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File #5617

March 5, 2010

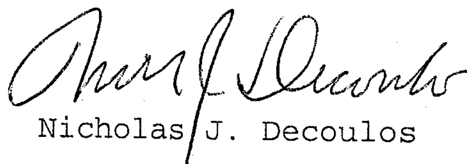
Massachusetts Land Court
226 Causeway Street
Boston, MA 02114

Re: Maria A. Kitras, Trustee, et al.
Vs. Town of Aquinnah, et al.
No. 238738

Dear Sir or Madam:

I enclose for filing the Plaintiffs' Brief and a Certificate of Service.

Very truly yours,



Nicholas J. Decoulos

NJD:aw
Enclosures
cc: Service List w/enc.

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COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. MISC. CASE NO. 238738

MARIA A. KITRAS, TRUSTEE, et als. Plaintiffs
v.
TOWN OF AQUINNAH, et als., Defendants

PLAINTIFFS' BRIEF

The Plaintiffs, Maria A. Kitras, as Trustee of Bear Realty Trust, Maria A. Kitras and James J. Decoulos, as Trustees of Bear II Realty Trust, and Maria A. Kitras and James J. Decoulos, as Trustees of Gorda Realty Trust, submit to the Court the following Brief.

ISSUE

Whether the Plaintiffs acquired an easement by necessity to use the land of the Defendants for access to any existing public way as a result of the partition of the common lands which severed the Plaintiffs' lots from access to any public way.

STATEMENT OF THE FACTS

On March 30, 1862, the House of Representatives ordered that the Report of John Milton Earle, Commissioner under the Act of April 6, 1859, concerning the Indians of the Commonwealth, be reprinted. (Ex. 4, Pgs. 11-55).

Commissioner Earle reported that the Indians were "recognized as wards of the State". (Pg. 19). Earle identified ten remaining tribes in the Commonwealth, three of which resided on the island of Martha's Vineyard: the Chappequiddick, Christiantown and Gay Head Tribes.

As to the Gay Head Tribe, Earle stated that:

> About four hundred and fifty acres of the land is held in severalty, and is fenced and occupied by the several owners, and the remainder is held by the tribe in common. (Ex. 4, Pg. 27)
>
> The land is generally rough, affording abundance of **stone for fencing**, and a considerable portion of what is not taken up and enclosed or is not used for pasturage, is grown up to bushes, which afford convenient summer fuel for common culinary purposes. Any member of the tribe may take up, fence in, and improve as much of this land as he pleases, and, when enclosed, it becomes his own. (Ex. 4, Pg. 30) (Emphasis supplied).

See, also, Exhibit 4, Pg. 386, a photograph (ca. 1887) depicting "a network of stone walls, ... Stone walls offered little protection, being built primarily to delineate property bounds and to enclose pastures."

Commissioner Earle reported that three commissioners had been previously appointed by the governor under the Act of June 25, 1811 to be guardians to the Indian, mulatto, and negro proprietors of Gay Head. In an 1849 report of other commissioners appointed under the Resolve of the Legislature on

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May 10, 1848, they described that the "legal conditions of this tribe is singularly anomalous." (Ex. 4, Pg. 35).

Regarding the division and development of lands at Gay Head, Earle described Indian title in his Report with regard to the acquisition of land ownership in 1862:

> If any man wishes for more land than he has, he has only to go upon the public domain and select what he wants, wherever he chooses, and **fence it in**, and it then becomes his own. If he will not do so much as this, for the sake of the land he wants, why should he have it? (Emphasis supplied) (Ex. 4, Pg. 39).

Earle prepared a tabular list of the owners of the land held in severalty (Ex. 4, Pgs. 45-55). Zaccheus Howwoswee was referenced in Earle's tabular list as the owner of 34 acres of land held in severalty. (Ex. 4, Pg. 47) On March 30, 1863, the Legislature enacted Chapter 42 to determine the boundary lines between the common lands and the individual owners adjoining the common lands. (Ex. 5, Pgs. 56-57).

On March 13, 1866, Charles Marston, the Commissioner appointed under Chapter 42, 1863, submitted his Report but died without completing his labor (Ex. 7, Pgs. 60-63).

On April 30, 1866, the Legislature enacted Chapter 67, the first resolution of the Act related to the establishment of boundary lines of Indian lands at Gay Head, confirmed Charles Marston's Report and directed that a book of titles be prepared to be deposited in the Registry of Deeds and that those titles

were to be conclusive evidence of the title of the persons therein named. (Ex. 8, Pgs. 65-66).

