REPRINT: Gender Bias Study of the Court System in Massachusetts *

Spring, 1990

Reporter
24 New Eng. L. Rev. 745 *

Length: 51661 words

Text

[*745] *Executive Summary*

Gender bias exists in many forms throughout the Massachusetts court system. Sexist language and behavior are still common, despite an increased understanding that these practices are wrong. Beyond these overt signs of bias, many practices and procedures exist that may not appear motivated by bias but nonetheless produce biased results.

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 issuing this report, the Gender Bias Study Committee has completed the task set forth in its mandate: to determine the extent, nature, and consequences of gender bias in the judiciary and to make remedial recommendations to promote the fair and equal treatment of men and women. As we pursued this task over the last three years, our attention was increasingly drawn to the larger goal underlying our mandate: the elimination of gender bias in any form from our judicial system.

[*746] We believe that this larger goal can and must be achieved. Time and resources are needed, but the most critical need is for committed leadership. This type of leadership has already been demonstrated by members of the judiciary, the legislature, and the bar in their support of our study. It is to this same source that we look for the courage and commitment to complete the job.

Because we believe so strongly that this goal can and should be achieved we intend to propose to the Supreme Judicial Court the appointment of a Commission to Eliminate Gender Bias in the Courts. 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

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* The Gender Bias Study of the Court System in Massachusetts (Gender Bias Study) is an official report of the Massachusetts Supreme Judicial Court. In 1986, 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 Gender Bias Study is the result of the committee's research. New England Law Review has published the Executive Summary, Family Law, and Civil Damage Awards sections of the Gender Bias Study in their original form. The Introduction, Domestic Violence and Sexual Assault, and Gender Bias in Counthouse Interactions sections can be found in volume 23 of Suffolk University Law Review.

New England Law Review expresses its appreciation to Gladys E. Maged, Executive Director of the Committee for Gender Equality, and Lois Frankel, Assistant Director, for their assistance in publishing this material.

public, and it will work in cooperation with any other organization or department that is pursuing the goal of eliminating gender bias.

This report endeavors to evaluate many aspects of how the courts function, including the performance of judges. But to paint a fair picture, it must be noted that the overwhelming majority of judges and other employees of the court system do a remarkable job in serving the public. The men and women working in the judiciary do so in the public interest. And they do this day in and day out, despite the many challenges and difficult conditions they face.

Gender bias was not born in the court system. Rather, it reflects the prevailing attitudes and conditions of our society. Regardless of its genesis, the cost of gender bias is great. The court system must examine its role in continuing and contributing to gender bias, and it must work to correct the problems that exist. As you read this summary and the fuller documentation and discussion contained in our report, we believe that you will join us in the conviction that gender bias must be eliminated from our system.

FAMILY LAW

Research studies from throughout the country indicate that women's standards of living consistently decrease more than men's after a divorce because women are left with a disproportionately large share of the cost of raising children and a disproportionately small share of the marriage's wealth and earning power. The economic inferiority of women after divorce is inseparable from the problems women experience in getting and enforcing support and alimony orders. The issue of custody is inseparable from the economic issues of family law, and here, too, women face discriminatory attitudes and actions.

As we began our investigation of alimony, child support, and child custody, we noted that three aspects of the family law system consistently, and negatively, affect women. The first and most serious is lack of access to adequate legal representation: many women cannot obtain **[*747]** the assistance they need, particularly in the crucial first days and months after separation. Women without legal representation (*pro se*) find the system difficult to navigate, and free legal services are often not available to them. Private counsel may be unwilling to represent women because of the difficulty obtaining adequate awards of counsel fees during, and sometimes after, a trial. The second issue is repeated concern expressed by family law attorneys regarding the accuracy of financial data presented to the courts and the failure of the courts to take seriously the rules surrounding discovery in family law cases.

Lastly, our investigation raised questions about the use of mediation, as practiced in the probate courts, to settle family cases. Mediation, as it is commonly defined outside the courts, presupposes equal parties and a neutral mediator. Our research indicates, however, that women involved in divorce proceedings are often not on an equal footing with men. Women involved in the probate court's mediation of cases are frequently at greater economic risk, have less information about marital assets, and less information about their legal rights. They are also much more likely than men to bargain away property to get their preferred custody or visitation arrangements. The inequality between the participants is particularly severe when one party has been physically abused by the other.

Although we feel strongly that parties should not be forced to mediate inappropriate cases or be coerced into settlement, we recognize that the family service officers who handle cases in the probate court provide a crucial service to both the courts and the litigants. We support the practice of referring litigants to them within the guidelines that we have delineated in our recommendations.

In the area of alimony, the Committee found that very few women receive alimony awards, while even fewer women receive awards that are adequate. While many alimony awards undervalue the contributions of the homemaker to the family, they also overvalue the earning potential of homemakers who have long been out of the labor market. Further, only a minority of the alimony awards ordered ever get collected. This has a grave impact on those most dependent on alimony, particularly older homemakers who no longer receive child support and who have decreased earning potential because of years spent on childrearing. These women must rely on their own resources to bring contempt action in cases of nonpayment, and they receive little help from the courts.

We began our investigation of child custody aware of a common perception that there is a bias in favor of women in these decisions. Our research contradicted this perception. Although mothers more frequently get primary physical

custody of children following divorce, this practice does not reflect bias but rather the agreement of the parties and the fact that, in most families, mothers have been the primary **[*748]** caretakers of children. Fathers who actively seek custody obtain either primary or joint *physical* custody over 70% of the time. Reports indicate, however, that in some cases perceptions of gender bias may discourage fathers from seeking custody and stereotypes about fathers may sometimes affect case outcomes. In general, our evidence suggests that the courts hold higher standards for mothers than fathers in custody determinations.

Family service officers, probate judges, and appellate judges all say that giving primary consideration to the parent who has been the primary caretaker and psychological parent is in the best interests of children. In practice, however, it appears that as soon as physical custody is contested, any weight given to a history of primary caretaking disappears. Mothers who have been primary caretakers throughout the child's life are subjected to differential and stricter scrutiny, and they may lose custody if the role of primary caretaker has been assumed, however briefly and for whatever reason, by someone else.

Two other aspects of child custody determination raised concern for us. The presumption in favor of shared legal custody that is currently held by many family service officers can result in the awarding of shared legal custody in inappropriate circumstances. We also found that abuse targeted at the mother is not always seen as relevant to custody and visitation decisions. Our research indicates that witnessing, as well as personally experiencing, abuse within the family causes serious harm to children.

Women seeking child support enforcement have frequently found themselves facing an unresponsive and sometimes hostile system. We are, however, currently in a transition period. The court and the Department of Revenue (DOR) are establishing a new system that promises to be well-coordinated and responsive. Our study identified some key issues to be resolved during the transition period. Nonpayment must be met with predictable, steadily escalating enforcement sanctions. The child support guidelines, which have led to increased child support orders, should be used consistently in all courts. The standard for modification of an order must be redefined. Currently, the standard is so strict that it denies women modifications to which they are entitled. The court and the Department of Revenue need adequate resources to complete this transition. The community has a role to play in holding the court and DOR to the promise of a more responsive and respectful system that is focused on serving parents seeking support.

Even when these reforms are accomplished, however, it will not ensure adequate income for all families. Families will still suffer economic hardship when there just isn't enough income to support two households. A progressive family policy may need to include economic parenting supplements, tax code revisions, or other methods that ensure adequate income to children and fair treatment of both parents.

[*749] RECOMMENDATIONS:

Access to the courts by *pro se* litigants should be improved by designating personnel to assist them, educating all court personnel, and eliminating rules and procedures that act as barriers for *pro se* litigants. The private bar and legal services organizations should devote more resources to representation of women in family law cases. Judges must award adequate attorney and expert fees during the pendency of divorce litigation.

The probate court financial statement form should be changed to require the disclosure of accurate data concerning the valuation of pension and other deferred compensation and retirement rights. The probate court rules should require that counsel for the parties sign financial statements and certify to the correctness of the statements. The rules should call for parties to a divorce to recognize marriage as a "partnership." It should place the responsibility of full disclosure upon the divorcing parties, and it should authorize sanctions for failing to do so.

Family service officers should be relieved of any pressure that might lead them to coerce settlements. Parties to mediation must understand the particular nature of mediation in the probate court and should be routinely informed that their case can be heard by a judge if they so desire. Both family service officers and

judges need to be sensitized to signs of unequal power in the dynamics between the parties, unfair concessions, and the effects of abuse on the parties and on the children whose custodial parent is being abused.

M.G.L. c. 208, § 34, the statute regarding division of marital property, 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. Enforcement provisions, such as security interests, bonds, and wage assignments, should be included in financial orders. In addition, judges should be required to impose appropriate civil and criminal penalties for noncompliance with court orders concerning alimony and property division.

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.

Permanent shared legal custody should be awarded 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.

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 [*750] to make arrangements to protect any family member from further abuse.

The Department of Revenue should be given the resources to handle as many cases as possible to provide the greatest amount of assistance to the most people. DOR should issue written directives to emphasize to its staff and court staff that collection of support is not secondary to collection of arrears and that support payments are vital for the well-being of femaleheaded families, including those receiving public assistance and those who are not.

Automatic periodic updating of child support orders, in accordance with guidelines, should become standard practice through revision of the statute and a change in practice of the family law bar. The current child support guidelines should be made presumptive in order to further increase consistency from court to court and to continue the trend of making orders more reflective of the real needs of children. When the guidelines' content is reassessed as required by federal law, any change should be to reduce the disparities between women's and men's households after family breakup.

VIOLENCE

Women are disproportionately affected by crimes of violence involving nonstrangers -- colleagues, friends, relatives, or husbands. Beyond the "personal" impact on the victim, the high incidence of violence against women by acquaintances and relatives raises significant legal issues which challenge the long-held presumption that such matters are best left to the private sector and outside the realm of the courts.

In 1978, Massachusetts passed M.G.L. c. 209A, which provides that in emergency situations women may obtain orders mandating that their abusers, in a domestic situation, refrain from violence against them. The law makes this process as easy as possible, allowing women to obtain this relief on their own, without having to retain counsel, and allowing them to enter most courts in the state for these orders. Unfortunately, a disparity remains between the protection afforded to the victims by the statute and the actual manner in which the statute is being applied.

The Committee was impressed to find that petitions for orders of protection under c. 209A are almost always granted. Judges are providing women with the immediate relief from abuse that is available under the statute.

Nonetheless, the Committee discovered several areas where improvement is crucial to ensure that women have access to the full protection of the law.

While the law allows for proceedings to be *pro se*, litigants not represented by counsel or assisted by trained advocates are not always able to obtain child custody, support, or other benefits available under the statute. The problem is exacerbated when one party, usually the male respondent, is represented by counsel and the female petitioner is not.

[*751] The Committee also found that women contend with barriers to full use of the statute when they are faced with insensitive treatment and misleading information regarding their rights under the law. This problem is particularly acute when they get unclear or wrong information about the jurisdictions of the probate and the district courts.

The Committee is also concerned that domestic abuse cases in the civil and criminal arena may not receive the emphasis they merit and that this underlies the poor coordination between the courts and law enforcement agencies. This results in delays in the service of abuse prevention orders. Likewise, we heard many reports that the courts are not using the sanctions available to them to punish the violation of orders in a way that would clearly and publicly convey the message that abusive behavior is not acceptable. Further, judges' decisions should make clear that, just as the criminal law punishes violence occurring among strangers, the criminal law will also punish violence committed among people who are related or share a household.

In our research on sexual assault, the Committee discovered that the "rape shield" law is being correctly applied by judges and that sexual assault cases are generally treated very seriously by prosecutors. The vast majority of sexual assault cases involve parties who know each other. While most people feel that these cases should be treated in the same manner as cases of sexual assault by strangers, it appears that this does not always occur. Sentences seem to be set lower in cases where the victim and her assailant were acquainted. Stereotypes about relationships and victims' requests for lower sentencing in cases of acquaintance assault were both offered as reasons for lower sentences.

According to survey responses, attorneys believe that jurors expect more corroboration in sexual assault cases than in other felonies of like seriousness and that jurors accord sexual assault victims less credibility than they do victims of other felonies of like seriousness. It is less clearcut how judges perceive victims. Although half of those surveyed agreed that judges accord sexual assault victims the same credibility as victims of other serious felonies, the responses of the rest of the attorneys differed depending on the sex of the respondent.

A significant difference of opinion exists between the legal community and the rape crisis community regarding case dismissal policies. Police and prosecutors contend that virtually the only reason for dismissal of sexual assault cases is the victim's unwillingness to prosecute, while rape crisis counselors cite lack of prosecutorial zeal and discouragement of victims bY prosecutors as the chief reasons for dismissal. All parties agree that the victim/witness assistance programs provide much encouragement and support to victims.

It is clear that the judicial system has become increasingly sensitive to the unique issues sexual assault cases present. It is equally clear that room for improvement remains. In order to encourage victims to report **[*752]** and prosecute these cases, it is important to eradicate the perception of the courthous as a hostile environment with few allies for the sexual assault victim. The legal system must remain focused on a greater expectation and vision that challenges the system to be vigilant in its aim for justice unfettered by society's prejudices.

RECOMMENDATIONS

The courts must assert that the protection of women in abusive situations and the censure of abusers is a priority for the judicial system. More sensitive treatment of women seeking relief, accurate information regarding their rights, improved coordination with law enforcement agencies, and increased use of sanctions for violation of orders would all contribute to this goal.

Victim/witness advocates, trained court personnel, and *pro bono* attorneys should be available to assist parties in cases of domestic violence to the full extent possible.

Training should be provided for judges, jurors, court personnel, probation officers, clerks, registrars, family service officers, and attorneys. The bar and members of the public need to be educated to recognize domestic violence, to know the legal remedies, and to treat victims with sensitivity.

More victim/witness advocates should be hired. They should be better trained and better paid. In furtherance of these goals, the Victim and Witness Assistance Board should be encouraged to continue to evaluate on an ongoing basis the availability and quality of assistance in each county, and to continue improving services based on recommendations of both professionals and citizens.

More training of prosecutors is needed, especially in the area of sensitivity to the feelings of trauma, embarrassment, and shame felt by victims. Prosecutors should also receive training that helps them to understand victims' fears of the court process.

Prosecutors are encouraged to consider the use of direct indictments, eliminating the need for a probable cause hearing, to reduce the trauma to victims of testifying repeatedly.

District attorneys should devise and implement specific case dismissal policies for sexual assault cases. Such policies should include: 1) provisions for seeking input from rape crisis counselors before seeking dismissal; 2) provisions ensuring that victims are informed of the strengths and weaknesses of the case and are encouraged to come forward and prosecute; 3) provisions requiring that victims be given notice and an opportunity to be heard in cases where dismissal is contemplated.

The Commission to Eliminate Gender Bias in the Courts should work with the district attorneys' offices, representatives of the rape crisis community, and other appropriate groups to examine: whether judges are correctly applying laws concerning disclosure of privileged information; whether case dismissal policies vary significantly by county; public attitudes concerning [*753] the credibility of sexual assault victims and sexual assault by acquaintances; why judges and other sources disagree as to whether sentences are lower in sexual assault cases where the parties are acquainted. Among the questions to be answered are whether prosecutors make lower recommendations in these cases and to what extent the recommendations and sentences reflect the wishes of the victims.

Public education is needed. Attorneys and judges should be encouraged to participate in bar-associated programs that educate the public. It is important that the public, particularly youth, be educated about the definition of rape, and the definition of sexual assault in its broadest sense. We support legislation authorizing public schools to teach healthy alternatives to violent behavior.

Bar associations should cooperate with rape crisis advocates and the media to prepare and disseminate educational materials for victims and the public that inform them of the definition of rape, the resources available through rape crisis centers and victim/witness units, and the increased support for victims of acquaintance rape.

CRIMINAL AND JUVENILE JUSTICE

The special needs and circumstances of female offenders pose unique challenges to the criminal justice system. Where the treatment of young girls does not respond to the demands of their lives and the treatment of adult female offenders does not acknowledge the ways in which their criminal histories, the crimes they commit, and the responsibilities in their lives are different from those of men, the system is biased against the women who come before it.

In the Massachusetts juvenile justice system, status offenders such as runaways are serviced by the Department of Social Services (DSS), delinquent offenders by the Department of Youth Services (DYS). Although there are serious problems facing both male and female juveniles, testimony, surveys, and statistics all support the

conclusion that girls are disadvantaged to a greater extent than boys in the area of DSS and DYS placement and service.

Testimony indicates that service providers view girls as harder to handle than boys. Thus, even though in certain age categories more girls than boys require services, providers offer fewer programs for girls. Judges, in turn, commit a disproportionately high percentage of girls to DYS in the hope that the girls can be secured, stabilized, and provided with services not available from DSS. They base commitment either on contempt charges in CHINS (Children in Need of Services) cases or on detention for a minor delinquency offense. Unfortunately, our evidence indicates that often girls do not get the services they need at that point either, since the majority of the programs offered by DYS are male-oriented. In essence, girls are being detained to a greater extent than is merited in the hope that they can be helped, yet at no point **[*754]** are services sufficient to give them the help they require. Testimony from representatives of DYS reveals that the department is attempting to deal with the lack of female-oriented programs and facilities.

Our study of adults in criminal justice focused on bail, sentencing, and probation and was limited to preliminary questions. The criminal histories, crimes committed, and life responsibilities of women and men are very different, so a thorough study of gender bias in these processes would require an in-depth study of individual cases. Since limited resources precluded such a study, the Committee focused its bail, sentencing, and probation research on discrete issues that might affect the treatment of female offenders during the various phases of the judicial process. Our study of the incarceration of women investigated the Massachusetts Correctional Institution (MCI) at Framingham.

In the areas of bail and sentencing, the Committee focused on two discrete issues related to family responsibilities: child-care and financial responsibility. Controlling only for the impact of these two variables on the treatment of male and female offenders, attorneys' responses suggest that they are not the major determinants influencing judicial decision making in the areas of bail setting and sentencing. Though our data regarding these variables are informative, other factors must be considered to thoroughly understand differences in the experiences of men and women at the bail-setting and sentencing stages.

The Committee also looked at the effect of substance abuse treatment needs on bail and sentencing. Judges reportedly recognize the needs of women to the same extent as those of men. The lack of appropriate programs may, however, lead to different sentencing patterns between male and female offenders, though attorneys surveyed do not agree on whether the lack of programs results in higher incarceration rates for women or for men.

Finally, many attorneys reported that paternalistic statements are made to women in the sentencing process that are not made to men. This demonstrates that some judges still have sexist notions regarding the role of women.

The Committee focused its study of women's experiences with probation on the risk/needs classification system. Apparently, the original risk/need classification system was based on a model of the male probationer. The Committee commends the Office of Commissioner of Probation for taking a look at this model and at the women who are subject to it. However, several areas remain where there is a risk of punishing women for their inability to conform to a system that may not take into consideration the ways in which their lives are different from men's. In particular, the factor of employment raises the question of whether the supervision levels and plans of female probationers, who often have child-care responsibilities and are unable to work outside of the home, **[*755]** require them to meet more stringent requirements of supervision than male probationers.

In addition, we are concerned that women have slightly longer supervisory periods than men. The length of these periods is inconsistent with the fact that women commit fewer crimes against the person and have fewer prior court appearances than men.

Finally, the personal and family issues faced by the typical female probationer appear significantly greater in number and complexity than those of the typical male probationer. Among other consequences, this may result in the female offender having to contend with a myriad of bureaucracies and agencies. This can be overwhelming and self-defeating.

In regards to women who are incarcerated, the most glaring disadvantage to women is that almost all female offenders and detainees are incarcerated at one central facility, MCI-Framingham, whereas men awaiting trial or serving shorter county sentences are housed in local county facilities. Only a small number of women are at other state or county facilities.

The Awaiting Trial Unit at MCI-Framingham, which is under the auspices of the courts, has held women under deplorable and dangerously overcrowded conditions for years. Because women are held at one centralized facility, rather than at localized facilities, they are at a significant disadvantage to similarly situated men who are held in county facilities much closer to their home communities. This results in severe limitations on women's access to legal assistance, bail review, enrollment in community-based programs, and visitation with children, family, and community contacts. Desperately needed health services and treatment programs are also limited by this situation.

RECOMMENDATIONS:

Training for judges and probation officers should focus on possible paternalistic and protective attitudes that may cause them to place girls in more protective settings than are warranted, while perhaps underestimating the needs for protection of boys. Likewise, training should help judges identify ways in which stereotypes may affect their decision making in cases involving adult offenders, and it should emphasize the proper ways to address these offenders.

The Department of Social Services should recognize the needs of its female clients and provide programs that meet those needs. These programs should include more independent living slots, short-term, respite placements in a small group setting that is personnel secure, and services that address the drug and parenting needs of girls.

The judiciary should keep abreast of current research into the types of crimes committed by female offenders, suggested causes for their criminal behavior, and the current thinking on steps necessary to curb further criminal [*756] activity. Judges, in setting criminal sentences, should be cognizant of the factors that are unique to female offenders and should craft criminal dispositions that address their needs.

M.G.L. c. 123, § 35, should be revised to reflect that the Department of Public Health is responsible for providing the district courts with a list of available substance abuse treatment programs. A mechanism for ensuring that this occurs should likewise be established. Further, the judiciary should become an advocate for additional resources for substance abuse treatment.

