FACILITATOR'S REPORT OF THE WORKING GROUP ON CHILD-CENTERED FAMILY LAWS

I. Introduction

During the spring of 2012, Governor Deval Patrick requested that his then Chief Legal Counsel, Mark Reilly, create a Working Group on Child-Centered Family Laws ("the Working Group"). The undersigned, Michael L. Leshin, of the law firm of Ginsburg Leshin Gibbs & Jones, LLP in Wellesley was asked to serve as the facilitator.

The Charge reads as follows:

to review and recommend any necessary revisions to state laws to ensure that children's rights and interests are prioritized and protected during and following court proceedings pertaining to parental decision-making, responsibility and caretaking.[1]

Attached as Appendix "A" to this Report is a list of members.

Through the collective effort of many members of the Working Group, I consolidated drafts of various sections of this Report. In this Report, I have presented our deliberations through my lens, as informed by feedback from the members.

II. The Working Group's Process and Deliberations

On July 12, 2012, the Working Group convened its first meeting. In his opening remarks, former Chief Legal Counsel, Mark Reilly, noted that the Governor had not asked for any particular outcome. Rather, through a facilitative, deliberative process, he sought recommendations in furtherance of the Charge.

[1] An AFCC (Association of Family and Conciliation Courts) "think tank" has advocated reframing "caretaking" as "caregiving", a more child-centric term. Thus, this Report uses the term "caregiving".

We began with each member introducing him/herself and giving voice to his or her goals, issues, and concerns, which we continued to vet and analyze during our second meeting on August 15, 2012. See Appendix "B" for the list. In particular, we shared our divergent views of how judges presently address parenting time disputes (often referred to as custody and visitation disputes). We collected articles and surveys of other states' statutes from members and circulated them among the members of the Working Group.

During our August 15, 2012 meeting we fairly quickly coalesced around revising Massachusetts General Laws Chapter 208, Section 31 ("Section 31") so as to replace the rather antiquated and regressive terms of "custody" and "visitation" presently used in divorce practice. These terms are equally problematic as used in G. L. c. 209C, which governs nonmarital children. See Section III(A)(1) below. A consensus developed that the Commonwealth should articulate a public policy that encourages parents to share ***responsibility*** for – in contrast to having "custody of" – their children, as well as to share ***parenting time*** – in contrast to having "visitation."

The Working Group discussed at length the issues involved with parents' history of caregiving functions. The American Law Institute (ALI) defines "care[giving] functions" as tasks that involve direct interaction with the child or arranging and supervising the interaction and care provided by others. All members of the Working Group agreed that the parental history of caregiving functions is an important factor in determining parental responsibilities going forward. Members acknowledged the inherent tension between balancing the past, when

parents shared a residence, with the future, where each parent has a separate residence. These deliberations were spirited, heartfelt and challenging.

Some members expressed concern that this history should be subordinated in importance to the *current* interest, desire and abilities of each parent to fulfill caregiving functions, citing, for example, that married parents sometimes make choices that necessitate one parent being a "breadwinner" and therefore less available to perform caregiving functions. The parent who may have adopted the role of breadwinner should not be penalized in a custody proceeding, provided that he or she demonstrates a current interest, desire and ability to assume caregiving functions after separation and divorce.

Members disagreed about the extent to which child-welfare law was germane to the analysis of the importance of the history of caregiving.[2] Members also disagreed about the role of gender in custody awards.

The recommended language in Section 31(D)(5) reflects a compromise by the Working Group that balances two important concepts: (a) a child's adjustment to separation and divorce is easier when caregiving functions continue in the pattern to which he or she has become accustomed; and (b) shared parental responsibility best advances the best interest of most children, regardless of which parent performed caregiving functions in the past.

We created two sub-groups to more finely focus on revising Section 31: "Definitions/Parenting Plans" and "Factors/Presumptions." These sub-groups held several

[2] A finding of current parental unfitness by clear and convincing evidence is required before the Commonwealth may permanently take custody of a child away from a parent.

meetings during the fall of 2012. The Working Group then considered their proposals and during the first half of 2013 shaped them into a revised Section 31.

