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Sandra Lynch CA1-MA [Court of Appeals for the 1st Circuit-Massachusetts] Forms [2]

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. form	SSN (Partial); DOB (Partial); POB (Partial); Medical (Partial) (3 pages)	08/04/1994	P6/b(6)
002. memo	Stacy Reynolds to Victoria Radd re: Results of interview with Sandra Lea Lynch, Candidate (2 pages)	09/09/1994	P6/b(6)
003. form	re: Office of the Counsel to the President interview with Sandra Lynch, Candidate (8 pages)	09/08/1994	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Victoria Radd
OA/Box Number: 4961

FOLDER TITLE:

Sandra Lynch CA1-MA [Court of Appeals for the 1st Circuit - Massachusetts] Forms [2]

2013-0670-F

jm1013

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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PERSONAL DATA QUESTIONNAIRE

In answering these questions, please use letter size paper. Repeat each question and place your answer immediately beneath it. To expedite matters, send in your completed Questionnaire as soon as possible, since it is a prerequisite for the usual process of investigation.

1. Full name and social security number.

Sandra Lea Lynch - S.S.

(b)(6)

[001]

2. Office and home addresses, zip codes, telephone numbers and area codes. (Name of law firm, if associated.)

Office: Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109
617-482-1390 Ext. 5031

Home: 69 Naples Road
Brookline, MA 02146
617-277-5942

Bearcamp Pond
Sandwich, New Hampshire
603-284-6835

3. Date and place of birth.

(b)(6)

4. Are you a naturalized citizen? If so, give date and place of naturalization.

No.

5. Family status:

- a. Have you ever been married? If so, state the date of marriage and spouse's full name, including maiden name, if applicable.

I was married on October 13, 1973 to John Edwin Bowman, Jr.

- b. Have you been divorced? If so, give particulars, including the date, the name of the moving party, the number of the case, the court, and the grounds. Give the name and current address of any former spouse(s).

I am divorced. The Divorce Agreement and Judgment of Decree Nisi were entered on September 2, 1992 and the divorce became final on December 2, 1992. Each party moved for divorce in the Probate Court for Middlesex County, Massachusetts. The case numbers were 91D1281-D1&D2. John Edwin Bowman, Jr.'s current address is 10 Still Street, Brookline, Massachusetts 02146.

- c. Names of your children, with age, address and present occupation of each.

Stephen Lynch Bowman, age 11
69 Naples Road
Brookline, MA 02146
Student

6. Have you had any military service? If so, give dates, branch of service, rank or rate, serial number, present status, and type of discharge, if applicable.

No.

7. List each college and law school you attended, including dates of attendance, the degrees awarded and, if you left any institution without receiving a degree, the reason for leaving.

Boston University Law School, Boston, Massachusetts.
September, 1968 - June 1971, J.D. cum laude, June, 1971.

Wellesley College, Wellesley, Massachusetts.
September 1964 - June 1968, A.B. in Philosophy, June, 1968.

8. List all courts in which you have been admitted to practice, with dates of admission. Give the same information for administrative bodies which require special admission to practice.

Commonwealth of Massachusetts (1971).

United States Supreme Court (1974).

United States District Courts, District of
Massachusetts (1973) and District of Rhode Island
(1980).

United States Court of Appeals for the First Circuit
(1974).

I have been admitted pro hac vice in New Hampshire,
both state and federal court and, I believe, before the
Federal Energy Regulatory Commission.

9. Describe chronologically your law practice and
experience after your graduation from law school,
including:
- a. whether you served as clerk to a judge and, if so,
the name of the judge, the court, and the dates of
the period you were a clerk.
 - b. whether you practiced alone and, if so, the
addresses and the dates.
 - c. the dates, names and addresses of law firms or
offices, companies or governmental agencies with
which you have been connected, the nature of your
connection with each, and the names, addresses and
current telephone numbers for individuals who have
direct personal knowledge about your work at such
law firm, company or governmental agency.
 - d. any other relevant particulars.

Summer Summer Clerk, Boston Legal Assistance Project
1971 Judge Patrick J. King, Superior Court,
 1112 New Courthouse, Boston, MA 02109.
 617-725-8148, FAX 617-725-8137

1971-1973 Law clerk, Chief Judge Raymond J. Pettine,
 U.S. District Court, District of Rhode
 Island, One Exchange Terrace, Providence,
 Rhode Island, 02903, 401-528-5195.

1973-1974 Assistant Attorney General, Government
 Bureau, Commonwealth of Massachusetts.
 Walter Howard Mayo, Esq., former Chief
 of Government Division, Casner & Edwards,
 One Federal St., Boston, MA 02110
 617-426-5900, FAX 617-426-8810

Instructor in Legal Writing, Boston
University Law School. Prof. Tamar Frankel,
Boston University School of Law,

765 Commonwealth Avenue, Boston, MA 02215.
617-353-4256, FAX 617-353-3077.

1974-1978 General Counsel, Massachusetts Department of Education. Rhoda Schneider, Esq., General Counsel, Mass. Dept. of Education, 350 Main St., Malden, MA 02148. 617-388-3300, FAX 617-338-3396. Edward G. Phillips, former Chairman, Mass. Board of Education, The New England, 501 Boylston Street, Boston, Mass. 02116, 617-578-2627, FAX 617-578-3776.

1978 to present Foley, Hoag & Eliot, One Post Office Square, Boston, Mass. 02109, Partner (1982), Past head of Litigation Department, Pro Bono Coordinator, Professional Responsibility Committee. Michael B. Keating, Esq., David B. Ellis, Esq., Foley, Hoag & Eliot, 617-482-1390, FAX 617-482-7347.

10. a. What has been the general character of your practice, dividing it into periods with dates, if its character has changed over the years.
- b. Describe your typical clients, and mention the areas, if any, in which you have specialized.

1978 - 1994

Large firm litigation practice with specialties in environmental and employment litigation and large, complex litigation. I have represented companies, both large (e.g. Polaroid) and small (e.g. Brokerage Concepts) as well as individuals. I have also represented entities such as the Massachusetts Turnpike Authority, the Massachusetts Division of Capital Planning and Operation, the Pension Plans of Public Service Company of New Hampshire and of Cabot Corporation, and the Commission on Judicial Conduct. I represent plaintiffs and defendants, but more typically, defendants. Sometimes I handle cases alone; more frequently, I have others working under my supervision.

1974 - 1978

Represented Massachusetts Board and Commissioner of Education in school desegregation, special education, transitional bilingual education and other education related cases. Ran law office of five attorneys.

1973 - 1974

Represented state agencies in my capacity as Assistant Attorney General. Constitutional law issues predominated.

1971 - 1973

Law clerk to United States District Court Judge Raymond J. Pettine.

11. With respect to the last 5 years:

- a. Did you appear in court regularly, occasionally or not at all? If the frequency of your appearances in court has varied during this period, describe each such variance, giving the dates thereof.

I appeared regularly in court several times a month except during the period when I was Boston Bar President, when the appearances were less frequent. Please see response to No. 12.

- b. What percentage of these appearances was in:

- 1) Federal courts.
- 2) State courts of record.
- 3) Other courts.

The majority of my cases have been in federal court, but the frequency of appearances varied between state and federal court from year to year.

- c. What percentage of your litigation was:

- 1) Civil.
- 2) Criminal.

Entirely civil.

- d. State the number of cases you tried to verdict or judgment (rather than settled) in courts of record, indicating whether you were sole counsel, chief counsel or associate counsel.

Excluding cases I won on summary judgment or motion to dismiss (of which there are many), and including evidentiary remedial proceedings and preliminary injunction hearings, the answer is in the range of 15 cases. One trial involved three consolidated cases and a class action lasting about two months, another involved trial

proceedings over nine months resulting in a jury verdict. There were numerous remedial hearings, orders, and appeals in the school cases. I was sole counsel in two cases, an associate in two. I was trial counsel with J. Harold Flannery playing lead counsel on the two month trial and Michael Keating as lead counsel in the nine month trial. I was lead counsel, assisted by others, on the remaining cases. I have also tried another case to an arbitrator.

e. What percentage of these trials was:

- 1) Jury.
- 2) Non-jury.

Only one was a jury trial. Anderson v. W.R. Grace, which took place from January to September 1986, and involved more than 29 plaintiffs. I was trial counsel with Michael Keating, who had the lead counsel role. I have prepared other jury trials which settled on the eve of trial, including the New Bedford Harbor contamination case.

f. If you believe the responses 11(a) through 11(e) do not reflect your experience, please describe any experience which you consider the equivalent of trial experience.

As noted above, I have won many cases on dispositive motion. I have settled many cases after significant discovery or as trial neared. An example is a case I handled for a young woman who was raped by her boss after a company function. In addition, I have defended against a major multi-year grand jury investigation which resulted in a decision not to prosecute. I also worked with state police when I was in government in a major criminal investigation which resulted in a number of convictions.

I have also twice been a master and an arbitrator, taking evidence and hearing witnesses. I frequently teach in trial advocacy courses.

12. Summarize your experience in court prior to the last 5 years, indicating as to that period:

a. whether your appearances in court were more or less frequent.

- b. any significant changes in the percentages stated in your answers to question 11(b), (c) and (e).
- c. any significant changes in the number of cases per year you tried to verdict or judgment (rather than settled) in courts of record as sole counsel, chief counsel or associate counsel.

1978 - 1994

The frequency of my court appearances has varied over time. In 1986, I was involved in a massive federal court jury trial for the first nine months of the year involving 29 plaintiffs. In 1982 I spent almost two months in a trial in federal court. Until I became involved in the leadership of the Boston Bar in the last five years, I was in court frequently, on motion practice, for hearings, conferences, arguments. When not on trial, I was usually in court several times monthly. As I became more senior, with others working under me, and more involved in leadership in the Boston Bar Association, I went to court less frequently. The majority of my practice has been in federal court; the precise percentages vary with the mix of my caseload. Most of the caseload was civil, but there was one complex federal criminal grand jury matter which lasted more than a year. During that time, the criminal matter predominated.

1974 - 1978

I was often in court several times a week, with the vast majority of my work being in federal court. Most of the cases were civil, but I handled one major criminal investigation.

1973 - 1974

I was often in court several times a week. My practice was almost evenly divided between federal and state, with perhaps slightly more time in the Supreme Judicial Court of Massachusetts. All of my work was civil litigation.

- 13. Describe 10 of the most significant litigated matters, or matters that would be representative of your litigation experience, which you personally handled and give the citations, if the cases were reported. Give a capsule summary of the substance of each case, and a succinct statement of what you believe to be the

particular significance of the case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case, (a) the dates of the trial period or periods, (b) the name of the court and the judge before whom the case was tried, (c) the individual name, address and telephone numbers of co-counsel and of counsel for each of the other parties.

1. Massachusetts Turnpike Authority v. F.L. Roberts, Exxon, Mobil and Canadian/Oxy (1991-1994) (Suffolk Superior Civil Action No. 90-2795) (Gordon Doerfer, J.)

Represented as lead counsel plaintiff Mass. Turnpike Authority against oil companies who had leased and contaminated service areas along Turnpike since 1956, seeking to recover assessment, clean up, response costs and damages for contamination in excess of \$10 million. I won a summary judgment motion on a key indemnity point. The parties agreed to go to ADR to reduce costs of litigation and expedite resolution. This resulted in agreements in 1993, approved by the court, under which the oil companies are cleaning up the ten sites.

Counsel for Mobil	Robert M. Gault, Esq. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. One Financial Center Boston, Mass. 02111 617-542-6000 FAX 617-542-2241
-------------------	--

Counsel for Canadian/Oxy	Harold Hestnes, Esq. Hale & Dorr 60 State Street Boston, MA 02109 617-526-6000 FAX 617-526-5000
-----------------------------	--

Counsel for Exxon	Ralph T. Lepore, III, Esq. Michael A. Leon, Esq. Warner & Stackpole 75 State Street Boston, MA 02109 617-951-9000 FAX 617-951-9151
-------------------	--

Counsel for F.L. Roberts	Thomas F. Holt, Esq. Kirkpatrick & Lockhart
-----------------------------	--

One International Place
Boston, MA 02110
617-261-3100
FAX 617-261-3175

2. Reebok International v. Design Continuum, Inc.,
(Suffolk Superior No. 91-4858-B) (1991) (Botsford,
J.)

Reebok developed and owns the highly successful THE PUMP™ technology. In July 1991, Reebok learned that Spalding introduced an inflatable baseball glove at a trade show. Because the glove appeared to have used Reebok's technology, Reebok sued Spalding in Illinois and Design Continuum ("DC") in Massachusetts, seeking preliminary injunctive relief. I represented Reebok as lead counsel in Massachusetts, alleging DC, which had provided design services to Reebok in developing THE PUMP™ under a strict confidentiality and proprietary information agreement, had violated the agreement, unlawfully used and misappropriated Reebok's trade secrets and confidential information, and engaged in unfair and deceptive trade practices. In a very swiftly moving case, there was a full preliminary injunction hearing about two weeks after the complaint was filed. While the preliminary injunction motion was under advisement, the parties stipulated to certain relief and later resolved the case by agreement.

