EQUITABLE & ACCESSIBLE JUSTICE FOR ALL

A WORKING REPORT ON THE MASSACHUSETTS FAMILY COURT SYSTEM

December 2022

MASS FAMILY ADVOCACY COALITION
Making Family Court Better for All

ACKNOWLEDGEMENTS

The authors thank the many family law attorneys, social services agencies, and numerous other stakeholders who helped tremendously by contributing their time and thoughtful comments. They also thank the many courageous women who shared their experiences with the Massachusetts family law system in this report, and gratefully acknowledge the strong committee of passionate and active advocates who worked tirelessly with them to produce this report. The stories of 20 women, including the authors, are included.

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About the Authors

Lori, former Board member and Director of Advocacy at Jane Does Well and co-author of the "Jane Does Well Public Comments and Recommendations to the 2020-2021 Massachusetts Child Support Guidelines Task Force," began collaborating with Margie, former Chair of Family Court Reform at Jane Does Well, to raise awareness of women's experiences in the Massachusetts Family Court and to help effect reform of the court system. Together with members of their committee, they founded Massachusetts Family Advocacy Coalition, a grassroots organization solely focused on improving the family law system.

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EXECUTIVE SUMMARY

Mass Family Advocacy Coalition (MFAC) is a grassroots organization founded by women dedicated to improving the Massachusetts family law system. As they shared their family court experiences, themes emerged—namely, extraordinary legal expense, protracted delays, misuse of the system, unpredictable and inequitable outcomes, and bias. These issues harm Massachusetts families, especially children. MFAC was formed to raise awareness and help effect reform of the Massachusetts family law system. As users of the Family Court, our members' input is critical to the Court's efforts to improve the system. Through advocacy, education, and collaboration with the Court and other stakeholders, MFAC seeks to provide workable solutions to remedy policies and culture obstructing access to fair and safe justice.

MFAC fully supports the Court's stated mission to provide "justice with dignity and speed"[1] and its obligation set forth in the very first rule of the Massachusetts Rules of Domestic Procedure "to secure the just, speedy and inexpensive determination of every action they govern." Unfortunately, many members, the majority of whom are the primary-custodial parents ("caregivers"), and all of whom are women, have experienced the opposite. Instead of speedy, inexpensive, and equitable outcomes, members have experienced a protracted, expensive, and in many instances, unjust system.

These problems within the Family Court system are not new. They were identified by the Supreme Judicial Court's 1986 Gender Bias Study Committee ("1986 SJC Gender Bias Study Committee") in its report released in 1989 ("1986 SJC Gender Bias Study Committee Report").[2] Over the next several decades, the Massachusetts courts and the legal bar have presented reports identifying similar issues and calling for reform.[3] Though we appreciate that improvements have taken place, significant problems persist.

MFAC renews the request of the 1986 SJC Gender Bias Study Committee, appointed by the late Massachusetts Supreme Judicial Court Chief Justice Edward F. Hennessey, for the appointment of a "Commission to Eliminate Gender Bias in the Courts." [4] We recommend a new permanent commission be formed or an existing entity[5] be directed to collect and analyze Family Court data, make recommendations that can be reasonably implemented, oversee implementation of reforms, track their progress, report annually, and update reforms when necessary. In addition to trial court personnel, the entity will include users of the Family Court and academia to ensure diversity and transparency. This commission can assist the court in its mission to secure

[1] Massachusetts Trial Court Strategic Plan, June 2013 at 27.
[2] Massachusetts Supreme Judicial Court Gender Bias Study Committee, Report of the Gender Bias Study of the Court System in Massachusetts (1989), 24 New Eng. L. Rev. 745. The Report's Executive Summary is included in Appendix 3 at A-20.
[3] See Appendix 3 for a summary of past reports with their findings and recommendations.
[4] 1986 SJC Gender Bias Study Committee Report, supra note 2 at 746.
[5] For example, there is the Trial Court Office of Diversity, Equity, Inclusion and Experience and the Committee to Eliminate Racism and Other Systemic Barriers in the Massachusetts Trial Court.

the "just, speedy and inexpensive determination" of every action so that all citizens are treated fairly and receive equal access to justice regardless of gender or economic resources.

Our request for the establishment of a multi-party entity comports with the appeal made posthumously by the late Hon. Ralph D. Gants, then Chief Justice of the Supreme Judicial Court, together with Hon. Paula Carey, then Chief Justice of the Trial Court, in the December 2020 article in the Boston Bar Journal:

> *"[W]e must look afresh at what we are doing, or failing to do, to root out any conscious and unconscious bias in our courtrooms*; ***we must strive to eliminate bias in all aspects of our court system, to ensure that all court users are treated respectfully and fairly****…We recognize that we have miles to go in addressing the effects of systemic racism and bias in our courts. But it is also important to recognize that we have already begun this journey and that we are deeply committed to continuing to make progress as quickly as we can, for failure is not an option.* ***And as we do so, we invite your observations, your suggestions, your engagement, and, yes, your constructive criticisms, to help us see the way forward more clearly."*** [6] [Emphasis added]

In the spirit of the late Chief Justice Gants' invitation, we submit this report. We explain the issues facing Massachusetts families as users of the Family Court system and offer suggestions for long-lasting reform that eliminates inequality and prioritizes children's interests in alignment with the Court's stated mission.

We recognize that there are judges and court staff who work tirelessly under a grueling workload to administer justice. We also acknowledge the attorneys within the Family Court system who work passionately on behalf of their clients and are respectful of all parties. We acknowledge and thank these participants. Our focus in this report instead is on the shortfalls of the system, and how to address those gaps to improve justice for all.

Systemic problems detailed in this report include:

The Family Law System is Under-Resourced

The lack of adequate resources within the Family Court plays a significant role in deepening the systemic issues that afflict the family law system. With over 100,000 filings per year and the most pro se parties of all the trial departments, Family Court is one of the busiest courts in the Commonwealth. Yet, it only has 50 trial judges assigned to it. The shortage of judges and support staff lead to costly delays, misuse of the system, and unpredictable decision-making. Judges need adequate time to give full attention to decisions impacting the long-term financial and emotional well-being of families, especially children. (See pp 8-10 infra)

[6] Hon. Ralph D. Gants & Hon. Paula Carey, Creating Courts Where All Are Truly Equal, 65 Boston Bar J. (Winter 2021).

Soaring Legal Costs and Lack of Affordable Counsel

Equal access to the Family Court is impeded by the high and unbounded cost of legal representation, the complexity of the Family Court system, and bias against pro se parties in an overburdened system. Without question, there is a lack of affordable legal representation in Family Court, and demand is increasing. Many custodial parents, mostly women, do not have access to an income stream to retain counsel. Yet legal representation is critical in our complex, adversarial system to ensure that the best interest of the child is protected and that users of the Court system receive an equitable outcome. Despite improvements, the system is difficult for most non-lawyers to navigate successfully, self-help assistance programs fall short, and not all judges and court staff treat pro se parties with respect. When there is inequality of advocacy, parents' rights are often given more weight than the child's best interest or welfare.[7] It is imperative that every party has the opportunity to be represented by affordable, competent, and ethical family law counsel, or is ensured of equal access to justice if the party is self-represented. (See pp 11-20 infra)

Misuse of the Family Court Process Without Consequence

The Court's own rules obligate both "the court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding."[8] Unfortunately, some individuals willfully ignore or misuse the rules to thwart this mandate. Parties, often the economically advantaged ones, employ obstructionist and costly litigation tactics against financially weaker parties, often caregivers, to delay judicial resolution and increase legal expenses. Their legal strategy is to inflict financial and emotional distress on the targeted party so that the party eventually relinquishes their right to a judicial determination and fair resolution. Unfortunately, there are times where the attorney is complicit in this strategy to "bankrupt the mother into settling." Many members have been subjected to this harmful strategy as well as misuse of the system by high-conflict individuals to continue their abuse or coercive control over the other party. The financial and emotional damage inflicted on the targeted person and the family's children can be devastating. Although the Court has statutory power to curb this conduct by ordering the obstructionist individual to reimburse the targeted party for legal costs, it rarely does so. The Court's inaction has the unintended effect of condoning and inadvertently encouraging this injurious behavior. The repercussions of misuse of the Family Court system without consequence are severe and far-reaching to children, families, and the entire family law system. (See pp 21-33 infra)

High Unpredictability in Family Court Rulings

The broad discretionary power vested in the Family Court promotes unpredictability in the Court's decision-making. Whether by case law or statute, Family Court judges' discretionary decision-making tends to be limited only by generalized, subjective standards and unprioritized factors to consider. Such wide latitude allows each judge's predispositions, however

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[7] In its investigation of the tragic Harmony Montgomery case in Juvenile Court, the Massachusetts Office of the Child Advocate found that "too often in Massachusetts legal practice parental rights are given significantly more weight than the child's best interests or welfare." The 2022 Massachusetts Office of the Child Advocate Investigative Report, May 2022, at 55.

[8] Mass.R.Civ.P. 1; see also Mass.R.Dom.P. 1.

unintentional, to seep into the decisions. This results in inconsistent rulings among the approximate 50 Family Court judges in the state. The individual judges' decisions go largely unchecked: substantive motions to reconsider, reviewed by the same judge, are routinely denied; an appeal is too costly for most parties; and if a party somehow manages to outlast the protracted and often financially crippling process to appeal, great deference is given by the Appeals Court to the Family Court's discretionary decisions. There is no public accountability because there are few data available to determine which factors are commonly relied on or prioritized in reaching a decision. This decision-making process results in a lack of predictability, transparency, and accountability. (See pp 34-44 infra)

Gender Bias and Stereotyping

The legal system continues to undervalue the labor provided by caregivers and the support they need, while overestimating their ability to recover economically from divorce. Many primary caregivers find that their economic position post-divorce is ultimately significantly lower than the non-caregivers' position. This finding aligns with national and international data[9] that the non-custodial and/or financially superior parties (the majority of whom are men) eventually recover from the financial consequences of a divorce and that their overall financial position will far exceed the primary custodial parent's position (the majority of whom are women). Although Massachusetts law established that caregivers should be able to live at the pre-divorce lifestyle where funds permit,[10] that is not the reality. Many primary caregivers fare worse financially post-divorce due to a confluence of factors: the financial toll of the litigation itself; the "bankrupt the mom" strategy employed by economically advantaged parties and their attorneys; the predisposition of the family law bar against alimony; and the amount of total support at the time of divorce or modification. In addition, gender-based stereotypes and false narratives are deployed strategically and successfully against women in the Family Court. Legal strategies involving *any* stereotypes have no place in our justice system. (See pp 45-53 infra)

Each of the issues discussed in this report creates a critical barrier to justice for court users. There is no access to justice when parties, especially marginalized groups, mistrust the system and believe this Court of equity and fairness is, in reality, financially inaccessible; and where the law is unequally applied to users. Strengthening access to justice requires reform, continual review, and public accountability.

[9] I-Fen Lin & Susan L. Brown, The Economic Consequences of Gray Divorce for Women and Men, The Journals of Gerontology: Series B, Vol. 76, Issue 10, December 2021, 2073-85.
[10] *Young v. Young*, 478 Mass. 1, 6-7 (2017).

THE FAMILY LAW SYSTEM IS UNDER-RESOURCED

The problems described in this report impeding fair and accessible justice are interconnected. Under-resourcing of the Family Court system undoubtedly plays a role in all of them. Family Court users, lawyers, and judges tell us that the system, which is charged with making the most important decisions about children's lives and their financial means, is overwhelmed, overcrowded, and underfunded. Supporting data include:

1. The Family Court was one of the busiest courts in Massachusetts in 2020 with 113,863 filings.[11] In contrast, there were only 22,905 cases filed in Massachusetts Superior Court.

2. The Family Court has 51 judges, as authorized by the Massachusetts legislature. In contrast, the legislature has authorized 82 Superior Court judges, 38% more than in Family Court.[12] These statistics equate to 2,233 cases filed on average per Family Court judge, and 279 cases on average per Superior Court judge.

3. Of the total 113,863 cases filed in Family Court in 2020, the largest number by far were for modifications and contempt, which comprised 28% of total filings (31,728).[13] As we explain in this report, these actions could be reduced with more predictability in decision-making and increased enforcement of the financial contempt statute.

4. A significant proportion of Family Court users are unrepresented by counsel,[14] leading to further delay. Although we have not found detailed published data, court records show that between March 2020 and June 2022, over 80% (21,296) of those seeking one-on-one assistance from a self-represented Legal Service Center involved Probate and Family Court matters.[15] It is well acknowledged that pro se parties can cause delay in the proceedings because they are unfamiliar with the legal process.

5. Several experienced Family Court judges have retired from the bench before the mandatory retirement age because of the heavy workload, lack of resources, lack of civility among counsel, and high number of pro se parties.[16] The system is harmed by the loss of these experienced judges. Further, transferring cases midstream causes disruption in the efficient management of cases and disposition of fair results to families.

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[11] Annual Report on the State of the Massachusetts Court System Fiscal Year 2020.
[12] M.G.L. c. 211B, § 2.
[13] Massachusetts Trial Court, Probate and Family Court Filings FY 2021, Department of Research and Planning.
[14] Massachusetts Access to Justice Commission Access to Attorneys Committee Report, May 2017 at 4.
[15] Letter from Massachusetts Trial Court Chief Justice Jeffrey Locke dated July 25, 2022.
[16] Massachusetts Lawyers Weekly Editorial Advisory Board, Probate & Family Court crisis requires action, Massachusetts Lawyers Weekly, February 11, 2021.
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These data reflect the experience of our members: the Family Court system is overwhelmed and under-resourced. Despite best efforts, judges who are overburdened cannot give the attention needed to make important decisions that impact the financial and emotional needs of families. This inevitably has an adverse impact on the quality of justice delivered for parents and children.

The National Center for State Courts Addressing Implicit Bias in the Courts found that "decision makers who are rushed, stressed, distracted or pressured [due to heavy or backlogged caseloads] are more likely to apply stereotypes – recalling facts in ways biased by stereotypes and making more stereotypical judgments."[17] We can all agree that judicial decision-making should be free from bias to ensure equal treatment of all parties.

The consequences of litigating in an under-resourced court are brought to life in our members' cases. For example, one member reports:

> *"I have had six different judges since we started the process in 2015. The most recent judge ignored orders in place and disregarded my ex's abuse of the system (e.g., unsubstantiated contempt filings, which almost never resulted in me being awarded costs). She assigned all costs for supervised visitation by my ex to me, even though I earn a fraction of his income, which makes me question whether she even looked at the financial filings. It's been incredibly frustrating to deal with—it's an enormous drain on my emotional and financial resources to have to re-show my ex's tendencies to every new judge. Also, my ex is allowed to lie and verbally abuse me in court and my lawyer counsels it is best not to respond. So, with every new judge we go through this painful process over and over again, without any resolutions or end in sight."*

Another member states:

> *In my case, the judge admitted from the onset they had NOT read the memo. This has happened several times to me, even at the onset of trial. So, all these evidentiary hearings, pre-trial hearings all end up with lawyers trying to argue the case orally in a very short period of time (5 - 10 minutes max per a party to lay out all the issues).*

We understand that judges are overburdened. But without careful review of the matter before them, judges are left to rely on the advocacy of attorneys, which may be inaccurate. Several members have experienced false narratives from the opposing party, without regard to the facts or ability to refute the false claims. For example,

> *"My ex-husband's memoranda continually painted me negatively, and I felt the Court did nothing to support my attorney's significant and valid proof against the claims, and the Court's decision against me proved me correct. I realize the judges are reading these 15 + pages of memoranda in probably 20 minutes prior to calling us forward, which leaves little*

[17] National Center for State Courts, Addressing Implicit Bias in the Courts at 8.

room for sound, fair judgments. They need time to review the facts and not be swayed by the negative narratives put forth by counsel in Court."

As evident from the examples in this report, the inability to focus on the facts of each matter and resolve them in a timely manner results in crippling legal expenses and irretrievable family breakdowns that have dire societal consequences. It can, in particular, harm the cases that are most difficult and cause lasting harm to children caught in the conflict.

Adding judges to the Family Court is an important, necessary step to help to provide equitable and accessible justice for all. But the addition of judges alone is not the cure-all. Only with increased pro bono/affordable legal counsel, stronger and streamlined case management, elimination of obstructionist tactics, increased awareness of implicit bias, and standardization and oversight of decision-making, will our Family Court truly be accessible and fair to all its users.

SOARING LEGAL COSTS AND LACK OF AFFORDABLE COUNSEL

Equal access to the courts – a fundamental principle of our judicial system[18] – is impeded by the high and unbounded cost of legal representation, the complexity and adversarial nature of the legal system, and the disparate treatment of pro se parties.

Regrettably, our members' experiences mirror the very problems that the 1986 SJC Gender Bias Study Committee identified in its report nearly four decades ago:

> ***"The family law system is virtually impossible to navigate without legal assistance. Many women, however, cannot obtain the assistance they need, . . .Women suffer more from lack of counsel than do men. There are three reasons for this problem: 1) court clerks are often hostile to pro se litigants; 2) there are too few free legal services available for the poorest litigants; and 3) there is too little legal help available to moderate-income women, in part because judges fail to award adequate counsel fees, especially during the pendency of litigation.***
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> ***All our sources of information indicate that women's disproportionate lack of access to adequate legal representation in family law matters constitutes the most serious barrier to their ability to obtain justice. Family law experts believe that women are unrepresented more often than men and that the outcomes they obtain suffer as a result."*** [19]

Lack of affordable legal representation

Legal representation is essential to access justice in our Family Court system because it was built by lawyers to be navigated by lawyers. Yet, users in Family Court have no choice but to represent themselves pro se because they cannot afford legal representation. Our members report hourly attorney rates are as high as $675 an hour. Further, there is no predictable total cost, and legal expenses for a family are compounded since both parties need their own counsel. While the Family Court does not publish statistics on the number of pro se parties, the 2017 Massachusetts Access to Justice Access to Attorneys Committee notes that the Family Court's "extremely high number of self-represented litigants, even in high-stakes custody and domestic violence cases, is universally acknowledged."[20]

Demand for pro bono legal representation in Massachusetts far exceeds supply. According to the Boston Bar Association Statewide Task Force to Expand Civil Legal Aid in Massachusetts October 2014 Report, cases involving family law had the highest unmet need for legal services

[18] "Equal justice under law is not merely a caption on the facade of the Supreme Court building, it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability, without regard to economic status." Associate Justice of the United States Supreme Court Lewis F. Powell, Jr.

[19] 1986 SJC Gender Bias Study Committee Report, supra note 2 at 764.

[20] 2017 Massachusetts Access to Justice Access to Attorneys Report, May 2017, supra note 14 at 4.

in the state—civil legal aid programs in Massachusetts turn away an astounding 80 percent of family law cases.[21]

Although the lack of affordable counsel is a longstanding problem,[22] it is critical that the Court and lawmakers recognize that the gap between legal needs and available legal services is widening. Today, legal counsel is out of reach for families both at and above the poverty level.[23] The Access to Justice Access to Attorneys Committee explains this growing trend in its 2017 Massachusetts Access to Justice Access to Attorneys Report:

> *"Anyone receiving benefits or living at or below the poverty line simply cannot afford a lawyer.* ***Less widely recognized is the growing population of people with unmet legal needs who are not completely impoverished but live in the shadow of federal poverty levels or even somewhat higher on the economic ladder****."*[24] [Footnote omitted and emphasis added]

The Committee concluded that "[t]he traditional [legal expense] model – a bifurcated system consisting of two clearly defined parts: full-pay clients and *pro bono* clients – leaves too many without access to legal representation."[25]

Russell Engler, a nationally recognized expert in access to justice who has worked with the Massachusetts Access to Justice Commission and other organizations and committees, describes what he sees happening in Massachusetts courts to "poor people, women, and people of color:"

> *"What you see in the courts is the vast majority of people in these cases having to navigate the system without a lawyer, and they invariably lose their cases shockingly quickly…. We're taught all the time that the legal system is supposed to be the one place where the scales of justice are balanced. Everybody is supposed to get a fair shake, regardless of your background, regardless of your means. And that was just absolutely untrue in the world I saw.* ***Disproportionately poor people, women and people of color were getting steamrolled by the regular court processes in family law…."*** *[26]* [Emphasis added]

Because the caregiving parents, the majority of whom are women, usually do not have an equivalent income stream, or any income stream, to pay the legal costs, they and their children

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[21] Boston Bar Association Statewide Task Force to Expand Civil Legal Aid in Massachusetts, October 2014 Report Investing in Justice: A Roadmap to Cost-Effective Funding of Civil Legal Aid in Massachusetts, at 8-9.
[22] 1986 SJC Gender Bias Study Committee Report, supra note 2 at 746-47.
[23] A party is eligible for civil legal aid if their annual income is at or below 125 percent of the federal poverty level.
[24] 2017 Massachusetts Access to Justice Access to Attorneys Report, supra note 14 at 3.
[25] Id.
[26] Russell Engler, New England Law Blog, An Insider Look at the Access to Justice Movement.

are at a marked disadvantage in Family Court.[27] The chance of a successful outcome for them and their children is further reduced when the opposing party is represented by counsel and they are not.[28] Despite the fact that the Family Court is obligated to prioritize "the best interest of the child," a strong advocate for one side will likely prevail over a party without legal representation. This imbalance will undoubtedly result in unjust outcomes.

A member has experienced the difficulty of navigating the family law system, and the consequences have been devastating. She has been separated from her children for three years. She tells us that she spent all her savings and assets she received in her divorce on legal expenses trying to reunite with her children. She went from living an upper middle-class lifestyle to living in section 8 housing. Once her funds were depleted, she tried to find pro bono counsel but was turned down because she didn't meet the stringent indigency requirements for a legal aid attorney. She had no choice but to represent herself for ten months. Her ex-spouse, who has greater financial resources, is represented by a seasoned Family Court practitioner who advocated strongly on his behalf. The member did the best she could trying to represent herself. She found that the pro se assistance programs were not helpful. She was confused by the legal process and made procedural mistakes, causing delay. The member just does not have the legal knowledge or training to advocate for herself or her children as does the seasoned Family Court practitioner representing her ex-spouse.

This member's reported experience demonstrates the tragic consequences of the legal system when a caregiver cannot afford counsel and when legal procedure and advocacy are prioritized over the best interest of the children.[29] This case, where a parent is separated from her children, has been allowed to drag on for years. Every day that goes by impacts the health and welfare of the parties' children. Whatever the ultimate outcome, our member's children will never regain this crucial time in their development with their mother, and the long-term consequences for these children are likely severe.

Finding pro bono/low-cost counsel is nearly impossible when a party is of limited financial means and the case is complex. Yet, it is the complex cases where counsel is needed, especially when children are involved. The system is supposed to serve families and children, but it is designed to be navigated by attorneys. The result is that the children are often harmed the most.

The pro se assistance programs fall short

The Court has taken numerous steps to help self-represented parties in recent years, including creation of Court Service Centers in the busiest courts and the Lawyer for the Day program. Though the Court Service Center staff can give legal information, they are prohibited from giving legal advice and cannot act as a lawyer. Similarly, the Lawyer for the Day cannot

[27] Kathryn M. Kroeper, et al., Underestimating the Unrepresented: Cognitive Biases Disadvantage Pro Se Litigants in Family Law Cases, Psychology, Public Policy, and Law, 2020, Vol. 26, No. 2, 198–212, at 198.
[28] Id.
[29] 2022 Massachusetts Child Advocate Investigative Report, supra note 7 at 55.

represent a party in court. Given that our American judicial system is an adversarial system that places great importance on advocacy in court, the pro bono assistance programs do not balance the scales when one party can afford representation and the other cannot.

To illustrate the fact that help for self-represented parties falls short, we contacted by email each of the Family Court clerk's offices in Massachusetts and asked how to get free legal assistance in a divorce matter. (See Appendix 1 for the full responses.) Of the clerk's offices that responded:

- All had stringent financial restrictions
    - Help is only available to those that meet the restrictive national indigency poverty standard. For example, a family of four must make less than $33,125 a year to be eligible to speak to a "Lawyer for the Day."[30] This earnings cap is based on the national poverty level standard, which is much lower than the more realistic and relevant living wage level in Massachusetts.[31] In other words, a caregiver in Massachusetts, rated one of the most expensive states to live[32] and where childcare costs are the highest in the country,[33] is restricted to the same earnings cap as a caregiver in Arkansas, the least expensive state.[34]
- All had significant time restrictions
    - For example, Worcester's Lawyer for the Day was available only one morning per week.
- Most were available on a first come/first serve basis only
    - This means that caregivers must either bring children to court or find and afford childcare for an indeterminate amount of time without any guarantee that they will meet with the lawyer.
- Some did not respond at all
    - One court said to leave a message and a lawyer would call back. No one ever did.
- None offered any in-court appearance help
    - Parties are left to advocate for themselves in court.

Even if a party does manage to see a "Lawyer for the Day," it is not the same as having a strong legal advocate. A member tells us her experience:

> *"The Lawyer for the Day that I met with was not very helpful. He was unfriendly and gave me some ill advice; I learned this from another attorney who saw the motion I wrote with the Lawyer for the Day's help and laughed at it. I saw this Lawyer for the Day twice when I could find him, since he was mostly not available. When I called the clerk's office and asked if he was there (every other Thursday ONLY), they told me he would be*

[30] See Appendix 2 for a table of earnings caps for families of various sizes.
[31] MIT Living Wage Calculator for Massachusetts.
[32] These are America's 10 most expensive states to live in as inflation keeps rising, CNBC.com, July 13, 2022; Andrew DePietro, Most and least expensive states to live in 2022, Forbes, Feb 8, 2022.
[33] Child Care Costs by State 2022.
[34] DePietro, supra note 32.

in the courthouse until a certain hour, but he wasn't. Also, I knew more about the 2021 Child Support Guidelines changes than he did and spent time educating him!"