The Working Group agreed that shared parental decision-making and shared parental residential responsibility, as defined in the proposed statute, presents the best arrangement for most children, while acknowledging that exceptions exist when there is high and persistent parental conflict, when one or both of the parents is unfit, when there has been a pattern or serious incident of domestic violence, or in certain other circumstances. There was a difference of opinion within the Working Group as to the prevalence of awards of sole residential responsibility (presently expressed as sole physical custody). However, the Commonwealth does not collect statistical data concerning custody determinations. [3]

While some members of the Working Group sought to establish a rebuttable presumption of shared parental responsibility for both decision-making responsibility (legal custody) and residential responsibility (physical custody), a majority believed that the interests of a child are best served through a case-by-case determination for residential responsibility ("physical custody").[4] Ultimately, although the Working Group reached a compromise to not establish a rebuttable presumption, all members agreed on the importance of including language in the proposed Public Policy Statement which "encourages shared parental responsibilities."

[3] Members disagreed about the relevance of various research studies within Massachusetts and in other states that were circulated during several meetings.

[4] Members of the Working Group discussed the extent to which judges do or do not presently favor sole physical custody over shared physical custody. Members held quite divergent views on this issue.

A number of questions arose during our meetings that could be informed and addressed by the availability of statistics derived from the collection of data. For example, at present, Massachusetts does not collect data with regard to who has "custody" of a child (grandparent/mother/father), the "type" of custody (legal/physical; shared/sole), or the parenting schedule ("visitation") as set forth in a separation agreement or judgment of divorce. If funding and staffing were available, a study could be designed to gather this information. The study could also discern differences between a parent's desire for parenting time prior to commencing litigation and the allocation at the conclusion of the litigation.

In June of 2013, I asked members with a "representational"[5] capacity to circulate Version 5 of Section 31 to their constituents for feedback. I also circulated Version 5 to the organizations listed at Appendix "C", inviting their review and feedback. In August, I circulated a summary of this feedback, as well as Version 6, to the Working Group which we then reviewed at our August 15th meeting. During subsequent meetings, we continued refining our draft of Section 31. Finally, towards the end of our process, the Working Group discussed whether it was appropriate to include specific language relating to the parenting issues faced by veterans and active service-members. The group acknowledged that such language is important, but agreed not to presently devote time to this issue since there are important voices that would need to be heard that are not represented by the current members of the Working Group. We propose that any legislative consideration of amending G. L. c. 208, § 31, consider the concerns of veterans and service-members.

[5] These members were selected to serve on the Working Group by an organization, *e.g.* the Boston Bar Association.

III. Overview of Ancillary Issues

Through our close review of Section 31, we identified the need to further review and revise related statutes. We likewise identified the need for complementary legislation related to areas of family law practice that would further meet the Charge. We have divided this Overview into two sections. The first section analyzes related statutes that need to be further reviewed and, perhaps, revised beyond a rudimentary "search and replace" of the terms "custody" and "visitation." The second section reviews subject matters that warrant legislation to further the Charge.

A. Related Statutes

1. General Laws Chapter 209C.

Enacted in 1986, G. L. c. 209C ("Chapter 209C") provides for the determination of parentage of nonmarital children, as well as issues concerning their support, custody and visitation. The Working Group recognizes that Chapter 209C falls under the heading of Child-Centered Family Law – the charge of the Working Group – and recommends that Chapter 209C be examined in light of the proposed revisions of Section 31.[6] The Governor may want to convene a reconstituted Working Group to undertake such a review of Chapter 209C. Several members of this Working Group are interested in participating and, as identified during one of our meetings, such a task force could include, among others, at least: one unmarried mother, and unmarried father, and a representative from the Child Support Enforcement Division of the

[6] We have determined that a simple "search and replace" would not suffice to adequately revise the statute in this regard.

Department of Revenue, one or more hospitals' law department, and the Registry of Vital Statistics.[7] Given the large and growing population of unmarried parents, reviewing and updating Chapter 209C comports with the Working Group's aforementioned Charge.

