# Case & Statute Comment

## Best interests of the child versus unfitness of the parent: Unraveling the intertwinement

*C.P. v. R.S., 81 Mass. App. Ct. 223 (2012)*

### I. Introduction

On January 31, 2012, the Massachusetts Appeals Court, in *C.P. v. R.S*, affirmed an order granting custody to a child's stepfather over the objections of the child's biological father.[1] The Court specifically found the child's biological father unfit to parent the child, identified only by the pseodonym, "Samuel."[2] However, somewhat atypically, Samuel's father was not alleged to have engaged in any acts of abuse or neglect. Further, the father had no criminal record or history of drug or alcohol abuse.[3] In other words, Samuel's father lacked most of the classic hallmarks of unfitness referenced by Massachusetts' appellate courts in the past.[4] Unfortunately, despite the relative novelty of the issues it addressed, the court in *C.P. v. R.S.* did little to establish any clear guidelines for assessing custody awards in this context – i.e. where a parent is outwardly fit, but his capacity to care for his biological child is nonetheless challenged by a third party. In particular, the case appears to obscure the precise definition of parental "fitness."[5]

Samuel, the child at issue in *C.P. v. R.S.*, was born in September 2003. His mother subsequently married a man who was not Samuel's father. His mother died in December 2006, when Samuel was 3 years old. When his mother died, Samuel remained with his stepfather. During his first year, Samuel's father saw the child three or four times per week. In his second year, Samuel's father saw the child weekly, including overnight visits. Samuel saw his father on holidays and on his birthday. In fact, Samuel was with his father on the night that his mother died. After Samuel's mother died, Samuel's stepfather discontinued the visits. As a result, Samuel saw his father only fifteen to twenty times from ages three to seven. Samuel's father filed his Complaint for Paternity in September 2007; he had not filed a guardianship petition.[6]

Well-established Massachusetts case law makes clear that a parent, biological or adoptive, is presumed "fit" to care for his or child.[7] Absent a showing of "unfitness," a parent will prevail in a custody dispute over a non-parent.[8] Whether a proceeding is to remove custody of children from parents or to restore custody to parents from a legal guardian, a parent is denied custody only if the Court finds him or her unfit to further the welfare of the children.[9]

Against this backdrop, it seems—at least at first blush—surprising that the Appeals Court would have affirmed the custody award in *C.P. v. R.S.* The result appears to be, in the end, is a product of conflation of two basic probate law principles.

### II. The "Intertwined" Standards

In the context of a custody determination, a parent's unfitness is "closely intertwined" with a consideration of the child's best interest.[10] The "best interests of the child" and "unfitness of the parent" are not separate and distinct but "cognate and connected."[11] In other words, the two standards are related or analogous in nature, character, or function. This statement of intertwinement of the standards can be confusing for the practitioner and litigants trying to assess their likelihood of prevailing. It may be equally confusing for a trial court judge trying to apply the appropriate standard. It certainly appears to have been somewhat challenging for appellate courts in Massachusetts.

In describing unfitness, a court could state that the child's best interest is one factor in determining fitness. Instead, the court in *Guardianship of Estelle* describes the intertwinement of the two standards: "[t]he tests 'best interests of the child' in the adoption statue and 'unfitness of the parent' in the guardianship statute reflect different degrees of emphasis on the same factors."[12] Unfitness and best interests are applied in conjunction.[13] The fitness of a parent requires an analysis of the parent's "willingness and ability to care for the child, as well as the effect on child of being placed in the custody of that parent."[14]

1. *C.P. v. R.S.*, 81 Mass.App.Ct. 223, 228 (2012). Although Samuel was born during the marriage of the child's mother and stepfather, the Court does not dwell on that as a reason for awarding the stepfather custody over the father. *C.P. v. R.S.*, 81 Mass.App.Ct. at 226-28.

2. *Id.* at 224-225.

3. *Id.*

4. *Id.* at 226.

5. *Id.* at 226-28.

6. *See* Appellant's Brief to the Appeals Court, *C.P. v. R.S.* The author wishes to express gratitude to Attorney Francis Russell for sharing the Appellant's Brief to the Appeals Court, as well as Attorney Russell's Application for Further Appellate Review. The Appellee did not file a brief with the Court.