Counsel for
Design Continuum Robert Weinstein, Esq.
 Kassler & Feuer
 101 Arch Street
 Boston, MA 02110
 617-439-3800
 FAX 617-439-0060

Counsel for
Reebok in related
action Sheri J. Engelken
 Kirkland & Ellis
 200 East Randolph Drive
 Chicago, Illinois 60601
 312-861-2432
 FAX 312-861-2200

3. In the Matter of Joseph S. Mitchell (S.J.C. 1992)
Docket No. OE-088 (Justice Herbert Wilkins,
Supreme Judicial Court) (1989-1992)

I was appointed by the Supreme Judicial Court as
Special Counsel to the Judicial Conduct Commission to

prosecute disciplinary charges against Superior Court Judge Joseph S. Mitchell. We first obtained an agreement from Judge Mitchell and then filed further proceedings when the agreement was violated. The Commission sought his removal from the bench. Judge Mitchell, after proceedings, took early retirement.

Counsel for
Mitchell

J. Albert Johnson, Esq.
Thomas May, Esq.
Johnson, Mee & May
Charles River Park
8 Whittier Place, 1K
Boston, MA 02114
617-227-8900
FAX 617-227-3756

4. Korb v. Raytheon, 410 Mass. 581 (1991) (Superior Court Judge Hallisey (1989 - 1991))

Successfully represented Raytheon as lead counsel in trial court and on appeal in action by a former company Vice President who had been terminated after he made statements at press conference critical of employer's biggest customers at Department of Defense and contrary to employer's interest. Korb, represented by Civil Liberties Union, claimed the termination violated his free speech rights under Mass. Civil Rights Act ("MCRA"). I raised the issue of First Amendment limits on use of state power (through MCRA) to force defendant to associate with speech with which it disagreed. The SJC affirmed dismissal of his case.

Case had originally been removed to federal court because Korb's complaint alleged his First Amendment rights had been violated. Reaching a novel question, the district court held that an action brought under the MCRA in the private free speech context involving competing claims for First Amendment protection did not raise a federal question. Korb v. Raytheon, 707 F. Supp. 63 (D. Mass. 1989) (Woodlock, J.).

Counsel for
Korb

Jonathan Shapiro, Esq.
Stern, Shapiro, Rosenfeld &
Weissberg
80 Boylston Street, Suite 910
Boston, MA 02116
617-542-0663
FAX 617-451-0139

Counsel for amicus
Attorney General

James M. Shannon, Esq.
former Attorney General

of Massachusetts National Fire Protection Assoc.
Battery March Park
Quincy, MA 02169
617-984-7255
FAX 617-770-0200

5. Gene Trak v. Roche Diagnostic Systems, Inc.
 (Middlesex Sup. Ct. (C.A. No. 89-3266) (White, J.)
 (Mass. Appeals Ct. No. 89-J496) (Dreben, J.)

As lead counsel, successfully defeated at trial court and on appeal attempt to enforce non-compete agreement against my client Roche, who hired scientist to help develop DNA/RNA diagnostic test kits based on Polymerase Chain Reaction (PCR technology). This technology would enable hospitals to quickly diagnose diseases such as AIDS and possibly save lives by shortening the time to diagnosis. Case presented issues of freedom of scientist to leave work on one patented technology he believed would fail in order to work on only technology he believed would succeed (PCR). Legal issues involved interplay between the public disclosure policies of patent law and confidentiality policies of trade secret/non-compete law. Case involved explaining in simple terms highly technical scientific concepts. I obtained affidavits from Mass. Dept. of Public Health and a Nobel Laureate on the severely adverse public policy impact of enforcing a non-compete agreement in this arena.

Counsel for Gene Trak

Douglas Seaver, Esq.
Warner & Stackpole
75 State Street
Boston, MA 02109
617-951-9000
FAX 617-951-9151

Counsel for co-defendant Dr. Lawrie

David Angueira, Esq.
Bowditch & Dewey
161 Worcester Rd.
Framingham, MA 01701
508-879-5700
FAX 508-872-1492

6. Anderson v. Cryovac, Inc. (U.S. Dist. Ct. D.
 Mass.) (Docket No. C.A. 82-1672S) (Skinner, J.)
 (1983 - 1986)

Trial counsel along with Michael Keating, who was lead counsel, to W.R. Grace in lengthy jury trial in Woburn

Toxic Tort Case. Families and individuals, twenty-nine plaintiffs, sued, claiming leukemia in their children had been caused by chemicals in drinking water, and that drinking water wells had been contaminated by movement in groundwater of chemicals from defendants. The Court divided this massive case into four separate trial phases. The first phase of case involved trial proceedings from January through September 1986, before a federal court jury on complex issues of hydrogeology and causation of contamination in wells. The jury verdict against Grace was vacated because the jury interrogatories were inconsistent. The case then settled.

In the face of enormous publicity threatening the ability to find an impartial jury, the trial court had issued protective orders prohibiting disclosure of information obtained through discovery except, as needed, to public health and environmental officials. The Boston Globe challenged the orders, asserting there was a public right of access to such materials. The trial court's orders were upheld on appeal. Anderson v. Cryovac, 805 F.2d 1 (1st Cir. 1986).

Counsel for plaintiffs

Jan Schlichtmann, Esq.
Marketplace Center
200 State Street
Boston, MA 02109
617-439-9567
FAX 617-439-4434

Counsel for co-defendant
Beatrice Food

Jerome Facher, Esq.
Neil Jacobs, Esq.
Hale & Dorr
60 State Street
Boston, MA 02109
617-526-6000
FAX 617-526-5000

Co-counsel for Grace on Globe's appeal

Prof. Henry Monaghan
Columbia University Law School
435 West 116th Street
New York, New York 10027
212-854-2644

7. Robinson v. Polaroid Corp., 567 F. Supp. 192 (D. Mass. 1983) (Skinner, J.), aff'd, 732 F.2d 1010 (1984)

Trial, almost two months long, in three related class action employment cases against my client Polaroid. Plaintiffs asserted that race discrimination motivated the layoffs of black exempt and non-exempt employees. Defense was that: (1) hourly layoffs were seniority based and, (2) as to salaried employees, Polaroid was an exemplary affirmative action employer who took risks in hiring, risks that could not continue in terms of poor performance in time of layoff and that (3) statistical evidence showed no disproportionate impact. Defendants' verdict was affirmed on appeal. Legal issues on appeal involved interplay between disparate impact and discriminatory treatment analyses.

Counsel for Plaintiff

Jonathan Shapiro, Esq.
Stern, Shapiro, Rosenfeld
& Weissberg
80 Boylston Street
Suite 910
Boston, MA 02116
617-542-0663
FAX 617-451-0139

8. Spencer Companies, Inc. v. Agency Rent A Car, 542 F. Supp. 237 (D. Mass. 1982) (Skinner, J.) and Agency Rent A Car v. Connolly, 542 F. Supp. 231 (D. Mass. 1982) (Skinner, J.), vacated and remanded, 686 F.2d 1029 (1st Cir. 1982)

In related litigations, our client Spencer, a local shoe company successfully fought off a greenmail and then take-over attempt by a corporate raider. We convinced the First Circuit that a state statute and regulatory order thereunder forbidding the raider from purchasing more stock were not preempted by the Williams Act, to require abstention, and to vacate an injunction issued by the district court against enforcement of the state anti-take over statute. The district court had held the statute unconstitutional as an impermissible burden on interstate commerce and declined to abstain. I was an associate for most of the case.

We also convinced the District Court that Agency had violated the provisions of the Williams Act and so it preliminarily enjoined Agency's tender offer.

Counsel for Agency: Mark Michelson, Esq.
Choate, Hall & Stewart
53 State Street
Exchange Place
Boston, Mass. 02109
617-227-5020

Robert Rothberg, Esq.
now General Counsel,
Cabot Corporation
75 State Street
Boston, MA 02109
617-345-0100

9. Baird v. Bellotti, 443 U.S. 622 (1979)
Planned Parenthood League of Massachusetts v.
Bellotti, 641 F.2d 1006 (1st Cir. 1980), revs'g in
part and aff'g in part 499 F. Supp 215 (D. Mass.
1980) (J. Mazzone)

My firm accepted pro bono cases on behalf of Planned
Parenthood League of Massachusetts challenging a
Massachusetts statute as unduly burdening access to
abortions. The U.S. Supreme Court invalidated the
statute. The legislature amended the statute and the
First Circuit held portions of the new statute invalid
as undue burdens. I was an associate on the cases.

Counsel for Defendant

Garrick F. Cole, Esq.
Smith, Duggan & Johnson
One Center Plaza
Boston, MA 02108
617-248-1900
FAX 617-248-9320

Counsel for Plaintiff:

Joseph J. Balliro, Esq.
Balliro, Mondano & Balliro, P.C.
3 Arlington Street
Boston, MA 02116
617-227-5822
FAX 617-437-1187

10. Boston School Desegregation Case: Morgan v.
Kerrigan, 388 F. Supp. 581 (D. Mass. 1975), aff'd,
Morgan v. Kerrigan, 401 F. Supp. 216 (D. Mass.
1974), denial of stay, 523 F.2d 917, aff'd, 530
F.2d 401 (1st Cir.), cert. denied, 426 U.S. 935
(1976) (remedial plan); Morgan v. Kerrigan, 409 F.
Supp. 141 (D. Mass. 1975) (D. Mass. 1974), aff'd,
sub nom. Morgan v. McDonough 540 F.2d 527 (1st

Cir. 1976), cert. denied, 429 U.S. 1042
(receivership of South Boston High School).
(Garrity, J.)

From 1974 to 1978, I was counsel to the Massachusetts Board of Education. My client was a defendant in the Boston school desegregation case along with the Boston School Committee. The Board of Education was held not to have violated plaintiffs' rights. I was involved in several appeals to the First Circuit and to the U.S. Supreme Court in addition to several times weekly sessions with the trial court.

Counsel for School Committee

Douglas Woodlock
(now U.S. District Court
Judge)
U.S. District Court,
John W. McCormack POCH
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FAX 617-523-4793

Counsel for state

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now Attorney General of
Massachusetts
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FAX 617-727-3251

Counsel for plaintiffs

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FAX 617-725-8137

Eric VanLoon, Esq.
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FAX 617-228-0222

Counsel for Intervenor
Home and School Association

Thayer Fremont-Smith
(now Superior Court
Judge)
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617-725-8148
FAX 617-725-8137

For Intervenor Boston Teachers' Union

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FAX 617-742-1015

For Intervenor School Administrators

Richard Coleman, Esq.
Segal, Roitman & Coleman
11 Beacon Street
Boston, MA 02109
617-742-0208
FAX 617-742-2187

Counsel for Intervenor El Committee

Carolyn Playter, Esq.
Kehoe, Doyle, Playter & Novick
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Boston, MA 02110
617-338-0070
FAX 617-338-2160

For Intervenor City of Boston and Mayor

Marilyn Sticklor, Esq.
Goulston & Storrs, P.C.
400 Atlantic Avenue
Boston, MA 02110
617-482-1776
FAX 617-574-4112

14. a. Have you ever held judicial office? If so, give dates and details, including the courts involved, whether elected or appointed, periods of service, and a description of the jurisdiction of each of such courts with any limitations upon the jurisdiction of each court.

No.

- b. have you ever held public office other than judicial office? If so, give details, including the office involved, whether elected or appointed, and the length of your service, giving dates.

1971-1973 Law Clerk to Chief Justice Raymond J. Pettine, U.S. District Court, District of Rhode Island

1973-1974 Assistant Attorney General, Commonwealth of Massachusetts

1974-1978 General Counsel, Massachusetts Department of Education

Please also see Exhibit A.

15. Have you ever been an unsuccessful candidate for elective, judicial or other public office? If so, give details, including dates.

No.

16. Have you ever been engaged in any occupation, business or profession other than the practice of law or holding judicial or other public office? If so, give details, including dates.

No.

17. Are you now an officer or director or otherwise engaged in the management of any business enterprise?

No.

- a. If so, gives details, including the name of the enterprise, the nature of the business, the title or other description of your position, the nature of your duties and the term of your service.

- b. Is it your intention to resign such positions and withdraw from any participation in the management

of any such enterprises if you are nominated and confirmed? If not, give reasons.

18. Have you ever been arrested, charged or held by federal, state or other law enforcement authorities for violation of any federal law or regulation, state law or regulation, or county or municipal law, regulation or ordinance? If so, give details. Do not include traffic violations for which a fine of \$100.00 or less was imposed.

No.

19. Have you, to your knowledge, ever been under federal, state or local investigation for possible violation of a criminal statute? If so, give particulars.

No.

