Commonwealth of Massachusetts
Supreme Judicial Court

ESSEX COUNTY

No. SJC-11010

AMY E. HUNTER,

PLAINTIFF-APPELLEE

v.

MIKO ROSE,

DEFENDANT-APPELLANT

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

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES PRESENTED

1. Whether the trial court properly evaluated a young child's best interests when it ordered a transfer of custody from her mother, with whom she had lived her entire life and with whom she had an extremely close bond, to the mother's same sex partner without considering the effect of transfer on the child and by ignoring undisputed evidence that the child was thriving in her mother's care.

2. Whether the trial court properly ordered "legal parent" status in Massachusetts for each of two same sex partners as to the other's child by enforcing a California domestic partnership scheme which is illegal under the Massachusetts Constitution.

3. Whether the trial court properly decided that when a mother moved from Massachusetts to Oregon with her daughter, the removal was unlawful even though the "legal parent" status of the mother's same sex partner in Massachusetts had not yet been established.

4. Whether the trial court properly assessed $180,000 in attorneys fees against a mother as a penalty for litigating the question whether her same sex partner is a "legal parent" to the mother's child

under a California scheme which violates the Massachusetts Constitution and for requiring a trial on the issues bearing on her young daughter's best interests in a custody dispute.

STATEMENT OF THE CASE

This appeal presents compelling issues regarding children and parental status in the context of a same-sex relationship. In an extraordinary decision following lengthy litigation, the trial court ordered that a three and one-half year-old child be immediately removed from her mother's custody and returned from Oregon to Massachusetts to live with her mother's partner. The judgment was issued with no consideration of the child's extremely close bond with her mother (with whom she has always resided), of the effects of the custody change on that relationship, or of undisputed evidence that the child is doing well in her mother's care. Instead, the court decided that the partner is the child's "legal parent" in Massachusetts based solely on a California domestic partnership scheme, because the parties never married in Massachusetts and the child was never adopted by the partner in Massachusetts. The California scheme, however, discriminates against same-sex couples and

their children and is illegal under the Massachusetts Constitution. The court's ruling confers parental status at the expense of full consideration of the child's best interests which Massachusetts law requires and must be reversed.

1. Statement of Prior Proceedings

Approximately one month after defendant and her fourteen-month-old daughter J moved to Oregon in October, 2008, plaintiff, her same-sex partner, filed a complaint which sought custody of J . This was followed on December 12, 2008 by a complaint for divorce under G.L. c. 208, § 1B and an equity complaint seeking dissolution of the parties' California domestic partnership, physical custody, and return. In addition, plaintiff sought temporary orders seeking custody, return, and the appointment of an evaluative guardian ad litem ("GAL"). Defendant filed answers and motions to dismiss. On February 2, 2009 the court (Cronin, J.) denied the motion to dismiss; "recogniz[ed]" the California domestic partnership as a "legal spousal relationship"; established a parenting order which gave plaintiff access to J ;

but refused to order return of J .[1] On March 16, 2009, following the assigned judge's recusal, the judge who eventually presided over the trial was assigned to the case [A. 805-06, 808, 810].[2]

On August 10, 2009 the court (Manzi, J.) issued a "memorandum of decision" which ruled that each party is a "legal parent" of the child born to the other based on the parties' domestic partnership "with all the rights and responsibilities as described in the California statute".[3] On the same date the court appointed an attorney as the "GAL/next friend" to "represent the interests of" both of the children. On October 16, 2009 the court issued a further temporary order refining the parenting schedule, providing that the parties have joint legal custody of J , and ordering that defendant retain primary physical custody. After issuing orders on several pretrial motions and procedural issues, a seven-day trial took

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[1] As stipulated by the parties, the court also consolidated the complaints.

[2] On February 22, 2009 defendant had sought relief from the Single Justice under G.L. c. 231, § 118 regarding the interlocutory order which concluded that plaintiff's registered domestic partnership gave her "legal parent" status, but that relief was denied by the Single Justice (Duffly, J.) on March 16, 2009, Appeals Court No. 2009-J-84.

[3] Plaintiff's daughter M had been born in January, 2009.

place on November 4, 5, 8, 9, and 19, 2010 and on January 28 and 31, 2011 [A. 813-14, 817-18].

On April 20, 2011 the court issued a "judgments of custody and dissolution", "procedural history, findings of fact, and conclusions of law", and "rationale and further findings of fact". The court ruled that the parties' registered domestic partnership in California was a "legal spousal relationship" and that each of the parties is a "legal parent" of the other's child; ordered that the parties have "joint legal custody" of J with "physical custody" awarded to plaintiff subject to a parenting schedule for defendant; ordered that J be returned to Massachusetts and transferred to plaintiff's "physical custody" within four days; granted plaintiff sole legal and physical custody of M ; established a parenting schedule for defendant; ordered that the parties refer to each other in the children's presence as "Mommy [ ]" or similar terms; and ordered each of the parties to refer to each of the children as "sisters or sibling". There was no provision for child support [A. 797-803].

On May 26, 2011 the court entered "further judgments" which addressed the question of attorneys

fees and which ordered that defendant pay to plaintiff $180,000 in annual installments of $30,000 [A. 949-51]. The judgments were timely appealed [A. 923, 952].

2. Statement of Facts

Defendant summarizes the facts found by the trial court as follows, and in addition points out undisputed material evidence which was not addressed by the court and findings which should have been made (but were not) based on that evidence.[4]

A. Facts Found By Trial Court

The parties began their romantic relationship in 2001 and lived together in Massachusetts until they moved to California in spring, 2002. Plaintiff was employed as an attorney for the United States Department of Education's Civil Rights Office and the move was intended to facilitate defendant's attendance at medical school in California. On September 30, 2003 the partners registered as domestic partners in California pursuant to Calif. Fam. Code §§ 297 and 297.5, subsequently exchanged rings, and purchased a home together. Effective January 1, 2005 the California statute regarding domestic partnerships was

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[4] The trial court's findings, with only isolated exceptions, were an adoption of plaintiff's extensive proposed findings [A. 804-91, 639-731].

changed, giving registered partners greater rights and obligations regarding property and family, and prior to that date persons who had registered could opt out. The parties did not do so [A. 821-23, 819].