The second resolution of Chapter 67 authorized the Governor to appoint and commission a suitable person to complete the examination and the determination of the boundary lines, and that his decision and finding be also recorded at the Registry of Deeds. (Ex. 8, Page 66) The resolution stated that the new commissioner who succeeded Marston shall have the same authority to examine and determine all questions to title and that:

> . . . his report thereof, when made to the governor and council, shall have all the force and effect of the decision, finding and report of the commissioner heretofore appointed and commissioned under said resolve; (Ex. 8, Page 66).

Hon. Richard L. Pease was appointed as Commissioner in 1866. (Ex. 10, Pg. 71; Ex. 18, Pg. 131).

On May 22, 1871, a Report was given by Richard L. Pease (Pease Report) (Ex. 18, Pgs. 107-118). The Pease Report is entitled: "Commissioner Appointed to Complete the Examination and Determination of All Questions of Title to Land and of All Boundary Lines Between the Individual Owners."

At Page 24 of the Report (Ex. 18, Pg. 131), Pease describes his responsibility to complete the duties of the original Commissioner, Charles Marston, which was described in the Resolve, Chapter 42, by the Legislature of 1863:

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> . . . to examine and fully and finally to determine all boundary lines between the individual owners of land located in the Indian District of Gay Head, in the county of Dukes County, and also to determine the boundary line between the common lands of said district and the individual owners adjoining said common lands. (Ex. 18, Pg. 131).

Pease describes his appointment by Governor Bullock and declares in his Report that he has "completed the duties assigned to him". (Ex. 18, Pg. 131). He also "submits a map of Gay Head lands, and sectional plans of the same on a larger scale, . . ." (Ex. 86 and Ex. 20, Pgs. 162-188).

The Land Titles prepared by Richard L. Pease were recorded at the Dukes County Registry of Deeds (the "Registry") in Book 49, Pages 89-199 (Ex. 83), which was land held in severalty by the grantees, conveying Lots 1-173 and were depicted on the aforementioned Sectional Plans as stated in the Pease Report, Ex. 18, Pg. 131. The lots were also depicted on Exhibit 86, but without the numbering of the lots.

The Land Titles (Ex. 83, Book 49, Page 89) are divided into four sections. An alphabetical index of lands (Ex. 83, Book 49, Pgs. 91-94); a numerical index of Lots 1-173 (Ex. 83, Book 49, Pgs. 95-99); a description of ten areas of Gay Head (Ex. 83, Book 49, Pgs. 101-116); and the individual deeds to Lots 1-173 (Ex. 83, Book 49, Pgs. 116-198). The Map of Gay Head recorded at the Registry in Plan Book 5, Plan 34 in 1917 (Ex. 86) depicts

the ten areas described in Book 49, Pg. 101-116, the common lands and the lot lines of the lands held in severalty.

The individual lots held in severalty as determined by the Commissioner, identified as Lots 1-173, and described in Ex. 83, Book 49, Pgs. 116-198, are depicted on the Sectional Plans with the lot numbers. The remaining land on the Sectional Plans is the common lands.

The Sectional Plans depicting Lots 1-173, although received by the Registry on October 26, 1871 (Ex. 20, Pg. 184), were unavailable until May 22, 2007. See letter dated May 22, 2007 of Diane Powers, Register of Dukes County Registry of Deeds, Ex. 20, Pg. 185.

Zaccheus Howwoswee was granted Lot 51, which was immediately conveyed to Abram Rodman (Book 49, Pg. 140);

Lot 79, described as his homestead place (Book 49, Pg. 153);

Lot 87, which was also jointly granted to Olive Jerrett (Book 49, Pg. 158);

Lot 93 (the metes and bounds description identifies Olive Jerrett as Howwoswee's sister, Book 49, Pg. 161);

Lot 94, which was also jointly granted to Olive Jerrett (Book 49, Pg. 161);

Lot 96, which was jointly granted to Esther Howwoswee (Book 49, Pg. 162);

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and Lot 140, which was "recently purchased" by Isaac D. Rose (Book 49, Pg. 181). See Offer of Proof filed on February 2, 2010 (Pg. 3, ¶5), which states that the five lots conveyed to Zaccheus Howwoswee, recorded at Book 49, Pages 140, 153, 161 and 162 on October 26, 1871 (Ex. 83), contained 35.3 acres and compare with Earle's tabular list of the owners of the land held in severalty.