The Office of Commissioner of Probation is encouraged to continue its research and training on women and probation. In specific, studies should investigate the appropriateness of each factor included in the Risk/Needs Assessment to ensure that all of them are valid determinants of the risks and needs associated with women. The next revision of the forms should include the factor of employment within the home, so that researchers can determine empirically the effect of this occupation on the criminal activity of female offenders.

The Office of Commissioner of Probation should investigate patterns of technical violations of probation, since it may be that women, given their greater child-care responsibilities, are susceptible to more technical violations than men. In this same vein, the Office of Commissioner of Probation should assist female probationers to coordinate and, if necessary, resolve the sometimes conflicting and overwhelming demands of the agencies trying to help them.

Women awaiting trial and serving county sentences must not all be held in one centralized facility. Plans for establishing regional facilities should be enacted as quickly as possible to reduce the severe overcrowding and to place women closer to their home communities.

The Department of Correction, county officials, the advocacy community, and the Commission to Eliminate Gender Bias in the Courts should work in coalition to oversee the creation of new beds for women to ensure that their needs are met.

Until women are moved back to local facilities, every effort should be made to encourage community-based service providers to give priority to those county women held away from their home communities.

Whenever a woman can remain in the community, such as through local detoxification facilities, day-reporting centers, or alternative sentencing programs, this should be encouraged.

CIVIL DAMAGE AWARDS

Our research tried to determine if the amount of damages awarded in civil actions depends on whether the plaintiff is male or female. National surveys and the opinions of local personal injury attorneys indicate concern about the possibility of bias in these awards. To obtain objective data from Massachusetts jurors, we surveyed people called for **[*757]** jury duty about the awards they would give in a hypothetical personal injury case. The research was carefully controlled so that we could draw conclusions about the influence of the plaintiff's gender on the awards.

There is no statistically significant difference between awards given to male and female plaintiffs when the responses to the jurors' survey are analyzed collectively. When juror responses are divided into groups, however, the influence of bias emerges. The data suggest that women respondents, no matter what age group, treated male plaintiffs and female plaintiffs the same. In contrast, men under forty gave the female plaintiff higher awards for medical expenses, while men over forty favored the male plaintiff in the awarding of damages for both diminished earning capacity and pain and suffering.

We have come to some tentative conclusions about the presence and absence of gender bias among jurors hearing and deciding civil cases and recommend steps to be taken to ensure that bias does not affect jury decisions. But more research is essential if we are to achieve a fuller picture of how bias operates in this area.

RECOMMENDATIONS:

The handbook all jurors receive should be modified to stress that the gender of litigants, without more, is an impermissible basis for making decisions. The orientation video shown to jurors should be modified to stress the impropriety of making decisions on the basis of the gender of the parties or witnesses.

Judges should consider instructing jurors that, in making decisions, they are not to be influenced by the gender of the parties. The following short and straightforward instruction could be used in virtually all cases: "Your verdict must be based solely on the evidence developed at trial. It would be improper for you to consider any personal feelings about the defendant's race, religion, national origin, sex, or age. Those personal feelings are not a proper basis for deciding any issue of fact you are required to decide in this case, and you must not allow them to influence you in making the important decision you are about to make."

GENDER BIAS IN COURTHOUSE INTERACTIONS

Women today have opportunities and roles open to them that were undreamed of a hundred years ago. This is true in the court system, as it is throughout our society. Yet barriers and discrimination still exist. From their entrance into the courthouse and throughout their participation in the business of the courts, female litigants, witnesses, employees, and attorneys are faced with unnecessary and unacceptable obstacles that can be explained only in terms of their gender.

Women in the Massachusetts courts, whether they be attorneys, litigants, **[*758]** witnesses, or employees, suffer discriminatory treatment at the hands of some male judges, attorneys, and employees. Although male attorneys emerged in our research as the worst offenders, we must also recognize the part that court employees play in making the courthouse environment an uncomfortable and sometimes hostile place for women. Although judges were reported to exhibit gender-biased behavior less often than other groups, their responsibility for setting the standards of behavior in the courthouse increases the impact of their actions. Judges are the role models and the authorities for attorneys and employees. Accordingly, the evidence of judicial bias is most disheartening.

As litigants and witnesses, women are subjected to inappropriate terms of address, suggestive comments, unwanted touching, yelling, and verbal harassment. Women litigants who must bring their children to court are further burdened by the lack of day care facilities and flexibility in court schedules.

Female attorneys are also subjected to conduct ranging from discriminatory treatment to sexual harassment; this conduct is especially pronounced toward minority attorneys. Female attorneys are also disadvantaged in the area of court appointments, where they are significantly underrepresented among attorneys appointed by the Trial Court and Committee for Public Counsel Services.

This bias undermines the credibility of female attorneys, hampering them in their role as an advocate, and weakening female litigants' testimony. When women, in their diverse roles, are denied credibility because of their gender, the courts are seriously impaired in their ability to deliver justice to anyone in our society.

During the course of our research we sometimes encountered perceptions that biased treatment of women in the courts is a trivial matter or that reports of this treatment are exaggerated. As the chapter on courtroom environment in this report illustrates, however, women have good cause to anticipate that they will be treated differently than men. Furthermore, biased attitudes do more than hurt feelings. They affect women's ability to function in the system, and they are linked to unjust outcomes.

RECOMMENDATIONS:

The Commission to Eliminate Gender Bias in the Courts, appointed by the Supreme Judicial Court, should issue a statement condemning gender-biased behavior in the courts. It should urge every court and state and local bar association to adopt this statement. Guidelines for courtroom behavior developed by the Commission should be issued to all judges and court employees.

The Supreme Judicial Court should consider authorizing a study of racial [*759] bias and taking actions comparable to those recommended by this Committee in an effort to eliminate racial bias.

The Commission will work with the bar associations to establish a clearinghouse function for complaints regarding gender-biased conduct, provide a means of informal dispute resolution, and serve as a liaison with the judiciary on these issues. This clearinghouse should sponsor a regular column in the *Massachusetts Lawyers' Weekly* that includes discussion of gender bias issues, describing in an anonymous fashion examples of this behavior and suggesting concrete actions that could be taken to address the situation.

The Commission will work with the Judicial Performance Evaluation Advisory Committee to ensure that gender-biased behavior becomes an integral part of judicial evaluation. The Commission will work with the Judicial Training Institute, the Flaschner Institute, the various departments of the trial courts, and others to incorporate teaching on gender bias into training for judges and court employees.

When a substantiated complaint involving gender bias has been lodged against a judge with the Judicial Conduct Commission, the judge involved should be required to participate in appropriate training or consultation regarding this behavior.

The Chief Justice of the Superior Court should ensure that at least one superior court judge in each county is available at all times to hear § 12S petitions for consent to abortions.

The Judicial Nominating Council, the Joint Bar Committee, the Executive Council, and the Governor's Legal Counsel should continue to encourage women to apply for appointment as judges and clerk-magistrates and make every effort to appoint women to courts in locations where few women currently serve.

The Commission should work with the chief justices of the Trial Court departments, the Committee for Public Counsel Services, and the bar associations to review and improve the system of appointment of attorneys by the courts including establishing and publicizing lists of available attorneys for appointment

and the qualifications for appointments; and establishing effective recruitment to ensure full participation by women and minorities.

The Chief Administrative Justice and those responsible for court facilities should see that all courthouses are wheelchair accessible, including automatic doors and ramps, and that they have supervised waiting areas for children and spaces for day care, such as the Roxbury District Court Child Care Center.

COURT PERSONNEL

The work of the court system's employees is critical to the efficient operation of the courts and to the public's image of the judicial system. Because of this, we reviewed employment practices to determine which practices might indicate active discrimination. We were immediately **[*760]** struck by the significance of a key overriding condition that seriously affects all employees: job segregation.

As is true throughout the American workplace, many workers in the Massachusetts courts labor in positions that are clearly dominated by either women or men. In the Trial Court, which employs more than 95% of the total court workforce, three-quarters of the job titles with four or more job-holders are held by over 70% men or over 70% women. Women account for 90% of the workers in clerical track jobs, while men dominate in the higher ranked positions.

Although some progress has been made through the efforts of the Affirmative Action Office of the Chief Administrative Justice of the Trial Court, statistics on the proportion of women in the upper managerial positions show that there is still a long way to go. In addition to job segregation, we also analyzed several more specific features of the employment situation: compensation, promotions, appointed positions, and working conditions.

In the area of employee compensation, we studied the Trial Court evaluation system devised by Arthur Young and Co. We found that although the system is consistently applied to the positions it covers, the male-dominated, high-paying position of court officer is not included in the system. Our research was not extensive enough to draw conclusions about whether values (which underlie the evaluation system) were assigned in a gender neutral way.

In the area of promotional opportunities, our research shows that gender does not have a negative impact on the promotions of women through most of the clerical track, though there may be a barrier to access to the higher positions in that track. However, the substantial underrepresentation of women at the assistant clerk level suggests that they are impeded from advancing beyond the traditional clerical track in any meaningful numbers. Our research also found that race seems to have a negative impact on access to promotions. The condition and extent of employment records precluded a meaningful investigation into additional aspects of the promotions picture, as well as the related area of hiring.

The Committee also investigated women's access to two appointed positions that are high in pay and prestige, those of judge and clerkmagistrate. Though only one out of ten judges is a woman, there has been notable progress toward increasing the number of women on the bench. The current governor, Michael S. Dukakis, and the Judicial Nominating Committee appear committed to this increase, though criteria for nomination could be better articulated and recruitment efforts could be improved. The position of clerk-magistrate shows no comparable progress, with the applicant pool and the resulting appointments remaining heavily male-dominated.

Run-down and inadequate facilities mean that the working conditions **[*761]** of the Trial Court are, in general, unpleasant for all employees. But, women report that they face additional problems, specific to their gender, including sexual harassment, other disrespectful treatment, and disadvantageous application of work rules, policies, and assignments. Both women and men believe that the Trial Court should provide day-care facilities and institute job sharing and flexible working hours so as to facilitate the employment and retention of working parents.

RECOMMENDATIONS:

The courts must aggressively counter job segregation. In particular, the Trial Court Affirmative Action Office should actively recruit women to positions that are currently male-dominated and should investigate

those positions for barriers that may exclude women from their ranks. Examples of positions that should be targeted for affirmative action efforts are assistant and chief probation officer, assistant clerk, and court officer.

The Judicial Nominating Council and the governor should structure their recruitment, evaluation, recommendation, and appointment processes to ensure that the percentage of female judges in the Commonwealth equals, at a minimum, the percentage of women in the active bar. Special efforts should be made to recruit and advance the candidacies of female applicants for the position of clerk-magistrate.

The Trial Court job evaluation system should be thoroughly examined to determine whether it has a built-in gender bias, failing to value or undervaluing traits associated with female-dominated job classifications. The probation officer and court officer job titles should be included in the Trial Court job evaluation system and paid in accordance with the established criteria.

The trial court should train managers and judges regarding treatment of equal dignity for both genders; sensitivity to the problems of sexual harassment experienced by female employees; and gender-free employee evaluation. Bar and other relevant professional associations should be encouraged to educate their members on these issues.

COMPLETING OUR TASK

The elimination of gender bias from the court system requires time and resources. As a first step, the Supreme Judicial Court should appoint a Commission to Eliminate Gender Bias in the Courts. This report makes many recommendations that entail change throughout the system. An ongoing body is needed to oversee their implementation. To be effective, this commission must be composed of active members and have staff support.

But the work of the commission alone will not be enough. We need courageous and committed leadership coming from all levels of the court system. The courts and the legal community displayed this type **[*762]** of leadership when they chose to undertake the public self-examination entailed in this study. What is called for now is a continued commitment by the leaders of the judiciary, the bar, the legislature, and citizen's groups to see that the task is completed. The citizens of the Commonwealth deserve a court system free of gender bias. This is a goal we can and must achieve.

Family Law

OVERVIEW

Our work in the subcommittee studying family law issues was motivated in part by the growing statistical evidence that women suffer tremendous negative economic consequences following the dissolution of a marriage. This evidence is so provocative that it led us to examine whether national data on the economic consequences of divorce are applicable to Massachusetts and, if so, whether gender bias in the family law system contributes to the precarious economic status of women after divorce.

Research studies from throughout the country indicate that women's standards of living consistently decrease more than men's after a divorce, resulting in a tremendous difference between the lifestyles of women and those of their former husbands. In Vermont, for example, a recent study found that men's income went up 120% following divorce, while women's income decreased by 33% (Wishik, 1986). In California, a study of postdivorce income revealed that, for middle-income couples married ten years or less, the husband's per capita income was 83% higher than the wife's (the wife was generally the primary caretaker of children). For higher-income families, the discrepancy between men's and women's postdivorce per capita income was 144%. The same study indicated that with respect to standard of living, the woman's standard declined 73% in the year following divorce, while the man's increased by 42% (Weitzman, 1985). Another study using national data from 1969 to 1975 found that in the first year following divorce or separation, the family income of women dropped to 70% of their previous income. Over 40% of the women had their incomes drop by more than half, compared to only one-sixth of the men (Duncan and Hoffman, 1985).

According to these studies, the drop in women's economic standing occurs because women are left with a disproportionately large share of the cost of raising children and a disproportionately small share of the marriage's wealth and earning power.

The decline in women's standard of living after a divorce is one of the major reasons that female-headed households are now the fastest **[*763]** growing segment of the poverty population. Statistics gathered by our committee clearly show that Massachusetts is very much a part of the national trend toward poverty for families headed by women: [1]

> Massachusetts is fifth in the nation in the percentage of families headed by women. Only the District of Columbia, New York, Georgia, and Mississippi have a higher proportion.
>
> The feminization of poverty in Massachusetts is more acute than elsewhere. Nationally, 48% of those living below the poverty level are mothers and children; here, 68% of the poor are mothers and children. Female-headed households in Massachusetts are eleven times more likely to be in poverty than two-parent families, more than twice the national average.
>
> In 1984, 70% of the female-headed households in Massachusetts had incomes below $ 20,000, while 80% of the two-parent families had incomes over $ 20,000.

The family law system is an important area in which to explore solutions to the problems of economically disadvantaged women. Although the causes of women's desperate economic conditions are complex and deeply ingrained in our society, the courts must examine whether they play a role in continuing and contributing to women's inferior economic and social status. Divorce is a financial disaster for most low or middle-income families, and supporting two households on the income that previously supported only one can strain the resources of all family members. While committee members realize that the negative consequences of divorce are felt by both husband and wife, the task before the Committee was to examine whether the consequences of divorce have a *disproportionately* negative impact on either men or women. Members of the Subcommittee on Gender and Economics examined court practices regarding custody, child support, alimony, and property division to isolate patterns of behavior that disadvantage women and to examine the results of this behavior on the economic status of women. We found that women face problems in the family law system that men do not and that these problems are linked to gender bias. We believe that the economic inferiority of women after divorce is inseparable from the problems women experience in getting and enforcing support and alimony orders and that those involved in the family law system must come up with solutions to the problems caused by systemic gender bias.

Although each report in the family law section details specific ways in which gender bias occurs in the areas of custody, child support, and alimony, subcommittee members were struck by three overriding issues that consistently, and negatively, affect women in all areas of the family law system. These include: access to legal counsel; accuracy of financial **[*764]** data; and mediation in the probate courts. (When using the term "probate court," we are referring to the Probate and Family Court Department of the Trial Court.) Because these issues are pervasive throughout the system, we thought it crucial to highlight them at the beginning of the family law report and to recommend ways to deal with the problems raised.

ACCESS TO LEGAL COUNSEL

The family law system is virtually impossible to navigate without legal assistance. Many women, however, cannot obtain the assistance they need, particularly in the crucial first days and months after separation. [2] **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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[1] Statistics from Massachusetts Division of Employment Security, 1986; and Marilyn Smith, Department of Revenue.

[2] The material in this finding is completely corroborated by the findings of the Massachusetts Legal Services Plan for Action (Massachusetts Legal Assistance Corp., 1987). See especially the material at pp. 122-123.

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.

Pro se litigation

There is widespread agreement among attorneys and litigants that women who try to resolve problems in the probate court *pro se* encounter many more difficulties than do those who are represented by counsel. Both family service officers [3] and attorneys in focus groups reported a recent increase in *pro se* female clients, an increase that they believe the system is unprepared to deal with. Why this increase? As one public hearing witness put it, "Why do I and other mothers attempt to represent ourselves? The answer is simple. We have no funds, and the legal professionals have no services to offer low-income non-AFDC recipients." Reports from the litigant meetings confirmed that women lack information about court processes, how to get what they need from the courts, and how to get help with their legal problems. [4] An overriding **[*765]** theme that became apparent from the litigant meetings is women's lack of knowledge of how the system functions, what their options are within the system, and how and where to get counsel or other information pertaining to their rights as litigants. As one Boston attorney noted in public hearing testimony, a woman may be able to file papers in the probate court, but she may not know that she must serve process. Even if she gets process served, she may wait for weeks or months for a hearing because she does not know that she has the burden of marking up the case for trial.

According to attorneys and family service officers, a particular problem *pro se* women experience is lack of assistance and hostile attitudes from court personnel, especially assistant registers and assistant clerks. Several Worcester attorneys said at a focus group meeting that some assistant registers view it as their job to set up barriers between *pro se* clients and judges. While such behavior occurs with *pro se* clients in general, attorneys feel that the problem is particularly acute for *pro se* women. Not only are women clients treated disrespectfully, but, according to family law attorneys, "they are often given the wrong information." These difficulties contribute to the feelings of powerlessness that many women experience as part of their family's breakup.

At a litigant group meeting, one woman discussed her efforts taking her case *pro se* to the Supreme Judicial Court (SJC). While this litigant had a successful outcome at the SJC, she encountered harassment at the lower court levels, including being denied copies of her court papers, getting summoned to court from her job without advance notice, and receiving denigrating comments from court personnel. These problems were compounded by the psychological cost of pursuing support from a man who frequently changed jobs and earned below his capacity.

One witness pointed to the utility of *pro se* clerks in the federal court and of housing specialists in the housing court, and wondered why the probate courts did not employ similar people to assist *pro se* litigants. [5]

Free legal services

The focus group of legal services advocates revealed that in many parts of the state no legal services staff lawyers work on family law cases. Most legal services programs rely on private attorneys to handle **[*766]** the cases *pro bono*. This practice has a strong negative impact on access to legal counsel. In the four westernmost counties, for

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[3] Family service officers, also known as probation officers, are court employees whose tasks include mediating and investigating cases. Family service officers are hired by the courts and report to both the Commissioner of Probation and the chief justice of their courts. For more on family service officers, see "Child Custody."

[4] This is confirmed by comments from family service officers in the Worcester focus group. This problem is exacerbated when the women do not speak English or are illiterate.

[5] Assistant registers' response to the question of why they fail to provide assistance to *pro se* litigants is that they are forbidden by statute from practicing law. They interpret this to mean that they cannot help *pro se* litigants because that constitutes "practicing law." The chief justice's office of the probate court has supported this interpretation. (See recommendation 3 for response to this problem.)

example, no staff attorneys handle family law cases; the waiting list for a *pro bono* lawyer can be up to two years. In addition, all legal services programs have stringent criteria for the cases they will accept. In Boston, for example, only primary caretakers in custody disputes are represented. [6] Private attorneys often limit the types of cases they will handle *pro bono*; in some areas, they will handle only uncontested divorces.

Women's poverty is linked to unavailability of quick legal assistance. As one lawyer testified at a public hearing, "In our experience, it has been those first few days or weeks following a separation where legal assistance is most critical to the economic safeguard of a woman and her children. With the assistance of counsel a recently separated woman could file for separate support or a divorce with a request for support *pendente lite*. A speedy request for a support or custody order would enable women to maintain or at least stabilize their living situations pending a full hearing." [7]

Attorneys' fees for private counsel

In the family law survey, in focus group meetings, and in public hearing testimony, attorneys consistently reported that adequate counsel fees are not ordered in advance by judges, decreasing the incentive to represent female clients, who almost always have fewer resources than men. Eighty-five percent of the lawyers responding to the family law survey said that courts rarely or never award adequate counsel fees in advance to the spouse unable to afford fees, while 68% reported that judges rarely or never award adequate expert witness fees, either during or at the close of a case. One attorney from western Massachusetts related at the Springfield public hearing that in the 300 times she had applied for counsel or expert fees in advance, she was awarded a fee only once. Adequate fees are almost never awarded during the pendency of litigation, meaning that attorneys must bear all of the costs of the case until after trial.

These sentiments were echoed in the attorney focus group in Boston, where participants stated that attorneys' fee decisions can deny effective representation to women, particularly in the area of discovery. These lawyers said that judges do not understand the economics of current law practice. As a legal services lawyer testified, attorneys' fees "is a mechanism which could provide some representation to women from middle-income families. However, it is rare that an attorney in private practice will accept a domestic relations case in anticipation of court **[*767]** awarded fees and costs and rarer still that a court will order payment of costs in the absence of the need for sanctions."

Attorneys' comments were corroborated by data from our court records study. In the cases examined, fees generally were not awarded when sought, and several cases revealed one party's difficulty affording counsel fees. [8]

RECOMMENDATIONS

1. Access to the courts by *pro se* litigants must be improved. Personnel should be designated to provide assistance to *pro se* litigants, akin to the *pro se* clerk in federal court and the housing specialists in housing courts. Court personnel should be educated about the economic needs of women in an effort to reduce hostile attitudes toward *pro se* litigants, and courts should review their rules and procedures to eliminate those that discriminate against *pro se* litigants.

