# Petition to Designate the 231 and 235 Homes and lots a Cambridge Landmark



The lots and buildings were part of the holdings of East Cambridge Land Company, and are the only Land Company structures surviving today. The entire plan and structures were specifically authorized and formed by our legislature under a Special Act to lay out the streets and grids and canals so as to encourage development of what was really our marshland. To be sure, this was an incredible responsibility and one that to this day has benefited and supported Cambridge. Who can doubt the incredible industrial development that fed this city for over a century or even today with the new biotech center? Amazing to realize that in the 19th century, these developers were enlightened enough to create a manmade Broad Canal which stretched from First Street to Portland to easily access the planned industries.

Here is the Act:

Chap. 0062 An Act to incorporate the east Cambridge land company.

Be it enacted, fyc, as follows:

Section 1. James C. Dunn, Estes Howe, Henry Potter, Joseph H. Converse, and Edmund Munroe, their associates and successors, are hereby made a corporation, by the name of the East Cambridge Land Company, with all the powers and privileges, and subject to the duties, liabilities and restrictions, set forth in the sixtieth and sixty-eighth chapters of the General Statutes, with power to purchase and hold, in fee simple or otherwise, all or any part of that tract of land and flats situated in Cambridge, and bounded westerly by Portland Street, southerly by Hampshire Street and Broadway, easterly by the commissioners' line on Charles River, and northerly by Bridge and Cambridge Streets; with all the privileges and appurtenances thereto belonging.

Section 2. Said corporation shall have power to sell and convey, lease, mortgage or otherwise dispose of said corporate property or any part thereof, and to manage and improve the same, with authority to construct dams, docks, wharves and buildings, and to lay out streets and passage-ways and otherwise improve the same, as it shall be deemed expedient: provided, that nothing herein contained shall give said corporation any right not belonging to the riparian proprietors, to extend their wharves or otherwise improve said premises.

Section 3. The capital stock of said corporation shall not exceed three hundred thousand dollars, and shall be divided into shares of one hundred dollars each.

Section 4. This act shall be in force for a term of twenty years, unless sooner repealed by the legislature.

Approved March 1, 1861.

Aside from the historical significance of the East Cambridge Land Company, 231 Third Street is historically significant as the situs of a highly significant women's law firm

that played a pivotal role in seminal court cases establishing the same sex right to adoption.

PROPERTY TO BE CONSIDERED FOR LANDMARK DESIGNATION:

231 and 235 Third Street Homes and Lots.

PETITIONERS:

| NAME AND SIGNATURE | ADDRESS | EMAIL OR PHONE |
|---|---|---|
| Marie Elena Saccoccio | 55 OTIS ST | saccocciom@yahoo.com |

| | NAME AND SIGNATURE | ADDRESS | EMAIL OR PHONE |
|---|---|---|---|
| 2. | Betty Lee Saccoccio | 55 Otis St. | bsaccoccio@comcast.net |
| 3. | Branka Nikolic | 61 Otis St | branka@aol.com |
| 4. | John Whitmarsh | 61 Otis St. | jwwhitmarsh@gmail.com |
| 5. | Janet St Rdz Unit 6 74 Otis St. Camb Mass. 02141 | | |
| 6. | Kathleen Ranelli 58 1/2 Spring St Camb Ma | 617-4927646 | |
| 7. | [illegible] | 36 Second St Apt #1 | 617-417-1028 |

PROPERTY TO BE CONSIDERED FOR LANDMARK DESIGNATION:

231 and 235 Third Street Homes and Lots.

| | NAME | ADDRESS | EMAIL OR PHONE |
|---|---|---|---|
| 8. | Helen Kobek<br>Helen Kobek | 69R Gore St.<br>Camb. MA 02141 | 617-492-2340 |
| 9. | Judy Kobek<br>Judy Kobek | 69R Gore St<br>Camb. MA 02141 | 617-492-2340 |
| 10. | Anne Marie Dattco | 38 Gore St, Cambridge | dattco2@msn.com |
| 11. | Janice Faulds | 96 Spring St | 617-875-4068 |
| 12. | | | |
| 13. | | | |

Spokesperson for the Petitioners: Marie Elena Saccoccio, Esquire
Phone number: 617-864-8403 Email: saccocciom@yahoo.com

Cambridge Historic Commission in opposition to demolition of 235 Third Street as well as 231 Third Street and in support of Landmarking Petition.

Members of the Historic Commission:

I am submitting this raw research in opposition to the demolition sought for 231 and 235 Third Street. The lots and buildings were part of the holdings of East Cambridge Land Company, as specifically authorized and formed by our legislature under a Special Act to lay out the streets and grids and canals so as to encourage development of what was really our marshland. To be sure, this was an incredible responsibility and one that to this day has benefited and supported Cambridge. Who can doubt the incredible industrial development that fed this city for over a century or even today with the new biotech center?

235 Third Street was the site of critical development of East Cambridge street pattern concentrating and controlling street grids and even Broad Canal for one of the most productive industrial complexes on the East Coast. These buildings are our only visible remnants of that great enterprise.

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Be it enacted, fyc, as follows:

Section 1. James C. Dunn, Estes Howe, Henry Potter, Joseph H. Converse, and Edmund Munroe, their associates and successors, are hereby made a corporation, by the name of the East Cambridge Land Company, with all the powers and privileges, and subject to the duties, liabilities and restrictions, set forth in the sixtieth and sixty-eighth chapters of the General Statutes, with power to purchase and hold, in fee simple or otherwise, all or any part of that tract of land and flats situated in Cambridge, and bounded westerly by Portland Street, southerly by Hampshire Street and Broadway, easterly by the commissioners' line on Charles River, and northerly by Bridge and Cambridge Streets; with all the privileges and appurtenances thereto belonging.

Section 2. Said corporation shall have power to sell and convey, lease, mortgage or otherwise dispose of said corporate property or any part thereof, and to manage and improve the same, with authority to construct dams, docks, wharves and buildings, and to lay out streets and passage-ways and otherwise

improve the same, as it shall be deemed expedient: provided, that nothing herein contained shall give said corporation any right not belonging to the riparian proprietors, to extend their wharves or otherwise improve said premises.

Section 3. The capital stock of said corporation shall not exceed three hundred thousand dollars, and shall be divided into shares of one hundred dollars each.

Section 4. This act shall be in force for a term of twenty years, unless sooner repealed by the legislature.

Approved March 1, 1861.

The Act and the East Cambridge Land Company are memorialized today in a wonderfully descriptive opinion of the Massachusetts Supreme Judicial Court, Munroe v. Worthington Pump, 245 Mass. 474 (1923) and is attached herewith in this email submission:

[314] flourishing industries already established, are still to be occupied. This territory is distant less than one mile from the State House in Boston, and it can be purchased for a lower figure than that quoted for desirable locations in either East Boston, South Boston, or Charlestown.

Woodward Emery, Esq., chairman of the Massachusetts Harbor and Land Commission, referring to this section of Cambridge, says:—

The East Cambridge Land Co. was established under a charter from the Commonwealth more than quarter of a century ago, for the purpose of improving the vacant marsh lands in East Cambridge lying between Third and Portland streets, Broad, Canal, and Charles streets, and including about three million square feet of land. It was organized by Gardiner G. Hubbard, who may fairly be called the father of three great enterprises which have greatly benefited the city, to wit: the horse railroad, the gas company, and the water-works; the late Estes Howe, a name associated with many Cambridge enterprises of public interest and character; Charles W. Munroe, whose father owned and improved a considerable amount of real estate in the city; and their associates. The improvement of this property, by the laying out and building of streets, adapted it for manufacturing industries and mechanical enterprises. The Grand Junction branch runs through the property from north to south, with a spur track to the eastward, so located as to offer ready facilities to works which may become established upon its line. Since the development of this property, the company has sold more than two million feet of its land. The George F. Blake Manufacturing Co., The Boston Bridge Co., The Boston Woven Hose Co., The American Rubber Co., and others, have purchased, erected plants, and established large businesses in these lands. Many of these manufacturing plants were located in this locality after a thorough examination and exhaustive study; as the proprietor of one of them said: "Of the suburbs of Boston beginning at East Boston, and following the Boston and Albany Railroad through East Boston, Chelsea, Everett, Charlestown, Somerville, and Cambridge, and examining all vacant lands on railroads entering Boston not too remote for our purpose, the result of this

careful examination was the choice of the present location of the works. The price was found very reasonable compared with any other "

https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A2001.05.0185%3Achapter%3D45%3Apage%3D314

*The Cambridge of eighteen hundred and ninety-six: a picture of the city and its industries fifty years after its incorporation*
*Arthur Gilman, Ed.*

....1924 garage *permit 24696* [razed by 2000] 231 (o) McElroy Alice (b) Ryan Martin W

•235 house 1½-st 1872

.....1872 land *deed 1494,413* nwc court+bent 35x79 (o) McElroy Rosana / Francis G from (o) East Cambridge Land co

.....house *tax*; thru 87 w3 third : 135 (o) McElroy Francis G.

.....1886 *Hopkins atlas*

.....1924? •garage [1930 atlas; like garage for 231 but separate permit not found]

Christopher Hail Survey of Cambridge Streets and Buildings.

The incorporation of the city and the projection of the railroad, promising a new era of prosperity and growth, encouraged certain merchants, in 1847, to undertake the improvement of the overflowed lands in this quarter. Corporate powers were secured by them from the General Court, with authority to buy and develop lands between the highlands of East Cambridge and the River Charles and north of West Boston Bridge; and the Cambridge Wharf Company was organized. Beyond the purchase of a tract along the river front and the conception of a plan of improvement, this company did little, and finally released its entire holdings to an individual purchaser in 1890. A second corporation was created by the legislature in 1861, under the name of the East Cambridge Land Company, to attempt the work of reclamation in the territory covered by its predecessor. A large district covering some seventy-five acres, lying between Portland Street and Third (formerly Court) Street and the Broad Canal came into the possession of this company. On these lands a number of manufacturing structures and workshops, some of notable character, have been erected; but after thirty-five years of effort, and despite the strong and steady growth of the old districts of the city during that period, quite one third of the available holdings of this company still remain to be built upon. In 1874, a third charter was granted by the legislature to other citizens desirous of solving the utilitarian problems in this section. The Cambridge Improvement Company was thus formed, and became possessed of between fifty and sixty acres of lowlands, mostly flats, between Third Street and the river. The interposition of Broad Canal between these lands and Main Street, always a seemingly insurmountable obstacle to the use of these lands, effectually closed them from advantageous connection with Boston. With the aid of the authorities of the municipality, this barrier was, however, about to be removed, when the disastrous financial panic following the [110] initiation

of this enterprise, which paralyzed all energies, effectually put an end to the efforts of this company. A short section of stone wall on the river front, ragged from neglect, remained as a forlorn monument of the fallen fortunes of this enterprise until 1889, when a citizen of Boston, convinced of the possibilities of these barren lands, situated as they were in the heart of a great community, and within a trifling distance of the commercial centres of his city, acquired nearly fifty acres of this territory, including the entire water front, half a mile in length, lying between the canal and either bridge.

