

Read more at www.lynchowens.com/blog

SJC Signals Changes Coming to 'Real Advantage' Test in Child Removal Cases

By Carmela M. Miraglia | January 26, 2018

Family Law Divorce Child Custody

Divorce attorney Carmela M. Miraglia reviews a Massachusetts Supreme Judicial Court (SJC) that clarifies the legal standard in child relocation cases, but signals changes on the horizon.



In a recent decision reviewing the legal standard for custody cases involving parents seeking to move out of state with children, the SJC affirmed the so-called “real advantage test” – which favors custodial parents in removal cases – while simultaneously signaling that the Court may be considering changes to test. The decision, [Miller v. Miller \(2017\)](#), explored the different legal standards that operate in child relocation depending on whether the parent seeking removal has sole physical custody of the children or shares physical custody with the other parent.

In *Miller*, the Court clarified how courts should determine sole vs. shared custody in removal cases. However, the decision includes a concurring opinion from the influential and respected [Chief Justice Ralph D. Gants](#), who called for the Court to eliminate the different standards for sole and shared custodians in removal cases. Although the majority did not join in Gants’ concurring opinion, a footnote early in the decision suggests that the Court is open to considering Gants’ view in a future case.

Yanas and Mason: Different Legal Standards for Massachusetts Removal Cases

As we have discussed in past removal blogs, Massachusetts law favors parents who have been awarded primary or sole physical custody in cases where such

parents request to remove or relocate their children to a new state outside of Massachusetts. When the parent seeking relocation has sole physical custody, a court applies the so-called “real advantage test”, which is drawn from the case of [Ioannis v. Yanas \(1985\)](#), whereby the Court gives substantial weight to the custodial parent’s desire to move, so long as the move constitutes a “real advantage” to that parent. Ultimately, a Court must still decide if a proposed move is in the best interests of a child, but under Yanas, the “real advantage” to the custodial parent is a major factor, based on the theory that the interests of that child are “so interwoven with the well-being of the custodial parent” that “the determination of the child’s best interest requires that the interests of the custodial parent be taken into account” (citation omitted).

In contrast, if the parents share physical custody of the child, the “real advantage” test is omitted, and the Court must decide whether the move is in the best interests of the child without giving special consideration to the custodial parent’s interests. This is known as the Mason test, where the standard arises out of the case of [Mason v. Coleman \(2006\)](#). In Miller, the SJC described the two standards as follows:

Where one parent has sole physical custody, a judge must evaluate that parent’s request to remove the child under the “real advantage” analysis set forth in Yannas. Where, on the other hand, the parents share joint physical custody, a judge must apply the “best interests” analysis articulated in Mason. “The main distinction” between these analyses “comes down to the weight that should be assigned to the benefits that relocation would provide the parent seeking to move.” (Citation omitted.)

As we have discussed in our recent removal blogs, over the last five years, Massachusetts courts have increasingly struggled to apply the real advantage test. Invariably, the question that arises in removal cases is this: how much weight should the custodial parent’s interests be given in the ultimate analysis of removal cases? For many years following the Yanas decision in 1985, the “real advantage” to the custodial parent was viewed as decisive; if the custodial parent could show a proposed move would result in a “real advantage” to the custodial parent, the move was typically allowed.

In recent years, however, Massachusetts appellate courts have upheld a number of lower court decisions in which a custodial parent’s request to relocate was denied despite the parent showing a “real advantage.” As a result of the recent trend, it has become more difficult for parties, attorneys and judges to predict what evidence provides sufficient proof for a relocation request. Under current law, the “real advantage” that a move may provide a primary custodial parent

remains a powerful argument in favor of relocation. Just how decisive this advantage should be is increasingly elusive, however.

Functional Analysis: Determining the Legal Standard when Sole vs. Shared Custody is Unclear

In *Miller v. Miller*, the question before the Court was whether the lower court judge erred in applying the “real advantage” test to the mother’s request to relocate when the parties divided parenting time 60/40 in favor of the mother. The father argued that the 60/40 split amounted to shared custody, meaning the Mason test should have applied. The mother favored the judge’s finding, which was that the mother’s “functional” duties made her the children’s primary custodian.

