grounds of improper execution due to lack of knowledge of the will contents.

Indeed, the Appeals Court wrote that "we have no doubt that the judge would have discredited (the attorney's) testimony that he was able to communicate adequately with (the testator) in English on the date of execution." The Appeals Court noted that there were not a lot of Massachusetts cases on lack of English proficiency, but in this case, no parties raised as an appeal issue the lack of English proficiency, and thus, there was no evidence to rebut the presumption of proper execution. The Appeals Court pointed to a number of cases, most from states other than Massachusetts.

Barounis v. Barounis and another, 87 Mass. App. Ct. 667 (2015) was another siblings battle involving competing petitions to probate wills executed five months apart (November 2003 and April 2004) by their father. The contest was tried on undue influence, testamentary capacity and not knowing will content theories. Originally, a 1998 will gave only a nominal sum of money to the daughter, with the remainder to the other two siblings equally.

In 2003, the testator-father asked the daughter to find a Greek-speaking attorney because the testator's command of English was not good; he had a minimal ability to read English, could not write it and spoke only basic conversational English. In a meeting at the Greek-speaking attorney's office on Nov. 21, 2003, the attorney spent one and a half hours describing the estate plan (50-plus pages), which included a will and trust. The thrust of the estate plan was that the daughter would receive the entire estate. The attorney explained the effects of the estate plan to the testator, who executed the will and a trust. A few months later, one of the other siblings became aware of the 2003 will.

In 2004, the testator's longtime accountant recommended a meeting to review the testator's estate plan because of changes to the estate tax laws. At a meeting during which Greek was spoken, they talked of modifying the 1998 estate plan. The accountant recommended an attorney who did not speak Greek. The attorney procured by the accountant did not meet with the testator prior to drafting the 2004 will as well as other estate planning documents. The attorney relied on the accountant during two separate conversations as to the decedent's purported dispositive wishes. The attorney included an "in terrorem clause," which had not been discussed with the testator nor the accountant and had not been instructed by the accountant. The estate plan was 70 pages long, yet neither the accountant nor the non-Greek-speaking attorney reviewed a draft with the testator. The attorney sent out a draft (it was unclear to whom) and received back from an unknown person handwritten corrections in the English language.

At the execution ceremony on April 14, 2004, the non-Greek-speaking attorney met the accountant at the testator's home. The signing ceremony was about 40 minutes in duration and included income tax returns. The 2004 will and estate plan gave the daughter only a nominal sum of money. Despite not having read the 70-page estate plan, the accountant gave the testator an explanation in Greek of the documents but did not explain to the testator what the dispositive provisions were. The testator signed the 2004 estate plan without reading the will, which contained obvious errors, including misspellings of the names of the children. The attorney spoke only in English, and it was translated by the accountant to the testator. The accountant had provided his own interpretation of the testator's wishes to the attorney. The attorney's sole source of information was the accountant. The accountant testified that the discussion in Greek between the accountant and the testator was very simple and did not contain any substantive affirmation of dispositive wishes ending up in the will. One of the other siblings paid the accountant, who kept some of the money, while also giving some to the attorney and $100 to one of the witnesses. The Appeals Court, in affirming the trial court disallowance of the will, accepted the trial judge's finding that the testator did not read English, could not speak it in a sophisticated way, and was unaware of the contents of the 2004 will.

Dobija v. Estella Hopey and others, 353 Mass. 600 (1968) involved a blind, elderly and widowed testator who, despite speaking primarily Polish, understood English extremely well, according to witnesses' testimony. The testator executed a will in July 1965, 12 days before her death. There were four witnesses, one of whom was the drafting attorney. The attorney who drafted the will restated it in English in the testator's presence and testified that she understood English extremely well, and that there was no language problem. The other three witnesses corroborated that testimony. One was a former housekeeper who spoke primarily in Polish to the testator. One of the contestants conceded that the testator's English was fair. The evidence was not sufficient to rebut the presumption that a person signing a written instrument knows its contents.

Probate counsel should be on alert for what might be many future will petitions or trust litigation where the testator's/settlor's primary language is not the English in which the instruments were written. This legitimate issue is often overlooked in favor of the more traditional and tactically tempting grounds of undue influence and lack of testamentary capacity. Counsel must also understand that knowledge of will contents is distinct from testamentary capacity. ■

LIVING IN TERROR(EM) OF PROBATE LITIGATION: NO-CONTEST CLAUSES

BY PATRICIA L. DAVIDSON AND LEAH A. KOFOS

Some parents never cease refereeing their children's grievances, even well after the parents have died and many decades have passed since the offspring first dueled over who punched whom first. Through *in terrorem*, or "no-contest" clauses, testators and grantors can provide a mechanism to punish objectors for airing grievances about the terms of an estate plan or the discretion and actions of the appointed fiduciary. No-contest clauses warn would-be objectors to think long and hard before contesting a testamentary instrument or risk getting "cut out."

