

W 7-7-16

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT
PLYMOUTH DIVISION DOCKET NO.: PL 13D0641 DR

Anthony Michael Branch,
PLAINTIFF/Defendant in Counterclaim

v.

Evelyn M Wiggins Branch,
DEFENDANT/Plaintiff in Counterclaim

Findings
(Complaint for Divorce filed on May 9, 2013, and
Counterclaim for Divorce filed on July 11, 2014)

- I Relevant Procedural History.
 - 1 Plaintiff/Defendant in Counterclaim ("Husband") filed the above captioned Complaint for Divorce on May 9, 2013 alleging the sole grounds of adultery with a known person.¹ The Complaint seeks a divorce on said grounds, custody of the parties' 2 minor children, that Defendant/ Plaintiff in Counterclaim ("Wife") be prohibited from imposing any restraint on his personal liberty and resume her maiden name, and for the conveyance to him of the property located at 25 Montello Street Ext., Brockton ("Marital Home"), title to which stands in his name alone.
 - 2 Wife filed an Answer to the Complaint for Divorce on October 30, 2013, denying the allegation of adultery.²
 - 3 Wife's Motion to file a Counterclaim late was allowed by the Court (Ward, J.). Her Counterclaim for Divorce filed on July 11, 2014 alleges the grounds of cruel and abusive treatment on June 29, 2013 and "many" other diverse occasions, and the alternate grounds of irretrievable breakdown of the marriage. The Counterclaim also seeks sole legal and physical custody of the children, an order that Husband be prohibited from imposing any restraint on Wife's personal liberty, child support, health insurance, alimony, a conveyance of the Marital Home to Wife, and for permission to resume her maiden name.

¹ Husband was *pro se* when he filed this Complaint. At one point in the proceedings, he was represented by counsel on a limited assistance representation basis.

² Wife was represented by Ruthanne Withers, Esquire ("Attorney Withers").

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- 4 Husband filed a Motion to insert the name of a co-defendant into the Complaint on August 29, 2014. The Motion to insert the name of Antonio R. Harris ("Harris") as co-defendant was allowed by the Court (Ward, J.) on September 12, 2014.
- 5 The Pre-Trial Conference was scheduled first on July 24, 2014. It was continued to September 11, 2014, and then to October 6, 2014, at the request of one or both of the parties. From October 6, 2014, it was continued to January 28, 2015, then to April 24, 2015, and then to September 1, 2015, each continuance at the request of one or both parties. Although availability sometimes was an issue, the continuances, for the most part, were requested because discovery (both mandatory Rule 410 discovery and formal discovery) had not been completed. In addition, neither party had completed the required Parent Education Program.³
- 6 After the Pre-Trial Conference on September 1, 2015, an Order issued scheduling 3 days of trial on February 25 and 26, and March 1, 2016. Each party's prospective witnesses were named in the Order. Husband named 11 witnesses in addition to Wife and himself. He did not name Harris. Wife's only named witness in addition to Husband and herself was Harris.
- 7 Harris was served in hand with the Complaint naming him as co-defendant on October 2, 2015. He failed to Answer or otherwise appear or defend.
- 8 Husband marked several Motions for hearing on November 9, 2015. Withers filed a motion to Withdraw as Wife's counsel and marked it for hearing on November 9, 2015. The hearing resulted in an Order dated November 12, 2015 in which Wife was ordered to produce financial documentation or be precluded from introducing evidence concerning financial matters at trial, and was ordered to complete an approved Parent Education Program or be precluded from introducing evidence concerning parenting matters at trial.⁴
- 9 Withers was permitted to withdraw as Wife's attorney after the hearing on November 9, 2015, but the trial dates of February 25 and 26, and March 1, 2016 were confirmed by the Court. Each party was urged to seek the assistance of counsel for trial.
- 10 Husband marked several Motions for hearing on February 22, 2016. His Motion to File Late Counterclaim Answer, Motion to Dismiss Counterclaims, and Motion to Enlarge Discovery were denied. His Motions for Further Temporary Order regarding child support and child tax exemptions were deferred to the trial that was scheduled to commence a few days later.

³ Husband completed the Parent Education Program on August 18, 2015.

⁴ Wife did not complete the Parent Education Program until January 15, 2016.

- 11 On February 24, 2016, Attorney Ardrena Parkman-Lyles faxed a Notice of Appearance for Wife with a Motion for Continuance of the trial scheduled to start the next day so that she could “become familiarized with the current matter and the case in chief.” However, Attorney Parkman-Lyles did not attend Court on February 25, 2016 to present this Motion. Wife presented the Motion, which was denied, but the Court recessed until 10:00 AM on February 26, 2016, which was the second of the three scheduled trial days, to enable Wife and Attorney Parkman-Lyles to prepare.
- 12 Attorney Parkman-Lyles faxed a Notice of Withdrawal of Appearance to the Court after the close of business on February 25, 2016, and did not appear for trial on February 26, 2016.
- 13 Trial took place on February 26 and March 1, 2016 as originally scheduled. The third day was fit in on March 8, 2016. Husband and Wife each proceeded *pro se*.