20. Has a tax lien or other collection procedure ever been instituted against you by federal, state or local authorities? If so, give particulars.

No.

21. a. Have you ever been sued by a client? If so, give particulars.

I have never been sued by a client. My law firm has been sued for actions done by others and I may have been named as a defendant in some of those cases along with the other partners of the firm.

- b. Describe any claim or lawsuit which alleged an act or omission by you as a lawyer.

None.

- c. Have you ever been sanctioned pursuant to Rule 11 or pursuant to any other federal, state or local rule?

No. However, in Spencer v. Agency, the trial judge found Spencer had not complied with the terms of a protective order in asking questions at a deposition, held that was civil contempt and ordered the payment of Agency's counsel fees on the motion, saying that was the only harm Agency had suffered. I was an associate on the case at the time of the actions. All Spencer lawyers on the case, including me, wrote a letter of apology to the court, saying there had been a good faith

belief there was compliance with the court's order and no intention not to comply.

22. Have you ever been a party or otherwise involved in any other legal proceedings? If so, give the particulars. Do not list proceedings in which you were merely a guardian ad litem or stakeholder. Include all legal proceedings in which you were a party in interest, testified as a witness, were named as co-conspirator or a co-respondent, and any grand jury investigation in which you figured as a subject, or in which you appeared as a witness.

I was a party in my divorce. Other than that, my law firm has from time to time brought suits to recover fees and I may have been named as a party in that capacity. I once testified in a fee collection case for my law firm that services had been rendered. That was Hoffman v. Van Gorder, U.S. District Court, D. Mass. Civ. Action 81-288K.

23. Have you ever been disciplined or cited for a breach of ethics or unprofessional conduct by, or, to your knowledge, been the subject of a complaint to, any court, administrative agency, bar association, disciplinary committee, or other professional group? If so, give the particulars.

No.

(b)(6)

(b)(6)

25. Furnish as least 5 examples of legal articles, books, briefs or other legal writings which reflect your personal work. If briefs are submitted, indicate the degree to which they represent your personal work. If there are reported opinions relevant to a submitted brief, give the citation to or a copy of any relevant appellate opinion.

See publications attachment.

26. List all bar associations and professional societies of which you are a member and give the titles and dates of any offices which you have held in such groups. List all chairmanships of any committees in bar associations and professional societies, and memberships on any committees which you believe to be of particular significance (e.g., judicial selection committee, committee of censors, grievance committee).

- 1994 Advisory Committee on Rules of the U.S. Court of Appeals for the First Circuit (1993 through present).
- Massachusetts Supreme Judicial Court Committee on Model Rules of Professional Conduct.
- Massachusetts Supreme Judicial Court Historical Society, Board.
- ABA Commission on Partnership Programs (1993 - 1995).
- 1993 Member, Commission on Federal Appointments (U.S. District Court, U.S. Attorney and U.S. Marshal).
- 1992-1993 President, Boston Bar Association (voluntary bar of 8,000 members, oldest Bar Association in country).
- National Conference of Bar Presidents, Member and Speaker.
- Bar Leadership Institute, ABA, speaker.
- Various ABA Conferences on Justice System, participant (1991 - 1994).
- 1991-1992 President-Elect, Boston Bar Association.
- 1987-1991 Secretary, Treasurer and Vice President of BBA successively.
- 1986 Chair, BBA Committee on Role of Gender in Practice of Law. Co-initiator of BBA Report on Role of Gender in Practice of Law.
- 1986-1988 Member, Joint Bar Committee (advises Governor on judicial appointments).
- 1986-1987 Council, Boston Bar Association.
- 1982-1986 Vice Chair, Board of Bar Overseers of Commonwealth of Massachusetts 1985-1986, Member 1982-1986. Bar disciplinary Board (appointed by S.J.C.).
- 1982 Member, Screening Committee for U.S. Magistrate, U.S. District Court (D. Mass).

1975-1977 Council, Boston Bar Association.

I am and have been for some time a member of the American Bar Association, Boston Bar Association, Massachusetts Bar Association, Women's Bar Association, National Association of Women Lawyers.

27. List all organizations and clubs other than bar associations or professional associations or professional societies of which you are or have been a member, including civic, charitable, educational, social and fraternal organizations, and give dates of membership, offices held and honors bestowed.

I belong to the following organizations, as well as to those listed on Exhibit A:

Museum of Fine Arts, Boston
Museum of Science, Boston
Bearcamp Pond Association, Sandwich, New Hampshire
Sandwich Historic Society, Sandwich, New Hampshire
Massachusetts Audubon Society
WGBH, Boston

28. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinctions in college or law school) other than those mentioned in answers to the foregoing questions.

Awards

- | | |
|------|--|
| 1993 | Silver Shingle Distinguished Alumni Award, Boston University Law School. |
| 1980 | Planned Parenthood League of Massachusetts Distinguished Service Award. |

Fellowships and Scholarships and Academic Awards

- | | |
|-----------|---|
| 1974 | National Endowment for the Humanities Fellowship to study Constitutional Law at University of Virginia for one month. |
| 1968-1971 | Scholarship to Boston University Law School, Boston University Law Review, Articles Editor. Book awards: Administrative and Corporate Law (for highest grades in law school class). |
| 1964-1968 | Seven College Scholarship to Wellesley College |

29. Describe any pro bono or community service activities in which you have engaged.

In 1992 - 1993, I was President of the Boston Bar Association and spent most of my time on the presidency. As President, I involved the Bar in the education reform legislation efforts, initiated a summer jobs program for Boston Public School students, ran programs for unemployed lawyers, and engaged in a number of activities in support of the court system. In many ways the primary achievement of my year as BBA president was the enactment of major court reform legislation in Massachusetts. That legislation called for greater accountability of the court system and gave it needed management tools. Significantly, it also created a statewide juvenile court and consolidated the various jurisdictions over children and youth in that court.

Since being President of the Boston Bar Association, I have spent some time in community service activities designed to work on issues of job creation. That led me to work on a committee of the Massachusetts Taxpayers Foundation and on the Leading Industries Committee of the Boston Chamber of Commerce, of which I am now co-chair.

Throughout my career I have engaged in pro bono litigation in various matters. An example of such litigation is Bezio v. Patenaude, 381 Mass. 563 (1980) on which I worked while I was an associate. We argued that the trial judge was in error in removing a child from a mother simply on the basis of her sexual preference. I was appointed Special Counsel to the Commission on Judicial Conduct by our Supreme Judicial Court to prosecute a case against a state court judge, who ultimately resigned from the bench. I have represented indigent clients.

I have also been involved in improving the administration of justice, through my activities over a four year period on the Board of Bar Overseers for the Commonwealth of Massachusetts, including being Vice-Chair. I also served on the Joint Bar Committee which made recommendations to the Governor of Massachusetts concerning candidates for judicial appointment. I was also instrumental in instigating a report and survey conducted by the Boston Bar Association on the Role of Gender in the Practice of Law.

I have also been involved in advising pro bono clients of the firm, including a day care center.

Please see Exhibit A for more information.

30. State any other information which may reflect positively or adversely on you, or which you believe should be disclosed in connection with consideration of you for nomination for the Federal Judiciary.

None.

Sandra L. Lynch
Signature

Aug 5, 1994
Date

PUBLICATIONS

Damages in Massachusetts Litigation, "Damages in Sale of Goods, Insurance and Employment", MCLE (1993).

"Beyond Plato", Boston Bar Journal 2 (July/August 1993).

"The 724 Children", Boston Bar Journal 2 (May/June 1993).

"Anatomy of a Success: BBA and Court Reform", Boston Bar Journal 2 (March/April 1993).

"Mirror, Mirror On The Wall", Boston Bar Journal 2 (Jan./Feb. 1993).

"High Noon In The Courthouse", Boston Bar Journal 2 (Nov./Dec. 1992).

"Of Mice and Men ... And Women and Children," Boston Bar Journal 2 (Sept./Oct., 1992).

"Public Institution Litigation in the First Circuit," 74 Mass. Law Review 259 (Dec. 1989).

Various Mass. Continuing Legal Education Course Materials, including "Federal Court Motion Practice" (1989), "Avoiding and Litigating Wrongful Termination Cases" (1988), "Third Party Liability for Workplace Injuries" (1987), "Federal Court Practice" (1984), and MBA "Ready for Trial: Theme of Case and Preparation of Witnesses" (1990).

"The Boston School Desegregation Case", 62 Mass. L. Quarterly 137 (Fall 1977).

"Education Law", 1975 Boston College Annual Survey of Massachusetts Law 396.

"New England Regional Government", in Power, Pollution, and Public Policy, by Project NECAP (New England Coastal Area Planning), M.I.T. Press (1971).

Comment, "Little Ado About Much: Jurisdiction of the Supreme Court to Issue Mandamus," 51 B.U.L. Rev. 106 (1971).

Note, "Can the Section 1331 Amount Requirement Constitutionally Bar a Plaintiff Alleging Violation of His First Amendment Rights from Using the Federal Court to Get an Injunction Against a Federal Officer." 50 B.U. L. Rev. 178 (1970) (Special Issue).

EXHIBIT A

PROFESSIONAL ACTIVITIES

1994

Massachusetts Supreme Judicial Court Committee on Model Rules of Professional Conduct.

American Arbitration Association Panel on Large and Complex Cases.

1993-1994

Advisory Committee on Rules of the U.S. Court of Appeals for the First Circuit.

Board, New England Legal Foundation.

ABA Commission on Partnership Programs.

Wellesley College Business Leadership Conference.

Boston Chamber of Commerce, Leading Industries Committee.

1993

Silver Shingle Distinguished Alumni Award, Boston University Law School.

Member, Commission on Federal Appointments (U.S. District Court, U.S. Attorney and U.S. Marshal) established by Senators Kennedy and Kerry.

Massachusetts Taxpayers Foundation, Policy Committee.

1992-1993

President, Boston Bar Association. President of 8,000 member voluntary bar. Accomplished enactment of major court reform legislation resulting in greater accountability and efficiency, focussed bar on children (by sponsoring legislation creating statewide juvenile court, initiating bar involvement in education reform legislation, and summer jobs program for Boston students in law offices), initiated legislation for pay raise for state judiciary, created programs for unemployed lawyers, requested First Circuit initiate gender and racial bias studies. As President of the BBA I also sat on other boards such as the G. Robert White Trust and the Boston Coalition Against Drugs and Violence.

1991-1992

Special counsel to the Commission on Judicial Conduct to prosecute In the Matter of Justice Joseph S. Mitchell (appointed by Supreme Judicial Court).

President-Elect, Boston Bar Association, author of BBA Study: Courts in Crisis, A Blueprint for Reform.

1987-1991

Secretary, Treasurer and Vice President of Boston Bar Association (successively).

1986-1989

Chair, BBA Committee on Role of Gender in Practice of Law; co-initiator of BBA Report of same title, which was first gender bias study of a major bar.

1986-1988

Member, Joint Bar Committee (advises Governor on Judicial Appointments).

1986-1987

Council, Boston Bar Association.

1982-1986

Vice Chair, Board of Bar Overseers of Commonwealth of Massachusetts 1985-1986, Member 1982-1986. Bar disciplinary Board (appointed by S.J.C.).

1982-1984

Member, Massachusetts Advisory Committee, U.S. Civil Rights Commission.

1982-1983

Civil Liberties Union of Massachusetts, Board and General Counsel.

1982

Member, Screening Committee for U.S. Magistrate, U.S. District Court (D. Mass).

1980-1981

Civil Liberties Union of Massachusetts, Board.

1980

Planned Parenthood League of Massachusetts Distinguished Service Award.

1977-1978

First Vice President, Civil Liberties Union of Massachusetts.

Beacon Press School Integration Studies.

1975-1977

Council, Committee on Legal Services to the Poor, Boston Bar Association.

1974-1975

Women's Rights Project, Civil Liberties Union of Massachusetts, founder and Steering Committee member.

Advisory Board, Center for Women's Legal Studies.

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON FEDERAL JUDICIARY

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information which concerns me, including any complaints erased by law, and is known to, recorded with, on file with or in the possession of any governmental, judicial, disciplinary, investigative or other official agency, Board of Bar Overseers,* or any educational institution, or employer, and I hereby authorize a representative of the American Bar Association Standing Committee on Federal Judiciary to request and to receive any such information.

** Sandra L. Lynch
Sandra Lea Lynch

8/4/94
Date

* Please insert the name of the appropriate state or federal authority, e.g. Board of Bar Overseers, Commission on Judicial Conduct, etc.

