

NISI PROBLEMS, PART I:  
NEW TRIALS: AMENDMENT OF JUDGMENTS -- RULE 59  
by Paula H. Noe, Esq.

Introduction: According to Black's Law Dictionary (With Pronunciations), "NISI" is derived from the Latin and means "Unless". In the Divorce context in Massachusetts, we know that the Nisi Period is a creature of statute (M.G.L. Ch. 208, §21) and rule (Mass.Rule Dom. Rel.P.58) and public policy and provides a 90 day period after the entry of the Judgment Nisi to allow for the parties to reconcile or otherwise object to the terms of the divorce. Problems can and do arise during this "unless" time; this article will address the Rule 59 potential problems and solutions - what if one of the parties seeks a new trial or to modify or otherwise amend the agreement already approved by the Family and Probate Court? As we shall see, strict adherence to the strict requirements set forth by Rule 59 are absolutely necessary.

- I. Massachusetts Rule of Civil Procedure 59 provides:
  - A. Text of Rule 59

NEW TRIALS: AMENDMENT OF JUDGMENTS

- (a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the Commonwealth; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the Commonwealth. A new trial shall not be granted solely on the ground that the damages are excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges are excessive. A new trial shall not be granted solely on the ground that the damages are inadequate until the defendant has first been given the opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable. On a Motion for a New Trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
- (b) **Time for Motion.** A Motion for a New Trial shall be served not later than 10 days after the entry of judgment.
- (c) **Time for Serving Affidavits.** When a Motion for a New Trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) **On Initiative of Court.** Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a Motion for a New Trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) **Motion to Alter or Amend a Judgment.** A Motion to Alter or Amend the judgment shall be served not later than 10 days after the entry of judgment.

II. Massachusetts Rule of Domestic Relations Procedure 59 differs from MRCP 59 only in section (a). Mass. Rule Dom. Rel. P. 59 (a) provides:

(a) **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the Commonwealth. On a Motion for a New Trial, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Therefore, all reference to jury trials and inadequate or excessive damages as grounds for a new trial are deleted as not applicable in the Family and Probate Court context.

III. The grounds for a Motion for a New Trial are “any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the Commonwealth”. The Supreme Judicial Court, in Davis v. Boston Elevated Railway Co., 235 Mass. 482, 486, 126 N.E. 841 (1920), defined the grounds available for a new trial to be “accident, mistake, or misfortune in the conduct of the trial” so that a “new trial is necessary to prevent a failure of justice.”

(See sample Motion for a New Trial in the Family and Probate Court attached hereto as Appendix A.)

IV. Filing of a Motion for a New Trial (Rule 59(a) or Motion to Alter or Amend a Judgment (Rule 59(e))

It is crucial that said motions must be SERVED (NOTE: filing said motion with the court is NOT enough) “not later than 10 days after the entry of judgment” (Rule 50(b)). You should note that the official Reporter’s Notes to Rule 59 states that the 10 day period begins to run even though a party has not received notice of the entry of Judgment. It has been held that the wording of Rule 59(b) could allow the filing of a Motion for a New Trial either before or after the entry of judgment. Partridge v. Presley, 189 F.2d 645 (D.C. Cir. 1951); McCulloch Motors Corp. v. Oregon Saw Chain Corp., 245 F. Supp. 851 (S.D.Cal. 1965): however, some courts have held that Motion for a New Trial filed before entry of judgment is deemed denied by subsequent entry of said judgment.

(Mosier v. Federal Reserve Bank of New York, 132 F.2d 710 (2nd Cir.1942); Agostino v. Ellamer Packing Co., 191 F.2d 576 (9th Cir.1951). It is arguable, since the language of the rule is “not later than” instead of “within” 10 days after the entry of judgment, that the Supreme Court intended to allow the motion to be made either before or after the entry of judgment. Also, Rule 59 (a) allows the court to open judgment “if one has been entered”.

