

Cases/Statutes on The Purpose of Probation and Conditions of Probation and Pre-Trial Release¹

Probation

The principle goals of probation are rehabilitation and public protection. *Commonwealth v. Pike*, 428 Mass. 393, 403 (1998). Punishment, deterrence, and retribution are also objectives of probations. *Id.* In order to accomplish these goals, probation conditions should address the particular characteristics of the juvenile and the crime for which he/she has been placed on probation. *Id.*

Probation is granted “with the hope that the probationer will be able to rehabilitate himself or herself under the supervision of the probation officer.” *Commonwealth v. Sheridan*, 51 Mass. App. Ct. 74, 77 (2001), citing *Commonwealth v. Olsen*, 405 Mass. 491, 493 (1989).

Commonwealth v. McDonald, 50 Mass. App. Ct. 220 (2000), affirmed 435 Mass. 1005 (2001) – the conditions of probation, signed by a defendant, is not a contract since it is not premised on mutuality of agreement or obligation. Terms of probation that are set by the judge, not the condition of probation form, are enforceable as a court order.

Conditions of Probation

Commonwealth v. Williams, 60 Mass. App. Ct. 331 (2004) - special condition not to “consume or possess any alcohol” affirmed even though there was no evidence of alcohol use in connection with the offense. “A judge has broad discretion to impose conditions of probation which are reasonably calculated to control the conduct of the defendant.” *Id.* (Emphasis added) Here the defendant was on a CWOFF for violating the terms of a 209A order, he was subsequently arrested for two crimes involving assaultive behavior. In upholding the special probation condition, the Appeals Court reasoned that most trial judges in a District Court are familiar with the connection between anger, violence, and alcohol consumption in a person who has a violent disposition. While alcohol possession and consumption is legal for adults, this prohibition furthers the goal of helping the defendant change his conduct.

Commonwealth v. Kenney, 55 Mass. App. Ct. 514 (2002) fur. *app. rev den* 437 Mass. 1110 (2002) - probation condition that the defendant surrender her driver’s license and not apply for a new one was within the “great latitude” judges are given in imposing conditions, and complied with the principal goals of probation – rehabilitation, protection of the public, as well as punishment, deterrence and retribution. Here the defendant was convicted of leaving the scene of an accident after causing personal injury and driving to endanger. The defendant argued that the condition was illegal because the power to

¹ Wendy Wolf, Esq., Committee for Public Counsel Services, Youth Advocacy Project, Juvenile Defense Network.

revoke a persons license was exclusively in the registrar of motor vehicle G.L. c. 90 § 24 (2) (b). The court found that G.L. c. 90 § 24 (2)(b) does not prohibit a judges' power to order, as a condition of probation, that the defendant surrender his/her license or refrain from operating a motor vehicle.

Commonwealth v. Lally, 55 Mass. App. Ct. 601 (2002) – condition that the defendant submit to “treatment as deemed necessary,” was held to be ambiguous. Probation conditions must provide clear guidelines as to what is expected and what behaviors constitute a violation. After being placed on probation, the defendant underwent a psychological evaluation. It was recommended that he receive random urine screens for drugs and alcohol as part of his probation. This was not a condition imposed by the sentencing judge, and when asked, by the probation officer, to sign a new “contract,” the defendant refused. At the surrender hearing the defendant was found in violation for refusing to sign this condition. While refusing to sign a condition of probation constitutes a violation, since the condition was added by probation and not ordered by the judge it was not a violation. The Commonwealth argued that this condition could have been added at the violation hearing. The court disagreed, stating that the hearing is not the time to add conditions improperly imposed by probation. This would delegate the judges' authority to probation. Conditions must be set by the sentencing judge.

Commonwealth v. LaPointe, 435 Mass. 455 (2001) - the defendant was convicted of indecent assault and battery, the complainant was one of his daughters. The probation condition prohibiting him from residing with his minor children and with any future children he may have, was upheld. When imposing a sentence, judges may consider many factors, which may not have been admissible at trial, for instance, the defendant's character, behavior and background. The appropriateness of a probation condition depends upon the facts of the case. Here the conditions reasonably related to the offense and the goals of probation. At sentencing, the complaining witness stated how this had an adverse effect on her life, there was evidence that another sister was molested, and the defendant had a prior record for indecent assault and battery of a minor. The court found that the probation condition removed the defendant from situations where he posed a danger and eliminated the risk that he may abuse his own children. The sentencing judge retained jurisdiction over the condition of residing with future children and ordered the defendant to get the judges authority to reside with said children.