The effort to recover this land was at once renewed, and this time with effect. First Street was at once filled, from its terminus at Binney Street to the line of Broad Canal, a thousand feet in length, and the sea-wall along the river extended easterly. By a wise cooperation of the city authorities and the courageous investor, the Broad Canal was at length bridged, and entrance gained to Main Street at its junction with West Boston bridge. Since that time, the work of recovering the waste lands of this part of Cambridge has been rapid. Already about fifteen acres of original flat-lands have been filled. First Street has been recognized by the city authorities as a thoroughfare of such importance as to warrant a pavement of granite blocks. Its sidewalks, ten feet in width, will be asphalted. On this street stands, finished but yesterday, one of the noblest monuments of industry yet erected in Cambridge, a great structure, whose purposes are proclaimed by Athena, goddess of letters, whose heroic effigy proudly crowns its pediment.

Of the ancient marshes and flats in this quarter of the city, between the highlands and the river's line, over one hundred acres still await reclamation. It is to this district that Cambridge must largely look in the future for its prosperity. For here, under wise encouragement, should grow up a great manufacturing quarter second to none other in or near the capital city. All elements necessary for the creation of a commercial district of this character seem to be here in happy conspiracy. It is almost at the gates of Boston. First Street is only a mile distant from the City Hall of Boston, and, accordingly, nearer to that accepted centre than the Hotel Vendome, than the new Union station now proposed on the Back Bay, than Dover Street, than all South Boston, except a small portion of the newly made lands, than all East Boston, than all Charlestown [111] but a small fraction. Barges of the largest size may be moored at its wharves, and, by spur from the main line of steel track, the products of its factories may find direct land transportation over the continent. Two main thoroughfares lead from this quarter straight to the heart of the great city over the narrow waters in one direction, and out into the cities and towns beyond in the other. Here wide streets will afford ample room for traffic, and preserve the play of sunshine and the freedom of air. A dense population is at hand to supply the artisans of the coming industries. A river park on the one side and a land park on the other will furnish the toilers and their children with refreshment and recreation. The policy of the city in encouraging the private reclamation of its lowlands, now long since established, will favor the proper improvement of this quarter with increased generosity as its possibilities become more fully appreciated. For with its appropriation by the great hives of industry will come an increased prosperity to the community. As a purely residential city, Cambridge cannot hope to be more than an annex to Boston. The presence within her borders of large commercial interests will give her the importance of a self-sufficing entity, and a hardy independence of her neighbors, great or small. To the spread of the quarters of business more than to those of habitation will be due that happy increase of financial resource which is so necessary for the pressing wants of a growing community. Long before Cambridge celebrates a centennial anniversary of urban existence, these lands, every inch reclaimed from the deep, and filled with workshops and warehouses, will

be pointed out with pride as a distinctive quarter of the city, its past nakedness and desolation buried and forgotten.

Thus, in this memorial year, the results of the work of the last few years in solving the grave problems affecting the Cambridge littoral sum up largely. It is only thirteen years since the first stone of a sea-wall facing the bay of the Charles as the outwork of a public promenade was laid in the solid gravel of its bed. To-day, the wall stretches out far from either side of the Harvard bridge, in front of it an always open basin, and behind it the promised esplanade, two hundred feet wide, and thirty-five hundred feet in length, ready for the decoration of trees and plants to justify its exceeding value to the Cambridge of the future and its further extension along the river banks. [112] To-day, the wall of the Charlesbank of East Cambridge is built, and a beautiful section of river park will at no distant time be there open to the people. To-day, with the exception of a few hundred feet, the entire littoral is in the hands of the people. The progressive improvement of the river's banks under public control will force the wholesome recovery of all the abutting lowlands at private initiative. In the commercial district to the north of Main Street the Binney marshes have given way to a health-giving common, and the obnoxious flats are fast disappearing. Since 1892, the bridge at First Street has been built, and fifteen acres of the adjacent lands have already been reclaimed for settlement; it will be but a short time before the tide is finally driven from this entire quarter. To the south of Main Street, a great section of the ancient shallows, one hundred and twenty acres in extent, has given place to clean uplands, inviting the builders of houses. Beyond, to the west of the railroad, a million feet of the marshes have been raised, and a site for a great athletic campus is made. If all but a tithe of this great work has been done during the past five or six years, what may not be accomplished in its active prosecution within the next decade? There can be now no retrograde action in the treatment of the shores of the beautiful river. The transformation of the desolation that threatened the well-being of the people, that mortally offended the sense of the beautiful, that foreboded a staggering burden of public debt, has so far progressed that the quick consummation of the hopes of the past may be confidently anticipated. Nor will Cambridge be long alone in the labor. Her example must stimulate the great sister city to happy imitation on the south shore of the bay, and hasten the park scheme, covering the upper reaches of the Charles, to completion. When the work is finally completed of devoting this river and its banks far up the stream to the pleasures of the people, and all the menacing lowlands are things of an unhappy past, a great pride will fill the hearts of the people in the possession of so beautiful a spot, and the stranger will come from afar to admire. And Blaxton, could he climb again the high peak of his hermitage, and gaze on the splendid panorama about him, would indeed marvel at the mighty works of those who have come after him.

Cambridge, 1896.

*The Cambridge of eighteen hundred and ninety-six: a picture of the city and its industries fifty years after its incorporation*
*Arthur Gilman, Ed.*
The Cambridge Littoral

Frederick H. Viaux.

With respect to 231 Third Street, early same sex adoption pleadings were authored right from that law office. It was described merely as a "women's law practice" by one of the abutters. To be sure, our same sex adoption litigation was the seminal case in the country. Copy of the Brief is attached to this email as well. Fascinating that when built this was the home and business of a woman restauranteur and her daughter, with daughter and mother running restaurant and both living upstairs. This distinctive building is a mere steps from the Foundry, the seat of the first minimum wage law in the country. Interesting "Women's Quarter" for East Cambridge.

# Munroe v. Worthington Pump Mach. Corp.

245 Mass. 474 (Mass. 1923) · 139 N.E. 828
Decided May 31, 1923

November 15, 1922.

May 31, 1923.

Present: RUGG, C.J., DeCOURCY, CROSBY, CARROLL, JJ.

*Way,* Public: establishment; Private: extinguishment by adverse use. *Adverse Use.*

Provisions in St. 1861, c. 62, the charter of East Cambridge Land Company, and in St. 1874, c. 99, the charter of Cambridge Improvement Company, giving to those corporations, respectively, authority "to lay out streets and passageways" upon land to be improved by them, did not give them authority to lay out public ways, but only the power, possessed by individuals, to build streets on their own land.

The provisions of R. L. c. 53, § 1 (see now G.L.c. 86, § 2), relate only to public ways or to statutory private ways laid out under public authority, which are "private only in name but are in all other respects public;" and do not apply to streets laid out by the corporations under the charters above described.

A petition for the registration of title to a parcel of land bounded by a certain way, together with a right of way over the way extended through land of a respondent, cannot be maintained where, upon findings of fact by the trial judge, it appears that, even if such a right of way appurtenant to the land of the petitioner ever existed, it was a private way and was extinguished by adverse use by the respondent for more than twenty years.

PETITION, filed in the Land Court on January 22, 1921, for registration of the title to land in that part of Cambridge known as East Cambridge, bounded by Second Street, by Binney Street, by Third Street and by Rogers Street, with a right of way appurtenant thereto on the course of Rogers
475 *475 Street extended westerly through land of the respondent to Ninth Street.

The petition was heard by *Davis,* J. Material findings by the trial judge are described in the opinion. His conclusions were as follows:

"I find no easement in Rogers Street over land of the respondent Worthington Company appurtenant to land of the petitioners by grant, express or implied, by estoppel, layout or prescription; and if there ever was any easement as claimed I find that it has been extinguished by adverse use and occupation. I am unable to see that the forty year statute is in any way pertinent to the present case.

"From Fifth Street west to Ninth Street the Rogers Street strip is occupied by tracks and various other obstructions. It would be possible to get through on foot, but not with a team. There is no evidence of user as appurtenant to land of the petitioners.

"There may be a decree for the petitioners, with an appurtenant right of way over Rogers Street easterly to Commercial Avenue in common with others entitled thereto."

The petitioners alleged exceptions.

*H.R. Bailey,* ( *E.B. Church* with him,) for the petitioners.

*C.N. Barney,* ( *W.A. Dane* with him,) for the respondent.

CARROLL, J.

This is a petition for the registration of land in East Cambridge, bounded by Second, Binney, Third and Rogers streets. The Land Court found that the petitioners have title to the tract of land claimed by them on Rogers Street east of Third Street, and a right of way over this street easterly from Third Street. The petitioners also claim that they have a right of way in common with others over Rogers Street west of Third Street. The Land Court found that there was no easement in Rogers Street west of Third Street over the land of the respondent appurtenant to the land of the petitioners; that if an easement as claimed ever existed, it has been extinguished by adverse use and occupation, and that the forty year statute was in no way pertinent to the case. The case is before us on the petitioners' exceptions.

The respondent, The Worthington Pump and
476 Machinery *476 Corporation, owns the land through which the petitioners claim Rogers Street runs to the west of Third Street. Prior to 1889 the title to the entire tract owned by the respondent, was acquired by its predecessor in title, through the East Cambridge Land Company the owner of land west of Third Street, including the tract over which the petitioners assert that Rogers Street existed. The petitioners show no claim of title under the East Cambridge Land Company. By St. 1861, c. 62, the East Cambridge Land Company, hereinafter called the Land Company, was incorporated with the power to purchase, hold and sell certain land in Cambridge, with authority to construct dams, docks, wharves, and buildings, and to lay out streets and passageways and otherwise to improve the land. A plan belonging to the Land Company, made in 1869, recorded in registry of deeds, showing the land between Court and Ninth streets, divided into blocks by crosswise streets, including Rogers, Bent and Binney streets, was in evidence. The Munroe heirs were stockholders in the Land Company. They conveyed in 1872 to one Woodbury land between Court (now Third) and Second streets, shown on the plan drawn on the deed and recorded therewith, which shows Rogers Street and indicates it as continuing westerly from Court Street. The petitioners claim title under Woodbury. Rogers Street continued to be shown on plans of the Land Company and its successors in title, and deeds of the several tracts now owned by the respondent were drawn with reference thereto and bounding on Rogers Street. Title to all these lots, "conveyed at various times by different parties by deeds under which easements in Rogers Street unquestionably existed as between the parties, was . . . eventually acquired, so far as the block between Third, Binney, Fifth and Bent streets is concerned, by the respondent Worthington Company." Woodbury, after acquiring title from the Munroe heirs to all but two lots within the limits of the lots now owned by the petitioners, gave a mortgage to Charles W. Munroe; and the petitioners' title comes under a foreclosure of this mortgage in 1879. The title to the two lots above referred to do not affect the question in
477 controversy. *477

The Cambridge Improvement Company, hereinafter called the Improvement Company, incorporated by St. 1874, c. 99, took title from Woodbury after the mortgage to Munroe had been given. It acquired a large tract of land easterly of Third Street. The foreclosure of the mortgage, according to the ruling of the Land Court, "racked the title of the Improvement Company;" but the existence of Rogers Street easterly from Second Street as shown in the deeds and plans of the Improvement Company, was not controverted.