** Please type or print name under signature line.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
002. memo	Stacy Reynolds to Victoria Radd re: Results of interview with Sandra Lea Lynch, Candidate (2 pages)	09/09/1994	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Victoria Radd
OA/Box Number: 4961

FOLDER TITLE:

Sandra Lynch CA1-MA [Court of Appeals for the 1st Circuit - Massachusetts] Forms [2]

2013-0670-F

jm1013

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. form	re: Office of the Counsel to the President interview with Sandra Lynch, Candidate (8 pages)	09/08/1994	P6/b(6)

COLLECTION:

Clinton Presidential Records
Counsel Office
Victoria Radd
OA/Box Number: 4961

FOLDER TITLE:

Sandra Lynch CA1-MA [Court of Appeals for the 1st Circuit - Massachusetts] Forms [2]

2013-0670-F
jm1013

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
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**Questions for Federal District Judge Nominees --
Helen Gillmor, David Katz, Sean McLaughlin, William Moore,
Roslyn Silver, and Alvin Thompson**

QUESTIONS FROM SENATOR PRESSLER

In answering the following questions, please be thorough and expansive.

EXCLUSIONARY RULE

I believe there are a number of problems with the "exclusionary rule" as it is currently applied: (1) it is ineffective; (2) it imposes excessive costs on the criminal justice system and society by freeing the guilty, while not helping the innocent; and (3) the penalty of completely excluding otherwise proper and relevant evidence bears no proportion to the abuse it seeks to prevent - the penalty is the same regardless of whether a police officer's improper conduct is unintentional or not, whether it is minor or flagrant.

In 1984, the Supreme Court modified the exclusionary rule in United States v. Leon to permit the introduction of evidence obtained in reasonable good faith reliance on a search warrant that later proved defective. Also, the 5th and 11th Circuits have adopted a good faith exception for warrantless searches.

- 1) What are your views on the issue? Do you take an expansive or restrictive view of the Federal exclusionary rule? Do you favor a broader "good faith" exception to the rule than current law allows?
- 2) What do you think of a proposal made last Congress which would have overturned Leon and the 5th Circuit exception by modifying the exclusionary rule so as to admit evidence obtained with a defective warrant only if the officers requesting the warrant and the issuing magistrate can be proven to be "detached and neutral"?

DEATH PENALTY

The Congress has recently passed legislation that provides for the imposition of the death penalty for a number of federal capital offenses.

- 1) Do you feel the death penalty constitutes one of the "cruel and unusual punishments" proscribed by the Eighth Amendment?
- 2) Is there any reason why you could not, in good conscience, vote to uphold the death penalty, if the facts of the case warrant its imposition?

HABEAS CORPUS

Each year, thousands and thousands petitions of habeas corpus are filed clogging the federal district court dockets. For example, in 1992 inmates filed a total of 49,939 civil suits, including habeas petitions, against the government in federal court. The same year, a total of 48,538 criminal cases were brought by the government in federal courts. This means that, in 1992, inmates filed 1,401 more cases against the government than the government brought against wrongdoers.

Most habeas petitions are totally without merit. Prisoners seem to file them as a form of occupational therapy. Other prisoners, such as those on "death row", file successive petitions simply to delay the imposition of their sentence. 40% of all habeas petitions are filed more than five years after the petitioner was convicted. Almost one-third of all petitions are filed more than a decade after conviction.

The lack of finality in our criminal justice system imposes high costs -- both economic and societal -- on all of us. Public confidence in the system has been seriously undermined as a result. Victims and their families are unable to put their lives back together as litigation drags on and on. The resources of the federal courts and prosecutors are strained to the breaking point.

- 1) Do you agree there is a need for habeas corpus reform?
- 2) What are your thoughts on a proposal to abolish the requirement that persons convicted of capital crimes exhaust all available state remedies before petitioning in federal court for a writ of habeas corpus?
- 3) What do you think of time limits requiring federal district and circuit courts to act on habeas petitions within a specified period of time?

ROLE OF A FEDERAL JUDGE

As a federal judge, you would be bound to follow precedent laid down by the Supreme Court and by the Court of Appeals in which you sit. You will, however, be faced with cases of first impression.

What principles will guide you, or what methods will you employ, in deciding cases of first impression?

Are you committed to following all Supreme Court precedents faithfully and giving them full force, even if you personally disagree some of them?

Under what circumstances do you believe a federal judge should refrain from consideration of a case which involves a political question?

Under what circumstances do you believe it is appropriate for a federal district judge to depart from the principle of "stare decisis?"

CONSTITUTIONAL ISSUES

What is your view of Constitutional interpretation - do you think it should be strictly construed as the Founding Fathers wrote it or do you believe the interpretation of its provisions should change over time?

Do you feel the federal sentencing guidelines have been effective in the equitable administration of justice at the federal level?

Additional Question for Roslyn Silver

Ms. Silver, in response to an earlier question I asked, you indicated a belief that the Equal Protection Clause of the U.S. Constitution may allow the consideration of statistical evidence of race discrimination in the implementation of the death penalty. However, in McClesky v. Kemp, 481 U.S. 279 (1987), the Supreme Court rejected a statistical theory of racial discrimination in the death penalty. It ruled that a capital defendant claiming a violation of the federal Equal Protection Clause must show the existence of purposeful discrimination and a discriminatory effect on him or her.

Would you please more fully explain under what circumstances you believe it might be appropriate to consider statistical evidence of racial discrimination in the implementation of the death penalty?

QUESTIONS FROM SENATOR HATCH

In answering the following questions, please provide any explanation or amplification that you believe necessary.

1. Are you committed to following Supreme Court precedent faithfully and giving it full force, even if you personally disagree with that precedent?

2. Are you also committed to following the law of the circuit in which you would sit?

3. What will you do if what the Constitution and laws require conflicts with what you think the law ought to be?

4. I think that it's essential to the Rule of Law that judges not act politically. Do I have your commitment that you will decide cases based on the law and the facts, and not let political considerations influence your judgment?

5. As a District Court judge, you would be bound to follow precedent laid down by the Supreme Court and by the Court of Appeals in which you sit. You will, however, be faced with cases of first impression. What principles will guide you, or what methods will you employ, in deciding cases of first impression?

6. Irrespective of Supreme Court precedent governing the death penalty and of the obligation of lower court judges to follow that precedent, what is your best independent legal judgment regarding whether or not the death penalty should be deemed constitutional?

dice to the defendant. The trial judge saw and heard the jurors and conducted the voir dire examination, including an inquiry concerning jurors' awareness of pretrial publicity. His evaluation of the likelihood that the impartiality of one or more jurors might be affected by sequestration is entitled to the "highest degree of respect." *Arizona v. Washington*, *supra* at 511.

We are satisfied that the judge exercised sound discretion in his decision to declare a mistrial. *Arizona v. Washington*, *supra* at 514. He did not act precipitately, or without awareness of the double jeopardy impact of an erroneous ruling. He gave each side a full opportunity to explain its position with respect to a mistrial, and explored less drastic alternatives, such as interrogation of the jurors, cautionary instructions, and sequestration. Contrast *United States v. Jorn*, 400 U.S. 470, 486-487 (1971); *Cherry v. Director, State Bd. of Corrections*, 613 F.2d 1262, 1267 (5th Cir. 1980); *United States v. Pierce*, 593 F.2d 415, 417-419 (1st Cir. 1979); *Jones v. Commonwealth*, 379 Mass. 607, 616-617 (1980). There was no abuse of discretion. The declaration of a mistrial was a matter of manifest necessity.

We answer the reported question in the affirmative. The case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

BRENDA A. BEZIO vs. MAGDALENA PATENAUDE.

Franklin: June 9, 1980. -- September 22, 1980.

Present: HENNINGSEN, C.J., QUINCY, KASSAB, WHELAN, LACROIX, & ADAMS, JJ.

Guardian. Of minor. Parent and Child. Custody of minor. Words "Unfit," "Unsuitable."

Discussion of the standard to be applied where a parent petitions to revoke a guardianship previously entered upon her assent under G. L. c. 201, § 5. [571-577]

Upon a mother's petition to revoke a guardianship previously entered upon her assent under G. L. c. 201, § 5, the standard to be applied was whether the mother was currently fit to further the welfare and best interests of the child. [576-571]

A mother's voluntary assent to a guardianship petition pursuant to G. L. c. 201, § 5, did not constitute a waiver of her natural custodial rights. [575]

In an action by a mother to revoke a guardianship previously entered upon her assent under G. L. c. 201, § 5, the judge's finding that the mother was unsuitable to have custody of her children because of her unwillingness or inability in the past to assume responsibility for their care was insufficient to support his conclusion that custody should remain in the guardian, and his finding that raising the children in a lesbian household would adversely affect the children was without basis in the record. [578-579]

PETITION filed in the Probate Court for the county of Franklin on November 21, 1975.

A complaint seeking removal of a guardian and return of custody of minor children was filed on February 18, 1977, and was heard by Keedy, J.

The Supreme Judicial Court granted a request for direct appellate review.

William C. Newman & Wendy Sibbison for the plaintiff.

Geoffrey A. Wilson (James A. Whitbeck, John M. Finn & Peter S. Johnson with him) for the defendant.

John H. Henn, Sandra L. Lynch, Stefanie D. Cantor & John Reinstein, for the Civil Liberties Union of Massachusetts, amici curiae, submitted a brief.

John P. Ward, John Rughelmer, Rosalie Davies & Don Martin, for the Gay & Lesbian Advocates & Defenders & another, amici curiae, submitted a brief.

LIACOS, J. The plaintiff, Brenda King,¹ appeals from a judgment of the Franklin County Probate and Family Court denying her petition to remove the defendant, Magdalena Patenaude, as guardian and to regain custody of her two natural children. The plaintiff's application for direct appellate review to this court was granted. The judgment below is not supported by adequate findings as to the fitness of the mother. We reverse and remand. We summarize the facts and the proceedings below.

In January, 1971, Brenda King, then age seventeen, was introduced by a pastor of a local church to Magdalena Patenaude, then age twenty-six. At that time Brenda was experiencing emotional problems, and it was thought that Magdalena, who had herself experienced similar difficulties in her early life, might provide friendship and guidance. They became close friends.

Brenda's first child, a daughter, was born on December 6, 1972. Between December, 1972, and April, 1974, when Brenda married James L. Bezio, Brenda entrusted her child to the care of her friend Magdalena from time to time. After her marriage, Brenda and her husband and child lived with Magdalena for approximately three weeks. Brenda and her daughter then moved to North Carolina where James Bezio was stationed in the United States Army. In North Carolina Brenda, then pregnant with her second child, began experiencing medical problems related to her pregnancy. Brenda testified that she was unable to obtain adequate medical attention in North Carolina due to military bureau-

¹The plaintiff filed her petition in 1977 under her married name, Brenda A. Bezio. She has since resumed the use of her maiden name, Brenda King.

cracy and her lack of personal funds. In August, 1974, still suffering from complications attendant to the second pregnancy, Brenda returned to Greenfield, Massachusetts, and left her daughter with Magdalena. She returned to North Carolina for approximately one month.

When Brenda was seven months pregnant she was hospitalized in Greenfield for pregnancy complications and potentially fatal, deep thrombophlebitis. At Brenda's request, her daughter was placed in Magdalena's care. Brenda underwent surgery for a pulmonary embolus, and the second daughter was delivered prematurely by caesarean section. Magdalena visited Brenda daily at the hospital. When Brenda was released, she and her two daughters went to live with Magdalena. The following day Brenda was readmitted to the hospital, and the two children remained with Magdalena. She again returned to Magdalena's home upon her release and remained there with the children until January, 1975, when she and the children went to stay with her parents.

In April, 1975, Brenda was experiencing physical and emotional distress, and she arranged to leave her children with Magdalena for approximately one month. The younger child remained with Magdalena for an additional month. Shortly thereafter Brenda took both children to North Carolina. In September, 1975, Brenda returned to Massachusetts with her children for a visit. Brenda left the children with Magdalena and returned to North Carolina where she was again hospitalized for what was diagnosed as another attack of thrombophlebitis. In October, 1975, Brenda returned to Massachusetts at Magdalena's request. The younger child had been suffering from an attack of croup, and Magdalena had been experiencing some difficulty in securing medical care as she was not the child's legal guardian. Brenda met with the attending physician, and both women subsequently discussed the possibility of Magdalena's being appointed legal guardian of the children. Magdalena felt that if she were going to continue caring for the children, she should have legal authority to secure medical treatment for them.

On November 21, 1975, Magdalena filed a petition for temporary and permanent guardianship in the Franklin County Probate and Family Court. Brenda assented, and Magdalena was appointed temporary guardian with custody. Soon thereafter problems developed between the two women regarding visitation rights. In February, 1976, temporary custody was returned to Brenda with Magdalena's assent. On May 11, 1976, the Probate Court judge continued temporary custody in the mother for another three months. Later the same day, however, the two women talked, and Brenda became upset and unsure of her ability to care properly for the children. Brenda decided to leave the children with Magdalena. When the probation officer assigned by the court to supervise the children's custody learned of this development, he filed a report with the court. As a result of his report the court returned temporary custody of the children to Magdalena.