7. *Bezio v. Patenaude*, 381 Mass. 563, 571 (1983).

8. *Id.* at 571 (citations omitted); *Guardianship of a Minor*, 1 Mass.App.Ct. 392, 395 (1973) (stating that the unfitness standard has been part of Massachusetts law since 1873).

9. *Id.*

10. *R.D. v. A.H.*, 454 Mass. 706, 715 (2009).

11. *Guardianship of Estelle*, 70 Mass.App.Ct. 575, 581 (2007) (quoting *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption*, 367 Mass. 631, 641 (1975).

12. *Guardianship of Estelle*, 70 Mass.App.Ct. at 580 (quoting *Petition of the New England Home for Little Wanders to Dispense with Consent to Adoption*, 367 Mass. at 641).

13. *Id.*

14. *Guardianship of Estelle*, 70 Mass.App.Ct. at 581.

The Massachusetts Uniform Probate Code governs guardianship matters in Massachusetts and refers to the "best interest of the minor" twice in the guardianship framework. First, the court is required to determine that the appointment of a guardian will serve the "welfare and best interest of the minor."[15] Similarly, the Court will appoint a minor's nominee unless such an appointment is not in the minor's best interest.[16] Thus, the Massachusetts Uniform Probate Code does *not* present the "intertwinement" concept so heavily relied upon by the courts of the Commonwealth.

## III. Parental Unfitness

### A. Unfitness defined

For a guardianship petition, the Massachusetts Uniform Probate Code requires a showing of unfitness of the parents if the parents do not consent to the guardianship.[17] Proof of unfitness is similarly required to terminate parental rights in the child protection or adoption context.[18] No distinction in definition is made for these two very different contexts, although such a distinction may well be warranted.

Unfitness is not defined by the Massachusetts Uniform Probate Code or by any other statute in Massachusetts, but rather by reference to the plain meaning of the word.[19] "In general, "unfitness" means unsuitable, incompetent, or not adapted for a particular use or service."[20] "Unfitness" includes the concept of "being unsuitable or ill adapted to serve under the existing circumstances."[21]

However, unfitness may not be based upon "inappropriate factors, such as disapproval of a parent's life-style."[22] Morever, more than temporary unfitness is required to terminate parental rights.[23] Courts, however, are not required to grant parents an indefinite opportunity for reform.[24] Where there is evidence that a parent's unfitness is not temporary, a court may properly find unfitness sufficient to terminate parental rights.[25]

Consistent with these principles, courts look at *current* fitness, rather than at a history of unfitness. "The mere fact that [a parent] has on occasion shown some lack of interest or involvement in the child's life clearly does not rise to level of disinterest, abandonment, or inattentiveness which demonstrates parental unfitness."[26] Lack of involvement "in the past does not, standing alone," render a parent unfit.[27] At the same time, a judge is allowed to consider a past pattern of parental conduct for its "prognostic value" in determining current parental fitness.[28]

Thus, parents may be currently fit, and are presumed fit, even if they were previously uninterested in the child.[29] Recent evidence of unfitness is required.[30] Past shortfalls may be offset by more recent attentive conduct.[31] In short, as the Supreme Judicial Court has noted on more than one occasion, "unfit" is "a strong word" and a conclusion that should not be reached easily.[32]

### B. Unfitness Quantified

The Massachusetts Appeals Court has acknowledged a lack of "mathematical precision" in determining fitness.[33] Indeed, no single metric has ever been articulated for making this determination. Rather, each case is assessed on it own merits, and a judge's findings must be "specific and detailed" to demonstrate that close attention was given to all relevant evidence.[34]

Despite this somewhat amorphous standard, parental rights can be terminated under the care and protection statue or the adoption statute only upon clear and convincing evidence of parental unfitness.[35] The burden of proof is upon the person seeking to deprive the parent of custody.[36] Thus, while a judge has broad latitude in terms of the evidence that may factor into a fitness determination, there is a high standard of specificity of specificity imposed on the findings required to support any such determination.