In 1880 railroad tracks ran through Rogers Street from Ninth Street to Third Street. In 1891 and 1893 the respondent's predecessors built a fence along the westerly line of Third Street, barring all access to their property from Third Street except through Second and through gates on Rogers Street. The fence has been maintained from that

time to the present. Twenty-five years ago a covered passageway between the respondent's buildings was erected across the Rogers Street strip and has since been maintained. The space between the respondent's buildings on either side of Rogers Street has been used as a yard for temporary storage purposes and their occupation of Rogers Street west of Third Street for over twenty years has been open, exclusive and adverse to any other interests, and "has been not only inconsistent with the existence of any easement, but absolutely preventive of the exercise of any easement," and so open that the petitioners ought to have known of it.

As stated in the decision by the Land Court, "The petitioners contend that Rogers Street was laid out under the provisions of the statute; that it was therefore subject to be used by the public; and that the public easement could not be extinguished by less than forty years of adverse use." R. L. c. 53, § 1. See G.L.c. 82, § 2.

The strip called Rogers Street was never in fact a public way. The Land Company, under the statute by which it became a corporation, had authority to lay out streets and passageways, as did also the Improvement Company. In granting these charters the Legislature did not intend to give to a private
478 land company the right to act for the *478 public to lay out public highways and impose on the city the care and maintenance of them. Rogers Street had never been laid out, established or accepted by the city, as required by law, and it never became a public way. *Morse* v. *Stocker,* 1 Allen, 150, 154. *Hayden* v. *Stone,* 112 Mass. 346, 351. *Guild* v. *Shedd,* 150 Mass. 255. See *Denham* v. *County Commissioners,* 108 Mass. 202. The Legislature in granting the Land Company the right to lay out streets and passageways, intended to give to that corporation the power possessed by an individual to build streets on his own land. The intention was to designate and describe the powers of the corporation and to grant it powers it might not possess if not specially named. But it was not intended to delegate to this private corporation the authority to lay out and establish public highways. The power residing in the public authorities was not taken away and given to the corporation by the special statute incorporating it. See *Attorney General* v. *Old Colony Newport Railway,* 12 Allen, 404, 406; *Peabody* v. *Boston Providence Railroad,* 181 Mass. 76, 81. The statute, R. L. c. 53 (see now G.L.c. 86) providing for the removal of fences and buildings on highways and other public places, unless the obstruction was continued for more than forty years, has no application. The purpose of this statute was to prevent encroachment on public places and ways which were laid out for the public under public authority. It refers to "a highway, town way, private way . . . street, lane or alley, or other land appropriated for the general use or convenience of the inhabitants of the Commonwealth, or of a county, city, town or parish." The private ways referred to are the statutory private ways laid out under public authority, which are "private only in name, but are in all other respects public." *Denham* v. *County Commissioners, supra,* page 208. The word "way" in the statute has been interpreted as meaning a way laid out by public authority, as required by the statute. *Boston Gas Light Co.* v. *Old Colony Newport Railway,* 14 Allen, 444, 447.

The forty year statute does not apply to private rights of way as distinguished from statutory
479 private ways, and *479 the uninterrupted, continuous and adverse use of the land designated as Rogers Street west of Third Street by the respondent under a claim of right for a period of more than twenty years was sufficient to establish its right to the land. *Emerson* v. *Wiley,* 10 Pick. 310. *Jennison* v. *Walker,* 11 Gray, 423. *Ball* v. *Allen,* 216 Mass. 469, 473. Even if it be assumed that the petitioners had an easement in Rogers Street west of Third Street, which we do not decide, *Regan* v. *Boston Gas Light Co.* 137 Mass. 37, *Downey* v. *H. P. Hood Sons,* 203 Mass. 4, *Prentiss* v. *Gloucester,* 236 Mass. 36, the finding of the Land Court that "if there ever was any

easement as claimed I find that it has been extinguished by adverse use and occupation," disposes of the petitioners' claim. *Ball* v. *Allen, supra. Jennison* v. *Walker, supra.*

As the petitioners had no right of way over Rogers Street west of Third Street, their exceptions must be overruled for the reasons given. Even if Rogers Street west of Third Street were in fact a public way or a private way laid out under the statute by public authority, the petitioners' land did not abut on this part of the street and we have not found it necessary to consider the question whether it was within the jurisdiction of the Land Court to register the petitioners' right in a public street upon which its land did not abut.

*Exceptions overruled.*

COMMONWEALTH OF MASSACHUSETTS

**SUPREME JUDICIAL COURT**

Essex County

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No. SJC-11010

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**AMY E. HUNTER,**
Plaintiff-Appellee

**v.**

**MIKO ROSE,**
Defendant-Appellant

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Appeal From The Probate And Family Court,
Essex County

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# BRIEF OF PLAINTIFF-APPELLEE

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### CASES

**STATUTES AND RULES**

**MISCELLANEOUS**

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial court properly recognized the legal spousal relationship between the parties?
2. Whether the trial court properly concluded that both parties are legal parents to each child?
3. Whether the trial court properly granted physical custody of J[redacted] to Plaintiff in light of Defendant's inability to prioritize J[redacted]'s best interests, maintain a stable environment for J[redacted], and support J[redacted]'s relationships with her other parent and sister, and Plaintiff's emotionally attuned parenting and stability?
4. Whether the trial court properly awarded reasonable attorney's fees to the Plaintiff when the Defendant disregarded court orders and discovery rules, withheld and obscured evidence, and prolonged litigation?

## STATEMENT OF THE CASE

### PRIOR PROCEEDINGS

This action began on Nov. 20, 2008, when the Plaintiff, Amy E. Hunter ("Plaintiff" or "Hunter"), filed a complaint and motion for temporary orders seeking custody of her child, J[redacted]. Plaintiff

sought to establish an appropriate parenting plan after J[redacted]'s other mother, Miko Rose ("Defendant" or "Rose"), took J[redacted] to Oregon and severed all communications. A.21-30. In December 2008, after it became known that Rose sought to retain J[redacted] in Oregon, Plaintiff filed (1) a complaint for divorce; (2) a complaint in equity to dissolve the parties' California registered domestic partnership ("RDP"), to address the custody and support of J[redacted], and to order her return to Massachusetts; and (3) an amended motion for temporary orders. A.34-42, 47-56, 97-110.

Defendant answered the custody and equity complaints and moved to dismiss the custody and divorce complaints. A.43-46, 63-86, 111-32. Having consolidated the complaints, on Feb. 2, 2009, the court (Cronin, J.) denied the motions to dismiss and issued a Memorandum of Decision recognizing the legal spousal status of the parties created by their RDP and recognizing their joint parentage of J[redacted]. The court also issued temporary orders establishing a parenting plan to reconnect J[redacted] and Hunter, whom Rose had prevented from seeing or speaking to each other in over three months. A.133-45. Defendant sought a stay pending appeal, as well as a protocol

to, inter alia, prevent Hunter from referring to herself as "Mommy" during visitation. A.146, 175-84. These were denied. A.185-87, 202-05.

Defendant sought relief under G.L. c. 231, § 118. The Single Justice of the Appeals Court (Duffly, J.) denied that relief on Mar. 16, 2009, finding support for the ruling that it was in J[redacted]'s best interest to restore the status quo prior to Rose's termination of contact between J[redacted] and Hunter based, in part, on the spousal relationship of the parties and its attendant rights of parentage. A.271-80.

Despite these two rulings on the legal status and parentage of the parties, Defendant persisted in treating these issues as open legal questions. To resolve this, the parties re-briefed them and on Aug. 10, 2009, the court (Manzi, J.)[1] issued a Memorandum of Decision re-confirming that both parties are the legal parents of both J[redacted] and M[redacted], the parties' second child, who was born on Jan. 16, 2009. The

[1] Judge Cronin recused himself on Feb. 23, 2009. While concluding that Defendant's claims of his bias were unfounded, he wanted to prevent Defendant and her counsel from distracting the court from its proper focus on J[redacted]'s best interests. A.211-14. Judge Manzi was appointed on Mar. 5, 2009 and presided over the remainder of the case. A.7.

court also appointed attorney Judith Cowan as GAL/next friend to represent the children. A.452-54, 458.[2]

In light of the court's affirmation of joint parentage and Rose's continuing refusal to extend any additional parenting time to Hunter, on Oct. 16, 2009, the court issued further temporary orders, granting joint legal custody of J[redacted], significantly increasing parenting time for Hunter, including overnights and vacations, and ordering Rose to pay for Hunter's trips to Oregon through July 2010.[3] A.541.

Trial took place on Nov. 4, 5, 8, 9, and 19, 2010, and on Jan. 28 and 31, 2011. On Apr. 11, 2011, Plaintiff filed a motion to preclude Rose from moving J[redacted] again before the court had issued its final custody decision, having learned that Rose decided to move J[redacted] to Michigan the first week of May without her consent or the court's permission. A.4. The court issued its findings, rationale, and judgment on Apr. 19, 2011. The court dissolved the parties' legal spousal relationship; declared the parties to have

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[2] Concluding that, though parallel to marriage, the RDP was not a marriage within the meaning of G.L. c. 208, the court dismissed the divorce complaint on July 22, 2009. A.449-51.

[3] Trial was originally scheduled for July 12-15, 2010, but was postponed due to a trial in progress. A.1-2.

been legal parents of both children from their births; ordered revision of J[redacted]'s birth certificate to list both parents; granted joint legal custody of J[redacted], sole legal and physical custody of M[redacted] to Hunter, and primary physical custody of J[redacted] to Hunter with parenting time for Rose; ordered J[redacted] returned to Massachusetts; and allowed the parties to request attorney's fees. A.797-922.