Many states, including Massachusetts, have long recognized no-contest clauses. No-contest clauses are now codified under the Massachusetts Uniform Probate Code, G.L. c. 190B, §2-517: "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is enforceable." No-contest clauses are usually not "boilerplate," but are adopted by testators/grantors who are aware of likely contention among beneficiaries. While a no-contest clause cannot prevent a would-be litigant from filing suit, it can and should be a significant deterrent. Indeed, some authorities argue that no-contest provisions should be strictly enforced even if the contestant had good grounds for the contest. The concept is that courts should respect and uphold the intent of a testator or settlor and advance a policy in favor of the freedom of disposition; courts should not rewrite the plain language of an instrument to reflect the court's sense of justice.

As a result, a no-contest provision can present significant contradictions. How does a court balance a credible allegation of wrongdoing against unambiguous language in a no-contest clause? In practice, Massachusetts courts struggle with how to enforce the clauses, particularly when faced with good faith and even meritorious objections. What if the will really was the product of fraud or undue influence? What if the named personal representative really did breach a fiduciary duty? Should the court have a trial on the merits before adjudicating a no-contest provision? Does a no-contest clause permit a fiduciary to act with impunity? How does the court balance the no-contest clause with the general rule that any trust provision purporting to relieve the trustees of the duty imposed by law, e.g., filing an account, is against public policy?

A recent decision from the Massachusetts Appeals Court helps clarify how to invoke the clause and the consequences of the clauses. In *Capobianco v. DiSchino*, 98 Mass. App. Ct. 1101 (2020), in an unpublished decision, the Appeals Court upheld a judgment that a beneficiary of a trust had violated a no-contest clause by filing an action against the trustees. In that case, the settlors were a married couple who had each executed a trust. Each trust held title to the settlors' LLCs. Each trust included a no-contest clause because the settlors were concerned about litigation within the family. Upon the settlors' deaths in 2009 and 2010, Daniel Capobiano was appointed trustee of the trusts. Subsequently, the settlors' son, Charles DiSchino, was appointed as a co-trustee.

In 2013, a beneficiary of the trusts, Dennis DiSchino, filed an equity complaint in the Norfolk Probate and Family Court seeking: (1) to replace the trustees and remove Charles as manager of the LLCs; (2) to appoint Dennis as sole trustee and manager of the LLCs; (3) to enjoin the trustees from transferring any trust assets while the action was pending; and (4) to obtain an accounting of the trusts and the LLCs. The trustees responded by seeking judgment that Dennis had violated the trusts' no-contest clause by filing the equity complaint and, therefore, that he had forfeited his beneficial interest in the trusts. In 2015, the trustees filed an additional action in the Suffolk Probate and Family Court that sought to enforce the no-contest clause. The cases were consolidated in the Fiduciary Litigation Section (FLS).

In ruling on cross motions for summary judgment seeking a declaration on the applicability of the no-contest clause, the FLS entered summary judgment on the Suffolk action, finding that Dennis had violated the no-contest clause by filing the action in Norfolk County, and therefore had forfeited his beneficial interest in the trusts. The FLS then dismissed the Norfolk action and awarded the trustees attorney's fees. Dennis appealed.

The Appeals Court initially found that the trustees lacked standing to bring the Suffolk case. But the Appeals Court determined that it could review *de novo* the decision to dismiss the Norfolk case and upheld the lower court's findings that Dennis had violated the no-contest clause by filing the Norfolk action. The court determined that Dennis' fatal flaw was seeking to replace the trustees with himself. Although Dennis did not try to challenge the legitimacy of the trust document itself, his prospective actions would have violated the trust terms. The court stressed that if Dennis had been successful in his request to oust and then personally replace the co-trustees, the succession of trustees would not have been carried out in accordance with the trusts' terms. The court reiterated the concept that no third party, including any beneficiary or interested party, has the authority to recalibrate the specific directive in a trust to conform to a personal sense of what is right or wrong.

The Appeals Court stressed that because equity does not favor forfeitures, no-contest clauses should be construed narrowly. Nevertheless, it concluded that language in the trusts was intended to foreclose both challenges to the trusts and challenges to any of the provisions of the trusts, including amendments. The Appeals Court stressed that the complaint filed by Dennis in the Norfolk action pointed directly at the provisions of the trusts that govern the trustees, the appointment of successor and co-trustees, and the authority of trustees to act as managers of the LLCs.