II Specific Standards of Law

- 1 “A married person who has sexual intercourse with a person not his spouse ... shall be guilty of adultery...” GL ch. 272 §14. In civil cases for which there is a corresponding criminal offense, the standard of proof for that civil case should be the general standard for civil matters, i.e., preponderance of the evidence. Richardson v. Burleigh, 85 Mass. 479, 481 (1862).
- 2 “The evidence by which the act of adultery is proved is seldom direct. The natural secrecy of the act makes it ordinarily impossible to prove, except by circumstantial evidence.” Thayer v. Thayer, 101 Mass. 111, 113 (1869).
- 3 The party alleging adultery must demonstrate that the spouse had (1) the opportunity to commit adultery, and (2) the disposition to commit adultery. Murphy v. Murphy, 244 Mass. 110 (1923); DiRosa v. DiRosa, 350 Mass. 765 (1966). Ample opportunity standing alone “would not be sufficient to justify the inference” that a party is guilty of adultery. *Id.* Both elements, disposition and opportunity, must be present in order for the Court to make a determination that the spouse has committed adultery. White v. Ely, 234 Mass. 221 (1919).
- 4 Generally, if a party confesses to adultery, that confession, without corroborating evidence, is not enough to prove adultery. Baxter v. Baxter, 1 Mass. 346 (1805). If the Court makes a finding that the admission was based on real facts and was not collusive, however, the admission may constitute sufficient evidence of adultery. Sayles v. Sayles, 323 Mass. 66 (1948).
- 5 Cruel and abusive treatment must appear to have caused injury to “life, limb or health, or created danger of such injury, or a reasonable apprehension of such danger”. It may be proved by “mere words if they create a reasonable

apprehension of personal violence or tend to wound feelings to such a degree as to affect the health of a party, or create a reasonable apprehension that it might be affected.” Brown v. Brown, 323 Mass. 332 (1948). A single act may constitute sufficient grounds for divorce for cruel and abusive treatment. Collis v. Collis, 355 Mass. 25 (1968).

- 6 The decision that a marriage is irretrievably broken need not be based on any proved objective fact. It is sufficient that a party subjectively decides that his/her marriage is over, and there is no hope of reconciliation. Caffyn v. Caffyn, 441 Mass. 487 (2004).
- 7 An “abusive parent” is one who has committed a pattern of abuse or serious incident of abuse. If a parent is abusive, there is a presumption that it is not in the best interests of a child to be placed in his/her sole or shared legal or physical custody. The presumption may be rebutted by a preponderance of the evidence that a custody award is in the best interest of the child. MGL ch. 208 §31A.
- 8 “Joint custody is synonymous with joint decision-making and a common desire to promote the children’s best interests. It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in a mature civilized fashion, (citation omitted), and where their respective concepts of child rearing equally commensurate with the children’s best interests.’ ... ‘Although complete agreement between parents to implement joint custody may not be necessary,’ in order to be effective ‘joint custody requires two capable parents with some degree of respect one another’s abilities as parents, together with a willingness and ability to work together to reach results on major decisions in a manner similar to the way married couples make decisions.’ (citation omitted). It is very difficult, as in the present case, to award joint custody following a divorce traumatized by personal and emotional conflict. Rolde v. Rolde, 12 Mass. App. Ct. 398, 405 (1981). “ ‘As a court ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, [joint custody] can only enhance familial chaos.’ (citation omitted).” Id.
- 9 A parent may not be entitled to retain joint physical or legal custody of a child, even though the parents had shared custody arrangements under a temporary order of the Court after a finding that both parents were good parents and attended to the child’s needs, where there was significant animosity and acrimony between the parties that impacted the child. Franco v. Mudford, 55 Mass. App. Ct. 1110 (2002).
- 10 In determining child custody, the best interest of the child standard is applied in the context of the particular needs and circumstances of the child in question. Hunter v. Rose, 463 Mass 488 (2012);

- 11 Neither alimony nor division of property may be justified in a divorce action purely on the basis of the blameworthy conduct of one of the spouses. Putnam v. Putnam, 5 Mass. App. Ct. 10 (1977).
- 12 Each spouse in a divorce proceeding has the obligation to provide adequate financial data to the other spouse and to the Court. Grubert v. Grubert, 20 Mass. App. Ct. 811 (1985).

III Findings of Fact

Husband and Wife each testified at trial. Husband also called Mary Otiato ("Otiato"), who is the successor to Harris as Chief of Staff at the Massachusetts Commission for the Blind, Alicia Kennerly ("Kennerly"), who is the mother of his two older daughters (Ronecia Kennerly ("Ronecia") and Karliyah Branch⁵), and Terry Branch ("Branch"), who is his brother, to testify on his behalf. Wife called no other witnesses to testify on her behalf. Forty-five exhibits were introduced.⁶ The Court also reviewed Husband's CARI report.⁷ Little evidence was introduced concerning the factors required pursuant to G.L. ch 208 for custody, support (child or spousal), and division of assets. Some evidence came in the form of testimony in response to basic questions, such as date of birth, marriage, separation, education, and employment history, posed by the Court.

After considering all of the credible evidence introduced, the Court finds as follows:

- 1 Husband was born on June 10, 1966. He is fifty (50) years old. He is approximately twenty years older than Wife, who was born on September 6, 1986, and is twenty-nine (29) years old.
- 2 Wife graduated from high school in 2005. After graduating from high school, she was employed by Good Samaritan Hospital in the medical records department. The evidence was not clear as to when Wife left this position, but she then worked briefly at a financial services agency. In approximately 2006, Wife began

⁵ Ronecia and Karliyah were named as witnesses by Husband, but not called to testify.

⁶ Husband did not provide copies of his proposed exhibits to Wife pursuant to the Pre-Trial Order. He testified that he attempted to provide them to Attorney Withers, but they "were refused". However, Attorney Withers had withdrawn her appearance for Wife well prior to the date the parties were required to exchange Exhibits pursuant to the Pre-Trial Order. In any event, Wife declined to look at Husband's proposed Exhibits on the first day of trial, objecting to all of them, sight unseen. Husband was given an opportunity to re-designate and mark his proposed Exhibits for identification. Wife did not provide copies of her proposed Exhibits to Husband pursuant to the Pre-Trial Order. Husband was given the opportunity to look at Wife's 2 proposed Exhibits, which also were marked for identification.

⁷ Wife does not have a criminal record.

to attend Bridgewater State University ("BSU"). She received a bachelor's degree in psychology from BSU in December, 2010.