On May 26, 2011, after reviewing the parties' submissions and considering the conduct of the parties and their counsel throughout the litigation, the court issued further judgments, reiterating that "[t]he evidence was clear and convincing that the best interests of this very young child could only be served by her being placed in the physical custody of" Hunter, and awarding Hunter $180,000 in attorney's fees. A.947-51. Defendant appealed. A.923, 952.

**STATEMENT OF FACTS**

This case involves the family formed by Hunter and Rose over the course of their romantic relationship. At the time of trial, Hunter was 42 years old, and lived in Byfield, Massachusetts. She has worked as an attorney for the U.S. Department of Education Office of Civil Rights ("OCR") since 2001.

She is part of a large, supportive extended family, and is very close with her parents, siblings, nieces and nephews. A.819, 1095-97, 1109-15. Rose was 38 years old, and lived in Corvallis, Oregon. She earned her Doctor of Osteopathic Medicine degree in June 2009 and completed one year of a residency in internal medicine until she was terminated from the program for failing her board examinations. Rose has lived on the East Coast for most of her adult life. Her mother and stepfather -- the only family with whom she has any contact -- moved to Oregon in recent years. A.820, 1878-80, 1922-24, 1931.

**Hunter and Rose Were A Committed Couple Who Formalized Their Relationship In Law.**

Hunter and Rose began dating in Feb. 2001. Their romance grew, and they soon became a committed couple. In spring 2002, the parties moved to San Francisco, California for Rose to prepare for medical school, which she began in Fall 2005. Hunter transferred to OCR's San Francisco office so that they could be together. A.821-22, 1115-17, 1932.

Their commitment to each other continued to grow. They joined together legally by executing a

Declaration of Domestic Partnership on Sept. 20, 2003.[4] A.822, 2669. They exchanged rings that same fall. They bought a house together in Nov. 2004, shared financial resources and bank accounts, named each other as beneficiaries of life insurance and retirement accounts, and held themselves out as a committed couple in every way. As parties to an RDP, their legal rights expanded on Jan. 1, 2005 to parallel those available to married couples. See 2003 Cal. Legis. Serv. c. 421. The parties were aware of these changes to the RDP law -- indeed they had been passed but not yet implemented at the time the parties registered -- and never terminated their RDP when the changes went into effect. A.823, 1119-21, 1312-14, 1464-65, 1577.

**Hunter and Rose Planned To Start a Family Together.**

From the beginning of their relationship, Rose knew of and supported Hunter's desire to have children. They jointly began efforts for Hunter to get pregnant in spring/summer 2003. Over the course of three years, they endured multiple unsuccessful

[4] The California Secretary of State registered their RDP on Oct. 3, 2003, and they received a certificate declaring their legal status. A.822, 2671. (The Appendix has a numbering error, using A.2669-88 twice. This references the first occurrence of A.2671.)

inseminations and medical procedures to conceive. By spring 2006, it became clear that Hunter needed in vitro fertilization ("IVF") to conceive, but the parties could not afford it. A.824-25, 1125-32, 1981.

At that point, the couple agreed that Rose would try to conceive their child. Hunter was present at and supportive of Rose's efforts to conceive. They chose a donor together and shared equally the costs of inseminations. A.825-27, 1133-46, 2487. The parties intended to jointly parent the child they were working to bring into their family. A.827, 1135, 1145, 1147, 2027-28, 2675-79. Specifically, on Oct. 13, 2006, both parties consented to Rose's insemination and agreed, "from the moment of conception, [to] accept all legal and moral responsibility for any child born" as a result.[5] A.825-26, 2969-72. In Nov. 2006, Rose became pregnant with J[redacted] as a result of the inseminations at PRS. A.827, 2029. The couple and their family and friends celebrated the pregnancy with two baby showers. Hunter was supportive of Rose throughout, taking care of housework and meals and

[5] This consent was set forth in the Pacific Reproductive Services Agreement for Administration of Donor Sperm, which Rose signed as "recipient" and Hunter signed as "Partner or Spouse." A.826, 2969-72.

attending doctor's appointments. A.828, 1147-48, 1152-53, 1402-03, 2959.

In May 2007, the parties moved to the East Coast in order for Rose to perform medical school rotations and for Hunter to obtain insurance coverage for IVF so that she could bear the parties' second child. They first moved to Rhode Island, but upon learning that the insurance coverage available to them there would not cover IVF for Hunter or the delivery costs for J[redacted], they settled in Attleboro, Massachusetts in July 2007. A.829, 856, 1155-57.

At the same time, the parties followed through with plans for Hunter to bear their second child. A.856, 1158-59. In June 2007, both parties signed Reproductive Science Center's consent forms for Hunter's IVF. A.2680-87.[6]

**Hunter and Rose Welcomed J[redacted] Into Their Family And Parented Her Together.**

On August 6, 2007, J[redacted] was born in Providence, Rhode Island. Hunter supported Rose through labor and delivery, was the first non-medical person to hold J[redacted], and was involved in her care throughout their time in the hospital. The parties tried to give

[6] This cites the first occurrence of A.2680-87. See n.4, supra.

J[redacted] the last name "Hunter" on her birth certificate, but were told that Rhode Island law required it to be "Rose." A.830, 1166-71, 2688-2720, 2973. From the time of J[redacted]'s birth through Rose's departure for Oregon, both parties recognized themselves and each other as J[redacted]'s mothers. The couple's family and friends, as well as J[redacted]'s medical and child care providers, saw Hunter and Rose as equal parents to J[redacted]. Many of them provided affidavits in support of Hunter's adoption of J[redacted], an effort the parties began in January 2008 to confirm and secure Hunter's legal status regarding J[redacted]. A.831-34, 841-42, 1054, 1201, 1205, 1212-13, 1409, 1606-07, 2263-69, 2288-90, 2641-42, 2763-68, 2964, 2976-83, 3026, 3032, 3329.

Before Rose took J[redacted] to Oregon, Hunter was central to J[redacted]'s care and upbringing. She jointly made decisions with Rose about J[redacted]'s care and "did the majority of parenting other than nursing as well as the majority of the household tasks." A.868. Hunter bathed, clothed, fed, soothed, entertained, and cared for J[redacted], woke up with her in the night, located and shared the costs for her day care, took her to the doctor and stayed home from work when she

was ill. A.833-36, 868, 1198-1204, 1237-39, 2264-65, 3032. Hunter was J[redacted]'s parent in every regard.

**Hunter and Rose Worked Together To Conceive M[redacted].**

In April 2008, after several unsuccessful attempts at conception, Hunter conceived the couple's second child, M[redacted], using sperm from the same donor as conceived J[redacted]. A.857, 1163-66, 3468-93, 3584-3603. Rose supported Hunter's efforts to conceive M[redacted], taking her to and from IVF procedures, attending an ultrasound and accompanying Hunter to genetic counseling. A.857, 1164, 1298. Rose was excited for the pregnancy, rearranging a medical school rotation to accommodate it and attending a baby shower in Vermont celebrating M[redacted]'s impending arrival. A.856-57, 3305-08.

**Rose Ended Her Relationship With Hunter, Left for Oregon Under False Pretenses, Cut Off All Contact Between Hunter and J[redacted], And Rejected M[redacted].**

In May 2008, Hunter, Rose, and J[redacted] moved to Haverhill, Massachusetts. After the move, the adult relationship began to deteriorate. A.836-38. Rose promised to proceed with Hunter's adoption of J[redacted] regardless, but when the lawyer they had been working with was appointed to the bench and Hunter sought a new lawyer, Rose began to delay. A.843, 1216-18,

3387. They attended couples' counseling in the summer of 2008 to work on relationship issues and Rose's delaying of the adoption, but by August, when Hunter was four months pregnant with M[redacted], Rose ended the relationship. A.838. They continued to co-parent J[redacted] for the next two months, with Hunter taking on an even greater parenting role. From late August through most of September, Hunter parented J[redacted] almost exclusively due to Rose's rotation in Augusta, Maine, exams, and residency applications, and when Rose returned, Hunter continued to provide primary care for J[redacted]. A.838-39, 841, 1233-38.

In early October 2008, Rose informed Hunter that she planned to take J[redacted] with her to do a four-to-six week rotation in Oregon, returning in time for a rotation in Lawrence, Mass. the second week of December. A.840, 1240-45, 2993-94, 3006. Hunter was nearing her third trimester of pregnancy and could not fly. Hunter expressed her extreme distress at being apart from J[redacted] for so long, but Rose promised to provide regular updates and set up a webcam so that Hunter could see J[redacted] daily. A.840, 1244, 2993-94.

On Oct. 27, 2008, Hunter drove Rose and J[redacted] to the airport for their trip to Oregon. A.843, 1247.

Rose initially provided Hunter with updates about J[redacted] via e-mail, detailing that J[redacted] was having a hard time transitioning to being in Oregon, but thirteen days later, on Nov. 9, Rose cut off all communication with Hunter, then terminated her cell phone service, and refused to respond to any of Hunter's requests for information about J[redacted]. A.844, 1248-51. Rose denied Hunter any contact with or information about J[redacted] for over three months, until she was required to do so by the court's first temporary order in Feb. 2009. A.843-45, 1251-54.

On Jan. 16, 2009, M[redacted] was born in Cambridge, Massachusetts. A.857, 1296, 3371. Because of their RDP, the Commonwealth listed both parties as M[redacted]'s parents on her birth certificate. A.857, 1298. Rose was not present at M[redacted]'s birth, and did not inquire about her in any way until Sept. 2009, when she was eight months old. Rose has demonstrated no real interest in developing a relationship with M[redacted], admitted that she does not love her or want custody of her, refuses to acknowledge that M[redacted] and J[redacted] are sisters, and actively discourages their relationship. A.857-59, 1299-1304, 2421-26.

**Rose Undermined Hunter And J[redacted]'s Relationship And Created An Unstable And Harmful Environment For J[redacted], While Hunter Worked To Maintain Their Bond And Provide J[redacted] With Consistency And Care.**

From the time Rose left for Oregon and persisting through trial, Rose did everything she could to eliminate Hunter from J[redacted]'s life and undermine their relationship.[7] Rose disrupted and altered the course of her medical training purposefully to keep J[redacted] and Hunter geographically distant,[8] and made every effort to disrupt their parent-child bond. Rose's attempted disruption of J[redacted]'s attachment to Hunter and her relentless efforts to alienate Hunter from J[redacted] were harmful to J[redacted] and contrary to her best interests. A.862-63; Br. App. at 12 (admitting

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[7] Rose made decisions about medical and child care without consulting Hunter, refused any contact for over three months, demanded that Hunter not refer to herself as "Mommy" once contact was re-established, precluded Hunter from having overnight parenting time with J[redacted] for almost a year, undermined webcams between Hunter and J[redacted], refused to provide Hunter with her address or cell phone number, and disparaged and yelled at Hunter in front of J[redacted]. A.844-47, 850-51, 854-55, 1271, 1280, 2353, 2355-56, 2359-60, 2367, 2381; Brief of Defendant-Appellant ("Br. App.") at 10.