On April 30, 1870, Chapter 213 of the Acts of 1870 was enacted. Section 1 of the Act abolished the district of Gay Head and incorporated the town of Gay Head (the "Town") with:

> . . . all the powers, privileges, rights and immunities, and subject to all the duties and requisitions to which the other towns are entitled and subject by the constitution and laws of this Commonwealth.

Section 2 of the Act conveyed all common lands, common funds, and all fishing and other rights to the Town. Section 6 of the Act authorized the judge of the Dukes County Probate Court "upon the application of the selectmen of Gay Head, or of any ten resident owners of land therein" to partition any or all of the common lands (Ex. 11, Pgs. 85-87). It is important that the entire chapter made no mention of the lots held in severalty.

On September 1, 1870, a petition to partition the common lands was filed with the Dukes County Probate Court. (Ex. 12, Pgs. 88-90).

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On December 5, 1870, pursuant to the decree issued by the Probate Court, Joseph T. Pease and Richard L. Pease were appointed to divide the common lands. (Ex. 16, Pg. 101).

On December 5, 1870, a warrant was issued by the Probate Court to the Commissioners to make division of all of the common and undivided lands among the inhabitants of the Town. (Ex. 16, Pg. 103).

On May 12, 1879, the Commissioners reported that they had set off and divided the same among the people entitled thereto. The Commissioners' efforts produced a map depicting Lots 1-736. The map was recorded with the Probate Court (Ex. 86). Lots 174-736 were conveyed and recorded at the Registry of Deeds on January 20, 1879, in Book 65, Pages 150-405. (Ex. 84).

The Common Lands conveyed in 1878 did not have an easement for access to any public way, except for Lots 182, 183, 185, 186 and 187 which gained access to State Road. The remaining Common Lands, consisting of 547 lots, did not have an express easement for access.

In the year 1955, a taking was made by the Commonwealth of Massachusetts for the purpose of laying out the Moshup Trail which gave access to some of the lots conveyed in 1878. (Ex. 48).

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ARGUMENT

I HISTORY OF THE OWNERSHIP OF LAND IN GAY HEAD.

There were two types of ownership of the land in Aquinnah, fee simple absolute title and Indian title, prior to the enactment of the statutes which authorized the delivery of the deeds conveying the lots in fee simple.

In the case of James v. Watt, 716 F.2d 71, 74-75 (1st Cir. 1983), cert. denied, 467 U.S. 1209 (1984), the history of the land titles in Gay Head was carefully addressed.

> As the Supreme Court noted in *Oneida Indian Nation v. County of Oneida,* 414 U.S. at 667, American courts recognize two distinct levels of ownership in Indian lands: fee title and Indian title. . . Indian title, which gave Indians a "right of occupancy," coexisted with the fee title. This "right of occupancy" was legally significant in several ways. For one thing, only the sovereign (the king, the state, the federal government) could destroy this right; and, as long as the Indians retained it, ownership of the fee title brought with it no present right of possession. Rather, the fee owner "received a contingent future interest which ripened into a fee simple" only when the Indians abandoned their possessory interest (or when the sovereign, holding fee title, took that *possessory* interest). F. Cohen, *Handbook of Federal Indian Law* 321 n.372 (1942).
>
> Against this background, one might argue that the Massachusetts statutes giving Indians fee title and the power to alienate land, were not efforts to *take* land rights *from* the Indians, but rather efforts to *convey* the state's fee title *to* them and thereby to grant them their lands in fee simple absolute.

Chapter 213, Section 2, of the Acts of 1870 was the genesis of the lands titles relating to the common lands, Lots 174-736.

The common lands were conveyed to the Town by the Commonwealth, which held the title in fee simple, under Chapter 213, Section 2 of the Acts of 1870. There were no enclosures on these lands, e.g. walls or fences, no possessory rights - and no individual Indian titles to ratify, as was accomplished to the lands occupied and held in severalty. The conveyance by the Commonwealth of the common lands to the Town in 1870 was in fee simple absolute.