### C. Fit does not necessarily mean Ideal

"Ineptitude, handicap, character flaw, conviction of a crime, unusual life style, or inability to do as good a job as the child's foster parent" *are insufficient*, standing alone, to support a finding that a parent is unfit.[37] Stated differently, such attributes do not require a finding of unfitness. Rather, to be unfit, parents must suffer from "grievous shortcomings or handicaps that put the child's welfare much at hazard."[38]

15. Mass. Gen. Laws c. 190B, § 5-206.

16. *Id.* at § 5-207.

17. Mass. Gen. Laws c. 190B, § 5-204(a)(v) (requiring that that surviving parent(s) be "unavailable or unfit to have custody").

18. Mass. Gen. Laws. c. 210, § 3.

19. *See* Mass. Gen. Laws c. 109B.

20. *Guardianship of a Minor*, 1 Mass.App.Ct. at 396.

21. *R.D. v. A.H.*, 454 Mass. at 715 (2012) (quoting *Hirshon v. Gormley*, 323 Mass. 504, 507 (1948).

22. *Care and Protection of Three Minors*, 392 Mass. 704, 712 (1984).

23. *Adoption of Elena*, 446 Mass. 24, 31-32 (2006) (highlighting a long history of the mother's involvement with drugs and abusive men, which negatively impacted the children).

24. *Adoption of Cadence*, 81 Mass.App.Ct. 162, 169 (2012) (*quoting Adoption of Nancy*, 443 Mass. 512, 514-15 (2005) (stating "it is only fair to the child to say, at some point, 'enough'").

25. *Id.*

26. *Guardianship of Yushiko*, 50 Mass.App.Ct. 157, 160 (2000) (citing *Guardianship of a Minor*, 1 Mass.App.Ct. at 397); *Custody of a Minor* (No.2), 22 Mass. App.Ct. 91, 94 (1986) (requiring critical findings which bear on current unfitness).

27. *Guardianship of Garvey*, 64 Mass.App.Ct. 1101 (2005) (quoting *Guardianship of Yushiko*, 50 Mass.App.Ct. at 160).

28. *Care and Protection of Stephen*, 401 Mass. 144, 151-52 (1987) (examining a mother's mental health history as well as her current mental health).

29. *See Guardianship of Yushiko*, 50 Mass.App.Ct. at 160 (stating that a "parent's ability or interest to parent in the past" does not dictate current fitness). *Adoption of Rhona*, 57 Mass.App.Ct. at 485 (ruling that the passage of four years was too long a period to reliably predict future behavior, especially in light of contradicting evidence).

30. *Adoption of Rhona*, 57 Mass.App.Ct. at 485 (ruling that the passage of four years was too long a period to reliably predict future behavior, especially in light of contradicting evidence).

31. *Adoption of Rhona*, 57 Mass.App.Ct. at 482-83 (questioning current fitness after the child previously "tested positive for cocaine at birth and experienced withdrawal for six months").

32. *Bezio v. Patenaude*, 381 Mass. at 570.

33. *Guardianship of Estelle*, 70 Mass.App.Ct. at 578.

34. *Care and Protection of Lillith*, 61 Mass.App.Ct. 132, 134 (2004) (quoting *Adoption of Georgia*, 433 Mass. 62, 66 (2000)).

35. Mass. Gen. Laws c. 119, § 21-39; Mass. Gen. Laws c. 210, § 3; *Custody of a Minor*, 389 Mass. 755, 765-766 (1983).

36. *Petition of Kauch*, 358 Mass. 327, 329 (1970).

37. *Adoption of Rhona*, 57 Mass.App.Ct. at 483 (quoting Adoption of Katharine, 42 Mass.App.Ct. at 28).

38. *Id.*

Such shortcomings might take many forms. "Violence of temper, indifference or vacillation of feeling toward the child or inability or indisposition to control unparental traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform obligations resting on parents might render them unfit, apart from moral defects."[39] "The unfitness of parents ... must be determined with respect to their own character, temperament, capacity, and conduct, and to the welfare of the child in connection with its age, environment and affections."[40] Unfitness is such behavior or character trait that puts a child's welfare at palpably serious risk[41]