[8] Rose abandoned her plans to pursue a family practice and avoided the established residency placement system to preclude her placement on the East Coast, instead preemptively signing contracts for residencies far from Massachusetts -- first in Oregon, and later in Michigan. A.820-21, 852-54, 869; Br. App. at 10-11.

J[redacted] had a "strong bond[]" with and "an 'attachment' to" Hunter when Rose took J[redacted] from her).[9] Hunter, by contrast, did everything within her power to restore and maintain that bond. As soon as the court issued the first temporary orders, Hunter tried to see J[redacted] as often as possible, including repeated cross-country trips for parenting time while M[redacted] was still a very young infant.[10] She made the most of regular webcams and phone calls given J[redacted]'s age, and sent J[redacted] mail and monthly packages. Hunter also tried to communicate constructively with Rose about J[redacted], and has supported J[redacted]'s relationship with Rose. A.849-51, 1251-56, 1281-89.

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[9] The trial court relied on the expert testimony of Dr. Joanna Rohrbaugh, which addressed the harms to a child of J[redacted]'s age at the time Rose took her to Oregon from disrupting that child's attachment to a parent, as well as the harms from one parent engaging in parental alienation behaviors. A.860-64, 1717-29. The court found that J[redacted] engaged in those behaviors exhibited by children who are harmed by the disruption of their attachment to a parent. A.844, 862-63.

[10] Hunter's first trip to Oregon was mid-Feb. 2009, when M[redacted] was about one month old. They traveled to Oregon in Feb., Apr., May, June, July, and Aug. 2009, though Rose would only allow Hunter to spend five hours per day with J[redacted]. A.846-47, 849. Hunter had expected Rose would bring J[redacted] when she came to Massachusetts for six days in March 2009, but Rose refused, "ostensibly because Ms. Hunter called herself 'Mommy.'" A.849. J[redacted] finally came to Massachusetts in Sept., Oct., and Nov. 2009. Id. In 2010, monthly visitation alternated between the two states. Id.

While in Rose's custody, J[redacted]'s young life was marked by volatility, including four different homes, six different care providers, and three different doctors within two-and-a-half years. A.854, 856, 2330-39; Br. App. at 10-12. As the court found, Rose was "unable to manage J[redacted]'s care without significant, daily support from third parties in the home." A.855. This was true both when Rose was working the sixty to eighty hour a week shifts her medical residency required and when she was unemployed, traveled, or took vacation. A.855, 1658-61, 2329-34, 2930-50. In the midst of trial, Rose made plans to uproot J[redacted] yet again, accepting a residency in Michigan, where she would work the same type of demanding schedule, but without family, friends, or a support system. A.820, 856, 869, 2340. By contrast, J[redacted]'s parenting time with Hunter was characterized by consistency, attention to J[redacted]'s needs, and age-appropriate, child-centered activities and environments. A.847-48, 1097-1111. Hunter has worked to foster J[redacted] and M[redacted]'s relationship as sisters, as well as J[redacted]'s connection to her extended family, and has created a home with clear and

appropriate rules and values. A.847-48, 858-59, 1103-04, 1114-15.

As a result, the court found that (1) "Ms. Hunter has been and is better able in the present and the foreseeable future to be the parent who is mindful of the emotional and physical needs of J[redacted]," A.918; (2) "Ms. Rose has created an unstable living environment for J[redacted]," A.869; (3) "Ms. Rose is unable to act in J[redacted]'s best interests and unable to put J[redacted]'s needs above her own needs," A.869 (4) "the harm to J[redacted] would be substantial if J[redacted] were to remain in Ms. Rose's physical care," A.870; and (5) "it is in the best interests of J[redacted] that Ms. Hunter have physical custody[.]" A.918.

**SUMMARY OF ARGUMENT**

The trial court appropriately recognized the legal spousal relationship between the parties. The parties had a Registered Domestic Partnership ("RDP") from California, a relationship parallel to marriage for all purposes. The trial court properly extended comity to the RDP, just as Massachusetts has always extended comity to spousal relationships validly entered in other states, regardless of whether the same relationship could have been contracted here.

Recognizing the RDP does not undermine public policy. Rather, respecting the parties' relationship furthers the Commonwealth's commitment to equal treatment for same-sex couples, as well as the underlying purposes of comity of mutual respect among states, honoring the parties' intent, and protecting children. [p. 21-28].

The trial court properly concluded that both parties are legal parents to both children. Because the children were born into their parents' RDP via insemination to which each spouse consented, both parties are conclusively parents to both children under G.L. c. 46, § 4B and G.L. c. 209C, § 6. The same conclusion results from extending comity to the parentage protections of California law, which establish legal parentage for children born into an RDP. [p. 28-33]. Recognizing the joint parentage of J[redacted] and M[redacted] gives them the support and security of having two parents from their births, and furthers the Commonwealth's commitment to equal treatment for the children of legally united same-sex couples. The parties' parentage cannot be undercut by their not having duplicated the protections secured by their RDP through adoption or marriage. [p. 33-37].

The trial court properly addressed the children's custody as a straightforward matter of their best interests. The court weighed all relevant factors, including J[redacted]'s relationship with Rose and Rose's wrongful removal of J[redacted] from Massachusetts. Having concluded that that Hunter provided J[redacted] with stable, attentive, appropriate care while supporting her relationships with Rose and M[redacted], and that Rose's inability to place J[redacted]'s needs above her own, unstable environment, and efforts to alienate J[redacted] from Hunter and M[redacted] were harmful, the court correctly awarded Hunter physical custody of J[redacted]. [p. 37-46].

Finally, the trial court properly awarded Plaintiff attorney's fees. Defendant repeatedly re-litigated issues, disregarded court orders and discovery rules, withheld and obscured evidence, and unreasonably delayed the litigation. The award considered all relevant factors and was well within the court's discretion. [p. 46-49].

**ARGUMENT**

This case centers on two children, J[redacted] and M[redacted], born during the legal spousal relationship of their parents, Hunter and Rose, and the custodial

arrangements that serve those children's best interests now that the parents' spousal relationship has ended. It is about how those best interests are served by recognizing and honoring the legal commitment made by the parties and the spousal protections flowing from that legal commitment, as well as the host of other steps the parties took to create and protect their family. Finally, this case is about ensuring that legally-bound same-sex couples like the parties are afforded the same principles of comity, parentage, and custody as other couples to best protect their children.

Over the course of two and a half years of litigation, including seven days of trial, the trial court exhaustively considered the legal status of the parties vis-à-vis each other and the children, and the allocation of parental rights and responsibilities in accord with the children's best interests. Under established principles of comity, that court properly recognized the legal spousal relationship created by the parties' Registered Domestic Partnership ("RDP") as parallel to marriage for all purposes, including the protections of joint parentage for children born during a spousal relationship from birth. As in any

custody dispute, the court's findings thoroughly addressed the best interests of the children, J[redacted] and M[redacted]. Based on the overwhelming evidence, the court properly found that (1) J[redacted] would be harmed by remaining in Rose's physical custody because of Rose's inability to prioritize J[redacted]'s needs and her continuing instability; and (2) Hunter is the parent who can best provide both children with stability, nurturing, and care, and also support J[redacted]'s relationship with Rose. The judgments should stand.

## I. THE TRIAL COURT PROPERLY RECOGNIZED THE PARTIES AS LEGAL SPOUSES.

The trial court correctly recognized the parties' RDP as establishing a legal status parallel to marriage for all purposes, and as such, granted them the full range of spousal protections available under Massachusetts law. Extending comity to the parties' RDP fulfills that doctrine's animating principles, honors the settled expectations of the parties, protects the children born into their relationship, and furthers Massachusetts public policy.

### A. An RDP Is A Legal Spousal Relationship Parallel To Marriage For All Purposes.

By establishing and remaining in an RDP in California, the parties created a legal spousal

relationship. All the rights and obligations of marriage under California law attach to the parties' legal status. See Cal. Fam. Code § 297.5 (RDPs "shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other sources of law, as are granted to and imposed upon spouses."); Koebke v. Bernardo Heights Country Club, 115 P.3d 1212, 1219 (Cal. 2005) ("a chief goal of the Domestic Partner Act is to equalize the status of registered domestic partners and married couples.").

Significantly, Defendant does not dispute the parties' rights and responsibilities under California law. She instead tries to avoid recognition of their relationship by Massachusetts. Her efforts fail.

### B. Comity Applies To The Parties' Legal Spousal Status.

The trial court properly recognized the spousal status of the parties under established comity law.

> Interstate comity . . . is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of

> other persons who are under the protection of its laws.

Cote-Whitacre v. Dep't of Pub. Health, 446 Mass. 350, 368 (2006) (Spina, J., concurring) (quotations omitted). Massachusetts has long applied comity to recognize a spousal relationship so long as it was valid where entered. See id., at 359; Comm. v. Graham, 157 Mass. 73, 75 (1892); Comm. v. Lane, 113 Mass. 458, 463 (1873). The parties' RDP is a spousal status valid in California where it was entered; thus, comity applies to recognize the RDP.