The parties became jointly involved in the effort to have plaintiff conceive a child through artificial insemination but after those efforts were unsuccessful began, in 2006, to attempt the same through defendant's insemination with donor sperm. As a result defendant conceived J in November, 2006. The event was celebrated by the parties and they cooperated in preparation for the birth. In May, 2007 the parties moved to Rhode Island from California so that plaintiff could obtain insurance coverage for in vitro fertilization and defendant could perform rotations on the East Coast. The parties learned, however, that in vitro fertilization in Rhode Island could only be covered for opposite-sex couples. Because plaintiff's insurance with her federal Government employer would not allow a same sex partner to be added for benefits, the parties moved to Massachusetts where defendant's pregnancy and J 's health care could be covered by Mass Health. On August

6, 2007 J was born at a Rhode Island hospital [A. 824-30].

At the time and following J 's birth the parties acted in a manner which was consistent with both occupying a parental role and plaintiff was significantly involved in parental caretaking activities with J . In January, 2008 the parties took preliminary steps which would have led to plaintiff's adoption of J . Meanwhile, in April, 2008 plaintiff conceived M through in vitro fertilization using sperm from the same donor. In May, 2008 the parties moved from Attleboro, Massachusetts to Haverhill, Massachusetts, following which their relationship began to deteriorate and, in August, 2008 irretrievably broke down. Defendant nonetheless promised to proceed with the adoption, which had been halted when the attorney consulted by the parties was appointed to the bench. Plaintiff consulted a new attorney in August, 2008 because she wanted to provide additional security for her parentage but at some point thereafter defendant refused to proceed further. From August, 2008 into October, 2008 defendant was busy with her medical rotation in Maine, studying for upcoming examinations, and applying for residencies.

During this period plaintiff performed significant parenting activities for J . Beginning in late September the parties shared their apartment through a nesting arrangement until defendant moved out with J in October, while plaintiff continued to perform co-parenting activities for J [A. 830-37, 841-42].

In early October defendant told plaintiff that she intended to do a four-to-six-week rotation in Oregon, where her mother lived, and would return in early December, 2008 to do her next rotation in Massachusetts. On October 27, 2008 defendant took J to Oregon. Thereafter the parties exchanged emails in which "there is evidence of J 's difficulty transitioning to Oregon"; defendant did not intend to return to Massachusetts; and on or about November 9, 2008 defendant ceased communicating with plaintiff [A. 840, 843-44].

Plaintiff filed her first complaint on November 20, 2008. On January 19, 2009 M was born in a hospital in Cambridge, Massachusetts. Meanwhile, defendant kept plaintiff from communicating with J until the temporary order entered by the court in February, 2009, pursuant to which plaintiff had

visits in Oregon, although defendant was not "supportive" of these early visits. During the court-ordered visits plaintiff, J , and M generally spent time together, and when in Massachusetts J shared a room with M . During the visits plaintiff also undertook activities involving J and M with plaintiff's extended family in Vermont. Defendant has refused to call plaintiff "Mommy"; referred on one occasion to plaintiff as "dickwad"; and has refused to refer to J and M as sisters [A. 856-57, 845-50].[5]

Plaintiff has had the same employer for ten years, has a regular work schedule with some flexibility, and does not work weekends or holidays. Defendant began her residency in Oregon in June, 2009, and the court found that she chose a residency in Oregon to create distance between plaintiff and J . The residency represented a career change for defendant. Defendant worked a typical residency schedule of 60-80 hours per week, two weekends per month, and some holidays. In connection with continuing her residency defendant took but failed a

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[5] Plaintiff acknowledged that her use of the derogatory term was wrong but that she only used it once [A. 2193-94].

required examination in March, 2010; and retook it but not until after the August, 2010 deadline for retaining her position, resulting in termination. Thereafter defendant applied to residency programs in psychiatry or family medicine, rather than in internal medicine. On January 26, 2011 defendant accepted a position in Michigan but had not yet signed an employment contract. As she had done in applying for the Oregon residency, when she applied for the Michigan residency defendant did not utilize a "match program" by which she might have had the opportunity to be matched to a program on the East Coast. Her Michigan residency would last four years [A. 850-52, 820].[6]

While in Oregon, defendant and J lived in her mother's home in Medford, an apartment in Medford, an apartment in Corvallis (in connection with the residency), and an apartment in Portland (to which her residency required that defendant relocate in spring, 2010). was required. During the residency J was enrolled in a day care and, in addition, received

[6] As it did with virtually all of defendant's testimony, the court rejected her testimony as to why she did not specifically seek employment in Massachusetts [A. 2210-16, 2536-37].

substantial care from a live-in nanny hired by defendant. In addition, while in Oregon defendant received substantial assistance in caring for J from her mother and from a friend [A. 853-55].

While J has been in Oregon with defendant she has had frequent changes of day care providers, residences and doctors. As a result of the court-ordered parenting visits J and M have spent time together. Defendant believes that the only basis she sees for their potentially continuing contact is their shared biology. J has "strong bonds" with both parties and had an "attachment" to plaintiff at the time of the move to Oregon. Following the move J demonstrated aggressive behavior towards other children at her day care and defendant was not "supportive" of J 's relationship with plaintiff. The court therefore found that the relocation was "disruptive" of plaintiff's relationship with J and that "it is more likely than not that relocation was harmful" to J [A. 857-62].

Based on these findings the trial court found that plaintiff is J 's "legal parent" as a result of the California registered domestic partnership;

that defendant "wrongfully removed J from Massachusetts without notice to or consent from her other legal parent"; that defendant has tried to "alienate" J from plaintiff; that defendant has provided an "unstable living environment" for J ; that defendant does not place her own needs above J 's; that "the harm to J would be substantial if J were to remain in [defendant]'s physical custody"; that plaintiff is "the parent who can … fulfill [J 's] best interests"; that J and M are "siblings" and it "is in their best interests to live together"; but then found that the parties "have demonstrated an ability to co-parent" [A. 819, 863-70].

