

# THIS WEEK'S DECISIONS

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## SUPREME JUDICIAL COURT

### Parent and child

#### Return order - Paternity

Where a judge ordered a mother to return her child to Massachusetts and awarded the father joint legal custody, the judge erred and thus a remand must be ordered.

"A child was born to the defendant, Danielle McDonald (mother), and the plaintiff, Steven D. Smith, Jr. (father), who were not married. When the child was six months old, the mother moved with the child from Massachusetts to New York. Subsequently, as part of the proceedings at issue in this case, the plaintiff was determined to be the legal father of the child. A judge of the Probate and Family Court ordered the child returned to Massachusetts, gave sole physical custody to the mother, and awarded visitation rights and joint legal custody to the father. The mother challenges various provisions of the judgment. The evidence supports the judge's determination that the best interests of the child require a meaningful opportunity for a father-child relationship, and the judge acted within her discretion in developing a plan to increase contact between the father and the child. However, the judge's order to return the child to Massachusetts exceeded her statutory authority, and the judge's decision to award joint legal custody was not supported on this record. Given the current circumstances of the parties, the case requires further action by the judge in the Probate and Family Court, and we remand for that purpose. ...

"... Although probate judges have broad equitable powers to act in the best interests of

children under their jurisdiction, *E.N.O. v. L.M.M.*, 429 Mass. 824, 827-828 (1999), those powers are not unlimited. In the circumstances of this case, the judge lacked authority to order the child returned to Massachusetts without altering physical custody. ...

"Here, the child had only one legal parent when the mother relocated to New York on March 1, 2008. Because the father's paternity had not been adjudicated or voluntarily acknowledged, he had no legal rights vis-a-vis the child. The mother was free to move with the child wherever she wished. ...

"The judge's erroneous analysis requires that we vacate the order to return the child to Massachusetts. The orders regarding custody and visitation were entwined inextricably with the erroneous order to return to Massachusetts and must be vacated as well. ...

"[A] special exception to the usual procedure is warranted in this case. At the outset of proceedings on remand, the mother must inform the judge whether she wishes to live in Massachusetts or New York or elsewhere, and the judge must accept that choice. The judge must treat the mother's chosen residence as a given, and fashion a new plan for custody and visitation accordingly. We reiterate that this exception to what would ordinarily be an analysis directed to the best interests of the child obviously comes about by virtue of the unusual circumstances of this case."

#### Concurring opinion

Marshall, C.J., with whom Spina, J., joins. "The court concludes, and I concur, that the judge had no authority to issue an order during the pendency of litigation for the child (and hence the mother) to move back to Massachusetts. ... As the court acknowledges, a person having sole parental rights is 'free to move with the child wherever she wishe[s]'. ... As a

matter of law, it should make no difference to a parent's freedom to relocate that another party subsequently files to establish parental rights. ... There is no statutory basis or reason in fairness for the mother to remain in Massachusetts on the filing of a complaint for paternity, which may be filed for any number of extraneous reasons and may be denied. ... The paternity of a nonmarital child is not certain and is not infrequently in dispute. In contrast, the motherhood of a nonmarital child is established at birth. We may presume that the Legislature took these elementary facts into account in crafting a statutory scheme that gives primacy to the stability of a nonmarital child by vesting sole legal parentage in the mother unless and until there has issued a legal determination of paternity or a voluntary acknowledgment of paternity. The Legislature's policy choices may mean that a responsible and well-meaning litigant like the plaintiff in this case is disadvantaged where he elects not to establish paternity upon or soon after the birth of the child. Our role, however, is to faithfully construe the statute.

"I concur that the judgment must be vacated and the case remanded to the Probate and Family Court for further proceedings as to custody and visitation in light of the 'special exception' set out by the court. ..."

*Smith v. McDonald* (Lawyers Weekly No. 10-209-10) (32 pages) (Cowin, J.) (Marshall, C.J., with whom Spina, J., joins, concurring) (SJC) Case heard by DiLeo, J., in the Probate & Family Court. Barbara J. Katzenberg, of Wolfson, Keenan, Cotton & Meagher, for the mother; Julie A. Rougeau, Leila Wong and William Hickey for the father; Christina L. Paradiso and Edward M. Ginsburg, for Legal Assistance Corporation of Central Massachusetts, amicus curiae, submitted a brief (Docket No. SJC-10670) (Dec. 14, 2010).

## Criminal

### Threatened battery - Dangerous weapon

Where the Appeals Court has vacated a defendant's conviction for assault and battery by means of a dangerous weapon, he may be retried but only under a threatened battery theory, not under an attempted battery theory.

#### Background

"On the evening of March 29, 2006, the defendant, a special agent with the office of export enforcement of the United States Department of Commerce, was driving on Congress Street in Boston on his way home from work. Viewed in the light most favorable to the prosecution, the evidence at trial showed that, after the defendant took a right turn onto Dorchester Avenue, the victim rode up to the defendant's passenger side window on his motorcycle to complain that the defendant had nearly hit his friend, who was also driving a motorcycle. The defendant swore at the victim and claimed that the victim's friend had cut him off.

"The verbal altercation between the defendant and the victim continued over several blocks. The two men turned left onto Summer Street and drove on, at times side-by-side, with the victim's motorcycle in the left lane and the defendant's vehicle in the right lane. At one point the defendant's vehicle swerved so close to the victim's motorcycle that the victim warned the defendant not to come any closer. The defendant responded by pointing a gun at the victim, and the victim taunted, "What are you going to do, shoot me?" Soon after, the defendant swerved his vehicle again, this time striking the victim's motorcycle and sending the victim flying through the air, causing him

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