Commonwealth v. Pike, 428 Mass. 393, 402 – 405 (1998) – condition of probation prohibiting the defendant from entering Massachusetts during the probationary period was held to be invalid, as it violated the defendant's fundamental constitutional right of freedom of interstate travel. Here the defendant was convicted of unauthorized use of a motor vehicle and assault and battery by means of a dangerous weapon. The incident occurred when the defendant was traveling from New Hampshire into Massachusetts and he got into an altercation with a Massachusetts State trooper. Judges are given “great latitude” in setting probation conditions, however, when said conditions violate constitutional rights they must be “reasonably related to the goals of sentencing and probation.” *Id* at 403. Conditions should be “tailored to address the particular characteristics of the defendant and the crime,” *Id*. taking into consideration the special

problems of the individual. *See United States v. Tonry*, 605 F.2d 144, 148 (5th Cir. 1979) Restrictions from smaller geographic areas have been upheld, but here there was no showing that banishing the defendant from Massachusetts served any rehabilitative purpose; he was not more inclined to commit crimes in Massachusetts. Also, the condition did not protect the public safety. In addition, the court reasoned that states should not make other states a dumping ground for criminals. *See Also Commonwealth v. Thad T*, 59 Mass. App. Ct. 497 (2003) (juvenile judge committed the juvenile to DYS and imposed a condition which banished him from the town of Groton. The appeals court did not address the constitutionality of this condition since the juvenile was not placed on probation; however the court stated the judge could make recommendations to DYS. The court does cite G.L. ch. 119 §58 and the juvenile court's authority to impose conditions "that it deems appropriate." This appears to be an endorsement of the condition had the juvenile been placed on probation.)

Commonwealth v. Power, 420 Mass. 410 (1995), *cert denied*, 516 U.S. 1042 (1996) - the defendant appealed the portion of her sentence which placed her on probation for 20 years with the condition that she not profit from the sale of her story to the news media. The defendant argued that the condition violated her constitutional right to freedom of expression; it unconstitutionally placed in her jeopardy of conduct of other persons, and violated her due process rights. The SJC affirmed the special condition. Probation conditions that violate constitutional rights have been upheld if they serve the purpose of probation. Here, the court reasoned that the defendant's free speech rights were not violated; she could still tell her story she just couldn't profit from it. (*See footnote 6 for other cases where conditions were upheld even though there were constitutional implications*). The portion of the special condition that the defendant's assignees and representatives acting in her authority not profit was also valid since these people would only be acting on the defendant's behalf or her authority. Lastly, the defendant argued that the conditions were unconstitutionally vague. "The constitutional rule against vague laws applies as equally to probation conditions as it does to legislative enactments," *Id.* at 421, however, in this case the court found the conditions were as clear as possible.

Commonwealth v. Goodwin, 414 Mass. 88 (1993) –the defendant plead to three indictments of rape of a child and one indictment of kidnapping. The Commonwealth's sentencing memorandum, contained information of other sexual assaults that were uncharged and one that resulted in an acquittal. Information which results in acquittals should not be presented at sentencing and here, the SJC found the sentencing judge did not considerate it. However, reliable uncharged conduct is admissible in sentencing. Sentencing judges may consider reliable information that may not be relevant at trial and may include hearsay. Information about a defendant's character, behavior, and background may be considered in assessing his amenability to rehabilitation, but, a defendant may not be punished for uncharged other misconduct. *See also Commonwealth v. Henriquez*, 56 Mass. App. Ct. 775 (2002), *affirmed* 440 Mass. 1015 (2003) (case remanded to a judge other than the sentencing judge to determine whether uncharged conduct was used improperly in sentencing)

Commonwealth v. LaFrance, 402 Mass. 789 (1988) – Superior Court judge imposed as a condition of probation that the defendant submit to a search of herself, her possessions, and any place she may be, with or without a search warrant and at the request of a probation officer. The SJC remanded the case with the revised condition that any search must be based on a “reasonable suspicion” that a search might produce evidence of wrong doing; this would comport with Article 14. The court found that this added requirement would be consistent with the rehabilitative purpose and public protection goals of probation. In addition it would protect the defendant from unwarranted intrusions.