- 3 Wife is in good health. Although she testified that she was diagnosed in 2013 with post - traumatic stress disorder, she presented no evidence to confirm the diagnosis, nor evidence of current treatment for it.⁸ She was in an automobile accident in 2014, but received workers compensation when she was out of work and recovering, and she returned to work thereafter. She took approximately 3 months off pursuant to the Family Medical Leave Act beginning in June, 2015 to attend a full-time outpatient clinical day program at Arbor Hospital. She testified that her attendance was as a result of clinical depression, but, again, offered no evidence to confirm the diagnosis nor the referral for treatment, and she returned to work thereafter. She began to attend programs at the Boston Rape Center in the fall of 2015. There was insufficient evidence to support a finding that Wife suffers from any physical, mental or emotional condition which would impact her parenting ability or her ability to work.
- 4 Husband received a high school equivalency diploma in 1983. He attended Roxbury Community College in 1984 for one year. He worked at New England Medical Center in support services from 1983 until 1988. From 1988 until 1992 he was a property manager. From 1992 until 1996 he was director of administrative services for a property management company. He testified that he has been certified by the National Center for housing management as a HUD property manager in 2005, and for marketing and management in 2007. He became employed at Beth Israel Medical Center in 1996 in support services, leaving the position in 1998 to become a manager for the Massachusetts General Hospital ("MGH") neuroscience and oncology services. His last salary in this position was \$86,000.00 per year.
- 5 Husband is in good physical health, although he was hospitalized in 2013 for respiratory distress and blood sugar imbalance. There was insufficient evidence to support a finding that Husband suffers from any physical, mental or emotional condition which would impact his parenting ability or his ability to work.
- 6 Wife is the adopted daughter of Kennerly's maternal great aunt ("Bessie"). Kennerly's children with Husband considered Bessie to be their grandmother. As a child, Wife went to Kennerly's house to play with Husband's daughter, Ronecia. Wife first new Husband in this family context.
- 7 Wife testified, emotionally, that her relationship with Husband began at Kennerly's house when she was 14, and that when she was 15, Husband "took her virginity" on the kitchen floor at Kennerly's house and she had to "clean it up

⁸ It is possible that Wife's participation in the Arbor Hospital day program in 2015 relates to this claim, but no connecting evidence was introduced.

with bleach". Kennerly denied knowing anything about either the relationship between Husband and Wife at that time, or the alleged incident between them in her kitchen. However, Wife was 15 years old in December, 2001 when Kennerly obtained an Abuse Prevention Restraining Order against Husband that prohibited him from entering her house and from having any contact with her or with their children.⁹ Kennerly acknowledged that when Wife was 15 or 16 years old, Bessie asked Kennerly about Wife's relationship with Husband because Bessie thought that Wife's behavior was "off". When Wife was 17 years old, Kennerly asked Bessie whether anything had happened between Wife and Husband.

- 8 In 2004, when she was 18 years old, Wife moved out of Bessie's home to a friend's apartment on Massachusetts Avenue. After a short time at the friend's apartment, Wife moved into Husband's residence on Hillbrook Avenue in Brockton ("Hillbrook"). Then Husband obtained a Section 8 voucher for a residence on Oak Street in Brockton ("Oak Street"), and the parties moved there from Hillbrook in 2005.
- 9 Husband denied that he had sexual relations with Wife at any time prior to their move to Oak Street. Whether or not Husband and Wife had sexual intercourse in Kennerly's kitchen when Wife was 15 years old, or at Hillbrook when she was 18 years old and lived with him, Husband's denial of any sexual relationship with Wife before they moved together to Oak Street is not credible.
- 10 The parties lived together at Oak Street for approximately 2 years. Husband denied that he lost the Section 8 voucher for Oak Street, but admitted that he had not been reporting his income accurately. They moved from Oak Street to a residence in Dorchester in or about 2007/2008. Wife obtained a Section 8 voucher for the Dorchester residence.
- 11 Wife told Husband before they were married that she did not love him. Nonetheless, she accepted his proposal of marriage. At the time, she was pregnant with their first child. Husband then was a Muslim, and had been using the name Anthony Malik Shabazz since approximately 1988. Wife told him she would not marry him if he were a Muslim, so they started going to Zion Fire Church together.
- 12 The parties were married on May 21, 2007 in Kissimmee, Florida. They were in Florida to attend Husband's daughter's graduation ceremony.
- 13 Husband told Wife if she ever cheated on him, he would never take her back.
- 14 The parties' first child, Ariana T. Branch ("Ariana") was born on August 15, 2007. She was baptized at the Zion Fire Church.

⁹ This 209 A Order was in effect for approximately 6 weeks.

- 15 Wife was the primary homemaker and child care provider throughout the marriage. Husband was the primary financial provider throughout the marriage.
- 16 Wife had been receiving cash tuition benefits from Department of Children and Families (“DCF”) while attending BSU. The marriage was going to cause the termination of those benefits, so Husband, Wife, and Wife’s family agreed that no one would inform DCF of the marriage so that Wife would continue to receive the benefits, and they would share them. Wife’s family refused to “honor the deal” after the marriage, which caused a rift between Husband and Wife, and Wife’s family. Eventually, however, DCF learned of the marriage, and in October, 2007, terminated the benefits.
- 17 The parties lived in the Dorchester residence until the Marital Home was purchased in or about 2009. The Marital Home was purchased in Husband’s name alone for approximately \$114,500.00 on a down payment of approximately \$12,000.00. The down payment was from Husband’s MGH benefits, and cash advances. The balance of the purchase price was financed in Husband’s name alone.
- 18 The only evidence at trial of the fair market value of the Marital Home was Husband’s statement of it on his Financial Statement at \$187,176.00. The Court so finds. The only evidence at trial of the principal balance of the mortgage on the Marital Home was Husband’s statement of it on his Financial Statement at \$123,976.00. The Court so finds. As of trial, there was equity in the Marital Home of approximately \$63,200.00.
- 19 Wife graduated from BSU in December, 2010. She worked for several months on a per diem basis for Child and Family Services, where she received training in responding to domestic violence crises.
- 20 Wife gave birth to the parties’ 2nd daughter, Briana M. Branch (“Briana”), on December 3, 2010. After Briana was born, Wife was not employed for approximately 2 years.
- 21 At some point after the marriage, Husband and Wife opened their own church, the “Apostolic Meeting House of Brockton”, at the Marital Home. After that, Husband became re-involved in the “Refuge and Relief Ministries”, an apostolic pentecostal church founded by his aunt in which he had been “ordained” as a minister in or about 1986. Wife participated in each of these ministries.
- 22 When Husband’s aunt died in May, 2012, Husband and Wife assumed responsibility for the Refuge and Relief Ministry. Husband became pastor. Wife was “ordained” as a minister and became fully involved in church matters. She organized a women’s group and oversaw the first “Women Meet” event in October, 2012 for Revival Nation Chapels of America, of which Refuge and