In October, 1976, Brenda assented to Magdalena's appointment as permanent guardian with custody. Both women were represented by the same attorney. The judge granted Brenda the right to visit the children at Magdalena's home "at all reasonable times and occasions." At this time Brenda was experiencing extreme financial difficulty, and symptoms of deep thrombophlebitis persisted.² Prior to the court's allowance of the permanent guardianship petition, Brenda had written the court a letter stating that she believed Magdalena to be "the only one fully qualified to raise my children in a manner which I myself would do if I could."

After Magdalena's appointment as permanent guardian, difficulties arose over visitation rights. As a result, Brenda and her then husband, James, filed the present petition to

²Two doctors who had treated Brenda for symptoms of deep thrombophlebitis testified that at the time of the trial she was no longer in any significant danger from this condition. One doctor who had first examined Brenda in March, 1979, testified that his diagnosis of her symptoms was that she was suffering from asthma.

vacate the guardianship in February, 1977.³ Brenda also filed a motion for visitation rights. The judge ordered that Brenda be allowed to visit her children every other Saturday from 1 P.M. to 4 P.M.

In April, 1977, Brenda's parents filed a petition for guardianship. The judge appointed a guardian ad litem who reported in May, 1977: "Ms. Bezio lives in what she describes as a 'lesbian relationship' with a young woman. At this time she is not seeking custody of her children feeling that her chosen life style could cause problems for the children. Having battled with her own inner conflicts of gender identification for years, she does not wish to in any way influence her children. . . . Of striking concern to Ms. Bezio is the feeling that Mrs. Patnade [sic] is depriving her children of their identity and family heritage. . . . Ms. Bezio is anxious for her children to be placed in the custody of their grandparents and feels that her previous conflicts with them have been resolved." Brenda's parents withdrew their petition for guardianship in November, 1977. The judge, in his findings, indicated that the petition filed by Brenda and James in 1977 was not heard on its merits until September, 1979, due to the illness of the probation officer who had rendered a report, and the petitioner's inability to pay her lawyer.

From October, 1976, until June, 1978, the children were in Magdalena's care, and Brenda regularly exercised her visitation rights. However, on July 22, 1978, Brenda took her children for a regularly scheduled visit and failed to return them. From July 22, 1978, to November 2, 1978, the children lived with Brenda in Vermont. Brenda set up a home there and enrolled the children in school. The older daughter's first grade teacher testified that the child made rapid progress in acquiring the educational skills which she lacked at the beginning of the year. The teacher attributed

³The plaintiff was subsequently divorced from James Bezio and, by amendment, this action was discontinued with reference to him. See note 12, *infra*.

this rapid progress to Brenda's work with the child at home. Brenda's landlady, coincidentally an experienced social worker, testified that Brenda's apartment was cheerful, clean, and decorated with the children's drawings. The landlady described Brenda's relationship with her children as "relaxed" and "well controlled." "The children seemed happy with it." A Vermont Department of Public Health supervisor described Brenda's apartment as "very clean, very neat and very comfortable." She observed "good rapport" between Brenda King and her children, laughter and conversation, "a good strong relationship."

In November, 1978, Brenda was arrested on a Massachusetts warrant for kidnapping and the children were returned to Massachusetts. A Vermont police officer involved in executing the warrant testified that the children said they loved their mother and did not want to go back to Magdalena. After the children were returned to Magdalena, the complaint against Brenda was dismissed.

Brenda returned to Massachusetts and caused a care and protection complaint to be filed in the District Court of Franklin County against Magdalena. In mid-December, 1978, the children were moved to a neutral foster home. The women were granted visitation rights on alternate weeks. A social worker from the Department of Public Welfare testified that she and other social workers found that charges against Magdalena of neglect and sexual abuse of the children were unsubstantiated, and recommended to the court that the children be returned to the guardian's home. The District Court judge so ordered and at the same time denied the mother all visitation rights for three months. The probate judge concluded that the guardian did not sexually abuse the children and that the "allegation was engendered by the bitterness caused by this litigation."

Brenda, disturbed by her inability to see her children, entered the Elizabeth Stone House in Boston. The Stone House is a home for care, treatment and rehabilitation of persons coming out of stressful situations. Brenda resided at the home from March to June, 1979, and since that time has

returned for weekly visits. A psychotherapist to whom Brenda was referred by the Stone House testified that Brenda did not suffer from any mental disease, and that her therapy was for support in dealing with the separation from her children. A psychologist testified that Brenda's mental health was good and that she was a "very capable and competent mother."

In May, 1979, Brenda secured visitation rights with her children through an order of a judge of the District Court of Franklin. Visitation was supervised by a counselor with the New England Learning Center for Women in Transition (NELCWIT) who testified that the children were happy to see their mother. She stated, "I saw an increasing exchange of love displayed in hugs and kisses, a sharing of their past experiences that they would recall and laugh about." Another NELCWIT child care worker who supervised nineteen hours of visits testified that she observed a normal, loving mother-daughter relationship. A child therapist from NELCWIT concurred stating that Brenda "put a lot of effort into making sure each child got an equal share of her attention."

Brenda proposes to have the children live in her apartment with her if she regains custody. The probate judge indicated in his findings that she is "living in an active practicing homosexual relationship with a young teacher." Uncontradicted expert testimony was presented at trial to the effect that a parent's sexual preference per se is irrelevant to a consideration of that parent's ability to provide necessary love, care, and attention to a child. However, the judge concluded that the "environment in which [Brenda] proposes to raise the children, namely, a Lesbian household, creates an element of instability that would adversely [a]ffect the welfare of the children."⁴ This factor along with the mother's "unwillingness or inability in the past to assume the responsibility of their care" was part of the basis

⁴The judge also indicated in his findings that the early association between Magdalena and Brenda "may have had a homosexual basis."

on which the judge concluded that Magdalena should not be removed as guardian and custodian of the children.⁵

In deciding that the guardian should retain custody, the judge noted that Magdalena "has provided an excellent home and care for these children. She loves the children and they love her. The children love their natural mother and desire to visit with her but they regard the defendant as their real mother. . . . It would cause great trauma with the children to remove them from a home where they are happy and secure and from the custody of one who loves them and has their welfare at heart. Their best interest requires that they remain with the defendant."

The plaintiff claims error on a variety of grounds. We consider only those issues dispositive of this appeal. The plaintiff contends, and we agree, that it is a fundamental principle that "the Commonwealth may not attempt to force the breakup of a natural family without an affirmative showing of parental unfitness." *Custody of a Minor (No. 1)*, 377 Mass. 876, 882 (1979).⁶ Relying upon this proposition, the mother argues that the Probate Court judge erred by failing to apply the "fitness of a parent" test and by ignoring the presumption that a child's welfare is ordinarily furthered by being in the care and custody of a natural parent. The mother takes the position that since the custody provision of the guardianship statute, G. L. c. 201, § 5,⁷ requires a

⁵ The judge ordered that the mother be allowed to visit the children two hours each week under supervision.

⁶ "That a finding of current parental unfitness is required in a proceeding which results in a parent's loss of child custody derives from the substantial respect we accord family autonomy. The existence of a 'private realm of family life which the state cannot enter.' *Prince v. Massachusetts*, 321 U.S. 153, 166 (1944), is a cardinal precept of our jurisprudence" (citations omitted). *Custody of a Minor (No. 1)*, 377 Mass. 876, 880 (1979).

⁷ General Laws c. 201, § 5, provides in pertinent part: "The guardian of a minor shall have the custody of his person and the care of his education, except that the parents of the minor, jointly, or the surviving parent shall have such custody and said care unless the court otherwise orders. The probate court may, upon the written consent of the parents or surviving parent, order that the guardian shall have such custody; and may so order

showing of parental unfitness in order to deprive that parent of custody, the same standard of proof should apply where the parent petitions to revoke a guardianship previously entered upon her assent.

The guardian argues that the Probate Court judge correctly applied the "best interests of the children" test in this case. The guardian contends that the mother's voluntary assent to the October, 1978, guardianship petition constituted a waiver of her natural custodial rights; the Probate Court judge, not being called upon to "force the breakup of a natural family," was not required to apply the "unfitness of the parent" test. Thus, the guardian claims where, as here, the guardian has already been appointed and awarded custody, G. L. c. 201, § 5, does not apply. The guardian argues that this case should be governed by the guardian removal provision contained in G. L. c. 201, § 33, which provides in pertinent part: "If a guardian or conservator becomes mentally ill or otherwise incapable of performing his trust or is unsuitable therefor, the probate court, after notice to him and to all persons interested, may remove him."

In order to determine the appropriate standard for deciding the case at bar, it is useful to review other cases decided by this court where a natural parent sought to remove a guardian and regain custody of minor children. In *Duclos v. Edwards*, 344 Mass. 544 (1982), a guardian of three minor children appealed from a Probate Court judge's decree removing her as guardian and awarding custody of the children to their natural father. Following marital difficulties, the parents of the Duclos children had the children placed in the Edwards home. Soon after the mother's death which occurred a few years later the father consented to Edwards' appointment as guardian. Approximately nine years after the original placement of the

if, upon a hearing and after such notice to the parents or the surviving parent as it may order, it finds such parents, jointly, or the surviving parent, unfit to have such custody; or if it finds one of them unfit therefor and the other files in court his or her written consent to such order."

Duclos children in the Edwards home, the father, then remarried, petitioned to remove Edwards as guardian and to regain custody. The guardian agreed that the father should have custody of the two older children. Only the custody of the youngest child was in issue. The Probate Court judge found that the father was not an unfit person; that he was able to care properly for his three children; and that the welfare of the children warranted removing the guardian "so as to enable the father . . . to have his entire family with him in his new home." *Id.* at 546. This court affirmed the probate judge's decree.

We framed the issue in *Duclos* with reference to the guardian removal provision contained in G. L. c. 201, § 33,* stating: "Unsuitability, as that term is used in the statute, is not to be adjudged solely by an examination of the character, capacity, and conduct of the guardian. . . . All factors should be considered and 'adjudged with reference primarily to the welfare of the child.' See *Cassen v. Cassen*, 315 Mass. 35, 37 [1943]. This is the paramount consideration. . . . Admittedly, the order of the judge is a distressing one for the [guardian] and perhaps even for the child. Yet it is 'important in the long view that the child should be reared with her own next of kin and in companionship with her own' sisters. *Stinson v. Meegan*, 318 Mass. 459, 465 [1945]. This helps to create a normal family relationship which may well prove to be of inestimable future benefit to all of the children." *Duclos v. Edwards*, *supra* at 546.

Duclos lends support to the guardian's contention that a case such as the one at bar should be decided with reference to the guardian removal provision contained in G. L. c. 201, § 33. *Duclos* did, as the guardian suggests, interpret the term "unsuitable," as it is used in the guardian removal provision with primary reference to the best interests of the child. However, in the case at bar the plaintiff mother's position is also supported by the *Duclos* case. The judge in *Duclos* did give considerable weight to the importance of

*See text, *supra* at 571.

the child's being reared in a normal family relationship with her own next of kin. Moreover, any emotional trauma to the child and the guardian resulting from removal of the guardian was considered less significant than the importance of reuniting the natural family. In further support of the plaintiff's position is the judge's explicit finding in *Duclos* that the natural parent was not "unfit." The plaintiff, of course, argues that a finding of parental unfitness is always required in order to deprive a parent of child custody. We conclude that *Duclos* stands for the following proposition: Where a natural parent is fit to further the best interests of the child, the natural bond between that parent and child normally would render an otherwise suitable guardian an "unsuitable" custodian within the meaning of G. L. c. 201, § 33.

In *Wilkins v. Wilkins*, 324 Mass. 261 (1949), as in *Duclos*, the guardian of a minor child appealed from a Probate Court judge's decree removing her as guardian and awarding custody of the child to the natural parents. The guardian, who was appointed in March, 1944, was a sister of the child's father. The circumstances surrounding the appointment were that the father, who was engaged in military service abroad, assented in writing, and the mother was found unfit to have custody. In March, 1947, the parents petitioned for removal of the guardian alleging that the husband had always been a fit person and that the wife had now become a fit person. The Probate Court judge found the mother unfit to have custody. The judge did not find the father, considered apart from the mother, unfit to have custody.

The guardian in that case was described by the judge as "a graduate nurse, of great poise and culture . . . , familiar with children, strongly attached to the child, and devoted to her." *Id.* at 263. He further indicated that "[t]he child loves the guardian and her family, and distrusts her parents. The visits of her parents have been infrequent, and have resulted in worrying the child, who lost weight and woke up at night with 'screaming nightmares.'" *Id.*

The judge concluded that if the child were returned to the parents, "the effect of the emotional shock upon her would probably injure her future. The welfare of the child would be served by leaving her where she is." Despite this conclusion the judge ordered the child returned to her parents. This court reversed. *Id.* at 263-264.