Based upon our research, if the matter is anything other than simple, the pro se assistance programs are unfortunately not very helpful. Having competent counsel is essential for financially disadvantaged parents and their children.

Disparate treatment of pro se parties

In addition to the gaps in pro se services, members report that there is an unequal treatment of pro se parties in Family Court. Though the Court is required to treat pro se parties with respect, several members have experienced the opposite. Hostile treatment of pro se parties was identified by the 1986 SJC Gender Bias Committee nearly four decades ago as a problem that disproportionately impacts women.[35]

One member shares her pro se experience after spending tens of thousands of dollars unsuccessfully on legal fees and then deciding to represent herself:[36]

"I was warned by numerous parties that my judge 'hated pro se litigants.' In one hearing, the judge refused to allow me to testify at all to rebut a false accusation of contempt of court. The judge justified the lack of due process by telling me that I had to bear the consequences of having chosen to represent myself when I could have afforded a lawyer.

During the multi-day trial, the judge created 'special' rules to make it harder for me to present my case, including: refusing to allow me to testify to matters the plaintiff had testified to at length; refusing to allow me to have any papers or pen on the stand; refusing to let me refer to a bulleted list of topics so I did not forget anything in my direct testimony; refusing to allow me to refresh my memory by looking at documents; and refusing to allow me to take notes for my redirect. I was not permitted to rephrase my questions that were objected to 'for form' when cross-examining the plaintiff. The judge repeatedly commented that these rules resulted from my choice to represent myself.

At a break, a lawyer watching the proceedings sought me out to tell me that most of the numerous objections to my cross-examination questions that the judge had sustained were meritless and that the proceedings were not being handled fairly. Unsurprisingly, the judgment was harsh, and the judge's findings included the plaintiff's ad hominem attacks on me even though they were untrue, unsupported by evidence, and not relevant. Overall, the process felt abusive and the outcome unjust."

[35] 1986 SJC Gender Bias Study Committee Report, supra note 2 at 764.

[36] The member decided to represent herself due to the escalating, uncontrollable legal costs. She chose to prioritize saving money to pay for her child's college education over spending an unknown, large amount of money on a lawyer for an unpredictable outcome in Family Court.

Another member, a caregiver who represented herself pro se after going into debt for over $320,000 in legal fees, tells us she had a similar negative experience from the same judge:

> *"Our financial statements showed that we had assets in the seven figures. I was told by the judge and the clerk that I can afford a lawyer and because I didn't use one, I would be held to the highest standards of a lawyer. I had made the decision to represent myself because my ex had the job, controlled access to all of our funds, and held several properties in his name in a foreign country. I was the primary caregiver for our two children. I used attorneys during the divorce proceeding and was in debt to them for over $320,000 when the judgment finally issued. I had to go pro se in subsequent proceedings. <u>The judgment made us each responsible for our legal fees. I had to pay my legal fees from my share of assets. In contrast, my ex paid his legal fees from his access to our marital accounts throughout the marriage, thereby saving his share of assets.</u>*
>
> *After the judgment was issued, I qualified for UMass Justice Bridge legal assistance rates because I was the primary caregiver, had no income, received no alimony or child support because my ex quit his job which intentionally starved me of resources. I was catapulted from a wealthy class lifestyle in 2018 to Mass Health, SNAP, and heat assistance by the time of the issuance of the divorce judgment in 2021. We had about 1.8 million dollars in real estate that we needed to divide after the issuance of the judgment, which has been mired in complaints for contempt and special master hearings for 18 months and were valued on paper only."*

Another member-caregiver lives in the marital home in an affluent community and earns $15,000 per year; her ex-spouse makes a seven-figure income. This is her reported experience as a pro se party:

> *"In the last hearing on temporary orders, the judge wouldn't let me get a word in, gave much more airtime to my ex's lawyer, seemed extremely annoyed, and shut the whole thing down in minutes after denying me the relief. She said she couldn't allow the relief because there was no "emergency." However, I later consulted with an attorney who said that the judge was wrong—that by law, she could have allowed the relief without an emergency. I feel the judge is biased against me because I am representing myself pro se."*

This member decided to represent herself after spending $60,000 on lawyers "who dragged out the case for no reason, gave bad advice, overbilled, and when questioned, could not justify their billing." She describes the difficulties she has encountered representing herself:

> *"It has been extremely time consuming, confusing, and emotionally draining. The website with the self-service forms is sometimes incorrect or provides incomplete information. My ex's lawyer doesn't communicate with me, engages in abusive litigation tactics, and the whole process has been intimidating to say the least. The system is not pro se friendly in any way, shape, or form. I've also been told that if I go to trial*

unrepresented—and my ex is forcing me in this direction—I will get killed on the stand and don't have a prayer. However, I don't have much of a choice since my ex is refusing to pay the correct support amount according to the Child Support Guidelines, he won't settle, and owes me tens of thousands of dollars. It will cost me at least another $25,000 to go to trial represented, and there are no guarantees I will get anything. No thanks. At least representing myself pro se is virtually free, so If I die a slow death on the stand, there will be something left to leave my children."

The reported treatment of these pro se parties does not appear to comport with Rule 2.6 of the Massachusetts Code of Judicial Conduct ensuring the right to be heard, and the Judicial Guidelines for Civil Hearings Involving Self-Represented Litigants, which state in part:

> 1.4 Application of the Law: Judges shall apply the law without regard to the litigant's status as a self-represented party and shall neither favor nor penalize the litigant because that litigant is self-represented.
>
> 3.2 Evidence - Commentary: "A pro se [party] is not entitled to any greater protection than a [party] represented by counsel but he is not entitled to any less protection either." *Commonwealth v. Sapoznik*, 28 Mass.App.Ct. 236, 242 n. 4 (1990)

Their experiences suggest that there are judges who believe parties with some measurable assets should prioritize the extraordinary, unknown costs of legal representation over the needs of their families. Though it is preferable to be represented by competent and ethical counsel, parties have the constitutional right to represent themselves and should not be pressured otherwise. Parties should not be forced into selling their homes, going into debt, taking money from their savings earmarked for their children's education or well-being, or depleting their retirement savings to fund Family Court actions with no predictable costs or results—and they shouldn't be treated differently by judges who believe otherwise.

Treatment by Family Court staff

In addition to the reported negative treatment by some judges, pro se members have reported negative experiences with various court staff.

A member describes her experience:

> *"Some clerks were helpful and others extremely dismissive. I watched them laugh and joke with the lawyers who came in and were fast-tracked while I stood in line—they didn't seem to care to deal with me as much."*

Another member states:

> *"The judge's clerk screamed in my face outside the courtroom that I should, under no circumstances, ever write to her. I was just attempting to set up a foreign witness*

through Zoom and needed information on how to do that, a question that one would think is appropriate to ask a court clerk."

And another member reports:

"The clerks treated me with rudeness and condescension. They refused to answer the simplest non-legal questions and yelled at me for being in line to sign in (which I was, of course, obligated to do)."

Supporting academic research

The members' experiences are in line with the results of academic research. The following studies add to the growing literature supporting that the mere presence of counsel gives parties a material advantage in the courtroom:

(1) Recent academic research on the cognitive biases held by law students and lawyers led to worse outcomes for pro se litigants compared to counseled litigants in employment discrimination cases. The law students and lawyers appeared to stereotype pro se parties as less competent than otherwise identical counseled parties.[37]

(2) Researchers conducted experiments with civil court judges where only the presence of counsel varied (whereas other case-related factors were held constant). They found that legal officials, on average, devalued the case merit of pro se litigants relative to otherwise identical counseled litigants. "These results suggest that perceptions of case merit are strongly influenced by a litigant's counseled status."[38]

In summary, despite the steps the Court has taken to assist self-represented parties, pro se parties continue to face many obstacles.

Attorney's fees pendente lite can balance the parties' access to justice

Family Court judges have the authority to level the playing field by ordering fees to a party who earns significantly less than the other party.[39] The pendente lite statute, *G. L. c. 208, § 17*, gives the Family Court the power to "require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action…." Even though this tool is available to give both parties an equal opportunity for an equitable outcome, the Massachusetts Access to Justice Access to Attorneys 2022 Report on Fee Shifting in Family Law Litigation ("2022 Access to Justice Fee Shifting Report") found that the issuance of pendente lite fees are made infrequently in Family Court and that this infrequency harms the financially inferior parties' access to justice:

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[37] Victor D. Quintanilla, et al., The Signaling Effect of Pro se Status, Law & Social Inquiry, Volume 42, Issue 4, Fall 2017.

[38] Kathryn M. Kroeper, et al, supra note 27 at 198.

[39] 2017 Massachusetts Access to Justice Access to Attorneys Report, supra note 14 at 12. ("Arguably, fees pendente lite are most needed when one member of the couple earns significantly more than the other.")

> *"In the Committee's view, [not awarding pendente lite fees] is a lost opportunity to provide access to justice at a critical point in people's lives. In most cases, a divorce action significantly impacts litigants' fundamental rights with respect to parenting and may have long-term impact on litigants' ability to meet basic human needs. Litigating a divorce can be complex in both procedure and substance, and lawyers play a critical role in navigating rules, presenting evidence, and counseling clients on realistic goals. . . . Every effort should be made to maximize consideration of pendente lite awards in appropriate cases."*

Its conclusion that pendente lite fees are not frequently ordered in Family Court is based upon a "persistent circular argument: lawyers/litigants don't request fees because judges don't award fees and judges don't award fees because lawyers/litigants don't request fees."[40]

Our informal survey of members comports with the Committee's finding. Of the members asked, none were made aware of their right to request pendente lite fees by their attorneys. In fact, none knew of their right until we asked them.

It is disturbing that very few pendente lite orders are issued in 2022, nearly four decades after the 1986 SJC Gender Bias Study Committee urged their issuance so that moderate-income women could access justice:

> *"There is too little legal help available to moderate-income women, in part because judges fail to award adequate counsel fees, especially during the pendency of litigation. … Judges must award adequate attorney's fees during the pendency of litigation."* [41]

The infrequency of ordering pendente lite fees is apparent regardless of economic demographics. In its 2017 Report, The Massachusetts Access to Justice Access to Attorneys Committee suggests that allocation of fees is commonplace in high-end divorces and less often seen in middle- and limited-income cases.[42] An informal survey of the our membership, however, finds that allocation of fees is not commonplace in high-income divorces either. This conclusion is further supported by the 2022 Access to Justice Fee Shifting Report that does not differentiate between upper- and lower-income divorces in its finding that pendente lite fees are infrequently ordered.

It is apparent that balancing the ability for both parties to afford counsel is critical. The Access to Justice Access to Attorneys Committee puts forth a new standard in its 2017 Report that the Family Court could use to level the playing field between economically imbalanced parties:

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[40] Massachusetts Access to Justice Access to Attorneys 2022 Report on Fee Shifting in Family Law Litigation (May 2022) at 3.

[41] 1986 SJC Gender Bias Study Committee Report, supra note 2 at 764 and 767, quoted in the 2017 Massachusetts Access to Justice Access to Attorneys Report, supra note 14 at 12.

[42] 2017 Massachusetts Access to Justice Access to Attorneys Report, supra note 14 at 12.

> *Regardless of the cause, it is frequently the case that one party to a divorce has greater access to income and assets than does the other. It is common for one party to be represented by counsel while the other goes forward self-represented.* ***Rather than ask when it is reasonable to demand that one party to a divorce action finance the legal fees of the other, a better starting point would be to ask when it is not reasonable to expect that the combined resource of a married couple will be used to provide equal access to an attorney for each party****.*[43] [Emphasis added]

Other cost considerations

Costs for parties escalate quickly because even minor hearings can result in substantial legal fees. The Court's response to the pandemic proves that the bulk of motions and similar matters can be dealt with efficiently and effectively and for a much lower cost to parties using virtual technology rather than in-person court appearances.

Despite this, one member tells us that the judge refused to handle the motion hearing virtually and instead required the parties and their lawyers to drive about an hour each way for a motion hearing at a distant courthouse where the judge was sitting that day. This caused both parties unnecessary legal expense for travel and waiting for the judge. Both parties incurred almost four hours of billed time for a matter that could have been resolved in a 30-minute virtual hearing.

The adverse impact of requiring in-person hearings when remote hearings would be equally effective is even greater for economically disadvantaged parties, workers who cannot afford to miss workdays, and for caregivers who must find and afford child- or elder-care when absent.

[43] Id.

MISUSE OF THE FAMILY COURT SYSTEM

Rule 1 of the Massachusetts Rules of Domestic Procedure mandates that the Rules "shall be construed to secure the just, speedy and inexpensive determination of every action they govern."[44] Unfortunately, there are parties and attorneys who ignore or misuse the Court's rules to thwart the "just, speedy, and inexpensive determination" of a case. It is our conclusion, based on members' collective experience, that parties do this because they believe they will likely get away with it without consequence. Such nonaction has the unintended effect of rewarding the person misusing the system and encouraging the misconduct to continue. It also has detrimental repercussions on families and the entire court system.

This problem was identified four decades ago by the 1986 SJC Gender Bias Study Committee:

> **"There is a serious concern among family law attorneys regarding the accuracy of financial data presented to the courts, particularly by male litigants, and the failure of the courts to take seriously the rules surrounding discovery in family law cases."[45]**

Reflecting the findings of the 1986 Gender Bias Committee and based upon members' experiences, misuse of the system is still a very serious and unaddressed issue in Family Court in the following ways.

A. Obstructionist litigation tactics

Obstructionist litigation tactics are used by one party to force the other party to incur needless legal costs and delay court proceedings and judicial resolution for their own benefit. Common tactics include:

- Repeatedly filing unnecessary motions.
- Repeatedly filing unnecessary or duplicative discovery requests.
- Canceling court dates, requesting unjustified continuances, and otherwise causing delays in judicial resolution of matters.
- Not complying with rules, court orders and judgments, disclosure requirements, perfunctory discovery requests, or discovery orders, which cause the other party to continually go back to court at great expense.
- Complying with court orders or court discovery rules "on the courthouse steps," causing the other party unnecessary expense.
- Using the Family Court system to subject the other party to a pattern of threatening, humiliating, or intimidating actions to harm, punish, or financially damage them.

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[44] Similarly, Mass.R.Civ.P.1, which states it applies to the Family Court in proceedings seeking equitable relief, provides that the rules "should be construed, administered, and employed by the court and the parties to secure the just, speedy and inexpensive determination of every action and proceeding."

[45] 1986 SJC Gender Bias Study Committee Report, supra note 2 at 767.

Obstructionist litigation tactics are more commonly employed by the financially superior party. The economically dependent party, typically the caregiver to the parties' children, does not have an equivalent income stream, or in many cases any income stream, to defend against these tactics. Since over 80% of caregiving parents are women,[46] single mothers and their children are disproportionately harmed. This conduct creates financial harm to economically dependent parties by depleting them financially and emotionally so that they abandon the judicial process and settle for less than what they are entitled to under the law.[47]

Caregivers need income to help support themselves and their families during and after a divorce or modification, and they also need funds to pay an attorney to advocate for them and their children during the Family Court matter and negotiations. However, "[h]usbands generally tend to enter negotiations with superior earning capacity and control over assets, both of which make them far more able to bear [legal] costs than their spouses."[48] Add the unnecessary expenses and delay caused by a party misusing the legal system, and the result is financially devastating to caregivers, the majority of whom are women.

A family law scholar explains the disadvantages of many women in divorce settlement negotiations, and how financial superiority can play out as a powerful tool in a divorce:

> *Consider first the financial context in which divorcing wives must bargain. Generally, the wife and the children are dependent upon the husband. Until a court orders temporary support, husbands frequently refuse to provide child support and/or maintenance. The wife then has difficulty meeting her basic needs and those of her children. Unless the wife or her lawyer obtains an order for temporary support and the husband complies with that order, the wife's financial situation can become desperate, increasing her willingness to accept a poor settlement. On the streets, this tactic is called "starving her out."*
>
> *The wife's low or non-existent income also makes it difficult for her to pay attorneys' fees. Many wives proceed without lawyers or agree to joint representation by lawyers their husbands have chosen. A wife who seeks a lawyer sometimes cannot find one willing to represent her. Lawyers know that wives frequently cannot pay their fees and that courts commonly refuse to order husbands to pay wives' legal fees. Many lawyers,*

[46] United States Census Bureau, America's Families and Living Arrangements: 2021. Table FG6. One-parent Unmarried Family Groups with Own Children Under 18, by Marital Status of the Reference Person: 2021.
[47] Judith G. McMullen, Alimony: What Social Science and Popular Culture Tell Us About Women, Guilt, And Spousal Support After Divorce, 19 Duke J. Gender L. & Pol'y 41, 58, 70-71 and n. 268 (2011); Rebecca Aviel, A New Formalism for Family Law, 55 Wm. & Mary L. Rev. 2003, 2064-66 (2014); Penelope Eileen Bryan, The Coercion of Women in Divorce Settlement Negotiations, 74 Denv. U. L. Rev. 931 (1997) at 931.
[48] Marie Gordon, Spousal Support Guidelines and the American Experience: Moving Beyond Discretion, 19 Can. J. Fam. L. 247, 292 (2002).

particularly expensive lawyers, admit that they prefer to represent husbands because they know that husbands can pay their fees.[49]

Obstructionist tactics by high-conflict parties and domestic abusers

The Family Court system is also misused by high-conflict-personality litigants and domestic abusers. A high-conflict personality does not always have a psychiatric diagnosis; rather, it is evident in the repeated behaviors exhibited in a conflict.[50] This includes non-compliance, withholding information, filing excess litigation, delaying resolution, etc.[51] Similarly, domestic abusers turn the court system into a weapon so that they can use the Family Court process to continue their coercive and controlling behavior. The result is significant psychological and financial harm for the targeted parent and children, who have already suffered trauma.

Our members with a high-conflict person or domestic abuser as the opposing party have suffered tremendous financial loss and emotional injury. A court that is overburdened, slow-paced, and has inconsistent case management is particularly ripe for abuse by high-conflict parties. This behavior has continued to the great detriment to members and their children.

The widespread damage

Protracted, contentious litigation creates crippling financial harm to the economically dependent party leaving few, if any, assets for caregivers and their children. Moreover, it inflicts emotional and psychological suffering on the other party and on children, as widely reported in academic research.[52] *"*The negative impact of divorcing parents' conflict on children has been well-documented within the social science literature and has been found to be a more powerful predictor of children's maladjustment than the actual event of separation*."*[53] Sadly, many members and their children have suffered significant harm from the use of these tactics.

Obstructionist litigation tactics not only cause harm to the parties and their children, but they also result in serious collateral damage including:

(i) Harm to the Family Court and its good-faith users

These strategies harm the Family Court by increasing work for an already overtaxed court and harm all Family Court users by clogging the docket with repeated delay tactics that slow down the entire system.

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[49] Penelope Bryan, supra note 47 at 931-932.

[50] Bill Eddy, LCSW, Esq., Who Are High Conflict People?, High Conflict Institute, May 15, 2019.

[51] Esther Rosenfeld & Michelle Oberman, Confronting the Challenge of the High-Conflict Personality in Family Court, Family Law Quarterly, Volume 52, Numbers 1 & 2, Spring/Summer 2019, at 80.

[52] Linda D. Elrod, Reforming the System to Protect Children in High Conflict Custody Cases, William Mitchell Law Review: Vol. 28: Iss. 2, Article 5 at 496-497 (2001).

[53] Michael Saini & Rachel Birnbaum, Unraveling the label of "high conflict": What factors really count in divorce and separated families, 51(1) Ontario Association of Children's Aid Societies Journal 14, 14-20 (Winter 2007).

(ii) Harm to the reputation of the Family Court

The reputation of the Family Court has suffered due to the plethora of obstructionist tactics used without consequence and the lack of case management. A recent Massachusetts Lawyers Weekly editorial, "Probate and Family Court Crisis Requires Action," states:

> *"Lawyers and litigants in the Probate & Family Court are increasingly painting a picture of a court in serious need of fixing . . . The court's reputation for being in disarray makes it hard to attract applicants for open judicial positions: Experienced family law practitioners see the court's problems firsthand and are understandably reluctant to seek appointment to the bench."*[54]

(iii) Harm to domestic violence victims

Even if a party manages to safely leave an abusive relationship, some abusers turn to the Family Court to continue the abuse. The overburdened, slow-moving Family Court provides an optimal avenue where an abuser can inflict emotional and financial abuse on an ex-partner and continue to exert control long after a party has tried to remove herself or himself from an abusive situation.[55]

The Bar's role

While Rule 1 of the Massachusetts Rules of Professional Conduct states that a "lawyer should represent a client zealously within the bounds of the law," zealous representation is not unlimited. Although the Rules provide guardrails[56] to curb overzealous representation, "the problems of incivility at the court are so bad that they recently led to . . . changes to the Rules of Professional Conduct." [57] These amendments, effective as of October 2022, add additional obligations on attorneys to act with civility. They are described as "clearly a statement by the court that the use of 'abusive' tactics, whether in court or outside of court, directed at any participant in the process, is on thin ice and could likely involve your law license if you carry it to an extreme."[58]

Despite their obligation to act with civility, there are family law lawyers who use "tried and true tricks of the trade and are often pretty effective with judges":

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[54] Massachusetts Lawyers Weekly Editorial Advisory Board, supra note 16.

[55] Family courts in several states have adopted abusive litigation laws protecting survivors of domestic abuse from abusive litigation. Introduced in the last session of the Massachusetts legislature were Massachusetts **Bill H4149:** An Act protecting survivors of domestic abuse from abusive litigation, and **Bill H.1643**: An Act to improve protections relative to domestic violence which would have included "coercive control" in the statutory definition of domestic abuse. It is anticipated that the bills will be reintroduced in the next legislative session.

[56] See Massachusetts Rules of Professional Conduct Comment 1 to Rule 1.3; Comment 1 to Rule 3.2; and Rule 4.4(a).

[57] Massachusetts Lawyers Weekly Editorial Advisory Board, supra note 16. See Comment 1A to Rule 1.2; Rule 4.4(a)(1); and Rule 4.4(a)(3).

[58] Quote of Attorney Thomas Maffei in Pat Murphy, SJC's New Conduct Rules Continue Emphasis on Civility, Massachusetts Lawyer's Weekly, July 22, 2022.

> ***"I would try to bankrupt a mother into settling by mak[ing] it as cost prohibitive and time consuming as possible to go to trial, knowing that mom is likely to be worn down and end up [settling]."*** [Emphasis added]

Many members tell us they were, and continue to be, on the receiving end of this strategy. They report that they and their children have suffered significant financial and emotional damage from obstructionist litigation tactics used by the other party. From an inordinate number of court filings and retaliatory filings to hiding of assets and non-compliance of discovery requests, these actions cause financial and emotional harm to parties and children.

The following four examples are from our members, all Massachusetts attorneys who never practiced in Family Court but understand how the legal process is supposed to function.