Relief Ministries was a member. By October, 2012, Husband had assumed the title of bishop, a title he admitted that he used even before he was "sanctioned" in public.¹⁰

- 23 At some point between 2010 and 2012 Wife was in a single vehicle automobile accident. She told Husband that she had blacked out from stress. The car was demolished. To avoid liability, however, the parties made up a different story when they submitted the claim to their insurer.
- 24 During this period in the marriage, the parties presented the picture of a loving, committed, Christian couple to the public. They planned and conducted church services together. Wife planned, organized and carried out family birthday and holiday celebrations. She planned anniversary celebrations, including in Odyssey excursion. She bought gifts for Husband from herself and from the children, including a mug inscribed with the statement "Worlds Greatest Dad". She sent cards to Husband professing her love for him. She complimented him in Facebook postings, both as a man and as a man of God. He was equally as complimentary of her in public. Wife acknowledged at trial that she was happy in 2012.
- 25 Wife also testified, however, that she did the wifely things that she did because she was "expected" to do them, and that there were "repercussions" if she did not. She testified that Husband hit her, punched her, and choked her throughout their relationship, and told her she was "stupid" and "no good" in front of their children. Not only is this testimony not supported by any other evidence, it is contradicted by other evidence. It is not credible.
- 26 In 2012, Wife began working for the Commission for the Blind in Boston as an ADA specialist. Her salary was \$30,000.00 per year. Harris was her boss at the Commission.
- 27 By early 2013, Husband felt that Wife was pulling away from him, and was not as loving as she usually was. Their sexual relationship faltered.
- 28 In March 2013, Husband began going back and forth to Cincinnati to be with his mother because she was dying, and he and his family had to make decisions about her end of life care.
- 29 On Sunday, March 10, 2013, Wife got a manicure and pedicure after church. She testified that she did not remember doing so. It was the first time that she had done so on a Sunday, in Husband's recollection
- 30 Harris paid for a room at the Holiday Inn Express in Braintree on March 11, 2013.

¹⁰ The "official" process for Husband to become a Bishop.

- 31 Wife purchased items in Braintree at the Bourbon Street Café and at Konditor Meister, charging them to her Sears credit card on March 11, 2013. She testified that she did not remember the purchases.
- 32 Wife texted Husband from work on March 11, 2013. When she went home that evening, she showered immediately, which was not her usual routine.
- 33 Husband and Wife had sexual relations on March 12, 2013, which was the first time they had been intimate in several weeks. Husband testified, in some detail, that it felt “disgusting”.
- 34 Wife accompanied Husband to Cincinnati from March 25 through March 29, 2013. Husband’s mother died on March 29, 2013. Husband and Wife returned to Cincinnati on April 4, 2013 for his mother’s funeral.
- 35 Although it is not clear when Wife placed the order, on April 8, 2013, when Husband and Wife were returning to Boston from Cincinnati, a delivery of chocolate covered strawberries was made to Harris at his office, sent by Wife.
- 36 On April 16, 2013, Husband sent fruit and flowers to Wife at her work. On that day, he also reviewed the parties’ telephone bill for the month of March, 2013. On it, he saw several calls to an unknown number. He called the number, and got Harris’s voicemail. Husband then called Wife at work, ostensibly to confirm that she had received the fruit and flowers, but asked her if he could pick her up to discuss the telephone bill. After he picked her up at work, they drove around for a time before returning to the Marital Home. While they were in the car, Husband asked Wife about the telephone calls. At first, Wife told Husband that the telephone number belonged to her friend, Michelle. When Husband asked Wife about Harris, Wife told him that Harris was Michelle’s friend. Eventually, Wife admitted to Husband that she had made the phone calls to Harris, but told Husband that she had been counseling Harris and denied any sexual involvement with Harris.
- 37 Husband became upset and angry while they were in the car. Wife testified that he punched her in the arm and in the leg. Immediately after they arrived at the Marital Home, Wife left and returned to work via public transportation because she had left her belongings there.
- 38 After Wife left the Marital Home on April 16, 2013, Husband went to Harris’s house and confronted him. Husband had the children with him in the car. Husband told Harris that he was going to call the Governor’s Office to get Harris fired. Husband left Harris’s house and returned to the Marital Home. Harris called Husband at about 7:00 PM and admitted to Husband that he and Wife had a close friendship, but denied having a sexual relationship with her. Harris asked Husband not to call the Governor’s Office. After Husband returned to the Marital

Home following this confrontation with Harris, he had an episode of low blood sugar and shortness of breath. The police and paramedics came to the Marital Home, and Husband was taken to Good Samaritan Medical Center. He presented there with acute anxiety and panic "because of the family situation" with which he was dealing. He also had burns on his arm.¹¹ His brother was at the Marital Home with the children.