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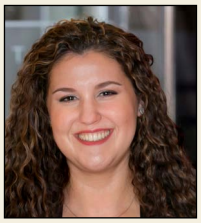

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As *Capobianco* demonstrates, no-contest clauses can often be useful if the settlors are worried about feuding family members challenging a validly executed will or trust. A no-contest clause is not supposed to be punitive; it is supposed to prevent adversarial proceedings, provide for the orderly administration of an estate or trust, and minimize expenses. It can also insulate fiduciaries who often have the difficult task of trying to provide order among beneficiaries, usually family members, who may be experiencing a wide variety of complex emotions and/or demonstrating questionable behaviors. While the inclusion of a no-contest clause cannot prevent beneficiaries from creating an adversarial proceeding, beneficiaries should certainly think twice before stirring up trouble. Testators and grantors/settlors who adopt no-contest clauses do not want fights after their deaths. They believe in the integrity of their documents and the integrity of their fiduciaries. And they are entitled to include arguably imprudent language in their documents. ■

BRITISH CERAMICS AND LAW FIRM MARKETING

BY SUSAN LETTERMAN WHITE

What can you learn about marketing your law practice from a British guy that made pottery?

Josiah Wedgwood lived in a small village that few people traveled beyond when the average lifespan was 33 years. He, like many others of that time and place, apprenticed to be a potter when ceramics were luxury items, and a pottery business was a craftsperson plus a few assistants or apprentices turning out a few useful, fully completed objects, one at a time. He had three insights that led to the creation of a successful and enduring product line and brand.

Josiah's first insight was to seek out the growth potential of his business rather than imposing unspoken limits. I imagine him wondering whether he could produce pottery with sales to more than a few local customers annually. He must have framed his challenge as: How might I persuade the wealthiest people that my pottery is as valuable and desirable as fine porcelain? I've most recently written about the link between framing problems and effective problem-solving here. How many lawyers limit their growth potential by never wondering what is possible beyond the assumption that all lawyers sell their expertise and time to a limited group of prospective clients?

His second insight was to understand the value he wanted to offer his customers as something different from that offered by his competitors. They produced useful objects with modestly profitable sales to local buyers. He produced perfect craftsmanship and beauty for wealthy patrons all across Europe, Russia and the Americas, who followed the trends set by royalty and aristocracy. How many lawyers copy what they see other lawyers and firms doing and never wonder about options to differentiate and focus deeply on who becomes a referral source?

His third insight was to introduce technology to redesign pottery production so that he could keep up with the wants and expectations of his ideal customers. He needed properly skilled workers and also efficient production. If he had copied what was already being done, he would have hired potters or potter apprentices; instead, he hired the untrained and trained them in his methods. If he had copied his competitors, his measure of a skilled laborer would have been someone able to produce a piece of pottery from start to finish; instead, he created one of the first assembly lines where each worker mastered a particular stage of the production process. He needed focused production perfection coupled with process efficiency that would be continually adjusted and improved by skilled managers. Sound familiar? How many lawyers use technology to its fullest potential or integrate process improvement into their business model?

So far, none of what I'm describing is what lawyers think of as marketing. Marketing for lawyers is getting noticed by the prospective clients who will decide to buy what you are selling. It's about connecting where there is already a fit. What if you are a lawyer who is struggling to find and get noticed by the right clients? Then, you need to create the fit.

Josiah Wedgwood created the fit first and then marketing was just about getting noticed. Begin marketing by asking what needs to happen before the people you want as clients would want to buy what you are selling? Josiah knew that his ideal customers wanted expensive, beautifully crafted pottery. He created it and then branded all of his merchandise with his name and gave away free samples to people, who then bought more and were emulated by others, who began purchasing. His branding and marketing efforts ensured that what he was selling would be noticed by his ideal customers, those who saw and wanted what their neighbors already had. He created referral sources.

Law firms grow when lawyers produce and then market the services, experiences and relationships that clients want to buy. That creates referral sources. How do lawyers do this effectively and efficiently? They continually collect and evaluate information about what their best clients want, expect and prefer. They consider how those wants, expectations and preferences will change in the future and then adapt the services, experiences and relationships they offer.