2. Judges must award adequate attorney fees during the pendency of litigation. They must be educated about attorneys' needs for such fees and the relationship between advance fee awards and a litigant's ability to procure legal representation. 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

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[6] Generally, there is little or no free representation available for noncustodians.

[7] Similar comments were made in the Worcester attorney focus group.

[8] The court record study examined 20 appellate level decisions from 1987 (see "Alimony").

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. Appellate courts must be aware of the significant dearth of legal resources for the representation of women in family law matters and make clear, as a matter of case law, the need for trial judges to order such fees.

3. 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.

ACCURACY OF FINANCIAL DATA

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.

We received a good deal of evidence indicating that the financial statements relied upon by the probate courts for determining financial **[*768]** awards are not sufficiently reliable. Since the financial awards affected by inaccurate financial statements often include child support, this is a situation that has a significant impact not only on women, but also on their dependent children. Although family service officers participating in focus groups differed in their assessment of how accurate financial statements are, all felt that some percentage are inaccurate. Family service officers also noted that filling out the statements can be very confusing, particularly for *pro se* litigants, and they suggested that the instructions be revised and clarified.

Family law attorneys agreed with family service officers that financial statements are difficult to fill out, but they were more consistent in their view that financial statements have a low degree of accuracy. In response to the family law survey, only 35% of the attorneys stated that men's financial statements are always accurate, while 65% believe the same of women's statements. Attorneys in focus groups also noted that the current financial statements are incomplete and do not include such important assets as pensions. In the cases studied in the court record survey, a number of judges specifically highlighted the inaccuracy of financial statements. In short, informants from all categories generally feel that there are significant problems with the financial statements that are currently used by the courts.

Financial statements do not represent the only financial data that are considered by the probate court, particularly in the area of equitable distribution. In the court record study, financial information presented by the parties was often found to be inaccurate or misrepresented. In one case, for instance, the husband stated that his pension was worth $ 19,000; the trial judge determined that it was worth much more. In another case, the trial judge labeled the tax return inaccurate. In two instances, the husbands were found to have withdrawn funds from joint accounts. And finally, in a case with a relatively large marital estate, the trial court stated that "there has been much controversy to the extent of the husband's income and assets . . . although the husband claims lack of income, he has managed to drive around in a Mercedes Benz automobile supplied by the company and to use his own airplane. What the husband shows on the books of the company as current income is not reflective of his ability to manipulate advances and loans." [9]

Questions about the accuracy of financial information submitted to the probate courts make the issue of discovery a crucial one. Yet, according to comments from attorneys speaking at focus groups and at public hearings, the courts do not take discovery seriously. Discovery requests are often ignored by opposing counsel, and the courts do not enforce them as they do in other nonfamily litigation. When discovery is not enforced, women are generally at the losing end of a fight to **[*769]** discover income and assets in which they should share. In the words of a Springfield attorney, "the women who have consulted me who feel that they have been victimized by a male conspiracy seem, in my experience, to be responding to their perception that the court declines to enforce full disclosure of assets with the stringency authorized by the rules. In the absence of complete and good-faith discovery procedures, there will be little in the nature of documentary evidence to substantiate (the wife's) belief that there is more money there

[9] A specific finding was made that the husband had control of the income flow of his corporation.

somewhere!" As attorneys noted, this is particularly true in cases where the spouses are self-employed or in control of a business.

RECOMMENDATIONS

1. The probate court financial statement form should be changed to require the disclosure of accurate data concerning the valuation of pension and other deferred compensation and retirement rights. In particular, the parties should be required to obtain from the pension's trustees a certified statement that reflects the pension's present and future value. [10] **In addition, the parties should be required to obtain a certified wage and benefits statement from their employers.**

2. The probate court rules should be amended to require that counsel for the parties sign Rule 401 financial statements and certify to the correctness of the statements. The signature of an attorney on a financial statement constitutes a certificate by the attorney that he or she has read the financial statement and, after reasonable inquiry into all relevant facts disclosed therein, to the best of his or her knowledge, information, and belief, the financial statement is accurate and complete as filed. 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.

> **Rule 401 should be revised to recognize marriage as a "partnership." It should impose fiduciary responsibilities of full disclosure upon the divorcing parties, and it should authorize sanctions for failing to do so.** [11]

MEDIATION IN THE PROBATE COURT

Mediation, as it is currently practiced in the probate court, disadvantages women because of their generally unequal bargaining power.

Mediation has become an important part of the operation of the **[*770]** probate court. Some probate court judges commented to the Committee that, because of heavy caseloads, their courts simply could not function without the family service officers who aid in the settling of cases through mediation. Family law attorneys responding to our survey reported that 41% of their divorce cases in the last two years had involved mediation by family service officers or court clinics.

In this report we comment only upon the system of "mediation" as it is practiced in the probate court. Mediation is used voluntarily in private settings and in various forms in several other courts. In the district court, for example, judges refer litigants, on a voluntary basis, to independent community-based mediators. We have not studied mediation as it is practiced in these settings, and therefore our comments apply only to the type of mediation practiced in the probate courts.

"Mediation" as it is generally practiced in the probate court is very different from "mediation" as it is described in the dispute resolution literature. One lawyer and mediator, for example, defines divorce mediation as "a voluntary, confidential process during which a neutral mediator helps a disputing couple reach agreement" (Fiske, 1986). Similar criteria are defined in the standards of the Massachusetts Association of Mediation Programs. These standards call for an impartial/neutral mediator, a confidential process, and participants who are informed about the process, voluntary in their participation, and able to determine a mutually agreeable outcome to the mediation. As comments from family law experts, attorneys, family service officers, and litigants reveal, what is called "mediation" in the probate court does not fit these criteria.

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[10] The probate court has recently proposed amending financial statements to require the specific listing of such assets as retirement and pension benefits (*Massachusetts Lawyers Weekly*, 20 March 1989).

[11] A similar recommendation has been made by the Commission on the Unmet Legal Needs of Children.

There are several reasons for this discrepancy which can be explained by examining mediation as it is practiced in the probate court. First, although practices in different probate courts vary, mediation sessions are frequently mandatory, not voluntary. According to information gathered at family service officer and family law attorney focus groups, mediation often occurs in one of two ways. Parties must either meet with a mediator before they go before a judge or they are immediately ordered to mediation upon appearing before the judge. In neither instance is mediation voluntary on the part of the litigants.

Second, family service officers mediate all kinds of cases, some of which may not be appropriate for mediation. For example, several family service officers participating in focus groups reported that they are asked by judges to mediate Abuse Prevention Act cases even though they themselves feel that these cases are inappropriate for mediation. Family service officers were also concerned that, although they do not have the legal and financial background to resolve disputes concerning the division of assets, they are increasingly being asked to handle cases involving complex economic cases. Several judges raised the same concern **[*771]** about family service officers handling these matters because they feel division of assets requires the input of a lawyer.

Third, mediation in the probate court is conducted under severe constraints. Family service officers generally deal with a case only once, on the day it is scheduled for *ex parte* hearing, contempt or trial. Thus, there is no opportunity for parties to fully think about their needs nor to consider the long-term implications of what they might agree to. [12] Fourth, family service officers often are required to act as investigators and mediators in the same case or to reveal to the judge what transpired in mediation. Family service officers may explain this to litigants at the start of the mediation, but the loss of confidentiality is still a serious distinction from the usual mediation model. Fifth, family service officers are sometimes required by the court to give their recommendation on how the case should be decided; thus, they lose their neutral role. Sixth, and most important, "mediation" in the probate court has a particular goal. According to attorneys in the focus group sessions, the purpose of mediation is to dispose of the issues quickly so that a full judicial hearing is not necessary. A Worcester attorney described the effects that this dynamic can have on some cases:

> *I* see them (family service officers) as browbeating the parties to the cases in order to process the cases more quickly. This saves the court the time it would take to hear the cases before judges. Family service officers are more interested in settling the cases than in getting to the right result.

Not all family service officers behave as described above. Judges comment that many family service officers work hard to maintain a balance between the needs of the parties involved in mediation and the goal of reaching a stipulation or partial agreement. Meeting with a family service officer during the mediation process fulfills several important functions for the courts. These include: assessing the extent of agreement/disagreement in a case; allowing parties to vent emotions and clarify issues; and encouraging use of additional legal/social/psychological services. But these purposes can be lost if the desire to reach a settlement dominates the mediation situation. Comments from family service officers indicate that the pressure to settle cases is a real one. Family service officers feel pressure from judges to settle cases, and they tend to believe that their effectiveness as a family service officer will be based on how many cases they can settle. Judges, on the other hand, convey pressure to settle because they are feeling the pressure of the backlog and the press of new cases.

[*772] As critical as caseload pressure is, it does not justify the maintenance of a system that systematically disadvantages people because of their gender. Our research indicates that the current practice of "mediation" in the probate court may indeed have that effect. An attorney in a Boston focus group commented that, when the goal of court-practiced mediation is to reach *any* settlement, "mediation allows the stronger, more powerful person to hold firm while the weaker person concedes more and more." The contention that mediators in the probate court sometimes coerce settlement, and that this practice may not affect both sides equally, is supported by the

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[12] Under current court procedure, when a motion for a temporary order is filed, the other side is notified seven days in advance of the hearing date concerning both the date and the nature of the motion, such as "visitation." However, without any additional details they cannot think about their needs or consider the implications of the motion before entering mediation. Requirements for a more detailed description of the intent of the notice might help.

reasoning of a male litigant who defended mediation at the Boston litigants' meeting: "Mandatory mediation can be useful. When *threatened*, people find a way to work things out" [emphasis added]. [13]

A process that empowers the already powerful is gender biased, for under current social conditions, the more powerful person is likely to be male. As Barbara Hauser, L.I.C.S.W., director of the Family Service Clinic at Middlesex Probate Court, testified:

> At times it appears that the court and its personnel have a limited appreciation about the inequality in ability of parties to bargain effectively at the time of marital separation. Women in these times often feel less adequate than men in areas of articulating their needs and wishes, forcefulness in negotiating, and economic stability. Furthermore, women often have a wish to resolve conflict through communication and mediation rather than taking a more adversarial posture, and it is thus important that these differences be recognized rather than overlooked in any form of divorce proceedings. [14]

Attorneys pointed out other ways in which women are disadvantaged in the mediation process. The responses to the family law attorney survey clearly indicate that women are more likely than men to bargain away property to get their preferred custody or visitation arrangements. An attorney testifying on behalf of Greater Boston Legal Services observed, "Women who are afraid cannot mediate, especially regarding child support . . . . The woman, especially if unrepresented, is probably not likely to know what a fair support order should be. And in our experience few of the mediators give her any indication of what the guideline amounts would be." The attorney further testified that when a woman "is desperate to keep custody she is not generally in an equal bargaining position, so will bargain away all of her other rights to keep custody." Attorneys also noted that women frequently are at greater economic risk, have less information about marital assets, and less information about their legal rights.

[*773] The inequality between the participants is particularly severe when one party has been physically abused by the other. This inequality creates problems whenever the victim is told to mediate issues with her batterer, not merely when she is told she must negotiate with her batterer about her physical safety. [15] "In [battering] cases I often have seen women sign agreements that are simply unconscionable because they want to avoid confrontation with the man," one Worcester attorney stated. Some family service officers agreed. "It's scary because a woman will be willing to take less to get out of the situation because of the danger. She's not looking out for her long-term financial interest." While it is at the temporary orders stage that mediation usually occurs, orders established at that time often influence the outcome of the permanent orders and thus assume a larger importance.

The unequal position of women in mediation can lead to unequal outcomes. Attorneys responding to the family law survey reported that men are more likely to be favored in custody and financial arrangements made through mediation than they are in custody and financial arrangements arrived at without mediation. [16] Recent research provides additional indications that women may be disadvantaged in divorce mediation. One study compared divorce settlements in three New York counties reached through three different dispute resolution mechanisms: judicially assisted, attorney negotiated, and privately mediated (Ray, 1988). It found that the sampled mediated cases reported the lowest percentage of agreements containing child support obligations for all types of custodial arrangements and significantly fewer with child support in joint custody cases. [17] The author concluded:

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[13] At the Worcester public hearing, Mr. Alexander, representative of Concerned Fathers, also called for greater use of mediation.

[14] There is a growing body of psychological literature to support Hauser's testimony (see for example, Gilligan, 1982).

[15] The problems with mediation in 209A cases are discussed in the chapter on domestic violence.

[16] The family law survey questions explicitly referred only to mediation by family service officers and did not inquire about the effect of mediation done outside the court setting.

[17] The absence of child support in a greater number of joint custody cases is disturbing because the study also found that mediation results in substantially more joint custody orders, but less actual sharing of child caretaking. Within three to six months after reaching a joint legal and physical custody agreement, less than half of the couples report sharing caretaking responsibility. The study found that joint custody arrived at by mediation is much more likely to break down to *de facto* sole maternal custody than is judicially assisted or attorney negotiated joint custody.

> If the support of all children by absent parents is to continue as public policy, then the findings from this study suggest that legislation mandating mediation in all disputed family matters involving child custody, child support, and visitation would be inconsistent with policy. Furthermore, the findings from the study would not support legislation to mandate mediation only in child custody and visitation disputes, since child support is so intimately entwined with the custodial arrangement.

Other researchers whose prior writings have been very supportive of mediation report the following results of an assessment of a **[*774]** mandatory, court-based mediation program in the Delaware Family Court (Pearson and Thoennes, 1985; Dingwall and Eekelaar, 1987). "Unlike cases processed in judicial forums, mediated child support levels are substantially lower than what would be expected based upon a rigorous application of the state's child support formula." Judicial awards were within +/- $ 10 (per month) of the guideline amount in 96% of the cases, and above the guideline amount in the few remaining cases. In contrast, fewer than half of the mediated support orders were within +/- $ 10 of the guideline. Almost one-fifth (18%) of the mediated awards were between $ 11-$ 49 below the guidelines, and nearly one-third (32%) were more than $ 50 below the guidelines. Moreover, the research did not find any particular benefits associated with this form of mediation. "Voluntary compliance with mediated agreements appears to be neither better nor worse than compliance with outcomes generated in judicial forums. Finally, interviews with divorcing parties exposed to mediation reveal little evidence of user satisfaction" (Pearson and Thoennes, 1988).

CONCLUSION

Apart from the troubling practical consequences of mediation as it is practiced in the probate court, there are troubling issues of principle. Mediation is essentially private. Public legal norms do not govern, and, because there is no record, judicial review is not possible. While these objections can be, and have been, voiced about mediation in general, the mediation of disputes in the probate court raises special concerns.

First, it is troubling that although society is now recognizing that many of the problems affecting women -- domestic violence, lack of child support, inequitable distribution of assets after divorce -- are not purely private matters, women are still being told by the court that these are, indeed, family problems for them to work out with their husbands or ex-husbands: they do not belong before a judge. Few other classes of disputes are so routinely diverted from the court. Second, inequality of bargaining power is commonplace, and may be related to gender.

Our recommendations are designed to ensure that parties are not forced to mediate inappropriate cases and are not coerced into settlement. This does not mean, however, that mandatory referral of cases to family service officers for prescreening [18] must stop or that family service officers should not serve as mediators. Family service officers provide a crucial service to both the courts and the litigants using the courts. Without their services the courts would be unable to handle **[*775]** many of the emergencies with which they are faced. None of our recommendations are meant to limit the ability of family service officers to collect information that judges often need to handle cases in an efficient and thorough manner. We do, however, believe that the process of "mediation" as it is currently practiced, that is, attempting to reach a settlement in a case, must be reformed.

RECOMMENDATIONS

1. *Settlements must not be coerced*. Mediation and other services performed by family service officers are 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. To ensure this, it must be clear to family service officers that their effectiveness will not be evaluated on the basis of the number of cases in which agreements are reached.

2. At the outset, parties referred to family service officers should be routinely informed that:

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[18] Pre-screening" would include the gathering of information about the family, gathering financial information and reviewing financial information, handling guidelines and wage assignment paperwork, assessing the appropriateness of a case for mediation.

a. they do not have to settle if they do not want to, and that the case can go to court on the election of either party.

b. the information gathered by family service officers is not confidential and when appropriate may be shared with the judge.

c. there are several purposes for meeting with family service officers, including fact gathering for the judge; assessment of issues in conflict; opportunity to clarify issues and defuse conflict; facilitate use of legal and social services; mediate temporary agreement if both parties freely accept the terms of the agreement.

3. Family service officers and judges need to be sensitized to:

a. signs of unequal power in the dynamics between the parties.

b. signs of unfair concessions by either party in the mediation

c. effects of abuse on the dynamics between the parties and adverse effect on children whose custodial parent is being abused.

4. Before mediating a case, the family service officer should use the following guidelines to determine whether the case is appropriate for mediation:

a. 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.

b. There should be no mediation of the division of assets until there is full disclosure and valuation, or acceptance of valuation, of assets. Courts can, however, go forward on temporary support issues.

5. When cases involving abuse are referred to family service officers, the following guidelines should be used:

a. All cases should go before the judge. At that time, the judge may offer to the parties, in appropriate cases, the option of giving information to a family service officer. Although this procedure may require [*776] several appearances, we believe that this quantity of time before the judge is justified, despite caseload pressures.

b. Family service officers will carefully explain to the parties that they are meeting only to gather information. The goal is not to balance the needs of one individual with the needs of the other, it is only to determine the needs of each. Meetings with each individual, instead of the two together, are encouraged whenever possible.

c. The Committee recognizes that in these meetings, it is possible that the needs of the couple may coincide in such a way that it may not be necessary to go before the judge. We recommend, nonetheless, that all cases where the family service officer has identified domestic violence should go before the judge who will publicly emphasize that such behavior is unacceptable.

6. A family service officer should not be allowed to make a recommendation to the judge in a case that she or he mediated, but in which no agreement was reached. If the family service officer is allowed to do so, it should only be after a full hearing has been held.

7. A committee including judges, family service officers, lawyers, court clinicians, and clients should be created to recommend guidelines for the different functions of family service officers and to recommend training programs for family service officers to assist them in the performance of their different responsibilities.

ALIMONY AND DIVISION OF PROPERTY

SUMMARY OF FINDINGS

Alimony awards and division of property are of obvious critical concern to those seeking a divorce; not only will they shape the futures of both the divorcing parties, but they will also have a direct impact on any minor children of the marriage. A number of research studies indicate that, although the goal of statutes governing alimony and property division is to effect equitable distribution of property and give adequate support to the spouse who needs it, this goal often is not met. Statistics show that after a divorce, the wife's standard of living usually drops, sometimes substantially, while the husband's standard of living rises (Weiss, 1984; Duncan and Hoffman, 1985; Weitzman, 1985).

Aware of these national trends, the Committee used a number of methods to evaluate current judicial practice in Massachusetts in the areas of alimony awards and property division. The Committee specifically concentrated on such topics as the relationship between the new child support guidelines and alimony awards, the disposition of the marital home, pensions, and businesses, and the economic circumstances of women and men following divorce. We found that:

1. In accordance with trends seen in other states, our data indicate that women generally experience a greater drop in standard of living after a divorce than do men. Although individual male litigants **[*777]** testified that they have been financially hurt by property dispositions in their divorces, the financial data gathered by the Committee show that, in fact, men's standard of living often improves after a divorce.

2. 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.

3. 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.

4. 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 take into account the sacrifice of earning potential many women have made in order to be the primary caretaker of the family.

5. In divorces in which there are minor children, there is a relationship between the disposition of the home and the availability of other material assets. If other assets exist, the courts do not customarily order the marital home to be sold immediately. In cases in which there are few assets, however, the parties are often ordered to sell the home, leaving the primary caretaker -- usually the mother -- with the need to find new housing for herself and the children. In general, disposition of the marital home can raise difficult financial issues for both husband and wife.

6. The treatment of pension and retirement rights and other business-related property interests in divorce cases may seriously disadvantage women because these assets are often ignored or undervalued.

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. There are noteworthy discrepancies between attorneys' views of judicial practices in divorce cases and the judges' views of their own practices.

METHODOLOGY

The Committee gathered data on alimony and property division through testimony at the public hearings; by using the family law section of the attorneys' survey, the family law attorney survey, and the probate section of the judges' survey; and through regional meetings and focus groups consisting of male and female attorneys, separate **[*778]** male and female litigant focus groups, and family service officers' groups.

In addition, the Committee conducted a court records study designed to evaluate the application of the Massachusetts equitable distribution statute, M.G.L. c. 208, § 34. We analyzed 20 appellate level decisions from 1987; 11 were summary dispositions (these cases, from the Appeals Court, were analyzed in depth including

extensive financial information), and 9 were reported cases decided by the Appeals Court or by the Supreme Judicial Court. [19]

The Committee recognizes that this sample represents a limited subset of divorces in Massachusetts. We believe, however, that one year of cases, carefully coded, provides sufficient data upon which to base an analysis of trial judges' application of c. 208, § 34, and to make some tentative assessments of the financial consequences of those decisions. We realize that any findings or conclusions which have been, or can be, drawn from this data are not necessarily representative of cases settled by agreement of the parties.