B. Undisputed Material Facts Ignored By Trial Court

In deciding J 's best interests and her physical custody, the court made no finding regarding the effect of a sudden return to Massachusetts on J . Even though the court conceded that J has a "strong bond[]" with defendant [A. 869], it also made no finding regarding the effect of the change in custody on J 's attachment to defendant after having lived with her mother for her entire young life. There was, however, abundant, undisputed

evidence from which the court readily should have found that its custody order would harm J .

Plaintiff's own expert testified that for a child who is J 's age her attachment to her parent is critical; that interruption of such an attachment would be "emotionally devastating"; and that such an interruption would also have long-term, detrimental effects [A. 1755-56, 1822]. Plaintiff admitted that J and defendant are "extremely close" and that alteration of J 's custody would be "difficult for J " [A. 1576, 1295]. Moreover, even one of plaintiff's witnesses who had provided day care for J testified that J "needs" both parties, as opposed to being best placed with plaintiff [A. 1614].

Plaintiff's expert testified to the types of behavior which one would expect to see if J 's move to Oregon had caused her harm by disrupting an attachment to plaintiff [A. 1755, 1790-91]. The undisputed evidence about J , however, did not reflect this. Plaintiff described J as "very advanced verbally", able to "count very well", and "a big fan of Dora and a big fan of Spanish" [A. 1292, 1107, 1557]. Plaintiff stated that her "main concern' about J is that "I only see her once a month" [A.

1292]. In its files the court also had a "report/observations" filed in June, 2010 by the "GAL/next friend" who it had appointed for the children [A. 571-76]. Notably, the document described J as "a smart, verbal, healthy, well-behaved child" as of September, 2009, noted that at a later visit she engaged in "creative play", and observed that she was able to "engage" with both parties [A. 572-73]. There was nothing reporting any of the behavior which plaintiff's expert postulated [A. 571-76].

In addition, defendant provided specific testimony regarding J 's adjustment to the relocation, her failure to achieve developmental benchmarks while living in Massachusetts, and her progress in achieving developmental benchmarks following her move to Oregon [A. 2134-37, 2139, 2143]. The trial court apparently rejected all of this evidence by simply and generally discrediting it.[7] No

[7] This seems to be one of those rare cases in which, contrary to human experience, nothing said by one party was considered credible. Measured by the deferential "clearly erroneous" standard those findings may survive appeal despite warranting grave skepticism. Why, however, the court discounted *plaintiff's* evidence about J 's state and the

contrary evidence as to J 's achievements was presented and the court merely ignored the subject in its fact-finding. Even plaintiff, however, did not argue that custody should be removed from defendant [A. 1430, 2662-63].

The court also rejected the relevance of plaintiff's failure to pursue a marriage in Massachusetts with defendant before J was born, or thereafter, merely stating that the question "has no bearing" [A. 910]. There was, however, undisputed evidence that plaintiff decided not to marry defendant for ostensible cost reasons, despite being aware that it would better secure her relationship with J . Plaintiff admitted that she only began looking into adoption as a way of securing her relationship with J by asking defendant to contact an attorney in January, 2008, when J was already six months old [A. 1215-16, 1505]. She had not done so sooner because "we were very busy", and no attempt was made to get affidavits until March, 2008 [A. 1506, 1509-10]. The attorney became unavailable in spring, 2008 but plaintiff made no further attempt to adopt until after

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effects of disrupting her attachment to defendant is not readily apparent.

her relationship with defendant had fallen apart in August, 2008 [A. 1510]. Plaintiff also admitted that she had contacted GLAD when the parties came to Rhode Island to investigate marriage as a way of securing her rights with respect to the child defendant was carrying and may have been advised to marry [A. 1506-08, 1320, 1322-23]. Plaintiff was aware that if she married defendant in Massachusetts she would be considered a legal parent of the child and stated that the parties were interested in marriage and discussed it [A. 1327-30]. She admitted, however, that one of the reasons she did not marry defendant was based on insurance costs [A. 1332]. Upon moving to Massachusetts the parties investigated private family plans which would cover plaintiff's in vitro fertilization treatments and J 's birth and concluded that it would cost more than $1,000 per month [A. 1333]. Accordingly, plaintiff opted for a Tufts plan to cover herself at $400 per month and defendant was put on Mass Health [A. 1331-32, 1334, 1336]. Although this decision was allegedly cost-driven, plaintiff was earning approximately $100,000 annually [A. 1334]. Moreover, she was voluntarily incurring substantial costs for uninsured acupuncture

treatments with respect to fertilization and for her back [A. 1342-47]. During that period plaintiff was therefore spending approximately $1,000 per month for her own insurance plan and the acupuncture [A. 1347-48]. In addition, she was incurring uninsured veterinarian costs for her older dog [A. 1348-49].

C. Trial Court's Findings Regarding Attorneys Fees

In its "further judgments" the court denied defendant's request for an evidentiary hearing on plaintiff's request for attorneys fees [A. 949]. Addressing the fees issues, the court ruled that defendant should not have persisted in litigating plaintiff's status as a "legal parent" after an interlocutory determination by it and the Single Justice's refusal to vacate that determination in 2009 and that defendant wrongfully required that the issue of J 's custodial arrangement be tried [A. 950]. The court found that plaintiff had incurred fees of $245,250 after August, 2009 [A. 950]. The court stated that "the evidence was clear and convincing that the best interests of [J] could only be served by her being placed in the physical custody of [] plaintiff", but again failed to mention any of the undisputed evidence described above [A. 950]. Acknowledging that

defendant was currently unemployed and that (after the court had ordered J   transferred) defendant had apparently foregone the Michigan residency, the court assessed an award of $180,000 in attorneys fees, payable in annual installments of $30,000 [A. 950-51].

SUMMARY OF ARGUMENT

When it ordered that the custody of defendant's daughter be transferred to plaintiff, the trial court failed to evaluate all of the factors regarding J   's "best interests", in violation of Massachusetts law. The court gave no consideration to the impact of its order on J   although it was undisputed that J and her mother are "very close", that J   has lived with defendant her entire life, and that disruption of their bond is likely to have harmful long-term effects on J   [pp. 21-29].