In particular, Section 10 describes the criteria for determining the *custody* of a nonmarital child. When a child is born to a married woman, the husband is presumed to be the father.[8] No presumption of paternity attaches to the birth of a nonmarital child. Subsection (b) of section 10 provides that the mother of a nonmarital child shall have *custody* unless and until a court orders otherwise.[9] Once paternity has been acknowledged or adjudicated, if a parent requests a *custody* determination, "the court may award custody to the mother or the father or to them jointly . . . as may be appropriate in the best interests of the child." G. L. 209C, § 10(a). There is no presumption in favor of either parent during any such custody determination hearing. Both the statute and common law require that the court consider the history of caregiving prior to the filing of a complaint under this chapter and the ability of parents to cooperate in child-rearing. Smith v. McDonald, 458 Mass. 540 (2010); Custody of Kali, 439 Mass. 834 (2003); Custody of Zia, 50 Mass. App. Ct. 237 (2000).

[7] One member of the Working Group is an unmarried father.

[8] This presumption arises from centuries of common law, and is found in G. L. c. 209C, § 6 and G. L. c. 46, § 4B.

[9] See Culliton v. Beth Israel Hospital, 435 Mass. 285, 292 (2001) ("the importance of establishing the rights and responsibilities of parents as soon as is practically possible… in case of the need for medical treatment in the event of medical complications arising during or shortly after birth.") See also Caban v. Mohammed, 441 U.S. 380, 397 (1979) ("Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.")

2. *General Laws Chapter 119*.

The Working Group's Public Policy Statement takes a child-focused tone for this revised Section 31. Our decision and language were influenced by the public policy statement in current Massachusetts law regarding child protection and state intervention, G. L. c. 119, §§ 1 *et seq*. Our elimination of the words "custody" and "visitation" illuminates the Commonwealth's overriding interest in the well-being of children.

However, during our deliberations we recognized that the term "custody" as a defined term has important significance throughout G. L. c. 119, the statutory scheme for state intervention involving children. Accordingly, any revision of Section 31 as proposed by the Working Group must be complemented with a review of Chapter 119.[10]

3. *General Laws Chapter 208, Section 31A*.

Enacted in 1998, G. L. c. 208, § 31A ("Section 31A") increased protection of domestic violence victims and their children. Section 31A creates a rebuttable presumption that it is not in the best interest of a child to be placed in sole custody, shared legal custody, or shared physical custody with an abusive parent if there is a finding by a preponderance of the evidence[11] of a pattern or serious incident of abuse. G. L. c. 208, § 31A. [12]

[10] In particular, Section 39D creates limited "visitation" rights for grandparents.

[11] Several members of the Working Group believe that the burden of proof should be by clear and convincing evidence.

[12] Serious incidents of abuse include: "the occurrence of one or more of the following acts between a parent and the other parent or between a parent and child: (a) attempting to cause or causing serious bodily injury; (b) placing another in reasonable fear of imminent serious bodily injury; or (c) causing another to engage involuntarily in sexual relations by force, threat or duress." Id. A restraining order, otherwise known as a 209A Abuse Prevention Order, cannot alone prompt the application of the presumption and does not constitute a pattern or serious

Our proposed revised Section 31 simply references the trial judge's consideration of Section 31A in rendering decisions as to parenting time and responsibility. Any revision of Section 31 that eliminates the words "custody" and "visitation" would – at the least - necessitate analogous nomenclature revisions to Section 31A. [13]

4. General Laws Chapter 71, Section 34H.

This provision of the General Laws regulates the information that a school can disseminate to parents based on their custodial status. The nomenclature of "custody" and "visitation" needs to conform to the new language of our proposed revised Section 31.

5. General Laws Chapter 215, Section 34A.

This provision of the General Laws sets forth, *inter alia*, remedies for the violation of a Probate and Family Court support or "custody" order. At Section G of proposed Section 31, we have set forth additional remedies. Beyond nomenclature revisions to Section 34A, there should be a thoughtful review of how best to consolidate these two sets of remedies. Perhaps, Section G would be better integrated into Section 34A.

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incident of abuse. G. L. c. 209A, § 3. However, a court may consider the original facts underlying the restraining order to determine if the rebuttable presumption is appropriate. Id.