ALIMONY AND PROPERTY DIVISION: LAW AND PROCEDURE

In Massachusetts, alimony and the division of a couple's property upon divorce are governed by statute M.G.L. c. 208, § 34, (1986 ed.), which lists a series of mandatory and discretionary factors to be considered by judges in determining alimony and property awards. The mandatory factors include: length of marriage, conduct of the parties during the marriage, age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, and opportunity for future acquisition of capital assets and income on the part of each party. The appellate courts have made clear that trial judges must consider all of the mandatory factors in arriving at a determination of alimony and property division in a divorce action. In addition, trial judges may consider the following discretionary factors: each party's contribution to the "acquisition, preservation or appreciation in value of their respective estates" and "the contribution of each of the parties as a homemaker to the family unit."

Theoretically, c. 208, § 34, is designed to provide for equitable distribution of the marital estate. As the terms of the statute reveal, however, "equitable distribution" is very much a matter of individual judgment on the part of the trial judge. C. 208, § 34, provides that "Upon divorce or upon motion in an action brought at any time after a divorce, the court may make a judgment for either of the parties to pay **[*779]** alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other." Thus, judges have broad discretion in considering how much alimony, if any, should be awarded to either spouse and in defining an equitable property division. [20]

C. 208, § 34, is also silent on the specific purpose to be achieved by either an alimony award or the division of property. Case law has, however, set standards in these areas. According to case law, the goals of alimony and property division differ. The purpose of alimony is to provide economic support to a dependent spouse. In considering the issue of alimony, trial judges must focus on the dependent spouse's need of support and the ability of the supporting spouse to pay such support; they cannot focus on circumstances or factors unrelated to the economic condition of the parties. [21] The purpose of property division, on the other hand, is to recognize and compensate equitably the respective contributions of the parties to the marital partnership. [22] Unlike alimony awards, property settlements are not subject to modification (*Drapek v. Drapek*). [23]

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[19] The pertinent facts for the twenty cases reviewed by the court record study group are set out in Table 4, which shows the demography of the group of cases. As described above, 11 of those cases were reviewed in depth, with extensive financial data codified and subject to computer analysis.

[20] It must be recognized that very few cases are in fact litigated and fewer are appealed, so it is in fact impossible to know the extent of compliance with the principles articulated by the appellate courts (see, for example, *Bouring v. Reid, 399 Mass. 265, 267* [1987]; *Ross v. Ross, 385 Mass. 30, 35, nn. 3, 4* [1982]; *Drapek v. Drapek, 399 Mass. 240, 245* [1987].

[21] See *Gottsegen v. Gottsegen, 397 Mass. 617, 623-624 (1986);* *Grubert v. Grubert, 20 Mass. App. Ct. 811, 819 (1985).* See also Heacock v. Heacock, 902 Mass. 21, 24 (1988); *Harris v. Harris*, 26 Mass. App. Ct. (1988).

[22] See *Heacock v. Heacock, supra, 402 Mass. at 24;* *Harris v. Harris, supra*, 26 Mass. App. Ct. (1988).

[23] See, however, the recent appellate decision in *Hartog v. Hartog, 27 Mass. App. Ct. 141 (1989).* The appellate court in this case upheld a lower court ruling modifying the conditions concerning the sale of the family home. The wife brought a

DISCUSSION OF FINDINGS

1. 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. Although individual male litigants testified that they have been financially hurt by property dispositions in their divorces, the financial data gathered by the Committee show that, in fact, men's standard of living often improves after a divorce.

Research studies from throughout the country indicate that the economic **[*780]** impact of divorce is very different for men than it is for women (see "Family Law Overview"). Our analysis of court records suggests that national trends regarding the impact of divorce on the party's postdivorce standard of living hold true for Massachusetts as well. To study the pre- and postdivorce standards of living of women and men, our consultant, Dr. Nancy L. Marshall, developed a method for comparison of standard of living relative to Census Bureau data. The family income prior to divorce was calculated for each of the eleven appellate cases for which financial data was analyzed in depth, and then the incomes of the woman and man after divorce were determined. "Income" included all disposable income described in the court records. In practice, this generally meant income from salary or social security and interest on savings accounts at 6% per year (see Table 1). Child support and alimony payments were added to the income of the party receiving the payments after the divorce and subtracted from the income of the party making those payments. For purposes of analysis it was assumed that support payments were received. This, of course, is not always the case. Tax consequences to each party were not considered in this calculation, and no adjustment was made for situations in which one party maintained mortgage payments on a house in which the other lived. The income figures provide a fairly good estimate of the standard of living for each family, even where they are not exact.

Incomes for the families were compared to the Census Bureau's report of the U.S. median family income for families of the same size and in the same year as the income data were recorded. In 1985, for example, one family's income before divorce was $ 33,371 (see Table 1); there were five people in the family. The U.S. median income for a family of five in 1985 was $ 31,974. Therefore, this family's income was slightly above the median family predivorce income. The same procedures were followed for postdivorce income, using postdivorce family size. [24] Table 2 reports each family's pre- and postdivorce income as a percent of median income and presents the change in standard of living. The change in standard of living is calculated as the percent of median income predivorce minus the percent of median income postdivorce.

Table 3 graphically represents the standards of living of women and men after divorce. The families are arranged from high predivorce standard of living to low predivorce standard of living, relative to median income. The *patterns* across all divorces suggest findings similar to Weitzman's: women consistently experience a greater drop in standard of living than do men. Child support, alimony, and property awards do **[*781]** not maintain the standard of living for women after divorce, while men's standard of living may be reduced somewhat less or may actually increase postdivorce.

2. 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.

Alimony is intended to provide support for a spouse whose ability to support herself or himself is insufficient. Because it is generally women who postpone their careers to be the family's primary caretaker -- and thus suffer a

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modification action asking that the home, which had been ordered sold in 1988 under the original divorce order, not be sold at that time because of "changed circumstances." These changed circumstances concerned a serious psychological problem with one of the minor children that would be exacerbated by moving from the family home. The appellate court upheld the lower court ruling delaying the sale of the home on the grounds that the property settlement order could be modified in this instance because it concerned the support of the children.

[24] When family size was "1," the median income for a family of two was used, since the Census Bureau does not consider a one person household a family. Thus, standard of living for one-person, postdivorce families -- usually the husband -- tends to be underestimated.

loss of earnings, both present and potential -- alimony awards are most frequently made to women. [25] Despite the differential earning capabilities of men and women following a divorce, however, the actual number of divorce cases in which alimony is awarded at all is quite small. This is true for the nation as a whole and also for the state. Nationwide, only 12.4% of the people divorced between 1980 and 1985 were awarded alimony, (U.S. Bureau of Census, 1989), while in Massachusetts, in divorcing families with minor children, alimony is awarded in only ten to twenty percent of the cases (Massachusetts Department of Revenue statistics). Indeed, attorneys responding to our family law survey indicate that they actually seek alimony in only a minority (29%) of their cases.

These statistics are borne out by the findings of the Middlesex Divorce Research Group relitigation study. Analyzing 700 divorce cases in Middlesex County between 1978 and 1984, researchers found that in the 584 cases in which the mother had primary physical custody of the children, alimony (in conjunction with child support) was awarded in only 10% of the cases. Far more common was an award of child support only (48% of the cases).

Evidence gathered by the Committee indicates that there is a relationship between the small percentage of alimony awards and the new child support guidelines. According to testimony from family law attorneys, one major effect of the guidelines has been a reduction in the number of cases in which alimony is given. Comments from judges and attorneys at the Massachusetts Bar Association's program on child support and alimony held in January 1989 suggest that a number of probate judges and lawyers believe that the child support provided under the guidelines actually constitutes family support and eliminates the need for alimony, at least during the years that there are minor children in the family. Comments from attorneys who participated in focus **[*782]** groups corroborate this perception. These attorneys are disturbed by the fact that some judges assume, without findings of fact, that the husband's contribution toward child support is the most that can be taken from him. Although it is legal services attorneys who feel that their clients are most affected by the negative impact of the child support guidelines on alimony, attorneys for higher-income clients also voiced their concern that "judges don't want to do the findings." These attorneys believe that without proper discovery and findings of fact the courts have no way of assessing how much a husband can truly afford to pay in child support and alimony.

The assumption that child support satisfies the need for alimony appears to reflect a bias against women who postpone their careers and sacrifice their earning potential to care for their families. An award of child support with no alimony can have a highly negative impact on a primary caretaker at the point that her children reach eighteen.

A case discussed by Worcester attorney (and now judge) Arline Rotman at a public hearing illustrates the problems of caretakers who receive child support and no alimony. The case involves a woman, married for twenty years, with three children. The woman had been at home raising the children for the majority of the marriage. Two years before the divorce, she had returned to work. At the time of the divorce, the wife was earning about $ 16,000, while the husband made approximately twice that amount, $ 30,000. The woman was awarded child support and no alimony. Since the last remaining child was close to eighteen, the child support was ordered for three years. As Judge Rotman notes, at the end of that time, the wife's income will still be about half of the husband's. "So, at the conclusion of a twenty-year marriage, when a woman has chosen to be a homemaker, she gets child support for a while, doesn't get alimony, and (after a few years) the man walks away with a termination of child support. He has $ 35,000 a year, and the woman has $ 18,000 a year. This is not taken into account, by the way, in property division, because that is seen as a separate matter. So the wife is double disadvantaged; she is not going to be able to accumulate as much (as the husband)."

While it may be possible for women to seek alimony when child support ends, the result of such action is impossible to predict. Public hearing testimony and comments from family law attorneys indicate that many judges are reluctant to modify alimony awards. Indeed, attorneys noted in public hearing testimony that it is much more common for judges to modify alimony awards downward than to modify alimony awards upward, and 71% of the attorneys responding to the family law survey stated that judges frequently modify alimony awards downward in response to alimony enforcement actions. In addition, as one judge noted in written testimony to the Committee, the courts are

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[25] For example, in two of the cases studied in the court records study, the trial judge awarded alimony to the husband. (The award, however, was vacated on appeal.)

seeing an alarming number of cases in which lawyers are signing off women's alimony **[*783]** rights forever in nonmerged agreements, without any consideration of the problems facing women who are primary caretakers of children. This is of crucial concern because nonmerged agreements are generally not modifiable.

Aside from the issues that confront women once child support ends, there are also problems facing women during the children's minority. These problems are especially critical for mothers of young children who devote most of their physical and psychological energy to caring for their families. Child support does not, in fact, meet a woman's needs separate from her children's. These needs include not only such items as clothing and food, but also educational and training expenses often necessary for a mother to procure future employment.

3. 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.

Alimony awards are not only infrequent, they are also difficult to collect. According to 1981 nationwide statistics, only 43% of the women who were awarded alimony received the full payment due them, while 33% received no payment at all. This percentage improved slightly in 1985, but still remained high, with 27% of those awarded alimony receiving no money (U.S. Census Bureau). Although these numbers are similar to the compliance rates for child support (see "Child Support"), the national and state responses to alimony enforcement and child support enforcement are quite different. While federal and state legislatures have responded to the low child support compliance rates with legislation strengthening child support enforcement procedures, no such efforts have been made for alimony. In Massachusetts, for example, the legislature has designated the Department of Revenue as the statewide coordinating agency for child support enforcement, but has established no similar coordinating mechanism for alimony enforcement. While the literature and the media contain detailed descriptions of child support noncompliance and the means used to collect money from nonpaying fathers, it is difficult to find any data on alimony enforcement.

Women who are not receiving alimony payments must bring a court action for contempt for nonpayment, and they must rely on the courts for enforcement. According to attorneys responding to the family law survey, however, the courts are not using adequate tools to enforce alimony orders. Although judges will generally enter income withholding orders in response to alimony enforcement actions, family law survey responses indicate that they will do so less often than they will in child support enforcement actions: 64% of the respondents noted that income withholding orders are often or sometimes entered in alimony enforcement actions, while 71% noted the same for child support actions. **[*784]** Judges in alimony contempts seldom jail respondents (86% of family law attorneys stated this rarely or never occurs), nor do they require posting of bonds (95% of family law attorney respondents noted this rarely or never occurs). Indeed, parties who go to court to enforce nonpayment of alimony sometimes end up with lower alimony orders: 71% of the attorneys responding to the family law survey stated that judges often or sometimes modify alimony awards downward, while 73% said that judges often or sometimes reduce arrears in response to alimony enforcement actions.

4. 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 take into account the sacrifice of earning potential many women have made in order to be the primary caretaker of the family.

Under Massachusetts case law, a major goal of alimony awards is to permit the spouse receiving it to maintain, insofar as possible, the standard of living comparable to that enjoyed during the marriage. [26] As our research indicates, however, that goal is generally not being met. Testimony from both family law experts and divorce litigants suggests that women are negatively affected by unrealistic expectations concerning their ability to procure employment and by an undervaluation of a caretaker's contributions to the family. As Gene Dahmen, President of the Boston Bar Association, noted in her public hearing testimony: "In the wake of the women's movement, I believe philosophical issues occurred and certain assumptions took hold in our courts about the capabilities and expectations of women, particularly as wage earners, that were unrealistic and detrimental. The negative

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[26] See *Grubert v. Grubert, 20 Mass. App. Ct. 811, 819 (1985); Partridge v. Partridge, 14 Mass. App. Ct. 918, 919 (1982).*

consequences were seen largely in the areas of alimony, child support, and, to some extent, in the division of property." These unrealistic expectations concerning women's ability to earn, Ms. Dahmen asserts, have led to problems with setting alimony.

The family law survey and the probate judges' survey asked certain questions about the frequency of alimony awards to differently situated women and homemakers. Responding attorneys and judges indicated that women married fewer than ten years and having no minor children are often not granted alimony at all, even in cases in which their earning capacity is less than or equal to 65% of their husband's. According to family law attorneys, however, this pattern of nonawards holds even in cases involving minor children. Sixty-eight percent of the respondents to the family law survey noted that employed women with school-age children at home often or sometimes receive no alimony, while **[*785]** 54% responded that nonemployed women with preschool-age children at home also frequently receive no alimony.

Attorneys and probate judges responding to the surveys noted that it is older homemakers who are more likely than others to receive alimony, particularly if they have no recent work history; 55% of responding family law attorneys stated that women in this category often receive indefinite alimony. However, this percentage changes significantly if the older homemaker is earning annual wages under $ 20,000. In these instances, almost half (49%) of the responding family law attorneys noted that women often or sometimes receive no alimony at all.

The opinion was expressed by family law attorneys in focus groups that length of marriage is one of the most important factors in determining whether or not alimony will be awarded. Our court record survey supports this view. Of the eleven cases analyzed in depth, alimony awards were made in seven. In six of these seven cases, the length of marriage was fifteen years or more; in the seventh, mental illness of the former wife may explain the award. By contrast, in three of the four cases in which no alimony was awarded, the length of marriage was less than ten years, and in the fourth, the husband's circumstances may have been thought to render an alimony award impractical.

Public hearing testimony and comments by attorneys participating in focus groups indicate that there is a problem of gender bias affecting awards of alimony to middle-aged women (aged 40-50) who have spent a long time as homemakers, as well as to younger women with small children. In the words of a family law attorney, it is the middle-aged woman who "is caught in the middle." Such women are "too young for long-term alimony," but too old and too long out of the labor market to be able to procure good jobs. According to testimony, it is these women who are most affected by the unrealistic expectations some judges have concerning the earning capabilities of women. Attorney Colleen Curry of the Hampshire County Bar Association testified at a public hearing that these middle-aged women are often "given awards that are inadequate to provide the support that they were used to during their marriage. They have been forced to take jobs that are very menial and that result in their living lifestyles that are very different from the lifestyles of their (former) husbands."

Female litigants echoed the points made by family law attorneys. At regional meetings, these litigants spoke of their obsolete job skills and the failure of the court to take their lost career opportunities into account when determining alimony. Their feelings are corroborated by over one-third (35%) of the attorneys responding to the family law survey. These attorneys noted that alimony awards rarely or never "reflect a realistic understanding of the earning capacity of homemakers with no recent work history."

Younger women with custody of young children also face hardships **[*786]** with respect to alimony. Individual women spoke of the problems they faced as a result of "rehabilitative" alimony awards that required them to go back to work in a short time following divorce, despite the fact that they had small children at home and day-care costs bordering on the prohibitive. Both attorneys and litigants complained that young mothers are being held to unreasonable standards that are based on a lack of understanding and undervaluation of a caretaker's role and responsibilities. One attorney at a focus group provided a particularly strong example of judicial bias in this area. The attorney represented a woman who had two children under six years of age, one of whom was chronically ill. The wife worked part time, earning less than one hundred dollars a week; the husband made $ 55,000 a year. According to the attorney, the judge at the divorce proceedings told the wife that "it was unconscionable for her to be taking a job like this. It was about time women learned that they had to work. His daughters were going to work."

The judge awarded the wife $ 200 a week to be reduced to $ 100 a week in six months, so that "she could learn a lesson."

One of the most common complaints voiced to the Committee was the concern expressed by many people, including public hearing witnesses, attorneys, and litigants, that alimony awards to women of all ages are unpredictable and very much a function of the individual judge's own beliefs and attitudes toward women and their roles. There is apparently no sense in the legal community that similarly situated people will receive similar treatment with respect to alimony. One family law attorney expressed the general sentiment well when he stated: "The problem is predictability. Some judges will award alimony on the basis of how much work a woman can do, others will compel a woman to work because of the bias that a woman should work when the kids reach a certain age. Other judges feel that a woman doesn't have to work if she's not trained and the marriage has lasted a certain period of time. We should be able to predict what a judge is going to do." This sentiment was echoed by a colleague who noted, "The problem with c. 208.34, is that there's too much discretion and too many opportunities for personal bias on the part of the judge." [27]

5. In divorces in which there are minor children, there is a relationship between the disposition of the home and the availability of other material assets. If other assets exist, the courts do not customarily order the marital home to be sold immediately. In cases in which there are few assets, however, the parties are often ordered to sell the home, leaving the primary caretaker -- usually the mother -- with the need to find new housing for herself [*787] and the children. In general, disposition of the marital home can raise difficult financial issues for both husband and wife.

Public hearing speakers, attorneys in the family law focus groups, and individual litigants addressed the disposition of marital homes; in addition, information about the marital home was gathered from the court record study. These sources of information, while limited, indicate that generally, if minor children are involved and if other assets exist, the primary custodial parent will maintain the marital home and it will not be ordered sold during the children's minority. [28] For many families, however, the marital home often represents a significant portion of the marital estate, and there are few additional assets. In ten of the eleven cases studied in depth in the court record study, for instance, the marital home represented from 52% to 100% of the total marital estate. In such cases, the disposition of the marital home raises difficult financial and emotional issues, especially for the custodial parent and minor children.

Attorneys for lower-income people are particularly concerned about the effects of the sale of the marital home on custodial mothers and their children. These attorneys pointed out that they must work hard to preserve the home, for "when the home is sold, their clients often end up homeless." The same attorneys noted, however, that the rise in property values has led to an increase in court orders to sell the marital home, even when there are minor children still living there. This is particularly common if the children are very young at the time of divorce.

This trend was also noted by an attorney at the Northampton focus group. He reported hearing a probate judge speak publicly on the issue of the inequity to the noncustodial parent [husband] of delaying the sale of the marital home during the young children's minority. According to the attorney, the judge stated that he was "not going to allow someone with a four-year old child to keep the house for fourteen years. She could perhaps have it for three to four years."

A female divorce litigant at the Worcester focus group provided a graphic example of the effects of the immediate sale of the marital home on custodial parents and their children. When this woman and her husband were unable to negotiate a settlement at their pretrial conference, they were ordered to go to trial immediately. When the woman's attorney refused to participate, the judge dismissed her complaint and proceeded with the husband's. The judge

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[27] The problem of unpredictability is one that is also recognized by the Massachusetts Divorce Commission, and the Commission is seeking to address it in their recommendations (Financial Decision Subcommittee, *Interim Report*, 1987).

[28] In the court record study of eleven cases, the researchers found as a common arrangement an award of the marital home to the custodial parent until the youngest child reached majority.

awarded the woman $ 30,000, but ordered her and her two and a half-year old twins to move out of the house in three months. Prior to receiving the **[*788]** money, the woman had no funds to find alternative housing for herself and the children. When she failed to vacate the premises, a sheriff arrived at the home and informed her that a truck would come and remove the contents of the house if she were not out by the next day.

While the immediate sale of a home has obvious negative effects on the custodial parent and minor children, the delayed sale of the marital home also poses difficulties for the parties involved. As one attorney noted in public hearing testimony, if the custodial parent (usually the mother) retains the home during the children's minority or for some other period of time before an ordered sale date, it is she who is often responsible for all costs of maintenance, taxes, and repairs. At the time of sale, the husband generally receives a predetermined percentage share of the sale proceeds, and the wife receives no recognition or offset for her financial or physical contribution to the preservation of the home. The end result is that the wife has had to manage real estate, children, and often a full-time job with no compensation for doing so, while the husband receives a percentage of whatever equity has accrued in the home.

Attorneys in the Northampton focus group noted that the disposition of a marital home raises difficult financial issues for both divorcing parties and that husbands can also be hurt by the manner in which the marital home is sold. According to these attorneys, husbands are at a disadvantage in those cases in which the wife is given occupancy of the home for a certain period of time, but the value of the house is fixed at the time of the divorce. When the sale ultimately occurs, the wife will receive the sole benefit of any appreciation in the value of the home. Moreover, the husband will generally not receive any interest on his equity in the home pending sale.

The maintenance of the marital home can pose an overwhelming financial burden to older homemakers. In one of the cases examined in the court record study, a sixty-seven-year old woman was awarded a home that carried an outstanding $ 14,000 mortgage for which she was responsible. The wife had a limited employment history and medical problems. She was also awarded a single cash payment of $ 14,000. How she was going to maintain the mortgage payments and pay her expenses at the same time was unclear.