The court's order that plaintiff is J   's "legal parent" under Massachusetts law based on her status as a registered California domestic partner is error. The California scheme violates the Massachusetts Constitution, in part because of its discriminatory effects on the children of same-sex couples. Plaintiff failed to marry defendant or adopt

J in accordance with Massachusetts law and cannot rely on a discriminatory alternative scheme to establish her legal parent status. Moreover, the trial court's ruling that Massachusetts should enforce the California scheme as a matter of "comity" ignores the clearly-stated view of this court and also misreads a California statute which bars recognition of Massachusetts same-sex marriages entered into after November, 2008 [pp. 29-41].

The order that J be returned immediately to Massachusetts was based on the erroneous premise that at the time defendant moved with J to Oregon she was barred from doing so, because plaintiff's status as a "legal parent" under Massachusetts law had not yet been established [pp. 41-43].

The order that defendant is the "legal parent" of M is reversible error because it is based on the California domestic partnership scheme, which violates the Massachusetts Constitution, in disregard of the voluntary decision not to marry in Massachusetts. Moreover, plaintiff's own testimony establishes that defendant did not consent to become M 's legal parent under G.L. c. 46, § 4B. [pp. 43-45].

The trial court's award of $180,000 in attorneys fees to plaintiff is reversible error because its purpose is to penalize defendant for litigating a novel question of Massachusetts law bearing on the "best interests" of her child and for requiring a full airing of those best interests before her daughter was removed from her custody [pp. 45-49].

ARGUMENT

I. THE TRIAL COURT ASSESSED J 'S BEST INTERESTS WITHOUT REGARD TO HER STRONG ATTACHMENT TO HER MOTHER, TO EVIDENCE THAT SHE WAS THRIVING IN HER MOTHER'S CARE, OR TO THE EFFECTS OF ITS DRACONIAN CUSTODY ORDER ON J , AND THAT ORDER MUST BE REVERSED

The standard of review by which the court's custody ruling must be assessed is well-established. "[T]he touchstone in custody cases is what arrangement will optimally serve the child's "best interests". *Custody of Kali,* 439 Mass. 834, 840 (2003). This determination "'rests within the discretion of the judge … [whose] findings … 'must stand unless they are plainly wrong.'" *Id.* at 845 [citations omitted]. This court, however, "will not sustain an award of custody 'unless *all relevant factors* in determining the best interests of the child have been weighed.'" *Id.*, quoting *Rosenberg v. Merida,* 428 Mass. 182, 191

(1998), quoting in turn *Bouchard v. Bouchard,* 12 Mass.App.Ct. 899 (1981) (rescript) [emphasis added]. So measured, the trial court's handling of the custody decision in the context of J 's "best interests" was fatally flawed and its decision must be reversed.

Most disturbing is the absence of any finding regarding the impact of the transfer of J 's custody on her attachment to defendant, her biological mother with whom she has lived her entire young life. The court conceded, as it had to, that J has a "strong bond[]" with defendant [A. 869]. The undisputed evidence was even more powerful. Plaintiff acknowledged unequivocally that defendant and J "are extremely close" and that alteration of J 's custody would be "difficult for J " [A. 1576, 1295]. Plaintiff's expert added emphasis to this concession, stating that for a child J 's age interruption of her attachment to a parent would be nothing less than "emotionally devastating" and would have long-term consequences [A. 1755-56, 1822]. Inexplicably, however, the court just disregarded this evidence and disrupted J 's attachment to her mother. Surprisingly, the court did not stop there, however - it ordered a fundamental change in that

relationship within four days of its order, setting a deadline which was Easter Sunday [A. 798]. The order is especially jarring given that the court previously (and properly) had decided to leave J 's custodial status and her location with her mother unchanged for nearly 2 ½ years [A. 142]. The temporary order entered by the first judge on February 2, 2009 had recognized, as the final judgment did not, that the requested relocation could have a harmful effect on J [A. 142].

The trial court limited its focus to engineering a family which would (1) maintain J 's attachment to plaintiff in a "stable" environment and (2) provide J with a "sibling" who she had never known until the court's temporary orders regarding visitation [A. 918-20].[8] But the discretion with which trial courts

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[8] *Compare Ardizoni v. Raymond,* 40 Mass.App.Ct. 734, 738 (1996), relied on by the trial court [A. 913]. That decision stated that among the many factors to be considered is "a presumption generally favoring the placement of siblings under one roof." In *Ardizoni* however, the siblings were identical twins who had grown up together until they were separated at the age of nine. *Id.* at 734. The evaluative GAL in that case specifically assessed the detrimental impact of the split on the two girls - an impact which was hardly surprising since they had been with each other since birth. *Id.* at 739. This court has subsequently *rejected* such a presumption in another case cited by the trial court, holding that a sibling relationship

are vested in custody matters is not a license to impose the court's own views of an appropriate family structure without any regard for the impact of its orders on a child. For this reason alone the custody judgment violates the overarching rule in *Custody of Kali, supra* at 845 and the cases cited therein.[9] That was far from the only fatal defect in the trial court's reasoning, however.

The court apparently concluded that this custody order served a punitive purpose, because it excoriated defendant for "wrongfully removing" J at a time when plaintiff's status as her "legal parent" had not yet been determined and before plaintiff had filed a lawsuit seeking the court's adjudication of that status [A. 917]. *See Smith v. McDonald,* 458 Mass. 540, 548-550 (2010), holding that the court committed error when it ruled that the mother had wrongfully removed her child where the biological father's paternity had not yet been adjudicated in accordance with G.L. c. 209C. Custody decisions which ignore critical factors

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is one factor to be considered. *Adoption of Hugo*, 428 Mass. 219, 230-31 (1998) [A. 913].