Modification of Conditions

Judges have the right to modify conditions of probation *LaPointe* 435 Mass. at 458

A probation officer does not have the discretion to alter or modify conditions of probation. *Commonwealth v. McDonald*, 50 Mass. App. Ct. at 224

Buckley v. Quincy Division of the District Court Department, 395 Mass. 815 (1985) - the supervisory court did not have the authority to modify conditions of probation. Here the Dedham District Court, Jury of Six, placed the defendant on probation with conditions. The defendant was placed on probation after an admission to operating to endanger. When the defendant reported to probation in Quincy the probation officer ordered him to attend an alcohol abuse evaluation program. The probation officer decided this based on his review of the defendant’s record and a profile from another probation officer. The case was brought into Quincy District Court and the judge ordered the defendant to go to the alcohol program. The defendant filed a motion pursuant to G.L. ch. 211 §3. The SJC held that Quincy District Court did not have the power to modify the conditions of probation, in this case, since there was no material change in the defendant’s circumstances since the time the conditions were imposed in Dedham. (Emphasis added). The court did note that conditions can be modified to serve “the ends of justice and the best interests of both the public and the defendant.” *Id.*, at 817, citing *Burns v. United States*, 287 U.S. 216, 221 (1932).

Pre-Trial Conditions

Jake J. v Commonwealth v. 433 Mass. 70 (2000) – juvenile court judge has authority under G.L. ch. 276 §87 to place a juvenile on pre-trial probation with conditions. The juvenile must consent to the conditions and if he fails to abide by them, he can be held without bail pursuant to the procedures set forth in G.L. ch. 276 §58B (bail revocation). In this case, the conditions of release included the standard probation conditions and the following special conditions: cooperate with therapy, report to probation weekly, submit to a court clinic evaluation, and a curfew of 5:00 p.m. 7 days a week. These conditions were imposed at arraignment. At the pre-trial hearing, a probation officer reported to the court that the juvenile was behaving poorly in school and disobeying school rules. The

judge added a new condition of release that the juvenile attend school daily on time and obey all rules. At a subsequent court hearing a probation officer reported that the juvenile had several disciplinary reports from school and the juvenile had been disruptive and continued to violate school rules. A few days later, with counsel present, the judge revoke the juveniles bail. The SJC affirmed the judge's order revoking bail. The court reasoned that the attempt "to assist and to supervise the juvenile on bail while he remained within the community and in the custody of his mother was consistent with the Juvenile Court's over-all mission to further the best interests of children who appear before the court on delinquency matters and, whenever possible, to offer a course of rehabilitation rather than punishment." *Id.* at. The SJC stated that this was consistent with the provisions of G.L. ch. 119 § 53, and that the intent of §53 should guide a judge in dispositions as well as conditions of release. When releasing a juvenile on pre-trial conditions, a judge should be clear on the record that said release is pursuant to G.L. ch. 276 § 87

Relevant Statutes

G.L. c. 276 § 87 Court May Place Certain Persons in Care of Probation Officer.

The superior court, any district court and any juvenile court may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant's consent, before trial and before a plea of guilty, or in any case after a finding or verdict of guilty; provided, that, in the case of any child under the age of seventeen placed upon probation by the superior court, he may be placed in the care of a probation officer of any district court or of any juvenile court, within the judicial district of which such child resides; and provided further, that no person convicted under section twenty-two A or twenty-four B of chapter two hundred and sixty-five or section thirty-five A of chapter two hundred and seventy-two shall, if it appears that he has previously been convicted under said sections and was eighteen years of age or older at the time of committing the offense for which he was so convicted, be released on parole or probation prior to the completion of five years of his sentence.

G.L. ch. 287 § 87A. Participation in Rehabilitative Programs or Performance of Community Service Work.