One attorney reports:

> *"I am an attorney and the family caregiver. I bore multiple discovery request expenses and attorney fees as father (who made 10 times what I made) refused to comply with basic Supplemental Probate and Family Court Rule 410 Mandatory self-disclosure discovery over a three-year period. I complied with all his discovery requests. I did not seek attorney's fees for his obstructionist behavior because my attorney, experienced in Family Court practice, informed me repeatedly that recouping fees was a lost cause and would only irritate the judge who was to remain on my case through its final disposition. I eventually settled for less than the alimony statute presumptive standard of 30 to 35 percent (22 to 28 percent tax-net) of our income difference and no child support for my college-aged children because I could not afford the $100,000 quoted cost of trial. During the perfunctory colloquy when the Family Court judge accepts the divorce agreement in court, I was asked by the judge whether I thought the agreement was fair. I told her that given the extraordinary trial costs quoted and the wide discretion inherent in Family Court decision-making, I had no choice but to accept the offered agreement. For me, the lesson learned was that fundamental fairness and equity, while stated tenets of the Family Court, are elusive to the payee where the payor's strategy is to cripple her with attorney's fees."*

Another member, an attorney tells us her experience:

> *"I am an attorney and was the full-time caregiver for our children for many years. My ex was the economically superior party. I stayed home with the children for many years. We have over 185 docket entries in less than seven years. It has been a pattern of my ex-partner's non-compliance with our mediated separation agreement (I have never been found in contempt). When I sought compliance through the mediator first and then court, there was a retaliatory filing/act by my ex which caused me great expense of time and money."*

Another member, an attorney, explains what happened to her and her children:

> *"I am an attorney, main caregiver, and primary breadwinner in the family. Notably, my marriage was less than six years and the divorce took three years (50% of the length of the marriage) because of egregious stonewalling and delay tactics, including refusing to respond to basic initial discovery requests for a year and a half (while numerous motions to compel went unanswered by the court). The divorce cost triple the amount of our total combined assets at the start of the proceedings. The court even remarked on the lack of assets at one point, yet it did literally nothing to enforce applicable deadlines and manage the case to a timely conclusion. If I had less earning power, it would have bankrupted my family (my ex-husband's obvious goal), and the system was complicit in his ability to use the proceedings to attempt to do so.*
>
> *Despite a party with high-conflict personality disorder diagnoses (amply documented, including through court-ordered psychiatric testing) and history of abusive conduct, the court exerted no pressure on the stonewalling party; it ignored multiple motions to compel long overdue discovery and continued five pretrial dates across two years because he had not produced discovery, with no admonishment, consequences, or award of fees for my continued need to resort to filings to move the litigation toward resolution. There were zero protections for me, the primary earner and full-time custodial parent, caught in a three-year litigation that drained all our assets (and then some).*
>
> *The court could and should have provided active case management by (1) compelling the other party to abide by the rules of the Court, especially around basic discovery requests and meeting deadlines; (2) containing costs to the cooperative party by ordering the obstructionist party to bear the costs/consequences of his obstruction once the clear pattern emerged; and (3) moving the case along on a reasonable timeline.*
>
> *As a litigator in other courts in the Commonwealth, I found that the rule of law did not seem to exist in Family Court. There was a disappointing lack of civility and respect in court proceedings among members of the bar (and towards opposing parties) that went unanswered by the judge. Of the important issues wanting reform in the Family Court system, case management, uniform enforcement of the applicable rules, and professionalism of members of the bar are squarely within the judicial system's ability to repair."*

Another member, an attorney, tells us about her Family Court experience and its detrimental impact on her and her children:

> *"I am an attorney, the primary caregiver, and also the partner who made more money in the family. I attempted to hire reasonable and honest legal counsel so that we could most efficiently divorce to minimize the impact of the divorce on our children, who have serious health issues. My husband hired lawyers from a large Boston family law practice*

who were wildly over-litigious and who allowed him to go on for more than two and a half years without paying his legal fees, which gave him the economic advantage in the matter. They engaged in nonstop abusive litigation tactics, including refusing to provide meaningful discovery responses, and repeatedly filing unnecessary motions, discovery requests, etc. I was forced to respond to these filings, causing a huge increase in my own legal costs, which crippled my family financially to the detriment of my children. Their nonstop filings and communications were not designed to resolve the matter but rather to attempt to escalate it, drag it out, and deplete my resources. It took so much time to respond to their nonstop tactics that it also interfered with my ability to care for the children or to work (let alone prepare my own case). They fought nonstop against my husband contributing financially in a meaningful way to the care of the children and successfully avoided paying for almost any child support or expenses throughout the matter. This resulted in the children going without essential medical services, which gravely harmed their health. They refused to have settlement discussions, admitting that they were intentionally trying to increase the legal costs to get a better deal without concern for the harm they were causing to the children."

All the above examples were given to us by member-attorneys who have been trained in the law. Sadly, their experiences in Family Court have left lasting marks on them and their children and have caused them to lose confidence in the Family Court to attain justice.

Manipulating income to reduce support

Our research indicates that many noncustodial payor spouses, at times with the complicity of their attorneys, employ obstructionist tactics with the goal of reducing their financial obligations to their spouse and children.[59] Here is one member's experience:

"During the period of our separation before the final divorce agreement my husband transferred all of the money out of our accounts, moved out of state, and left me with little resources to pay bills for myself and our two kids. This tactic was used by him to force me and the children to spend minimally during the two years prior to divorce being final, which is what support was based on. The dollar amount of my family's expenses during our separation was therefore far less than during our marriage. I had to liquidate retirement funds in my name to pay for our basic needs. When determining support, the judge focused on recent expenses only. Sadly, this tactic is accepted and normalized by the court system to the financial benefit of the non-custodial party."

B. Family Court's ability to curb the misuse of the Family Court system

Attorney's fees statutes

Massachusetts Family Court judges have tools in place to curb misuse of the system. One such tool is the broad authority given to the Family Court by the Massachusetts Legislature to order

[59] This tactic of manipulating income to reduce support is noted by the Supreme Judicial Court in *Young*, supra note 10 at 10.

a party to reimburse the opposing party for legal fees and costs. To be effective, however, the Court must exercise this power consistently, fairly, and immediately upon determination of the misconduct.

1) M.G.L. c. 208, § 38 (attorney's fees statute):
This statute gives the judiciary broad authority to order the reimbursement of attorney's fees. However, our members have found, and family law practitioners tell us, that attorney's fees are rarely awarded, especially before trial. The problem with this practice is that the overwhelming majority of cases settle before trial (often because the economically disadvantaged party can no longer afford the expense of litigation), so there never is an opportunity for the less economically secure party to be reimbursed for legal expenses. This judicial non-action emboldens the vexatious litigant, often the more financially secure party, to continue its misuse of the system.

A member shares her experience*:*

> *"We have 263 docket entries in about 10.5 years. In our case we have to go all the way to trial for him to get shut down and for me to get fees. The fees awarded are always significantly less than the actual fees I have been billed and paid. My ex has taken me to court on the parenting plan three times post-divorce (once it was dismissed due to inadequate proof of material change in circumstances). Each time, I lost substantial time, money, and emotional and physical health as I waited for the trial to come to completion. During this protracted and repetitive process, he has subpoenaed many parents of our child's friends, my friends, and my coworkers. I realize I'm very lucky to have received fees, albeit a portion. If he is permitted by the Court to continue like this until our child is 18 or 23, most caregivers would just go bankrupt. I already have had a significant change in my standard of living even without the fees I've paid due to the impact of his behavior on our child, my career, and my person."*

Another member reports:

> *"I am the full-time caregiver. During our marriage my ex definitely earned more money than I did. In my case my ex omitted that he was receiving unemployment payments on his financial statement and in a court-ordered conciliation meeting. We found out about this when we received his updated bank statements several months after the conciliation and prior to the next pre-trial meeting. My attorney filed several motions, including one for attorney's fees which I had incurred—over $10,000 at that point. During the pre-trial conference the judge didn't even speak to or consider the motion for attorney's fees. She only considered the motion for temporary support orders. I was not awarded any attorney's fees notwithstanding my ex's improper conduct."*

And another member states:

> *"I am an attorney and full-time caregiver (my ex only has 30 minutes of virtual visitation every two weeks. The clerk recently told me there are 116 motions in my file; only six to eight were initiated by me.*
>
> *I have spent tens upon tens of thousands of dollars just on these nonsense motions, proportionately well beyond my income, for A DECADE. I have rarely received any attorneys' fees. I received 50 percent of attorney's fees once from a judge when my ex didn't show up to a hearing on a contempt motion that he filed against me. She refused all my other motions to recoup attorney's fees for his filings. It has been appalling to me that he can continue to file at will with virtually no restrictions or consequences."*

In summary, even though the Legislature has given broad statutory power to the Court to order recovery of attorney's fees, our members tell us their motions for attorney's fees are rarely allowed, making the statute in all practical sense, ineffective.

2) M.G.L. c. 215 § 34A (financial contempt statute):

Similarly, judges are reluctant to award attorney's fees in contempt proceedings[60] even though the governing statute, M.G.L. c. 215 § 34A, creates a presumption of an award of attorney's fees for failure to comply with an order for monetary payment. M.G.L. c. 215 § 34A applies to successful complaints for violations of alimony, child support, and financial orders. The statute provides:

> In entering a judgment of contempt for failure to comply with an order or judgment for monetary payment, there shall be a presumption that the plaintiff is entitled to receive from the defendant, in addition to the judgment on monetary arrears, all of [his or her] reasonable attorney's fees and expenses relating to the attempted resolution, initiation and prosecution of the complaint for contempt. The contempt judgment so entered shall include reasonable attorney's fees and expenses unless the probate judge enters specific findings that such attorney's fee and expenses shall not be paid by the defendant. [Emphasis added]

This language creates a powerful presumption of an award of all reasonable attorney's fees. In fact, the presumption is so strong that the statute requires the court to enter written findings explaining why it chose not to order legal fees. The appellate courts agree, recognizing the important public policy behind the statute:

> *"[O]ur understanding of the statutory presumption [is] a reflection of 'the Legislature's concern that the statute be an effective goad to compliance with support payments.' If attorneys are to be willing to undertake efforts to obtain enforcement of support orders, they need to know they will be fairly compensated. This is all the more so, the more*

[60] 2017 Massachusetts Access to Justice Access to Attorneys Report, supra note 14 at 12.

> *recalcitrant or obstructionist the defaulting spouse. If attorneys had to look to their clients for compensation, realistically, the limited support ordered by the court would be reduced. A defaulting spouse should know that noncompliance can be costly.... The presumption under Section 34A can be overcome only by specific findings supporting a reduction in a request for reasonable fees*.[61]

Despite this strong directive from the Legislature and the appellate courts, our members have found that Family Court judges do not consistently order reimbursement of all fees in financial contempt proceedings and do not explain their reasoning for the denial or reduction.

Ability to pay attorney's fees

According to the 2017 Massachusetts Access to Justice Commission Access to Attorneys Committee Report, a reason judges might not be awarding counsel fees in contempt actions is because they link the contempt to the defendant's inability to pay. The 2017 Committee states:

> *"At the lower end of the economic ladder, failure to pay child support is sometimes linked to a limited ability or inability to pay. Inability to comply is a defense to contempt and, even where a judgment of contempt enters, courts may be reluctant to direct a portion of a defendant's available income to attorney fees, rather than to prompt remedy of child support arrears."* [62]

Relying on "anecdotal evidence," the Committee theorized that judges substantially reduce awards of attorney's fees for lower-income parties because they do not have an ability to pay.[63] However, our members found that judges rarely allow recovery of attorney's fees in financial contempt actions even if there is an ability to pay. If allowed, the amount requested is substantially reduced and often with no explanation.

For example, the judge in this financial contempt action did not provide any findings despite reducing the request for attorney's fees by more than 95%. A member explains:

> *"I filed a financial contempt for $1,120.32 for money my ex owed me and legal fees of $1,702. He was found to be in contempt, but I only received a judgment for $1,200 which the court document stated was for missed payments and legal fees. So, to be precise, I was reimbursed for $79.68 in legal fees."*

Ironically, our member actually lost money by winning her contempt complaint.

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[61] *Kennedy v. Kennedy*, 23 Mass.App.Ct. 176, 181 (1986), aff'd 400 Mass. 272 (1987). In its affirming decision, the Supreme Judicial Court stated "The effort put forth by counsel here was commensurate with the important interests at stake and the amount of opposition interposed by the defendant. To rule otherwise would be to condone and encourage obstructionist tactics...." Id. at 275.

[62] 2017 Massachusetts Access to Justice Access to Attorneys Report, supra note 14 at 12.

[63] Id. The Access to Justice Commission has to rely on anecdotal evidence because apparently the Family Court did not track the outcomes of contempt motions and associated motions for attorney's fees.

Another member describes her experience:

> *"My ex stopped paying regular support as ordered by our divorce judgment. My ex earned approximately 8 to 9 times what I earned, and he had amassed several hundred thousand dollars in additional assets in the few years since our divorce. He decided unilaterally to stop paying the full amount of alimony and child support, claiming he had lost income due to COVID. He was found guilty of contempt in reducing his payments on his own and was found to have ample assets to meet his support obligation, yet he was ordered to pay only $1,000 of the more than $8,000 in attorney fees I spent on the contempt matter."*

In summary, even though statutes give the Court the power to grant reimbursement of attorney's fees, our research shows they rarely do even when the violating party has the ability to pay. The Court's consistent exercise of this statutory power will help curtail the misuse of the system by placing the cost of noncompliance squarely where it belongs—with the party refusing to comply with the court's orders.

Parties' agreements to pay attorney's fees

Additionally, our members have found that Family Court judges are reticent to award attorney's fees even in situations where the parties' own agreements provide for them.

One member reports that a judge ignored her divorce agreement that expressly provides for attorney's fees when one of the parties is found in contempt:

> *"I am the caregiver. My ex-husband earns about $1.4 million annually and I earn about $15,000. My divorce agreement specifically states that if one of us is found in contempt, then he/she pays the fees. I was told by two different lawyers that due to the specifics of my agreement I should get most or all of my fees back for any contempt issue. I incurred $50,000 in attorney's fees because my ex-husband refused to provide documentation required under the agreement. He was ultimately found in contempt of our agreement and the judge ordered him to pay a small portion of these fees, around 16%, but she also ordered me to pay for a third of the forensic accountant's bill ($20,000) even though the contract with the accountant stated the same as the divorce decree. By the time I paid for that cost, which was roughly the same amount as the awarded fees, I came out losing almost the entire $50,000.*
>
> *But it got even worse: In the same ruling, I was found in contempt of a minor parenting issue around visitation, (a letter from opposing counsel went to my lawyer about our parenting schedule, but my lawyer forgot to show me the letter and negotiated a change without my consent), and the judge awarded my ex-husband* ***100 percent of his fees*** *requested! The inequity of this and the lack of explanation from the judge completely dumbfounded me."*

C. Obstructing access to justice

The practice of not reimbursing parties for their attorney's fees incurred to gain compliance of the other party is a barrier to equitable and accessible justice.

- First, it hinders an economically challenged party from finding a lawyer to represent them. The 2017 Massachusetts Access to Justice Access to Attorneys Committee explains that just *the impression* that attorney's fees will not be granted or, if granted, will be substantially reduced, "may . . . have a chilling effect on the willingness of attorneys to rely on awards for their payment."[64] The Massachusetts appellate courts concur,[65] and we agree. It already is extremely difficult to find pro bono/low-cost representation.

- Second, it casts a chilling effect on the harmed party seeking help from the Family Court to enforce future violations of court orders, and causes parties to lose faith in the system. For example:

  > *"I am in the low-income bracket and am the primary caregiver. My ex makes more money than I. Soon after my divorce, my ex committed up to five violations of the agreement, so I filed for contempt. Right before the hearing my ex complied with the agreement. At the contempt hearing, the judge said: 'He did everything. Why are we here?' My attorney responded: 'None of these would have been addressed if my client didn't file a contempt; we are asking for legal fees to be paid.' Result: I got $500. I think my fees were approximately $7,500. (I don't want to review the file for the actual amount because it is so upsetting to have lost those funds.)"*

  Instead of focusing on the conduct of the wrongdoer who violated the Court's judgment, the non-violating party was admonished for seeking reimbursement for expenses presumptive under a statute and which were only incurred due to the violating party's failure to comply with the Court's order.

- Third, it has widespread negative effects. A lawyer explains, "Failing to award fees can result in further contemptuous behavior and increase litigation so it not only hurts the litigant seeking relief, it increases the burdens on the court system."[66]

The practical ramification of the Court's inaction is that the non-violating party, often the financially disadvantaged party, must weigh whether it makes economic sense to seek costly

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[64] 2017 Massachusetts Access to Justice Access to Attorneys Report, supra note 14 at 12.
[65] *Kennedy*, supra note 61, at 181 ("If attorneys are to be willing to undertake efforts to obtain enforcement of support orders, they need to know they will be fairly compensated.")
[66] 2022 Access to Justice Fee Shifting Report, supra note 40 at 13.

Court intervention when a just outcome is at best uncertain, or just continue to accept the obstructionist behavior and noncompliance. This is a major barrier to access to justice.

D. Ineffective Methods to Curb Litigation Abuse

Based on their experiences, we strongly urge the Court to order payment of attorney's fees when a party is misusing the system. Other options to try to rectify abuse have not been successful and only result in more cost and delay:

(i) Alternative Dispute Resolution

Our members have found that alternative dispute resolution methods ("ADR") are unsuccessful when the opposing party is obstructionist, abusive, or has a high-conflict personality. Our members report that ADR with this type of person often causes substantial delays and escalating legal fees. The process does not constrain the high-conflict party/abuser; rather, it actually provides opportunities to continue to inflict harm on the targeted party, their children, and the court system.

(ii) Discovery masters

Several members tell us they have had "discovery masters" (other practicing attorneys) appointed by the judge in their case. The master appointments resulted from motions to quash subpoenas, motions to compel discovery, and other issues pertaining to non-compliance with discovery by the opposing parties. In addition to paying for their own attorney, members were forced to incur additional costly fees for the discovery master due to the noncompliance of the opposing party.[67] According to members who have completed the process, there was no significant improvement in their ex-partner's compliance. Discovery compliance should be standard, and where non-compliance or misconduct requires additional actions by the compliant party, fees and sanctions should be ordered against the non-compliant party. The cost of noncompliance should not be borne—or even shared—by the compliant party.

In summary, it is imperative that the Court intervene as soon as obstructionist litigation tactics are deployed. These tactics are antithetical to the best interests of children and harmful to all court users.

[67] In *Young*, supra note 10 at 10, the Supreme Judicial Court noted that "Not everyone can afford to pay a special master."

UNPREDICTABILITY IN FAMILY COURT RULINGS

Family Court judges are given wide latitude in their decision-making.[68] Whether by case law or statute, their discretion tends to be limited only by subjective, vague standards and unprioritized factors to consider.[69] We agree that judges need some discretion, guided by principles of law, when evaluating the facts of individual cases to reach an equitable decision. However, when judicial discretion is unbounded and unchecked, it promotes unpredictable outcomes, inconsistent decision-making, and an unequal application of the law. Judicial unpredictability has significant damaging impact: increased litigation in an overburdened court, increased legal expenses that most parties can ill afford, and increased opportunity for individual judges' predispositions to affect their decision-making. Overall, inconsistency in the Family Court system erodes public confidence that justice can be obtained through this legal process.

The focus on the family court's wide discretion by academic scholars is not new.[70] Over 30 years ago, a family law scholar explained that the lack of predictability caused by discretionary decisions in family law decision-making undermines confidence in judicial decisions, encourages protracted litigation, and overburdens the court. "As a result [of discretionary decision-making], the resources of both the judiciary and the litigants are wasted at a time when both are critically scarce."[71] The need for predictability is made greater when the family's finances or the well-being of children are at risk. Unpredictable judicial results prevent parties from meaningful settlement discussions which would lead to quicker resolution of cases and less burden on the court system.

A. Lack of uniformity of decision-making

Members and the legal bar tell us that a party's outcome depends largely upon which of the approximately 50 Family Court trial judges in Massachusetts is assigned to that party's case.[72] In fact, members report that the very first question any practitioner or party familiar with the Massachusetts Family Court system asks is: *"Who is your judge?"* This is astonishing, especially in a progressive state like Massachusetts. The same legal principles should govern all cases and should be fairly applied to each case regardless of which judge happens to be assigned to the case.

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[68] Marsha Garrison, How Do Judges Decide Divorce Cases – an Empirical Analysis of Discretionary Decision Making, 74 N.C. L. Rev. 401, 403 (1996).

[69] Judith G. McMullen, supra note 47 at 42.

[70] In A New Formalism for Family Law, supra note 47 at 2011 n.16 (2014), the author lists articles published in the last century addressing the uniquely large discretion of family court judges. See, e.g., Mary Ann Glendon, Fixed Rules and Discretion in Contemporary Family Law and Succession Law, 60 Tul. L. Rev. 1165, 1167-70 (1985) ("[Family law] is characterized by more discretion than any other field of private law…."); Ira Mark Ellman, Inventing Family Law, 32 U.C. Davis L. Rev. 855, 871 (1999) (endeavoring to show "that rules of largely limitless discretion are common in family law, and that their prevalence is not a good thing.").

[71] Jane C. Murphy, Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment, 70 N.C. L. Rev. 209, 210 (1991).

[72] M.G.L. c. 211B, § 2 allows for the appointment of 51 judges to the Probate and Family Court department.

For example, one member, an attorney, explains how the "best interest of the child" standard was applied by one judge but later disregarded by another judge in the same case:

> "*When allegations of abuse against my ex-husband (the father) were reported to the Department of Children and Families ("DCF") by a therapist, the judge on our emergency motion for supervision of the alleged abusive parent (who had a documented history of serious mental health issues and violence) swiftly ordered supervision, ordered the Guardian Ad Litem ("GAL") to assess, filed her own 51A from the bench, and set a follow-up date before our divorce litigation's assigned judge. A month later the case judge lifted supervision, despite no progress from the GAL and no investigation from DCF (because DCF deemed that supervision addressed any imminent risk). The judge's written order wholly disregarded the "best interests of the children standard" by describing the "burden" supervision placed on father's parenting time, with zero mention of the "best interest" standard or applying the standard to the facts. A subsequent motion for reconsideration was summarily denied. The contrast between the emergency hearing judge's concern for the children and the assigned judge was stark, and an all-too common illustration of the vast discrepancies among different judges who apply these broadly discretionary standards in Family Court. I learned that it cannot be assumed that rules are applied uniformly in Family Court – a view that fundamentally altered my view of Family Court or its concern for and ability to protect my children."*

Lack of uniformity of interpretation of Alimony Reform Act of 2011

An area that has provided much confusion and lack of consistency is the judiciary's interpretation of the Alimony Reform Act of 2011 ("2011 Alimony Act"). For over ten years, most Family Court judges have misinterpreted the 2011 Alimony Act as prohibiting a qualifying spousal caregiver from receiving both child support and alimony if income was below a certain level.[73] The judges' misinterpretation of the statute aligns with "the diminishing social sympathy for women who seek post-divorce spousal support."[74] Though some judges correctly interpreted the 2011 Alimony Act – allowing the caregiver to receive concurrent support of both alimony and child support in appropriate cases – these judges were few in number. Accordingly, a qualifying caregiver's financial future since 2011 depended upon which judge was assigned to the case.

Like the judiciary, lawyers misinterpreted the statute as well. Indeed, many did not even alert their clients to the fact that there was another interpretation that could allow for a concurrent order of alimony and child support. One member tells us:

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[73] In *Cavanagh v. Cavanagh*, 490 Mass. 398, 409 (2022), the Massachusetts Supreme Judicial Court resolved the confusion by holding that both child support and alimony can be available to a qualifying caregiver.

[74] Judith G. McMullen, supra note 47 at 48 ("Although there is some evidence of popular support for utilizing alimony to help women stay home with young children, there is a remarkable lack of sympathy for divorcing women who have done just that and now find themselves divorced, jobless, and with an empty nest.")

> *"I spoke to several family law lawyers about my case when deciding who to retain as my lawyer. All but two attorneys told me in no uncertain terms that I was not entitled to both alimony and child support under the statute. We went to mediation and the mediator told me the same—no alimony—even though my two children were soon to be emancipated leaving me with no support at all.* ***It just seems to me that something as important as whether a caregiver is eligible for both alimony and child support shouldn't be left to a judge's or lawyer's interpretation of a statute through their own lens, especially when dealing with the financial well-being of caregivers and children***."

The misinterpretation of the 2011 Alimony Act has had a tremendously negative and long-lasting financial impact for over a decade on the vast majority of caregiving parties, the majority of whom are women, and their children. Since a qualifying caregiver never even had the opportunity to receive alimony from the judge, the household income of the children was reduced; and, upon the children's emancipation, the caregiver was left without any support. Assuming the caregiver did not give up her right to alimony in a divorce agreement, the caregiver has no alternative but to return to an overburdened, slow-moving court to request alimony. Already in a financially weakened state because of the failure to receive alimony during the original court action, the caregiver will be further weakened by the additional legal costs and delay of a second court action seeking alimony—a request that has no predictable outcome of success because the 2011 Alimony Act still requires the requesting party to prove "need." Since "need" is a very subjective term, it is left up to the judge viewing the request through his or her own personal lens whether any alimony will be ordered.

The ten-year practice of many Family Court judges declining to even consider the issuance of alimony to a party with children generated significant criticism from family advocates who explained that the Massachusetts system punishes custodial parents with children. Since over 80% of custodial parents are women,[75] this practice disproportionately impacted women. Public advocacy groups informed the Massachusetts 2021 Child Support Guidelines Task Force of these inequities and the inconsistency within the Family Court judiciary.[76] Specifically:

- The Massachusetts system penalized custodial parents by issuing custodial parents less support than they would have received if they were childless.[77]
- Massachusetts was in the distinct minority of states that did not address situations when both alimony and child support should be paid to a recipient. Most states calculate alimony first, and then use the alimony payment to adjust the recipient and payor's income when calculating child support.[78]
- The Child Support Guidelines continue to result in awards that are inadequate to meet the needs of low-income custodial parent households. The percentages used are too

[75] United States Census Bureau, supra note 46.
[76] Jason V. Lynch, Massachusetts Legal Organizations Propose Changes to Child Support Task Force, Lynch & Owens P.C. blog, January 12, 2021.
[77] Massachusetts Council on Family Mediation letter to Massachusetts Trial Court Child Support Guidelines Task Force, December 15, 2020.
[78] Jane Does Well Recommendations to the 2020 Massachusetts Child Support Guidelines Task Force at 29.

low, childcare costs are underweighted, permissible health insurance deductions are overly broad, and alimony is too-often overlooked.[79]

In 2022, the Supreme Judicial Court tried to resolve the conflict within the Family Court judiciary and bar about the concurrent availability of alimony and child support in *Cavanagh v. Cavanagh.*[80] It found that the Family Court judge's refusal to consider an issuance of alimony to a caregiver receiving child support was an abuse of discretion. It ruled that both alimony and child support are available to a qualifying spouse under the 2011 Alimony Act. Further, it directed that a judge must calculate both alimony and child support and cannot deny a request for alimony without first making a fact-specific inquiry into the parties' circumstances, as evaluated through the application of the mandatory statutory factors of Section 53 (a) of the 2011 Alimony Act. If the judge does not order alimony, that judge must articulate the reasons for such a denial and identify specifically the statutory factors in the 2011 Alimony Act upon which the denial is based.