The 10 day time frame for filing these motions under Rule 59 is absolute and it has been held that the trial judge is “powerless” to act on a motion served too late. Dalessio v. Dalessio 409 Mass. 821, 570 N.E.2d 139 (1991). In Dalessio, as in many other cases, the filing party brought motions under both Rule 59 and Rule 60. Thus, when the court denied the Motion to Alter or Amend Judgment, it could direct its attention to the Motion for Relief for Judgment under Rule 60 because the 10 day time frame demanded by Rule 59 is not applicable to Rule 60. There is a little leeway in filing the motion with the court within the 10 day period, although it must be filed either before service or within “a reasonable time” thereafter. Albano v. Bonanza Intern. Development Co., 5 Mass. App. 692, 369 N.E.2d 473 (1977). And courts have refused to allow a motion to waive the 10 day requirement. Wilmington Fabricators, Inc. v. Jackson Millwork, 1987 Mass. App. Div. 134. In addition, it is important to note that under Mass. R. Civ. P. 6(b) (which provision is, of course, identical in Domestic Relations Procedure) Rule 59(b), (d) and (e) are specifically mentioned in that “the court...may not extend the time for taking any action.” Also, the Reporter’s Notes to Rule 59 actually state: “Because a motion under Rule 59 (b) affects the finality of judgment and tolls the time or taking an appeal, the 10-day limit may not be enlarged by the court.” As always the burden of establishing on the record that service was made in a timely fashion falls squarely on the filing party. Albano, supra. Depositing a copy of the motion in the mail has been held to be sufficient service to adverse counsel. Gloucester Mut. Fishing Ins. Co. v. Hall, 210 Mass. 332, 96 N.E. 679 (1911). Certified mail is, of course, always safer.

## V. Distinction Between Rule 59 and Rule 60 Motions

Since a motion under Rule 59 tolls the appeal period (an important distinction from Rule 60), it is vitally important that the filing party make clear to the court that the motion being filed comes squarely under Rule 59. In the worst possible scenario, when a Motion for a New Trial was filed BUT NOT SERVED within the 10 day time frame, said motion did not stay the running of time for the filing of the appeal and, therefore, the appeal was dismissed if not filed within the 30 days after the entry of judgment, Albano, id. The courts have on occasion read motions titled other than Motions to Alter or Amend (i.e., Motions to Vacate Judgment or Motions for Reconsideration) as Rule 59 Motions to Alter or Amend in order to toll the appeal period. Locke v. Slater, 387 Mass. 682, 442 N.E.2d 732 (1982), Pentucket Manor Chronic Hospital, Inc. v. Rate Setting Commission, 394 Mass. 233, 475 N.E.2d 1201 (1985). “Where doubt exists as to the proper characterization of a postjudgment motion, some courts simply treat all timely-filed motions which call into question the correctness of a judgment as rule 59(e) motions.” Pentucket, supra. Counsel would be well advised, however, to take pains to title Rule 59 motions correctly in order to assure correct consideration by the court. In addition, the

courts have held that a Motion to Amend or Alter Judgment can be treated as a Rule 60 Motion for Relief from Judgment if, indeed, the motion is not served and/or filed within the 10 days mandated under Rule 59. King v. Allen, 9 Mass. App. 821, 398 N.E.2d 510 (1980). It is well settled that a motion under Rule 59 must be filed in the court where the case was tried. Lambert v. Cheney, 221 Mass. 37B, 108 N.E. 1078 (1915). And if the judge who heard the case dies while a Rule 59 motion is pending, the motion can be heard by another member of the court. Mass. R. Dom. Rel. P. 63 (attached as Appendix B - note the discretion of the new judge to order a new trial.)

#### VI. Affidavit Under Rule 59(c)

When a Rule 59 motion is supported by an affidavit, said affidavit must be filed with the motion, not at a later hearing. Although the wording of the rule seems to suggest that affidavits are discretionary, sound legal practice would mandate that the filing party not miss this sole opportunity to clarify his/her position, especially since it has been held that the details in an affidavit can cure a failure to describe “with particularity the error of law” in the Motion for a New Trial. Leary v. Yacht Leasing Corp., 6 Mass. App. 961, 383 N.E.2d 861 (1978).