The division of the common lands was initiated by a voluntary petition to partition authorized by the Legislature in Chapter 213, Section 6 of the Acts of 1870 (Ex. 11, Pgs. 86-87). Pursuant to the Probate Court decree, a map was prepared depicting for the first time Lots 174 through 736 which were conveyed to the Plaintiffs' predecessors, albeit without access to the public way, State Road. (Ex. 68).

The Court should take judicial notice of the case of Black et al. v. Cape Cod Company, et al., MA Land Court, Misc. Case No. 69813, Decision at 5, July 14, 1975, where, after holding a trial in Edgartown and taking a view of lands south of Moshup Trail on June 4, 1974, the Black court found that "[t]here is no evidence whatsoever that the Commonwealth intended in the partition of 1878 to provide parcels of land to individual Indians without allowing them any means of access." (Emphasis supplied).

The Defendants have also conceded that the title to Plaintiffs' lands are vested with the Plaintiffs. *See* Joint Submission Relating to the Introduction of and Objections to Exhibits 1 through 86, dated February 20, 2009.

II DEFINITION.

An easement by necessity is "said to arise (or be implied) . . . when a common grantor carves out what would otherwise be a landlocked parcel." Bedford v. Cerasuolo, 62 Mass. App. Ct. 73, 76-77 (2004), quoting from New England Continental Media, Inc. v. Milton, 32 Mass. App. Ct. 374, 378 (1992).

III CREATION OF EASEMENTS BY NECESSITY.

The easements claimed by the Plaintiffs were created upon the division of lands in partition proceedings in the Probate Court. See the case of Mt. Holyoke R'lty v. Holyoke Corp., 284 Mass. 100, 106 (1933).

> An easement by implication comes into being only in connection with a grant or transfer of title to an interest in land. Nichols v. Luce, 24 Pick. 102....; upon a division of lands in partition proceedings in the Probate Court (Viall v. Carpenter, 14 Gray, 126); ....

See, also, Town of Bedford v. Cerasuolo, 62 Mass.App.Ct. 73, 77-78 (2004).

> 'Easements by necessity' refer to rights-of-way presumed at common law when a landowner conveys a portion of his land but still needs access over the transferred property to reach the property he

retained. *Leo Sheep Co. v. United States,* 440 U.S. 668, 679 (1979). See, e.g., *Chase v. Perry,* 132 Mass. 582, 584-585 (1882) (right of way by necessity over a plaintiff's lot to a defendant's landlocked parcel); *Richards v. Attleboro Branch R. Co.,* 153 Mass. 120, 121-122, (1891), ...

> Where during the common ownership of a parcel of land an apparent and obvious use of one part of the parcel is made for the benefit of another part and such use is being actually made up to the time of severance and is reasonably necessary for the enjoyment of the other part of the parcel, then upon severance of the ownership a grant to continue such use may arise by implication. . . . But as the trial judge correctly observed, both types of easement arise from what we gather, from the circumstances, to be the parties' intent when common ownership is severed. See, e.g., *Dale v. Bedal,* 305 Mass. 102, 103-104 (1940).

Restatement of the Law, Third, Property, § 215: Servitudes Created by Necessity.

> A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.

IV PRESUMPTION.

In his executive address at the commencement of the Legislative session of 1869, Governor William Claflin said:

> There is no reason why the exceptional policy hitherto applied to these Indians should be continued, and the sooner they are merged in the general community - with all the rights and privileges, and with all the duties and liabilities of citizens - the better it will be for them, and the more creditable to the Commonwealth. (Ex. 18, Pg. 135).

The fact that the commissioners' 1878 report severed Plaintiffs' lots from access to the only public way then in existence creates a presumption that the partition intended that each owner of a set-off lot would hold a way by necessity for access to their lot from the public way. Though, as noted, the presumption may be overcome by evidence of an intent to create a parcel without access, no such evidence appears in the present case.

> 'It is familiar law that if one conveys a part of his land in such form as to deprive himself of access to the remainder of it unless he goes across the land sold, he has a way of necessity over the granted portion. This comes by implication from the situation of the parties and from the terms of the grant when applied to the subject-matter. The law presumes that one will not sell land to another without an understanding that the grantee shall have a legal right of access to it, if it is in the power of the grantor to give it, and it equally presumes an understanding of the parties that one selling a portion of his land shall have a legal right of access to the remainder over the part sold if he can reach it in no other way. Davis v. Sikes, 254 Mass. 536, 545-546 (1926).