[9] The court's conclusory affirmation of the custody order in its "further judgments" by stating that the evidence "was clear and convincing" merely highlights its apparent misunderstanding of the law and of the evidence [A. 950].

bearing on the child's "best interests" and which place undue weight on a parent's conduct with respect to removal, even where the other parent's status as a "legal parent" was *not* in question, cannot withstand appellate scrutiny. *See Haas v. Puchalski,* 9 Mass.App.Ct. 555 (1980), cited in *Bouchard, supra* at 899. *Haas* held that consideration of the mother's conduct in improperly removing the child "'cannot be permitted to interfere with the welfare of the child … [because] [t]his is not a proceeding to discipline [her] for her shortcomings'" where there was nothing establishing that she has been "an inadequate parent." *Id.* at 557.

Consistent with its flawed approach, the court also ignored substantial evidence about J 's development in Oregon and her health and happiness, apparently with a blanket rejection of the credibility of any witnesses who testified to those matters. The findings, however, say virtually nothing about how J had been doing in Oregon beyond an isolated, early observation about daycare and the speculative conclusion that it is "more likely than not "that J had suffered "harm[]" from the relocation [A. 863]. Based on this skeletal record the court

predicted that "the harm to J   would be substantial if J   were to remain in [defendant's] physical care" [A. 870]. In light of undisputed evidence presented to the court, however, this simplistic, limited, and speculative analysis is disturbingly wrong.

Plaintiff's expert testified to the types of behavior which one would expect to see if J   's move to Oregon had caused her harm [A. 1755, 1790-91]. Yet plaintiff conceded that J   is "very advanced verbally", able to count "very well", and "a big fan of Dora and a big fan of Spanish" [A. 1107, 1557, 1292]. In fact, plaintiff's "main concern' about J   is that "I only see her once a month" [A. 1292]. Moreover, while the court did not utilize an investigative GAL under G.L. c. 215, § 56A, it did appoint an attorney as "GAL/next friend" for both of the children.[10] Although a trial court may, but need not, follow the *recommendations* of even an investigative GAL, *Mason v. Coleman*, 447 Mass. 177, 186 & n.12 (2006), the trial court inexplicably

[10] The "GAL/next friend" acted as an attorney at trial, examining witnesses [A. 2427]. The fact that she was appointed to "represent" both children, of course, strongly suggests an inappropriately pre-determined custody outcome.

disregarded significant, unchallenged *information* about J which was the subject of a court filing by the "GAL/next friend". Her June, 2010 "report/observations" described J as "a smart, verbal, healthy, well-behaved child" as of September, 2009, despite the move to Oregon; noted that at a later visit J engaged in "creative play"; and observed that J was fully able to "engage" with both parties [A. 572-73]. Wholly absent was any reference to the types of behavior which plaintiff's expert targeted as indicia of ongoing harm [A. 571-75].

Moreover, the only evidence that was presented regarding J 's achievement of developmental benchmarks was that she had difficulty meeting those while still in Massachusetts but had achieved her benchmarks after the move to Oregon [A. 2134-37, 2139, 2143]. This is precisely the type of evidence which the trial court was required to assay and address. *See, e.g., K.S. v. S.P.,* 73 Mass.App.Ct. 1128, 2009 WL 723104 *2 (2009)(Rule 1:28), pointing to evidence from witnesses that the child "was typically well-adjusted, healthy, clean and regularly attendant at school",

"disprov[ing] any serious shortcomings in parental care."[11]

Massachusetts law "cautions against rearranging a child's living arrangements", because "any unnecessary tampering with the status quo simply increases the risk of harm", *Custody of Kali, supra* at 843 (G.L. c. 209C, § 10(a)). *See Mitchell v. Lynch,* 79 Mass.App.Ct. 1126, 2011 WL 2436749 *2 (2011)(Rule 1:28) - if the child is "thriving in the [parent's] care", this "counsel[s] against disruption of the status quo".[12] J 's "best interests" were never fully evaluated in accordance with Massachusetts requirements, however. Instead, an order was entered which arbitrarily narrowed the inquiry to those "best interests" as they relate to her relationship with plaintiff, regardless of the obvious harm to J which would result from altering her status quo. This custody order transgresses the rules governing

[11] This decision is cited as "persuasive" but not "binding" under Appeals Court Rule 1:28. A copy is attached.

[12] This decision is cited as "persuasive" but not "binding" under Appeals Court Rule 1:28. A copy is attached.

evaluation of J 's "best interests" and it must be reversed[13].

II. THE CALIFORNIA DOMESTIC PARTNERSHIP SCHEME RESULTS IN DISCRIMINATION WHICH IS ILLEGAL UNDER THE MASSACHUSETTS CONSTITUTION AND CANNOT BE USED TO CONFER PARENTAL STATUS IN MASSACHUSETTS

A. The California Scheme Discriminates Against Same-Sex Adults And Their Children And Violates The Massachusetts Constitution. It Cannot Be Used To Confer Parental Status In Lieu Of Available Marriage or Adoption

The court's erroneous resolution of J 's "best interests" is also directly tied to its decision that plaintiff is a "legal parent" who is entitled to physical custody. The court ruled that plaintiff is a "legal parent" based on the parties' registered domestic partnership under Calif. Fam. Code §§ 297 and 297.5. Section 297 authorizes same sex couples to register as "domestic partners". Section 297.5(d) states that registered domestic partners have the same "rights and obligations … with respect to a child of either of them" as "those of spouses." The problem is that this structure is plainly unconstitutional in Massachusetts for a roster of reasons, including its impact on children.

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[13] The *idée fixe* of a court-approved family structure for J which apparently drove this decision resulted in a custody arrangement which not even plaintiff sought [A. 1430, 2662-63].