1. FIGURE OUT WHAT YOUR IDEAL CLIENTS WANT AND MARKET THAT.

Clients want to eliminate problems and obstacles and retain, recover or grow something they value. When the pathway requires legal help, they want the experience to be as pleasant as possible. Clients want results, not time and expertise. When the financial and emotional cost to obtain the result is less than the value of the result to the client, the client becomes a repeat client or referral source. The relationship and advice are valuable when they help the client feel better.

When a client believes they have received an increase of value by working with their lawyer, the client becomes a repeat client and/or referral source. Value, as perceived by clients, is a combination of results and how the lawyer makes the client feel in the relationship. Does the client feel understood, respected and cared about?

Marketing begins with the service you are selling. Continually seeking out and making sense of client wants, needs, expectations, preferences, interests and concerns is the foundation for effective marketing. You must sell what clients want — service and experience.

This past year with COVID has changed how people think and feel about value and their values. Consequently, buying and relationship behaviors have changed, and what matters most to your ideal clients has changed too. Professional and personal boundaries have blurred, and empathy and respect are expected in professional relationships and sought out elsewhere if absent. Digital is second nature. Marketing now means asking:

- What do your ideal clients want that requires legal expertise?
- What would make the client feel understood, respected and cared about?
- How do your ideal clients perceive the value of working with you?

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- What can you do to create and deliver more value?

2. CONNECT WITH CURRENT AND PROSPECTIVE CLIENTS REGULARLY.

Communicating with clients and prospective clients without billing for your time strengthens a relationship and makes it possible for you to collect information that you need for an informed business strategy. People will remember how you made them feel, even if they forget what you said and did for them. Relationships are built on emotions. If you want people to remember you in a positive light, spend the time to connect with them. Client loyalty grows from regular interaction where you add as much value as you take away.

Ask people to describe the pros and cons of their experience working with you or other lawyers. Too often, a fear of criticism or being too intrusive stops lawyers from asking what value means to any particular client. Solicit ideas for improving what you offer and how you provide those services. Find out what you do well and what they wish you would change.

Find ways to keep in touch with a broad group of prospective and current clients, from face-to-face presentations, online or phone feedback surveys, or a shared cup of coffee. Have a list of open-ended questions to ask, then listen.

3. COMMUNICATE EFFECTIVELY.

Clients are not always able to assess the financial cost-benefit of working with a particular lawyer, but they are always able to assess how the relationship will make them feel. Lawyers are always selling themselves and their ideas, making marketing and business development more difficult than in other sales relationships. Lawyers get new clients by selling themselves and their ideas as the best resource and process for a client to grow, retain or recover something that, in the perception of the client, is valuable. Hiring a particular lawyer is really a series of decisions about the lawyer's character and communication style, in addition to the decision about value.

The decision about character is whether the client believes they know, like and trust the lawyer. The more the lawyer and client have overlapping networks of people, the easier it is for the lawyer to establish credibility and for the client to decide the lawyer is competent and reliable.

The decision about whether communication styles match is more complicated. Imagine an analytical lawyer talking a lot, but with little emotion, to a client, who is tearfully expressing worry about paying the bills and managing pain after an accident. The lawyer is focused on evaluating the legal issue and is demonstrating that through a communication style, while the client is focused on whether the lawyer cares about the client as a person and not just a legal issue. The client may quickly conclude that working with this particular lawyer will be unpleasant.

The decision about whether styles match is unconscious, and yet it informs a client's decision about whether to respect and trust the lawyer and whether working together productively will be possible. We have natural communication tendencies we gravitate toward without thinking. In fact, the higher our stress level, the more likely we will fall into our natural communication style. Some styles mesh and others clash. Effective interpersonal communication is a consequence of being aware of your style, noticing different styles in others, and flexing your style as needed. Like mastering a new skill, you first learn the skill and then, over time, with lots of practice, it becomes easier and you become better at it.

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THE BUSINESS CASE AND BLUEPRINT FOR LEADERSHIP DEVELOPMENT

BY SUSAN LETTERMAN WHITE

THE VALUE OF LEADERSHIP DEVELOPMENT PROGRAMS

The cost of leadership development programs is not only financial. They also divert lawyers' time and attention away from the legal work. It makes sense to know whether the return on that investment will outweigh the expense.

There is a plethora of research showing a direct correlation between the perception of leaders as outstanding and their organization's revenue generation, profitability, employee productivity and retention, and customer loyalty and satisfaction. Any company, regardless of purpose, industry or headquarters, performs better with excellence in leadership as perceived by others. While some results of the research are expected, others are quite surprising.

It is not surprising that organizations with poor leaders perform poorly. **It is surprising that organizations with average leaders are substantially outperformed by those with outstanding leaders.** The collection of skills that makes this difference is also surprising.