We assumed, without deciding, that the parents had a right to revocation of the decree of guardianship unless the facts were such as would warrant an original appointment with custody under G. L. c. 201, § 5. We then explained that "[i]n determining whether parents are unfit, the most important consideration is whether the welfare of the child would be served by custody in them or in a guardian. . . . It has been said that 'unfit' means 'unsuitable, incompetent, or not adapted for a particular use or service'" (citations omitted). *Wilkins, supra* at 262-263. We concluded that the parents, jointly, taken as a couple, were unfit to have custody within the meaning of G. L. c. 201, § 5.

Wilkins lends support to the plaintiff's contention that a case such as the one at bar should be decided with reference to the custody provision of the guardian statute contained in G. L. c. 201, § 5. The question of custody in *Wilkins* turned on our decision that the parents, as a couple, were "unfit" to have custody within the meaning of G. L. c. 201, § 5. However, we also indicated that the welfare of the child is the most important consideration in determining whether the parents are fit to care for their child. That the child suffered "screaming nightmares" after visiting her parents bore heavily on our determination whether the natural parents were fit to have custody.

Wilkins and *Duclos* suggest that the custody provision of the guardianship statute, G. L. c. 201, § 5, and the guardian removal provision, G. L. c. 201, § 33, are to be read together in an appropriate case. In both cases there were explicit findings regarding the fitness of the parents. Likewise, each case contained findings relative to the suitability of the guardian. More importantly, both cases stand for the proposition that all factors should be con-

sidered with primary reference to the welfare of the child. *Duclos, supra* at 546. *Wilkins, supra* at 262.

In *Duclos*, the balancing of factors resulted in a decision that the importance of the child's being raised with her natural family outweighed any emotional distress the child might suffer from removal of the guardian. In *Wilkins*, on the other hand, the extreme emotional trauma suffered by the child after visits with her parents tipped the balance against reuniting the child with her natural parents. This court, in *Wilkins*, suggested that if returning custody to the natural parents would be seriously detrimental to the welfare of the child, then the parents could be considered to be unfit ("unsuitable, . . . not adapted for a particular use or service," *Wilkins, supra* at 262-263, citing *Richards v. Forrest*, 278 Mass. 547, 552 [1932]) within the meaning of G. L. c. 201, § 5. On the other hand, if the parents are fit, then the guardian is to be deemed "unsuitable" within the meaning of G. L. c. 201, § 33. We note that the judge's findings in the case at bar do not suggest that the children suffer severe emotional trauma as a result of visits with their mother. In fact, the judge finds to the contrary: "The children love their natural mother and desire to visit with her"

Perkins v. Finnegan, 105 Mass. 501 (1870), and *Malkin v. Pine*, 351 Mass. 358 (1966), are also cases involving custody disputes between natural parents and guardians which confirm this view. While neither *Malkin v. Pine, supra*, nor *Perkins v. Finnegan, supra*, cites any provision of the guardianship statute (G. L. c. 201, § 5, was formerly codified in Gen. Stats. c. 109, § 4 [1860], and G. L. c. 201, § 33, was formerly codified in Gen. Stats. c. 109, § 24 [1860]), both cases highlight the importance of the natural bond between parent and child. We conclude, on the basis of the cases discussed, that the guardian's contention that the mother's voluntary assent to the October, 1978, guardianship petition constituted a waiver of her natural custodial rights is without merit. The appointment of a guardian did not diminish the weight accorded to the natural bond between parent and child.

Our review of other cases where the parents sought to remove their children from the custody of persons who were not legal guardians reveals virtually the same analysis as in the above-cited cases. See, e.g., *Kauch*, petitioners, 358 Mass. 327 (1970); *Stinson v. Meegan*, 318 Mass. 459 (1945), S.C. 319 Mass. 682 (1946); *Gordon v. Gordon*, 317 Mass. 471 (1945); *Richards v. Forrest*, 278 Mass. 547 (1932). We believe that it would be inappropriate to draw a distinction between cases where parents make informal arrangements for their children and cases where parents conscientiously utilize the guardianship statute to make legally proper arrangements for their children.⁹ In both types of cases the natural bond between parents and children should be accorded great weight. Natural parents should be denied custody only if they are unfit to further the welfare of their children.

To the extent that cases such as the one at bar may be decided with reference to a particular test or standard, we believe that the critical question is whether the natural parents are currently fit to further the welfare and best interests of the child.¹⁰ Neither the "parental fitness" test nor

⁹At this point it is useful to note the distinction between parental consent to a guardianship and parental consent to an adoption. When a child is adopted "all rights, duties and other legal consequences of the natural relation of child and parent . . . except as regards marriage, incest or cohabitation, terminate between the child so adopted and his natural parents and kindred." G. L. c. 210, § 6. In contrast, when a guardian is appointed the parent-child relationship remains intact, and the parent is deprived of custody only by consent or if found "unfit to have such custody." G. L. c. 201, § 5. There was no finding of unfitness when the plaintiff voluntarily surrendered custody of her children to the guardians. Whereas the effect of releasing a child for adoption involves a most serious waiver of rights, the Legislature has created a statutory consent form which gives precise and detailed notice. G. L. c. 210, § 2. By comparison, the guardianship petition on which the mother in the case at bar placed her signature contains no such notice of an unconditional surrender. For discussion of the peculiar legislative standards dealing with adoption procedure under G. L. c. 210, §§ 3, 3A, see *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 307 Mass. 631 (1975).

¹⁰We need not reach the mother's further argument that the "unfitness" test is constitutionally required here as we have disposed of the issue on

the "best interests of the child" test is properly applied to the exclusion of the other. This is in accord with what we said in *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 307 Mass. 631 (1975). In that case we indicated that the "best interests of the child" test and the "unfitness of the parent" test "reflect different degrees of emphasis on the same factors, that the tests are not separate and distinct but cognate and connected." *Id.* at 621.

The probate judge below made no finding that the mother was currently unfit to further the welfare of her children. His finding that the mother is "unsuitable to have the custody of the children because of her unwillingness or inability in the past to assume the responsibility of their care" is insufficient to support his conclusion that custody should remain in the guardian. While it is true that "an assessment of prognostic evidence derived from an ongoing pattern of parental neglect or misconduct is appropriate in the determination of future fitness and the likelihood of harm to the child" (*Custody of a Minor (No. 1)*, 377 Mass. 876, 883 [1979]), the critical inquiry is "current parental [fitness]" (*id.*). Mere failure to exercise custodial rights in the past, particularly where a parent has voluntarily relinquished custody "for appropriate reasons" (*Little Wanderers, supra* at 640), does not support a conclusion that such parent is unfit to further the welfare of the child. In *Duclos v. Edwards, supra*, a parent who relinquished custody to a guardian for approximately ten years for reasons no more compelling than those asserted by the mother in the case at bar¹¹ was not found to be unfit. See *Perkins v. Finnegan*,

the basis of our case law. "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter." *Globe Newspaper Co. v. Superior Court*, 379 Mass. 846, 854 (1960), appeal filed 46 U.S.L.W. 3786 (No. 79-1862 May 23, 1980), quoting from *Fazio v. Fazio*, 375 Mass. 394, 405 (1976).

¹¹The judge found that "[b]ecause of ill health and social and emotional problems, the plaintiff has been unable to cope with the problem of

supra (parent who relinquished custody to a guardian for approximately six years not found unfit); *Mollen v. Pine*, *supra* (parent who relinquished custody to guardians for approximately two years not found unfit). See also *Kauch* petitioners, *supra*; *Stinson v. Meegan*, *supra*; *Gordon v. Gordon*, *supra*; *Richards v. Forrest*, *supra*.

The judge's finding that "[t]he environment in which [the mother] proposes to raise the children, namely, a Lesbian household, creates an element of instability that would adversely affect the welfare of the children" is also insufficient to support the judge's conclusion that custody should remain in the guardian. Our reading of the record does not support an inference that the mother's lesbianism would render her unfit to further her children's welfare. Both parties introduced evidence to the effect that a mother's sexual preference per se is irrelevant to a consideration of her parental skills. Dr. Alexandra Kaplan, a clinical psychologist and professor of psychology at the University of Massachusetts, testified as follows: "[T]here is no evidence at all that sexual preference of adults in the home has any detrimental impact on children. . . . [M]any other issues influence child rearing. Sexual preference per se is typically not one of them. . . ." Defendant's counsel questioned further: "[T]here is nothing to prove that a homosexual relationship would make or in any way influence a child to be a homosexual rather than a heterosexual?" Dr. Kaplan responded: "Quite [to] the contrary. . . . [M]ost children raised in a homosexual situation become heterosexual as adults. . . . There is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, maladjusted than children raised with a loving couple of mixed sex. [Sexual orientation of the parent] is irrelevant to [the child's] mental health." Psychologist David Johnson, a defense witness who had seen

caring for her two children. Because her parents disapprove of her life style, she early turned to the defendant for support in the caring and rearing of her two children."

the children in play therapy, concurred with Dr. Kaplan's opinion that homosexuality per se is irrelevant to parental ability.

A finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children "simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average." *Custody of a Minor* (No. 2), 378 Mass. 712, 719 (1979). See *M.P. v. S.P.*, 169 N.J. Super. 425 (1979). In the total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without basis in the record. This is not a matter about which the judge could take judicial notice. "Matters are judicially noticed only when they are indisputably true. . . . Judicial notice is not to be extended to personal observations of the judge. . . ." *Nantucket v. Reinecke*, 379 Mass. 345, 352 (1979). See *W.B. Leach & P.J. Liacos*, *Massachusetts Evidence* 27, 34-39 (4th ed. 1967), and cases cited therein.

The only finding on the issue of current parental fitness is the judge's finding that, "[a]lthough the plaintiff's psychological and emotional condition has improved, the elements of instability that have plagued the plaintiff's relationship with her children are still present." Whether the mother is currently fit to advance the best interests of her children is a question that should be resolved on remand by the Probate Court judge. His opportunity to observe the parties first hand is entitled to great weight. Moreover, nearly a year has passed since the trial below, and new evidence may be required to determine the issues. See *Stinson v. Meegan*, 318 Mass. 459, 466 (1945).

Accordingly, the judgment is reversed and remanded for further proceedings consistent with the opinion expressed herein.¹²

So ordered.

¹²The record does not indicate whether or not James Bezio assented to his removal as a party in this action. He is entitled to notice and an opportunity to be heard before he is denied custody of his natural daughter. See *Stanley v. Illinois*, 405 U.S. 645 (1972). Cf. G. L. c. 201, § 2; *Barry v. Sparks*, 308 Mass. 80, 84 (1940).

FORREST W. MILNE, THIRD, vs. SCHOOL COMMITTEE
OF MANCHESTER.

Filed: September 5, 1980. — October 1, 1980

Present: RUSSELL, C.J., BRAUNER, WILKINS, LACROIX, & ABRAMS, JJ.

School and School Committee, Termination of employment. Due Process of Law, Termination of employment.

A tenured teacher who was dismissed because of an actual decrease in the number of pupils in the town's schools was not entitled under G. L. c. 71, § 42, to notice and hearing prior to his termination. [582-583]
A tenured teacher who was dismissed because of an actual decrease in the number of pupils in the town's schools had no constitutional right to notice and a hearing prior to his termination. [583]

CIVIL ACTION commenced in the Superior Court Department on April 13, 1979.

The case was heard by *Linscott, J.*, on a motion for summary judgment.

The Supreme Judicial Court granted a request for direct appellate review.

Ann Clarke for the plaintiff.

James A. Toomey for the defendant.

WILKINS, J. The defendant school committee concluded in March, 1979, that a reduction in the number of physical education teachers to be employed during the next school year was advisable due to an actual decrease in the number of pupils in the Manchester schools.¹ The school committee, therefore, voted to dismiss the plaintiff, a tenured physical education teacher. The plaintiff had the least seniority of the physical education teachers employed dur-

¹The enrollment was 1,180 pupils in the 1977-1978 school year and 1,109 pupils in the 1978-1979 school year. The anticipated enrollment for the 1979-1980 school year was 1,030 pupils.

COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss.

APPEALS COURT
No. 80-244
(Supreme Judicial
Court No. M-1497)

.....
BRENDA A. BEZIO,
Appellant,
v.
MAGDALENA PATENAUDE,
Appellee.
.....

On Appeal from the Probate
Court of Franklin County

BRIEF OF THE CIVIL LIBERTIES
UNION OF MASSACHUSETTS AS
AMICUS CURIAE

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COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, ss.

APPEALS COURT
No. 80-244
(Supreme Judicial
Court No. M-1497).
BRENDA A. BEZIO,

Appellant,

v.

MAGDALENA PATENAUDE,

Appellee.
.BRIEF OF THE CIVIL LIBERTIES UNION
OF MASSACHUSETTS AS AMICUS CURIAESTATEMENT OF THE ISSUES

Did the probate court's decision denying a natural parent custody of her children on the basis of the parent's sexual preference violate the provisions of the Massachusetts child custody statutes and of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

This case involves an appeal by the natural mother from an order and judgment entered by the Probate Court of Franklin County on December 6, 1979 which effectively denied the mother custody of her children. That order refused to vacate a

previously entered guardianship order granting appellee custody of appellant's two minor children.