In 2003 this court held that any interpretation of the Massachusetts civil marriage statutes in a manner which bars marriage between same-sex couples would violate multiple provisions of the Massachusetts Constitution, and therefore defined "civil marriage" to include same-sex couples. *Goodridge v. Dep't of Pub. Health,* 440 Mass. 309, 342-43 (2003). Central to *Goodridge* was a concern about the effects of this unconstitutional discrimination on the children of couples who are illegally barred from marrying. At the very outset this court succinctly stated why the Massachusetts Constitution requires that same sex couples have the right to marry. "For those who choose to marry, *and for their children*, marriage provides an abundance of legal, financial, and *social* benefits." *Id.* at 312 [emphasis added]. Operating from the inherent premise that if their parents are "second-class citizens", children will suffer from a resulting illegal stigma, the court pointedly observed that "marital children reap a measure of family stability and economic security … that is largely inaccessible, or not as readily accessible, to nonmarital children" and ruled that "[s]ome of these benefits are social, such as the enhanced approval that still attends the

Moreover, while plaintiff could have adopted J to establish parental rights, *Adoption of Tammy*, 416 Mass. 205 (1993), and while the court rationalized plaintiff's failure to adopt, it simply disregarded undisputed evidence on that issue, as well. Plaintiff admitted that she had taken no steps before January, 2008 merely because "we were very busy" and that, after the attorney which the parties had then lined up became unavailable in spring, 2008, she did nothing further until the parties' relationship had come to an end in August, 2008 [A. 1505-06, 1509-10]. The court glossed over this fact, stating instead that defendant "thwarted" the adoption by withholding her consent "*after* the adult relationship ended" [A. 910] [emphasis added].

A party intent on establishing parental rights in Massachusetts who eschews an obvious, lawful method of becoming a "legal parent" should be held to that decision. *See A.H. v. M.P.*, 447 Mass. 828, 829-30 (2006), discussing a party's refusal to undertake adoption in lieu of seeking custody rights as a "de facto parent" and referring to the question as one which "implicat[es] the intimate, private right of competent adults to choose, or not to choose, the full

responsibilities and obligations of legal parents when they have *the means and opportunity* to do so." [emphasis added]. The *A.H.* court refused to grant legal parent status to an adult who had failed to adopt even though "adoption was available to [her] virtually from the moment of the child's birth." *Id.* at 843.

B. The Trial Court's Enforcement of The California Scheme As A Matter Of "Comity" Conflicts With A Ruling Of This Court And Also Is Premised On A Misunderstanding Of California Law

Because plaintiff failed to utilize these methods of becoming a legal parent of J under Massachusetts law, the trial court purported to arrive at the same destination by giving the California "domestic partnership" scheme validity as a matter of comity. The court cited nineteenth and early-twentieth century Massachusetts cases validating in Massachusetts relationships which were not recognized in Massachusetts but which were valid where entered into [A. 897-98]. But the court could cite no appellate decision from the past century validating a foreign state's arrangement which violates individual rights under the Massachusetts Constitution [A. 897-

98].[15] Instead, the court granted comity because "California recognizes same-sex marriages entered into in Massachusetts", citing Cal. Fam. Code § 308 [A. 898 n.2]. This analysis is fatally and misleadingly incomplete.

First, in this context the trial court's use of *Cote-Whiteacre v. Dep't of Public Health*, 446 Mass. 350 (2006) to support its "comity" ruling was plainly wrong.[16] The trial court failed to note that it quoted from a concurring opinion in *Cote-Whiteacre* or that the quoted language actually comes from a 1916 decision quoting in turn an 1895 decision [A. 897, citing "446 Mass. 350, 368" but failing to state "(Spina, J., concurring)" or to indicate the internal citations]. Moreover, the quoted language actually undermines the trial court's ruling because it discusses comity as a concept which among other things must account for "'the rights of [the forum state's] own citizens or of other persons who are under the

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[15] The court merely cited three trial court decisions regarding Vermont "civil unions" [A. 898 n.3]. There is no indication that those courts evaluated the Vermont scheme in light of *Opinions of the Justices*, *supra*. The trial court here clearly did not do so.

[16] *Cote-Whiteacre* summarily ruled that nonresident same sex couples could not marry in Massachusetts if their states of residence barred such marriages. *Id.* at 352.

protection of its laws.'" *Id.* at 368 (Spina, J., concurring) [citations omitted]. Finally, the concurring opinion states plainly that "Massachusetts has a rational and substantial interest in ensuring that the marriages it creates will be recognized as valid outside its borders." *Id.* at 372 (Spina, J., concurring). In fact, the dissenting opinion in *Cote-Whiteacre* illustrates the comity problem here in stark and dispositive terms - "it should be clear that *Goodridge* forecloses application of other States' discriminatory marriage laws in the Commonwealth, because such discrimination is against our public policy." *Id.* at 401 (Ireland, J., dissenting). As the dissent also points out, this court's ruling in *Opinions of the Justices, supra,* categorically rejected comity as a basis for recognizing in Massachusetts a "civil union" scheme which bars one's right to enter into a "marriage". *Cote-Whiteacre, supra* at 405 (Ireland, J., dissenting) citing and quoting *Opinions of the Justices, supra* at 1208.

Second, and inexplicably, the trial court ignored so-called "Proposition 8", an initiative which added section 7.5 to California's Declaration of Rights in November, 2008. That provision states "[o]nly marriage

between a man and a woman is valid or recognized in California." It is identical to "Proposition 22", Fam. Code § 308.5, which rendered foreign State marriages of same-sex couples unenforceable in California and which had earlier been invalidated by *In re Marriage Cases*, 43 Cal.4th 757, 796-801, 183 P.3d 384 (2008). Although a federal district court declared Proposition 8 unconstitutional in August, 2010, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), an appeal was taken to the Ninth Circuit and the lower court's ruling has been indefinitely stayed, *Perry v. Schwarzenegger*, 2010 WL 3212786 (9th Cir. 2010).[17] Not surprisingly, the trial court's summary of Calif. Fam. Code § 308, *i.e.*, that it "recognizes same-sex marriages entered into in Massachusetts", is wrong [A. 898 n.2]. Consistent with section 7.5, § 308 contains limitations which the trial court missed or ignored. Section 308(b) specifically validates same sex marriages entered into in a state such as Massachusetts *only* "if the marriage was contracted

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[17] In January, 2011 the Ninth Circuit certified a question regarding standing to the California Supreme Court and the question is pending. *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011); California Supreme Court No. S189476.

prior to November 5, 2008."[18] For same-sex marriages contracted *after* that date, § 308(c) gives the parties all the rights thereunder "with the sole exception of the designation of 'marriage'". In other words, the California provisions which the trial court omitted walk directly into the maws of the constitutional infirmity identified by this court in *Opinions of the Justices, supra* at 1207 ("[t]he bill's absolute prohibition of the use of the word 'marriage' by spouses who are the same sex is more than semantic"). Consistent with its failure to accurately summarize the California law, the trial court made no mention of this court's opinion [A. 894-908].[19]

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[18] The irony here cannot be missed. Had plaintiff followed through on marrying defendant before J 's birth and established her status as a "legal parent" in accordance with Massachusetts law, the marriage would *also* have been "grandfathered" in California.

