

Legal Lines

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PRESIDENT'S MESSAGE

By Terry J. McLaughlin

Let me begin once more by sending my best wishes that everyone and their families are healthy and safe and remain that way, now and through the upcoming holidays.

I also want to thank everyone that has suggested, planned, presented or participated in one of our virtual events over the last month. They continue to be a great success and very well attended. My additional thanks to Sandra DiLuzio, who has taken over the technological aspects of most, if not all, of our programming, including scheduling, hosting, recording and uploading all of our content. Please take the time to watch some of the recorded programs if you did not have a chance to see them live.

The CARE Committee and the subgroup on Education and Awareness have continued their great start. The "21-Day Racial Equity Habit-Building Challenge" finished on November 23rd with its third and final roundtable. Thank you to everyone who participated in the challenge and/or roundtables. The pieces, lectures, podcasts, information and discussions were excellent and very thought provoking. Thank you to Attorneys Rubby Wuabu, Areille Sharma and Weayonnoh Nelson-Davies for hosting one of the roundtables and for their honesty and courage.

The CARE Committee is working on several more great ideas for content and programming in the very near future. The Education and Awareness subgroup is planning panel discussions on Developments in the Law, Race and Equality in Juvenile Court, and Qualified Immunity. The Community Engagement subgroup is developing panel discussions on the recent SJC Study on Racial Disparities in the Massachusetts Criminal System and on Human Rights. They also have several ideas involving the local school communities, including Civic Education in the schools and an Introduction to the Court for High School Students. If you have an idea or would like to participate in the planning or presentation of these events, please reach out to co-chairs Adrian Angus and Courtney Mayo.

The next First Monday Series program, The Return of the Jury Trial, will be on December 7th from 1 to 2 pm. The program will be moderated by the Honorable Judge Daniel Wrenn. The panelists will be Judge Hillman, Judge Wrenn, Judge Kenton-Walker and Judge Despotopulos. They will be discussing their recent jury trial experiences, as well as plans for restarting jury trials in both federal and state court. A special thank you to all of the judges.

Please participate if you have the chance. These are meaningful programs that pack a lot of useful information into a short period of time. If you can't attend, the program will be recorded and uploaded on to the Association's website.

The Discovering Justice After School Mock Trial and Mock Appellate Program has reached out to the WCBA and invited us to participate in their Mentor Program in Spring, 2021. The Discovering Justice Program is a Community Outreach and Mentoring Program attached to the federal court. I have had a number of conversations with their Executive Director and I think this would be a great opportunity for our Association to collaborate with the Discovering Justice organization. Discovering Justice is asking the WCBA to mentor three middle school teams from the Worcester County area. The program is intensive, so we are hoping to fill three mentor teams with multiple people on them. This is the first time the Worcester County Bar Association has been asked to participate. Please reach out me or Geoff Spofford if you are interested.

As I write this, our new website is expected to launch over the weekend of November 21st and 22nd. Again, please be patient for the first few days as everyone works through the transition. When you have a moment, please visit the webpage and explore the new site. Thank you again to Sandra DiLuzio, Candice Staples and Rob White for all of their efforts to make this happen.

As I have asked before and will continue to ask, please reach out, be active and get involved. Despite the current circumstances, we continue to make progress together towards becoming a stronger Association and a stronger Bar.

I hope that everyone has a happy, healthy and small Thanksgiving holiday.

Submitted on Behalf of the Worcester County Bar Association – Family Law Section

Case Summary: Adoption of Daphne, 484 Mass. 421 (2020)

By Kevin J. Powers¹

I. Issue

Under G.L. c. 210, § 1, where a gestational carrier mother gives birth to a child in Massachusetts, but where (1) neither the biological father nor his partner reside in Massachusetts, and (2) the biological father and his partner remove the child from Massachusetts before or after filing an adoption petition, does the Massachusetts Probate and Family Court have subject-matter jurisdiction over the adoption petition?