Extending comity to the parties' RDP furthers -- rather than undermines -- the Commonwealth's public policy and constitutional commitments. See Pacific Wool Growers v. Comm'r of Corps. & Tax., 305 Mass. 197, 209 (1940) (comity may only extend if Massachusetts public policy "is in no way contravened or impaired."). Defendant's position -- that the parties' legal relationship cannot be recognized because it falls short of the full marriage equality required by the Massachusetts Constitution -- ignores both the basic contours of marriage recognition law and the policy commitments of the Commonwealth. While Defendant is correct that this Court has ruled that

*establishing* a separate, parallel spousal status for same-sex couples under Massachusetts law would not remedy the constitutional infirmity of excluding same-sex couples from marriage, see Opinions of the Justices to the Senate, 440 Mass. 1201 (2004), that in no way suggests that *recognizing* an existing legal spousal relationship validly entered into in another state would run afoul of Massachusetts public policy.[11]

First, that Massachusetts does not certify the spousal status of RDP is irrelevant to comity's application. Massachusetts has regularly extended comity to spousal statuses that could not have been contracted in the Commonwealth. See Boltz v. Boltz, 325 Mass. 726 (1950) (validating out-of-state common law marriage); Lane, 113 Mass. at 463 (validating out-of-state marriage of adulterer barred from remarrying here). As this Court made clear, "marriages celebrated in other States or countries, if valid by the law of the country where they are celebrated, are

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[11] Defendant seemingly had no objection to the trial court's recognizing the RDP in order to dissolve it. Having made no argument in this regard, Defendant has waived any objection to the RDP's dissolution. See Mass. R. App. Pro. 16(a)(4); Boston Hous. Auth. v. Guirola, 410, Mass. 820, 824 n.6 (1991). Regardless, the trial court's analysis of its authority to dissolve the RDP was proper. See A.899-900.

of binding obligation within this Commonwealth, although the same might, by force of our laws, be held invalid, if contracted here." Sutton v. Warren, 51 Mass. 451, 452 (1845).[12] California has established RDPs as a valid spousal status for same-sex couples, and given the clear constitutional mandate that the Commonwealth extend equal respect to the relationships of same-sex couples, Goodridge v. Dep't of Pub. Health, 440 Mass. 309 (2003), these same comity principles apply to the parties' RDP despite that it could not have been entered in the Commonwealth.[13]

Second, extending comity to a legal relationship that secures for same-sex couples the full panoply of spousal protections and obligations advances the

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[12] Defendant's use of the dissent in Cote-Whitacre glosses over the distinction between licensing and recognition. Br. App. at 37 (citing 446 Mass. at 401, 405). That dissent argued that importing other states' bans on same-sex couples marrying into this state's decisions about who could marry was improper -- a point bolstered by Opinions of the Justices, 440 Mass. at 1208. Neither that dissent nor the majority in Opinions of the Justices addressed the comity due a parallel spousal status created by another state.

[13] Other courts have reached the same conclusion. See Christiansen v. Christiansen, 253 P.3d 153 (Wyo. 2011) (recognizing Canadian marriage of same-sex couple for purposes of divorce despite explicit statutory ban); Dickerson v. Thompson, 897 N.Y.S.2d 298 (N.Y. Super. Ct. App. Div. 2010) (extending comity to Vermont civil union for purposes of dissolution).

Commonwealth's commitment to equal respect for the legal unions of same-sex couples. Indeed, the result Defendant seeks is the outcome that would offend the Massachusetts Constitution. Disregarding the RDP would result in a legally united same-sex couple being "barred access to the protections, benefits, and obligations of civil marriage," -- a result proscribed by Goodridge, 440 Mass. at 313.[14]

Furthermore, extending comity to the parties' RDP furthers comity's animating principles, including mutual respect among states. See Cote-Whitacre, 446 Mass. at 368-69 (Spina, J., concurring). Defendant's assertion that California does not extend comity to the marriages of same-sex couples from Massachusetts, Br. App. at 37-39, is both wrong and legally irrelevant. California extends to all out-of-state marriages the full range of spousal protections. Because of Proposition 8, which amended the California constitution to prohibit marriage for same-sex

[14] It bears noting that at the time the parties entered into the RDP, the Commonwealth had not yet ended the exclusion of same-sex couples from marriage. California offered the parties vastly greater protection than Massachusetts, thus making Defendant's suggestion that Massachusetts should disregard those protections as discriminatory even more absurd.

couples,[15] marriages entered by same-sex couples after Nov. 5, 2008 receive those protections without the designation of "marriage," while marriages entered before then receive those protections with the designation of "marriage." See Cal. Fam. Code § 308; Strauss v. Horton, 207 P.3d 48, 61 (Cal. 2009). California treats Massachusetts marriages as "legally binding and not merely aspirational." Cote-Whitacre, 446 Mass. at 390 (Marshall, C.J., concurring). Moreover, even if Defendant were correct, this Court's response to another state's discrimination against same-sex couples should not be to join in the discrimination by disregarding the parties' spousal relationship.

Finally, extending comity to the RDP honors the settled expectations of Hunter and Rose, who took on the status, and protects J[redacted] and M[redacted], who were born into the relationship. See, e.g., Richardson v. Richardson, 246 Mass. 353, 355 (1923) (recognizing spousal relationships entered into in good faith would "secure the existence and permanence of the family

[15] Prop. 8 has been held unconstitutional. See Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010), appeal pending, Docket No. 10-16696 (9th Cir.), certifying questions to Cal. Sup. Ct., 628 F.3d 1191 (9th Cir. 2011).

relation"); Milliken v. Pratt, 125 Mass. 374, 381 (1877) (recognizing spousal relationship warranted because it "permanently affects the relations and the rights of two citizens and of others to be born"). In light of all these principles, the trial court properly recognized the parties' spousal relationship.

## II. THE TRIAL COURT PROPERLY CONCLUDED THAT BOTH PARTIES ARE LEGAL PARENTS TO THE TWO CHILDREN BORN INTO THEIR LEGAL SPOUSAL RELATIONSHIP.

Because the parties had a legal spousal relationship, the trial court appropriately affirmed that both Hunter and Rose are legal parents to their children.[16] Having recognized the RDP status, that court correctly applied Massachusetts law to include joint parentage of children among the incidents of that spousal relationship. See G.L. c. 46, § 4B; G.L. c. 209C, § 6. Even if, arguendo, the Court were to extend comity only to the parentage protections of the RDP under California law, the same result would occur.

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[16] Defendant does not and cannot question the trial court's jurisdiction over the children or their custody. It is undisputed that Massachusetts is the children's home state. G.L. c. 209B, §§ 1, 2. Thus, whether directly applying G.L. c. 208 or proceeding in equity, the trial court had ample authority to address the children's parentage and determine their best interests. See G.L. c. 208, §§ 28, 31, 33; G.L. c. 215, § 6; A.R. v. C.R., 411 Mass. 570, 573 (1992); Matter of Moe, 385 Mass. 555, 561 (1982).

See Cal. Fam. Code §§ 297.5; 7540; 7611(a); 7613. J[redacted] and M[redacted] have two legal parents, and have since their births.

### A. Under Massachusetts Law, Children Born Into A Legal Spousal Relationship Have Two Legal Parents.

Having recognized the parties' RDP, Massachusetts law makes clear that both parties are the legal parents of J[redacted] and M[redacted]. Once a state extends comity to a spousal relationship, it applies its own law to determine the incidents of that relationship as they apply to Massachusetts residents.[17] See, e.g., Ex Parte Suzanna, 295 F. 713, 714-15 (D. Mass. 1924) (law of place of celebration applies to determine valid existence of the marriage, but law of domicile applies to the resulting status); see generally Restatement (Second) of Conflict of Laws § 284 (1971).[18]

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[17] Given that no conflict exists with California law, see Part II(B), infra, and Defendant does not argue one, Massachusetts applies to the question of parentage. See Kaufman v. Richmond, 442 Mass. 1010, 1011 (2004) ("only actual conflicts between the laws of different jurisdictions must be resolved").

[18] Even if the Court determines that the full range of Massachusetts spousal protections does not attach to the parties' RDP, the Court should still recognize that relationship solely for confirming the children's parentage. See Cote-Whitacre, 446 Mass. at 403 n.11 (Ireland, J., dissenting) ("where failure to recognize a same-sex marriage affects the best interests of a

Under Massachusetts law, when the spouse of a woman consents to her conception via assisted insemination, "that spouse is considered the legitimate parent of a resulting child[.]" T.F. v. B.L., 442 Mass. 522, 532 (2004). See G.L. c. 46, § 4B. Children born into a legal spousal relationship are presumed to be the children of both spouses, see G.L. c. 209C, § 6, and G.L. c. 46, § 4B establishes that this may be the case even without a biological tie between the child and parent.[19]

Under these provisions, both parties are plainly legal parents to these children. Rose conceived using donor sperm, with Hunter's consent, and J[redacted] was born during their spousal relationship.[20] A.824-30, 1139-47, 2217-21, 2969-72, 3468-93. Hunter conceived using donor sperm, with Rose's consent, and M[redacted] was born during their spousal relationship.[21] A.856-

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child born within the marriage ..., the reviewing court may determine that recognition is necessary.").

[19] As Defendant correctly noted, Br. App. at 33, these provisions apply equally to same-sex couples and must be read in a gender-neutral manner. See Goodridge, 440 Mass. at 324, 343 n.34 (citing G.L. c. 4, § 6).

[20] Though Hunter's consent was written, Massachusetts law does not require a writing. See G.L. c. 46, § 4B.

[21] Although legally irrelevant, J[redacted] and M[redacted] were conceived using sperm from the same donor. A.858, 2680-87, 3468-93, 3584-3603. As the trial

57, 1298, 2404-09, 2680-87, 3305-08, 3584-3603. Thus, both parties are legal parents to both children.[22]

### B. Under California Law, Children Born Into A Legal Spousal Relationship Have Two Legal Parents.

Even if, arguendo, the Court determined that the full range of spousal protections under Massachusetts law cannot apply to the RDP status created by California, comity would still apply to the protections of parentage California provides to children born into an RDP.[23] California law extends to RDPs the rights and obligations of the spouses with respect to a child of either partner. See Cal. Fam. Code § 297.5 (d). This includes the establishment of legal parentage for the spouse of a woman who

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court found, "Legally, they are sisters. Biologically, they are half-sisters." A.858.

[22] Defendant's reliance on A.Z. v. B.Z., 431 Mass. 150 (2000) to avoid her parentage of M[redacted] is wholly misplaced. First, the parties are parents by operation of law, not the ruling of the court. The inclusion of Rose's name on M[redacted]'s birth certificate reflects that law. Second, this is not a matter of "forced procreation," 431 Mass. at 160, but of holding Rose to her "duty … to support, provide for and protect the children [she and her spouse brought] forth[.]" L.M. v. R.L.R., 451 Mass. 682, 685 (2008).

[23] New York applied this analysis, extending comity to the parentage protections of a parallel spousal status. See, e.g., Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010) (extending comity to Vermont parentage protections attendant to civil unions).

conceives a child through assisted insemination under the care of a medical professional with that spouse's written consent, see Cal. Fam. Code § 7613, and the general presumption of parentage for children born during a spousal relationship. See Cal. Fam. Code §§ 7611(a), 7540; see also Elisa B. v. Super. Ct., 117 P.3d 660, 666 (Cal. 2005) (protections of RDP include that both women would be parents to child born to one of them).[24] Because both children were conceived through insemination to which the other spouse consented in writing,[25] and because they were born into the parties' RDP, under these provisions, both parties are parents to both children.

Recognizing these California parentage protections would further the same animating principles of comity discussed above: honoring the

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[24] These parentage protections had been in effect for nearly two years by the time of J[redacted]'s conception. See 2003 Cal. Legis. Serv. c. 421 (eff. Jan. 1, 2005).