[19] The court's fixed intent to validate plaintiff's status as a legal parent based on the registered domestic partnership is evident from its handling of a California statute regarding artificial insemination. Although Calif. Fam. Code § 7613(a) requires a specific written consent by "the husband" to establish parenthood, as set forth in a checklist on records regarding defendant's insemination, that checklist indicated that the required form was not filled out by plaintiff [A.3469]. *See McNamara v. Honeyman*, 406 Mass. 43, 54 n.10 (1989). Plaintiff never testified that she signed this form [A. 1157-65, 1359-64]. The court refused to allow the presentation of evidence regarding the proper form and rationalized

A child's "best interests", properly and thoroughly assessed, may warrant a "minimal" "intrusion" on her birth mother's "fundamental right, as a fit parent, to the custody of her child", in the form of visitation rights for an adult to whom the child has become attached. *E.N.O. v. L.M.M.*, 429 Mass. 824, 832-33 (1999). *E.N.O.* validated the visitation rights of a "de facto parent". *Id.* Here, however, the trial court ordered a wholesale infringement of defendant's fundamental interest in the custody of her daughter, rather than a "minimal intrusion" on that right, and did so by applying a California scheme which, incidentally, directly offends the Massachusetts Constitution. Worse, it did so by also ignoring the impact of custody transfer on J 's attachment to defendant.

This court has been appropriately reserved in granting custody rights to an adult under alternative schemes simply because those rights are assertedly in the child's "best interests". In *A.H. v. M.P.*, *supra* at 837 n.12, this court issued a strongly-worded admonition which has not been heeded here - while "the

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satisfaction of the consent requirement [A. 2026-27, 2518-30, 826-28, 908-09].

touchstone of our child welfare laws is the best interests of the child", this standard "is not a catch-all vessel into which any assertion of rights to care and custody of a child is entitled to flow." *See also T.F. v. B.L.*, 442 Mass. 522, 534 (2004), stating "[t]he 'best interests' standard in and of itself is not a mechanism by which courts may reach beyond the law to obtain an equitable result." That is precisely what the trial court has done and reversal on the custody decision is required.

III. THE TRIAL COURT'S RULING THAT DEFENDANT WRONGFULLY REMOVED J IS ERROR BECAUSE THE COURT HAD NOT YET ESTABLISHED PLAINTIFF'S STATUS AS A "LEGAL PARENT" UNDER MASSACHUSETTS LAW WHEN DEFENDANT MOVED WITH J TO OREGON.

The court ordered that J be returned to Massachusetts solely because plaintiff was a "legal parent" to J under Massachusetts law as of October, 2008 as a result of the parties' California domestic partnership and, therefore, defendant could not remove J without permission [A. 914-17]. This is fundamental error.

Simply put, plaintiff was not a "legal parent" in Massachusetts until she was (wrongly) adjudicated as such under her equity complaint, which was filed *after* the removal [A. 805, 840]. Massachusetts law is clear

that the bar on removal of a child without consent or permission does not apply where the other adult's status as a "legal parent" has not yet been established. *See Smith v. McDonald, supra* at 549-50, holding that where a father's paternity under G.L. c. 209C, § 2 had not yet been determined, the mother "was not required to seek permission to relocate" with the child despite a subsequent determination of paternity. *Smith* drew a contrast with "past cases evaluating a parent's relocation outside Massachusetts with a child" because in those cases "the child had two legal parents between whom custodial rights had been allocated at the time of relocation." *Id.* at 549 [citations omitted]. *See also id.* at 557-59 (Marshall, C.J., concurring), stating that removal analysis "is triggered only where the rights of two legal parents have been established prior to removal or attempted removal of the child"; that until those rights are determined, the mother "is free to [remove]" without permission, "even if the move disrupted arrangements she had previously made for visitation"; and that neither the other putative "parent" or "the Commonwealth had any legal authority to interfere

with" the mother's decision.[20] The trial court relied on the "bond" between J and plaintiff [A. 917 & n.6].[21] But while such a bond may result in determinations of other status, such as "de facto parent", with resulting reasonable visitation requirements, *E.N.O.*, *supra* at 833-34, it categorically is *not* sufficient to erect a barrier to removal.

IV. THE TRIAL COURT'S ORDER THAT DEFENDANT IS A "LEGAL PARENT" OF PLAINTIFF'S CHILD IS ERROR BECAUSE IT ENFORCES PARENTAL OBLIGATION IN MASSACHUSETTS UNDER A CALIFORNIA SCHEME WHICH ILLEGALLY DISCRIMINATES IN VIOLATION OF THE MASSACHUSETTS CONSTITUTION

The court's judgment that defendant be a "legal parent" of plaintiff's daughter M is equally flawed [A. 798]. This ruling flows from the court's application of the California domestic partnership scheme and therefore suffers from the same constitutional defect which vitiates its determination that plaintiff is a "legal parent" of J . Accordingly, the arguments made *infra* at pp. 29-41 regarding that issue govern with the same force here.

[20] The trial court distinguished *Smith* on the erroneous premise that plaintiff was a "legal parent" in Massachusetts prior to its own adjudication of her parental status [A. 917 & n.6].
[21] The court used the artifice of labeling that bond as a "parent-child bond" [A. 917 & n.6].