Leaders are required to be strategic planners and design step-by-step processes for reaching performance goals, like revenue and profit targets. If they are good leaders, we expect them to meet targets. In fact, there is a direct correlation between strategic planning capability and organization efficiency, effectiveness and financial performance. It makes sense that the better leaders are at designing and implementing plans for improving revenue and profit, the better the plans and their execution, and the better the results.

There is also an unexpected, direct correlation between key performance metrics and the perception of people as excellent leaders because of their strengths in helping colleagues solve a problem, seeking out others' ideas, or a variety of other interpersonal skills or skills related to agility, learning and change. People are evaluated by their bosses, peers and direct reports as outstanding leaders because of these skills and behaviors and not whether or not their organization is profitable, yet the organization is considerably more profitable when leaders

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are perceived as outstanding in these skills.

In the legal field, there are always skeptics who may argue lawyers, legal departments and law firms are different. Yet, across all industries, interpersonal skills matter and their absence often overshadows any value of extraordinary technical expertise. It's not difficult to imagine that people will stop listening to the regular instigators of conflict or the narcissists who repeatedly talk about themselves. Yet harmony-seeking, selfless leaders who lack strong interpersonal skills lead companies where knowledge is not shared, ideas are never developed into valuable assets, and collaborative, trusting relationships are never forged. The cost is often existential. I've worked with several law firms that no longer exist, despite strong revenue and profitability, because partners needed harmony and avoided conflict and difficult conversations, literally, at all costs.

WHAT IS LEADERSHIP?

Leadership is the intentional influence of others to complete projects that require a group effort. Some may argue that there are no group efforts to deliver legal solutions. Law is packed with people who have a preference for independence in their work and a love of applying deep legal expertise to solve problems. However, as the general counsel of a large international company, it's easier to see that the evolution in role parallels that of the chief financial officer 20 years ago.

Today's general counsels, along with their CEOs, choose their role. It is between aligning the legal function's strategy with that of the company or being a technical expert within many different areas of the law. The deep legal expertise is still needed; however, a new set of responsibilities for general counsel has emerged. It includes delegating tasks to the right legal subject matter expert while also assuming a leadership role as strategy partner with the CEO and entire senior leadership team.

This is a solution born out of the consequence of complexity. Today's business world is clearly complex. The challenges are more like managing traffic than building the engine of an automobile. But so is today's world for the client who is looking for help managing their wealth, navigating governmental obstacle courses to collect benefits, or recovering value lost because of an injury or lost job. It's the complexity, volatility, lack of clarity and lack of predictability that require lawyers to have much more than deep legal expertise to help their clients in the ways clients expect and want.

It's interesting that there is a collection of leadership skills that shows up over and over as being correlated with excellence, even though research also shows that excellence in leadership is all about the fit between what the leader does and what the organization needs. Winston Churchill was not recognized as an excellent leader until Dunkirk, and after World War II, he was voted out of office. There are lots of stories about people who were successful leaders in one organization only to be fired for poor performance shortly after moving to a new one.

Leadership is about competencies (sometimes called skills, capabilities, abilities), not styles or business models *per se*. Competencies are expressed through every style that meshes with every law firm, from those with a lockstep compensation business model to those with an individual achievement model. A decision to skip leadership development based on the belief that lawyers and law firms are too different from every other business is not a logical, analytical or sensible decision. It is contrary to the existing evidence and in fact is evidence of the need for leadership development in decision-making in a firm or law department that is not performing up to its highest potential.

The answer to the question of whether or not leadership development is sufficiently valuable is obvious when you examine the right data. If data about the law firm or law department's key performance indicators is weak or average, the value of leadership development far outweighs its cost.

DESIGNING LEADERSHIP DEVELOPMENT PROGRAMS

Focus on Excellence

Design a leadership program to develop excellence in the competencies that matter most for the organization, industry, role and career level. Extensive research tells us that poor leaders cost an organization in lost revenue, profitability and employee performance, but the surprise is that the performance difference between organizations with average leaders and those with outstanding leaders is dramatic. Aim for excellence in leadership. Great matters. Good is not good enough.

The aim of most developmental programs is to eliminate weaknesses instead of developing strengths. There is a difference between a fatal flaw or career stopper and a weakness. Research has repeatedly shown that selecting one to three skills that are among the relative strengths of a person and honing them is more likely to propel the person's career forward than is turning a weaker skill into an average skill.