[25] The evidence plainly demonstrates Hunter's written consent to Rose's insemination. A.826, 2969-72, 3468-93. That consent meets the requirements of Cal. Fam. Code § 7613. Thus, Rose's claims regarding the trial court's exclusion of a different form are irrelevant. Br. App. at 39 n.19. Moreover, given that no one could authenticate the excluded form, as both parties admit they did not receive it, its exclusion was not error. A.826, 1185-86, 2017-26. See Comm. v. Hubbard, 371 Mass. 160, 175-76 (1976).

expectations of the parties and securing the legal position of the children. See Putnam v. Putnam, 25 Mass. 433, 448-49 (1829) (extending comity to evasive marriage because of "the effect upon their innocent offspring"); Inhabitants of Medway v. Inhabitants of Needham, 16 Mass. 157, 160-61 (1819) (extending comity "to prevent the disastrous consequences to the issue of such marriages").

### C. Failure To Recognize Joint Parentage Would Harm The Children And Violate Public Policy.

Like all other children born into a legal spousal relationship, J[redacted] and M[redacted] deserve the certainty of having two legal parents from birth. See Culliton v. Beth Israel Deaconess Med. Ctr., 435 Mass. 285, 292 (2001) (noting "importance of establishing the rights and responsibilities of parents as soon as is practically possible"); Adoption of Mariano, 77 Mass. App. Ct. 656, 661 (2010) (child's financial and filial best interests favor having two parents rather than one). These children should not be deprived of this security just because their parents' spousal relationship was an RDP. See Woodward v. Comm'r of Soc. Sec., 435 Mass. 536, 546 (2002) (children "entitled to the same rights and protections of the

law regardless of the accidents of their birth.") (citations omitted); Goodridge, 440 Mass. at 348 (Greaney, J., concurring) (failing to treat the children of same-sex couples the same as children of different-sex couples "is irreconcilable with, indeed, totally repugnant to, the State's strong interest in the welfare of all children and its primary focus, in the context of family law where children are concerned, on 'the best interests of the child.'").

Defendant's assertion that extending comity to the parental rights flowing from the parties' legal spousal relationship would be harmful to children like J[redacted] and M[redacted] defies both logic and law. In essence, Defendant argues that the way to protect the children of RDPs is to deny them the "legal, financial, and social benefits" and the "family stability and economic security" flowing from their parents' spousal relationship -- the very problems she recognized this Court sought to address in Goodridge. Br. App. at 30.[26] Such a result flies in the face of Massachusetts law and public policy.

[26] The logical conclusion of Defendant's argument is that the Court should treat the RDP as a marriage, not entirely disregard its existence and significance.

### D. That The Parties Did Not Complete An Adoption Of J[redacted] Or Marry In Massachusetts Does Not Change Their Joint Parentage.

Defendant's emphasis on the parties' not having completed an adoption or gotten married after they moved back to Massachusetts is misplaced in light of the existence of their legal spousal relationship. The parties appropriately explored both adoption and marriage as additional means of safeguarding their relationships with each other and J[redacted] in an attempt to navigate an area of developing law. That they did not complete those efforts did not and could not undermine the existence of the parties' legal relationships to each other and the children.

As to adoption, Hunter did seek to adopt J[redacted] as an unassailable way to affirm her parentage separate from the legal relationship of the parties. Married same-sex couples regularly pursue this same practice, not because the spouses are not already legal parents, but because of the discrimination their relationships still face, particularly in other states.[27] The same was true for these parties. That they did not complete this belt-and-suspenders effort

[27] See Courtney G. Joslin, Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines, 4 Harv. L. & Pol'y Rev. 31, 40 (2010).

cannot negate Hunter's legal parentage. Moreover, given Rose's admission that she thwarted the adoption, Br. App. at 8; A.843, its incompletion cannot be held against Hunter.

As to marriage, it should not be the policy of this Commonwealth that same-sex couples must duplicate the spousal protections they have already secured in another state with a Massachusetts marriage. While that would be a facile bright line, the RDP already provides a bright line for establishing the parties' legal commitment. Requiring marriage would not provide additional clarity given the inconsistent respect for the legal relationships of same-sex couples. Most critically, the federal government treats the parties as "single," despite their RDP, and would do so even if they had married in Massachusetts.[28] Thus the parties confronted Hunter's inability to add Rose to her health insurance through her federal employer and questions about Rose's eligibility for MassHealth, and sought information from a legal hotline about their options. A.829, 1122, 1156-57, 1315-40, 3333-38. That the parties

[28] See 1 U.S.C. § 7 (defining spouse for federal purposes as "refer[ring] only to a person of the opposite sex who is a husband or wife").

were harmed by, but abided by, a discriminatory federal law in deciding not to marry does not change that they had a spousal status, and a later marriage would not change that legal reality.

**III. THE TRIAL COURT PROPERLY CONCLUDED THAT GRANTING PHYSICAL CUSTODY OF J[redacted] TO HUNTER WAS IN J[redacted]'S BEST INTERESTS.**

Having affirmed that J[redacted] and M[redacted] have two legal parents, the trial court appropriately treated this case like any other custody matter, engaging in a standard determination of the children's best interests. As legal parents to both children, Hunter and Rose stand on equal footing with regard to custody. See G.L. c. 208, § 31; Comm. v. Beals, 405 Mass. 550, 554 (1989). Though the court's findings of Hunter's substantial care of and bond with J[redacted] prior to Rose's deceptive departure for Oregon would support de facto parent status, A.833-40, 864, 868, 915; Br. App. at 8; A.H. v. M.P., 447 Mass. 828 (2006), this is not a case in which Hunter's parental rights and responsibilities turn on that in-fact parent-child relationship. Hunter and Rose stood as legal equals before the court, and the court correctly applied a straightforward analysis of J[redacted] and M[redacted]'s best interests.

Defendant recognizes, as she must, that "'[t]he determination of which parent will promote a child's best interests rests within the discretion of the judge ... [whose] findings in a custody case must stand unless they are plainly wrong.'" Br. App. at 21; Custody of Kali, 439 Mass. 834, 845 (2003)(citations omitted). See also Mason v. Coleman, 447 Mass. 177, 186 (2006).[29] The court's exhaustive findings, analyzing the parties' histories as parents and respective abilities to meet J[redacted] and M[redacted]'s physical, emotional, and educational needs, addressed all relevant components of the best interests analysis and its custody awards must be sustained.[30]

In determining that J[redacted]'s best interests would best be served by granting primary physical custody to Hunter,[31] the court thoroughly considered the

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[29] Defendant's intimation that the trial judge adopted Plaintiff's findings verbatim, Br. App. at 6 n.4, cannot survive closer scrutiny. Compare A.639-731 and A.797-891. Given the court's additions, edits, omissions, and credibility assessments, "it is clear that the findings are the product of [her] independent judgment." Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 465 (1991).

[30] Defendant does not contest the award of sole legal and physical custody of M[redacted] to Hunter.

[31] Despite Rose's claim, Hunter did seek sole physical custody of J[redacted]. A.107-09, 703-05. The GAL also advocated granting Hunter custody. A.780-96.

capacities of the parties to care for J[redacted]. The record and findings establish the instability and insecurity of J[redacted]'s life while in Rose's primary care. After Rose took J[redacted] away from Hunter to Oregon, she moved J[redacted] to four different homes in three cities, to six different care providers, and to three different pediatricians in under three years. A.854, 2338. Rose was unable to care for J[redacted] "without significant, daily support from third parties in the home," even when she was unemployed, and when working, worked long hours, including overnights, weekends, and holidays.[32] A.855, 1658-61. Rose planned to move J[redacted] to Michigan, where she would have a similar schedule but no support. A.856. Most critically, Rose actively denigrated and undermined J[redacted]'s relationship with Hunter and M[redacted].[33] In virtually every decision, Rose demonstrated an inability to place J[redacted]'s needs above her own.[34] The

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[32] See Haas v. Pulchaski, 9 Mass. App. Ct. 555, 557 (1980) (denying custody where child would be cared for by multiple care providers rather than parent).

[33] See Williams v. Massa, 431 Mass. 619, 624 (2000) (criticizing wife's efforts to disrupt husband's relationship with both children).

[34] See Zatsky v. Zatsky, 36 Mass. App. Ct. 7, 13 (1994) (custody based on parent's ability "to subordinate her emotional needs to those of the children").

court's ultimate finding, "that the harm to J[redacted] would be substantial if J[redacted] were to remain in Ms. Rose's physical care," A.870, is well supported.

In stark contrast, Hunter provides J[redacted] with stability,[35] with deep roots in New England, and an established, flexible work schedule affording her ample time to care for the children.[36] A.850-52. Hunter is "a loving and emotionally attuned parent," A.868, who engages J[redacted] in age-appropriate activities and also provides structure and discipline. A.848. Hunter supports J[redacted]'s relationship with Rose, despite Rose's hostility toward Hunter, A.849, 869, and has fostered J[redacted] and M[redacted]'s relationship as sisters. A.868.[37] Given the court's findings of Rose's harmful and alienating conduct and of Hunter's stable, child-centered parenting, none of which Rose contests,[38] the custody award was warranted.

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[35] See Custody of Kali, 439 Mass. at 843 ("Stability is itself of enormous benefit to a child[.]").

[36] See id., 439 Mass. at 847 (custody appropriate where parent's "schedule was sufficiently flexible to ensure that Kali's needs … will be attended to").

[37] See Adoption of Hugo, 428 Mass. 219, 230-31 (1998) (importance of sibling relationships among the factors to be given weight in custody determinations).

[38] Rose offered no evidence and makes no argument that Hunter is not a good parent. She relies solely on her contention that Hunter is not a parent at all.

See Custody of Zia, 50 Mass. App. Ct. 237, 244 (2000) (one parent's "refusal or inability to communicate with the father … for the benefit of the child," and "poor judgment and worrisome parenting decisions," and other parent's "active, substantial, and constructive involvement in the child's life," and "willingness to respect the mother's role as a parent" among factors relevant to child's best interests).