### D. Current Abuse, Neglect and Prolonged Absence as Proof of Unfitness

Unfitness of the parent can be demonstrated by abuse, neglect or long-term inability to care for a child.[42] This may include sexual abuse of a child, and medical neglect. Unfitness may also be evidenced by long periods of absence from a child's life,[43] lack of cooperation with child welfare agencies,[44]or "lack of interaction" with the child during supervised visits.[45] Likewise, courts may look to overcrowding, dirtiness, infestation, or lack of heat in a parent's home as an indication of the parent's unfitness.[46] But, a parent cannot be found unfit due to poverty alone; there must be an element of neglect.[47] The mere fact that such forms of neglect stem from involuntary drug use, perhaps as the result of an addiction, do not preclude a finding of unfitness, although "drug use, without more," is "insufficient to support a determination of unfitness."[48]

As noted already, an individualized analysis is required in each custody dispute. In *Guardianship of Estelle*, the Court stated that fitness is not merely the absence of abuse or neglect; nor is it a set of abilities or characteristics that are the same in all circumstances. A parent may be fit to parent one child, but not another. [49]

### E. Impact of a Change in Custody upon the child

The Supreme Judicial Court has previously referenced the possible ill effects upon a child to be removed from a custodial setting as a consideration.[50] But ill effects must be extreme to justify a denial of a return to a child to his or her parent. The Supreme Judicial Court has held that "it is error to base [a denial of custody to a natural parent] on a finding that the child would be hurt by being returned to the natural parent."[51]

Accordingly, bonding of a child with foster or adoptive parents is "not a dispositive consideration."[52] If custody to a parent is to be denied based upon the impact upon the child, the impact must be more than a difficult transition for the child. It must have an extreme and deleterious impact upon the child.[53]

Fundamental to this analysis is whether the effect on the child of a transfer of custody would be sufficiently negative that the parent would be unable to address the child's special needs, and so must be deemed unfit in the circumstances.[54] The Appeals Court defended the right of a biological parent to the custody of his or her child, but not to the extent that it would result in harm to the child. In such a case, a parent would be deemed "unfit."[55] In other words, a parent is fit unless it would be so detrimental to the child to have a change in custody as to render the parent effectively unfit by reference to the child's best interests.

These very issues were implicated In *Guardianship of Estelle* discussed above. There the Probate Court judge granted co-guardianship between the child's aunt and uncle, who were raising her, and the child's biological father.[56] The Appeals Court acknowledged the probate court judge's effort to reach the desirable objective to allow Estelle to remain with her aunt and uncle where she had thrived since infancy.[57]

However, the court ultimately concluded that the judge's findings did not support the decision to grant custody to a non-parent.[58] The facts of the case indicated that Estelle had bonded with her aunt and uncle; her father had played a significantly lesser role in the child's life; her father paid child support after a contempt action, was not involved in the child's school life or extracurricular activities and had never vacationed with the child and failed to attend recommended parenting classes.[59]

The Appeals Court in *Estelle* held that the trial court had to make

39. *Guardianship of a Minor,* 1 Mass.App.Ct. at 396.

40. *Id.*

41. *Adoption of Zoltan,* 71 Mass.App.Ct. 185, 187 (2008).

42. *Adoption of Carlos,* 413 Mass. 339, 350 (1992) (affirming the finding of unfitness of a father who had sexually abused his 3 year old son); *Adoption of Diane,* 400 Mass. 196, 204 (1987) (affirming the unfitness of a mother who had a pattern of ongoing, repeated, serious parental neglect, abuse and misconduct).

43. *Adoption of Hugh,* 35 Mass.App.Ct. 346, 353 (1993) (affirming the finding of unfitness of a father who had not seen his children in ten years, during which the children made great improvements in foster care and formed emotional bonds with families wishing to adopt them); *Adoption of Arthur,* 34 Mass.App. Ct. 914, 916 (1993) (affirming the finding of unfitness of a mother who for 16 years had visited her son inconsistently and showed no ability to place her son's before her own).

44. *Adoption of Simone,* 427 Mass. 34, 44, n. 4 (1998).

45. *Petitions of Department of Social Services to Dispense with Consent to Adoption,* 399 Mass., 279, 288 (1987) (considering refusal to cooperate with service plans, to continue therapy or medication and refusal to undergo a psychiatric evaluation, refusal to see the guardian ad litem, refusal of visitation with the children); *Care and Protection of Georgette,* 54 Mass.App.Ct. 778, 781, n. 4 (2002) (summarizing findings of neglect, lengthy separation, lack of involvement, criminal and antisocial behavior, domestic violence against the children and their mother as decisive proof of unfitness).