The previous guardianship order had been entered on October 5, 1976 with appellant's assent. Four months later, on February 18, 1977, appellant filed the Complaint seeking return of custody of her children, which was heard in September 1979 at a two-day trial and which resulted in the order now on appeal.

STATEMENT OF THE FACTS

Amicus curiae adopt the appellant's statement of facts insofar as those facts pertain to the consideration given by the lower court to appellant's sexual preference in reaching its decision to deny appellant custody of her children.

INTEREST OF AMICUS CURIAE

The Civil Liberties Union of Massachusetts ("CLUM"), an affiliate of the American Civil Liberties Union, is a nonprofit and non-partisan membership organization solely dedicated to defending the individual rights and liberties guaranteed by the Bill of Rights (and the Fourteenth Amendment) of the United States Constitution, and by the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts. One of CLUM's

major concerns as an organization, and of particular concern in this case, is that group of individual and personal rights associated with decisions to have and raise a family (the right to marry, the right to conceive, the right to decide whether to continue or terminate a pregnancy, the right to custody of children, and the right to raise children).

ARGUMENT

- I. The Fundamental Rights Of A Natural Parent To The Custody And Companionship Of Her Children May Not Be Denied Or Restricted On The Basis Of The Parent's Sexual Preference, Per Se

The lower court erred in relying on appellant's sexual preference as the apparent basis for denying her custody of her two natural children. There was no evidence before the lower court which would even suggest that appellant's sexual status itself made her unfit to have custody of her own children.^{1/} By depriving appellant of her fundamental right to custody of her natural children without a showing of a compelling reason, the probate court's order

^{1/} Indeed, the evidence presented at the trial suggested the contrary: that appellant is an intelligent, mature, caring and loving parent, who seeks to be reunited with her family. The lower court's disregard of such evidence confirms its reliance on sexual preference as the basis for denial of custody. The issue of appellant's sexual preference was raised sua sponte by the lower court, over appellant's objections.

violated both the Constitution and the child custody statutes of the Commonwealth, as construed by the Supreme Judicial Court. The lower court also erroneously employed a presumption of unfitness based on appellant's particular sexual preference, a presumption in itself inherently unconstitutional and in violation of statute.

A. Statutory Requirements And Constitutional Principles Preclude The State From Depriving A Natural Parent Of Her Fundamental Right To Custody Of Her Children Solely Because Of Her Sexual Preference.

Constitutional and statutory principles preclude a court from denying custody of a child to the natural parent on the basis apparently used here: a distaste for the appellant's non-conventional lifestyle even though that lifestyle had not been demonstrated to render the appellant unfit as a parent. Neither the lower court's distaste for appellant's non-heterosexual lifestyle nor the court's preference for other parents is a constitutionally permissible basis for its order.

A natural parent has a fundamental right to the custody, care and companionship of her children which is protected by the Due Process Clause.

Stanley v. Illinois, 405 U.S. 645, 651 (1972);
Cleveland Board of Education v. LaFleur, 414 U.S.

632, 639-640 (1974); Meyer v. State of Nebraska, 262 U.S. 390, 399-401 (1923); Smith v. Organization of Foster Families, 431 U.S. 816, 842-844 (1977); Quilloin v. Walcott, 434 U.S. 246, 255 (1978). "[L]egal custody of children is, of course, a central aspect of the marital relationship...." Id. at 256.

This right of custody is included in the bundle of rights associated with the family: the right to marry, Loving v. Virginia, 389 U.S. 1 (1967), Ablocki v. Redhail, 434 U.S. 374 (1978); the right to conceive, Skinner v. Oklahoma, 316 U.S. 535 (1942), Griswold v. Connecticut, 381 U.S. 479 (1965), Roe v. Wade, 410 U.S. 113 (1973); the right to establish a home, Wisconsin v. Yoder, 406 U.S. 205, 215-217 (1972), Moore v. City of East Cleveland, 431 U.S. 494, 504-505 (1977), Meyer v. State of Nebraska, supra at 399 (1923); and the right to raise children, Pierce v. Society of Sisters, 268 U.S. 510 (1925), Wisconsin v. Yoder, supra at 233 (1972), Prince v. Massachusetts, 321 U.S. 158, 166 (1944). Accord, Department of Public Welfare v. J.K.B., Mass. Adv. Sh. (1979) 2202, 2204; Custody of A Minor, Mass. Adv. Sh. (1979) 1117, 1122; Custody of A Minor, Mass. Adv. Sh. (1978) 2002, 2024.

Because it is classified as a fundamental right, the natural parent's right to custody cannot be extinguished except upon the showing of a compelling reason to do so. Roe v. Wade, 410 U.S. 113, 155 (1973); See Bellotti v Baird, 47 U.S.L.W. 4969, 4973, n.18 (1979); Stanley v. Illinois supra at 651 (1972). Accord, Moore v. East Cleveland, 431 U.S. 494 (1977); Petition of the Department of Public Welfare to Dispense with Consent to Adoption, Mass. Adv. Sh. (1978) 2388, 2403; Custody of A Minor, Mass. Adv. Sh. (1979) 2124, 2139. Nothing less than an express judicial finding of parental unfitness justifies terminating parental custody. Petition of the Department of Public Welfare to Dispense with Consent to Adoption, Mass. Adv. Sh. (1978) 2388, 2403-2404; Petition of New England Home for Little Wanderers to Dispense with Consent to Adoption, (hereinafter cited as Little Wanderers) 367 Mass. 631, 646 (1975). Such a finding of parental unfitness is constitutionally required^{2/} and is not met by a finding addressed solely to the "best interests" of the child.

^{2/} The constitutional rationale for requiring a finding of fitness has been described by the Supreme Judicial Court as follows:

For some parents, loss of a child may be as onerous a penalty as the deprivation of the parents' freedom.

Custody of A Minor, Mass. Adv. Sh. (1979) 1117, 1128. See also Department of Public Welfare v. J.K.B., Mass. Adv. Sh. (1979) 2202, 2204.

Stanley v. Illinois, supra at 658 (1972); Quilloin v. Walcott, supra at 255 (1978).

We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the break up of a natural family...without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." (Emphasis added.)

Id., quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862-863 (1977) (Stewart, J. concurring in judgment).

The Supreme Judicial Court, accordingly, has repeatedly held that those who seek to deprive a natural parent of the custody of her children must affirmatively show that she is currently unfit to have custody of her children. E.g., Richards v. Forrest, 278 Mass. 547 (1932); Gordon v. Gordon, 317 Mass. 471 (1945). This showing must be made whether the petitioner is a relative, Stinson v. Meegan, 318 Mass. 459 (1945), Ridgeway v. Cels, 350 Mass. 274 (1966); a stranger, Hirshon v. Gornley, 323 Mass. 504 (1949); or the state. Custody of A Minor, Mass. Adv. Sh. (1979) 1117. It must be made whether the forced separation is permanent, as with an involuntary adoption,^{3/}

^{3/} A petition may be brought, pursuant to G.L. c.210 §3, to allow a person or an agency

Little Wanderers, supra, or temporary, as with a guardianship^{4/} or a care and protection proceeding.^{5/} Kauch petitioners, 358 Mass. 327 (1970); Custody of A Minor, Mass. Adv. Sh. (1979) 1117.

(footnote continued)

having the care or custody of a child, to commence a proceeding to dispense with the need for the natural mother's consent to an adoption if it is found to be in the "best interests of the child." "In determining whether the best interests of the child will be served by issuing a decree dispensing with the need of consent . . . the court shall consider the ability, capacity, fitness and readiness of the child's parents . . . to assume parental responsibility . . . and shall also consider the plan proposed by the . . . agency [or person] initiating the petition."

4/ A guardianship proceeding, pursuant to G.L. c.201 §5, can cause a child to be removed from the custody of her parents. Section 5 provides in pertinent part, "The probate court may, upon the written consent of the parents or surviving parent, order that the guardian shall have . . . custody; and may so order if, upon a hearing and after such notice to the parents or surviving parent as it may order, it finds such parents, jointly, or the surviving parent, unfit to have such custody; or if it finds one of them unfit to have such custody; or if it finds one of them unfit therefor and the other files in court his or her written consent to such order. . . ." (Emphasis added.)

5/ G.L.119 §§24, 26, provide that any person concerned for a child's welfare may file a petition alleging that the child "is without necessary and proper physical, educational or moral care and discipline, or is growing up under conditions or circumstances damaging to a child's sound character development, or who lacks proper attention of parent, guardian with care and custody, . . . and

(footnote continued)

The requirement that "unfitness" be shown cannot be met by mere evidence as to parental behavior per se, including parental sexual preference per se, but only by evidence as to parental behavior that adversely affects the child.^{6/} Thus,

(footnote continued)

whose parents or guardian are unwilling, incompetent or unavailable to provide such care. . . ." If the allegations in the petition are proved, the child may be committed to the custody of the Department of Public Welfare.

Even after a parent has been deprived of child custody under c.119, the parent retains residual rights, such as, the right to visit, G.L. c.119 §35, to consent to adoption, G.L. c.210 §3, to determine the child's religious affiliation, G.L.c.119 §33, and to petition the court every six months for a review and redetermination of the current needs of the child, G.L.c.119 §26.

^{6/} Many judicial authorities outside this Commonwealth agree that homosexuality is not, in and of itself, sufficient reason to deny a natural parent custody unless it can be shown to affect the welfare of the child. As Judge Ross Campbell of the Michigan Circuit Court recently noted,

A parent's homosexual orientation if relevant, is certainly a factor which must be considered in determining custody, but it is relevant only if it actually affects or may affect the child. . .

Homosexuality alone, standing in a vacuum unrelated to the child, does not constitute a mandatory disqualification for child custody.

"Child Custody When One Parent is a Homosexual", 17 A.B.A. Judge's J. No. 2, 38, 41 (1978).

Similarly, in People v. Brown, 49 Mich. App. 358, 365 (1973), the fact that two women were involved in a homosexual relationship was found insufficient to support the conclusion that such a relationship rendered the home an unfit place

(footnote continued)

the Supreme Judicial Court noted almost half a century ago in Richards v. Forrest, supra at 552-554:

The unfitness of parents . . . must be determined with respect both to their own character, temperment, capacity, and conduct, and to the welfare of the child in connection with its age, environment and affections.

See Guardianship of A Minor, 1 Mass. App. Ct. 392, 396 (1973). Parental unfitness and the welfare of the child are "not separate and distinct,

(footnote continued)

for children to reside. And, in M.P. v. S.P., 5 Family Law Reporter, 2855 (N.J. Super. Ct. App. Div., 1979) the court rejected, as completely speculative, the notion that the natural mother's homosexual preference was destructive to the welfare of her two daughters absent evidence to that effect. There was no evidence of any specific instances of sexual misconduct by the mother or evidence that she tried in any way to inculcate the girls with her sexual attitudes.

In Smith v. Smith, 5 Family Law Reporter, 2450 (Mich. Cir. Ct., 1979), a Michigan court recently held that lesbianism is no bar to the granting of custody. The Court emphasized that it is "...the kind of care, the quality of care, the love, security, affection, and consistency of discipline" that a parent can give her children that is important, not the parent's sexual orientation per se. Id. at 2451.

See also, Ashling v. Ashling, 5 Family Law Reporter, 2976 (Oregon Ct. App., 1979); Miller v. Miller, 5 Family Law Reporter, 2302 (Mich. Sup. Ct., 1979); Armanini v. Armanini, 5 Family Law Reporter, 2501 (N.Y. Sup. Ct., 1979); Whitehead v. Black, 2 Family Law Reporter, 2594 (Maine Super. Ct., 1976).

but cognate and connected." Little Wanderers, supra at 641. Similarly, the "best interests of the child" test alone is an insufficient basis for separating a parent from her child. Quilloin v. Walcott, supra at 255.

The Supreme Judicial Court has explicitly rejected the notion that parents who have temporarily given up custody may be deprived of future custody by reference to the "best interests" standard. In Little Wanderers, supra at 639-640, the Court said:

[W]e do not think [the Legislature] meant to allow fit parents to be deprived of their children . . . Nor have we found any cases where fit parents who have voluntarily given up temporary custody for appropriate reasons lost their children to adoption by reference to the "best interests" standard simply because another set of parents was found better qualified.

The Supreme Judicial Court has also made it quite clear that a finding of unfitness may not be premised, as here, on the lower court's distaste for the parent's lifestyle. In Custody of A Minor, Mass. Adv. Sh. (1979) 2099, 2107, the Court stated:

[S]tate intervention is justified only when parents are shown to be incapable of fulfilling their duties as parents. This does not mean that the State is free to intrude upon families simply because their households fail to meet the

ideals approved by the community. Neither does it authorize state intervention simply because the parents embrace ideologies or pursue life-styles at odds with the average. Rather, it is incumbent upon the State to prove that the parents suffer from "grievous shortcomings or handicaps that would put the child's welfare in the family milieu much at hazard."^{7/} (Emphasis added.) (citations omitted).