Focus on select behaviors

Include the behaviors that routinely show up in high-performing organizations across all industries and geographies, and a variety of research studies. There is considerable data that successful leaders are achievement-oriented, able to influence the thinking, emotions and actions of others, and are able to learn and adjust to change. Many of the related behaviors are:

1. Making complex decisions
2. Demonstrating a learning mindset and resilience
3. Taking initiative
4. Mediating and negotiating conflict and differences
5. Establishing stretch goals and plans to achieve them
6. Building relationships and influencing people
7. Attracting, developing and optimizing diverse talent
8. Being courageous, trustworthy and authentic
9. Being flexible and adaptable
10. Having a client and outside focus

In addition to behaviors that routinely show up in high-performing organizations, legal technical competence, financial acumen, technology competency, and ethics are important capabilities for lawyers. Communication for lawyers includes capturing and retaining the attention of prospects and clients through conversations about how to create, retain or recover what the client considers valuable, in addition to advocating, mediating and negotiating to resolve conflict. These are the differences that explain why excellence is also a matter of "fit" between the leader and organization. Yes, there are some leadership differences that legal industry leaders need.

Each capability is really a combination of different skills, behaviors and approaches. For example, having a client focus means developing and demonstrating an understanding of what motivates your clients' decisions. It means knowing what they want and expect, rather than what legal solutions they need.

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Communicating with clients means explaining legal solutions and client responsibilities clearly and concisely, and also conveying empathy and understanding of their perspective on value. Hint, value to a client is not how much time it takes you to have a conversation or write a brief. Having an outside focus means noticing changes on a macro and micro level, from your prospective clients and competitors today to economic, demographic and social changes that affect who your prospective clients and competitors may be in a year and your options for connecting with them.

MEASURE USING STANDARDS

Since the measure of effective leadership is the perception of subordinates, peers and bosses, use a 360º assessment tool to establish a baseline and capture improvement measures after developmental efforts. A well-validated 360º assessment is the best predictor of leadership talent potential and the best measure of current levels of competencies. A good assessment defines the behaviors being measured, and a Likert scale will measure degrees of excellence. Once you have data about the baseline and improvement aims, you can create a step-by-step action plan for leadership performance improvement.

An example from the Korn Ferry Leadership Architect model and assessment defines a "towering strength" as rare; "the best people may have only a few towering strengths." It defines a "serious issue" as a "pressing need to improve … hurting performance … career could be stalled or stopped" because of it. A good assessment defines the skills being evaluated. An example defines the skills of "Drives Results" as a person who "has a strong bottom-line orientation. Persists in accomplishing objectives despite obstacles and setbacks. Has a track record of exceeding goals successfully. Pushes self and helps others achieve results."

DEVELOP THROUGHOUT A CAREER USING TRADITIONAL AND UNTRADITIONAL TOOLS

When the details of an individual's career intersect with the details of an organization's talent cycle, there is a fit. A talent cycle is the series of processes that work together to create a consistent pool of people with the right skills and fit with the organization to carry out its purpose. It begins with: (1) recruiting for defined positions; (2) making the decision to hire; (3) the onboarding process; (4) the developmental and evaluation processes; (5) career advancement, reward, recognition and compensation; and (6) termination. Development and evaluation work in tandem.

The most widely accepted theories on how to develop new knowledge and skills in adults combine traditional learning methods, like lectures and reading, with the ongoing application and practice of new behaviors over time with reinforcing and redirecting feedback to master a competency. After a person decides to strengthen a capability, that person studies and learns a new skill, then applies the skill to a real-life situation and practices it over time. Ideally, the learner receives outside feedback and reflects on its effectiveness until it becomes an outstanding strength admired by many and possessed by few people. Sometimes performance coaching is included as a means to emphasize reflection. Leadership development efforts that add objectively measurable value to any organization include using the skill with regular job duties. It is the extensive practice of a skill over time that transforms an average skill into an outstanding one.

An important leadership skill for most lawyers is business development. This is relationship-building communication that captures the attention of prospective clients and influences their decision to hire the lawyer. There are several components to the communication skill, including understanding and being able to notice communication preferences and differences, learning to adjust your own style, and knowing when to say what in a "sales" conversation. There is information to consume by reading or watching a video (traditional learning methods) followed with practice time, including role-play, to improve new behaviors. Untraditional learning methods, like role-play, performance feedback and coaching, support the required practice to transform knowledge into behavior and beginner behavior into talented behavior.