- 39 At some point late on April 16, 2013, Wife's brother picked her up at work. She went to the Marital Home with her brother and sister and discovered that Husband was at the hospital. She went to the hospital and saw Husband in the emergency room. She asked him about the burns on his arm. She testified that he told her that he had deliberately burned his arm because of the pain that she had caused him, telling her that the pain from the burn was nothing in comparison to the pain that he would feel if she had been having an affair with Harris. Wife told the nurse that Husband had burned himself. The nurse questioned Husband. Husband denied purposefully causing the burns, although he acknowledged that he was upset because of his mother's recent death and his belief that Wife had committed adultery. Wife left the hospital, went to the Marital Home, got the children and some personal property, then went back to the hospital. When she left the hospital after the 2nd visit, she and the children went either to her mother's house or her uncle's house. Husband was discharged from the hospital on April 17, 2013, and returned to the Marital Home.
- 40 Between April 17 and April 21, 2013, Husband received many phone calls from Harris's wife about Wife's relationship with Harris. On April 22, 2013, Harris himself called Husband. Harris was irate, and demanded that Husband stop accepting phone calls from his wife. After and as a result of this telephone call with Harris, Husband called Wife and accused her of having a sexual relationship with Harris. Wife admitted to Husband that she and Harris had sexual relations.
- 41 After the call from Husband on April 22, 2013, Wife went to the Marital Home with her sister to retrieve more of her personal property. Wife told him again that she had sexual relations with Harris, and that she did so because she was unhappy. He called Wife a name. Wife's sister told him that he should not have called Wife that name when Wife "only did it once." Husband refused to let Wife and her sister in the Marital Home, and told Wife that if she wanted anything from the Marital Home she would have to call the police. She did, and when police arrived at the Marital Home, she told them that Husband had guns in the house. He did, but he allowed the police into the house and surrendered his guns to them.¹² Wife collected her belongings and left the Marital Home at approximately 7:00 PM. She went to her uncle's home.

¹¹ There was no clear evidence about who had the care of the children after Husband was taken to the hospital on April 16, 2013.

¹² The inventory of the surrendered weapons, identifies handguns, only. No ammunition was surrendered.

- 42 Husband called Harris's wife after Wife had left the Marital Home. As a result of this call, Husband believed that Wife had been with Harris at the Holiday Inn Express in Braintree on March 11, 2013. While Husband still was talking on the telephone with Harris's wife, he received a text message from Wife stating, "It was easier to agree with the lie to get out of this marriage. I hope you got the answer you wanted! I got the out I needed!" followed by "Sheraton a better hotel!"
- 43 By March, 2013, Wife was unhappy in the marriage. If, as she testified, she had been told that Husband would "let her out of the marriage" only if she cheated on him, and if, as she testified, she "wanted out of the marriage", the text recanting her admission of adultery, which would accomplish her goal, is illogical. Moreover, it ignores the objective evidence. She had many private and personal phone calls with Harris, sent him a gift at work, and made otherwise unexplained purchases in Braintree on the same day that he paid for a hotel room there. The preponderance of the evidence supports the conclusion that Wife committed adultery with Harris. The Court so finds.
- 44 In the early morning hours of April 23, 2013, Harris called Husband again, upset that Husband was still talking to his wife. On April 29, 2013, Harris applied for and received an Harassment Prevention Order against Husband from the Brockton District Court that prohibited Husband from contacting Harris.
- 45 Husband was back at the hospital on or about April 26, 2013 with chest pains. By this time, DCF was conducting a 51A investigation.¹³ Wife told a mandated reporter, who told DCF, that she had picked Husband up at the hospital, and that she and the children had stayed overnight at the Marital Home with him because she "felt bad". On April 30, 2013, Wife told the DCF social worker directly that Ariana had missed school and Briana had missed daycare while she was staying with her uncle, and that she believed that Husband was planning to use the children's absences against her to obtain custody of the children. She also stated that she and the children remained at the Marital Home with Husband because the children wanted to be at home, and she wanted them to return to their routine. Wife denied to the DCF social worker that Husband ever had threatened to harm her, or ever had been physically abusive toward her, and denied that the children ever had been exposed to violence. "She was adamant that she feels safe at home."
- 46 On May 6, 2013, the parties had an argument. Wife left the Marital Home and did not return. The next day, Husband confronted Wife in the parking lot at Briana's daycare center, upset because he had learned of DCF's involvement. Wife told him that she was on her way to an appointment at the DCF office.

¹³ It is not clear from the evidence when this report was made, or what it alleged.

Husband followed Wife to a location that Wife thought was the DCF office, but was not. While she was at the wrong location, she called DCF for directions to the correct location. Husband took her cell phone from her, suspicious about her call. They then continued to make their way, separately, to the correct DCF location. The police met the parties in the parking lot of the correct DCF location. Each party was advised about his/her 209A rights. Wife told the police that no physical violence had taken place. She then went into the DCF office for her appointment, and Husband left the DCF premises.

- 47 Wife obtained an Abuse Prevention Restraining Order ("First 209A Order") against Husband through the Emergency Judicial Response System on May 7, 2013, based upon the incident on May 6, 2013. This First 209A Order, re-issued by the Brockton District Court on May 8, 2013, prohibited Husband from contacting Wife, and required him to remain away from her new residence in Dedham. Custody of the Ariana and Briana was awarded to Wife, but Husband was permitted to have contact with the children.
- 48 The parties last lived together on May 7, 2013 in Brockton. Their marriage was irretrievably broken down on or before this date.
- 49 Husband went to the Probate Court in Brockton on May 9, 2013, where he filed the above captioned Complaint for Divorce and an ex parte Motion for an emergency Order of custody. However, Wife and several of her relatives either already were at the Courthouse or arrived there shortly after Husband did. Wife filed an appearance for the May 9, 2013 hearing on the Motion, which was denied by the Court (Boyle, J.). Husband was harassed by Wife's entourage as he was leaving the Courthouse.
- 50 Husband tried unsuccessfully to see the children at their respective school and daycare locations after the issuance of the First 209A Order. On May 23, 2013, he presented an ex parte Motion to establish parenting time. It was denied without prejudice by the Court (Boyle, J.).
- 51 On June 7, 2013, the First 209A Order was vacated by the Brockton District Court "based upon the credible evidence" presented at a second hearing at which both parties appeared.
- 52 Husband saw the children on Father's Day on June 17, 2013. They were brought to the parties' church and returned by him to Wife at the Dedham Mall, without incident.
- 53 Wife filed a new Complaint for an Abuse Prevention Restraining Order against Husband in the Dedham District Court. This Complaint and Wife's Affidavit in support of it are dated June 19, 2013, but there is no evidence of any hearing on Wife's new Complaint on or about that date. Wife stated in her affidavit that she had informed Husband on April 6, 2013 that it was "draining physically and