As with all other aspects of Rule 59, the presiding judge has absolute discretion to reject an affidavit not properly sworn and/or signed or filed too late or to refuse to allow a Motion for a New Trial to be amended to include an affidavit. Hopcraft v. Kittredge, 162 Mass. 14, 37 N.E. 768 (1894).

Be aware of the provision in the rule which allows opposing affidavits within 10 days after service or extension up to 20 days “for good cause” or by written stipulation by the parties. In addition, the court “may permit” reply affidavits by the filing party.

#### VII. Discretion of the Judge

The court’s power to grant a new trial as to any or all of the issues or parties is “entirely discretionary”. Yates v. Dann, 11 F.R.D. 386 (D.Del. 1951). Thus, the trial judge is not required to hear a Motion for a New Trial on grounds that the finding was against or against the weight of the evidence, McElwain v. Capotosto, 332 Mass. 1, 122 N.E.2d 901 (1955), or on grounds of the insufficiency of the evidence to support the judge’s finding. Devore v. Good, 321 Mass. 84, 72 N.E.2d 405 (1947). In addition, even a Motion for New Trial brought by a successor counsel on a basis of “faulty preparation” for trial by the preceding counsel is “addressed solely to the sound judicial discretion of the trial judge and will not be reversed by the appellate division, except upon a clear showing that the disposition of the motion resulted from an abuse of that discretion. Mills v. Bell, 33 Mass. App. Dec. 167 (1965).

The grounds for a Motion for a New Trial in a non-jury case are most commonly a mistake of law or newly discovered evidence, Fitch v. Harris, 6 Mass. App. Dec. 14 (1953), Gilman v. Brown, 45 Mass. App. Dec. 184 (1970). If there is an indication that the judge is not impartial during a trial, an objection must be taken at the trial, “if then known to the counsel who conducts the case” in order to use the lack of impartiality as a

basis for a Motion for a New Trial. Crosby v. Blanchard, 89 Mass. 385, 7 Allen 385 (1863).

A judge may grant a new trial on “all or part of the issues” (Rule 59(a)) which were “not properly adjudicated” unless the issues and/or parties are “interwoven with the remaining issues”. Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1931). and new trials are not permitted for “trivial reasons”, Farrell v. Matchett, 310 Mass. 87, 37 N.E.2d 247 (1941) or if a new trial cannot produce a different result. Eastman v. Steadman, 273 Mass. 364, 173 N.E. 519(1930). A Motion for a New Trial on the basis of newly discovered evidence will be denied unless it is shown that the evidence was not available and could not have been discovered prior to the divorce trial. Mailer v. Mailer, 387 Mass. 401, 439 N.E.2d 811 (1982), appeal after remand 390 Mass. 371, 455 N.E.2d 1211 (1983). Furthermore, “questions of law which might have been raised at the trial on the merits, or which were raised and then abandoned and not preserved, cannot be raised as of right on a Motion for a New Trial.” The Haines Corporation v. Winthrop Square Cafe, Inc. 335 Mass. 152, 138 N.E.2d 759, (1956).

The general rule is that a motion for new trial is directed to the “sound discretion” of the trial judge. Eva-Lee, Inc. v. Thomson General Corp., 5 Mass. App. 823, 362 N.E.2d 935 (1977) and only rarely has there been found an abuse of said discretion. Barnett v. Loud, 243 Mass 510, 137 N.E. 740 (1923). Only upon finding of “clear abuse” of discretion by the judge will a decision denying a Motion for a New Trial be reversed. Coyle v. Cliff Compton, Inc. 31 Mass. App. Ct. 744, 583 N.E.2d 875, review denied 412 Mass 1102, 588 N.E.2d 691 (1992); Webster v. Johnson, 342 Mass. 455, 174 N.E.2d 40 (1961). The Supreme Court will find abuse of discretion only where “no conscientious judge acting intelligently could honestly have taken the view expressed by him.” Moran v. Pieroni, Inc., 326 Mass. 516, 95 N.E.2d. 296 (1950) or when in an “extraordinary case” an excess of jurisdiction or similar error is found. Cohen v. Peterson, 320 Mass. App. Dec. 164, affirmed 360 Mass. 872, 277 N.E.2d. 694 (1970). Obviously these burdens are difficult, at best, to meet.