Though described by some family law lawyers as a "gamechanger,"[81] the ruling in the *Cavanagh* decision was not unforeseen. A year earlier the Appeals Court in *Calvin C. v. Amelia A.*[82] acknowledged the allowance under the 2011 Alimony Act to order both alimony and child support to a qualifying spouse and to provide a specific method of calculation. Further, the 2021 revision to the Child Support Guidelines released immediately after *Calvin* concurred firmly, stating that the "Task Force strongly urges the Court and parties to proactively run different support scenarios to determine what support order is appropriate for the family – specifically whether determining alimony first and then child support provides the appropriate support."[83]

Despite the 2021 *Calvin* case and the 2021 Guidelines revision, we learned from Family Court practitioners that there were judges and attorneys who were still resistant to the issuance of concurrent alimony and child support. Some reasons given were:

(1) they were unaware of or unfamiliar with the *Calvin* case and the 2021 Child Support Guidelines revision;
(2) they found it too complicated to calculate both types of support; or
(3) they simply didn't agree that alimony should be ordered.

Disappointingly, the 2022 *Cavanagh* case has met similar resistance. The negative, one-sided article that appeared on the front page of Massachusetts Lawyer's Weekly[84] (the trade newspaper for the Massachusetts legal bar) shortly after the publication of the decision in

[79] Community Legal Aid position paper, December 9, 2020.
[80] *Cavanagh*, supra note 73.
[81] Eric T. Berkman, Sweeping SJC alimony decision alarms divorce bar, Massachusetts Lawyers Weekly, August 19, 2022.
[82] 99 Mass.App.Ct. 714, 721 (2021).
[83] 2021 Massachusetts Child Support Guidelines, at 16.
[84] Eric Berkman, supra note 81.

Cavanagh was subjectively entitled "Sweeping SJC alimony decision alarms divorce bar." The article reflected what we have heard from family law practitioners: despite the unambiguous language of the SJC's ruling, many attorneys are not advocating for both alimony and child support on behalf of their clients.

Likewise, the attorney who was on the panel of the lawyer's educational seminar (MCLE) to educate lawyers on the implementation of the *Cavanagh* ruling opined in the Massachusetts Lawyer's Weekly that in most cases judges still won't be calculating alimony:

> *"I think that in most cases where the combined income is under $400,000 judges will still simply be running the child support guidelines to determine what is appropriate."*

The resistance to implementing the "long-needed and well-reasoned"[85] *Cavanagh* ruling is deeply concerning. Without a concrete plan backed up by checks and balances to ensure that the principles in *Cavanagh* are followed, history and legal commentary suggest strongly that there will be caregivers who will not receive alimony when appropriate.

Consequently, even when there is a statute, case law, and a guideline to follow, a caregiver's financial future will likely continue to largely depend upon the predilection of the judge assigned to their case and the lawyer representing them. Because recipients of alimony are mostly women, women are disproportionately impacted by the lack of uniformity of interpretation of the 2011 Alimony Act and successive case law.

A lack of judicial consistency in applying the attorney's fees statutes

Another area of high unpredictability in Family Court decision-making is a party's ability to recover their attorney's fees. Like alimony, the repayment of attorney's fees was important enough for the Legislature to enact statutory law. However, according to the 2022 Access to Justice Fee Shifting Report, Family Court judges are reticent to order reimbursement of attorney's fees; and their reasoning is not consistently disclosed.[86] The 2022 Report's findings are confirmed by members and court observers.[87]

As explained earlier in this report, these three statutes are found to be highly underutilized by Family Court judges:

- The attorney's fee statute, M.G.L. c. 208, § 38, gives the Family Court wide discretion to order a recovery of attorney's fees. However, other than the requirement that the amount of attorney's fees be "reasonable," the statute is silent as to which factors a court should consider when deciding whether to allow a party's motion for attorney's

[85] See Letter to the Editor, Appendix 3.
[86] See 2022 Access to Justice Fee Shifting Report, supra note 40 at 2.
[87] "Despite their broad authority to order fees and costs, many Massachusetts Probate and Family Court judges are often reluctant to exercise these powers." When Can a Judge Order a Party to Pay Their Spouses Legal Fees in a Massachusetts Divorce, James M. Lynch Blog, October 1, 2015.

fees. Although a patchwork of appellate cases suggests a variety of factors a judge could consider, ultimately, judges make their decision based on their broad discretion.[88] Our members' experience is that judges either ignore their motions for attorney's fees or deny them without any explanation.

- The financial contempt statute, M.G.L. c. 215 § 34A, addresses a payor's failure to pay alimony, child support, and related expenses. This statute actually includes a presumption that attorney's fees and expenses are to be ordered. If all fees are not allowed, the statute requires the judge to make specific findings of fact as to the reasons for the denial. As explained earlier in this report, members have found that judges either don't consistently grant the motion for fees and expenses, or substantially reduce the fees with no stated reason.

- The *pendente lite* statute, M.G.L. c. 208, § 17, grants the judge authority to allocate marital funds between the parties to provide both parties the opportunity to present their respective cases with the assistance of counsel. As explained earlier in this report, there is no predictability as to when in the legal process and under what circumstances a Family Court judge will issue pendente lite fees.

The unpredictability of fee-shifting orders is confirmed by the 2022 Access to Justice Fee Shifting Report. The Committee's survey of the Family Court judges and family law practitioners "revealed a highly varied approach to fee shifting among judges, resulting in a lack of clarity and consistency with respect to factors impacting awards and leaving many practitioners reluctant to seek fees, particularly fees *pendente lite*. In the Committee's view, this is a lost opportunity to provide access to justice at a critical point in people's lives." [89]

Comments by lawyers in the 2022 Access to Justice Fee Shifting Report suggest that the family law bar does not view judges' orders of attorney's fees in financial contempt actions as predictable enough to rely on when deciding whether to represent a plaintiff in a contempt action. One lawyer states, "I would be much more likely to take on low-income clients if I were confident I would prevail on a motion for fees. I find it to be difficult to get an award of fees, even when one party is clearly in contempt."[90] And another lawyer urges that "there should be relative uniformity in how the judges handle all matters including contempts."[91]

Because the cost of Family Court litigation is often financially crippling for a family, it is critical that parties and their lawyers understand the probability of reimbursement of attorney's fees. Specifically, they need to know under what circumstances they are likely entitled to

[88] *Freidus v. Hartwell*, 80 Mass.App.Ct. 496, 504 (2011) ("A judge has broad discretion in awarding attorney's fees under G. L. c. 208, §38, and, it follows, broad discretion to deny an award. *Wolcott v. Wolcott*, 78 Mass. App. Ct. 539, 546 (2011))."
[89] See 2022 Access to Justice Fee Shifting Report, supra note 40 at 2.
[90] Id. at 14.
[91] Id. at 13.

reimbursement. Legal costs are too great to leave such an important decision up to the discretion of individual judges.

B. Subjective legal standards and indiscriminate application

Though Massachusetts case law and statutes provide judges with a myriad of standards and factors to consider in their decision-making, ultimately, each judge is given enormous discretion to do what he or she believes is the fair outcome in a particular case. The Massachusetts Appeals Court affirms this practice of decision-making: "Of the several factors which the judge may consider . . . this court has never required that they be accorded equal weight or conjunctive application. In any given case the judge as fact finder may thus attribute greater significance to [one factor than another]."[92]

Highly unpredictable outcomes clashes with the basic "human need of predictability"[93] and reduces public confidence in the family law system. Though the intent is to arrive at fair and equitable decisions, each judge's individualized selection and weight of factors result in a confusing decision-making process. This approach makes it very difficult to reasonably predict the probability of the judicial outcome on critically life-altering issues such as child support and alimony.[94] In addition, it hinders settlement and promotes litigation in an already overburdened court; and it allows the injection of a judge's personal beliefs, however unintentional, to seep into their decisions.[95]

Modification actions

In modification actions, judges rely upon the legal doctrine of merger[96] and their personal definition of a "material change in circumstances"[97] to change the parties' agreements that were previously accepted by the Court. A scholar describes this legal standard as "vest[ing] the judge with nearly as much discretion as the judge exercised in the original dispute" and that the decisions are "accorded great weight on any appeal."[98]

One member experienced this unpredictability in defending a modification claim brought by the non-custodial father. A Family Court judge chose not to apply longstanding principles of family

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[92] *Brooks v. Piela*, 61 Mass.App.Ct. 731, 734 (2004).

[93] Howard H. Stevenson & Mihnea Moldoveanu, The Power of Predictability, Harvard Business Review July-August 1995, at 141.

[94] Jane C. Murphy, supra note 71 at 210.

[95] "If the parties disagree about alimony, the judge's decision will likely be based on a combination of the application of vague guidelines and deeply held personal values." Judith G. McMullen, supra note 47 at 57.

[96] Under Massachusetts law, when a divorce agreement is "merged" into a judgment of divorce, its terms are incorporated into the judgment and may be changed under certain circumstances by a later court using its equitable power. See *Parrish v. Parrish*, 30 Mass.App.Ct. 78, 83 (1991).

[97] A merged agreement can be modified by the later court only if the spouse seeking modification can show a "material change of circumstances since the time the agreement was entered." *Chin v. Merriot*, 470 Mass. 527, 534-535 (2015); *Bercume v. Bercume*, 428 Mass. 635, 641 (1999).

[98] Rebecca Aviel, supra note 47 at 2025, quoting Joan D. Wexler, Rethinking the Modification of Child Custody Decrees, 94 Yale L.J. 757, 762 (1985).

law by ignoring the member's divorce agreement in place for 15 years that unambiguously addressed the claimed reasons for the modification.

There are strong public policy reasons for the court to uphold divorce agreements: it encourages settlement between parties without court involvement, and it furthers the important public policy to "impose a measure of predictability on the financial arrangements between parties to a divorce."[99] The predictability of financial agreements is especially critical for caregivers, the majority of whom are women, because of the detrimental economic impact on a parent who leaves the workforce to accept caregiving responsibilities as explained in the next section of this report.

In the above modification action, the judge proceeded to substantially reduce child support, expressly finding that it was in "the child's best interest" for the child to live in her pre-divorce lifestyle. The judge ignored the uncontroverted fact that the non-custodial father's post-divorce income and lifestyle were much greater since the divorce 15 years earlier. In making this unusual decision, the judge did not cite any Massachusetts precedent where a court allowed child support to decrease when the non-custodial parent's income had increased.

In determining the child's "needs," the judge decided not to apply case-law precedent that "children's needs are to be defined, at least in part, by their parents' standard of living and that children are entitled to participate in the noncustodial parent's higher standard of living when available resources permit."[100] This case law is mirrored by the Child Support Guideline "to provide the standard of living the child would have enjoyed had the family been intact."[101]

Family Court rulings that do not stay within the guardrails of Massachusetts case law and which lack a prioritized set of factors result in highly unpredictable outcomes. This wide discretionary power given to the Court encourages litigation and favors wealthier parties who can afford to take the risk, and it allows the Family Court to be used by parties for purposes other than to achieve equity and justice. Indeed, the overwhelming majority of cases filed in Family Court are modifications and contempts.[102]

In summary, an unbridled exercise of discretion which is supposed to lead to equitable results, often does the opposite. The results are inconsistency, unpredictability, and harm to children. Regularity and consistency must be the standard if the goal is to serve the best interest of the children. [103]

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[99] *Huddleston v. Huddleston*, 51 Mass.App.Ct. 563, 570, n. 11 (2001). See *Bercume*, supra note 97 at 644 ("a modified judgment should take into account the earlier, expressed desires of the parties.")
[100] *Brooks*, supra note 92 at 737.
[101] 2021 Massachusetts Child Support Guidelines at 3.
[102] Massachusetts Trial Court, Probate and Family Court Filings FY 2021, Department of Research and Planning.
[103] Rebecca Aviel, supra note 47 at 2026.

C. Unchecked Discretion

An appeal is the only way to correct a Family Court error of abuse of discretion. However, in addition to the well-known fact that the overwhelming majority of cases settle before a trial, an appeal is out of reach for most Court users. This is a barrier to access justice.

The appellate process is accessible to very few users

(i) The process is too costly

With the astronomical costs of legal representation at the trial level, an appeal is simply not an option for most parties. The FY20 Trial Court Data published in the 2020 Annual Report makes this abundantly clear. Although the Probate and Family Court had the most filings of any of the trial departments (113,863), only 100 appeals were filed (and this number includes appeals of probate decisions, i.e., non-family law matters). This equates to less than 0.1%. Our members' experience mirrors this data. Very few members were able to endure the protracted time and expense of a Family Court action through trial, and even fewer could afford to go beyond trial to an appeal.

(ii) The process is too complex for pro se parties

Without an attorney on appeal, the likelihood of accessing an appeal and succeeding on appeal is even lower. The Court's technical rules laid out in the Massachusetts Rules of Appellate Procedure are so intricate and demanding in form that a party without a lawyer is at a great disadvantage—even lawyers have difficulty complying with these rules.[104] It is unfathomable how an unrepresented party be expected to do the same.[105]

The limited access to an appeal has extraordinarily damaging consequences to our justice system. As the investigators found in the Harmony Montgomery custody case where the judge in Juvenile Court erred in applying the law:

> *"Although [the Judge's interpretation of the law] was not in line with the caselaw in Massachusetts, and although the Judge chose to apply caselaw from another state, without an appeal of the Judge's decision there is no legal ruling that the Judge was incorrect in their application of the constitution to this case.*[106]

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[104] Even the lawyers in *Cavanagh*, supra note 73, inadvertently did not meet the appellate rules' exacting requirements. Id. at 404.

[105] In fact, it is likely that the only reason the Supreme Judicial Court was able to finally resolve the decade-long confusion in the Family Court over the concurrent order of alimony and child support is that appellant in *Cavanagh* was represented by pro bono counsel. Lynn Cavanagh, who is the caregiver and financially weaker party, was fortunate to obtain pro bono representation after her previous counsel withdrew on the eve of trial because of the Family Court's refusal to advance attorney's fees pendente lite. Brief for the Appellant at 5 and 11.

[106] 2022 Massachusetts Child Advocate Investigative Report supra note 7 at 50.

The lack of an appeal had tragic consequences in Harmony's case.[107]

Accordingly, the belief that the Family Court does not need oversight or reform because the appellate process provides an avenue to correct any misuse of discretion does not reflect the fact that an appeal is out of reach of the vast majority of Family Court users.

The extraordinary high standards of review make a successful appeal unlikely

Even if a party can afford an appeal, matters decided within the discretion of a Family Court judge will be overturned only if the appellant can meet the extraordinarily high standard of "abuse of discretion."[108] "[A] judge's discretionary decision constitutes an abuse of discretion where the appellate court concludes the judge made "a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives."[109] The appellate court gives much deference to the judge as factfinder. "We defer to the judge's evaluation of the evidence presented at trial and will disturb his factual findings as to such change only if clearly erroneous."[110] Even where the Family Court fails to articulate facts in support of its decision, an appellate court has stepped in to provide them.

The bar to appeal is even higher at the Supreme Judicial Court, the highest court in Massachusetts, because its screening process is limiting. It only accepts requests for appellate review "upon substantial reasons affecting the public interest or the interests of justice."[111] According to the Court's 2021 data, only 10 of the 786 petitions for requests for appellate review were accepted. The 786 petitions came from all departments of the Trial Court, not just the Probate and Family court.[112] It is clear that the vast majority of appeals from the Family Court and Appeals Court decisions are denied review by the Supreme Judicial Court regardless of whether they constitute errors of law or abuse of discretion.

In summary, multiple factors come together to make it very difficult to correct decisions through an appeal. The Family Court's discretionary power is so broad, the standards and factors the judges apply are so subjective and unprioritized, legal costs of appeal are so great, and the bar for a successful appeal is so high. As one scholar recognized: "As a practical matter, life-altering decisions such as where children live, how they will be supported, and how property will be divided rests in the near absolute discretion of the judge, whose decision is seldom upset on appeal."[113]

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[107] Laura Crimaldi & Dugan Arnet, Missing Girl Harmony Montgomery is Dead, Authorities Say**,** Boston Globe August 11, 2022.
[108] Cavanagh, supra note 73 at 405.
[109] *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014), quoting *Picciotto v. Continental Cas. Co*., 512 F.3d 9, 15 (1st Cir. 2008).
[110] See *Canisius v. Morgenstern*, 87 Mass.App.Ct. 759, 770 (2015).
[111] Rule 27.1 of the Massachusetts Rules of Appellate Procedure.
[112] Massachusetts Supreme Judicial Court Case Statistics.
[113] Jane C. Murphy, supra note 71 at 214-15.

No public accountability or oversight of judicial discretion

Finally, there are few data available regarding Family Court decisions. There are no available data analyzing judicial decisions by judge or assessing which factors are relied upon in making critical economic decisions for Massachusetts families. The lack of data does not promote consistency, transparency, or public accountability.

GENDER BIAS AND STEREOTYPING

Four decades ago, the 1986 SJC Gender Bias Study Committee concluded in its report that:

> *Gender bias exists in many forms throughout the Massachusetts court system…. [M]any practices and procedures exist that **may not appear motivated by bias but nonetheless produce biased results**.*[114] [Emphasis added]

The Committee urged that "[t]he court system must examine its role in continuing and contributing to gender bias, and it must work to correct the problems that exist."[115] They petitioned the Supreme Judicial Court to appoint a standing Commission to Eliminate Gender Bias in the Courts, and they set forth its specific duties and responsibilities:

> ***"This Commission will monitor recommendations contained in this report and formulate guidelines, standards, and procedures needed to implement them. The Commission will foster educational efforts for the bar, judiciary, court employees, and the public, and it will work in cooperation with any other organization or department that is pursuing the goal of eliminating gender bias."*** [116]

Despite this strong, focused call to action and several subsequent attempts at reform, many of the problems identified in the 1986 SJC Gender Bias Study Committee's report still exist in the family law system today. Earlier this year, former Massachusetts Trial Court Chief Justice Paula Carey stated:

> *"The Trial Court began its intentional journey to address issues related to diversity, equity, and inclusion in 2013, after a survey reflected that judges of color and **female** judges had been treated differently based upon their race or **gender**. In examining these issues, **we now understand that disparities did exist,** and this conclusion led to the reflection that, if judges experienced this treatment, our employees and **court users** were likely having similar experiences."* [117] [Emphasis added]

It is widely accepted that "gender bias exists when men or women as a group can be subjected to a legal rule, policy or practice which produce worse results for them than for the other group."[118] Based on our members' experiences, it is clear that gender bias, however unintentional, continues to exist today. Three of the issues described in this report – the high cost of legal representation, misuse of the legal system without consequence, and unbounded

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[114] 1986 SJC Gender Bias Study Committee Report, supra note 2 at 745.
[115] Id. at 746.
[116] Id.
[117] Chief Justice Paula M. Carey, Going Beyond Equality and Striving Toward Equity: Addressing Systemic Racism and Bias in the Courts, Boston Bar J., DEI Special Edition (June 14, 2022).
[118] Maryland Special Joint Committee, Gender Bias in the Courts, May 1989 p. iii.

and unchecked judicial discretion – disproportionately harm women, the majority of whom are caregivers.

The disproportionate harm to women aligns with the 1986 SJC Gender Bias Study Committee's findings and its description of how gender bias appears in the Massachusetts judicial system:

> *"We found gender bias to be in operation when decisions made, or actions taken were based on preconceived or stereotypical notions about the nature, role, or capacity of men and women.* ***We observed the effect of myths and misconceptions about the economic and social realities of men's and women's lives and about the relative value of their work.***"[119] [Emphasis added]

Four decades later, women are still experiencing the problems identified in the 1986 Committee's report and the detrimental effects of these "myths and misconceptions about the economic and social realities of men's and women's lives and about the relative value of their work."

A. Myths and misconceptions about the economic realities

(i) Economic consequences of a caregiving parent post-divorce

Many members, the majority of whom are or were primary caregivers, find that their economic position post-divorce is ultimately significantly lower than the non-caregivers' position. Their experience aligns with national and international data[120] that the non-custodial and/or financially superior parties (the majority of whom are men) eventually recover from the financial consequences of a divorce and that their overall financial position will far exceed the primary custodial parent's position (the majority of whom are women). Although it is well established under Massachusetts law that caregivers should be able to live at their pre-divorce lifestyle where funds permit,[121] that is not the post-divorce reality of many caregivers. Primary caregivers ultimately fare far worse financially post-divorce than their former spouses.

The reason for this disparity is that there is a continuing misconception about the economic reality of caregivers when determining the amount of support. In most marriages, earnings capacity is the greatest asset. When a couple decides that one parent should be primarily responsible for child-rearing, even for a few years, that parent's financial future is impacted

[119] 1986 SJC Gender Bias Study Committee Report, supra note 2 at 745.
[120] Lin & Brown, supra note 9 at 2073.
[121] *Young*, supra note 10 at 6-7.

negatively.[122] The longer the caregiving parent is away from a career, the greater the impact.[123] If the parents later divorce, the caregiver faces almost insurmountable financial obstacles:

- They are unable to re-enter the job market in their previous or similar career on the same wage trajectory.
- The longer they are out of the workforce and the older they are, the fewer equivalent job opportunities are available.
- They experience a lifelong loss of income and retirement savings due to time out of the workforce.
- Even though a divorcing couple may divide assets equally, the party with the higher earnings capability is able to replace some or all of those assets over time, while the caregiving parent could be liquidating assets from Day One just to pay for basic needs.[124]
- The unrestrained legal costs of a divorce can financially devastate the caregiving parent, especially if their ex-spouse uses obstructionist tactics in court (as explained earlier in this report).

Together, these factors produce a detrimental economic outcome exclusively for parents that accept the caregiving role. Post-divorce, those parents face a severely diminished income, as well as an overall lifestyle decrease for them and their children unless adequate support is ordered. Since most parties that accept the caregiving role are women, women are disproportionately affected.

(ii) Saving as a "need"

A factor negatively impacting a caregiver's ability to recover financially from divorce is that savings is not legitimized as a "need" for support in Massachusetts. Several states consider savings as a living expense in appropriate cases, such as where saving was part of the couple's

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[122] The researchers in Yavorsky, et.al., The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood, J Marriage Fam. 2015 Jun; 77(3): 662–679 found that rearing children tends to interfere with women's, but not men's, labor supply and investment in their human capital. Mothers are much more likely than fathers to drop out of the labor force, cut back to part-time employment, take less-demanding jobs, choose occupations that are more family-friendly, or pass up promotions due to their caregiving responsibilities—all of which affect their current and future wage trajectories. We saw this play out recently during the pandemic when many women, for the good of the family, had to leave their careers to provide necessary childcare to their children. National Women's Law Center, All of the Jobs Lost in December Were Women's Jobs, January 2021 Fact Sheet.

[123] The decision of a parent to stay home for a period of time comes with a huge cost. That parent forfeits or reduces their lifetime earnings, reduces the amount saved in a 401(k) plan, and pauses contributions to social security. The longer that parent is out of the workforce, the more severe the long-term effects are on their earnings. The study estimates that a 26-year-old woman who is earning $30,000 and takes off five years to provide unpaid childcare for her family is losing $482,000 over the course of her career—a 19% reduction in her lifetime earnings If the same woman took 10 years off her career to focus on unpaid childcare for her family, she forfeits a whopping $826,000. Madowitz, Rowell, and Hamm, Calculating the Hidden Cost of Interrupting a Career for Child Care, Center for American Progress, June 21, 2016.

[124] Our members' experiences align with several studies that statistically prove that the financial impact of a divorce is typically less severe for men than for women. Indeed, the U.S. Government Accountability Office found that men's household income fell by just 23% after divorcing past the age of 50 while the women's household income fell by 41% after separating past the age of 50. Lin & Brown, supra note 9 at 2073.

pre-divorce lifestyle.[125] As one court noted, "There is no demonstrable difference between one family's habitual use of its income to fund savings and another family's use of its income to regularly purchase luxury cars or enjoy extravagant vacations."[126] By legitimizing savings as a need, these courts are promoting the public policy of savings "which benefits both the individuals concerned, and society as a whole."[127] They also recognize that a supporting spouse requires savings "in the event of disaster, to make future major acquisitions such as automobiles and appliances, and for retirement."[128] The fact that future alimony payments are protected by life insurance or other financial tools "does not make the consideration of the savings component any less appropriate."[129] Savings is not a replacement of income but rather a legitimate living expense where there is an ability to pay in appropriate cases.

In contrast to these states, Massachusetts is silent on the issue of whether savings is a component of "need" for spousal support. There is no line item for savings on the Family Court's Financial Statement that parties are required to complete in a divorce or modification action. Many members report that their attorneys did not counsel them to list savings as a living expense on the Financial Statement. One member, a full-time caregiver at the higher end of the economic ladder, tells us that her ability to save support to contribute to her children's future education needs was used against her to in a modification action to decrease support.

Savings is a valid need for support in appropriate circumstances because:

- After a divorce, the non-custodial working parent has the opportunity to continue to accrue retirement savings, but the caregiver often does not. Even if the caregiver is able to return to work post-divorce while also providing caregiving duties, their savings potential is greatly diminished for reasons explained earlier in this section.
- Without including savings as a component of support, the caregiver will not be able to save for future large replacement needs (such as a car, a roof, and a furnace).
- Ultimately, the caregiver is forced to either forego an essential need or return to court for another costly, lengthy modification proceeding, which further burdens an already overburdened court. Indeed, modification and contempt claims comprise the bulk of the Family Court filings.[130]

The current system discourages caregivers from saving funds for future needs. An economically dependent party is counseled from the very beginning to "use it or lose it" even after their divorce. In other words, if you don't spend money, your "need" will be reduced. A member was actually admonished by her own counsel for keeping a budget. The family law system should be encouraging, not discouraging, parties to save and to spend wisely. As one court stated in

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[125] *Lombardi v. Lombardi*, 447 N.J. Super. 26, 29-30, 36 (App. Div. 2016); *In re Marriage of Drapeau*, 93 Cal.App.4th 1086, 1096-97 (Cal.Ct.App. 2001); *In re Marriage of Weibel*, 965 P.2d 126, 129-130 (Colo.App. 1998); *In re Marriage of Krupp*, 207 Ill.App.3d 779, 796 (Ill.App.Ct. 1990).