6. The treatment of pension and retirement rights and other business-related property interests in divorce cases may seriously disadvantage women because these assets are often ignored or undervalued.

Public hearing testimony, comments from family law attorneys, and data from the court record study all indicate that women are hurt by the way in which pension and retirement rights are currently treated by the courts. The prevailing sentiment expressed to the Committee by family law experts is that "courts seem generally unconcerned about protecting **[*789]** woman's future retirement." [29] Indeed, as attorneys pointed out in focus group discussion, there is not even a space for pension information on the financial statements submitted by divorcing parties. The courts seem to assume that a wife's future economic security is less important than a husband's because she will probably remarry and her future husband will "take care" of her.

The ignoring of pension and retirement rights appears to affect women from all economic categories. Legal services attorneys at the Boston focus group were unanimous in their contention that pension rights are systematically overlooked in cases where the parties appear *pro se*. Our data from the court record study suggest that this also occurs with middle and upper-income litigants. In many of the cases we examined, pensions were simply not mentioned, even though the husband's job was such that it would appear certain he had pension rights. These were all cases in which the parties were represented by counsel. [30]

Public testimony indicates that even in those cases in which pension and deferred compensation rights are considered as part of the division of marital property, the results are often prejudicial to women. In cases involving the disposition of pension rights, the husband is generally awarded his pension as part of the division of property;

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[29] Arline Rotman, (now Judge Rotman) Worcester Public Hearing testimony.

[30] See *Smith v. Lewis, 13 Cal. 3d 349, 118 Cal. Rptr. 621 (1975)* concerning a malpractice suit successfully brought by a woman against her divorce counsel for ignoring her husband's pension rights in the property disposition.

the usual practice is to value the benefits as of the date of divorce and treat them as a "set off" for other assets that will be assigned to the wife. The result is that the wife often receives no retirement benefits from the marriage; instead, she gets 50% of the present value.

Women who have spent the major part of their adult lives as family caretakers are particularly disadvantaged by this practice. As Judge Arline Rotman noted in public testimony, women who have given up their careers to raise a family "are counting on the same retirement benefits to take care of them in later years" as are their husbands. If these women return to the labor force after the divorce, it is almost certain that their pension benefits will never equal those of their former husbands and that their social security benefits will also be lower. This scenario also holds true for women who are in the labor force at the time of the divorce. Because of delayed entry into the workplace, breaks in service due to childbirth, and inequities in the labor market, even women who are employed generally have lower pension benefits than their husbands.

Under the current method of handling pension rights, the disparity between men and women will only increase with time. After divorce, the value of a husband's pension benefits will generally appreciate at a greater rate than the wife's, reflecting his work experience during the **[*790]** marital years. For example: if the husband worked ten years during the marriage and then fifteen more years after divorce, he will get a pension for twenty-five years, which is worth much more than a fifteen-year pension. The husband thus has the benefit of those first ten years of work experience as part of an appreciating asset. This is a benefit that many women simply do not have.

The disposition of small, closely held businesses as part of the property division in a divorce has the same negative impact on women as does the disposition of pension rights. Because the family business is generally owned by the husband, the wife often has a very difficult time securing an accurate valuation of the asset at the time of divorce. As will be elaborated in the next section of the report, women frequently cannot afford to pay for an expert to conduct a proper business appraisal. While the issue of discovery fees is a crucial one in many divorces, it is especially critical when a family business is involved. As a family law attorney noted at a focus group meeting, "As the only advocate for a woman and her children against the wealthy father I do not get anywhere near the money I need to conduct the kind of discovery necessary, the kind of in-depth analysis necessary" to a proper valuation of assets.

The comments of attorneys concerning problems with discovery in the disposition of the family business were corroborated by testimony from individual litigants. One woman who had been married for twelve years and had two children recounted her experiences involving the division of the one million dollar business owned by her husband. According to this litigant's testimony, the business was never properly evaluated during the divorce process. Although the judge originally ordered an appraisal of the business (at the recommendation of the wife's counsel), he rescinded the order upon the husband's request. Since the woman was financially unable to afford her own appraiser, the business was not evaluated. The husband was awarded the entire business, while the wife received the house (with mortgage and taxes due) and child support, with no provision for future college education, camp, or religious education.

Such a disposition of the family business appears to be common court practice. According to public hearing testimony, the husband in a divorce will usually receive the business as part of the property settlement. This has obvious negative consequences for women. Like pension rights, the business is an asset that will appreciate with time. Although the wife has often worked in the business (e.g., bookkeeping, managing the office, etc.) and nurtured its growth, she will not share in that growth after the divorce. Instead, she will often find herself out of a job, with no compensation for her efforts on behalf of the business. In addition, she will not be entitled to unemployment benefits because **[*791]** she was not on the payroll nor will she receive social security benefits. [31]

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.

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[31] Testimony of Arline Rotman, Worcester Public Hearing.

One of the most far-reaching problems attorneys raised in focus group discussion, in public hearing testimony, and in the family law survey was the failure of courts to award fees for counsel and/or experts in advance of the resolution of a divorce case. Since women seeking a divorce generally have fewer assets than their husbands and are less able to afford attorney and expert fees, a woman's ability to conduct adequate discovery is severely limited under the current court practice. Although counsel fee and expert fee awards given at the end of the case might be adequate, they come too late. Several lawyers indicated in focus groups and at public hearings that they would not represent women who could not put down a significant retainer because they could not afford to carry the costs of experts and uncompensated time during the pendency of the proceeding. Access to competent legal services and case preparation is therefore denied.

Public hearing testimony from family law experts throughout the state graphically illustrates the problems posed to women by the failure to award counsel and expert fees in advance. Springfield attorney Julia Wilkins Kay, for example, believes that discovery is not taken seriously by the courts, thus defeating the intent of c. 208, sec. 34. According to Ms. Kay, serious discovery requests are often ignored by opposing counsel, and the courts do not enforce them as they do in other non-family litigation. The result is that, "in the absence of complete and good-faith discovery procedures, there will be little in the nature of documentary evidence to substantiate (the wife's) belief that there is more money there somewhere!"

Ms. Kay's comments were echoed by several other public hearing speakers, in addition to focus group participants and respondents to the family law survey. Springfield attorney Peter Roth reiterated the belief that "the courts do not take discovery seriously. They do not provide women with the information they need to fully and adequately contest family law cases." One attorney from western Massachusetts related at the Springfield public hearing that in the 300 times she had applied for counsel or expert fees in advance, she was awarded the fee only once.

According to Sandra Lamar of the Association of Women Lawyers of Worcester County this is not an uncommon experience. In a survey distributed to members of the Association, the most common problem **[*792]** voiced by women attorneys was the failure of the courts to award counsel fees in advance in divorce cases. Eighty-five percent of the respondents to our family law attorney survey noted that courts rarely or never award adequate counsel fees in advance to a spouse unable to afford fees, while 68% reported that judges rarely or never award adequate fees for experts, either during or after a case. Responses to the family law survey confirm that women are disproportionately disadvantaged by this practice: 59% of the lawyers reported that their female clients are always or often unable to afford expert fees for discovery, while only 16% of the respondents noted the same for their male clients.

8. There are noteworthy discrepancies between attorneys' views of judicial practices in divorce cases and the judges' views of their own practices.

One of the significant findings concerning alimony and property division to come out of our study is the discrepancy between attorneys' reports of judicial practices and probate judges' reports of their own practices and beliefs. Over one-third of the attorneys in the family law survey reported that judges sometimes or often make remarks indicating that alimony awards or property divisions are based on the likelihood of the wife's remarriage. This contrasts with the results of the probate judges' survey, in which ninety-five percent (95%) of the respondents disagreed with the statement that a woman who is likely to remarry does not need as much alimony or property as one who is not.

Similar discrepancies appear in responses to questions concerning contributions to the marital estate. Almost half of responding family law attorneys (48%) reported that where a wife's primary contribution is as a homemaker, the monetary award reflects a judicial attitude that the husband is entitled to a larger share of the marital estate. All of the responding probate judges, on the other hand, reported that, they disagree with the proposition that a husband's income-producing contribution entitles him to a larger share of the estate.

In addition, while the overwhelming majority of the attorneys responding to the family law survey reported that judges rarely or never award adequate counsel fees in advance or expert fees to a spouse unable to afford them, 54% of the responding probate judges stated that they often or always award requested counsel fees in advance to a spouse unable to afford them, and 48% reported the same practice for requested expert fees.

Finally, on the issue of accuracy of financial statements, only a little over one-third (35%) of the attorneys responding to the family law survey consider the husband's financial statement to be always or often accurate; two-thirds (65%) believe the statement is only sometimes or rarely accurate. With respect to the wife, the percentages are reversed: almost two-thirds (65%) of the attorneys reported that the statements **[*793]** are always or often accurate, and approximately one-third (35%) indicated the statements are only sometimes or rarely accurate. Probate judges responding to the judges' survey had a somewhat different view, particularly in relation to the husband. One-half of the judges reported that the husband's financial statement is always or often accurate. Somewhat less than two-thirds (62%) of the judges reported that the wife's financial statement is always or often accurate.

These differences in views are disturbing. Because the overwhelming majority of divorce proceedings are settled rather than litigated, attorneys' perceptions of what judges do are enormously influential. Obviously, attorneys reach settlements for their clients based on their views of judicial practices. Our data indicate that attorneys believe that judges in divorce proceedings treat women differently than men. It is important to discover where the truth lies if we are to accurately understand dispositions of divorce cases and how dispositions affect women and men. If the attorneys' perceptions are correct (and data gathered from our court record study and from the testimony of individual litigants support their perceptions), it is a matter of concern that judges' views of their own conduct and practices do not reflect what really happens. To the extent that actual results consistently disadvantage women they may reflect unconscious bias on the part of judges that must be addressed through education.

CONCLUSIONS

Although the goal of the Massachusetts statute governing alimony and property division is to effect an equitable distribution of property and give adequate support to the spouse who needs it, our research indicates that this goal often is not met. In Massachusetts, as in the nation, awards of alimony are the exception, not the rule, and the alimony awards that are made frequently fail to maintain the needs of divorced women. These awards all too often reflect both the lack of value given by society to the noneconomic contributions of the caretaking spouse and the unrealistic expectations held by judges and attorneys concerning the realities that women face as wage earners. While many alimony awards undervalue the contributions of the homemaker to the family, they also overvalue the earning potential of homemakers who have long been out of the labor market. Our research suggests that in their attempt to treat women and men "equally," judges sometimes fail to recognize the unequal status of men and women involved in a divorce and to ignore the very real situational and economic differences between spouses.

As our findings indicate, women who have postponed their careers to raise children or to work in the family business are often economically disadvantaged, both at the time of their divorce and for many years to come. The disparity between the potential of men and women **[*794]** for future acquisition of capital appears to be given inadequate consideration by the courts, not only when deciding alimony awards, but also in the division of property and the disposition of pension rights and business assets.

Our research also indicates that women are seriously hurt by the failure of the courts to award counsel and expert fees in advance. Attorneys in focus groups, in public hearings, and in surveys consistently noted that the courts do not take discovery in divorce cases seriously. The result is that the party without the means to pay advance counsel and expert fees is at a significant disadvantage in obtaining competent legal services and in conducting a proper discovery of the family assets.

These issues have an impact on the frequency with which alimony is awarded and the size of the awards. There is, however, another serious problem faced by those seeking alimony: only a minority of the alimony awards ordered ever get collected. While federal and state authorities have given much attention to the issue of noncompliance in child support orders and have strengthened child support enforcement tools, they have yet to deal with the problem of alimony noncompliance. The lack of concern shown by officials toward alimony enforcement has a grave impact on those most dependent on alimony, particularly older homemakers who do not receive child support and who have long been out of the labor force. These women must rely on their own resources to bring contempt action in cases of nonpayment, and they receive little help from the courts.

RECOMMENDATIONS

1. 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.

2. The probate court financial statement form should be changed to require the disclosure of accurate data concerning the valuation of pension and other deferred compensation and retirement rights. In particular, the parties should be required to obtain from the pension's trustees a certified statement that reflects the pension's present and future value.[32]In addition, the parties should be required to obtain a certified wage and benefits statement from their employers.

3. 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. The signature of an attorney on a financial [*795] statement constitutes a certificate by the attorney that he or she has read the financial statement and, after reasonable inquiry into all relevant facts disclosed therein, to the best of his or her knowledge, information and belief, the financial statement is accurate and complete as filed. 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.

> **Rule 401 should be revised to recognize marriage as a "partnership." It should impose fiduciary responsibilities of full disclosure upon the divorcing parties, and it should authorize sanctions for failure to do so.** [33]

4. 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.

5. 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.

6. Although the disposition of the marital home in a property settlement can present difficult problems for both wives and husbands, an order to sell the family home has a particularly strong negative impact on minor children and the custodial parent. For this reason, probate court judges should defer the sale of a home pending children's majority, if at all possible.[34]

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.

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[32] See endnote 10.

[33] A similar recommendation has been made by the Commission on the Unmet Legal Needs of Children.

[34] See *Hartog v. Hartog*, above.

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. [*796]

TABLE 1: ANNUAL INCOMES *

Name	Year Filed	Before-Divorce Income	Before-Divorce Family Size	Woman's Post-Divorce Income	Woman's Post-Divorce Family Size
001	1984	$ 76,866 **	4	$ 36,982 **	3
002	1985	$ 13,702 1	2	$ 6,093 1	1
003	1985	$ 54,241	4	$ 24,704	3
004	1983	$ 153,900	2	$ 31,800	1
005	1985	$ 33,371	5	$ 15,015	4
006	1984	$ 28,637	3	$ 10,937	1
007	1974	$ 20,263	3	$ 17,780 2	2
008	1984	$ 47,840	5	$ 22,560	4 3
009	1978	$ 60,888 **	4	$ 58,342	3
010	1971	$ 15,366 1	4	$ 5,200	3
011	1985	$ 49,762	4	$ 32,800	3
012	1984	$ 22,660	4	$ 8,860 5	3
013	1984	$ 43,144	4	$ 22,344	3

* Prepared by Dr. Nancy L. Marshall.

** Plus other sources of income

1 Interest on savings calculated at 6% per year.

2 Income in 1984, including child support. Does not include alimony awarded at appeal in 1984, because husband's income in 1984 unknown.

3 Children from previous marriage.

5 This is based on wife working part-time. Judge expected wife to work full-time with children ages 5 and 7.

TABLE 1: ANNUAL INCOMES *

Name	Year Filed	Man's Post-Divorce Income	Family Size
001	1984	$ 39,884 **	1
002	1985	$ 8,080 1	1
003	1985	$ 29,538	1
004	1983	$ 122,100	1
005	1985	$ 18,356	1
006	1984	$ 17,700	2
007	1974	$ 12,983	1
008	1984	$ 25,280	1
009	1978	$ 35,388 4 **	1
010	1971	$ 10,166	1
011	1985	$ 16,962	1
012	1984	$ 13,800	1
013	1984	$ 20,800	1

* Prepared by Dr. Nancy L. Marshall.

** Plus other sources of income

1 Interest on savings calculated at 6% per year.

4 Husband also pays children's tuition. **[*797]**

TABLE 2: PERCENT OF MEDIAN INCOME *

	Before-Divorce	Women's Post-Divorce		Man's Post-Divorce	
Name	% Median	% Median	Change	% Median	Change
001	247%	133%	-114	181%	-66
002	59%	26%	-33	35%	-24

TABLE 2: PERCENT OF MEDIAN INCOME *

	Before-Divorce	Women's Post-Divorce		Man's Post-Divorce	
Name	**% Median**	**% Median**	**Change**	**% Median**	**Change**
003	165%	84%	-81	128%	-37
004	740%	153%	-587	587%	-153
005	105%	46%	-59	79%	-26
006	103%	50%	-53	80%	-23
007	156%	81%	-75	125%	-31
008	155%	73%	-82	115%	-40
009	298%	323%	+25	250%	-48
010	132%	50%	-68	126%	-6
011	152%	112%	-40	73%	-79
012	73%	32%	-41	63%	-10
013	139%	80%	-59	94%	-45

* Prepared by Dr. Nancy L. Marshall **[*798]**

TABLE 3: COMPARISON OF STANDARD OF LIVING BEFORE AND AFTER DIVORCE *

Pre-Divorce Standard of Living	**Standard of Living After Divorce**			
	Under 100%	**100-135%**	**136-199%**	**200% or More of Median**
	004 - H - W			
	009 - H - W			
	001 - H			

TABLE 3: COMPARISON OF STANDARD OF LIVING BEFORE AND AFTER DIVORCE *

Pre-Divorce Standard of Living	**Standard of Living After Divorce**			
	Under 100%	**100-135%**	**136-199%**	**200% or More of Median**
200% or More	- W			
	003 - H			
	- W			
	007 - H			
	- W			
	008 - H			
	- W			
	011 - H			
	- W			
	013 - H			
	- W			
136-199%				
	010 - H			
	- W			
	005 - H			
	- W			
	006 - H			
	- W			
100-135%				
	012 - H			
	- W			
				H = Husband
	002 - H			W = Wife
	- W			
0%				

TABLE 3: COMPARISON OF STANDARD OF LIVING BEFORE AND AFTER DIVORCE *

Pre-Divorce Standard of Living	**Standard of Living After Divorce**			
	Under 100%	**100-135%**	**136-199%**	**200% or More of Median**
	Under 100%	100-135%	136-199%	200% or More of Median

* Prepared by Dr. Nancy L. Marshall **[*799]**

TABLE 4: SUMMARY OF CASES STUDIED

Length of	**No. of**	**Av. Age**		**Socio-Economic Status**			**Children**	
Marriage	**Cases**	**W**	**H**	**Low**	**Med**	**High**	**Yes**	**No**
Less than 10 years	3	29	30	2	1	0	2	1
10-19 years	9	46 (3NM)	47 (3NM)	4	2	3	7	2
20+ years	8	53	55	0	3	3	7	1
Total	20			6	6 (2NM)	6	16	4

NM - Not Mentioned
N/A - Not Applicable

Note 1: Includes one case in which the trial judge awarded alimony to the husband. The award was vacated on appeal.

TABLE 4: SUMMARY OF CASES STUDIED

Length of	**Ages of Children**				**Alimony<1>**		**Wife Employed**	
Marriage	**1-10**	**11-18**	**19+**	**County**	**Yes**	**No**	**Yes**	**No**
Less than 10 years	2	N/A	N/A	Plymouth - 2 Norfolk - 1	2	1	2	1
10-19 years	3	6	N/A	Hampden - 3	5	4	4	4

TABLE 4: SUMMARY OF CASES STUDIED

Length of	Ages of Children				Alimony<1>		Wife Employed	
Marriage	**1-10**	**11-18**	**19+**	**County**	**Yes**	**No**	**Yes**	**No**
				Middlesex - 2 Barnstable - 1 Hampshire - 1 Plymouth - 1 Suffolk - 1			(1NM)	
20+ years	0	1	7	Hampden - 3 Middlesex - 2 Norfolk - 1 Hampshire - 1 Plymouth - 1	8	0	3 (1NM)	4
Total	5 (2NM)	7	7		15	5	9 (2NM)	9

NM - Not Mentioned

N/A - Not Applicable

Note 1: Includes one case in which the trial judge awarded alimony to the husband. The award was vacated on appeal.

[*800] CHILD SUPPORT

SUMMARY OF FINDINGS

In families with children, child support is the most important means for redressing the economic imbalance that befalls women when families break up. [35] Prior to 1986, when major reforms were begun, the Massachusetts child support system, fragmented and overburdened, was unable to obtain court-ordered support for many women and children, leaving them with severely lowered standards of living. Our examination of the courts' role in child support revealed that deficiencies still exist but that improvements now in progress offer hope for a more effective system and fairer treatment of the women and children who are dependent on this system.

We believe that the problems in the child support system that we have identified are linked to gender bias. The economic inferiority of women after divorce is inseparable from the difficulties women experience in getting and enforcing support. Critics believe that the reason the child support enforcement system performs so poorly is because women and children, and only women and children, depend upon it for their economic survival.

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[35] The economic consequences of divorce and the relative availability of child support, alimony, and other remedies were discussed in detail in the family law overview and the alimony and division of property chapter. For convenience, this report frequently refers to household breakup as dissolution of marriage, although we realize that the same economic consequences occur whether or not the couple has been married.

The Committee found that:

1. 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.

2. The Department of Revenue's (DOR) practices in collecting child support arrears may, in some cases, hinder efforts by women and children to obtain adequate current support. DOR's local office staff members are inconsistent in their adherence to management policies and sometimes jeopardize women's interests or safety.

3. Courts are not uniform in their use of available tools to enforce support. Nonpayment is not met with predictable, steadily escalating enforcement sanctions.

a. Use of wage assignment, the most effective means of support enforcement in most cases, is increasing. Wage assignment still is not put into operation administratively in many locations because there is no system to do so.

b. 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. **[*801]** They should be reserved for instances when no other enforcement method has worked.

c. In an effective enforcement system, jailing must be used to punish those who do not respond to other sanctions. Jailing is seldom used, however, in the Commonwealth.

d. Courts interpret the standard for modification of support too strictly, denying women the benefit of modifications to which they are entitled.

e. Child support awards virtually never are designed to keep up with inflation or with normal changes that occur over time.

f. Enactment of the relatively simple civil procedure for paternity establishment has eased the task of obtaining support for children born out of wedlock, but some provisions of the law are still not adequately used.

g. Faced with an increasing caseload, the court system as a whole, and the probate courts in particular, will require both increased resources and a more efficient case processing system. Quotas and other limitations on the number of support cases heard per week are inefficient and contribute to delay.