#### VIII. Attorney Fees During Rule 59 Proceedings

An interesting case on this point is Hager v. Hager, 12 Mass. App. 887, 421 N.E.2d 1261 (1981), which stands for the propositions that, although it was not within the power of the divorce court to modify the judgment to increase the attorney’s fee while the appeal from the judgment modifying the divorce decree was pending, nonetheless, the court did have jurisdiction to award attorney fees and costs to the plaintiff for those proceedings which were subsidiary to the divorce. In other words, the court held that the “power to award costs and fees of appeal during pendency of the appeal is a different matter from the power to modify a judgment on appeal.”

#### IX. Delay and Rule 59 Motions

It has recently been decided by the Appeals Court in Zatsky v. Zatsky, Lawyers Weekly No. 11-026-94 (February 7, 1994) that, even in the face of 27 months of delays in the entering of a judgment and in the hearing of postjudgment Motion for a New Trial, the “unpardonable delay” does not violate the party’s due process right. Although, “the tortuous progress of this case casts no luster on the judicial system”, the Court decided that the existing judgment should stand although the husband (moving party) could now petition for a modification of the divorce judgment. The case is also interesting in that the court suggested practical tips for expediting the judicial process.

Conclusion: As we see clearly spelled out in the case law surrounding Rule 59, time and precision are controlling factors in a situation where judicial discretion reigns supreme. Therefore, the practicing divorce attorney must provide necessary affidavits, particularity and exact adherence to the rules when seeking either a new trial or an amendment of the judgment during the “Unless” period known as NISI.



Exhibit \_\_\_\_, which affidavit is incorporated herein by reference.

WHEREFORE, THE \_\_\_\_\_ MOVES PURSUANT TO MASS. R. DOM.  
plaintiff/defendant  
REL. P 59 THAT THE COURT CONDUCT A HEARING HEREON AND GRANT  
THE RELIEF REQUESTED HEREIN.

RESPECTFULLY SUBMITTED  
FOR \_\_\_\_\_ BY  
\_\_\_\_\_ ATTORNEY

\_\_\_\_\_, and

Ave. \_\_\_\_\_, MA  
\_\_\_\_\_ Telephone (\_\_\_\_)

\_\_\_\_\_  
B.B.O Registration No.

Dated: \_\_\_\_\_, 19\_\_\_\_

[Insert Affidavit]

#### CERTIFICATE OF SERVICE

A copy of the aforesaid Motion and Affidavit has this day been served on the  
\_\_\_\_\_, [by mailing a copy thereof postage prepaid] [by delivering a  
copy thereof] to \_\_\_\_\_, the attorney of record for the \_\_\_\_\_, at  
\_\_\_\_\_, \_\_\_\_\_, MA, \_\_\_\_\_, together with notice that  
the Motion has been marked for hearing on \_\_\_\_\_, 19\_\_\_\_, at \_\_\_\_\_ a.m. in  
the forenoon in the \_\_\_\_\_ Division of the Probate and Family Court at  
\_\_\_\_\_.

Dated: \_\_\_\_\_, 19\_\_\_\_

\_\_\_\_\_  
ATTORNEY FOR THE  
\_\_\_\_\_

## Appendix B

### Massachusetts Rules of Domestic Relations Procedure

#### Rule 63, Disability of a Judge

If by reason of death, sickness, resignation, removal or other disability, a judge before whom an action has been tried is unable to perform the duties to be performed by the court under these rules after findings of facts and conclusions of law are filed, then any other judge regularly sitting in or assigned to the court in which the action was tried may, on assignment by the Chief Justice, or in the case disability of such Chief Justice, by the senior judge of the Administrative Committee present and qualified to act, perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at that trial or for any other reason, he may in his discretion grant a new trial.