In *Miller*, the SJC reaffirmed recent decisions indicating that when custody is ambiguous, a court “must first perform a functional analysis, which may require a factual inquiry, regarding the parties’ respective parenting responsibilities to determine whether it more closely approximates sole or shared custody, and then apply the corresponding standard”. If the parenting duties of the party seeking relocation are consistent with that of sole physical custody, then the court should apply the “real advantage” test to the party’s removal request. If the parenting duties appear to be shared, the court should proceed directly to the best interest of the child analysis.

We will dig into the SJC’s analysis of these factors later in this blog. Before that, however, we must address the concurring opinion of Chief Justice Gants, which argues for a major rethinking of the real advantage test.



The advertisement features a woman, Carmela M. Miraglia, in a red blazer, standing in front of a city skyline. The text includes the firm's logo 'L&O', the tagline 'Need a family law lawyer? Hire the Best', and a call to action 'Need a Child Custody Attorney? CONTACT CARMELA TODAY!'.

L&O
DIVORCE & FAMILY LAW ATTORNEYS

Need a family law lawyer? Hire the Best

Need a Child Custody Attorney?
CONTACT CARMELA TODAY!

Carmela M. Miraglia
Senior Associate Attorney

Chief Justice Gants: Apply the Real Advantage Test in Every Removal Case

In his concurring opinion (in which he was joined by Hon. Frank M. Gaziano), Chief Justice Gants makes the following argument:

This case well illustrates the limits of the Yannas-Mason framework; we should not allow it to linger any longer. It is time that we abandon it and resolve all removal cases under the same standard: whether removal is in the best interests of the child. As part of that "best interests" determination, a judge should be permitted to consider the "real advantage" of the move to the parent seeking removal of the child, regardless of whether that parent has sole or joint physical custody, and accord that factor as much weight as is warranted by the specific facts of the case. As the court acknowledges, the determination whether removal is in the child's best interests is a "classic example of a discretionary decision," in which "much must be left to the trial judge's experience and judgment" (citation omitted). But in its strict adherence to the Yannas-Mason framework, the court chooses to constrain that equitable discretion, and in a way that interferes with, rather than assists, sound decision-making.

The crux of Gants' argument is that many parenting plans no longer fit into the neat box of sole physical custody vs. shared physical custody. Gants does not argue against the theory underpinning the "real advantage" test; namely, that a child's happiness is so closely connected to the happiness and well being of his or her primary parent that the parent's needs should be given increased weight. Instead, Gants is concerned about the cases in the muddy middle. Gants explains the problem as follows:

The inflexibility of the Yannas-Mason framework is on full display in this case where, as in many cases, the parenting arrangement resists easy classification. Unlike Yannas, this is not a case where one parent has sole physical custody. Nor is it a case like Mason, where the parents share physical custody equally. Here, pursuant to the parties' stipulated parenting plan, the child spends approximately sixty per cent of her time with her mother and forty per cent with her father. In practice, the percentage of time spent with the mother was higher because, although the father has a loving relationship with the child, he travels frequently. Based on these and other facts, the judge decided that the mother is the child's primary caregiver and analyzed it — as she is required to do under the court's binary framework — as if it were a straightforward, uncomplicated case where one parent does in fact have sole physical custody. (Citations omitted.)

The core of Gants' argument is this: in cases where it is difficult to say whether custody is primary or shared, one parent should not receive a decisive advantage simply because the judge *must* choose either sole custody or shared custody to determine the legal standard. Instead, Gants argues that the case should examine the "real advantage" to the parent requesting the move in every case, and that courts should determine how much weight to assign to the "real

advantage” based on the fact of the case. (Although Gants is not explicit, his concurrence suggests that he believes that in cases where one parent fits the classic mold of “sole physical custodian”, then the “real advantage” of the move to the parent should continue to be afforded considerable weight.)

Although the majority did not follow Gants, the main opinion includes a [tantalizing footnote](#) that suggests that the SJC may consider the Chief’s view in the near future:

In the concurrence's view, our adherence to the Yannas-Mason framework when deciding this case constitutes an endorsement of an overly formalistic analysis that constrains judges' discretion. ... By incorporating this functional (rather than formalistic) inquiry regarding custody into our existing framework, however, we seek to provide trial judges with more discretion when deciding these cases (beyond that inherent in a judge's application of either Yannas or Mason). **And although we do not necessarily disagree with certain of the concurrence's concerns, to the extent we must reexamine the wisdom of the Yannas-Mason framework, we wait to do so in a case where the issue has been raised and briefed by the parties.** (Citations omitted.)