4. The child support guidelines have led to large increases in the amount of child support orders. They still are not being used in some locations, particularly in district courts.

5. 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.

6. Women support obligors may be held to a lower standard than men, paying less than men in similar circumstances would be ordered to pay.

METHODOLOGY

Child support was one of the topics most frequently discussed at the public hearings. At least fourteen witnesses, including speakers at all three locations, testified on child support issues. The Worcester hearing featured a panel of speakers on child support, including representatives of parents' groups, the state Department of Revenue, and providers of legal services to low-income women.

The child support working group held several meetings that included such participants as a family service officer and members of a women's group organized around the issue of child support. We also reviewed the literature on the topic.

A set of questions relating to child support was asked of family law practitioners in the family law survey. As part of the attorneys' survey and judges' survey, those who practiced or sat in family law cases were asked special sets of questions pertaining to family law, some of which **[*802]** dealt with support. Similarly, child support questions were asked in the focus groups for family law attorneys and family service officers.

CHILD SUPPORT AND THE IMPOVERISHMENT OF FEMALE HEADS OF HOUSEHOLDS: WHY IS IT A GENDER BIAS PROBLEM?

The lack of a well-functioning child support enforcement system is a problem that can be properly analyzed as gender bias because it disadvantages women so much more than men. About 90% of custodial parents eligible to receive support are women (Bureau of the Census, *Child Support and Alimony*, 1983). All of the problems that impede support collection thus affect women in a disproportionate manner. Attorney Lonnie Powers, director of the Massachusetts Legal Assistance Corporation, testified at a public hearing that the Massachusetts Legal Needs Survey completed in 1987 found that women are three and a half times more likely to have support related problems than men. Nan Hunter supports this analysis in an article in the *Harvard Women's Law Journal*. She says: "Though child support law is facially neutral, in practice its profound economic effects are directly tied to gender. It is women who pay the bulk of the costs that result when one household becomes two" (1983). Ms. Hunter states further that the child support enforcement system "functions in an unarticulated but systematic way to force women to assume the financial responsibility for childrearing -- responsibility that belongs to both women and men. Although the criticism of child support policy is widespread, there is little explicit recognition that the policy issues involved are vastly different for women than for men. Such a grossly flawed system does more than just lower the standard of living of millions of children; it also imposes on women a disproportionate share of the cost of raising children."

For the majority of custodial parents, regular payment of child support is the exception, not the norm. Only slightly more than half the families that are eligible to receive support have court orders, in part reflecting the systemic difficulties in obtaining orders, especially for women who give birth out of wedlock. Of those women who have support orders, only 47% collect all of the money due them and an additional 25% collect some that is due (Bureau of the Census, *Child Support and Alimony*, 1985). Thus, only 28% of the eligible households get any support at all. And for those who do get support, it may only be after a history of repeated court battles. The Middlesex Divorce Research Group studied 265 families involved in relitigation following divorce and found contempt complaints for nonsupport in 176 of those cases, far more than any other kind of postdivorce litigation.

The bias against women is highlighted by a comparison of past practices in child support collection with other areas where money is due under a law or court order. State and federal taxes are collected through efficient systems with severe penalties for nonpayment. **[*803]** Whether or not you have the money, your tax obligation is still owed and never reduced, as it was in child support actions where, until recent legislation prohibited the practice (c. 714 of Acts 1989), arrears were often reduced. Collecting money in all types of civil actions, child support or otherwise, can present difficulties. But mothers trying to enforce a child support order may meet with derision and complacency on the part of court personnel that is particular to support collection. Nan Hunter notes that, women seeking child support "confront all the difficulties accruing to the plaintiff in a civil action, while seeking funds to provide for their children's basic necessities. But unlike many other plaintiffs, they cannot easily eliminate expenses to minimize financial losses during the pendency of litigation."

The effect of this nonpayment epidemic on the economic well being of households headed by women is enormous, as shown by the statistics on women's standard of living in the family law overview. Moreover, because of the relative infrequency of alimony and significant property division, child support is the one source that many families, especially the poor, can realistically look to for help in solving the economic crisis in which they find themselves after family breakup.

INTRODUCTION OF THE CHILD SUPPORT SYSTEM

Federal Involvement in Child Support

The alarming statistics on nonpayment of child support and its effect on female-headed families prompted the development of the federal child support enforcement program, which establishes the regulatory framework within which DOR and all state child support enforcement agencies must operate. This federal program, established in 1975 as Title IV-D of the Social Security Act *(42 U.S.C. 651 et seq.*), was designed to strengthen families and reduce spending on welfare by placing the responsibility for supporting children on their parents. The federal child support enforcement program is administered by the Department of Health and Human Services. States are required to establish child support enforcement plans meeting certain federally established criteria in order to receive federal welfare reimbursements and federal financial participation in the costs of operating the program.

The statute involves federal and state agencies in performing a variety of services including locating absent parents, establishing paternity, setting support orders, and collecting and disbursing support.

In 1984, Congress significantly expanded the scope of this program by passing the Child Support Enforcement Amendments (P.L. 98-378). This law mandated sweeping changes in states' programs, requiring the states to use new enforcement remedies. Most significantly, the law required states to provide comprehensive support enforcement services to all custodial parents, whether or not on welfare. These services to nonwelfare families are intended as "welfare prevention," placing the **[*804]** burden of supporting children on their parents at the outset, not just when the family is on welfare. The effects of the federally mandated requirements on child support enforcement in the Commonwealth and the 1988 legislation that triggers additional requirements will be discussed below.

Child Support in Massachusetts: Recent History

For many years, child support enforcement has been a disgrace that results in lower living standards for millions of women and children. In Massachusetts, the most vulnerable aspect of child support collection has been the fragmented system of enforcement. Prior to 1986, no single agency had responsibility for the entire system, instead, responsibility was scattered among many administrative and judicial agencies, including sixty-nine district courts and fourteen probate courts. These problems were detailed in a study of the system performed by the Arthur Young consulting firm which found "rampant noncompliance with payment orders, no coherent enforcement strategy, inadequate automation, failure to comply with federal regulations, inadequate internal controls, inadequately trained staff" (Department of Revenue, *First Year Progress Report* 4, 1988).

As a result of federal requirements and local agitation for change, Governor Dukakis named the Governor's Commission on Child Support Enforcement. The Commission's report, issued in October 1985, concluded that fragmentation of the system made it accountable to no single authority and that variation from jurisdiction to jurisdiction meant that "persons in similar circumstances cannot count on similar treatment." The report also concluded that there were inadequate services for those who needed support and that available enforcement tools were inadequately used.

As a result of the Commission's report and other factors, M.G.L. c. 310, Acts of 1986, a comprehensive child support reform law, was passed. This statute brought many changes to the system of child support enforcement in the Commonwealth, including the following:

* The Department of Revenue (DOR) took the place of the Department of Welfare as the single, statewide coordinating agency for child support enforcement for welfare families, and it was given the additional responsibility of providing child support enforcement services to families not receiving welfare.
* The law allowing child support payment by wage attachment was strengthened.
* The state's paternity law was changed to permit the establishment of paternity in civil proceedings.
* Written, numerical guidelines to assist judges in setting child support amounts were mandated.

Since the enactment of that law, two other statutes have been passed affecting child support enforcement. The first (M.G.L. c. 490, Acts of **[*805]** 1987) gave the Department of Revenue the power to administratively place liens and levies upon the real and personal property of child support debtors and to use other administrative enforcement methods that the agency already possessed in the tax context. The second (M.G.L. c. 714, Acts of 1987) prohibited judges from retroactively modifying child support arrearages.

As a result of these and other reforms, and of the increased attention given to child support, gross collections in the Commonwealth have skyrocketed. Total collections in the 1988 fiscal year were $ 150.8 million, up from $ 119.8 million the previous year and $ 72.3 million in fiscal 1983. This figure included $ 85 million for families not receiving welfare.

Department of Revenue

The 1986 legislation has begun to have an effect on the problems that beset Massachusetts' child support enforcement structure by giving responsibility for collection and enforcement to the Department of Revenue, by giving it expanded administrative enforcement powers, and by improving existing judicial remedies.

On July 1, 1987, the Department of Revenue became responsible for the state's child support enforcement system. DOR inherited an existing caseload of 87,000 current and former AFDC recipients and became responsible for a nonwelfare population whose cases were being handled by a variety of law enforcement agencies, including court probation departments and local district attorneys. DOR has already increased the number of support establishments and drastically increased the proportion of cases in which paternity is established.

Services currently available to non-AFDC applicants include parent location and enforcement of existing orders through wage assignments, state and federal tax refund intercepts, lien and levy procedures, and referrals to district attorneys for criminal prosecutions. DOR collected more than $ 1,200,000 in tax refund intercepts in the 1988 tax processing year on behalf of non-AFDC customers. Currently, almost 600 nonwelfare cases have been referred to DOR attorneys for legal action. To provide these services, DOR is increasing staffing to what will ultimately be a staff of 677 child support enforcement personnel. DOR has begun drafting and issuing uniform case processing procedures.

One of the biggest projects undertaken by DOR is the creation of a central computerized clearinghouse for all child support collections in the state, known as the "court conversion" project. Currently, court personnel work in an atmosphere of constant interruptions as they perform the arduous and time-consuming steps involved in a manual bookkeeping system or struggle with the Probation Receipts Accounting (PRA) computer, with its unexpected system "down time" and inadequate resources. DOR is working on a court-by-court basis to **[*806]** assume responsibility for collecting, monitoring, and disbursing child support payments. The transition will take several years and will conserve judicial resources, allowing court personnel to provide more direct services to women in need and to all people using the court.

Wage Assignment

Wage assignment, also known as garnishment, is the legal procedure by which payment for child support is taken directly from the payor's wages, just as income taxes are withheld. Prior to the 1986 child support reform law, wage assignments were suspended in the first instance and implemented only when good cause was found. Now wage assignments are much more common because judges must make immediate wage assignments unless the parties agree otherwise in writing or the judge finds good cause not to do so. As a result of this law, many more cases involve collection of child support direct from the obligor's wages, the method that researchers find the most reliable (U.S. Senate Committee on Finance, Child Support Enforcement Program Reform Proposals, Jan. 24-25, 1984, # 98-673, pp. 28, 127.) Even when the judge suspends the wage assignment for good cause, it must be executed administratively, without a prior court hearing, when the total arrearage in the case reaches two weeks.

Massachusetts' progressive wage assignment design proved so attractive that it was used as the model for national legislation, the Family Support Act, P.L. 100-485, § 101, requiring virtually the same legislative framework in all states.

Guidelines

Another important requirement of the 1986 legislation was the promulgation of child support guidelines by the Chief Administrative Justice of the Trial Court under guidance from a 15-person advisory committee. These guidelines have numerical ranges that recommend the amount of the support order based on family income. They are to be used by all those who set child support orders, although they have no binding effect. A new federal law, the Family Support Act of 1988, P.L. 100-485, § 103, requires that the guidelines be made presumptive by October 1989, so that judges will have to provide written findings if they deviate from them.

Massachusetts' child support guidelines are not designed to fully remedy women's lower standard of living after divorce. Both before and after the promulgation of the guidelines, child support awards fell far short of meeting the full cost of child-rearing (Espenshade, 1984; Steinschneider, 1988). Scholars who have looked at approaches to

child support guidelines find that only one approach, the "income equalization" model, will bring the woman's postdivorce income in line with the man's. The income equalization approach involves calculating **[*807]** all the income available to both households after divorce, then, by use of a generally accepted index of standard of living (such as that developed by the Federal Bureau of Labor Statistics) shifting income from the better-off to the worse-off household until their living standards are equal in relation to the index for households of their size (Smith, 1987). This approach to child support guidelines could involve large transfers of income from men to women. Massachusetts considered adopting such a model, but neither Massachusetts nor any other state chose this approach.

Instead, Massachusetts and most other states chose an "income sharing" model, which directs that a percentage of the noncustodial parent's income be paid to the custodial parent and children in an effort to reflect the share of the man's income that he would spend on his children if the family had remained intact. Neither party's "needs" or expenses are part of the guideline calculation. Because there are extra costs when the family splits into two households, allocating the same share of parental income to children after divorce purchases a lower living standard for the children after divorce than before.

For many families, the guidelines provide substantial improvement over previous practice in their standard of living, at least to the extent that the support can be collected. But for poor families, the guidelines may offer little assistance in getting them off of welfare or up to a decent standard of living. Unless an absent father earns approximately $ 25,000 or more in annual income, calculations under the guidelines will not result in a support order high enough to take his family off of welfare. If an absent father is unemployed, partially employed, or employed at the minimum wage, he may earn far less than this. Providing truly adequate support for low- and moderate-income families after separation may require modification of tax laws and provision of a parenting supplement that will assist families in need without putting them on welfare.

DISCUSSION OF FINDINGS

1. 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.

Women still generally bear complete responsibility for establishing and enforcing support, whether they can afford counsel or not. Nan Hunter writes that when there is nonpayment "it is up to the mother to institute enforcement proceedings. It will not be worthwhile for the mother to sue, however, until the support owed exceeds the fee she will probably have to pay an attorney to bring the suit. By the time it becomes worth it to proceed, her financial plans and budgeting may be in turmoil" (1983, pp. 13-14). Lenore Weitzman echoes similar sentiments **[*808]** about the unresponsiveness of the system and the expense and burden of pursuing support which a mother with children can ill-afford (1985, pp. 285-87). In *Economic Child Abuse*, Jon Laramore says, "Many mothers, either assuming that the courts are taking action or not knowing whom to contact, let large arrearages develop before they contact the courts. Bills pile up and the family financial situation becomes desperate before a court even hears about the problem" (1985, p. 24).

We found recurrent evidence that the court system fails to assist women seeking to vindicate their right to support. Lucy Williams, an attorney representing advocates of low-income women, testified at a public hearing that "the courts are simply not functioning to get desperately needed money to poor women and children." Joan Diver, a representative of a mothers' group, testified that many children suffer because the state's efforts to enforce support are simply not good enough. Representatives of the same mothers' group spoke at a committee meeting about how enforcement sometimes takes so long that women can't afford, financially or psychologically, to wait, so they drop their cases.

Both probation officers in district court and family service officers in probate court, and the court rules they follow, create barriers and cause harmful delays. Gretchen Bath, an attorney at the Legal Assistance Corporation of Central Massachusetts, testified at a public hearing that in her local probate court:

> "when a mother misses a child support check and contacts the Family Service Department about it, she is told to wait longer, that maybe the check will come. In some cases, she is told to wait until a set number of checks

> have been missed. Generally that number is four. Meanwhile, there is no action taken in her case. Even if she is not told to wait longer, the Family Services Department has a policy that it won't take any action until the request is in writing . . . . This causes further and unnecessary delay, and it presents a real barrier to unrepresented women, to illiterate or barely literate women, and to women whose primary language isn't English."

Laramore documents the long history, in some locations, of problems with probation supervision of support collection based on poor management and conflict with other probation duties (1985, pp. 24-25). Family service officers sometimes fail to bring nonpayment cases for review promptly. Sometimes they may be unaware of the nonpayment because they lack an automated payment system, and other times they may simply fail to properly exercise their discretion. Attorney Bath testified that practices vary from "office to office and officer to officer. Some officers will file contempt. Others will simply make friendly reminder call after friendly reminder call, all without taking any enforcement action. Some will inform the woman what is happening, and many will just repeatedly refuse to talk with her when she calls and **[*809]** won't return the phone calls leaving her totally in the dark about her case. I have heard of this happening for weeks and even months at a time, all without any enforcement action being taken."

Because of these various practices, when a custodial parent fails to receive her check she has to determine whether the father isn't paying or whether a bureaucratic error is responsible. Then she must contact probation staff to ensure that enforcement efforts are brought, and in many cases, must proceed personally to schedule a hearing with the clerk's office and ensure that notice is sent to the defaulting father. These requirements are time-consuming and difficult for an unrepresented woman to meet.

In addition to unresponsiveness, support-seeking women sometimes face hostile court personnel in pursuing their cases. In written testimony, Lucy Williams of the Massachusetts Law Reform Institute notes that many women "complain of bad treatment by court personnel, including assistant clerks, assistant registers and probation and family service officers." She writes further that, "in the most egregious cases, sexual advances or sexually explicit remarks from court officers and others" are reported. An attorney, in our Worcester family law attorney focus group, reported that court personnel in Suffolk County feel that it's so unusual for women to get regular child support payments that they shouldn't expect it to happen, but should feel lucky to get anything. While these personnel sometimes berate women who seek support, Carol Allen, an advocate from Western Massachusetts, said at a public hearing, "rarely have I heard a man being insulted or degraded for not supporting his children."

Unresponsiveness and hostile attitudes on the part of court personnel are exacerbated by the difficult conditions under which they work. There has been a tremendous increase in the courts' child support business over the past several years. In many courts, the child support caseload has multiplied several times without any increase in available resources. Lack of automated systems, staff, and adequate physical facilities all lead to frustration among personnel and inadequate human resources to process cases properly.

As indicated in the family law overview, there simply is not enough legal help to go around. Women seeking support are frequently not represented because they cannot afford to hire an attorney or because legal services and the Department of Revenue do not have the capacity to handle the large number of women who need help. An unrepresented woman will often find the court's procedures difficult to understand and comply with. The problem is particularly difficult for those seeking to use contempt to enforce support, according to an attorney in our Worcester focus group. Contempt is a complicated procedure even for attorneys, involving a new complaint and service of process. Contempt defendants often are entitled to appointed counsel if indigent, **[*810]** but the person seeking a contempt is not. According to a public hearing witness, "women are faced with filing contempt motions to pursue child support. Many times, the women have to track down the ex-husbands who leave their jobs to avoid payment."

The Department of Revenue is in the process of taking over the management of many functions in the child support enforcement system. It intends to provide help to many of those with the problems described here, and it hopes in the future to be able to provide assistance, perhaps including legal representation, to all those seeking support. These efforts, if they are successful, will do a great deal to solve the problems discussed in this section. However, the problems are far from solved and DOR has a large task ahead. At present, we continue to hear comments such

as the one from a family service officer in western Massachusetts who reported at our focus group meeting that, "DOR has not helped so far. Their system is confusing and they are confused themselves. When one calls one gets confusing and contradictory information from different people."

2. The Department of Revenue's (DOR) practices in collecting child support arrears may, in some cases, hinder efforts by women and children to obtain adequate current support. DOR local office staff members are inconsistent in their adherence to management policies and sometimes jeopardize women's interests or safety.

Grady B. Hedgespeth, formerly Deputy Commissioner, Child Support Enforcement Division, at DOR, testified at a public hearing that DOR's priority is "to ensure that money due is money collected, so that *all* children get the support of both parents." But critics, including witnesses who testified at the same public hearing, say that DOR is concentrating more on collecting money for the state than it is on collecting money to help families survive. They believe that M.G.L. c. 119A mandates that collecting sufficient maintenance be the priority. This problem is especially acute when families leave welfare and DOR seeks to obtain payments on "arrears" that accrued when the family was on welfare and payments were not made.

A legal services attorney testified that "I have seen many cases where a family is off AFDC, perhaps working to supplement child support payments, and is barely getting by, yet the court orders regular payments on the arrears to the state agency. These arrear payments are often small amounts, sometimes as low as $ 10 a week, but that can be a substantial amount to families with incomes below the poverty level." Another witness testified that "it is critically important that when the woman is going off AFDC, the maximum amount of support is designated as current support as opposed to an arrearage. Yet what we see on a regular basis is that the courts enter a current support order . . . and then attribute an additional amount in arrearage that goes only to **[*811]** the State." Advocates reason that, in the case of poor or low-income families, if the noncustodial parent can make payments on arrears then that parent should instead be ordered to pay higher current support.

The goal of maximizing current support is even more important because the families going off welfare need more than the equivalent amount of money in support; they also need to replace the medical insurance, food stamps, and supplemented day-care payments that they had received with welfare and that they may lose eligibility for as their income increases. Both Massachusetts law and the child support guidelines require that all support orders include provision for dependent health insurance coverage by the obligor if it is available. However, enforcement and implementation of this requirement is inconsistent throughout the Commonwealth.

While some critics feel that DOR puts too much emphasis on arrears collections, DOR collection statistics show that arrears collections represent only 17% of total IV-D collections. DOR collected $ 25.2 million in arrears payments last year. Of this, $ 11.6 million was in tax intercepts, which cannot lawfully be applied to current support. Similarly, much of the remaining $ 13.6 million that DOR received in arrears represents collections made through liens, lump sum settlements, IRS full collections (seizure of all assets by federal marshals), and other methods that are by definition arrears collection techniques. Advocates argue that DOR should identify and redesignate the portion of its arrears collections which are attributable to wage assignment payments from arrears to current support payments, but DOR notes that federal law will not permit such redesignation.

DOR further responds that it pursues a dual policy by attempting to collect the maximum amount of current support recommended by child support guidelines and also to pursue arrears, in both AFDC and non-AFDC cases. DOR believes that a strong policy on arrears will motivate parents to comply with current support orders. Legal services organizations feel that strict enforcement of current support orders is more effective than pursuit of arrears.