II. Facts

The biological father and his same-sex partner entered a gestational carrier agreement with the biological mother. The child was born in Massachusetts. The father is not a resident or citizen of the United States.

III. Procedural History

The father filed several adoption petitions in the Probate and Family Court. The Probate and Family Court rejected the petitions on jurisdictional and clerical grounds. The father, partner, and child returned to their home country. The father then filed a further adoption petition. The Probate and Family Court dismissed the petition with prejudice for want of jurisdiction. The father appealed and the Supreme Judicial Court transferred the case sua sponte.

IV. Rule of Law

Under G.L. c. 210, § 1, the jurisdictional requirements are: (1) a petitioner of full age; (2) adopting a child younger than the petitioner; (3) where the child is not in one of several specific familial relationships to the petitioner; (4) where the spouse, if any, joins or where the court makes necessary findings negating the spousal requirement; and (5) the petitioner files the petition "in the county where he resides" or, if the petitioner is not a Massachusetts inhabitant, the petitioner must file the petition in the county where the child "resides."

A domicile of origin is not lost until a new domicile is acquired. The child's domicile at birth is the birth mother's domicile. The child's temporary abode with outside-of-Massachusetts petitioners does not change the child's domicile.

V. Policy

The phrase "[a]ny person" in the statute was intended to permit adoption of resident children by petitioners domiciled in another state. Farnsworth v. Goebel, 240 Mass. 18, 21 (1921). It would be illogical to hold that the mother's surrender of the child, pursuant to G.L. c. 210, § 2, would impact the child's domicile without further court proceedings. Nor can the signing of a voluntary acknowledgment of paternity, without further adjudication, change the child's domicile; such a result would cause the child's domicile to change each time a court grants custodial rights to a noncustodial parent.

Compliance with the six-month residency requirement of G.L. c. 210, § 5A, if held to effect a change in the child's domicile, would bar all petitions by nonresident petitioners; the Legislature could not have intended that result.

If a petition for adoption was a custody proceeding, the Probate and Family Court would have jurisdiction under G.L. c. 209B, § 2(a)(1)(ii), despite the father and child leaving the United States.

VI. Reasoning

Justice Cypher, writing for the Court and reviewing this issue of statutory interpretation *de novo*, observed that the only ambiguities are in the definitions of the words "residing" and "resides." Because the child's birth mother was domiciled in Massachusetts, the child's domicile at birth was also Massachusetts. Although the father's signing of the voluntary acknowledgment of paternity, which occurred before the mother's surrender, granted the father a constitutional right to parent and maintain a relationship with the child, that did not change the child's domicile.

Therefore, despite the child's removal to the father's home country during the adoption proceedings, the child's domicile remained in Massachusetts.

VII. Holding

Because the child was "residing" in Massachusetts under G.L. c. 210, § 1, the Probate and Family Court had subject matter jurisdiction to conduct a hearing on the father's petition. As to personal jurisdiction, the father consented to the court's personal jurisdiction by filing his petition there.

VIII. Disposition

The SJC vacated the dismissal of the adoption petition.

IX. Dicta

The child will acquire a new domicile with the legal and custodial parent when the adoption is finalized.

The SJC strongly urged the Legislature to consider a more expedient process for post-birth gestational surrogacy parentage judgments. The Uniform Parentage Act § 809, which Massachusetts has not adopted, automatically assigns parental rights to the intended parents where the gestational surrogacy agreement is enforceable. Other New England states have adopted similar legislation. See, e.g., Conn. Gen. Stat. § 7-48a; Me. Rev. Stat. tit. 19-A, § 1934; N.H. Rev. Stat. § 168-B:12; Vt. Stat. tit. 15C, § 804.

The Probate and Family Court also could have exercised equity jurisdiction under G.L. c. 215, § 6. The equity statute imposes no residency requirement.

¹ The author handles appeals and complex trial motions for busy trial lawyers who love going into court but who lack the time to decamp to a law library. He can be reached at kpowers@kevinpowerslaw.com.