[126] *Lombardi*, supra note 125 at 39.

[127] *Drapeau*, supra note 125 at 1097-98.

[128] *Lombardi*, supra note 125, at 39 quoting *Weibel* supra note 126 at 129-30.

[129] Id. at 39.

[130] Probate and Family Court Departments Filings by Fiscal Year and Case Type.

upholding saving as a need, "In our view, a former spouse receiving maintenance, not the obligor, should be permitted to benefit from his or her frugality and should not be penalized for choosing a more austere lifestyle. If, as husband appears to argue, any frugality and reduction in lifestyle is to benefit the obligor, then there is no encouragement for the obligee to save or prepare for retirement."[131]

At a minimum, if savings were part of the lifestyle of the couple and the ex-spouse has the ability to pay, then savings should be considered a need for support and should not be a reason to reduce support at a later time. Since most parties needing support are women, women are disproportionately affected.

(iii) Alimony terminates at payor's retirement age

Another factor impacting a payee's ability to recover financially from a divorce is the 2011 Alimony Act's directive that alimony terminate at the payor's retirement age, even if the payor continues to work.[132] The termination of alimony to older payees goes against two national trends:

- Although the overall divorce rate in the United States is declining, divorce among people in their 50s and older is rising. The divorce rate has actually doubled for the over-50-age group according to 2014 research.[133]
- Research shows that among older women, those who are divorced have dramatically lower incomes and higher poverty rates than widows and most other Social Security beneficiaries. According to a study published by the Social Security Office of Retirement and Disability, 20 percent of divorced women over 65 live in poverty, compared with 13 percent of divorced men.[134]

Although the 2011 Alimony Act's retirement provision includes the possibility of receiving alimony post-retirement, it can only be ordered upon "good cause" shown, which is up to the wide discretion of the judge.[135] Without data, we do not know how many times "good cause" has been found by judges and what factors they relied on to determine "good cause." Based on our own research and informal survey of our members, we have yet to find a member's experience or published case that confirms that "good cause" was found by a Family Court judge.

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[131] *Weibel*, supra note 125 at 129.

[132] MG.L. c. 208, § 49 (f) provides: (f) Once issued, general term alimony orders shall terminate upon the payor attaining the full retirement age. The payor's ability to work beyond the full retirement age shall not be a reason to extend alimony, provided that: (1) When the court enters an initial alimony judgment, the court may set a different alimony termination date for good cause shown; provided, however, that in granting deviation, the court shall enter written findings of the reasons for deviation.

[133] Lin & Brown, supra note 9.

[134] Barbara A. Butrica & Karen E. Smith, The Retirement Prospects of Divorced Women, Social Security Bulletin Vol. 72, No. 1, 2012.

[135] MG.L. c. 208, § 49 (f), supra note 132.

A member tells us about her experience with the harshness of this no-alimony-after-retirement provision in the 2011 Alimony Act:

> *"I was the full-time caregiver in our family. I was 71 and my former husband was 67 when we divorced. We had been married for 13 years, and I was very much a part of working with him to build a business. Because of his age at the time of our divorce, I did not receive any alimony. I was told that Massachusetts law prohibits it—no alimony is awarded to a party if the payor is over 67. My lawyers argued that my ex was still capable of working, but his lawyers argued that there was no guarantee that he would still be working into his 70s. The judge ruled in favor of my ex, and I had to settle on only a 50/50 asset division. However, by the time we went through expensive discovery and valuation process, I received only 38 percent. My former husband, at age 70, continues to reap significant incomes from the business which I helped grow, and he lives a very lavish lifestyle. In contrast, I have had to spend down my assets to live. My lifestyle is nowhere near my pre-divorce lifestyle. It's not even in the same galaxy. The ability to take a trip, dine out, take lessons (educational, wellness, or otherwise) is grossly limited, and every day I worry about the safety of my savings, especially in light of recent market trends."*

Another member states her experience:

> *"I am 55 years old and have two children, ages 5 and 14. I stopped working during our marriage to be the full-time caregiver. I am highly unemployable in my previous career, both because of my age and gap in work history. My requests to the judge for 60/40 division of assets and equalization of legal fees have been denied despite their father's personal extravagant expenses and legal fees, which were more than double that of mine. I have had to spend down my assets to sustain our living during our separation and foresee continuing to do so in the future. While their father's lifestyle and quality of life have been greatly enhanced post-divorce, that of mine and the children's is severely compromised and limited."*

In long-term marriages, if a payor continues to earn income after age 67, the presumption should be that alimony continue or the economically dependent spouse receive a disproportionate share of the assets. Without a stream of income, a payee is forced to spend down whatever assets she has, while the payor, who is still working, does not. Since most parties seeking alimony are women, women are disproportionately affected.

B. Myths and misconceptions about the social realities of the parties

(i) Use of gender-based stereotypes

Nearly 20 years ago, then Chief Justice of the Supreme Judicial Court Margaret Marshall and then Chief Justice of the Trial Court Robert Mulligan presented to the bar the handbook, "*Within our Reach: Gender, Racial and Ethnic Equality in the Courts 2004*." With this handbook they reminded their colleagues that "[f]airness and equality are bedrock principles of our

constitutional democracy" and that "[b]ehavior manifesting bias or prejudice based on race, gender, . . . or socioeconomic status is inimical to our justice system and will not be tolerated in the courthouse."

Prominently featured in the handbook is this declaration**: "STEREOTYPES HAVE NO PLACE IN OUR TREATMENT OF PEOPLE OR IN THE HANDLING OF CASES."** The authors acknowledge the existence of implicit bias and urge the judiciary to not allow "deeply ingrained preconceptions" to color "our perceptions of individuals in the courtroom, our assessments of credibility, our fact finding, our decision making and our priorities. . . . For instance, **guard against any tendency to label female litigants as more troublesome or emotional than male litigants, or to regard cases typically brought by female litigants, such as child support enforcement, as less important than other cases."** [Emphasis added]

Despite this good-faith attempt to curb stereotypes and bias, members report stereotypical gender-based language and false narratives used against them without consequence. Such language and tactics promote the myths that a caregiver is a financial burden to the non-custodial parent, and that a female litigant acts out of emotion rather than reason.

One member, a non-practicing attorney and caregiver, describes the following passage in her ex-partner's appellate brief:

> *"My ex-partner described my appeal to the Appeals Court as 'little more than an attempt to vent her frustration with the judge's findings and reasoning;' and that 'the judge's failure to render a judgment to her liking and to issue the findings which she sought are not proper reasons to appeal, while the resulting impact on [father] (namely time, money and aggravation) is obvious." His brief went on to characterize my defense to the action that he brought against me as 'just the games spouses play in highly emotional, and ofttimes irrational, divorce situations,' quoting an old appellate case. As a former commercial litigator, I anticipated a rebuttal to my appeal based on caselaw and policy, not gender stereotypes. Gender-based claims and false narratives should not be allowed in court or in court filings, and such conduct should be sanctioned."*

Another member, also an attorney, explains her experience:

> *"I was in Family Court on a motion for reconsideration in my divorce action when opposing counsel started her argument by saying to the judge, "She's just mad when she doesn't get her way." The judge sat silent. I am an attorney and in every other court in which I've practiced, that level of unprofessionalism and personal attack would be addressed swiftly from the bench, especially one with even a whiff of gender bias. I was shocked throughout the multi-year divorce litigation at how little civility there was and by the glaring absence from the bench of upholding a culture of professionalism."*

And another member, also an attorney, reports:

> *"My ex-partner, acting pro se, filed for an 'emergency' hearing to try to stop my travel abroad (which was allowed by our orders). In the middle of his lengthy pontification, he pointed to me sitting at the defense table and went off on my looks for several minutes, discussing my weight, laziness, and whether or not other men might find me attractive. The judge did not cut him off."*

And another member's experience:

> *"I had a very robust career for several years before I got married; but after having three children in two years and moving four times for my husband's job, which required him to travel 75 percent of the time, we decided that I would take a step back from my career to be the caregiver. In settlement negotiations with my husband and his lawyer 18 years later, his lawyer told me that I should not get alimony because I did not put any "sweat equity" into the marriage. I was absolutely appalled that my value as a caregiver was even in question, much less given no value at all."*

(ii) Promotion of gender-based stereotypes in family law bar training materials

The promotion of gender-based myths and misconceptions also exists within the family law bar. For example, the biased example in the training materials of the Massachusetts Continuing Legal Education ("MCLE") "Trying Divorce Cases" program (October 2021)[136] promotes long-standing and outrageous gender stereotypes. The sample Husband's opposition to Wife's motion for attorney's fees after trial alleges:

- "The Wife is a spendthrift and has caused the parties to have substantial debt. Wife also spends extravagantly on herself on such frivolous services such as a holistic healer, yoga consultant, psychic past life channeler, herbal therapist, personal trainer, acupuncture and on and on"
- "The Wife has been unreasonably litigious in her unwavering effort to try and prove that the Husband earns more money or has more assets than he does"
- "The legal fees of litigation have been a further burden on the Husband's financial circumstances, and it is fair and equitable for Wife to share in this burden due to her excessive spending and her unreasonable litigiousness which have caused the Husband to incur substantial additional and unnecessary legal fees"

The MCLE training material furthers the stereotypical gender-based narrative that a caregiving wife is a financial burden to a payor-husband. The wife is described as a clichéd rapacious spendthrift, and her attempts at self-care (which include legitimate women-owned services such as yoga instruction and herbal therapy) are characterized as "frivolous." There were no reasons given in the husband's motion addressing the relevant issue of why the wife should not recover her attorney's fees given (i) the disparity in income between the two parties caused by

[136] MCLE Trying Divorce Cases (2019) at 94-95.

the caregiving role the wife accepted for the family; or (ii) the husband's refusal to provide documents that increased the wife's legal expenses. Instead, the husband argues, in essence, that the wife's financial burden to him should exonerate him from paying her attorney's fees.

There is nothing amusing or flip about the issues facing parties in Family Court for either gender. New lawyers should not be trained to showcase, make light of, or promote gender-based stereotypes or myths. Just like religion and race, gender should not be mocked or typecast. Promotion of gender stereotypes in training materials for family court attorneys should not be allowed.

As detailed extensively in this report, Massachusetts Family Court decisions, practices, and policies produce disproportionately harmful economic results to women and their children. In the words of the 1986 SJC Gender Bias Study Committee: "[t]he court system must examine its role in continuing and contributing to gender bias, and it must work to correct the problems that exist."[137]

[137] 1986 SJC Gender Bias Study Committee Report, supra note 2 at 746.

RECOMMENDATIONS

Respectfully, we urge the Court to adopt the following recommendations to promote efficiency and predictability in the Family Court and extend fundamental fairness and equity to Massachusetts' families. Each of the recommendations below helps court users to access justice. Strengthening access to justice requires reform, continual review, and public accountability.

We emphasize that none of these recommendations stand alone. For example, increasing the number of represented parties in Family Court without other reform will not solve the systemic problems—many members were represented by competent counsel, yet they and their children were still disproportionately harmed by the Family Court process. Only through comprehensive reform of the system will there be access to justice and equality for all.

I. Increase Family Court resources

1) Request the legislature for an increase in the number of Family Court judges.

2) Increase the number of support staff for the Family Court judiciary.

3) Request the Legislature for additional funding for better data collection and management.

II. Pursue methods to increase low-cost legal representation

1) Continue pursuing analysis and implement fee-shifting tools recommended in the 2017 Massachusetts Access to Attorneys Committee Report. (See Appendix 4 for a summary of the Committee's recommendations.)

2) Explore and support ways to increase pro bono/low-cost legal representation in Family Court as recommended by the 1986 SJC Gender Bias Study Committee.[138]

III. Enforce the pendente lite fees statute (M.G.L. c. 208, § 17)

1) Order pendente lite fees as recommended by the 2022 Access to Justice Fee Shifting Report. This provides equitable access to justice when one party earns significantly more and ensures the Court receives information from both parties directly from trained counsel, reduces the number of pro se parties, and shortens the legal process.

[138] **"The private bar and legal services organizations must devote more resources to representation of women in family law cases. Bar associations and legal services organizations should explore new sources of funding for this representation."** 1986 SJC Gender Bias Study Committee Report, supra note 2 at 767.

2) Create Pendente Lite Guidelines requiring pendente lite fees to be presumptive under certain circumstances. If the full amount of fees requested are not granted, then there should be findings of fact explaining why they were denied.

IV. Curb misuse by enforcing the financial contempt statute and delivering consequences

1) Order the reimbursement of all reasonable attorney's fees as directed by M.G.L. c. 215, § 34A in successful actions for financial contempts. This includes following the statute's requirements that:
    - The full amount of reasonable attorney's fees be awarded.
    - If less than the full amount is awarded, then findings of fact must be made explaining the reasons for the denial.

   This will mitigate harm to targeted parties and their children, curb the use of delay tactics, reduce the backlog of cases, and improve the public's confidence in the Family Court.

2) If obstructionist or abusive litigation tactics occur in an action, order the obstructionist party to pay the full amount of reasonable attorney's fees as soon as these tactics appear. This will send a clear message that these tactics will not be tolerated by the Court and will protect targeted parties and their children.

3) Sanction those who employ obstructionist tactics or "bankrupt-the-mom" strategies that are so detrimental to caregivers and their children.

4) Order additional sanctions against parties who repeatedly use obstructionist tactics:
    - Reimburse the targeted party for lost wages and other expenses caused by repeated court visits.
    - Order that no motions or petitions can be filed or that no court appearances may be scheduled without the Court's prior approval.
    - Deny continuance/adjournment requests for excessive or unnecessary delay.
    - Order the party obstructing discovery or delaying resolution to pay for any master fees.

5) Shut down any gender-based-stereotypical language and narratives immediately, and sanction parties and their attorneys that employ them in any part of the legal process (in court, pleadings, and negotiations).

6) Require findings of fact for the denial, allowance, or partial allowance of a party's motion for attorney's fees under any of the attorney's fees statutes (including M.G.L. c. 208, § 17, M.G.L. c. 208, § 38 and M.G.L. c. 215, § 34A) so

that parties have a clear understanding of the factors upon which the Court relies for its decision allowing or disallowing recovery of attorney's fees.

V. Implement mandatory legal education and bias training for Court, counsel, and users

1) Require consistent, mandatory education for judges, family law counsel, and court personnel (including case managers and probation officers). This will restore public confidence; communicate recent family law changes, best practices, professional obligations, and academic research; and allow for sharing of case studies.

   Suggested educational topics include:
   - Gender-based biases and stereotyping, explicit and implicit, including how stereotyped thinking manifests itself in decision-making, and ways for judges to spot or avoid gender-biased stereotypes, misconceptions, and narratives in court or in pleadings.
   - Biases against pro-se parties, explicit and implicit.
   - Rules of professional and ethical conduct for judges, lawyers, and clerks, including the new rules of civility and a condemnation of any "bankrupt-the-mom" strategy, and rules regarding the proper treatment of pro se parties.
   - Recent changes in family law, such as the 2022 *Cavanagh* decision and the 2021 revised Child Support Guidelines.
   - High-conflict personalities, coercive control, and abusive litigation[139] so that judges can quickly recognize and admonish these tactics that are so damaging to the Family Court system, targeted parties, and children.

2) Implement mandatory continuing legal education for all family law attorneys licensed to practice in Massachusetts.

   The ABA Model Rule for Minimum Continuing Legal Education recommends continuing legal education for all attorneys (see Appendix 7 and 8 for ABA letter and list of requirements by state). Massachusetts is one of only four states (the others are Maryland, Michigan, and South Dakota) that do not require ongoing continuing legal education for practicing attorneys. The other 46 states require annual education, and most require annual ethics education and implicit bias training.

[139] Several states have adopted abusive litigation laws prohibiting litigants from using abusive litigation tactics as a form of domestic violence. Massachusetts Bill H4149, An Act protecting survivors of domestic abuse from abusive litigation, was introduced in the last session and had the support of several non-profits, most notably Jane Doe. This bill, if passed, would have provided courts with a tool to curb abusive litigation and mitigate its harms. It is anticipated that the bill will be reintroduced in the next legislative session.

3) Require mandatory classes for court users immediately upon filing for divorce/modification/contempt action or voluntarily before filing. These classes would detail:
   - The rights of each party under the Alimony Reform Act of 2011 and the Child Support Guidelines, including the fact that an award of both alimony and child support is available in appropriate cases.
   - The divorce process, including legal costs, mandatory disclosure documents, and instructions on how to prepare the required Financial Statement.
   - The penalties if a party obstructs or misuses the process to delay resolution or harms the other party.
   - The availability of the Department of Revenue as an alternative to Family Court. It is not widely known that a parent could apply for the services of the DOR to obtain, enforce, or change a child support order. This could save parties seeking child support the expense of legal representation. Further, unlike the Family Court, the DOR can collect past-due child support amounts, along with spousal support if a child support order is in place, and use enforcement methods such as suspending licenses, garnishing wages, and placing liens on properties.

VI. Improve data collection and implement analysis for predictability, accountability, and transparency

1) Implement continuous, mandatory data collection and analysis of Family Court decisions by individual judge, and share the results with the judiciary, lawmakers, academics, and groups representing users.

2) Track and analyze relevant data by party's characteristics such as gender, primary caregiver, payor, payee, income level, and self-representation (pro se). Examples of relevant data:
   - Dispositions of actions for child support, alimony, unallocated support, tuition, additional expenses not covered in child support, modifications, and contempts.
   - Dispositions of motions for pendente lite fees and attorney's fees.
   - Findings to support all dispositions above.
   - User satisfaction with the process.

3) Collect and track data comparing the financial positions of divorced parties, both post-divorce and post-emancipation of children, and analyze the results to assess whether support orders are equitable to both parties.

VII. Streamline the Family Court process

1) Create a magistrate or administrative position to manage and track cases. Similar to the recommendation by the 1995 Pro Se Committee Report,[140] magistrates would screen cases at the outset to help resolve/streamline issues in a timely manner. They could make initial orders and ensure that resolution of the case is not obstructed by parties or their counsel. The Court could look to the current magistrate system operating effectively in the federal court system as a model.

2) If working effectively, expand the current PATHWAYS pilot program of case management and direct that the case managers be part of the mandatory education and bias training.

3) Recommend the expansion of the Department of Revenue's authority under M.G.L. c. 119A to include the enforcement of stand-alone spousal support orders in addition to spousal support orders established with concurrent child support orders. This would definitely reduce the number of cases in Family Court.

4) Modernize the current Financial Statement form so that it comports with today's expenses and income categories and recent case law. Create a functional online form with clear instructions for all users to be able to complete independently.

5) Direct that the bulk of motions be heard virtually to enhance efficiency and decrease costs.

6) Long-term, simplify the Family Court process so that it is less complex, less adversarial, and more accessible to all users.

7) Utilize the latest software technology to streamline and improve the system for the Court, counsel, and parties.

VIII. Improve predictability and uniformity of decision-making

1) Ensure judges make specific written findings of fact (beyond, for example, the generalized term of "best interest of the child") for dispositions of all substantive matters including but not limited to child support, alimony, deviations from Child

[140] 1995 Pro Se Committee Report, Pro Se Litigants: The Challenge of the Future, April 8, 1995, at 26.

Support Guidelines, modifications, contempt proceedings, and attorney's fees motions.[141]

2) Adopt guidelines setting forth specific factors that judges must consider when exercising their judicial discretion and requiring that findings be made on each factor.

3) Establish clear and unambiguous guidelines for alimony and combined support including:

- Set presumptive percentages based on new tax laws (22 to 28 percent) and award the presumptive amount immediately as temporary orders.
- Create a presumptive directive that savings is a living expense for support when there are available funds and include savings as a living expense on the Financial Statement.
- Include a presumption that the "good cause" standard in the 2011 Alimony Act is met if a payor in a long-term marriage continues to earn income after age 67.
- Include a standard worksheet/app to perform the calculations required by the *Cavanagh* case and the estimated tax effects.
- Minimize the excessive scrutiny of the recipient's expenses and instead focus on the 2011 Alimony Act's presumptive parameters of 30-35% (22-28% after tax) of the difference in gross incomes as a presumptive floor and ceiling.[142]

The above recommendations will promote predictable outcomes, resulting in increased settlements, less legal costs, decreased burden on court resources, improved equal application of the law, and increased user confidence in the Family Court as a court to access justice.

IX. Implement checks and balances at trial level

1) Require motions for reconsideration[143] to be reviewed by another judicial officer to determine if there is a substantive error in the Court's order. It is our members' experience that motions for reconsideration are routinely denied unless they involve a mathematical or clerical error. Since an appeal is unrealistic for the vast majority of users, there should be a second look where substantive errors are alleged and can be corrected at the trial level. This process would

[141] See *Freedman v. Freedman*, 49 Mass.App.Ct. 519, 521 (2000) (judge's action must be supported by findings of fact); *Fechtor v. Fechtor*, 26 Mass.App.Ct. 859, 861 (1989) (findings must make apparent the reasons for the judge's conclusions).
[142] See *Young*, supra note 10 at 10.
[143] See Mass.R.Dom.P. 60.

improve consistency in the application of statutes, case law, and judicial guidelines.

2) Require judges to include the calculations behind the alimony and child support orders, which should be based on the calculations required by *Cavanagh*.[144]

X. Improve diversity, equity, and inclusion

1) Establish an ombudsperson position to help court users resolve concerns in real time; and to help ensure that the court process is free of bias and is operating in compliance with statutes, case law, guidelines, and rules.

2) Establish an entity, or subcommittee within an existing entity, composed of a diverse group of stakeholders that is specifically focused on working to eliminate gender bias in the family law system.

3) Require any task force empowered to draft guidelines be composed of key stakeholders including representative users of the Family Court.

4) Require professionals trained in gender bias to audit MCLE and all other lawyer-training materials/programs to ensure that they are free from gender-based stereotypes and include a balanced presentation of advocacy of both parties' perspectives. Eliminate training materials that contain gender-based stereotypes.

[144] *Cavanagh*, supra note 73 at 410-11 ("Compare the base award and tax consequences of the order that would result from the calculations in step (1) with those of the order that would result from the calculations in step (2), above. The judge should then determine which order would be the most equitable for the family before the court, considering the mandatory statutory factors set forth in G. L. c. 208, § 53 (a), and the public policy that children be supported as completely as possible by their parents' resources, G. L. c. 208, § 28, and determine which order to issue accordingly. Where the judge chooses to issue an order pursuant to the calculations in step (2) or otherwise that does not include any award of alimony, the judge must articulate why such an order is warranted in light of the statutory factors set forth in § 53 (a). *Zaleski*, 469 Mass. at 236, citing *Rice*, 372 Mass. At 401.")

APPENDICES TABLE OF CONTENTS

MASS FAMILY ADVOCACY COALITION
Making Family Court Better for All

Appendix 1: Pro Bono Service Help Survey from the Massachusetts Family Court
(Organized by greatest number of 2021 case filings)

JDW Email sent to all Court Houses (JDW) 6/1/22:

"I am trying to get information on the availability of pro bono assistance at the courthouse. Does your court have an information desk or a lawyer for the day? I am specifically looking for family court guidance in my divorce.
I looked online and was directed to ask the specific court directly about the services offered.
Your help is greatly appreciated!
Thanks,"

1. MIDDLESEX County
2021 Probate and Family Court New Case Filings: 19,642

Response:
"There is a Lowell Court service center in Lowell at 370 Jackson St. Lowell, Ma and you can also Zoom them between 9am and 12Noon M-F @ lowellcsc@jud.state.ma.us"

JDW:
"Thanks, is this a lawyer I could talk to? Not sure what a court service center is - is it just information or can I speak to a lawyer?"

Response:
"They are lawyers "

JDW:
"Thanks I can't tell from the web site are there income requirements? not sure I qualify."

Response:
"The court service center cannot give any legal advice but can help you fill out paperwork. There is a Lawyer for the day in Woburn this month and this is when they will be in this month June 13th, 14th, 15th, 21st, and 22nd from 9-1. It is based on your income. Below are the income qualifications:

125% of Current Poverty Guidelines Applicable under G. L. c. 261, § 27A
Size of Family Unit
1 $16,100

2 $21,775
3 $27,450
4 $33,125
5 $38,800
6 $44,475
7 $50,150
8 $55,825
For each additional member of the family unit in excess of 8, add $5,675."

From the Website:

Middlesex Probate and Family Court lawyer for the day

- Get basic legal advice, help understanding laws and your rights, and assistance filling out forms

Notice

- Lawyer for the day is currently unavailable in person. For additional information and registry assistance, please visit the virtual registry.

Days and Times

- Monday, Thursday & Friday from 9 am-1 pm
- First-come, first-served

Location

- Family Law Information Center on the first floor. The center is on the right after the security check point

Eligibility

- Must qualify as low-income

Services

- Selecting and completing court forms; legal advice and information

Other Information

- Does not assist with probate matters (some exceptions apply)

Coordinated by the Family Law Information Center: (617) 768-5800

2. **Worcester County**:

2021 Probate and Family Court New Case Filings: 14,237

Response:

No written response, just an attachment of the following

Virtual Court Service Center
Emergency Assistance

Monday – Friday - 9:00 a.m. to 12:00 p.m.