The presumption "is, however, a pure presumption raised by the law . . . Such a presumption ought to be and is construed with strictness." Orpin v. Morrison, 230 Mass. 529, 533 (1918). Accordingly, the presumption may be overcome by evidence that the parties did not intend to provide a way of access. Id. at 533-534.

The Defendants in this action have not identified, any evidence of an intent by the Town or the Probate Court to landlock the lots created in 1878.

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"A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption. The extent of that burden may be defined by statute, regulation, or the common law. If that party fails to come forward with evidence to rebut or meet that presumption, the fact is to be taken by the fact finder as established." Relating to presumptions, see *Massachusetts Guide to Evidence*, Section 301(d), Supreme Judicial Court Advisory Committee on Massachusetts Evidence Law, 2010 Edition. A copy of the complete recommended rule is found in the Addendum to this Brief.

"The origin of an implied easement 'whether by grant or by reservation . . . must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.'" Labounty v. Vickers, 352 Mass. 337, 344 (1967), quoting Dale v. Bedal, 305 Mass. 102, 103 (1940).

"What is required, however, is not an actual subjective intent on the part of the grantor but a presumed objective intent of the grantor and grantee based upon the circumstances of the conveyance." Flax v. Smith, 20 Mass. App. Ct. 149, 153 (1985).

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V RIGHTS ACQUIRED IN AN EASEMENT BY NECESSITY.

An easement by necessity may be used for such purposes as are reasonably necessary to the full enjoyment of the premises and is not limited to the uses being made of the premises at the time of the conveyance. Davis v. Sikes, 254 Mass. at 547; Rajewski v. MacBean, 273 Mass. 1, 5-6, (1930).

Utility rights are included in the bundle of rights which accompany easements by necessity. Plaintiffs' lands are zoned for residential use, are appropriate for single-family house lots, and the full enjoyment of these lands should also include the right to install underground utilities.

> What is necessary depends on the nature and location of the property, and may change over time....the increasing dependence in recent years on electricity and telephone service, delivered through overland cables, justify the conclusion that implied servitudes by necessity will be recognized for those purposes.
>
> Restatement's Commentary § 2.1 5d.

Also directly on point is United States of America v. 176.10 Acres of Land, 558 F.Supp. 1379, 1381-1382 (1983) where, in determining the value of land that became landlocked in 1852, the Federal Court reviewed Massachusetts law and concluded:

> [the] use of land for a single residential dwelling is a reasonable use that was foreseeable in 1852, and that use of the easement appropriate to permit residential use of the dominant estate is, therefore, appropriate today...

The Court then concluded that this use included the right to

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install utilities:

> ...where the easement is implied by necessity as it is here, the Court must interpret the intent of the parties in defining the scope of the easement. *In interpreting the intent of the parties who severed the property at issue in 1852 the Court rules that it is reasonable to assume that the parties foresaw residential use of the landlocked parcel as a probable use and that use would today include utilities as well as a driveway.* (Emphasis added.)

See also, G.L. c. 187, § 5, which specifically allows utilities in private ways.

The right to claim an easement by necessity "continues. . .so long as the necessity continues" Schmidt v. Quinn, 136 Mass. 575, 576 (1884), New York and New England Railroad Company v. Railroad Commissioners, 162 Mass. 81 (1894).

CONCLUSION

The Plaintiffs have demonstrated that their lots derive from common unified title, otherwise known as the common lands; that their lots were severed from access as a result of the Probate Court's 1878 partition proceedings; and that they have a continuing necessity for an easement to their property.

For the foregoing reasons, it is respectfully submitted that the Court enter a Judgment declaring that:

1. The Plaintiffs' lands have the benefit of easements by necessity for the purpose of access to the public ways now found in the Town of Aquinnah, including the Moshup Trail; and that

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the easements shall be used as public ways are commonly used in Aquinnah, including the installation of underground utilities.

2. It was the intent of the common grantors who had unity of title, when they subdivided the common lands, that the grantees of the lots conveyed by the common grantors were to have access to a public road network and existing ways, which would have included the roads in existence in 1870 and any new roads that were created thereafter, that the access would be equivalent to streets as presently used in the Town of Aquinnah and that the plaintiffs and defendants would have the right to install and maintain above and below ground utility systems, drainage and any other improvements as found on public ways commonly used in the Town of Aquinnah.