A person becomes an expert in a skill with practice and coaching. Think of top athletes and musicians. They all practiced every day for many years before becoming experts in their fields. It's the same for any skill. You learn how to do something; engage in intensive practice, often with coaching; and then plateau without continued practice and an intention to improve. Whether a leader wants to hone business development or management skills, it takes an intensive learning period that may include watching other leaders, receiving formal and traditional training, coaching, and planning actions in advance.

SOURCES:

John H. Zenger and Joseph R. Folkman, *The New Extraordinary Leader, Turning Good Managers into Great Leaders* (2020).

Nancie Lataille and Gabriella Kilby, "The Legal Function Transformed: Best Practices of Today's General Counsel," (2008). ■

HOW TO SUBMIT ARTICLES

To inquire about submitting an article to *SECTION REVIEW*, contact Kelsey Sadoff (KSadoff@MassBar.org).

THOUGHTS AND CONSIDERATIONS FOR LAWYERS LOOKING TO TRANSITION TO A SOLO OR SMALL FIRM

BY DAVID J. VOLKIN

Four score and … Ok, maybe not that long ago, but over four years ago, I transitioned from firm life to the life of a solo practitioner. There were a lot of changes in how I spent my working hours and several cultural changes. Here, in this article, I will relay my personal experiences and challenges I faced, as many other people who are forced into this challenge or want to make the change may have a similar experience.

There is a process to making the transition. There are many questions I had to think about, including:

1. Do I want to remain in Boston or someplace closer to home, or just do a virtual office and work out of the home?
2. Do I want to focus my practice on one or two areas, areas I have experience in, or become a generalist?
3. Do I want to form an LLC or be a sole proprietor?
4. How do I open a business bank account and set up an IOLTA account?
5. How do I maintain an IOLTA account?
6. Do I want to hire a receptionist or paralegal, use a service, or just pick up my own phone calls?
7. What furniture, equipment and software will I need?
8. How do I inform existing clients about the move?
9. How do I get new clients?

I found that these questions were only the beginning of the journey. And while it may seem daunting, these questions are addressable if you come at them with a plan of action as opposed to waiting for things to become a problem and then figuring out the solution. Being lawyers, you need to approach your new business with the same vigor as you would handling a client's case. If that is just not "you," then perhaps rethinking the idea now rather than making the big move is preferable.

Once you have made the leap, it is important to have both feet in — whether it's the investment in small things like business cards, to longer-term commitments, such as leasing an office, or signing contracts with companies like Westlaw or Lexis.

LOCATION

Deciding on whether to work in the city or not is the first question, understanding that some clients still have a perception that "Boston lawyers" are intrinsically better than lawyers in the suburbs. One easy solution is to get a "mailbox office" so that you can keep an address in Boston and any mail that comes there is sent to you. Another option is to rent one or a group of offices but share reception and conference rooms. Another lower-cost option is to sublet a space from an existing firm with extra office space. Post-COVID, there is likely a lot of office inventory or going to be a lot of office inventory in the city.

However, there is nothing wrong with opening up an office outside of the city. The advantages include reduced commuting times and generally a lower cost (depending on the town). Today, many sophisticated law offices operate in the suburbs doing complex commercial litigation to mergers and acquisitions. While the advantage to being in Boston is the implied marketing, the advantage to being in the suburbs is access to clients who may not want to go to Boston for legal services either out of convenience or the perception of fee amounts.

Depending on the type of law, some attorneys can work directly from home. Some have homes that can be co-zoned for business where a client and work area can be separated from the residential part of the home. More often, some people prefer to work from home for the convenience but will rent conference room space to meet with clients.

AREA OF PRACTICE

Choosing an area of practice requires some thought. As opposed to an attorney fresh out of law school, it is assumed that you have spent some time working in one or two areas of law. Just because you have experience in one or two areas doesn't mean you can't change, but it requires more work.

Some thought needs to be given to how easy it will be to position yourself in that area as a small-firm or a solo practitioner. You need to consider your size and how able you would be to handle certain types of cases or projects. You may also want to broaden your area of expertise to take on more potential clients.

Living as a generalist in the suburbs can also be a good living if you are not taking cases you cannot handle. The advantage is that you can focus your marketing and advertising to the local community.

Unlike in years past, you can also be a specialist and thrive in the suburban market, but it does require marketing to areas at least as large as the county.

BUSINESS FORMATION

Other than issues dealing with taxation, this does not need to be decided right away. Many people start as a sole proprietor and move into an LLC, LLP, PC or other type of formation. However, it often does require changes to the bank account and any contracts you may have with vendors or landlords.