Due to COVID-19, the Court Service Centers (CSCs) are providing assistance with **emergency cases**. If you have safety, family or housing issues, the CSCs can help you with:

- legal information about your options,
- filling-out court forms, and
- connecting you to community or legal resources.

GETTING HELP

STEP 1: Do I have an emergency?

Here is a list of cases we are helping with:

Safety concerns

- Domestic violence or harassment
- Loved ones in crisis due to mental health or substance use

Family issues

- Emergency Guardianship
- Emergency Custody
- Emergency Parenting time/Visitation
- Modification of Child support

Housing issues

- Lockouts, forced eviction, utility shut-off, severe harassment, serious health violations or destruction of property
- If you had a default or dismissal issued since March 1, 2020

STEP 2: Get ready

A. Gather basic information such as:
   - **Who**: names and addresses of the people involved
   - **What:** quick summary of what you want/what happened
   - **When**: important dates and times

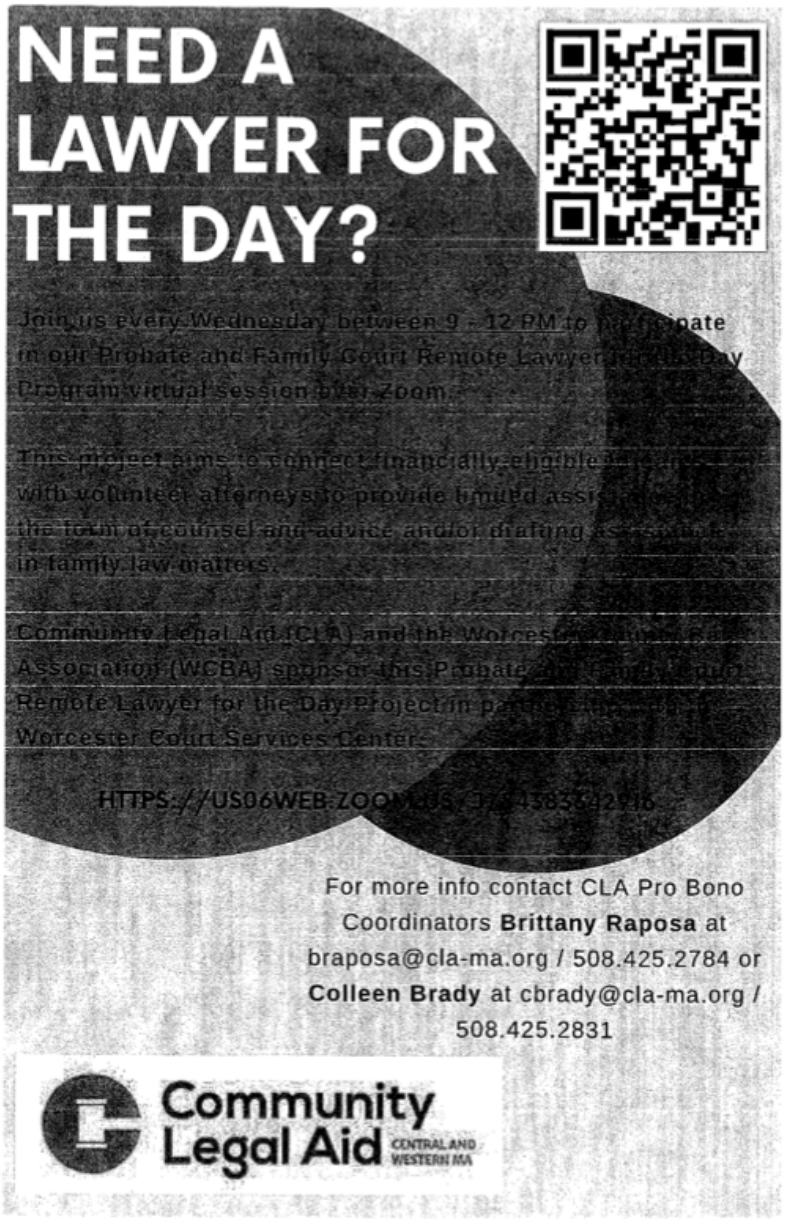
B. Gather important documents related to your situation. Click here for a list of the documents you need before calling.

C. Do you **already have a case** in court about this issue? If you do, please provide:
   - **case number(s)** OR the **full names** of each person in the case, and
   - a copy of the last order or judgment in the case, if you have it.

Worcester County, cont:

JDW:
"Thank you - so to confirm is the service center for emergencies only regarding family court issues? You do not have any lawyer for the day or any other services that are non-emergency?"

Response:
"We also have a lawyer of the day program that is only available Wednesday 9-12. I've attached a copy of the flyer. Unfortunately, when scanned in it came out really dark, you can still see the QR code and phone number at the bottom. As soon as we can send over a cleaner copy we will do so."



From the Website:

Worcester Probate and Family Court lawyer for the day

- Get basic legal advice, help understanding laws and your rights, and assistance filling out forms

Days and Times

- Wednesdays, 9 a.m.-1 p.m.
- First-come, first-served

Location

- 1st floor of the Worcester Trial Court

Eligibility

- Must qualify as low-income
- Sign up on list and fill out an “Income Eligible Form”

Services

- Legal advice and guidance; answer case-related questions; discuss legal options and strategy; assist drafting pleadings and court forms

Other Information

- Coordinated by Community Legal Aid: (508) 755-3260 and the Central West Justice Center: (508) 425-2886

3. <u>Essex County:</u>
2021 Probate and Family Court New Case Filings: 13,242

<u>Response</u>:
"We do not have pro bono attorney's that we can recommend. For information on Attorney's that may take on a case pro bono or for a discounted rate you should contact the Essex Bar Association. We do have an Attorney of the Day program every Monday, Tuesday & Thursday from 10AM-12PM. This service is based on your income eligibility, and it is a first come first serve service. This is available on our Zoom Virtual Registry. Other resources that are available is the Court Service Center which is located at our Satellite Location at Lawrence District Court.

I have attached an Affidavit of Indigency Packet. The Poverty Guidelines that are on the front are what we also use and reference to see if you are Income Eligible to meet with the Attorney of the Day. It is based on the size of your household and the yearly income."

Affidavit of Indigency

125% of Current Poverty Guidelines Applicable under G. L. c. 261, § 27A

Size of Family Unit	125% of Poverty Guidelines
1	$15,612.50
2	$21,137.50
3	$26,662.50
4	$32,187.50
5	$37,712.50
6	$43,237.50
7	$48,762.50
8	$54, 287.50

For family units with more than 8 members, add $5,525 for each additional member.

Please inform the appropriate personnel, as soon as possible, of the existence of these standards which are to be used with the affidavit of indigency until new standards are published next year. Also, please note that pursuant to S.J.C. Rule 3:10, § 1(h)(ii), as amended, effective November 1, 2016, this poverty standard applies to appointment of counsel for indigents.

4. Bristol County

2021 Probate and Family Court New Case Filings: 10,199

Response:

No written response, just a link to website with information below:

Bristol County Probate and Family Court Virtual Lawyer of the Day program will be available:
June 7th, 2022 :: 9:30pm to 11:30am ~ In Person ~ Fall River Only & Virtual :: 2:00pm to 4:00pm
June 9th, 2022 :: 9:30pm to 11:30am
June 17th, 2022 :: 9:30pm to 11:30am
June 21st, 2022 :: 9:30pm to 11:30am ~ In Person ~ Fall River Only
June 24th, 2022 :: 2:00pm to 4:00pm
June 27th, 2022 :: 9:30pm to 11:30am
June 28th, 2022 :: 2:00pm to 4:00p
June 30th, 2022 :: 9:30pm to 11:30am
July 7th, 2022 :: 9:30pm to 11:30am
July 11th, 2022 :: 9:30pm to 11:30am
July 22nd, 2022 :: 9:30pm to 11:30am
July 13th, 2022 :: 2:00pm to 4:00pm (Probate Case Types Only)
July 18th, 2022 :: 9:30pm to 11:30am
July 29th, 2022 :: 2:00pm to 4:00pm

Use this link to enter via zoom https://www.zoomgov.com/j/1612606196
Use this phone number and meeting ID to call in
Telephone Dial In :: 1-646-828-7666
Meeting ID :: 1612606196

The Volunteer Lawyer of the Day will assist pro se litigants understand the law and their rights. The Lawyer may also assist with forms. I am grateful to the Bristol County Bar Association for their assistance in getting this much needed program off the ground, without their investment of time this program does not happen

On 9/12/22 I revisited the web site and found the following updated information:

Bristol County Probate and Family Court Virtual Lawyer of the Day
program will be available:
September 8th, 2022 :: 2:00pm to 4:00pm
September 13th, 2022 :: 2:00pm to 4:00pm
September 14th, 2022 :: 2:00pm to 4:00pm (Probate Case Types Only)
September 15th, 2022 :: 2:00pm to 4:00pm
September 19th, 2022 :: 2:00pm to 4:00pm
September 21st, 2022 :: 9:30am to 11:30am ~ IN PERSON ONLY~ Fall River Location
September 22nd, 2022 :: 2:00pm to 4:00pm
September 29th, 2022 :: 2:00pm to 4:00pm

5. Suffolk County

2021 Probate and Family Court New Case Filings: 10,024

Response:

No written response.

I found on the website:

> The Family Law and Guardianship clinics provided by the Volunteer Lawyers Project are now taking place in a hybrid model. In person clinics will be every 1st and 3rd Wednesday of the month and every 2nd and 4th Wednesday of the month clinics will be virtually via the Zoom platform. To sign up for these clinics please contact the Eastern Region Legal Intake line at 617-603-1700.
>
> Days and Times
> 1st and 3rd Wednesday of the month from 9:00am – 2:00pm
> 2nd and 4th Wednesday of the month from 9:30am – 1:00pm via Zoom
>
> Location for In Person clinics
> Court Service Center, 2nd Floor of the Edward W. Brooke Courthouse
>
> By Appointment only. For additional information please contact Eastern Region Legal Intake (ERLI) at 617-603-1700
>
> Eligibility
> Must qualify as low-income
> Must be a legal permanent resident or citizen and bring proof
>
> Services
> Answer case-related questions; discuss legal options and strategy; help fill out court forms; drafting pleadings
>
> Other Information
> Coordinated by the Volunteer Lawyers Project (VLP): (617) 423-0648
>
> If you are in need of legal information or help filling out court forms, please visit the Virtual Court Service Centers to see if they can help you.
>
> Virtual Court Service Center
> Court Service Centers are operating a hybrid service model that includes in-person and remote services.

Court Service Center locations provide in-person services on Tuesdays and Thursdays with priority given to emergency cases, and remote services on Monday, Wednesday, and Friday.

The Virtual Court Service Center will continue to be available Monday through Friday via Zoom video conferencing software for both emergency, and non-emergency matters.

Court Service Centers CAN provide:

- One-on-one help filling out court forms
- Information about court rules, procedures, and practices
- Court documents and written instructions
- Access to interpreter services
- Contact information for community resources, legal assistance programs, and social service agencies

Court Service Centers CANNOT provide:

- Legal advice
- Represent you in court
- Assist you if you have a lawyer

To connect with the Virtual Court Service Center, you can join the daily Zoom Meeting to receive help with legal information, court forms, and referrals to legal and community-based organizations. Before you call, please learn what information you will need to receive assistance.
Here is how you can join the Virtual Court Service Center through Zoom:
Via videoconference: https://www.zoomgov.com/j/1615261140
Via phone: dial (646) 828-7666. Enter Meeting ID 1615261140 then press # #
The Virtual Court Service Center is open from 9:00 a.m. to 12:00 p.m. from Monday through Friday. After 12:00 p.m.,

Which types of cases are being given priority for in-person services?
The Court Service Centers are giving priority to the following types of cases for in-person services:

- 209A Abuse Prevention Orders (restraining orders)
- 258E Harassment Prevention Orders
- Commitments (Section 35 and 12)
- Emergency Guardianship of an Incapacitated Person
- Emergency Guardianship of Minor
- Emergency Probate and Family Court filings relating to custody/parenting time/child support
- Emergency Modifications of Child Support (varies by county)
- Answer and Discovery forms for eviction complaints
- Housing Temporary Restraining Orders

- Housing motions to vacate default entered since March 1, 2020
- Housing motions to vacate a dismissal for failure to appear entered since March 1, 2020
- Housing motions to stay an execution

6. Norfolk County:

2021 Probate and Family Court New Case Filings: 9,481

1. Emailed Norfolk county court house

Response: Auto Reply:

"Thank you for contacting the Norfolk Probate and Family Court. The best way to reach us is through our Virtual Registry which is open 8:30am to 1:00pm M-F. Thank you."

I clicked the link:

"The Virtual Registry uses Zoom video conference. Customers can connect and handle business directly with registry staff online by clicking this link: https://www.zoomgov.com/j/1617846497"

I clicked the zoom link at 11:50am 9/12.22. 10 minutes later I was connected to someone that said that they no longer offer Lawyer for the Day because lawyers are not signing up for it, so they can't offer it.

I was given a court service center zoom number 646-82807666 ID 1615261140. I was told that lawyers manned this service center and that I could call and ask case related questions.

The CSC is open M-F 9-12.

I found on the website:

Norfolk Probate and Family Court lawyer for the day

- Get basic legal advice, help understanding laws and your rights, and assistance filling out forms

Days and Times:

- Monday through Friday from 8:30 am-3 pm (sporadic)
- First-come, first-served.

Location:

- Norfolk Probate and Family Court (outside the registry office)

Eligibility:

- No income requirements

Services

- Answer case-related questions; discuss legal options and strategy; help fill out court forms

2. Emailed the Bar Association of Norfolk County: admin@norfolkbarassn.org 9/12/22

"Hello -

Can you please provide details on your lawyer for the day program?

Is it in person only or can I access via zoom?

Is it every day or do I have to call ahead the day before to see if one will be available the next day?

Are there any income requirements?
I am specifically looking for family court guidance in my divorce - and need help regarding alimony and child support options.
Many thanks,"

Response: No response

From the website:
Norfolk Probate and Family Court Virtual Registry
Get virtual "face to face" help from the registry while staying safe at home.
Days and times
The Norfolk Probate and Family Court Virtual Registry operates from 8:30 a.m. to 1:00 p.m., Monday through Friday

Entering the Virtual Registry
The Virtual Registry uses Zoom video conference. Customers can connect and handle business directly with registry staff online by clicking this link:

https://www.zoomgov.com/j/1617846497

Please note: Once you click on the zoom link above, you will be directed to a virtual waiting room (similar to waiting in line). Once a staff member becomes available, they will let you in to the virtual registry to assist you.

You can also call in to the Virtual Registry by phone without using video:

Call in number: 1 (646) 828-7666
Meeting ID: 1617846497
Other information
If you have any questions about accessing the Virtual Registry, please contact the Norfolk Probate and Family Court at 781-830-1200.

7. Hamden County:
2021 Probate and Family Court New Case Filings: 9,318

Response: No written response to my email

I could not find any information available on the website

8. **Plymouth County:**
2021 Probate and Family Court New Case Filings: 8,606

Response: No written response to my email

I found on the website:

The Plymouth County Probate and Family Court addresses the needs of Plymouth County residents in matters of child support, divorce, probate of estates, guardianships, custody, visitation, abuse protection, changing your name and adoptions, to name a few. For any of these actions, you must file papers with this court in order to address your concerns. Some matters have a filing fee, others do not.
The Plymouth and Brockton court locations both offer assistance to self-represented litigants in various ways.
Plymouth

- Daily Attorney of the Day Program
- Guardianship Clinic every 1st & 3rd Wednesday afternoon
- Partnership with Greater Boston Legal Services Guardianship Training Sessions (check with Registry for dates)
- SAFEPLAN (Court Advocacy for survivors of Domestic Violence seeking Restraining Orders/Domestic Relations Protective Orders)
- Self-serve public access computers

Brockton

- Attorney of the Day Program many days of the month
- SAFPLAN (Court Advocacy for survivors of Domestic Violence seeking Restraining Orders/Domestic Relations Protective Orders)
- Court Service Center on 1st floor for assistance with forms, and interpreters, if available
- Notary Public located in courthouse
- Daily DOR Hours

Other Information:

- As noted elsewhere on this website, most matters which come before the court involve complex legal issues. The staff of our Court is prohibited from giving legal advice with respect to those issues. You are advised to consult an attorney for advice as to legal issues and consequences. Here are some resources for Legal Assistance and other related assistance.
- If you want to understand a little more about the Plymouth County Probate Court, what it does and how it operates, you can click on the link “What is Probate Court” to find out more information.
- For an explanation of some legal terms, click on “Common Legal Terms”.
- For helpful hints before going to court, click on “Ten Suggestions before you go to Court”.
- For an explanation of the Probation Department, who they are, what they do, and when you might need to go to that office at the Probate Court. This

information has been provided by Charles LoGiudice, former Chief Probation Officer, Plymouth County Probate and Family Court. “Special in depth information about the Probation Department”

- Here you can download Brochures and Pamphlets that will help you with further information. You will also find an Application for DOR services and a pamphlet that was contributed by the Massachusetts Department of Revenue regarding Paternity. More Helpful Information

The Lawyer of the Day Program is a program that provides indigent pro se litigants with legal assistance. The program is open in the Plymouth Courthouse and in the Brockton Courthouse most business days from 9:00 a.m. to 1:00 p.m. Attorneys volunteer their time to assist pro se litigants, but do not represent the litigants in court. The Court is grateful for the efforts of the many attorneys who participate in this extremely valuable program. **Barnstable County:**

2021 Probate and Family Court New Case Filings 5,356

Response:
“I have placed you on the lawyer of the day list for tomorrow. LOD's are no longer located at the court and you will receive a call from them tomorrow between the hours of 9am and 2pm.

Paulette Corriveau
Case Coordinator
Barnstable Probate and Family Court”

JDW:
“Thanks. My number is xxx-xxx-xxxx. Are LOD every day or just on Thursdays?”

Response:
“Mostly everyday but requests for one day are scheduled for the next day.”

Response:
I never received a call

9. Berkshire County:

2021 Probate and Family Court New Case Filings: 2,757

Response:
No written response to my email

No information available on its website that I could find at that time.

10. **Hampshire County**:
2021 Probate and Family Court New Case Filings: 2,135

Response:
"Thank you for your email. The Probate and Family Court does not offer pro bono representation, you could reach out to the Hampshire County Bar Association to see if they can offer you a list of local attorneys who might be willing to take on your case in that way. There is a service offered through our Court called Lawyer for the Day where you can sign up for a 30 minute meeting with an Attorney to ask any questions you might have on your case, however, this attorney will not represent you in your case. If you would like more information in regards to that service or to sign up please reach out to my colleague, Jenna, who can assist you further. Her direct phone is (413)587-8503 or you can email her at: jenna.martinez@jud.state.ma.us

Best,

Rebecca L. Smith
(she|her|hers)
Operations Supervisor | Hampshire Probate & Family Court
15 Atwood Drive | Northampton | MA | 01060
(413)587-5206 p | (413) 584-1132 "

11. Franklin County:
2021 Probate and Family Court New Case Filings: 1,344

Response:
"Unfortunately, we do not have a lawyer for the day program at the current time. However, we have an excellent resource here in the Court Service Center (CSC). The CSC can provide legal information (although not legal advice) and can assist with forms and paperwork. I have attached a referral.

For people looking for legal representation, we refer people to the Franklin County Bar Association, which maintains a list of attorneys who may be willing to offer lower cost or short term representation called LAR. Their number is 413-773-9839.
Community Legal Aid is our area's pro bono legal services provider- their website can be found here: https://communitylegal.org/contact/

If you have specific questions about court procedures, you can also feel free to call our Registry of Probate at 413-775-7464.

Alexa Flanders (she/her/hers)
Judicial Case Manager
Franklin Probate and Family Court"

Franklin County, cont.

Flyer attached to email:

GREENFIELD COURT SERVICE CENTER
HYBRID OPERATIONS- updated 4/14/22

In-person Services are offered on Tuesdays and Thursdays, only
8:30-1pm and 2pm-3:30pm

The services are walk-in, no appointment needed, with emergencies taking priority. It is helpful to contact us on a remote day to plan your in-person trip because many things can be handled remotely and/or may speed up the process when you arrive in-person.

Remote Services are offered on Mondays, Wednesdays and Fridays

Please contact us by emailing or leaving a voicemail message. (***only one contact is needed- no need for multiple messages/emails**):

Email us: greenfieldcsc@jud.state.ma.us
MUST include full name, telephone number with good times to call, the town you live in, the docket number, if known, who referred you, other people involved in the case (children) and the reason you are seeking help from the CSC.

OR

Leave a message on 413-775-7483:
MUST include full name (please spell last name), telephone number with good times to call, the town you live in, the docket number, if known, who referred you, other people involved in the case (children) and the reason you are seeking help.

PLEASE USE OUR STATEWIDE TRIAGE CENTER IF YOU NEED AN INTERPRETER, OR YOU HAVE NOT CONTACTED US BEFORE

Contact the CSC State Triage Center M-F 9am -12pm, which covers intakes for the statewide CSCs:

- by telephone- 1-646-828-7666, #, #, then enter Meeting ID: 161 526 1140
- by video- **https://www.zoomgov.com/j/1615261140**

Mgk: documents/calendarsandforms/CSCreferralslip-4-14-22

FOR EMERGENCIES (209A Restraining Orders, 258E Harassment Protection Orders, Section 35 Petitions, Guardianships, Emergency Custodies, Housing related emergencies, etc…)

When we are working remotely, Courthouse staff members and/or litigants should email us directly at greenfieldcsc@jud.state.ma.us

When we are on-site, send them directly to the CSC with the disclaimer that we are not available between 1-2pm.

If a litigant is in-person at the courthouse on a Monday, Wednesday, or Friday, they may use the CSC telephone, located just inside the CSC at the table or one of the computer stations in the CSC to sign onto their email and send an email, if that is helpful. There are also contacts for various community resources located in the CSC in the front.

Conditions of our assistance:

By seeking services from the Court Service Center ("CSC"), the litigant must not have their own attorney actively representing them and understands the following:
1. The CSC only provides legal information, ***not*** *legal advice*;
2. The CSC is not their attorney, so the communication isn't confidential; and
3. The CSC can provide assistance to both sides of a case.
4. Some things the CSC assists with includes legal process, procedure, forms, and referrals to community resources.

The CSC does ***NOT*** assist with: Adoptions, Conservatorships, Probates (except Voluntary Administration), Discovery, and complex litigation or matters requiring legal advice.

12. Nantucket County
2021 Probate and Family Court New Case Filings: 283

Response:
"We do offer Lawyer of the Day- However I am not sure when I have someone coming next, if you give me your phone number I can call you when I know and give you a time slot.
You can also go on Mass.gov and chat with a Law Librarian and they can answer questions.
There is also the court service center available M-F 9am to 12pm
This is available via zoom
http://www.zoomgov.com/j/1615261140
or by phone 646-828-7666 Meeting ID : 1615261140"

13. **Dukes County**
2021 Probate and Family Court New Case Filings: 429

Response:
"Dukes County does not provide pro bono services."

Appendix 2: Earnings Caps for Court Lawyer for the Day Access

Affidavit of Indigency

125% of Current Poverty Guidelines Applicable under G. L. c. 261, § 27A

Size of Family Unit	125% of Poverty Guidelines
1	$15,612.50
2	$21,137.50
3	$26,662.50
4	$32,187.50
5	$37,712.50
6	$43,237.50
7	$48,762.50
8	$54, 287.50

For family units with more than 8 members, add $5,525 for each additional member.

Please inform the appropriate personnel, as soon as possible, of the existence of these standards which are to be used with the affidavit of indigency until new standards are published next year. Also, please note that pursuant to S.J.C. Rule 3:10, § 1(h)(ii), as amended, effective November 1, 2016, this poverty standard applies to appointment of counsel for indigents.

Appendix 3: Past Attempt at Reform

1. *Gender Bias Study of the Court System in Massachusetts*
New England Law Review Spring 1990

Following the national effort in the 1980s to encourage state courts to set up permanent commissions with a goal to eliminate gender bias, in 1986, then Supreme Judicial Court Chief Justice Edward F. Hennessey appointed the Gender Bias Study Committee to determine the extent and nature of gender bias in the Massachusetts judiciary and to make recommendations to promote equal treatment of men and women. The resulting report, The Gender Bias Study of the Court System in Massachusetts (Gender Bias Study)[1] was published in the New England Law Review in 1990.

Executive Summary

The Massachusetts Gender Bias Study Committee concluded that "gender bias exists in many forms throughout the Massachusetts court system." Specifically,

> *We found gender bias to be in operation when decisions made, or actions taken were based on preconceived or stereotypical notions about the nature, role, or capacity of men and women. We observed the effect of myths and misconceptions about the economic and social realities of men's and women's lives and about the relative value of their work. Throughout this report the workings of bias are illustrated in statistical data, expert testimony, and first-hand accounts of people using the court system.*

In this report, the Gender Bias Study Committee determined the extent, nature, and consequences of gender bias in the judiciary and made recommendations to promote the fair and equal treatment of men and women. In addition, the Committee proposed to the Supreme Judicial Court the appointment of a Commission to Eliminate Gender Bias in the Courts. This Commission would be mandated to monitor recommendations contained in the Gender Bias Study and formulate guidelines, standards, and procedures needed to implement them. The Commission would also promote educational efforts for the bar, judiciary, court employees, and the public, and it would work in cooperation with any other organization or department in pursuit of the goal of eliminating gender bias.