emotionally to please him, and [she] was still unhappy doing so” and “no longer wanted to be married to him due to the lack of feelings for him.” She stated that Husband had “smack[ed] her ... choked her, punched her” during the marriage, had “changed her email account information, bank account passwords”, had harassed her family, friends and coworkers, had “called her boss”, and on June 19, 2013 had come to her house and was taking pictures but “fle[d] once [her] cousin and children approach the house.” Although Wife referenced filing a police report on June 19, 2013, none was introduced into evidence. Wife also stated in her June 19, 2013 affidavit that Husband had violated the First 209A by emailing and facebooking her, that she had filed a report alleging these violations, and that a hearing was scheduled on July 7, 2013.

54 On June 29, 2013, Husband called the Dedham police to request assistance in picking up the children at Wife’s residence in Dedham. The Dedham police declined to provide assistance unless an incident occurred. The children were not at Wife’s residence when Husband arrived. Wife’s sister was at the residence. Husband was told that the children were at their grandmother’s house on Wellington Street in Boston (“Wellington Street”), and asked to leave the premises. Either Wife or Wife’s sister called the Dedham police and claimed that Husband was pounding on the door of her residence in Dedham and may have a weapon.¹⁴ The Dedham police responded to this call. Before the police arrived, Husband left.

55 When he left Wife’s residence in Dedham, Husband went to Wellington Street. The grandmother called the Boston police and reported that Husband was trying to abduct the children from her. The Boston police responded to the grandmother’s residence. Husband also called the Boston police and requested their presence at Wellington Street, informing them that his lawyer advised him that because the First 209A had been vacated he had full parental rights, that he was at Wellington Street to take his children “out of unsafe conditions”, and that he was videotaping the events. He stated, “[] the kids are not supposed to even be at this address. So I’m going to need a police report that they’re here without

¹⁴ The Dedham police report of the June 29, 2013 incident, which was dictated on July 5, 2013, conflicts with the transcript of the June 29, 2013 phone calls between the Dedham police and the Boston police. The transcript of the phone calls states that: (1) Wife had called the Dedham Police Department from Maine to allege that Husband was pounding on the door of her house in Dedham, (2) that her sister was there, (3) that Husband had weapons, and (4) the Dedham police were told when they arrived that Husband did not have a weapon, that there was no restraining order in place, and that the parties had a court date on July 9, 2013. The Dedham incident report, however, suggests that the responding officer (1) spoke with Wife at the Dedham residence in Dedham on June 29, 2013 and was told by Wife that she and Husband were in a custody dispute, that Husband wanted to take the children for the weekend, that she had refused to give the children to him, and that the children with her mother in Boston for the weekend, and (2) that the Dedham police officer agreed to do a report for Wife to use at Family Court in the custody dispute. Wife testified that she was not at either location - her home in Dedham or Wellington Street - on June 29, but made the report to the Dedham police based on what her mother or her sister told her.

- her supervision. This is perfect. I will get custody of them.” He did not take the children from Wellington Street.
- 56 Wife failed to prove by a preponderance of the evidence that Husband was cruel and abusive to her on June 29, 2013 or any other prior occasion.
- 57 Wife’s complaint alleging that Husband had violated the First 209A Order was heard on or about July 2, 2013. Wife was supported by many friends and family members. Husband testified that he was harassed and physically assaulted by several of the people who accompanied Wife, and pressed charges against them.
- 58 The hearing on Wife’s new Complaint for an Abuse Prevention Restraining Order against Husband took place in the Dedham District Court on July 9, 2013. An Abuse Prevention Restraining Order (“Second 209A Order”) was entered for a period of 1 year on that date. The Second 209A Order prohibited Husband from abusing Wife and ordered him to stay away from her residence. It did not include any terms concerning custody of or visitation with the children.
- 59 Husband filed a Motion for Temporary Orders in December, 2013 seeking to establish parenting time with the children. On December 20, 2013, the Court (Stanton, J.) Ordered parenting time twice per week for periods of 2 hours each time, supervised at the Brockton Family and Community Resource Center (“BFCRC”). These visits did not begin until early February, 2014, but they all went well.
- 60 By this time, Wife had become involved with Josian Adorno, whom the children referred to as “Joey”. The children often mentioned “Joey” to Husband during the supervised visits. On his own, Husband did a “background check” on Joey. A certified copy of Joey’s criminal record in Connecticut was introduced at trial. Joey was charged in 2008 with 2nd degree breach of the peace, 3rd degree assault, 2nd threatening, and violation of a protective order. These charges were discharged with conditions, including anger management, no weapons, and random urine screens. In 2011, Joey pled guilty to an OUI charge and received a 30 day jail sentence.
- 61 In March, 2014, the Court (Ward, J.) Ordered Husband to pay child support to Wife in the amount of \$308 per week through Department of Revenue (“DOR”) by implemented wage assignment. Although requested, no revisions were made to the previously established supervised parenting time.
- 62 On July 9, 2014, the Second 209A Order was extended for a year, after hearing.
- 63 In August, 2014, Husband requested an Order for unsupervised parenting time with the children. After hearing, the requirement of supervision was terminated by the Court and a schedule was established by which the children were with

Husband every Friday overnight and every other Saturday overnight, with an automatic extension overnight on Sunday if followed by a Monday holiday. Husband also was entitled to a midweek dinner visit every Wednesday from 3:00 PM to 6:00 PM. The children were to be exchanged at the Dedham police station, and the parties were permitted to contact each other by telephone or text to discuss child related matters only. Visits did not start right away, however. Wife was found guilty of civil contempt for having willfully failed and refused to permit visitation between Husband and the children on 3 dates in the fall of 2014. Husband was entitled to make up time for these missed visits.