In short, the majority prefers to wait for a case in which one or both parties fully briefs arguments for and against changing the removal standard. While the footnote does not endorse Gants’ view, it reads like an invitation to lower court judges and appellate attorneys to make the argument soon.

Custody Labels Overrated: Why Judges Must Examine Functional Parenting Roles in Removal Cases

One thing the Miller decision makes clear is this: just because two parties say they will “share physical custody” in an agreement doesn’t mean that parenting duties are actually equal. The decision explains the need for a functional test as follow:

[The] functional assessment is necessary for two reasons. First, "custody judgments issued by the Commonwealth's courts do not consistently utilize" the categorical phrases "sole physical custody" or "shared physical custody" "as defined in G. L. c. 208, § 31." As a result, "such categorizations . . . are utilized inconsistently, [and] can obscure more than they illuminate." Second, even where a custody order renders such a "categorical custodial

determination," the actual practice of the parties may differ from what the order specifies." (Citations omitted).

In short, courts should look past the labels used in parenting plans and examine the reality of each party's responsibilities. The Miller Court also addressed cases in which custody is not defined by any label at all:

In other cases, such as the instant one, there is no prior custody order to refer to, as a parent's removal request is concurrent with their divorce complaint. Still, the same principles apply; in deciding the appropriate removal standard, the judge must focus on "functional," as opposed to technical, "divisions in caregiving and parenting responsibilities." At this stage, "the judge must make a 'factual inquiry' to determine the approximate custodial arrangement and then apply the corresponding test". As we have stated, although an existing custody order is of course a common feature of removal cases, the fact that one does not exist does not preclude the application of the appropriate removal standard." (Citation omitted).

Conclusion: Real Advantage Test Provides Important Guidance Despite Flaws

Gants raises several persuasive arguments against over-relying on the "real advantage" test in cases where physical custody falls in the murky area between primary and shared custody. However, in cases in which primary custodial duties are clearly assigned to one parent, the "real advantage" test provides helpful guidance on whether parties should seek (or oppose) relocation from the court at all. Relocation cases are incredibly difficult for courts to decide because either outcome often includes a devastating blow to one parent. If a primary parent is seeking a move in order to take a better job, live with a new spouse, or move closer to extended family, a court's denial of their relocation request is a bitter pill to swallow following a long and extraordinarily expensive trial process. The outcome is hardly better for non-moving parents, for whom a loss often means a huge reduction in parenting time.

Obviously, every case is different, and probate court judges need broad discretion to determine what is best in each removal case. However, the "best interest of the child" standard is so broad as to be nearly meaningless. Despite its flaws, the "real advantage" test has provided a singular benefit to Massachusetts parents: the test provides at least *some* framework through which parents can hope to understand whether a request to relocate *might* be allowed or denied.

Although probate and family court judges should have broad discretion to determine outcomes in every case involving child custody, it is critically important that the SJC provide *some* guideposts for parties, attorneys and judges to understand what represents a “good” removal case, in which relocation should generally be allowed. For good or for ill, the “real advantage” test provides some semblance of structure by suggesting that a primary parent who (a.) can demonstrate a move constitutes a real advantage and (b.) checks off the remaining boxes cited in the case law, will *generally* be permitted to relocate with his or her children. Without some structure, every removal case will result in a painful and expensive trial, since neither party will ever know when to settle. Invariably, parties who can afford to litigate will wear down those who cannot, making the deciding factor in many relocation cases money.

Gants raises legitimate concerns with the “real advantage” test in his concurrence. Let’s hope that if the SJC adopts his view in the future, it does so while providing guidance about what would typically constitute a “good” removal case in which relocation should generally be allowed under the new standard.

About the Author: [Carmela M. Miraglia](#) is a Massachusetts divorce lawyer and Massachusetts family law attorney for Lynch & Owens, located in Hingham, Massachusetts and East Sandwich, Massachusetts. She is also a mediator for [South Shore Divorce Mediation](#).

Schedule a consultation with [Carmela M. Miraglia](#) today at (781) 253-2049 or send her an email.

© Lynch & Owens, P.C. and www.lynchowens.com, 2019. Unauthorized use and/or duplication of this material without express and written permission from this site’s author and/or owner is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given to Lynch & Owens, P.C. and www.lynchowens.com with appropriate and specific direction to the original content.