There are other problems with DOR's administration of child support that adversely affect women. Women complained that, contrary to DOR policy, they sometimes are not notified when the state brings their cases to court, so they cannot attend hearings to represent their own interests. Sometimes families are not promptly notified of nonpayment and cannot take enforcement action. Notification is the joint responsibility of DOR and the courts, based on a cooperative agreement they have entered into regarding collection of support. In addition, female litigants noted that regulations aimed at stopping state support collection when it could trigger physical abuse in the

family are not always enforced. Despite the good intentions of DOR's top management, public hearing witnesses expressed the opinion that their policies were **[*812]** not being carried out by local employees who have daily contact with support-seeking women.

On the Department of Revenue side, it should be noted that DOR's caseload includes over 33,000 AFDC cases where a court order for support exists. On average, payment is received for about 17,000 of these cases in any given month. Given the high volume of attendant enforcement proceedings it must file, DOR believes that the complaints it receives concerning the conduct of its court workers or its attorneys are proportionally few. DOR encourages advocates and other concerned parties to use DOR's established procedure for making inquiries about policy and the handling of individual cases.

3. Courts are not uniform in their use of available tools to enforce support. Nonpayment is not met with predictable, steadily escalating enforcement sanctions.

The courts do not adequately use available tools for enforcing support orders, so that nonpayment often goes unpunished. The available tools include demand letters, state and federal income tax refund intercept, contempt, use of collection agencies and credit reporting services, use of *capias* for arrest, judicial attachment or lien against property, trustee process, actions to reach and apply, and administrative liens and levies by DOR (Smith, 1988). Although many of these tools are administrative and can be employed by DOR without the necessity of further court hearing, in many cases administrative measures must proceed jointly with judicial remedies for enforcement to have an impact.

To effectively deter nonpayment, child support enforcement must be structured to provide a series of steadily escalating enforcement measures, each more severe than the last. To conserve scarce judicial resources, judicial enforcement must be used selectively where it is most effective. Civil contempts and criminal nonpayment actions serve a valuable purpose, but they are even more effective when pursued in tandem with administrative enforcement remedies.

DOR is now developing a strategy it calls the "Enforcement Pyramid" to coordinate the use of all its enforcement powers. Under this approach, one administrative enforcement measure will lead inexorably to the next until payment occurs. For example, an absent parent who ignores a dunning notice might find that his case has been referred to a collection agency or certified for tax refund intercept. The same absent parent might next discover that an administrative lien has been placed on his property or that his ability to secure credit has been impaired. DOR believes that in many cases this concerted administrative effort will frequently preclude the need to use judicial processes.

In addition, there should be consideration of enforcement tools not yet widely used here despite statutory authority for their imposition. One example is the posting of security. This entails the noncustodial **[*813]** parent setting aside an amount equal to several weeks' support (in an escrow account, for example) on which his family could draw if he gets behind in his payments. Ninety-one percent of attorneys responding to the family law survey said that judges rarely or never exercise the option to make support obligors post bond for security for payment.

a. Use of wage assignment, the most effective means of support enforcement in most cases, is increasing. Wage assignment still is not put into operation administratively in many locations because there is no system to do so.

The general consensus of attorneys and family service officers is that wage assignments are used much of the time. Attorney respondents to the family law survey reported that judges are quick to enter income withholding orders. Seventy-one percent of the responding attorneys said that courts do so always or often. A large majority of the judges responding to their survey said they enter wage assignments always or often. DOR reports, however, that many courts question the need for wage assignments in certain cases or order suspended assignments without the required good cause findings.

While wage assignments are being implemented much more often than they were before the statutory change in 1986, those with suspended wage assignments still have problems. The law requiring automatic implementation of

withholding when the obligor falls fourteen days behind or is found in contempt is rarely or never enforced, according to 50% of the respondents to the family law survey. Under the terms of the law, each court is to monitor all support orders, and, when a total arrearage amounting to fourteen days accrues, the court is to administratively implement wage withholding. In most courts, this process does not occur because there is no regular monitoring of arrearages. Instead, the woman receiving support must notify the court of arrears and try to persuade the court to implement the wage withholding order. Some courts still require hearings on implementation despite the statutory language, and some court staff do not understand DOR's statutory authority to implement wage assignments administratively when sufficient arrears accrue or when obligors change jobs.

b. 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.

In cases where the obligor has no source of periodic income, the most common alternative to wage assignment is an action for contempt for nonpayment. Contempts are also used against obligors who are on wage assignments when other enforcement strategies have failed. An action for contempt for nonpayment is perhaps the single court procedure **[*814]** that best exemplifies the problems of delay and complications, and the need for legal representation or other assistance for women seeking support. For example, attorneys report that continuances are common and that judges are slow to use forceful sanctions even when the attorneys present a strong case against the obligor.

Women bringing contempt actions may risk losing what they already have without any advance notice. Counterclaims for modification or change of custody, made without notice to the custodial parent until the date of the child support hearing and in complete violation of due process requirements, are not only countenanced by the court, but granted. Family law attorneys in the Worcester focus group reported that, when a woman goes to court on contempt, everything is "up for grabs," even when only the enforcement action has been scheduled for hearing. She may leave court with a modification or lose custody, even if the other side gives no notice of motions on these topics.

According to family law attorneys in the Northampton focus group, judges frequently reduce arrears at contempt hearings. Approximately two-thirds of the family law attorneys surveyed indicated that judges frequently respond to support enforcement actions by reducing arrears or modifying the support order downward. Judges' own opinions of their actions diverge from this report. Eighty-three percent of the respondents to the judges' survey reported that they rarely or never reduce arrears or modify orders downward. At approximately the same time that we completed this survey, the legislature prohibited retroactive modification of child support arrears (c. 714, Acts of 1987 as codified at c. 119A, § 13). Despite the statutory change, it is still true that judges can establish an arrears figure but decline to require payment on it.

c. In an effective enforcement system, jailing must be used to punish those who do not respond to other sanctions. Jailing is seldom used, however, in the Commonwealth.

We also found a consensus that jailing should be used more often for chronic nonpayers. Without the threat of this ultimate sanction, many other enforcement methods are less effective. Massachusetts' law allows for jailing child support nonpayers through civil or criminal contempt actions or under the criminal nonsupport law, c. 273, § 1. Focus group attorneys feel that jailing should be used more often to punish nonpayment and that women (particularly those who are unrepresented) simply do not have other tools to collect support from someone who doesn't want to pay. Family service officers reported in our Boston focus group that judges have been reluctant to use jailing even when there have been fifteen or twenty contempt hearings. They agreed that more enforcement tools should be used and that jailing should be used more often.

[*815] Recently, family service officers in Suffolk County reported that judges are increasingly using jailing as a sanction. For example, between June 1988 and February 1989, Suffolk County Probate Court used jailing in nineteen cases. These cases included men who were committed to jail and men who received suspended sentences. Of those nineteen obligors, ten are now paying regularly and eight have made lump sum payments for a

total of $ 20,850. Family service officers consider this a dramatic improvement in the behavior of hardcore nonpayers.

Jailing is one portion of the child support enforcement system in which the courts' cooperation is essential. Yet a large majority of attorneys responding to the family law survey believe that judges are loath to jail, with 84% of these attorneys reporting that judges do so rarely or never. Contrary to this view, 74% of judges responding to the judges' survey reported that they often or sometimes jail respondents for nonpayment.

The literature on the topic shows that the knowledge that jail will be the ultimate sanction for nonpayment is essential to an effective child support enforcement system. Professor David Chambers's study of support enforcement in Michigan (1979) concluded that jailing provides a necessary incentive for payment. At the time of this study, Michigan, the state with the best support enforcement system in the nation, had extremely high rates in some counties for jailing for nonpayment. As many as one out of every four support payers in some counties served some jail time during the life of the support order. Although resumption of regular payment did not always result in cases where jailing was used, Chambers's study found that the widespread perception that jailing would result from nonpayment greatly increased the incentive to pay of men not jailed. Once that principle became clear, compliance improved.

DOR's case reports illustrate the effectiveness of jailing, or even the threat of jailing. In a series of collaborative efforts with district attorneys in several interstate criminal actions, DOR has used the criminal nonsupport law with success. For example, an absent parent working as a bartender in Ohio owed some $ 15,000 in support and produced the entire sum after being extradited by means of a governor's warrant and ordered to serve a jail term. In another case, DOR obtained more than $ 50,000 in payments from a man arrested in California on criminal nonsupport charges. This defaulter served several weeks in jail as punishment for years of evasion of his obligation. In its first year, DOR obtained the surrender of 3,000 men wanted on criminal or civil warrants.

Jailing can have an adverse effect on the custodial parent trying to collect support by interrupting the income stream of the obligor. Of course, jailing, as an enforcement tool, is only used as a last resort. **[*816]** Even in these cases, consideration should be given to alternative incarceration programs where the obligor could maintain his job during the period in jail.

d. Courts interpret the standard for modification of support too strictly, denying women the benefit of modifications to which they are entitled.

Few remedies can address the adequacy or resource gap between custodial-parent mothers and absent-parent fathers so thoroughly as a legal modification of the support order. Modification of orders permits the court to take into account the increased needs of older children, the rising cost of living, and significant changes in the earning capacity of the parents. It also allows the children to share in the improved standard of living of the father. For example, in one probate court, DOR was able to obtain a series of modifications resulting in orders typically being increased from $ 15 to $ 89 and from $ 60 to $ 222.

A 1983 Census Bureau study on child support found that, nationwide, some $ 10.1 billion was due as court ordered child support and that $ 7.1 billion was actually collected, leaving a "compliance gap" of $ 3 billion dollars. By contrast, if all these orders had been set according to the guidelines in use in Delaware or Wisconsin, both of which are relatively modest guidelines, the total amount due for the same number of children nationwide would have been $ 26.6 billion, or more than 2.5 times the amount actually ordered. Using these guidelines, an "adequacy gap" of more than $ 15 billion exists. This money would be available to single-parent households if child support orders set without the use of guidelines were updated regularly to keep up with increases in parental income.

Attorneys and family service officers in focus groups and several witnesses at public hearings all felt that judges employ too stiff a standard for awarding modifications, possibly in an attempt to limit their dockets. An attorney who testified in Springfield said that if the courts do not consider promulgation of the child support guidelines to be a change in circumstances, the standard for modifications creates a double standard: a family getting divorced after

the guidelines came into use would get one order, while a family divorcing prior to guidelines would have another, eliminating the equity that motivated promulgation of the guidelines in the first place.

Despite express statutory authority, many courts are reluctant to make temporary orders for modifications. The applicable law requires the court to find a reasonable expectation of "injury, harm or damage" if temporary relief is not given. Many courts interpret this requirement so strictly that it is almost never met.

e. Child support awards virtually never are designed to keep up with inflation or with normal changes that occur over time.

[*817] Beyond the problem of modifications *per se*, inflation is the greatest enemy of the value of child support orders. Even if a given case does not meet the standard for modifications, a year or two after the order is made it is outdated because of the normal changes in costs and income that occur over time. Women's economic status is pushed down over time when the support order remains constant while costs of living, costs of raising children as they get older, and the obligor's income rise. This occurs even when these factors do not add up to a "substantial change in circumstances" as required for a modification. For that reason, periodic updating of orders outside the context of modifications must be considered.

The importance of periodically reviewing and adjusting support orders has been recognized by Congress, which included requirements for regular review of orders in the Family Support Act of 1988. Under this law, states must have procedures in place for making sure that orders conform with the guidelines. Beginning in October of 1993, these reviews must take place at least once every three years. There is now no administrative method for adjusting child support orders in Massachusetts. The often lengthy and complex procedure of modification is the only currently available way for changing orders.

Under the guidelines, which mandate percentages of income for support, periodically updating child support orders is simple, and some parties do agree in divorce agreements to periodically update orders. Studies have shown that updating old child support orders to reflect new income and expense levels could produce as much as a tenfold increase in the amounts of support paid (McDonald, Moran, and Garfinkel, 1983; Smith, 1988).

f. Enactment of the relatively simple civil procedure for paternity establishment has eased the task of obtaining support for children born out of wedlock, but some provisions of the law are still not adequately used.

Another 1986 legislative change to aid in obtaining support was enactment of M.G.L. c. 209C for the civil establishment of paternity. About 15,000 children are born out of wedlock in Massachusetts each year, and paternity must be established for each of them before support can be ordered. Previously, Massachusetts had been one of only three states to retain quasi-criminal paternity establishment, and certain restrictions meant that the most accurate scientific evidence often could not be used. Because of the new statute, DOR was able to establish 7,950 paternities last year, the highest number ever and double the number of just three years ago. The new law makes establishment considerably simpler and thus facilitates payment of child support.

M.G.L. c. 209C, § 11(b), permits written voluntary acknowledgements of paternity that can be filed and then approved by the court without a trial. In uncontested cases, voluntary acknowledgements save **[*818]** time that DOR and the courts could better spend on more important matters. In several probate courts, however, there has been great reluctance to permit these acknowledgements to be filed. Some courts insist that they must be filed in court with one or both parents present.

g. Faced with an increasing caseload, the court system as a whole, and the probate courts in particular, will require both increased resources and a more efficient case processing system. Quotas and other limitations on the number of support cases heard per week are inefficient and contribute to delay.

As the child support dockets become ever more crowded, particularly in the probate courts, a combination of increased court resources and a more efficient case processing strategy will be necessary to absorb the volume. At present, some courts impose informal quotas upon the number of child support cases that can be filed by DOR in

any given week. Quotas, however, offer only a short-term solution. Quotas also violate expedited process standards established by federal regulation.

One approach that has already had great success in some divisions of the probate court is to set aside, in advance, blocks of time for the hearing of child support cases. Where DOR has been guaranteed access to a specific block of court time, it has been able to prepare and present as many as twenty-five to thirty cases within a single half-day session. The use of block time thus conserves judicial resources without contributing to delay.

4. The child support guidelines have led to large increases in the amount of child support orders. They still are not being used in some locations, particularly in district courts.

The vast majority of those who talked to us feel that the child support guidelines represent a positive step toward increasing the size of child support orders to better meet the needs of children and that the guidelines reduce the disparity in orders from court to court. All those surveyed found that the guidelines had brought new consistency and certainty to cases, making them easier to settle. In the attorneys' survey, for example, 89% of attorneys reported that they rarely or never advise a female client to accept less than the guidelines would provide, and 60% rarely or never advise a male client to pay over the guidelines.

While almost all the family law survey respondents reported that probate court judges always or often use the guidelines, they reported a different situation in the district court. Only 40% of the attorneys surveyed reported that district court judges often or always follow the guidelines, and 35% said district court judges never or rarely use the guidelines. There is no financial statement promulgated for use in the **[*819]** district courts, and most district courts require no written financial statement. Thus, it is difficult to determine whether the guidelines are followed in the district courts. Federal law requires that by October 1989 states must make guidelines presumptive, that is, they must be applied unless the judge makes written findings stating the reasons they should not apply.

In December 1987, the Office of the Chief Administrative Justice of the Trial Court published its study of a random sample of cases analyzed to show the use and impact of the guidelines. The report did not distinguish between probate and district courts as to use of the guidelines. It found that "In 64% of the cases sampled, the amount ordered was either the Guidelines amount, or within 20% of what the Guidelines would suggest." The report did not indicate whether the 36% of the cases in which orders were not within 20% of the guidelines were above or below, but other evidence we gathered makes it seem likely that in a large majority the orders were below the level recommended by the guidelines.

The guidelines are widely perceived as the maximum amount the courts can order from the noncustodial parent. A legal services attorney who testified at a public hearing noted that although the guidelines "merely suggest that an absent parent should pay about 25% of his income to support a child, the courts routinely use this figure as a ceiling. There is never any inquiry into the circumstances of the absent parent to see if there is any way that he could pay more." Family service officers in all five focus groups stated they feel the guidelines are too high. This attitude could affect the outcomes of cases they mediate and lead to the establishment of orders below the guidelines.

According to a survey administered to judges, attorneys, family service officers, and court support workers as part of the Trial Court study, the following reasons are used to explain the failure to utilize the guidelines: 23% of the respondents cited expenses of subsequent marriage, 18%, ability to pay; 17%, judicial discretion; 15%, prior orders being paid; 13%, parties agreed outside guidelines.

Evidence compiled by the Trial Court shows that the average child support order for a family on AFDC has increased 71% under guidelines, while the average order for other families has gone up 36%. The average AFDC order went from $ 35 to $ 60 per week. The average nonwelfare order went from $ 60 to $ 82.

As mentioned above, family service officers in five focus groups around the state criticized the guidelines as "too high." We wonder if some of this is based on an inadequate understanding of the guidelines, which was reflected in many of their specific criticisms. For example, a family service officer in Boston said that direct payments of expenses could not be counted in the guidelines calculation, which is not the case. A family service officer in

Worcester said that support paid to a **[*820]** previous family was not taken into account under the guidelines, although it explicitly is.

More troubling than these specific criticisms, however, is the critics' overwhelming concern with the impact the guidelines have on men. Family service officers in Boston said the guidelines were too high because they did not allow men to meet their expenses. An attorney in the attorneys' survey wrote that "while I am strongly in support of the principle that a father must support his child(ren), the current practice of determining the amount of support without consideration of deductions and expenses, usually renders the father incapable of providing for himself." From the Boston attorney focus group: "In another case the judge made the child support and alimony awards so high the father had to move in with his parents." More than half the family law attorneys surveyed believe that monetary awards to women are at least sometimes based on how much the man can afford to pay without diminishing his current lifestyle.

These findings are consistent with Lenore Weitzman's observation that judges in California utilize an informal rule against a child support order greater than 50% of the man's net income "to maintain his motivation to earn, and this means setting aside 'enough' income for him. While the judges may not be aware of the extent to which they are allocating income to the father at the expense of his children, they are aware of and clearly express their priority for taking care of his needs first" (1985, p. 267).

These examples stress the situation of the father while ignoring the even poorer status of the mother. For a father to have to move in with his parents is not ideal, but when -- as is much more often the case -- the mother and children must move in with parents or else face substandard housing, or even homelessness, the consequences are much more serious. The economic differential between men and women after divorce is not made up by the guidelines, and women make much greater economic sacrifices. As Steinschneider points out, allowing men to have a "new life" after divorce overlooks the fact that women with custody of children cannot afford such a luxury (1989). As Weitzman wrote of the women in her study, "It is hard to imagine how (women) deal with such severe deprivation: every single expenditure that one takes for granted -- clothing, food, housing, heat -- must be cut to one-half or one-third of what one is accustomed to" (1985, p. 339).

In fact, the economic underpinnings of the Massachusetts guidelines guarantee that men will emerge from divorce better off financially than women who are usually the custodial parent. [36] As one commentator **[*821]** wrote of the "income sharing" model adopted in Massachusetts, "The relative impoverishment of women and children in single-parent families, up until now accomplished under the guidance of judges operating with essentially standardless discretion, has now been institutionalized in rules." [37] Scholars like Wishik and Weitzman conclude that economic equality can result only if child support guidelines are designed to equalize the two standards of living after divorce (Weitzman, 1985, p. 379; Wishik, 1986).

The federal Family Support Act, P.L. 100-485, requires that states must reassess and update their guidelines every four years starting in 1993. When the content of Massachusetts' guidelines is reassessed, the guidelines' failure to adequately address the lower economic position of women after divorce should be taken into account. Those who

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[36] While a complete dissection of the economic data underlying the Massachusetts guidelines is beyond the scope of this report, it is useful to mention some of that data. The economic data on the "cost of children" that form the greater part of the basis for the Massachusetts guidelines, prepared in large part by economist Thomas Espenshade, is "one of the most conservative estimates" of the cost of raising children, according to Weitzman. It completely omits, for example, the cost of child care. His data measure only for current consumption, not savings in any form. His data all come from intact households, so that the additional costs of split families (e.g., additional child care; duplicate equipment for visitation in the other household; pay for services the other parent used to perform) must be borne by the custodial parent. See Bruch, 1986, pp. 6-7.

[37] Steinschneider, 1989, p. 48. She states that only the income equalization model, rejected by all states in formulating guidelines, "does not entail sex-linked maldistribution of benefits and burdens attendant upon raising children in singleparent homes." She believes that only income equalization compensates women for their foregone income when they raised children (economically labeled "opportunity cost") and compensates them for the child care and other services they performed while out of the work force. Many states relegate these functions to alimony which, as another section of our report shows, is seldom awarded (see "Alimony").

reexamine the guidelines should not be swayed by critics' emphasis on men's needs, but should look instead at the economic data that show unequivocally that women suffer more after family breakup.

5. 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.

A family law attorneys' group in Worcester and focus groups of family service officers in Worcester, New Bedford, and Northampton reported that the guidelines increased the number of contested custody cases as men attempt to gain custody (or bargain with it) to decrease support. Sixty-one percent of respondents to the family law survey noted that enforcement of child support awards is adversely affected by alleged visitation problems or the possibility of counterclaims for modification of custody. Similarly, more than half of the judges surveyed have seen noncustodial parents allege visitation violations in order to gain leverage when custodial parents request enforcement of child support **[*822]** awards. The survey data were corroborated by comments from attorneys in focus groups that extraneous issues are frequently raised in an attempt to lower support orders. The Worcester attorneys' group also commented that women bargain over support amounts in abuse cases to get agreement to a vacate order or a promise to attend counseling.