- 64 On October 16, 2014, by Stipulation that was incorporated into an Order of the Court, the parties agreed that they would have shared legal custody, that Husband would have the right to access the children's medical and educational records, and that the hours of and pick up location for Husband's Wednesday parenting time would be changed so that he could pick the children up at school or after school program in Dedham, when school is in session. The drop-off location remained the Dedham police station. Husband had accumulated a child support arrears by this date. He requested, and, Wife agreed to, a reduction to \$25 per week in the amount DOR was taking each week toward the arrears in addition to his current child support payment.
- 65 Despite the seeming progress, Husband and Wife were unable to communicate effectively enough to agree on a holiday schedule for the children in 2014. Husband wanted time with the children on Thanksgiving Day. Wife's position was that Husband should not have time with the children on Thanksgiving Day because he was going to have them with him for the weekend beginning on the day after Thanksgiving pursuant to the routine parenting schedule. Until they were in Court on December 12, 2014 on Husband's Motion, they were unable to reach an agreement about Christmas Day, either.
- 66 On February 3, 2015, Wife obtained a modification of the Second 209A Order that required Husband to remain away from her residence. This modification was reviewed on February 17, 2015 and, after a hearing at which both parties appeared, it remained in place with the previously existing paragraphs of the Order.
- 67 Husband had been using a dating website, and by February or March, 2015, he had become involved with Lashaun Middleton ("Lashaun"), who was 22 years old. Lashaun and her young child moved into the Marital Home with Husband.
- 68 In mid-May, 2015, Husband posted bail for Lashaun in Connecticut, where she had been charged with assault and battery. Husband then learned that Lashaun had DCF "charges" against her involving her child. According to Husband, when he learned of the DCF charges, he told Lashaun that she had to leave, prompting her to contact Wife and conspire against him. On June 11, 2015, the Brockton police went to the Marital Home at the request of DCF while DCF interviewed

Lashaun. During the interview, Lashaun gave the police ammunition that she said belonged to Husband. Husband was charged with violation of the Second Abuse Prevention Restraining Order, and with possession of ammunition without an FID card. These charges are pending.

- 69 Lashaun obtained an Abuse Prevention Restraining Order against Husband in the Brockton District Court on June 12, 2015. Lashaun's 209A Order expired two weeks later.
- 70 On June 13, 2015, a picture of Husband with Lashaun was posted on the Facebook page that Husband maintained as "Toney Shabazz".
- 71 On June 17, 2015, Wife, acting pro se even though represented by counsel, filed an ex parte Motion to suspend Husband's parenting time, alleging that "[Husband] was recently found to be in possession of ammunition and magazine clips." In her supporting affidavit, Wife stated that she had been told by Lashaun on June 11, 2015 that Husband had "beat and choke her and abuse her daughter (which is 7 months) and she fears for my daughters safety [sic]". Wife stated that Husband "will try to get [the children] from school and of [sic] harm to them." The Court (Phelan, J.) denied ex parte relief because Wife's affidavit was not supported by any police or other official report. After a hearing on Wife's Motion on July 6, 2015, at which Husband failed to appear, his parenting time with the children was suspended.
- 72 A hearing on the Second 209A Order was held in the Dedham District Court on July 8, 2015. The Second 209A Order was terminated after that hearing, endorsed with the finding of "no credible evidence to support extension of order [sic]." Wife was so upset at this result that she posted a statement on Facebook linking the action of the Court and Husband to an unrelated incident in which a father admitted to throwing his child off a bridge and then jumping. She did not, however, appeal the termination of the Second 209A Order.
- 73 The July 6, 2015 Order suspending Husband's parenting time was vacated after further hearing on September 1, 2015. The previously existing parenting time schedule was reinstated, but visits did not resume right away. Wife resisted and, at times, simply refused Husband's parenting time. Husband filed a motion to compel visitation, which was denied as procedurally improper. He then filed a Complaint for Contempt. On October 28, 2015, Wife was found guilty of civil contempt for having willfully failed and refused to permit parenting time on and after September 9, 2015. Husband was permitted to have makeup time with the children, and Wife was ordered to perform 4 hours of community service through the Trial Court Community Service Program for each future visit missed as a result of her actions or decisions that were not adequately supported by good faith, good cause evidence.

- 74 After the hearing on October 28, 2015, Wife filed a Motion to change Husband's parenting time and require it to be supervised again. Wife's motion was denied on November 12, 2015, but without prejudice to hearing at trial, which was scheduled to begin on February 25, 2016.
- 75 Shortly before trial, Wife was placed on administrative leave because she had not been working her full 37.5 hours per week. She testified that her inability to work the hours required was due to child care issues. However, Wife continues to state her gross salary of approximately \$682.00 per week on the Financial Statement that was made an Exhibit at trial. Her adjusted weekly income after taxes, FICA, and union dues deductions is approximately \$571.00. In addition, she states an \$85.00 per week retirement deduction, resulting in a net weekly income of \$486.00.¹⁵ As stated on her Financial Statement, her expenses and those of the children on a weekly basis are \$1,119.75, including \$235.00 per week for child care. Her stated liabilities are student loans of \$1,468.00, which are deferred, and a credit card bill of \$684.00. She has a motor vehicle with no equity, and a Commonwealth of Massachusetts retirement account that she values at \$8,364.00. She has a bank account with a minimal balance.
- 76 By April, 2015, Husband had eliminated his child support arrears. His child support payments in May, 2015 were short by approximately \$99.00. Although he paid in full for the month of June through October, 2015, he carried this small arrears balance. Shortly before trial, Husband's position at MGH was eliminated. He presently receives unemployment compensation in the amount of \$747.00 per week according to the Financial Statement that was made an Exhibit at trial. Husband made child support payments consistently between November, 2015 and the end of February, 2016, but in amounts less than required by the Court Order. Between November, 2015 and the end of February, 2016, Husband had accumulated \$1,326.72 in child support arrears.¹⁶ His weekly expenses as stated on his Financial Statement are \$378.00, not including the mortgage payment on the Marital Home because he is not making it. In addition to the equity in the Marital Home, Husband states ownership of a motor vehicle with equity of \$2396. He identifies no retirement account whatsoever on his Financial Statement. He has a checking account with a minimal balance. He stated his liabilities at \$126,095.00 from "various unsecured credit cards". No evidence was presented to support this statement.
- 77 Based upon Husband's stated unemployment compensation and Wife's stated salary, and giving Wife credit for child care on the in the amount of \$235.00 per week as stated on her Financial Statement, the amount of Husband's current child support obligation to Wife pursuant to the Child Support Guidelines would

¹⁵ These figures do not include Husband's child support payment.