The conditions of probation imposed by a court upon a person pursuant to section eighty-seven of this chapter, section fifty-eight of chapter one hundred and nineteen or section one or section one A of chapter two hundred and seventy-nine, may include, but shall not be limited to, participation by said person in specified rehabilitative programs or performance by said person of specified community service work for a stated period of time.

The court shall assess upon every person placed on supervised probation, including all persons placed on probation for offenses under section 24 of chapter 90, a monthly probation supervision fee, hereinafter referred to as "probation fee", in the amount of \$ 60 per month. Said person shall pay said probation fee once each month during such time as said person remains on supervised probation. The court shall assess upon every person placed on administrative supervised probation a monthly administrative probation supervision fee, hereinafter referred to as "administrative probation fee", in the amount of \$ 20 per month. Said person shall pay said administrative probation fee once each month during such time as said person remains on administrative supervised probation. Notwithstanding the foregoing, said fees shall not be assessed upon any person accused or convicted of a violation of section 1 or 15 of chapter 273, where compliance with an order of support for a spouse or minor child is a condition of probation.

The court may not waive payment of either or both of said fees unless it determines after a hearing and upon written finding that such payment would constitute an undue hardship on said person or his family due to limited income, employment status or any other factor. Following the hearing and upon such written finding that either or both of said fees would cause such undue hardship then: (1) in lieu of payment of said probation fee the court shall require said person to perform unpaid community work service at a public or nonprofit agency or facility, as approved and monitored by the probation department, for not less than one day per month and (2) in lieu of payment of said administrative probation fee the court shall require said person to perform unpaid community work service at a public or nonprofit agency or facility, as approved and monitored by the probation department, for not less than four hours per month. Such waiver shall be in effect only during the period of time that said person is unable to pay his monthly probation fee.

The court may waive payment of either or both of said fees in whole or in part if said person is assessed payment of restitution. In such cases, said fees may be waived only to the extent and during the period that restitution is paid in an amount equivalent to said fee.

Said probation fee shall be collected by the several probation offices of the trial court and transmitted to the state treasurer for deposit into the General Fund. The state treasurer shall account for all such fees received and report said fees annually, itemized by court division, to the house and senate committees on ways and means.

The court shall also assess upon every person placed on supervised probation, including all persons placed on probation for offenses under section 24 of chapter 90, a monthly probationers' victim services surcharge, hereinafter referred to as "victim services surcharge", in the amount of \$ 5 per month. Said person shall pay said victim services surcharge once each month during such time as said person remains on supervised probation. The court shall assess upon every person placed

on administrative supervised probation a monthly administrative probationer's victim services surcharge, hereinafter referred to as "administrative victim services surcharge" in the amount of \$ 1 per month.

Said person shall pay said administrative victim services surcharge once each month during such time as said person remains on administrative supervised probation. Notwithstanding the foregoing, said fees shall not be assessed upon any person accused or convicted of a violation of section 1 or 15 of chapter 273, where compliance with an order of support for a spouse or minor child is a condition of probation.

The court may not waive payment of either or both of said fees unless it has determined, after a hearing and upon written finding, that such payment would constitute an undue hardship on said person or his family due to limited income, employment status or any other factor. Such waiver shall be in effect only during the period of time that said person is unable to pay his monthly probation fee.

Said probation fee shall be collected by the several probation offices of the trial court and shall be transmitted to the state treasurer for deposit into the General Fund of the commonwealth. The state treasurer shall account for all such fees received and report said fees annually, itemized by court division, to the house and senate committees on ways and means.

G.L. ch. 276 § 42A. Family Trouble Cases; Additional Terms of Recognizance and Conditions of Probation.

Whenever a court issues a criminal complaint and the crime involves assault and battery, trespass, threat to commit a crime, nonsupport, or any other complaint which involves the infliction, or the imminent threat of infliction, of physical harm upon a person by such person's family or household member as defined in section one of chapter two hundred and nine A, the court may, in lieu of or in addition to any terms of personal recognizance, and after a hearing and finding, impose such terms as will insure the safety of the person allegedly suffering the physical abuse or threat thereof, and will prevent its recurrence.