Summary of Findings in the Gender Bias Study:

1. Mediation, as it is currently practiced in the probate court, disadvantages women because of their generally unequal bargaining power.
2. In accordance with trends seen in other states, our data indicate that women consistently experience a greater drop in standard of living after a divorce than do men.
3. The financial data gathered by the Committee show that, in fact, men's standard of living often improves after a divorce.

[1] Gender Bias Report, *supra* at note

4. The new child support guidelines have had a negative impact on alimony awards. Family law attorneys believe that in cases involving minor children, alimony is awarded less frequently than it was before the guidelines came into effect. In many instances, alimony is not awarded at all.
5. According to U.S. Census Bureau data, the rate of compliance with alimony orders is very low. Our research indicates that the courts are not using adequate tools for enforcing alimony orders.
6. When alimony is awarded, some awards do not appear to be based on a realistic understanding of the impact of lost career opportunities on future earnings or to properly consider the sacrifice of earning potential many women have made in order to be the primary caretaker of the family.
7. The failure or refusal of judges to award counsel fees or fees for expert witnesses in advance of or pending trial of a divorce proceeding disadvantages women since they generally are the parties with insufficient funds to retain an expert or even a private attorney.
8. Despite recent efforts at reform, women still find that the burden for child support enforcement rests on their shoulders and that they face an unresponsive and sometimes hostile system
9. Courts are not uniform in their use of available tools to enforce support. Nonpayment is not met with predictable, steadily escalating enforcement sanctions.
10. Actions for contempt are time-consuming, labor-intensive means to enforce support. They are not always effective and often create additional difficulties for women seeking support. They should be reserved for instances when no other enforcement method has worked.
11. Courts interpret the standard for modification of support too strictly, denying women the benefit of modifications to which they are entitled.
12. The child support guidelines have led to large increases in the amount of support orders. They still are not being used in some locations, particularly in district courts.
13. The higher orders established under the child support guidelines have led to an increase in disputes over custody and visitation as many noncustodial parents seek ways to avoid paying support.
14. Refuting complaints that the bias in favor of mothers was pervasive, we found that fathers who actively seek custody obtain either primary or joint *physical* custody over 70% of the time.
15. When fathers contest custody, mothers are held to a different and higher standard than fathers.
16. Women who are separated from their children temporarily may lose custody, even if they have been primary caretakers.
17. Shared legal custody is being awarded inappropriately, to the detriment of women with physical custody.
18. Permanent shared legal custody is being ordered inconsistently with existing law.
    - Shared legal custody is being ordered when parents are unable to agree about childrearing, and even when there is a history of spouse abuse.

- The inappropriate use of a presumption of permanent shared legal custody and inappropriate awards of shared legal custody adversely affect women.

19. In deciding motions to move out of state, many probate judges give more weight to the interests of the noncustodial father than to those of the custodial mother and the child, contrary to clear case law.
20. In determining custody and visitation, many judges and family service officers do not consider violence toward women relevant.
21. A majority of the probate judges surveyed agreed that "mothers allege child sexual abuse to gain a bargaining advantage in the divorce process."
22. The courts are demanding more of mothers than fathers in custody disputes.

Recommendations:

1. *Settlements must not be coerced*. Mediation is crucial in coping with the overwhelming number of cases that the probate court handles. But the pressure to dispose of cases must never translate into an effort to coerce parties to settle in mediation.
2. Judges need to be sensitized to:
    - signs of unequal power in the dynamics between the parties.
    - signs of unfair concessions by either party in the mediation
    - effects of abuse on the dynamics between the parties and adverse effect on children whose custodial parent is being abused.
    - There should be no mediation unless both parties voluntarily agree to it, and the parties appear to have roughly equal power, based upon a preliminary assessment of the family dynamics.
    - There should be no mediation of the division of assets until there is full disclosure and valuation, or acceptance of valuation, of assets.
3. The probate court should adopt a rule providing that, on a reasonable showing of need, a party is *entitled* to obtain fees for counsel and experts *pendente lite*; and that if the judge declines to order such fees, he or she must enter written findings delineating the reasons behind the decision. An order refusing to order fees, or ordering fees that are not reasonable, should be considered subject to review by a single justice pursuant to M.G.L. c. 231, § 118, first paragraph.
4. The probate court rules should be amended to require that counsel for the parties must sign Rule 401 financial statements and certify to the correctness of the statements. Such a rule should further provide that if the financial statement turns out to be incomplete or inaccurate, and the attorney knew or should have known of the omissions or inaccuracies, sanctions against counsel may be imposed.
5. M.G.L. c. 208, § 34, should be amended in the following manner: 1) lost career opportunities resulting from child-care responsibilities should be added to the list of mandatory factors to be considered by judges in determining alimony and property awards, and 2) a consideration of the tax consequences to each of the parties resulting from property and alimony dispositions should be required.

6. The Commission to Eliminate Gender Bias in the Courts should join with the probate court and the Judicial Training Institute to develop mandatory educational programs for probate judges on the job and salary opportunities available to women who are returning to the labor force without recent work experience.
7. Modification of alimony orders should be prohibited in contempt hearings. Such modification should occur only when a complaint for modification has been brought.
8. Probate judges should make more frequent use of enforcement provisions, such as security interests, bonds, and wage assignments, in financial orders. In addition, judges are urged to impose appropriate civil and criminal penalties for noncompliance with court orders concerning alimony and property division.
9. The probate court rule requiring impoundment of financial statements should be amended to permit researchers to have access to such data on a basis that will not disclose the identities of particular individuals.
10. Personnel should be designated to assist *pro se* seekers of support to obtain support in the court system, similar to housing specialists in the housing courts and the *pro se* clerk in the federal court.
11. The probate court, the district court, and the Judicial Training Institute should work together to educate all court personnel about the importance of child support so that they will be more willing to assist support seekers. *Pro se* litigants must be seen as customers to be served, not ignored.
12. The family law sections of the bar associations should lead all family law attorneys to a practice of incorporating in all agreement's provisions for the automatic periodic updating of child support orders, in accordance with the guidelines. The probate court should promulgate standard language for judges to incorporate in their judgments to require such periodic updating independent of the modification, with court intervention only if no agreement can be reached.
13. The legislature and/or appellate courts should better define the "best interests" standard to direct judges to give primary consideration to the parent who has been the primary caretaker and psychological parent throughout the child's life, not merely from the point of separation. "Primary caretaking" includes such activities as 1) caring for the child's physical needs (feeding, bathing, dressing, and doing the related planning and shopping); 2) supervising daily activities (putting the child to bed, waking the child in the morning; arranging for social interactions); 3) arranging and monitoring alternative care (day care or babysitters); 4) attending to health needs (caring for the child when (s)he is sick and arranging trips to doctors); 5) disciplining; 6) providing religious, cultural, and social education; 7) teaching basic skills, or assisting with school work and interacting with teachers; 8) nurturing emotional growth (Massachusetts Continuing Legal Education, 1983). The "psychological parent" is the parent who is most aware of the child's needs and interests and best able to distinguish his or her own needs from those of the child and to put the child's needs first.
14. Judges should award, and family service officers should recommend, permanent shared legal custody only when the parents submit an acceptable shared legal custody plan to the court and the court finds that the parents are willing and able to work together to make major decisions concerning the children. Judges and family service officers should

presume that temporary as well as permanent shared legal custody is inappropriate if a parent is abusive to either the child or the custodial parent, is unfit, or has abandoned the child. The Legislature should amend M.G.L. c. 208, § 31, to make these standards explicit.

15. The legislature and/or appellate courts should make it clear that abuse of any family member affects other family members and must be considered in determining the best interests of the child in connection with any order concerning custody. If access to the child is allowed, judges should be directed to make arrangements to protect any family member from further abuse.
16. The Judicial Training Institute and the Flaschner Institute should develop programs on the issues of gender bias in child custody decision making; child sexual abuse in the context of divorce; and domestic violence and child custody. Attendance at such programs, or the equivalent, should be required for probate judges, family service officers, and court clinic staff. Massachusetts Continuing Legal Education should offer similar programs periodically for interested attorneys.

2. Pro Se Litigants: The Challenge of the Future
Probate and Family Court Department, Pro Se Committee Report, April 8, 1995

Executive Summary

Pro se litigation is not a temporary phenomenon in the Probate and Family Court. It must not be viewed as a "problem" but as an ongoing challenge. Indeed, it is presently the single most important challenge to the court's ability to provide prompt and equal access to all citizens of the Commonwealth through effective case management. The challenge is particularly acute in the Probate and Family Court as there is no statutory authority or court rule which permits the appointment of attorneys for the parties or their children (except in those limited instances in which the Department of Social Service is a party). This challenge must be considered with an open mind and an understanding of the difficulties faced by all involved (the litigants, the Bar, judges, and court staff) and with a willingness to make changes. Whether this court meets this challenge and how will have a lasting effect on the face of the Probate and Family Court in the future. A number of the recommendations of this Committee will require significant changes in the operation of the court and the function of the Bar. But the challenge is great and will not be met by doing things as they have always been done. We make these recommendations so that now and, in the future, the court will better serve all who come before it.

Recommendations:

1. **Magistrates**
   We propose the creation of a magistrate position which would play a crucial role in effectively managing the increasing volume of cases involving pro se litigants. The primary role of the magistrate would be that of "case manager." There would be a mandatory case conference with the magistrate in most domestic relations and equity actions and specific probate matters. It would be the magistrate's task to screen cases, to ensure that issues and parties are properly before the court, and to make initial orders in some cases. The magistrate would ensure that by the time matters come before a judge they are ready for the hearing. By allowing a magistrate to conduct initial case conferences, hear certain uncontested matters and make preliminary referrals for support services, judges would have more time to hear complex contested matters.
2. **Simplified Domestic Relations Process**
   The Committee recommends the implementation of a process in the Probate and Family Court that would be similar to the "Small Claims" process in the District Court. Litigants involved in domestic relations matters (i.e., divorce or paternity) with a limited number of issues (i.e., support and visitation) could, with the approval of the judge or magistrate, elect to proceed under the Simplified Domestic Relations Process which would eliminate most formal discovery and relax the rules of evidence, two major stumbling blocks for many pro se litigants.
3. **Unbundling Legal Representation**
   "Controlled unbundling" of legal representation is one way to make legal representation available to more litigants. "Controlled unbundling," in the form recommended by this Committee, would allow the attorney to handle certain aspects of a case without requiring

the attorney to participate in all hearings before the court. The attorney would be required to file an appearance in the case and the client and his/her attorney would in certain circumstances be allowed to agree when the attorney need not appear.

4. **Rules and Legislation**
   A number of the Committee's recommendations would require changes to rules of court, standing orders and existing legislation. For example "controlled unbundling" of legal services would require changes to both ethical rules and Massachusetts Rules of Domestic Relations Procedure regarding appearances and pleadings; the recommendation that the Register of Probate be allowed to refuse to accept certain incomplete or improper filings would require a change in Massachusetts Rules of Domestic Relations Procedure, Rule 77 and the recommendation that mandatory attendance at Parent Education Programs be completed within a certain time period would require changes to standing orders. Many of the initiatives recommended in this Report require additional funding. However, with modest additional filing fees and the ability to assess court costs, it is anticipated that a significant amount of the necessary funding could be generated.
5. **Education and Information**
   The Committee recommends that educational/informational material be made available in a variety of forms and languages. The Committee proposes, for example, the implementation of an automated information system; the designation of a Pro Se Facilitator and the institution of a Court Information Center in each Probate and Family Court; the creation of informational videos on court processes and proceedings; development of Website/Computer Access; expansion of the Lawyer for the Day Program; and the expansion of law student representation of indigent litigants. The Committee recommends specific training for judges and court staff to increase awareness of issues involving diversity of the population, language barriers and literacy problems. The Committee also recommends that, as part of the educational process, the importance of obtaining qualified counsel be continually emphasized.
6. **Forms Revision**
   The Committee recommends that the forms most often used by unrepresented litigants be reviewed and, where appropriate, revised to include simplified language; larger spaces for writing information; clear concise instructions; and overlay templates to address diverse language needs. Forms should be compiled in self-contained packages which include all necessary forms and instructions necessary to present the most frequently filed matters (e.g., divorce, paternity).
7. **Probation Officers**
   The Committee recommends the expanded involvement of probation officers in dispute resolution through referrals by judges and magistrates, and in conducting investigations. The Committee also recommends the creation and funding of the position of associate probation officer in the Probate and Family Court to relieve the probation officers of certain duties and enable them to fulfill these expanded duties and to implement certain education policies and procedures.
8. **Court Clinic**
   The Committee recommends the expansion or creation of Court Clinics either on a regional or county basis. Such clinics already exist in several counties of the Probate and Family

Court, where they provide initial evaluations and assessments in custody and child welfare cases.

9. **Pro Se Coordinator Position**
   The Committee recommends the creation of a permanent Pro Se Coordinator within the Probate and Family Court Administrative Office to implement the Committee's recommendations and monitor their effectiveness. The coordinator's role will also include development of ongoing responses to the changing needs of the court and litigants .

3. Battered Mothers Speak Out
A Human Rights Report on Domestic Violence and Child Custody in the MA Family Courts Wellesley Centers for Women, November 2002

Executive Summary:

To our knowledge, few of the recommendations made in the 1989 Massachusetts gender bias study have been implemented. Similarly, no systematic steps appear to have been taken, either by the courts or by the Legislature, to ensure that the Presumption of Custody law is applied uniformly, beyond an initial distribution of basic information about it.

Moreover, the Massachusetts court system does not collect specific data on the number of family court cases it hears each year that involve partner abuse and child custody issues, thereby making quantitative research on this topic extremely difficult to conduct. Thus, there has been no body of research in Massachusetts that documents the specific problems that battered mothers encounter in the family courts, the range of these problems, or their long-term impact on battered mothers and their children.

The Battered Mothers Project recorded the voices and experiences of those most directly affected by the problems being studied- the battered mothers themselves. We found that there are state actors who have committed one or more of the following human rights violations:

1. failure to protect battered women and children from abuse;
2. Discrimination and bias against battered women;
3. Degrading treatment of battered women;
4. Denial of due process to battered women;
5. Allowing the batterer to continue the abuse through the family courts; and
6. Failure to respect the economic rights of battered women and children.

Summary of Findings:

Some Massachusetts family courts are placing battered women and their children in danger by issuing child custody and visitation orders that require them to have ongoing, unprotected contact with batterers and child abusers. These women and children are harmed and/ or threatened physically, sexually, emotionally, and/ or economically by the abuser as a result.

There are family court judges, guardian's ad litem, probate probation officers, Department of Social Service workers, and court-appointed psychological evaluators who fail to protect battered women and their children by:

- Granting or recommending custody of children to batterers;
- Granting or recommending unsafe visitation with batterers;
- Ignoring or minimizing mothers' reports of partner abuse or child abuse/mistreatment, including by:
    - Omitting women's descriptions of, or concerns about, abuse from official reports and recommendations;

    - Inappropriately or inaccurately characterizing women's reports of abuse;
    - Failing to pay attention to women's concerns about their children's safety and well-being
    - Taking punitive actions against women for attempting to protect their children; and
    - Blaming women for the abuse, its impact on the children, or for the children's refusal to visit with their fathers
- Failing or refusing to investigate partner abuse or mothers' allegations of child abuse;
- Failing to examine or credit documented evidence of partner or child abuse; and Mishandling child sexual abuse allegations (guardians ad litem specifically).

There are Massachusetts family court judges, guardian's ad litem, probate probation officers, Department of Social Service workers, and court-appointed psychological evaluators who are:

- Conducting investigations and evaluations and producing reports that unfairly or baselessly favor fathers over mothers;
- Holding battered mothers to higher behavioral and parenting standards than fathers;
- Stereotyping battered mothers as hysterical and unreasonable; and
- Discriminating against battered mothers on the basis of sex, race, ethnicity, socioeconomic status, and/ or sexual orientation.

There are state actors in the Massachusetts family courts, primarily judges, guardian's ad litem, and probate probation officers, who are treating battered mothers with condescension, scorn, and disrespect. As a result, battered mothers may be re-victimized and their allegations of abuse dismissed or not responded to effectively. This can contribute to the courts' ordering custody and visitation arrangements that endanger women and that are not in children's best interests. The Massachusetts Code of Judicial Conduct is also clear that judges should treat litigants with respect.

There are batterers who use the family court system in ways that amount to harassment, retaliation, and intimidation of battered mothers. Battered mothers (and therefore children) are harmed emotionally and financially. There also are state actors in the Massachusetts family courts, particularly judges, who fail to identify and, thereby, sanction this abuse of the court process, rendering them complicit in it and in any resulting harm to women and children. Specific litigation abuse tactics used by batterers that our study uncovered include:

- Filing multiple harassing, baseless, or retaliatory motions;
- Making false allegations against women;
- Manipulating the court process to avoid paying child support or to receive a reduction in child support; and
- Using parallel actions in courts of different jurisdictions to their advantage.

There are state actors in the Massachusetts family courts-particularly judges-who are negatively affecting battered women's and children's economic well-being through their actions

and failures to act. In some cases, this hinders women's abilities to provide for their children. Specific problems include:

- Judges' making unfair or unreasonable child support orders;
- Judges' failing to hold batterers accountable for nonpayment of child support;
- Judges' reducing child support orders to compensate for the cost of abuse-related services such as supervised visitation;
- Judges' allowing batterers' financially draining litigation abuse tactics, which cause women to miss work or to lose their jobs, among other problems; and
- The Commonwealth of Massachusetts 'failing to provide and allocate sufficient resources for poor or pro se litigants.

Recommendations:

1. **Conduct audits of every family court**

We recommend that there be an audit of every family court in Massachusetts every three to five years. This audit should include an evaluation of gender bias, racial and ethnic bias, sexual orientation bias, custody and visitation outcomes, and litigant satisfaction. The audit should be overseen by an independent commission or similar entity .

2. **Collect more detailed annual data about divorce and custody proceedings**

We call on the court system to collect more detailed annual data about divorce and custody proceedings. At a minimum, these data should include:

- The number of contested and uncontested divorces initiated in and processed by the probate and family courts;
  The number of cases (both contested and uncontested) that involved custody and visitation disputes;
- The number of divorce cases and child custody/visitation disputes that involved allegations of domestic violence and/ or child abuse;
- The disposition of the various types of divorce and custody cases; and
  The numbers of cases where guardians ad litem and/ or expert entities and/ or psychological evaluators were used and the types of recommendations they made to the court.

3. **Statutory Reform**

We call on the Massachusetts Legislature to take the following steps toward statutory reform:

- Mandate by law that all custody evaluators/ guardians ad litem be trained in both partner abuse and child abuse issues.(For a model, see Rule 1257.7of the California Rules of Court). Reform the Presumption of Custody law in the following ways:
- Create a rebuttable presumption that a person who has perpetrated either a pattern or a serious incident of partner or child abuse should be required to have supervised visits with his or her children for at least one-year post-separation;
- Require batterers to pay for the costs of visitation. Child support orders should not be lowered to compensate for the cost of supervised visitation.

- In cases involving allegations of domestic violence, require family court judges to make written findings of fact regarding which parent has been the primary caretaker before making a custody determination, even in temporary orders. This "primary caretaker" standard should be incorporated as an explicit component of the "best interests of the child" standard that is currently in use;
- In cases involving allegations of domestic violence, require family court judges to investigate and consider the alleged batterer's criminal record as a key factor in making custody and visitation decisions; Require family court judges to use only state-certified batterer intervention programs when sending batterers or alleged batterers to counseling; and
- Make it more difficult for parties to use repetitive court dates for intimidation and control and to file baseless court motions.

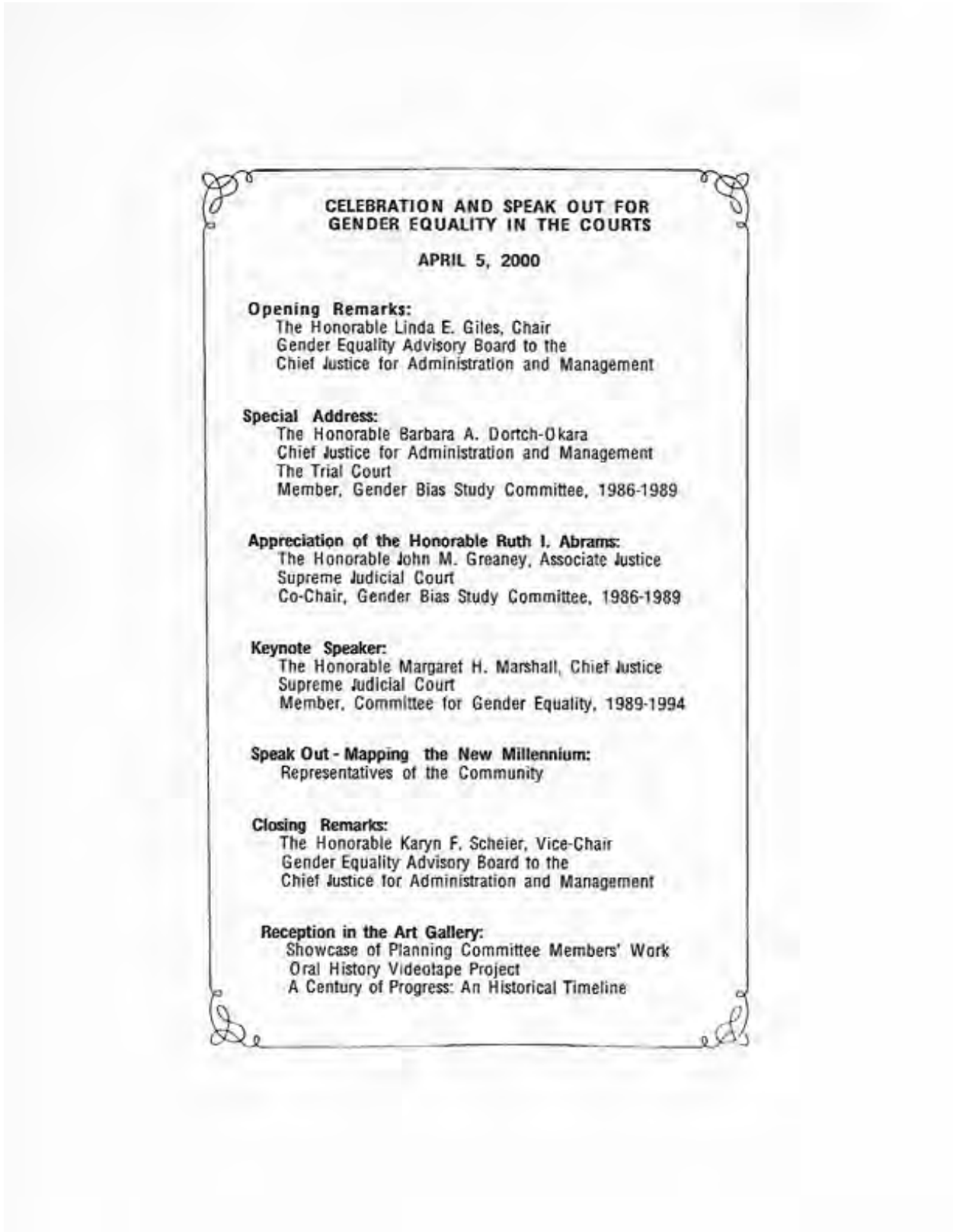
4. **Require training for family court personnel on domestic violence, child abuse, child development, and mental health**

We call on the Probate and Family Court to require frequent, mandatory “training on partner and child abuse for all family court personnel, including specific section son post-separation issues and batterers' tactics in court ("litigation abuse"). We urge the Chief Justice of the Probate and Family Court to use his or her power to sanction judges who fail to complete this training, including by requiring them to participate in a judicial enhancement program (in accordance with Mass. Gen. Laws Ch. 211B,§ 10, xv)

4. Gender Fairness in the Courts: Action in the New Millennium, 2001
by Lynn Hecht Schafran and Norma J. Wikler

"The Massachusetts Gender Equality Board presented ***A Celebration and Speak Out for Gender Equality in the Courts*** to celebrate its ten-year implementation effort. The Chief Justice of the Trial Court gave an overview of progress since the original Task Force's report, including several important appellate decisions that cite the report. The Chief Justice of the Massachusetts Supreme Judicial Court, who had been a member of the Task Force Implementation Committee for five years, gave the keynote address. The Board published a brochure listing its past accomplishments, and fourteen speakers gave their views on what the Equality Board's future focus should be. The event was attended by 350 people, including six of the Massachusetts' Trial Court's seven department heads, as well as the chief of the Probate and Family Court. This judge later sent copies of the entire gender bias task force report to every presiding judge. **His cover letter stated that he knew the Probate and Family Court had done many good things since the report's publication, but since only eight of the forty-six current probate court judges were on the bench when it was published, it was time to review it with colleagues and staff to assess what had been accomplished and what remained to be done."** p. 88

Gender Fairness in the Courts: Action in the New Millennium, 2001 (cont)



CELEBRATION AND SPEAK OUT FOR
GENDER EQUALITY IN THE COURTS

APRIL 5, 2000

Opening Remarks:
The Honorable Linda E. Giles, Chair
Gender Equality Advisory Board to the
Chief Justice for Administration and Management

Special Address:
The Honorable Barbara A. Dortch-Okara
Chief Justice for Administration and Management
The Trial Court
Member, Gender Bias Study Committee, 1986-1989

Appreciation of the Honorable Ruth I. Abrams:
The Honorable John M. Greaney, Associate Justice
Supreme Judicial Court
Co-Chair, Gender Bias Study Committee, 1986-1989

Keynote Speaker:
The Honorable Margaret H. Marshall, Chief Justice
Supreme Judicial Court
Member, Committee for Gender Equality, 1989-1994

Speak Out - Mapping the New Millennium:
Representatives of the Community

Closing Remarks:
The Honorable Karyn F. Scheier, Vice-Chair
Gender Equality Advisory Board to the
Chief Justice for Administration and Management

Reception in the Art Gallery:
Showcase of Planning Committee Members' Work
Oral History Videotape Project
A Century of Progress: An Historical Timeline

Gender Fairness in the Courts: Action in the New Millennium, 2001 (cont)

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Honorable Karyn F. Scheier, Land Court Department, Vice-Chair
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Eve Blakeslee, Franklin Superior Court
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Ex Officio:
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Marilyn Wellington, Judicial Institute*

STAFF
Lois Frankel, Administrative Office of the Trial Court

*We thank these organizations for their generous contributions.