46. *Care and Protection of Three Minors,* 392 Mass. 704, 713-14, n. 11 (1984).

47. *Id.* at 714 n. 12 (focusing upon a mother's frequent changes in living arrangements as illustrative of her "inability to provide a stable, healthful home environment").

48. *Adoption of Rhona,* 57 Mass.App.Ct. at 483 -84 (citing Adoption of Katharine, 42 Mass.App.Ct. at 33-34).

49. *Guardianship of Estelle,* 70 Mass.App.Ct. at 581.

50. *Freeman v. Chaplic,* 388 Mass. 398, 406 (1983).

51. *Petition of Department of Social Services to Dispense with Consent to Adoption,* 391 Mass. 113,119 (1984).

52. *Adoption of Nicole,* 40 Mass.App.Ct. 259, 262 (1996)(stating that such a factor "has weight in the ultimate balance").

53. *Guardianship of Yushiko,* 50 Mass.App.Ct. at 160 (holding that although "return of the child to [the] father will prove difficult" the judge's findings did not clearly and convincingly demonstrate the father's unfitness).

54. *Guardianship of Estelle,* 70 Mass.App.Ct. at 581.

55. *Id.* at .582.

56. *Id.*

57. *Id.* at 577-78.

58. *Id. at* 584.

59. *Id.*

an *actual and specific finding of unfitness* and was not at liberty to craft the solution of co-guardianship in the case.[60] The Court also found that a finding of fitness or unfitness had not been made and remanded the case to the trial court to assess the effect upon the child of separating from her aunt and uncle.[61]

By contrast, the Appeals Court in *C.P. v. R.S.* appeard to veer away from the same requirement of the type of specific finding of unfitness mandated in *Estelle*. As in Estelle, the court in *C.P. v. R.S.* also placed particular emphasis upon the impact of a transfer of custody. The Court questioned whether the effect of a transfer of custody would be sufficiently negative to the child that the father would be unable to address the child's special needs.[62] The father in that case had not played an active parenting role for the child, had been an occasional caregiver rather than providing the daily necessities of life, had not provided financial support for the child, or visited the in the last three years.[63] In contrast, the proposed guardian encouraged loving relationships with a sibling and family members and provided and supported schooling, sports and other activities that are the hallmarks of a health upbringing. In fact, the child referred to the proposed guardian as "daddy."[64]

This fact pattern, however, is not unusual or dramatic. In most cases where a child has been with a non-parent for a significant period of time, the child forms close relationships with the caretaker, half-siblings or other family members and would necessarily be traumatized by separation from a familiar environment.[65] In the end, however, the Appeals Court did not seem to hold the probate court to the same standard of specificity in supporting its finding of unfitness as compared to the holding in *Estelle*.

## IV. A Best Interests Analysis to Determine Parental Unfitness

In denying return of a child to his parent, courts have relied upon a consideration of the child's best interests.[66] The SJC envisions a negative enough impact upon the child to support a finding of unfitness. [67]

### A. "Best interests" tempered

It is not sufficient that a non-parent might be a better custodian than the parent. Fitness is not comparative.[68] It would be inappropriate to transfer a child from a parent to another custodian because the latter would provide a more advantageous environment for the child.[69] A comparison between the advantages the prospective custody may offer to a child with that offered by the parent is also inappropriate.[70] Similarly, considering whether a child's station in life would improve if she remained with her guardian is "problematic."[71] A parent's presumptive right to raise his child overrides the child's enhanced opportunities or better station in life if placed with a nonparent.[72] For its part, the Appeals Court has described as "conceivable, though 'rare' in practice" situations where an unfit parent would have to yield custody of his child because the child's separation from a caretaker would seriously hurt the child.[73]

In a 2009 case, *R.D. v. A.H.*, the Supreme Judicial Court, upon direct appellate review, affirmed the return of a child to his father from a long term guardian under a fitness of the parent analysis. Both the appellant and an amicus curiae urged the SJC to consider the best interests of the child and award custody to the child's guardian, rather than to his father.[74] The guardian was the child's primary caregiver from age 14 months to 11 years, genuinely loved the child and seen by both the child and guardian as the child's mother.