OPENING A BANK ACCOUNT/IOLTA

If you are an attorney who takes fees upfront for work not yet performed (retainers) or accepts settlement payments on behalf of your clients, you may need to create an IOLTA account. Not all banks offer IOLTA accounts, and it must be a designated IOLTA account, i.e., you can't just create a savings account and call it an IOLTA account. IOLTA accounts are regulated, and reading the rules carefully if you have not been responsible for one before is crucial to a successful practice. The vast majority of bar complaints resulting in suspension relate to the mismanagement of IOLTA funds. The Massachusetts Law Office Management Assistance Program (Mass LOMAP) and the Massachusetts Bar Association (MBA) have useful guides and seminars on IOLTA management.

The other thing to note is that to open a bank account as a sole proprietor, most banks will require that you provide a business registration from your local town hall (local to where your business is predominately going to be done).

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HIRING EMPLOYEES

The next big decision is whether to do everything on your own or to hire. Hiring can be expensive, and you must comply with the employment and tax laws. Alternatives can be hiring a service or paying a temp agency for support when needed. Often, it depends on what type of practice you will be running and your own comfort level in doing tasks that are not billable or not ethical to bill (such as secretarial work). If you choose not to hire anyone or use any alternatives, you need to be comfortable doing the routine aspects of running a business by yourself, and that non-revenue-generating work can take up a substantial portion of your time. Whether it is bookkeeping, answering calls or creating envelopes, there are a lot of non-revenue-generating tasks.

However, like choosing how to form your business, this is one area that also can be done later as your new business grows. Often, an early mistake people make is to take on employees without having sufficient work for them or you to perform, leaving all of your revenue going to pay salary and other overhead.

INITIAL PURCHASES

When thinking about opening your own office, many decisions need to be thought through. If you are having clients in your office, do you need a conference room, a large table, a desk? Do you want to rent space already furnished? Minimally, you should make sure you have a good workspace including a desk, comfortable chair (you will likely spend more time in the office chair than any other furniture you own), a computer (or laptop), printer and phone (whether it's your cellphone, hard line or Voice over Internet Protocol phone).

For the full range of technology you may need in starting your new office, I would suggest looking at the MBA seminar I participated in this past fall as part of the Resilient Lawyer series, which had several panelists go over such issues. That subject alone could be a 30-page article. However, litigators need some access to case law, whether it is the free service that comes with the MBA subscription, the Social Law Library, or Lexis or Westlaw. The other software purchases that should be considered include word processing, accounting, practice management and document editing.

NOTIFICATION TO CLIENTS

How clients are notified depends on whether you are a partner in your existing firm. If you are a partner, there are additional duties you must do to ensure compliance with the ethical rules and your fiduciary duty to the remaining partners. An associate has no such fiduciary duty but must still comply with any relevant ethical rules on notifying or actively seeking to keep existing clients. All parties need to remember that a client can always choose their attorney.

GETTING NEW CLIENTS

If you were not the rainmaker at your previous firm, you may have questions about how to obtain new clients. While marketing strategies may differ depending on the type of law you do and whether you practice in downtown Boston or in the suburbs, there are universal strategies. The first is actively growing your network of lawyers in your networking circle. Fellow lawyers are often the biggest area of client referrals, whether you meet them through the bar association or they have been on the same or opposing side of a deal or case and you invite them to get a cup of coffee (post-COVID). With local or state bar associations, being a member alone rarely is going to build your base of clients. It is called networking because it involves work. That means being active in those organizations. There are also associations from paid networking groups to chambers of commerce. It is not unusual to spend an average of two to four hours a week in marketing and networking. Some actions have short-term results, and others may take over a year to come to fruition, but both are necessary.

In addition to marketing, there is also direct advertising. Whether it is a local billboard, town paper, digital advertising such as search engines, or lawyer directories, there are a lot of options and prices. There are people who will do it for you and easy ways to do it yourself. Having a website is also a part of advertising, and care should be taken in making sure it looks professional, as your business website does reflect on you even if it is not an accurate reflection.

CONCLUSION

While it is an intensely important decision to make for your career, the question of whether to open a solo practice should not consume you. If you become consumed by the process, try to keep these steps in mind, talk to other lawyers who made moves similar to the one you are contemplating, and try to get a good feel for whether that style of practice is conducive to you. It is not a decision that is right for everyone, and many people can be equally successful no matter which route they take. But giving thought to these areas will either help get you moving in the right direction, whichever direction that is, or help you get to some of the fundamental questions you may not have known to ask of yourself or others. ■

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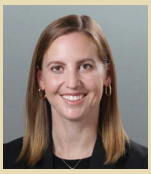

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