¹⁶ As of June 30, 2016, the arrears are \$3,163.20, based on the amount of Husband's Temporary Support Order.

be \$203.00 per week. This adjustment should be made retroactively to March 4, 2016. Husband shall inform Wife forthwith upon his reemployment, and provide her with documentation confirming his income. The parties shall use their best efforts to recalculate child support pursuant to the Child Support Guidelines based upon their respective incomes at that time. If they are unsuccessful, either party may file a Complaint for Modification to address this issue.

- 78 It appears that neither party has private group health insurance. Husband states that he has no health insurance on his Financial Statement. Wife states on her Financial Statement that she (and presumably, the children) are covered by MassHealth.
- 79 Although the parties' standard of living may have been lower at the beginning of the marriage, they appear to have lived a middle-class lifestyle during most of the marriage.
- 80 There was no evidence that either party had any expectation of acquiring capital assets through inheritance.
- 81 There was no evidence that either child had any unique or noteworthy present or future needs.

IV Rationale

In general, the parties were woefully ill-prepared to represent themselves in these complicated divorce proceedings. Even though the Court provided each with a copy of MGL ch 208 §34 to assist them in understanding the necessary elements of divorce cases, they spent almost all of their ample trial time on two issues: attempting to prove and disprove the grounds that each of them alleged for the divorce, and the other's conduct after they separated and the divorce was underway. They spent very little time presenting, and introduced virtually no evidence about, their children, their financial circumstances, and/or their marital estate.

In general, credibility was an issue for each party. During the marriage on at least one occasion the parties together manipulated facts to suit a purpose, impacting negatively on their overall credibility before this Court. In addition, each party offered testimony to this Court that (1) was wholly self-serving, (2) differed from direct to cross examination and sometimes within direct examination itself, and/or (3) was contradicted by other evidence presented, and/or (4) was not corroborated by any other evidence presented, raising substantial issues with its credibility. Husband either has maintained a dual identity for years, or reactivated his former alias after the separation. Wife made directly contradictory statements about Husband's conduct to DCF and to the Courts to achieve the result she desired at the time.

In the end, this was a marriage of 6 years, during which two children were born. Wife was the primary homemaker and child care provider, and the children consistently have resided primarily with her. Although the parties agreed to have shared legal custody as part of a Temporary Order, they never actually exercised it with any success. There was no evidence that they have communicated or could communicate effectively about the children, or work together cooperatively to make decisions for the children. The evidence was quite to the contrary, confirming a high level of bitterness and acrimony between them. That hostility, and the demonstrated efforts each party has taken to destroy the reputation of the other during these proceedings, have convinced this Court that shared legal custody, with all of its obligations, simply is not in the best interests of Ariana and Briana. Notwithstanding the Court's determination of the parties' clear inability to work together in the best interests of their children, each party individually has been an appropriate custodial parent. Therefore, rather than an award of sole physical custody to one party with parenting time for the other, a shared physical custody arrangement that follows, in general, the present parenting plan is in the best interest of the children. As a result, although the parties will "share" physical custody, the children will be with Husband approximately 1/3 of the time.

Although Wife was employed for approximately the last year of the marriage, Husband was the primary financial provider during the marriage. Although Wife is a college graduate and Husband is not, he has a greater earning history and present capacity than Wife. In addition, Wife has been and will remain the children's primary care provider and they will reside primarily with her. Husband should pay child support to Wife calculated pursuant to the Child Support Guidelines on the parties' incomes as stated on their respective Financial Statements, with Wife as primary physical custodian.

There are only two marital assets with equity: the Marital Home and Wife's pension. Both were acquired during the marriage, and, in general, an equal division of it would be equitable. Such a division would require Husband to pay approximately \$27,400 to Wife if Wife retained her pension in its entirety and Husband retained the Marital Home.

Dividing the property here has been made more complicated by Husband. Title to the Marital Home and the mortgage on it are in Husband's name alone. Although there was no evidence of any open bankruptcy proceeding presented at trial, at his Proposed Finding #8, Husband states that the Marital Home was scheduled for an "auction sale on January 12, 2016 stayed by [his] Chapter 7 Bankruptcy filing in the U.S. Bankruptcy Court on January 11, 2016." If Husband has filed individually and is seeking discharge from the unsecured credit card debt (far in excess of the equity in the Marital Home), and/or the mortgage on the Marital Home (that he no longer is paying), the equity in the Marital Home may be taken by the Trustee in Bankruptcy.


Therefore, based upon Wife's lower earning capacity and her role as primary caretaker for the children, Wife should retain her pension in its entirety. If following Husband's discharge in bankruptcy there is any equity in the Marital Home to which he

is entitled, he shall retain the first \$8,400 of same, and the balance, if any, shall be divided equally between the parties.

If, however, Husband has not actually filed the bankruptcy proceedings to which his post judgment pleadings refer, the marital estate in its entirety should be divided equally. An equal division would result in a distribution of \$35,800.00 to each party. Because Wife will retain her pension, Husband should pay the sum of \$27,400.00 to her to equalize the division.

By the Court,

Dated: July 5, 2016



Lisa A. Roberts, Justice