3. Each and every defendant is permanently enjoined from preventing the plaintiffs from using said road network as streets are commonly used in the Town of Aquinnah and any and all other improvements thereon.

4. Immediately thereafter, the Court shall proceed with the second phase of these proceedings to determine the location of those easements.

5. For such further relief as this Court deems just and proper.

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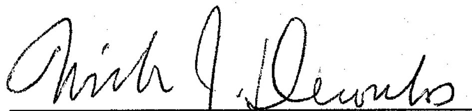
Respectfully submitted:

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust

By their Attorney:



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March 5, 2010

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Section 301. Civil Cases

(a) Scope. This section applies to all civil actions and proceedings, except as otherwise specifically provided by statute, the common law, a rule, or a regulation.

(b) Inferences. An inference is a step in reasoning that the fact finder may make from evidence that has been accepted as believable. A fact may be inferred even though the relationship between the basic fact and the inferred fact is not necessary or inescapable, so long as it is reasonable and possible.

(c) Prima Facie Evidence. Where a statute or regulation provides that a fact or group of facts is prima facie evidence of another fact at issue, the party against whom the prima facie evidence is directed has the burden of production to rebut or meet such prima facie evidence. If that party fails to come forward with evidence to rebut or meet the prima facie evidence, the fact at issue is to be taken by the fact finder as established. Where evidence is introduced sufficient to warrant a finding contrary to the fact at issue, the fact finder is permitted to consider the prima facie evidence as bearing on the fact at issue, but it must be weighed with all other evidence to determine whether a particular fact has been proved. Prima facie evidence does not shift the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast.

(d) Presumptions. A presumption imposes on the party against whom it is directed the burden of production to rebut or meet that presumption. The extent of that burden may be defined by statute, regulation, or the common law. If that party fails to come forward with evidence to rebut or meet that presumption, the fact is to be taken by the fact finder as established. If that party comes forward with evidence to rebut or meet the presumption, the presumption shall have no further force or effect. A presumption does not shift the burden of persuasion, which remains throughout the trial on the party on whom it was originally cast.

NOTE

Subsection (b). This subsection is derived from Commonwealth v. Dinkins, 440 Mass. 715, 720–721 & n.8, 802 N.E.2d 76, 82 & n.8 (2004), and DeJoinville v. Commonwealth, 381 Mass. 246, 253 n.13, 408 N.E.2d 1353, 1357 n.13 (1980). "In this formulation, 'possible' is not a lesser alternative to 'reasonable.' Rather, the two words function in a synergistic manner: each raises the standard imposed by the other." Commonwealth v. Dinkins, 440 Mass. at 721, 802 N.E.2d at 82. "[W]e have permitted, in carefully defined circumstances, a jury to make an inference based on an inference to come to a conclusion of guilt or innocence. But we require that each inference must be a reasonable and logical conclusion from the prior inference; we have made clear that a jury may not use conjecture or guesswork to choose between alternative inferences." Commonwealth v. Dostie, 425 Mass. 372, 376, 681 N.E.2d 282, 284–285 (1997). See, e.g., Commonwealth v. White, 452 Mass. 133, 136, 891 N.E.2d 675, 678–679 (2008) (concluding that there was sufficient evidence connecting the defendant to a gun found at the crime scene, the court observed that "[w]e do not require that every inference be premised on an independently proven fact"). For a lengthy list of inferences, see W.G. Young, J.R. Polletts, & C. Poreda, Massachusetts Evidentiary Standards, Stand. 301 (2007 ed.). See also Model Jury Instructions for Use in the District Court § 3.03 (Mass. Cont. Legal Educ. 2003).

Subsection (c). This subsection is derived from Burns v. Commonwealth, 430 Mass. 444, 450–451, 720 N.E.2d 798, 804 (1999); Ford Motor Co. v. Barrett, 403 Mass. 240, 242–243, 526 N.E.2d 1284, 1286–1287 (1988); and Cook v. Farm Serv. Stores, Inc., 301 Mass. 564, 566, 17 N.E.2d 890, 892 (1938). For a list of statutes that involve prima facie evidence, see W.G. Young, J.R. Polletts, & C. Poreda, Massachusetts Evidentiary Standards, Stand. 301 (2007 ed.). See also Model Jury Instructions for Use in the District Court § 3.08 (Mass. Cont. Legal Educ. 2003).