However, the court in *R.D. v. A.H* criticized the guardian for her lack of follow through in the child's speech therapy and for her decision to home school "Thomas" which left him somewhat isolated. In that case, the father had been consistently involved in the child's life and actively participated in his care. In the end, the trial court did not find the child's father "unfit." The proposed guardian was granted visitation with the child. The Supreme Judicial Court reviewed the judge's decision and affirmed,[75] stating that it is "essential to recognize that the determination whether a parent is 'unfit' is closely intertwined with a consideration of the best interests of the child."[76]

*R.D. v. A.H* stands for the proposition that, in determining fitness, a court will consider the child's best interests as part of the analysis. Although the Courts decline to state whether fitness or best interests is the primary consideration, favoring language that the two tests are analogous and must be used in conjunction, the reality is that best interests are a consideration in fitness. The courts can and have relied upon best interests when choosing between a fit parent and a similarly fit custodian.

## V. Conclusion

A biological parent is presumed fit to care for his or child, and any finding of unfitness must be supported by clear and convincing evidence. In carrying out this analysis, a probate court is required to examine, *inter alia*, the history of the relationship between the child and parents, the parent's involvement in school life, sports and extracurricular activities, the parent's financial support of the child and the circumstances surrounding the support; the parent's involvement with other family members; and, the parent's ability to parent a child traumatized by separation, and the potential for irremediable trauma occasioned by such separation. The touchstone in *finally* weighing these factors is, of course, the best interests of the

60. *Id.*

61. *Id.* (stating that the trial court must consider whether the father is prepared to cope with the child's inevitable trauma upon separation from her aunt and uncle).

62. 81 Mass.App.Ct. at 228.

63. *Id.* at 227-28.

64. *Id.* at 224, 27-28 (noting that familial relationships would not likely continue if custody were changed).

65. *Adoption of Nicole*, 40 Mass.App.Ct. at 262-63 (affirming termination of parental notes and noting the risk of serious psychological harm when a child is "plucked" from her home at age four).

66. *R.D. v. A.H.*, 454 Mass. at 706.

67. *C.P. v. R.S.*, 81 Mass.App.Ct. at 228.

68. *Care and Protection of Zelda*, 26 Mass.App.Ct. 869, 872 (1989).

69. *Guardianship of Estelle*, 70 Mass.App.Ct. at 577-78.

70. *Care and Protection of Three Minors*, 392 Mass. at 714; *Guardianship of Yushiko*, 50 Mass.App.Ct. at 159.

71. *Guardianship of Yushiko*, 50 Mass.App.Ct. at 159.

72. *Id.* at 160.

73. *Care and Protection of Zelda*, 26 Mass.App.Ct. at 872 (expressly considering the value of siblings living together).

74. The author and Attorney Lynn Girton submitted an amicus curiae brief on behalf of the agency, Raising our Children's Children. That amicus brief urged the Court to conduct a best interest of the child analysis in determining custody. The Appellee did not submit a brief to the Appeals Court.

75. Appellant's Brief, *R.D. v. A.H.*, 454 Mass. 706 (2009).

76. 454 Mass. at 715.

child. However, the question of fitness should retain some measure of independent vitality.

In *C.P. v. R.S.*, there was no abuse or neglect alleged on the part of the biological father. The failings of the father, to the extent they were identified at all, had to do with the subjective benefits of remaining in what is described as a loving and appropriate home. Unfortunately, there was little of the usual requisite specificity undergirding this finding (if it even may be viewed as rising to the level of a finding, unsupported as it is by the typical quantum of record evidence).

Moreover, the analysis in *C.P. v. R.S.*, to the extent that it completely merged the questions of fitness and "best interests of the child" makes articulating any precise metric for the former problematic. While, in the end, the child's best interests may well need to predominate the inquiry, it would seem helpful to have some independent standard for determining fitness, a determination that can then be properly and fairly factored into the "best interests" analysis. By intertwining these questions to the degree that occurred in *C.P. v. R.S.*, it is difficult to say by what standard fitness is now being judged in Massachusetts. If nothing else, a fit parent deserves to have that fact noted in a custody decision, even if another custodial arrangement better serves the child's interests. Future cases, perhaps, may add some clarity to this currently muddled question.

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