[13] The Superior Court and District Court, as well as the Probate and Family Court, have jurisdiction to issue abuse prevention orders. The Trial Court has promulgated a comprehensive "Guidelines for Judicial Practice: Abuse Prevention Proceedings." Accordingly, any review of Section 31A should be undertaken with all stakeholders at the table. Members of the Working Group disagreed about the scope of instances of false accusations of abuse and the need for any legislative response. In addition, several members believed that the Trial Court should revise the abuse prevention forms to reference limiting factor E.8. of proposed Section 31 ("A parent's knowingly providing false information to any court regarding parenting.")

B. Related Subject Matters

1. Mediation.

Many states allow or require courts to refer divorcing or separating parents to mediation. Some referrals include all issues in dispute and others refer only parenting plan disputes. Massachusetts already authorizes courts to refer parents to court-connected mediation programs under the Uniform Rules of Dispute Resolution.

The Working Group considered providing for mediation of parenting issues within its redraft of Section 31. However, we were not able to fully vet the associated concerns for any such directive.[14] Accordingly, we recommend that a complementary statute providing for mediation of not only parenting disputes, but all issues arising in a divorce, be considered for submission to the Legislature.[15] See Appendix "D" for comment concerning mediation.

2. Parenting Coordination.

Parenting coordination is a child-focused dispute resolution process whereby the parenting coordinator assists the parents in implementing a parenting plan by providing education, facilitating resolution of disputes, making recommendations, and with prior approval of the parents, making decisions within the scope of a court order, judgment or agreement incorporated into an order or judgment. A parenting coordinator may be necessary

[14] Concerns raised include: (a) funding; (b) credentialing; (c) domestic violence; and (d) *pro se* parents.

[15] On January 21, 2011, State Representative Alice Peisch filed House Bill No. 2851 entitled "Mediation of cases involving children." See: https://malegislature.gov/Bills/187/House/H2851/History for history.

when parental communication is rife with conflict or ineffective, or to promote safety of vulnerable parties, including children and parents.

At this time, the majority of states have statutory provisions related to the appointment of a parenting coordinator.[16] Massachusetts does not have such a statute. At this time, parenting coordinators are appointed by agreement of the parties, and there are no regulations or standards to guide the practice despite the public protection that parenting coordination standards would provide. [17]

Parenting coordinators currently serve in this complicated role often without any training, competency certification, or regulatory oversight. As informed by the Ruddy case (see footnote 17) judges appear to have the limited authority to appoint a parenting coordinator when parents agree in a separation agreement to appoint one. It does not appear that a judge has the authority to appoint a parenting coordinator over a party's objection (absent any prior agreement to use a parenting coordinator). Accordingly, many parents who agree to an appointment may incorrectly believe that the court is managing or regulating the parenting coordinator. Many members of the Working Group recommend legislation that provides for such an appointment, as a fee-generating category, thereby providing the court with the authority to monitor, approve, and educate parenting coordinators. Other members of the

[16] Some states refer to this role as a "special master" or "mediator/arbitrator."

[17] In a Rule1:28 decision the Appeals Court upheld the Probate and Family Court's authority to enforce the parties' agreement for the appointment of a parenting coordinator. Ruddy v. Ruddy, 84 Mass. App. Ct. 1110 (2013). In pertinent part, the Court noted: "[T]he practice of requiring parenting coordinators in a divorce proceeding is established in the Commonwealth. See e.g., Katzman v. Healy, 77 Mass. App. Ct. 589, 592 n.6 (2010) (affirming 'judgment requiring the parents to select and utilize a parenting coordinator,' [as required by their separation agreement] when, among other difficulties, there was conflict between parents that impeded children's ability to transition between parents' homes)." (footnote omitted).

Working Group were not prepared to make such a recommendation.

3. *De Facto Parenting*.