The termination of appellant's fundamental right to custody solely because the lower court did not condone her life style is clearly unconstitutional. "Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State not to attempt in a society constitutionally committed to the idea of individual liberty and freedom of choice." Bellotti v. Baird, 47 U.S.L.W. 4969, 4973 (1979).

^{7/} While it is true that this statement was made in the context of a G.L. c.119 §24 "care and protection" proceeding, there is no reason to doubt its applicability to this case. First, such safeguards directly derive from the Supreme Judicial Court's recognition of the fundamental nature of the parent-child association and not from the identity of the contestants in a custody suit. In Custody of A Minor, Mass. Adv. Sh. (1979) 1117, 1131 n.10, a "care and protection" case, the Supreme Judicial Court stated that much of its decision was equally applicable "to custody disputes involving husbands and wives or other relatives of the child." Second, this is indeed a custody dispute between parent and the Commonwealth. Ms. Paterau is not in any way related to appellant and the Department of Public Welfare was an active participant in the trial below because the Department was the legal custodian of the children at that time.

Although the lower court did purport to make detailed findings of fact, it is apparent from the court's decision that appellant's homosexuality per se caused the court to find her "unfit" to have custody of her natural children. The lower court's preference for a more conventional lifestyle is simply an insufficient basis for its order under the Constitution.

B. In The Absence Of Evidence To Support A Finding Of Unfitness, The Sexual Preference Of A Natural Parent Is A Neutral Factor And Has No Presumptive Effect.

Premising its order on unsupported assumptions about lesbianism, the lower court violated its constitutionally compelled obligations to make specific individualized findings concerning unfitness and established, contrary to law, a presumption of unfitness based upon the mother's sexual preference.

Without any evidence to support its conclusion, the lower court concluded that "...[A] lesbian household creates an element of instability that would adversely effect [sic] the welfare of the children." At trial, there was no evidence that appellant's sexual preference has had or would have any adverse impact on the children. In fact, the expert testimony presented by all parties was that sexual preference per se was unrelated to

determining a parent's fitness and that the children were currently emotionally healthy and stable. Lay witnesses all attested to the normal relationship between appellant and her children and to the fact that appellant is a fit and caring parent. The lower court, nonetheless, made no finding on her present fitness, but instead made findings relative to her sexual preference from which it inferred a negative effect on her children. In so doing, the lower court violated its obligation to detail the specific parental "shortcomings or handicaps" that render the natural parent "unfit". Custody of A Minor, Mass. Adv. Sh. (1979) 1117, 1130. The lower court's decision fails to demonstrate that "close attention has been given the evidence and that the necessity of removing the child from his or her parents has been persuasively shown." Id. "Indeed, we believe that important personal rights such as those involved when the breakup of a family is threatened, warrant an extra measure of evidentiary protection." Id. at 1128. (Emphasis added.)

Here, not only did the lower court fail to make specific individualized findings but it did exactly the contrary of providing "an extra measure of evidentiary protection" to a family relationship threatened with breakup. Because there was no evidence to support its conclusion, the only

explanation for the lower court's decision to deny appellant custody is that it applied a presumption: lesbians are unfit parents. The attempt on the part of the lower court to give presumptive effect to appellant's sexual preference is unwarranted, unauthorized and unconstitutional. It is also directly contrary to the holdings of the Supreme Judicial Court. In Custody of A Minor, Mass. Adv. Sh. (1979) 2099, 2112, the court held that a mother could not be denied custody on the basis of a finding that she suffered from mental disorders and was incapable of sound judgment. As such findings do not establish unfitness, so appellant's sexual preference does not establish unfitness.

Because substantial personal liberties are at stake in cases where termination of the parent-child custody relationship is sought, the burden of proving unfitness is on those who seek that termination. This is so under the decisions of the Supreme Judicial Court, the Supreme Court and under the statutes of the Commonwealth.

That burden may not, consistent with the constitution, be shifted to the parent to prove her fitness.^{8/} "[T]he Commonwealth may not attempt

^{8/} The Supreme Court has rejected the notion that the state may force a natural parent to bear the burden of demonstrating fitness to have custody. In Stanley v. Illinois, 405 U.S. 645, 648 (1972)

to force the break up of a natural family without an affirmative showing of parental unfitness."

Custody of A Minor, Mass. Adv. Sh. (1979) 1117, 1124. It was error for the lower court to use appellant's sexual preference as the basis for shifting to her the burden of proving her fitness.

The use of a presumption is also directly contrary to the Supreme Judicial Court's consistent requirement that custody decisions be made on a case by case basis, with careful attention given the facts. Little Wanderers, supra at 646; Petition of the Department of Public Welfare to Dispense with Consent to Adoption, Mass. Adv. Sh. (1978) 2388, 2406; Custody of A Minor, Mass. Adv. Sh. (1979) 1117, 1130.

The close, case-by-case attention to particular and individual facts, which gives the lower courts the flexibility in the custody area to respond fairly to the variety of situations that come before them, is not merely a wise judicial policy but is constitutionally compelled. Custody of A

(footnote continued)

the Court made it clear that Illinois could not justify a statute requiring the state to take custody of illegitimate children on the death of the mother by affording the natural father an opportunity to go through adoption proceedings in which he would bear the burden of demonstrating his fitness.

Minor, Mass. Adv. Sh. (1979) 1117, 1128; Custody of A Minor, Mass. Adv. Sh. (1979) 2099, 2108; Petition of the Department of Public Welfare to Dispense with Consent to Adoption, Mass. Adv. Sh. (1978) 2388, 2406. The Supreme Judicial Court has uniformly upheld the constitutional validity of various "child removal" statutes, such as G.L. c.201 §5, G.L. c.119 §24, and G.L. c.210 §3, which have been attacked on vagueness grounds, saying, "Standards of mathematical precision are neither possible nor desirable in this field...." Little Wanderers, supra at 646; Petition of the Department of Public Welfare to Dispense with Consent to Adoption, Mass. Adv. Sh. (1978) 2388, 2406. The use of broad and general terms in those statutes is acceptable, however, only when coupled with a requirement of close, careful scrutiny of the facts of a particular case.

[I]t is constitutionally demanded that a judge exercise the utmost care, as demonstrated through specific and detailed findings of fact, in rendering a judgment which deprives parents of child custody....

Custody of A Minor, Mass. Adv. Sh. (1979) 1117, 1118.

Indeed, not only did the lower court impermissibly shift the burden to appellant to prove her fitness, but even after the evidence suggested that she was "fit", the lower court still denied

her custody of her children. The lower court's disregard of the evidence of appellant's fitness suggests that the lower court considered appellant's sexual preference to be an insurmountable obstacle to her claim for custody. The lower court not only employed a presumption, but it appears to have employed an irrebuttable one, and so was in error.

The Supreme Court has consistently disfavored irrebuttable presumptions and has found them to violate the due process clause in a variety of contexts. Cleveland v. LaFleur, 414 U.S. 632, 643-646 (1974) (striking down irrebuttable presumption that pregnancy beyond a certain stage caused unfitness to teach); Vlandis v. Kline, 412 U.S. 441, 446 (1973) (striking down irrebuttable presumption that students are out of state residents for state university tuition purposes); Carrington v. Rash, 380 U.S. 89, 96 (1965) (striking down irrebuttable presumption that servicemen were non-residents for franchise purposes). Such presumptions violate due process when the basis for the presumption is not necessarily true in fact and the individual is denied his right to challenge the factual basis of such a judicial or legislative determination.

In Stanley v. Illinois, supra at 654 (1972), the Court struck down a statute requiring the state to take custody of any illegitimate child upon the death of its natural mother and without allowing the putative father an opportunity to prove his fitness to be a custodial parent. The Court held that the state statute, which created an irrebuttable presumption that unmarried fathers were incompetent to raise their children, violated the Due Process Clause:

It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents... But, all unmarried fathers are not in this category; some are wholly suited to have custody of their children.

Id. at 654. The Stanley Court held that the advantage of presumption was inadequate when the "issue at stake is the dismemberment of his family", and that a more individualized determination of a father's competence to care for his children was necessary so as to avoid "running roughshod over the important interests of both parent and child."

Id. at 657, 658. See also, Cleveland Board of Education v. LaFleur, supra; Carrington v. Rash, supra; Heiner v. Donnan, 285 U.S. 312 (1932).

The lower court's decision suffers from the same infirmities as the laws struck down in Stanley v. Illinois and Cleveland Board of Education v. LaFleur. The lower court made no individualized

determination as to appellant's fitness to be a parent. It ignored evidence of appellant's fitness and, instead, relied on broad, negative conceptions of homosexual environments to presume a negative effect on appellant's children. To deprive a parent of custody of her natural children on such a basis offends the requirements that the state has the burden of demonstrating unfitness, and that the court make individualized determinations and avoid irrebuttable presumptions. Because the lower court's decision was not rooted in the facts of this case, it violated appellant's due process rights and must be reversed.

II. The Probate Court Unjustifiably Discriminated Against Appellant's Constitutionally Protected Parental Rights.

By determining appellant to be unfit because of her sexual preference, the lower court effectively denied her equal protection of the laws. The presumption that appellant was unfit based solely on the fact of lesbianism is an impermissible discrimination against homosexuals.

Under equal protection analysis, where fundamental interests such as parental custody of a natural child are treated in a discriminatory manner, the state carries a heavy burden of justifying the discrimination. The state must show

that the classification involved -- here, homosexual as opposed to heterosexual parents -- furthers a compelling state interest, and is closely tailored to effectuate legitimate state interests. Carey v. Population Services International, 431 U.S. 678, 688 (1977); San Antonio School District v. Rodriguez, 411 U.S. 1, 16-17 (1973); Zablocki v. Redhail, supra at 382 (1978); Shapiro v. Thompson, 394 U.S. 618, 633-34, 638 (1969); Dunn v. Blumstein, 405 U.S. 330, 339, 342-343 (1972).

In the instant case, the lower court's termination of appellant's custodial rights is not justified by any significant state interest. The state does have a legitimate interest protecting the welfare of minor children by removing them from unfit parents. Custody of A Minor, Mass. Adv. Sh. (1979) 1117, 1123-1124; Custody of A Minor, Mass. Adv. Sh. (1979) 2099, 2103; Petition of the Department of Public Welfare to Dispense with Consent to Adoption, Mass. Adv. Sh. (1978) 2388, 2403. The legislative policy expressed in the various child removal statutes embodies legitimate interests which are within the power of the state to implement:

...[T]he policy of this commonwealth [is] to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care

of children; ...and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development. The purpose...is to insure that the children of the Commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.9/

However, the state's interest in removing children from the custody of "unfit" parents supplies no justification for removing children from the custody of a homosexual parent. Where the evidence before the lower court was undisputed that homosexuality is not the equivalent of parental unfitness, the lower court's different treatment of appellant on the ground of homosexuality was impermissible.

Equal protection analysis requires a determination of whether the means used to achieve

9/ This is the statement of policy which precedes the "care and protection" removal provisions in G.L. c. 119 §1 and is the best synthesis of the decisions in the area of child custody. For example, this policy applies to adoption proceedings, Little Wanderers, 367 Mass. 631, 645 (1975); Petition of Department of Public Welfare to Dispense With Consent to Adoption, Mass. Adv. Sh. (1978) 2388, 2405. Its applicability to every proceeding in which a natural parent stands to lose custody of her children is apparent.

legitimate ends are constitutionally defensible. Stanley v. Illinois, supra at 652 (1972); Zablocki v. Redhail, supra at 388 (1978). There is no doubt that the means the lower court used to terminate appellant's custody rights, namely, a per se finding of unfitness, was impermissible. As the Supreme Court stated in Stanley v. Illinois:

We observe that the State registers no gain towards its declared goals when it separates children from the custody of fit parents. Indeed, if Stanley is a fit father, the State spites its own articulated goals when it needlessly separates him from his family.

Id. at 652-653. That observation was echoed in

Little Wanderers:

[W]e do not think [the legislature] meant to allow fit parents to be deprived of their children....

Id. at 639.

In sum, the lower court's decision reflects a classification drawn "with an evil eye and an unequal hand", motivated by a "feeling of antipathy against a specific group". Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886); Skinner v. Oklahoma, supra at 541 (1942). Where there was no evidence to permit the lower court to connect the welfare of the child with appellant's fitness as a parent resulting from her sexual preference, the lower court simply discriminated against her. This discriminatory act denied appellant the equal protection of the law and should be reversed.

CONCLUSION

For the reasons stated above, this case should be remanded for rehearing under the constitutionally required standards.

Respectfully submitted
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