Such terms and conditions shall include reasonable restrictions on the travel, association or place of abode of the defendant as will prevent such person from contact with the person abused.

As part of the disposition of any criminal complaint, the court may establish such terms and conditions of probation as will insure the safety of the person who has suffered such abuse or threat thereof, and will prevent the recurrence of such abuse or threat thereof.

Such terms and conditions shall include reasonable restrictions on the travel,

association or place of abode of the defendant as will prevent such person from all contact with the person abused; or the payment by the defendant to the person abused of monetary compensation for losses suffered as direct result of the crime. Compensatory loss shall include, but not be limited to, loss of earnings or support, out-of-pocket losses for injuries sustained, moving expenses and reasonable attorneys fees.

In addition, the terms and conditions of either the probation or the disposition of the complaint may include, but not be limited to, referral of the defendant to a clinic, facility or professional for one or more examinations, diagnoses, counseling or treatment; requiring the defendant to report periodically to a probation officer; or release of the defendant to the custody of a residential treatment facility.

G.L. ch. 119 §53 Provisions to Be Liberally Construed; Proceedings Not to Be Deemed Criminal.

Sections fifty-two to sixty-three, inclusive, shall be liberally construed so that the care, custody and discipline of the children brought before the court shall approximate as nearly as possible that which they should receive from their parents, and that, as far as practicable, they shall be treated, not as criminals, but as children in need of aid, encouragement and guidance. Proceedings against children under said sections shall not be deemed criminal proceedings.

G.L.ch. 119 § 59. Proceedings Upon Violation of Terms of Probation.

If a child has been placed in care of a probation officer, said officer, at any time before the final disposition of the case, may arrest such child without a warrant and take him before the court, or the court may issue a warrant for his arrest. When such child is before the court, it may make any disposition of the case which it might have made before said child was placed on probation, or may continue or extend the period of probation.

G.L. ch. 119 § 57. Investigation by Probation Officer; Reports.

Every case of a delinquent child shall be investigated by the probation officer, who shall make a report regarding the character of such child, his school record, home surroundings and the previous complaints against him, if any. In every case involving a child attending a special class authorized by law, he shall secure from the bureau of special education a record of performance of said child. He shall be present in court at the trial of the case, and furnish the court with such information and assistance as shall be required. At the end of the probation period of a child who has been placed on probation, the officer in whose care he has been shall make a report as to his conduct during such period.

G.L. ch. 119 § 58 Adjudication; Proceedings after Adjudication; Payment for Support of Child.

If a child is adjudicated a delinquent child on a complaint, the court may place the case on file or may place the child in the care of a probation officer for such time and on such conditions as it deems appropriate or may commit him to the custody of the department of youth services, but the probationary or commitment period shall not be for a period longer than until such child attains the age of eighteen, or nineteen in the case of a child whose case is disposed of after he has attained his eighteenth birthday.

G.L. ch.119 § 62. Restitution By Child.

If, in adjudging a person a delinquent child, the court finds, as an element of such delinquency, that he has committed an act involving liability in a civil action, and such delinquent child is placed on probation, the court may require, as a condition thereof, that he shall make restitution or reparation to the injured person to such an extent and in such sum as the court determines. If the payment is not made at once, it shall be made to the probation officer, who shall give a receipt therefor, keep a record of the payment, pay the money to said injured person, and keep on file his receipt therefor.

G.L. ch. 119 § 64. Powers of Commissioner of Probation.

The commissioner of probation may supervise the probation work for delinquent children, and make necessary inquiries in regard to the same, and in his annual report may make such recommendations as he considers advisable for the improvement of methods of dealing with such children.

Superior Court Rule 56. Conditions of Probation

The conditions of probation, unless otherwise prescribed, shall be as follows: That the defendant shall (1) comply with all orders of the court, including any order for the payment of money, (2) report promptly to the probation officer as required by him, (3) notify the probation officer immediately of any change of residence, (4) make reasonable efforts to obtain and keep employment, (5) make reasonable efforts to provide adequate support for all persons dependent upon him, and (6) refrain from violating any law, statute, ordinance, by-law or regulation, the violation whereof is punishable. Any other condition shall be presumed to be in addition to the foregoing.