Appendix 4: MASSACHUSETTS ACCESS TO JUSTICE COMMISSION ACCESS TO ATTORNEYS COMMITTEE REPORT, MAY 2017 SUMMARY OF KEY RECOMMENDATIONS

The Committee considered a large number of options as it determined which recommendations to highlight. Below are the key recommendations the Committee is making to the full Commission. A full accounting of all recommendations is included in the body of the report.

1. Strongly support efforts to expand the right to counsel where the most essential needs of low income litigants are at stake, such as Bill SD. 694/HD. 1448 (the right to counsel bill supported by Boston Mayor Martin Walsh);

2. Further investigate apparent obstacles to the use of fee shifting to serve low income litigants by analyzing existing data from decisions in the Housing and Probate Courts, encouraging the thorough and consistent coding of fee petitions and awards in the MassCourts system to enable greater study and understanding, and educating the bar and judiciary to encourage more fee shifting litigation;

3. Endorse the use of fee awards to level the playing field in Probate Court, including pendente lite awards[1];

4. Track usage of LAR in MassCourts and provide consistent LAR information at Court Service Centers;

5. Strongly encourage legal aid offices to increase fee shifting awards as a funding source, consistent with their priorities;

6. Endorse a statewide initiative to implement monthly fee shifting networking initiatives, such as the one employed by CLA and Heisler, Feldman & McCormick, P.C.; and

7. Include LAR and fee shifting components as part of the Practicing with Professionalism seminar required of all law school graduates.

[1] Pendente lite awards are those ordered when a Probate Court requires "either party to pay into court for the use of the other party during the pendency of an action an amount to enable him to maintain or defend the action..." G.L. c. 208, § 17.

Appendix 5: MASSACHUSETTS ACCESS TO JUSTICE COMMISSION ACCESS TO ATTORNEYS COMMITTEE REPORT ON FEE SHIFTING IN FAMILY LAW LITIGATION, MAY 2022 SUMMARY AND CONCLUSION

Summary

Providing access to funds for an attorney can be an important way to provide equitable access to justice in family law cases, particularly when one party earns significantly more than the other. Statutory law allows for allocation of marital funds for an attorney for either party in divorce actions and fee shifting in contempt actions involving a monetary dispute. Our committee's investigation of fee shifting in these actions found that awards are made infrequently. Two surveys, one given to Probate and Family Court judges and the other to family law practitioners revealed a highly varied approach to fee shifting among judges, resulting in a lack of clarity and consistency with respect to factors impacting awards and leaving many practitioners reluctant to seek fees, particularly fees *pendente lite*.[1] In the Committee's view, this is a lost opportunity to provide access to justice at a critical point in people's lives. In most cases, a divorce action significantly impacts litigants' fundamental rights with respect to parenting and may have long- term impact on litigants' ability to meet basic human needs. Litigating a divorce can be complex in both procedure and substance, and lawyers play a critical role in navigating rules, presenting evidence, and counseling clients on realistic goals. The workgroup believes that every effort should be made to maximize consideration of *pendente lite* awards in appropriate cases.

The workgroup recommends that the Probate and Family Court consider whether a set of guidelines for fees *pendente lite* would increase consistency and predictability in awards and lead to greater use of fee shifting as a means to provide representation in appropriate divorce actions. A form similar to the one created for deviations from the Massachusetts Child Support Guidelines might be sufficient to help practitioners, litigants, and judges alike home in on and weigh the factors most important to assessing a request for fees in each case. Brief and frequent trainings for judicial staff and practitioners would remind both of the availability of this tool to "level the playing field"[2] and educate lawyers on its appropriate use. Guidance on mass.gov would provide assistance to unrepresented litigants.

The workgroup concludes that fee shifting in contempt actions is more complicated and, while an important incentive to encourage compliance or appropriately distribute the costs of non-compliance, it is a less effective tool for providing a lawyer where one would not otherwise be affordable. The goal of a contempt action is compliance and compliance short of a judgment of contempt does not result in an award of fees. As a result, the workgroup concludes that it is not reasonable to rely on fee shifting to fund efforts to gain compliance.

[1] Fees *pendent lite* present a special form of fee shifting. Rather than awarding fees to the prevailing party, fees *pendent lite* grant the judge authority to allocate marital funds between the parties to provide both parties the opportunity to present their respective cases with the assistance of counsel.
[2] This phrase was used in a response to the judicial survey and echoes recommendations made in a

Supreme Judicial Court report more than thirty years ago: "[T]here is too little legal help available to moderate-income women, in part because judges fail to award adequate counsel fees, especially during the pendency of litigation. ... Judges must award adequate attorney's fees during the pendency of litigation." Report of the Gender Bias Study of the Supreme Judicial Court, p. 20 (1989).

Conclusion

Responses to both surveys strongly suggest a lack of clear mutual understanding between the bench and the bar regarding when fee shifting is appropriate, how much the award should be, and what factors should be used to make both determinations. In addition, with respect to fees *pendente lite*, the surveys support the impression that awards are infrequently made and reveal a variety of factors weighing on judges' minds. It is imperative that we work collaboratively to increase the understanding and appropriate use of this important access to justice tool. By creating a statutory provision to address fees *pendente lite* in divorce actions, the legislature emphasized the importance of providing divorcing spouses with fair opportunity to present their respective cases. The Supreme Judicial Court reinforced the importance of fees *pendente lite* in its 1989 report on gender bias in the court system.[9] The Committee encourages the Probate and Family Court to consider providing further guidance and training to both judges and the public so that all members of the justice delivery system have a clear and consistent understanding of when and how requests for fees should be made, as well as realistic expectations about the likelihood and amount of a fee award in a given case. A follow up survey similar to the one previously sent should be sent to judges and practitioners a year after implementation of any changes.

[9] Report of the Gender Bias Study of the Supreme Judicial Court, p. 20 (1989).

Appendix 6: Letter in response to Massachusetts Lawyers Review Article

August 26, 2022
By Email Only

Henriette Campagne
Lawyers Weekly
Attention: Editor
40 Court St., 5th Floor
Boston, MA 02108
hcampagne@lawyersweekly.com

RE: *SJC alimony ruling alarms divorce bar.*

Dear Editorial Board,

We were surprised and disappointed by MLW's August 22, 2022, front-page article, " SJC alimony ruling alarms divorce bar." Like many family law practitioners, we view the decision in Cavanagh v. Cavanagh, No. SJC-13222 (Mass. Aug. 8, 2022), as a long-needed and well-reasoned resolution to persistent confusion about the availability and distinct purposes of alimony and child support in modest-income cases. The article's negative presentation, highlighting speculation about "costs, complications" and raising the ominous specter of "unintended consequences," undermines the decision and ignores the magnitude of the unintended consequences the ruling corrects. The Alimony Reform Act was never intended to deny alimony to otherwise eligible spouses on the sole basis that they have children.

For years, some family court judges and Massachusetts practitioners have endorsed the erroneous interpretation applied by the Trial Court in Cavanagh "that no alimony could be awarded to the mother for the sole reason that the judge had 'considered all of [the father's] gross income in setting the child support order.'" Cavanagh at *4. When the law is applied this way, it is starkly unjust and facially discriminatory against litigants with children. Perversely, this interpretation has denied relief to many of the very people who need it most. Consider survivors of domestic violence who faced financial, as well as physical, abuse in their marriages; career homemakers whose earning capacities have been forever reduced by years out of the workforce; and spouses who delayed career advancement to care for children and support their spouses' educations or careers. The SJC reminds us that child support and alimony are different forms of support serving different purposes. One simply is not a substitute for the other.

The Cavanagh decision does not make alimony an "entitlement," as one quoted practitioner suggests. It merely affirms that the law "allows for the concurrent award of child support and alimony" and requires a "fact-specific analysis of the family's circumstances." Cavanagh at *2 and 20. Similarly, the prediction by another surveyed practitioner that unallocated support will no longer be permitted and that "flexibility and creativity" in settlement will be curtailed is questionable. Why not consider the

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increased opportunity for settlement created by clarification that concurrent orders are permissible for all families, not only the very rich? With clarity and equity in the law, we can do our best work to help families move beyond litigation to stable, productive futures.

We hope *Massachusetts Lawyers Weekly* will seek more varied perspectives in future articles about significant new case law.

Sincerely,

Steven Anderson-Garrison and Laura W. Gal on behalf of Greater Boston Legal Services
Christina Paradiso on behalf of Community Legal Aid
Rachel B. Biscardi on behalf of Northeast Legal Aid
Abbigail Shirk on behalf of MetroWest Legal Services
Kimberly Yox on behalf of Justice Center of Southeast Massachusetts
Jamie Ann Sabino on behalf of Massachusetts Law Reform Institute
Lola Remy on behalf of the Women's Bar Foundation of MA
Maritza Karmely, Clinical Professor, on behalf of Family Advocacy Clinic, Suffolk Law School
Stephanie Goldenhersh, Clinical Professor, Harvard Legal Aid Bureau
Cindy Palmquist and Geraldine Gruvis-Pizarro on behalf of Volunteer Lawyers Project
Aimee Parco on behalf of Casa Myrna
Lori Sherman Johnson and Christina Pavlina on behalf of Jane Does Well
Amy Hamill on behalf of The Second Step—Steps to Justice
Hema Sarang-Sieminski, Policy Director, on behalf of Jane Doe Inc.

Appendix 7: MCLE Model Rules by State

Jurisdiction	Number of Credits Required Per Year	Credit Hour Calculation	Ethics and Professionalism Programming Required	Stand-Alone Diversity and Inclusion Programming Required	Stand-Alone Mental Health and Substance Use Disorders Programming Required
ABA MCLE Model Rule	15 credits	60 minute credit hour	Yes - 1 credit per year	Yes - 1 credit every 3 years	Yes - 1 credit every 3 years
Alabama	12 credits	60 minute credit hour	Yes - 1 credit per year	No	No
Alaska	3 credits required, 9 additional credits voluntary	60 minute credit hour	Yes - 3 credits per year	No	No
Arizona	15 credits	60 minute credit hour	Yes - 3 credits per year	No	No
Arkansas	12 credits	60 minute credit hour	Yes - 1 credit per year	No	No
California	8.33 credits	60 minute credit hour	Yes - 4 credits per 3 year period	Yes - 1 credit Elimination of Bias per 3 year period	Yes - 1 credit Competence Issues per 3 year period
Colorado	15 credits	50 minute credit hour	Yes - 7 credits per 3 year period	No	No
Connecticut	12 credits	60 minute credit hour	Yes - 2 credits per year	No	No
Delaware	12 credits	60 minute credit hour	Yes - 4 credits per 2 year period	No	No
Florida	11 credits	50 minute credit hour	Yes - 5 credits per 3 year period	No	No
Georgia	12 credits	60 minute credit hour	Yes - 1 credit per year of ethics and 1 credit per year of professionalism	No	No
Guam	10 credits	60 minute credit hour	Yes - 2 credits per year	No	No
Hawaii	3 credits required, 9 additional credits voluntary	60 minute credit hour	Yes - 3 credits per year	No	No

Jurisdiction	Number of Credits Required Per Year	Credit Hour Calculation	Ethics and Professionalism Programming Required	Stand-Alone Diversity and Inclusion Programming Required	Stand-Alone Mental Health and Substance Use Disorders Programming Required
ABA MCLE Model Rule	15 credits	60 minute credit hour	Yes - 1 credit per year	Yes - 1 credit every 3 years	Yes - 1 credit every 3 years
Idaho	10 credits	60 minute credit hour	Yes - 2 credits per 2 year period	No	No
Illinois	15 credits	60 minute credit hour	Yes - 4 credits per 2 year period*	Yes - 1 credit Diversity and Inclusion per 2 year period*	Yes - 1 credit Mental Health and Substance Abuse per 2 year period*
Indiana	12 credits	60 minute credit hour	Yes - 3 credit per 3 year period	No	No
Iowa	15 credits	60 minute credit hour	Yes - 3 credits per 2 year period	No	No
Kansas	12 credits	50 minute credit hour	Yes - 2 credits per year	No	No
Kentucky	12 credits	60 minute credit hour	Yes - 2 credits per year	No	No
Louisiana	12.5 credits	60 minute credit hour	Yes - 1 credit per year of ethics and 1 credit per year of professionalism	No	No
Maine	11 credits	60 minute credit hour	Yes - 1 credit per year	No	No
Maryland	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE
Massachusetts	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE
Michigan	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE
Minnesota	15 credits	60 minute credit hour	Yes - 3 credits per 3 year period	Yes - 2 credits Elimination of Bias per 3 year period	No

Jurisdiction	Number of Credits Required Per Year	Credit Hour Calculation	Ethics and Professionalism Programming Required	Stand-Alone Diversity and Inclusion Programming Required	Stand-Alone Mental Health and Substance Use Disorders Programming Required
ABA MCLE Model Rule	15 credits	60 minute credit hour	Yes - 1 credit per year	Yes - 1 credit every 3 years	Yes - 1 credit every 3 years
Mississippi	12 credits	60 minute credit hour	Yes - 1 credit per year	No	No
Missouri	15 credits	50 minute credit hour	Yes - 2 credits per year	No	No
Montana	15 credits	60 minute credit hour	Yes - 2 credits per year	No	No
Nebraska	10 credits	60 minute credit hour	Yes - 2 credits per year	No	No
Nevada	12 credits	60 minute credit hour	Yes - 2 credits per year	No	Yes - 1 credit of Substance Abuse, Addictive Disorders, and/or Mental Health every 3 years
New Hampshire	12 credits	60 minute credit hour	Yes - 2 credits per year	No	No
New Jersey	12 credits	50 minute credit hour	Yes - 4 credits per 2 year period	No	No
New Mexico	12 credits	60 minute credit hour	Yes - 2 credits per year	No	No
New York	12 credits	50 minute credit hour	Yes - 4 credits per 2 year period	No	No
North Carolina	12 credits	60 minute credit hour	Yes - 2 credits per year	No	Yes - 1 credit Substance Abuse Awareness or Debilitating Mental Conditions every 3 years
North Dakota	15 credits	60 minute credit hour	Yes - 3 credits per 3 year period	No	No

Jurisdiction	Number of Credits Required Per Year	Credit Hour Calculation	Ethics and Professionalism Programming Required	Stand-Alone Diversity and Inclusion Programming Required	Stand-Alone Mental Health and Substance Use Disorders Programming Required
ABA MCLE Model Rule	15 credits	60 minute credit hour	Yes - 1 credit per year	Yes - 1 credit every 3 years	Yes - 1 credit every 3 years
Northern Mariana Islands	10 credits	60 minute credit hour	No	No	No
Ohio	12 credits	60 minute credit hour	Yes - 2.5 credits per 2 year period	No	No
Oklahoma	12 credits	50 minute credit hour	Yes - 1 credit per year	No	No
Oregon	15 credits	60 minute credit hour	Yes - 5 credits per 3 year period	Yes - 1 credit Access to Justice per 3 year period	No
Pennsylvania	12 credits	60 minute credit hour	Yes - 2 credits per year	No	No
Puerto Rico	12 credits	60 minute credit hour	Yes - 4 credits per 2 year period	No	No
Rhode Island	10 credits	50 minute credit hour	Yes - 2 credits per year	No	No
South Carolina	12 credits	60 minute credit hour	Yes - 2 credits per year	No	Yes - 1 credit Substance Abuse or Mental Health issues in the Legal Profession every 3 years
South Dakota	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE
Tennessee	15 credits	60 minute credit hour	Yes - 3 credits per year	No	No
Texas	15 credits	60 minute credit hour	Yes - 3 credits per year	No	No
Utah	12 credits	60 minute credit hour	Yes - 2 credits ethics per year and 1 credit professionalism and civility per year	No	No

Jurisdiction	Number of Credits Required Per Year	Credit Hour Calculation	Ethics and Professionalism Programming Required	Stand-Alone Diversity and Inclusion Programming Required	Stand-Alone Mental Health and Substance Use Disorders Programming Required
ABA MCLE Model Rule	15 credits	60 minute credit hour	Yes - 1 credit per year	Yes - 1 credit every 3 years	Yes - 1 credit every 3 years
Vermont	10 credits	60 minute credit hour	Yes - 2 credits per 2 year period	No	No
Virgin Islands	12 credits	60 minute credit hour	Yes - 2 credits per year	No	No
Virginia	12 credits	60 minute credit hour	Yes - 2 credits per year	No	No
Washington	15 credits	60 minute credit hour	Yes - 6 credits per 3 year period	No	No
Washington DC	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE	Non-MCLE
West Virginia	12 credits	50 minute credit hour	Yes - 3 credits per 2 year period	No	No
Wisconsin	15 credits	50 minute credit hour	Yes - 3 credits per 2 year period	No	No
Wyoming	15 credits	60 minute credit hour	Yes - 2 credits per year	No	No
	*Effective July 1, 2017				Compiled 4/12/2017

Appendix 8: ABA Letter regarding MCLE Model Requirements

Defending Liberty Pursuing Justice

AMERICAN BAR ASSOCIATION

Standing Committee on
Continuing Legal Education
321 North Clark Street
Chicago, Illinois 60654-7598
(312) 988-6210
FAX (312) 988-5368

5 April 2017

Dear Chief Justice «Last_name»,

We take this occasion to report to you the recent adoption of the ABA Model Rule for Minimum Continuing Legal Education and Comments dated February 2017 ("MCLE Model Rule"), which replaces the 1988 version of the rule. It is our hope that your jurisdiction will undertake a review of the MCLE Model Rule and consider integrating some or all of its provisions into your jurisdiction's MCLE rules.

This new MCLE Model Rule represents the culmination of more than two years of work by the ABA's Standing Committee on Continuing Legal Education (SCOCLE) in conjunction with more than fifty volunteers, including individual lawyers, ABA leaders, CLE regulators, CLE providers, judges, academics, law firm professional development coordinators, and state/local/specialty bar association leaders. The ABA House of Delegates adopted this MCLE Model Rule in February at its 2017 Midyear Meeting.

Like its predecessor, the new MCLE Model Rule recognizes the vital role MCLE plays in the legal profession. This MCLE Model Rule emphasizes several key goals in its Purpose statement, which provides: "To maintain public confidence in the legal profession and the rule of law, and to promote the fair administration of justice, it is essential that lawyers be competent regarding the law, legal and practice-oriented skills, the standards and ethical obligations of the legal profession, and the management of their practices."

This new MCLE Model Rule looks significantly different than its predecessor, employing a new structure and eliminating many specific provisions related to the administration of MCLE programs, such as the size and composition of a jurisdiction's MCLE governing entity, methods of reporting MCLE credits, deadlines, fees, sanctions, appeals, and methods of financing MCLE administration. However, some key provisions have remained the same.

Both the new MCLE Model Rule and its predecessor:

- Recommend fifteen hours per year of MCLE (while recognizing that some jurisdictions prefer twelve hours).
- Take no position on whether lawyers should report MCLE credits every 1, 2, or 3 years.

1

• Recommend that jurisdictions have a system by which frequent MCLE sponsors can be designated "approved providers."

• Recommend that all lawyers be required to take diversity and inclusion programming (although, as noted below, the new MCLE Model Rule has a more specific requirement than its predecessor).

• Recommend that speakers at MCLE programs have the necessary skills to teach the course, but do not require speakers to be lawyers.

Below is a summary of some of the key components of the new MCLE Model Rule:

- Requires lawyers to take the following specialty credits, which also count towards the general MCLE requirement: (1) Ethics and Professionalism (average one credit per year); (2) Diversity and Inclusion (one credit every three years); and (3) Mental Health and Substance Use Disorders (one credit every three years).
    - The Diversity and Inclusion credit requirement builds on existing ABA policy which encourages jurisdictions with MCLE to "include as a separate credit programs regarding diversity and inclusion in the legal profession of all persons regardless of race, ethnicity, gender, sexual orientation, gender identity, or disabilities, and programs regarding elimination of bias."
    - The Mental Health and Substance Use Disorder Credit recognizes that requiring all lawyers to receive education about these disorders can benefit both individual lawyers and the profession. This requirement is in part a response to the 2016 landmark study conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs, entitled, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys."
- Accredits CLE program formats that include the use of distance learning, and does not limit the number of credits that can be earned using a particular delivery format.
- Accredits CLE programs that address law practice and technology.
- Allows lawyers to choose the MCLE programs that best meet their educational needs by not limiting the number of credits that can be earned in any subject area (e.g., substantive law, law practice, technology, ethics and professionalism, diversity and inclusion, and mental health and substance use disorders).
- Treats in-house sponsors of CLE programs the same as other sponsors and allows for full accreditation of programs when all other accreditation standards have been met. Also, the new MCLE Model Rule no longer places limits on the number of credits a lawyer can earn through in-house programming.
- Encourages jurisdictions to adopt a special exemption for lawyers licensed in multiple jurisdictions, pursuant to which a lawyer is exempt from satisfying MCLE requirements if he or she satisfies the MCLE requirements of the jurisdiction where the lawyer's principal office is located.
- Recognizes that jurisdictions may choose to authorize additional exemptions from MCLE requirements for certain groups, such as retired lawyers. The new MCLE Model Rule does not contain the Comment from its predecessor that stated: "Exemptions are inconsistent with the purpose of MCLE and are not recommended."

- Creates a more narrow definition for "self-study" activities that are not approved for MCLE credit, including programming without interactivity, informal learning, and reading. Activities such as viewing programs online or on video are now defined elsewhere in the new MCLE Model Rule and are approved for MCLE credit.

A discussion of each of these provisions can be found in the Report that was submitted to the ABA House of Delegates with the new MCLE Model Rule.

SCOCLE has created an MCLE Model Rule Implementation Committee that will gather information on the rule's implementation and serve as a resource for jurisdictions. SCOCLE maintains a website, located at http://ambar.org/mclemodelrule, which contains links to the new MCLE Model Rule, its accompanying Report, and other materials. The Implementation Committee is also available to meet with you by phone and to provide assistance as you review the rule. If you have questions or would like additional background on the MCLE Model Rule, please contact the Implementation Committee through Gina Roers-Liemandt, Director of MCLE and Professional Development, American Bar Association, gina.roers-liemandt@americanbar.org, (312) 988-6215.

In addition to looking to SCOCLE and the Implementation Committee as resources, we anticipate that you may choose to call upon other associations and agencies. To keep those entities informed about the implementation of the MCLE Model Rule, we have forwarded a copy of this letter to state bar association executive directors, state bar Presidents and Presidents-Elect, ABA State Delegates, and others. If there are additional individuals or agencies you would like us to contact, please let us know.

In closing, SCOCLE is honored to have spearheaded the drafting of this new MCLE Model Rule. Its adoption reflects the ABA's continued leadership in continuing legal education. We look forward to serving as a resource to jurisdictions throughout the United States as they review the MCLE Model Rule. Thank you for your consideration of this important new rule.

Respectfully,

Micah Buchdahl, Chair

Appendix 9: Suggested Data Reforms (partial)
Racial Disparities in the Massachusetts Criminal System
Harvard Law School, September 2020

"There are several types of data that we requested but did not receive, and data that we received but were unable to analyze for various reasons. The data that we did receive contained substantial problems in quality and consistency that hampered our analysis in certain ways. We were given unprecedented access to Massachusetts criminal data and our experience collecting, cleaning, and analyzing this data makes clear that, at the time of our study, **data collection practices in Massachusetts presented a significant barrier to understanding racial disparities at all stages of the criminal justice system**. " p. 4

- **Data Consistency**
  - Implement the cross-agency tracking system required by M.G.L. c. 6A, §18 3⁄4.
  - Create a uniform identification system for tracking individuals across all agencies.
  - Standardize and define data fields consistently across agencies and throughout the state.
  - Coordinate across offices to develop consistent and compatible data definitions, collection practices, and management systems.

- Data Quality
  - Collect uniform and accurate race and ethnicity data in all cases. Self-reported race and ethnicity information is best.
  - Strengthen universal standards for recording important case events
  - Use structured data fields and other formats that can be easily compiled electronically wherever possible.
  - Require collection of sentence data in every case.
  - Facilitate communication between research staff and clerical staff to identify data quality trends and patterns
  - Conduct periodic external audits of data quality.

- **Data Transparency**
  - Implement the provisions of M.G.L. c. 6A, § 18 3⁄4 (12)(3) requiring public access to electronic records.
  - Make robust de-identified data sets available to researchers.
  - Create streamlined process for requesting data that is consistent across agencies.