A line of recent decisions in the Commonwealth have established and elucidated the concept of a *de facto* parent, defined as follows: "A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent." E.N.O. v. L.M.M., 429 Mass. 824, 829 (1999); see also R.D. v. A.H., 454 Mass. 706 (2009); A.H. v. M.P., 447 Mass. 828 (2006); Youmans v. Ramos, 429 Mass. 774 (1999). These cases set a very high standard for an individual to establish a *de facto* parent relationship, as well as limited relief in the form of "visitation."[18] Many members of the Working Group recommend the promulgation of legislation that addresses *de facto* parent relationships. Other members did not believe that such a recommendation was appropriate.

IV. Recommendations

The Working Group recommends that the Governor submit to the General Court a comprehensive legislative package that addresses the panoply of statutes and subject areas detailed in this Report as anchored in our proposed revision of Section 31 of General Laws Chapter 208. To the extent such an omnibus effort is not presently feasible then we

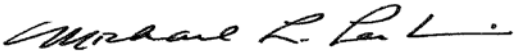
[18] A *de facto* parent has no obligation to pay child support and is not viewed as equal to a legal parent. Children very often develop deep and meaningful parental relationships with *de facto* parents; which relationships are vulnerable to loss when the adult relationship between parent and *de facto* parent deteriorates.

recommend that the Governor submit Section 31 to the General Court.[19] In furtherance of these recommendations, I would be happy to convene a subgroup of the Working Group to meet with the Governor or his designee to develop a plan to implement the goals identified in this Report.

V. Conclusion

We have all appreciated that the Governor convened this Working Group and provided us with the opportunity to submit our revised Section 31. Most fundamentally, the laws of the Commonwealth of Massachusetts should give voice to the public policy articulated in Paragraph A of our revised Section 31, namely, to promote the best interest of children by supporting safe, healthy, and meaningful relationships between children and their parents. The language of the law and of parenting needs to embrace the child-centric focus of sharing responsibility and eliminate any use of the problematic labels of "custody" and "visitation." We promote the best interests of children when we encourage the sharing of parental responsibility.

Respectfully submitted



Michael L. Leshin

[19] In such event, perhaps the legal counsel's office of either the Governor, House and/or Senate could review the appropriate scope of drafting ancillary legislation that would reconcile the new terminology of Section 31 with other statutes that use the terms of "custody" and "visitation," as noted in this Report. Of interest in such an endeavor would be the Boston Bar Association's proposed legislation (House Bill No. 2852/Senate Bill No. 00691) to enact a Section 31B which would create the ***alternative*** of using "decision making responsibility" and "residential responsibility" in lieu of "custody." For example, it provides: "'Sole decision making responsibility,' one parent shall have the right and responsibility to make major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development. This term corresponds with 'sole legal custody.'"

APPENDICES

A: List of Working Group members and consultants

B: Goals, Issues and Concerns

C: List of Organizations providing comments to revised Section 31

D: Comment on Mediation

APPENDIX "A"

Working Group Members

Participant	Organization/Position
Rachel Biscardi	Women's Bar Association
David Calvo	A Father's Voice
Senator Cynthia Stone Creem	Massachusetts Senate
Robin Deutsch	Child and family forensic psychologist
John Fiske	Boston Bar Association
Richard Fucillo	Citizen representative
Gail Garinger	Office of the Child Advocate
Richard Gedeon	Family law practitioner
Sheridan Haines	Governor's Council to Address Sexual Assault and Domestic Violence
Peter Hill	Fatherhood Coalition[20]
Ned Holstein	National Parents Organization, Founder and Chairman of the Board[21]
Joyce Kauffman	Massachusetts LGBTQ Bar Association
Marsha Kline Pruett	Researcher and clinical psychologist
Michael Leshin	Governor's Office representative - Facilitator
Representative Eugene O'Flaherty	Massachusetts House of Representatives
Christina Paradiso	Community Legal Aid
Denise Squillante	Massachusetts Bar Association

[20] Due to a disagreement with the leadership of the Fatherhood Coalition as to an October 2013 letter sent to the Governor concerning the Working Group, Peter Hill resigned from this organization. He has continued to serve on the Working Group in his individual capacity.

[21] During Ned Holstein's tenure the organization changed its name to the National Parents Organization from Fathers and Families.