A foreign scheme which violates the Massachusetts Constitution is especially inappropriate in this context. Massachusetts public policy holds that "the law shall not be used as a mechanism for forcing [intimate family] relationships when they are not desired." *A.Z. v. B.Z.*, 431 Mass. 150, 162 (2000). *See also T.F. v. B.L., supra* at 529-30. As defendant has argued regarding J , marriage in Massachusetts would have accomplished the result which the court has forced because marriage was voluntarily foregone. An order which imposes "legal parent" status under the California domestic partnership structure transgresses the Massachusetts Constitution's ban on illegal discrimination, necessarily violates Massachusetts policy, and cannot stand.

Nor did defendant consent to parental status regarding M as is required by G.L. c. 46, § 4B. Plaintiff's own testimony established that legal consent did not exist. The most plaintiff could offer was that defendant drove her to appointments and "those sorts of things", but she conceded that this would not equate to legal consent [A. 1298, 1559]. Plaintiff also admitted that defendant did not attend any of the insemination procedures at the facility,

that defendant signed none of the facility's forms, and that even defendant's limited "involvement" began to "wane" in summer, 2008 [A. 1559, 1299]. Moreover, plaintiff acknowledged that when M was born she unilaterally listed defendant as a parent without defendant's knowledge or consent and, to boot, was ambiguous about whether defendant should be listed, but did so only because she purportedly wanted to "do the right thing" [A. 1298, 1366-74, 3371-73]. In other words, defendant's actions here were consistent with those of a family friend or distant relative, not with those of one who has consented to be a "legal parent" of M . As a matter of policy this court should hold that § 4B requires far more.

V. THE TRIAL COURT'S ATTORNEYS FEES AWARD WRONGLY PENALIZES DEFENDANT FOR LITIGATING A NOVEL, SIGNIFICANT QUESTION OF MASSACHUSETTS LAW AND, EVEN WORSE, FOR LITIGATING THE QUESTION WHETHER HER CHILD'S BEST INTERESTS ARE SERVED BY REMOVING CUSTODY.

The court ordered defendant to pay $180,000 in attorneys fees to plaintiff in six annual payments.[22] It did so after denying a requested evidentiary hearing [A. 949]. Three reasons were stated in the decision. First, the court concluded that defendant

[22] The order reveals no statutory or other basis, but refers to authorities which apply G.L. c. 208, § 38 and similar statutes [A. 949-51].

should pay for litigating the question of plaintiff's "legal parent" status "despite the ruling of the Single Justice of the Appeals Court in March, 2009" and its own ruling in August, 2009 [A. 950]. Second, the court held that defendant should compensate plaintiff because she took to trial "the custodial arrangement(s) which would serve the best interests of J and M " [A. 950]. Finally, acknowledging that defendant is unemployed because she had opted not to take the job in Michigan after the court ordered J transferred to Massachusetts, the court decided that she is "voluntarily" unemployed and has the ability to earn income to pay the fees [A. 950-51].

Fees awards in this type of litigation are measured by an "abuse of discretion" standard and are ordinarily presumed to be correct. *Ross v. Ross*, 385 Mass. 30, 39 (1982) [citation omitted]. But "'caution and restraint'" are the rule and an award "must comport with 'our traditional invocation of a 'conservative approach''". *Caccia v. Caccia*, 40 Mass.App.Ct. 376, 381 (1996) [citations omitted], reversing a fees award. *See Pemberton v. Pemberton*, 9 Mass.App.Ct. 9, 17-18 (1980), stating that "each such

award is to be carefully screened on its own merits." So measured, this award fails appellate review.

At the outset the fees award must be reversed because the decision on the merits is wrong. There are, however, additional defects. The trial court's ruling is clear. The fees award penalizes defendant for having litigated the novel issue of whether plaintiff's status as a registered domestic partner in California gives her legal parental rights in Massachusetts as to J . There was, however, no considered, fully-aired, or binding determination of that important question by August, 2009. The Single Justice's decision merely decided that there were no grounds for vacating an interlocutory ruling in light of the differential standard applicable to G.L. c. 231, § 118 (first paragraph). Docket in No. 2009-J-84 (March 16, 2009). Hence the cautious reference to absence of a "likelihood of prevailing", which in any event went further than necessary. *Id.* Likewise, the trial court's rulings were interlocutory, preliminary, and non-dispositive [A. 133-45, 452-54]. The court's assessment of fees to punish defendant's litigation of this significant issue is simply wrong.

The assessment of fees because defendant took the custody question to trial is even more egregious. The court has penalized a mother for resisting an effort to wrest her daughter from her custody by requiring that all of the evidence bearing on her child's best interests be thoroughly explored. It requires little analysis to conclude that this is fundamentally against Massachusetts public policy. Consistent with the rules which cabin attorneys fees awards in this area, the courts have affirmed assessments where the paying party engaged in vexatious, obstreperous, or groundless litigation conduct involving established legal questions. *See*, e.g., *Downey v. Downey*, 55 Mass.App.Ct. 812, 819-20 (2002); *C.D.L. v. M.M.L.*, 72 Mass.App.Ct. 146, 163 (2008) None of that is present here. The trial court purported to honor the "'conservative principles'" which control Massachusetts fee assessments [A. 951]. But the award clearly is predicated on a belief that defendant got in the way of preconceived notions regarding a novel legal question and J 's appropriate custody arrangement. That falls far short of grounds which are sustainable under Massachusetts law.

Finally, the decision that defendant is "voluntarily" unemployed and therefore has the capacity to pay $30,000 annually, commencing in September, 2011, does little more than reveal a flawed analysis.[23] The court's rationale is ironic in light of its conclusion that plaintiff has more commitment to J 's best interests than does defendant. Defendant did not commence her job in Michigan because the court removed J 's custody from her and ordered J 's return to Massachusetts immediately. She is "voluntarily" unemployed because of an erroneous court order which would have separated her from J had she gone through with the Michigan job. She did exactly what one should expect of a good mother in the circumstances and has been punished with a fees assessment. Nothing about this award withstands the required scrutiny.

CONCLUSION

The judgment of the trial court should be reversed.

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[23] Another judge of the trial court has stayed this order pending the appeal.