Subsection (d). This subsection is based on the predominant approach in Massachusetts whereby a presumption shifts the burden of production and disappears when the opposing party meets its burden by offering evidence to rebut the presumption. However, the disappearance of the presumption does not prevent the fact finder from drawing an inference [illegible]n one or more basic facts that is consistent with the original presumption. See Standerwick v. Zoning Bd. of Appeals of [illegible]ndover, 447 Mass. 20, 34–35, 849 N.E.2d 197, 209 (2006), quoting Epstein v. Boston Hous. Auth., 317 Mass. 297, 302, 58 N.E.2d 135, 139 (1944) (in the context of the statutory provision that an abutter is presumed to have standing in cases arising under G. L. c. 40A, the court observed that "[a] presumption does not shift the burden of proof; it is a rule of evidence that aids the party bearing the burden of proof in sustaining that burden by 'throw[ing] upon his adversary the

burden of going forward with evidence.'"); Jacobs v. Town Clerk of Arlington, 402 Mass. 824, 826–827, 525 N.E.2d 658, 660–661 (1988) (rebuttable presumption of death). The quantum of evidence required to rebut the presumption may vary. See Yazbek v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 41 Mass. App. Ct. 915, 916, 670 N.E.2d 200, 201 (1996).

In civil cases, presumptions ordinarily require a party against whom the presumption is directed to come forward with some evidence to rebut the presumption; they ordinarily impose a burden of production, not persuasion, on that party. What has been termed an irrebuttable or conclusive presumption is not a rule of evidence, but rather a rule of substantive law designed to address a social policy, and cannot be rebutted by evidence. W.G. Young, J.R. Pollets, & C. Poreda, Massachusetts Evidentiary Standards, Stand. 301(e) (2007 ed.), citing Commonwealth v. Clerk-Magistrate of the W. Roxbury Div. of the Dist. Ct. Dep't, 439 Mass. 352, 354–356, 787 N.E.2d 1032, 1035–1036 (2003); Commonwealth v. Dunne, 394 Mass. 10, 18, 474 N.E.2d 538, 544 (1985). See G. L. c. 152, § 32(e); Carey's Case, 66 Mass. App. Ct. 749, 755–758, 850 N.E.2d 610, 616–617 (2006).

A presumption may give rise to a constitutional question even in civil cases. See, e.g., Care & Protection of Erin, 443 Mass. 567, 571, 823 N.E.2d 356, 361 (2005) ("[I]n cases that involve severing parental rights, the presumption that a child, who had been in the care of the department for more than one year, would have her best interests served by granting a petition for adoption or dispensing with the need for parental consent to adoption, violates the parents' due process rights because it shifts the burden to the parent affirmatively to prove fitness and to prove that the best interests of the child would be served by maintaining parental rights."). For a lengthy list of presumptions, see W.G. Young, J.R. Polletts, & C. Poreda, Massachusetts Evidentiary Standards, Stand. 301 (2007 ed.). See also Model Jury Instructions for Use in the District Court § 3.07 (Mass. Cont. Legal Educ. 2003).

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COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

DUKES, ss. MISC. CASE NO. 238738

****
MARIA A. KITRAS, TRUSTEE, et als. *
Plaintiffs *
*
v. *
*
TOWN OF AQUINNAH, et als., *
Defendants *
****

CERTIFICATE OF SERVICE

I, Nicholas J. Decoulos, do hereby certify that on this day I caused a copy of the following document to be served upon the following counsel and parties of record.

DOCUMENT SERVED:
Plaintiffs' Brief

DATE AND MANNER OF SERVICE:
March 5, 2010, First class mail, postage prepaid

COUNSEL AND PARTIES OF RECORD:
See attached service list

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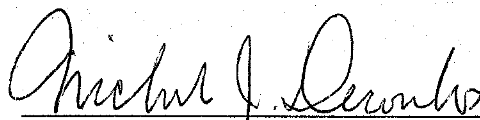
Signed under the penalties of perjury this 5th day of March, 2010.

Maria A. Kitras as she is the Trustee of Bear Realty Trust, Bear II Realty Trust and Gorda Realty Trust; James J. Decoulos as he is the Trustee of Bear II Realty Trust and Gorda Realty Trust; Plaintiffs

By their Attorney:



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Maria A. Kitras, Trustee, et al.
v.
Town of Aquinnah, et al.

Massachusetts Land Court No. 238738

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