Anita Robboy	Academy of Matrimonial Lawyers, Massachusetts chapter
Congresswoman Katherine Clark succeeded by Senator William N. Brownsberger[22]	Massachusetts Senate

Working Group Consultants

Consultant	Organization/Position
Chief Justice Paula Carey, succeeded by the Hon. Angela Ordoñez upon her elevation to this post on July 16, 2013 and Judge Carey's assuming the role of Chief Justice of the Trial Court	Probate & Family Court[23]

[22] In March of 2013, then Deputy Chief Legal Counsel Nicholas Martinelli invited then Senator Katherine Clark to participate in the Working Group. Following her election to Congress, her successor as Co-Chair of the Joint Committee on the Judiciary, Senator William N. Brownsberger was asked to participate.

[23] On behalf of the Probate and Family Court, as of March of 2013, Denise Fitzgerald, Manager of Legal Research Services, participated, providing thoughtful guidance.

APPENDIX "B"

Goals, Issues and Concerns

1. Heightened suicide rates for middle-aged, divorced men.
2. The status of *de facto* and stepparents in the lives of children.
3. Role of attorneys appointed to represent children.
4. The Guardian *ad litem* process.
5. Ensuring the involvement of both divorced parents in the lives of children.
6. Elimination of the terms "custody" and "visitation."
7. High-conflict divorces.
8. Interdisciplinary panels of lawyers and mental health professionals to assist with settlement of cases.
9. Conflict which pervades following the divorce.
10. Rebuttable presumption of shared physical custody.
11. Gender neutrality in decision making.
12. Challenges for low-income clients and *pro se* litigants.
13. Safety issues for divorcing parents.
14. Children's "voice" within the divorce process.
15. Challenges for unmarried parents.

16. Procedural and evidentiary rules in the Probate and Family Court.

17. Cognizance of the spectrum of concerns for children as informed by age and development.

18. Standards for removing a child from the Commonwealth of Massachusetts (permanent residence change).

19. Challenges for same-sex couples – married and unmarried.

20. Enforcement of court orders as to parenting time.

21. Contrasting scope of child-welfare/state intervention cases with intra-parental disputes.

22. Abuse prevention orders within the scope of judicial decision making as to parenting time.

23. Mediation.

24. Parenting education and support programs.

25. Parenting plan templates, such as the State of New Hampshire provides parents.

26. Cameras in the courtroom as concerns appeals and Commission on Judicial Conduct proceedings.

APPENDIX "C"

Non-represented Organizations from Whom Feedback was Requested

a. Massachusetts Association of Guardians *ad Litem*

b. Massachusetts Council on Family Mediation

c. Massachusetts Collaborative Law Council

d. Massachusetts Law Reform Institute

e. Massachusetts Family and Probate American Inn of Court

f. Massachusetts Chapter of the Association of Family and Conciliation Courts

In addition, the Massachusetts Bar Association sought feedback from the following organizations:

Barnstable County Bar Association

Berkshire County Bar Association

Bristol County Bar Association

Dukes County Bar Association

Essex County Bar Association

Franklin County Bar Association

Hampden County Bar Association

Hampshire County Bar Association

Middlesex County Bar Association

Nantucket County Bar Association

Bar Association of Norfolk County

Plymouth County Bar Association

Worcester County Bar Association

APPENDIX "D"

Comment on Mediation

Prepared by John A. Fiske, Esq.

More and more people turn to mediation to resolve disputes. Arguments between parents are ideally suited for this dispute resolution process. Studies show that children benefit when their parents agree to work together instead of becoming adversaries – mediation promotes and teaches cooperation. In addition, parents are parents forever, and they need to continue to resolve by themselves the myriad issues of raising children long after any court is involved. By court rule, Massachusetts already **allows** court-connected mediation programs to handle parenting disputes. The Legislature could strengthen this healthy approach by **requiring** referrals to mediation, regardless of subject matter, as long as the parties have a child or children and subject to protective screening protocols for abuse. Since 1985, Maine has exemplified this approach, creating a safe place for parents to talk confidentially with trained assistance to help them define binding agreements on their own terms. Studies show parents follow their own agreements since no court orders are imposed on them.