Defendant fails to undermine the court's findings and judgments. First, Defendant's claim that the trial court assessed J[redacted]'s best interests without regard to her relationship with Rose is plain wrong. To the extent J[redacted] even has a secure attachment to Rose, the court's judgment safeguards rather than disrupts it.[39] Specifically, based on the testimony of Plaintiff's expert, Dr. Rohrbaugh, makes clear that the court's judgment went farther than necessary to protect J[redacted]'s attachment to Rose. Specifically, based on Dr. Rohrbaugh's testimony, the court found that in order to protect the attachment of a child of J[redacted]'s age, "parenting time should take place at

[39] Thus Defendant completely misuses the expert testimony, Br. App. at 22, which addressed the harms of completely severing a parental attachment, as Rose did when she took J[redacted] to Oregon.

least once a month for a long weekend, and there should be daily contact by telephone or webcam. The child also needs a picture of the left behind parent." A.864.[40] Having already found that Hunter and J[redacted] call Rose every night and that Hunter has a picture of Rose in J[redacted]'s bedroom, A.849, the court's order went beyond the parameters explained by Dr. Rohrbaugh, granting joint legal custody and more parenting time for Rose than Hunter had at any point in this case, including thrice weekly webcams and in-person visits every other weekend. The court also gave Rose ample opportunity for greater access to J[redacted] if she relocated. A.797-803. The court's order clearly considered J[redacted]'s relationship with Rose.

Second, the timing of J[redacted]'s move to Hunter's custody was precipitated by Rose's actions. Late in the trial, Rose accepted a residency in Michigan. A.856. With the custody judgments pending, Rose unilaterally attempted to remove J[redacted] to Michigan on

[40] Defendant completely misconstrues Dr. Rohrbaugh's testimony, Br. App. at 22, which addressed the harms of completely severing a parental attachment, as Rose did when she took J[redacted] to Oregon. A.1755-56.

or about May 1,[41] prompting Hunter to file a motion to prevent another move for J[redacted] prior to the court's ultimate determinations. A.4. The court acted expeditiously to issue its judgments and, in so doing, spared J[redacted] from yet another unfamiliar home, care provider, and community. Instead, J[redacted] was returned to the stable, familiar home of Hunter and M[redacted]. The court carefully considered J[redacted]'s interests and needs and issued its judgments accordingly.

Third, there is ample support for the court's findings that J[redacted] was negatively affected by Rose's insufficient attention to her needs and no evidence that J[redacted] was thriving in Oregon. The court was well within its discretion to reject the self-serving and contradictory testimony of Rose, her mother, and their family friend. See Care & Protection of Three Minors, 392 Mass. 704, 711 (1984). Rose's trial testimony was rife with fabrications and revisionist history. Her credibility was completely undermined after cross examination, which began her impeachment in the third question and continued consistently throughout. A.2216-2426. Moreover, the weight of the

[41] Given the temporary orders in place, this removal would have been unlawful without Hunter's consent or the permission of the court. G.L. c. 208, § 30.

evidence wholly undercut her testimony. Rose presented no documents and little evidence about J[redacted]'s life in her custody,[42] and the little that was presented suggested that J[redacted] was not thriving. See A.844 (difficulty transitioning); A.863, 1658 (aggressive behavior, hitting other children).[43]

Furthermore, that the parties, the GAL,[44] and the trial court all agree that J[redacted] is a bright, verbal child who is loved by both of her parents does not change the trial court's finding of harm to J[redacted] from remaining in Rose's custody. That finding appropriately focused on Rose's lack of ability to act in J[redacted]'s best interests, patterns of poor parental

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[42] Seemingly, Defendant saw no need to provide any objective evidence, relying on her genetic connection to J[redacted] to dictate the court's analysis, but biology alone does not equate meeting a child's best interests. See Paternity of Cheryl, 434 Mass. 23, 24, 31 (2001); C.C. v. A.B., 406 Mass. 679, 689-690 (1990).

[43] The evidence refutes Rose's claim that J[redacted] failed to meet developmental milestones in Massachusetts. See A.2764 (pediatrician stating, "[n]ot only is J[redacted] healthy and developing normally, she appears to be thriving in her home environment in the Hunter-Rose home"); A. 2581 (Rose's mother stating that J[redacted] was "a thriving, alert healthy baby" in first 15 months).

[44] The trial court appointed Attorney Cowan as GAL, as per Mass. R. Prob. & Fam. Ct. 5, to represent the children's legal interests in this matter, and not to investigate or evaluate them. See A.458. As such, her report was properly not a source of fact finding.

decision making, and hostility and alienating behaviors regarding J[redacted]'s relationship with Hunter and M[redacted]. These are entirely appropriate considerations regarding J[redacted]'s present and future wellbeing. See Williams v. Massa, 431 Mass. 619, 623-24 (2000); Custody of Zia, 50 Mass. App. Ct. at 244; Custody of a Minor, 5 Mass. App. Ct. 741, 749 (1977).

Finally, the court properly considered Rose's unilateral removal of J[redacted] from the Commonwealth as one part of its exhaustive analysis. As with any child born into a spousal relationship, J[redacted]'s parentage was established by law from her birth. No judicial determination of parentage was required.[45] As a result, Rose's permanent removal of J[redacted] without Hunter's permission was unlawful. See Smith v. McDonald, 458 Mass. 540, 549 (2010). Even if, arguendo, the removal was not unlawful, the court could nonetheless consider the removal as part of its assessment of Rose's inability to place J[redacted]'s needs above her own and its finding that Rose "stymied deliberately any attempts by [Hunter] to participate in [J[redacted]'s] life," as "such a finding may support an

[45] That the court was forced three times to declare the parties' parentage was a matter of Rose's denying that status, not the need for it to be established.

award of sole custody to the other parent…." Smith, 458 Mass. at 553-54 (citation omitted). Rose's wrongful removal, joined with the other best interests factors, justified the custody award to Hunter, "not as punishment, but… because [Rose] did not act in the best interests of her [child]." Hernandez v. Branciforte, 55 Mass. App. Ct. 212, 221 (2002).

## IV. THE TRIAL COURT PROPERLY AWARDED PLAINTIFF ATTORNEY'S FEES BECAUSE DEFENDANT DISREGARDED COURT ORDERS AND DISCOVERY RULES, PROLONGED LITIGATION, AND WITHHELD AND OBSCURED EVIDENCE.

An award of attorney's fees "is within the sound discretion of the judge and will not ordinarily be disturbed." DeMatteo v. DeMatteo, 436 Mass. 18, 38-39 (2002). See also G.L. c. 208, § 38. Here, the trial court's fees award was plainly authorized.[46]

First, the court's award appropriately focused on Rose's refusal to accept the rulings of three different judges on the issue of parentage. The award did not turn on the substance of her position, but on her repeated re-litigation of this issue, which forced the need for extensive discovery and trial. When a party ignores previous court decisions and continues

[46] The trial court did not specify the basis for the award. Plaintiff argued fees were appropriate under G.L. c. 208, § 38 and G.L. c. 231, § 6F. A.925-26.

to make arguments that have already been rejected, an award of attorney's fees is proper. Cf. City of Worcester v. AME Realty Corp., 77 Mass. App. Ct. 64, 71 (2010), review denied, 460 Mass. 1104 (2011).

Second, the fees award was proper given Defendant's discovery abuses, obstructionist conduct, and delay tactics. See J.S. v. C.C., 454 Mass. 652, 666 (2009); Downey v. Downey, 55 Mass. App. Ct. 812, 819 (2002). The trial court credited Plaintiff's counsel's "thorough[] and accurate[]" submissions in support of the fees, which detailed Defendant's litigation misconduct. A.950.

For example, Defendant filed numerous redundant motions to re-litigate decided issues without any new facts or arguments.[47] Defendant flouted or ignored several court orders, requiring the expense of enforcing them.[48] Defendant failed to obey basic discovery rules,[49] withheld and refused to cooperate in

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[47] See Motions to Dismiss Custody Complaint, A.66-86, 111, 806 and 628-31, 634, 817; Motions to Prevent Hunter from calling herself "Mommy," A.175-84, 185-87, 807 and 188-89, 202-03, 808-09; Motions to Amend Answer, A.283-307, 455, 811, 813 and 817.

[48] See, e.g., A.807, 812-13, 815-16, 854-55, 937.

[49] See, e.g., A.311-84, 807, 809-12, 936-37.

obtaining documents,[50] and refused to provide a financial statement.[51] In short, Rose unnecessarily prolonged discovery, J.S., 454 Mass. at 652, and forced Hunter "to engage in extraordinary discovery efforts." Downey, 55 Mass. App. Ct. at 819.

Even more egregious, Defendant complicated and prolonged the litigation by burning relevant documents[52] and by her counsel's tampering with the court's docket.[53] The trial court properly recognized the litigation misconduct of Defendant and the extraordinary amount of work caused thereby, stating, "Clearly the plaintiff was assigned the laboring oar by the defendant." A.951.

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[50] For example, Defendant refused to produce or sign releases for documents relating to her medical education, requiring Plaintiff's counsel to secure out-of-state counsel and file a motion before Defendant relented. See A.936.

[51] Having ignored Rule 401, two formal requests, four letters to her counsel, and a motion to compel, Rose did not file a financial statement until two days after the court-ordered deadline, and ten months after the case began. A.311-12, 324-25, 349-53, 814, 936.

[52] Rose admitted to burning all of her journals from the time period of her relationship with Hunter on the eve of leaving for Oregon, knowing that litigation was likely. A. 840-41, 2257-58. See Kippenham v. Chaulk Serv., Inc., 428 Mass. 124, 127 (1998) (sanctions for spoliation of evidence "if a litigant ... knows or reasonably should know that the evidence might be relevant to a possible action").

[53] See A.220-30, 281, 810.

Finally, the court had first hand view of counsel's skill, and detailed submissions, including contemporaneous time records, affidavits, and bills, documenting Plaintiff's litigation expenses. See J.S., 454 Mass. at 666. The court reviewed the financial positions of the parties through the litigation and the submissions related to the motion for fees. The court's comparisons of the parties' positions,[54] including Rose's ability to pay her own counsel fees of approximately $237,000, and assessment of Rose's ability to earn sufficient income to pay the fees were within the court's discretion.[55] See Cooper v. Cooper, 62 Mass. App. Ct. 130, 141 (2004). The court awarded only part of Plaintiff's actual fees and spread the payments over multiple years. The award was well within the court's discretion and should stand.

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[54] It bears mentioning that Rose began the litigation in a better financial position. On the day she was served with the initial complaint, Rose took approximately $18,000 from the parties' joint account, leaving Hunter with no financial cushion. A.867.

[55] Given the extensive submissions, the evidence at trial of the parties' financial circumstances, and the judge's vast knowledge of the case, the denial of an evidentiary hearing was not error. See Edinburg v. Edinburg, 22 Mass. App. Ct. 192, 198 (1986).

## CONCLUSION

For all the reasons herein, this Court should affirm the judgments of the Probate & Family Court.

## RULE 16(k) CERTIFICATION

The undersigned certify that this brief complies with the Massachusetts Rules of Appellate Procedure.

Respectfully submitted,

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