Data from the Middlesex Divorce Research Group raise concerns that custody and visitation may be used in retaliation for support enforcement. [38] In their study of relitigation in family law matters, support enforcement actions were brought in 176 of 265 instances. The group looked for cases in which visitation or custody modification actions were brought within sixty days of the filing of a support enforcement action, an extremely conservative measure of whether the custody or visitation sanction was retaliatory. The group found ten such cases, meaning that, even under a strict standard of retaliation, it occurred in more than 5% of the cases.

6. Women support obligors may be held to a lower standard than men, paying less than men in similar circumstances would be ordered to pay.

Only a small percentage of mothers are ordered to pay child support to fathers. Some information gathered by the Committee indicates that they may be held to a different standard. Family service officers in focus groups reported that they believe women obligors are not held to the same standards as men, but are required to pay less. Some family service officers noted that under the guidelines some custodial men began to receive support for the first time. Half the attorneys responding to the family law survey reported that women rarely or never are ordered to pay custodial fathers when the fathers would have had to pay support to a custodial mother. One contributing factor to this difference may be that women who lose custody often do so because of mental, physical, or emotional handicaps that prevent them from earning comparably to men.

CONCLUSION

The child support system -- fragmented, overburdened, and sometimes insensitive -- has failed to assist many women in collecting critical child support payments. This failure has resulted in a drop in standard of living for many women and children.

But today we are in a transition period. The courts and the Department of Revenue are establishing a new system that promises to be **[*823]** well-coordinated and responsive. Attorneys, other advocates, and all those concerned with a fair and efficient child support system should monitor and support the reforms now being put in place, including court conversion and full implementation of the child support guidelines.

These reforms will bring great improvement, but they do not ensure adequate income for all families. Families will still suffer economic hardship when there just isn't enough income to support two households. In the future,

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[38] This discussion is based on preliminary data. The conclusions drawn from it are those of the Gender Bias Study, not the Middlesex Divorce Research Group. These data may not be quoted or reproduced without the permission of the Middlesex Divorce Research Group.

progressive family policy may need to include economic parenting supplements, tax code revisions, or other methods that ensure adequate income to children and fair treatment of both parents.

RECOMMENDATIONS

1. 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.

2. 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.

3. The probate court and the district court should develop systems to make prosecution of support cases simpler for those without representation, and administrative and bureaucratic roadblocks to enforcement should be eliminated. The probate court should adopt a rule, similar to District Court Special Rule 209, allowing for service of process by mail in support cases.

4. DOR and the courts need to place increased emphasis on non-AFDC support enforcement and make clear that collection of current support is not secondary to the collection of arrears. DOR's support enforcement and collection policies should be implemented by written policy directives to DOR personnel and through education of DOR and court personnel. These directives and education should emphasize the importance of child support for the economic well-being of femaleheaded families, both those receiving public assistance and those who are not.

5. DOR should promulgate rules governing its employees so that there is uniformity from one part of the state to another regarding the priority of cases, the timing and content of enforcement actions, and other activities relating to women seeking support enforcement.

6. DOR should be encouraged to implement its "enforcement pyramid" and courts should cooperate with this effort. DOR should be given the resources to handle as many cases as possible to provide the greatest amount of assistance to the most people. DOR's efforts to automate the [*824] state's child support enforcement system and to centralize the system should continue. Automation should be geared to the administrative implementation of wage assignment when the statutorily specified arrears have accrued and to other administrative enforcement actions.

7. To maximize the currently available judicial and DOR resources, courts should set aside specific blocks of time for hearing support enforcement cases; implement the law allowing voluntary registration of paternity agreements without a full paternity proceeding; and allow approval of support agreements in motion sessions. The courts should exempt child support matters from the requirement of pretrial conferences when the matter involves only the application of the guidelines to uncontested facts.

8. Judges should be educated regarding the effectiveness of alternative child support enforcement methods, including jailing. The utility of enforcement tools not widely used in the Commonwealth, such as posting of security, should be explored.

9. The statutory requirement for special findings should be removed from the standard for temporary orders in modification cases.

10. The family law sections of the bar associations should lead all family law attorneys to a practice of incorporating in all agreements 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.

11. The current child support guidelines should be made presumptive in order to further increase consistency from court to court and to continue the trend of making orders more reflective of the real needs of children. When the guidelines' content is reassessed as required by federal law, any change should be to reduce the disparities between women's and men's households after family breakup.

12. In instances where child support collection efforts spawn litigation over custody or visitation, judges should not allow custody or visitation to be raised without proper notice as required by law. Liberal provisions for appointment of counsel in these cases needs to be established. This should be explored in a joint effort by the Committee for Public Counsel Services, the Office of the Chief Administrative Justice, and others interested in the provision of this resource for women.

CHILD CUSTODY

SUMMARY OF FINDINGS

We began our work aware of the perception that in the area of custody, at least, gender bias works in favor of women. Some of us involved in the Study shared that perception. What we found instead is that, more frequently, gender stereotypes mean that mothers are held **[*825]** to a higher standard than fathers and that interests of fathers are given more weight than the interests of mothers and children. While these conclusions may come as a surprise to many, they are consistent with trends that have been observed throughout the country.

Specifically, we found that:

1. In most cases, mothers get primary physical custody of children following divorce. In general, this pattern does not reflect judicial gender bias, but the agreement of the parties and the fact that in most families mothers have been the primary caretakers of children. In some cases, however, perceptions of gender bias may discourage fathers from seeking custody, and stereotypes about fathers may affect case outcomes.

2. 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.

3. When fathers contest custody, mothers are held to a different and higher standard than fathers.

   a. About half of the probate judges surveyed agreed that "Mothers should be home when their children get home from school," and 46% agreed that "A preschool child is likely to suffer if his/her mother works."

   b. Women who are separated from their children temporarily may lose custody, even if they have been primary caretakers.

   c. Dating and cohabitation by mothers is still viewed differently than dating or cohabitation by fathers, although it may be less of an issue than formerly.

4. Shared legal custody is being awarded inappropriately, to the detriment of women with physical custody.

   a. Permanent shared legal custody is being ordered inconsistently with existing law.

   b. Shared legal custody is being ordered when parents are unable to agree about childrearing, and even when there is a history of spouse abuse.

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

5. 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.

6. In determining custody and visitation, many judges and family service officers do not consider violence toward women relevant.

7. A majority of the probate judges surveyed agreed that "mothers allege child sexual abuse to gain a bargaining advantage in the divorce process."

[*826] 8. The courts are demanding more of mothers than fathers in custody disputes.

METHODOLOGY

Data were gathered from several sources, using different methodologies. We sent surveys including specific questions about child custody to family law attorneys, to the general attorney sample, and to probate judges. We convened three focus groups of family law attorneys and four of family service officers, in different parts of the state; participants discussed a variety of child custody matters. Two general attorney listening sessions also raised some child custody issues. We organized five regional litigant meetings, three for women and two for men; child custody issues were raised by several participants. We reviewed public hearing testimony and written material submitted to the Study that dealt with child custody. Finally, we examined relevant research and reports done by other individuals and groups both inside and outside Massachusetts.

CHILD CUSTODY: LAW AND PROCEDURE

Issues about child custody can arise in a variety of legal settings. [39] We focused, however, on decisions about child custody made in the context of divorce in the probate court. These decisions represent the largest group of child custody cases, and it was about this group of cases that the most concerns about gender bias were expressed. As background for the presentation of findings, this section will briefly review the legal standards for custody decision making and the way cases are processed in the probate court.

The Legal Standards

The legal standard that governs child custody decision making in Massachusetts is a broad one: the best interests and welfare of the child. [40] No Massachusetts statute enumerates the factors that must be considered in determining custody, as is done in M.G.L. c. 208, § 34, for alimony and division of property. [41] The guidance provided in appellate **[*827]** cases is also limited. While the cases hold that considering some factors is not an abuse of discretion [42] and that basing the decision on some other factors is, [43] no appellate case sets out a more specific definition of the elements of the best interests standard. Deducing such a standard from the body of appellate case law is particularly difficult in the area of child custody because of the reluctance of appellate judges, in divorce-related custody disputes, [44] to recount the specific facts found by the trial judge. [45]

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[39] Care and protection petitions in district and juvenile court, M.G.L. c. 119, § 24; child custody petitions in probate court, M.G.L. c. 119, § 23C; petitions to dispense with consent to adoption in probate court, M.G.L. c. 210, § 3; guardianship of a minor petitions in probate court, M.G.L. c. 201, § 5; awards of custody after an adjudication or voluntary acknowledgment of paternity, M.G.L. c. 209C, § 10; temporary awards of custody in Abuse Prevention Act cases in district, superior, or probate court, M.G.L. c. 209A.

[40] See M.G.L. c. 208, § 31, "the happiness and welfare of the children shall determine their custody or possession," and *Hersey v. Hersey, 271 Mass. 545, 555 (1930)* and *Jenkins v. Jenkins, 304 Mass. 248, 250 (1939).*

[41] The closest Massachusetts comes to enumerating factors for consideration is language inserted into M.G.L. c. 208, § 31, by c. 695 of the Acts of 1983: "When considering the happiness and welfare of the child the court *may* consider whether or not the child's present or past living conditions adversely affects his physical, mental, moral, or emotional health when making an order or judgment relative to the custody of said child."

[42] It was not an abuse of discretion for a judge to award sole custody to the parent who had been the "primary nurturing parent" and "primary caretaker," and with whom the children had the "strongest bond" (*Rolde v. Rolde, 12 Mass. App. Ct. 398, 405* [1981]).

[43] In *Fort v. Fort, 12 Mass. App. Ct. 411 (1981),* for example, the court held that the moral or criminal character of a parent's cohabitation was properly found immaterial in the absence of evidence showing it had an adverse effect on the child.

[44] In care and protection proceedings, in contrast, when the state is seeking custody, appellate opinions generally review the factual findings of the trial court in detail.

[45] See, e.g., *Rolde v. Rolde, 12 Mass. App. Ct. 398, 406, n. 11 (1981).*

A second principle that must be applied in child custody matters is that "the rights of the parents shall, in the absence of misconduct, be held to be equal" (M.G.L. c. 208, § 31). This language, part of Massachusetts law since 1855 (St. 1855, c. 137), was adopted to alter the common law rule that gave the father custody of the children, as it gave him control of all other family matters. [46] Unlike many states, Massachusetts law never formally recognized a maternal preference, even in cases involving children "of tender years." [47]

Although the general principles governing the ultimate disposition of child custody cases have been in place for many years, recent statutory changes concerning shared (joint) custody have effectively transformed child custody decision making in Massachusetts. Before discussing those changes, a few definitions are necessary (from Pearson and Handler, 1987).

> "Temporary" custody refers to arrangements about custody that are designed to be in effect only until a hearing on the merits can be held. Despite the label "temporary," these decisions are extremely important, because courts are reluctant to alter custodial arrangements that appear to be working.
>
> "Permanent" custody refers to an arrangement that is part of a final **[*828]** judgment. Even "permanent" orders can be modified, however, since the court retains jurisdiction over minor children.
>
> "Legal" custody refers to the right of a parent to be involved in making major decisions concerning education, medical care, and emotional, moral, and religious development. "Shared" (also known as "joint") legal custody gives both parents the right to be involved in making such decisions. "Sole" legal custody gives one parent the right to make major decisions, although the other parent has the same rights of access to academic, medical, hospital, or other health records of the child as he or she would have in the absence of the custody order.
>
> "Physical" custody concerns the allocation of time a child will spend with each parent. It carries with it authority for the parent who has physical custody to make ordinary day to day childrearing decisions.
>
> "Shared" or "joint" physical custody refers to a situation in which the child does not have a principal residence, but spends substantial amounts of time with both parents. When a child resides most of the time with one parent, that parent was traditionally said to have "custody" or "sole physical custody," while the other parent had "visitation" rights. Because objections have been expressed to the term "visitation," this arrangement is now sometimes characterized as one of "primary physical custody" and "secondary physical custody."
>
> "Split" custody refers to a situation in which different parents have custody of different children.

The concept of shared or joint custody was first recognized in Massachusetts law in 1981, when M.G.L. c. 208, § 31, was amended to allow judges to approve agreements for this form of custody. It provided that if the court rejected the agreement, and ordered sole custody, it must make findings of fact to support its conclusion that approval of the agreement would not be in the child's best interest. A much more significant amendment of § 31 occurred in 1983. In that year, a rebuttable presumption of shared *legal* custody was created during the *temporary order* period. Thus, although the direct application of the statute has limits, it has had far-reaching effects that are discussed in more detail in connection with finding 5, below.

The Processing of Custody Cases in the Probate Court

Each probate court is assigned probation officers, usually referred to as family service officers, who may be assigned to investigate or mediate child custody cases. They receive some training but are not required to have degrees in social work, and their backgrounds vary. Two counties also have the resources of a court clinic.

The family service officers play an important role in cases in which there is a disagreement about custody. In at least one county, contested custody matters are automatically sent first to a family service officer. In other counties, the parties may go first before a judge, but a referral to a family service officer is likely to occur. Family service officers are called upon both to mediate and investigate child custody **[*829]** matters; these roles are frequently

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[46] ***Commonwealth v. Briggs, 33 Mass. (16 Pick.) 203, 205 (1834).***

[47] Despite the absence of statutory or decisional authority for a maternal preference for children of tender years, it is possible that in practice, judges exercised such a preference (Pearson and Handler, 1987).

combined. Lawyers, family service officers, and judges agree that family service officers are enormously influential. Agreements "mediated" by family service officers are likely to be approved; findings, and recommendations if they are made, are likely to be accepted by judges (see "Family Law Overview").

In the counties that have them, more complex child custody disputes are usually referred to court clinics. Elsewhere, the judge may appoint a *guardian ad litem* to do an investigation. The report of a *guardian ad litem*, like the report of a family service officer, usually carries a great deal of weight.

DISCUSSION OF FINDINGS

1. In most cases, mothers get primary physical custody of children following divorce. In general, this pattern does not reflect judicial gender bias, but the agreement of the parties and the fact that in most families mothers have been the primary caretakers of children. In some cases, however, perceptions of gender bias may discourage fathers from seeking custody, and stereotypes about fathers may affect case outcomes.

In the great majority of cases in the Commonwealth, mothers have primary physical custody of children following divorce. [48] The main reason for this pattern is that in most families, even when mothers work outside the home, they are still the primary caretakers of children (Pleck and Staines 1983; Finlay, 1984; Barnett and Baruch, 1988; Bronstein, 1988). Most parents, when they divorce, agree to continue this arrangement, and most probate judges and family service officers give some consideration to the parent who has been the primary caretaker.

Despite the clear gender-based pattern of custody awards, the Committee has concluded that these dispositions do not reflect judicial gender bias. Considerations of child welfare provide a strong justification for a presumption in favor of the primary caretaker (Goldstein et al., 1973; Chambers, 1977). When gender-neutral rules have a disparate impact because of real, and relevant, differences in the situation of men and women, their use does not constitute judicial gender bias (see "Introduction"). Indeed, to ignore the unequal role many women play in raising their children, and the unequal sacrifice of earning potential these women make in order to be primary caretakers, is not "neutrality," but gender bias against women.

It should not be presumed, however, that women are always the primary caretakers of children. Each case must be judged on its own facts. And though the outcomes of contested custody challenges do not reflect **[*830]** a pattern of bias against men, stereotypes about fathers' roles may be a problem in some cases.

Although custody challenges by fathers have increased recently, [49] custody is contested by fathers in only a small percentage of cases (see finding 2, below). This low rate of serious custody challenges may not entirely reflect fathers' preferences. Several men reported at regional litigant meetings in Boston and Northampton that their attorneys had strongly advised them against seeking custody.

Some attorneys may discourage fathers from seeking custody because of perceived gender bias in the courts. A quarter of the family law attorneys surveyed thought that fathers rarely or never "receive fair and serious consideration by the court when they actively seek primary or shared physical custody." Whether this perception is accurate or not, it would tend to discourage custody challenges. [50]

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[48] Attorney focus groups in Boston, Worcester, Northampton; family service officer focus groups in Boston, Worcester, Northampton, and New Bedford; public hearing testimony of Mr. Alexander, Mr. Acton, and Mr. Alvarez; men's regional litigant meetings.

[49] Many observers attributed part of the increase to the desire to reduce the support obligation under the child support guidelines. Attorney focus groups, Worcester, Northampton. Family service officer focus groups, Northampton, Boston, Worcester, New Bedford.

[50] Not all of the attorneys who thought that "fathers who sought custody rarely or never received fair and serious consideration" had represented such fathers, and some attorneys held such views even though they were contradicted by their own experience. One attorney, for example, wrote in the family law survey that "the wife will be awarded physical custody over the

Stereotypes about a father's role may affect the judgment of some judges and family service officers. One attorney at the Springfield public hearing related a statement made by a district court judge in a 209A (abuse prevention) case: "We all know mothers always get custody of children. Here we have to prove the mother unfit to get custody." [51] A representative of Concerned Fathers attributed similar statements to family service officers and probate judges in another county. Attorneys in the Boston and Northampton focus groups noted the strong traditional view of some judges and family service officers that children must be with their mothers.

2. 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.

[*831] Although perceptions of bias that discourage fathers from seeking custody are a concern, [52] the outcome of cases in which custody is contested provides a more direct source of information about possible judicial gender bias. We heard testimony from George Kelly, a representative of Concerned Fathers, that in contested custody cases, mothers are awarded physical custody over 90% of the time. Mr. Kelly was unable to provide substantiation, however, [53] and our own investigation revealed a very different picture.

The statewide sample of attorneys who responded to the family law survey had collectively represented fathers seeking custody in over 2,100 cases in the last 5 years. [54] They reported that the fathers obtained primary physical custody in 29% of the cases, and joint *physical* custody in an additional 65% of the cases. Thus, when fathers actively sought physical custody, mothers obtained primary physical custody in only 7% of cases. The attorneys reported that the fathers had been primary caretakers in 29% of the cases in which they had sought custody.

The preliminary findings of the Middlesex Divorce Research Group relitigation study show a similarly high rate of paternal success, but fewer awards of joint physical custody. In their sample of 700 cases in Middlesex County between 1978 and 1984, fathers had sought custody in 57 cases (8.14% of the sample). In two-thirds of the cases in which fathers sought custody, they received primary physical custody (42% in which fathers were awarded sole legal and sole physical custody, plus **[*832]** 25% in which fathers were awarded joint legal and primary physical custody). Joint physical and joint legal custody was awarded in 3.5% of cases. In 11% of the cases, mothers received primary physical and joint legal custody; in 12%, mothers were awarded sole legal and physical custody;

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father 100% of the time." The same attorney reported handling five cases in which fathers sought custody. In none, according to the attorney, had the father been the primary caretaker. In all five, the father got joint *physical* custody.

[51] Colleen Curry, Hampshire County Bar, Springfield public hearing. In 209A cases, however, district court judges are only authorized to award temporary custody to the petitioner. And the eventual outcome of the case supports our conclusion that bias against men is not the major problem in the probate court. The witness reported that the case eventually moved to probate court, and the probate judge, on the recommendation of the family service officer, gave custody to the father.

[52] The absence of clear legal standards may contribute to the perception of gender bias. Because the law is unclear about whether and how a history of primary caretaking should be considered in determining custody, a father who has had little contact with his children prior to divorce, but is fit, may see gender bias in any suggestion that his chances for obtaining physical custody should be any less than those of a mother who has been the children's primary caretaker.

[53] To substantiate his comments, Mr. Kelly referred the Committee to the Interim Report of the Special Commission and Divorce and the Senate Committee on Ways and Means, F.Y. 1988 Budget, Vol. 2, Agenda '90. We examined both sources carefully; neither contains any statistics concerning which parent gets custody in contested cases.

[54] It is not possible to calculate exactly the percentage of cases in which fathers sought custody. Most of the questions in the family law survey asked for information about the attorneys' experience and practice within the last *two* years. Within the last two years, this group of attorneys handled over 12,000 divorces involving dependent children. Because fathers seek custody in a small percentage of cases, to ensure a large enough sample, we asked for information about fathers seeking custody in the last *five* years: over 2100 such cases were reported. This number would represent about 17% of the two year total; since some of the cases of fathers seeking custody occurred over two years ago, the percentage of cases involving minor children in which fathers seek custody must be well under 17%. If we assume that the percentage of fathers seeking custody has increased recently, and that half, rather than two-fifths, of the cases in which fathers sought custody occurred in the last two years, then cases in which fathers sought custody would represent 8.75% of the total.

other custodial arrangements were ordered in the remaining cases. Thus, when fathers sought custody, mothers received primary physical custody in fewer than one-quarter of the cases in the Middlesex study. Information about which parent had been the primary caretaker was not available for the Middlesex cases.

These trends were apparent in an earlier study of a sample of 500 Middlesex County cases filed between 1978 and 1981. Fathers had sought sole custody in about 8% of the cases. They received sole custody in 41% of those cases, and joint custody in 38%. In 5% of the cases, custody went to someone other than a parent. In instances in which fathers sought sole custody, mothers received sole custody in only 15% of the cases (Phear et al., 1983).

These statistics may be a surprise to many. They are, however, consistent with findings in other states. A study of court records in Los Angeles County, California, in 1977 found that fathers who sought sole custody obtained it in 63% of the cases (up from a success rate of 37% in 1972) (Weitzman, 1985, p. 233). A nationwide survey of all reported appellate decisions in child custody cases in 1982 found that fathers obtained custody in 51% of the cases, up from an estimated 10% in 1980 (Atkinson, 1984).

The high success rate of fathers does not by itself establish gender bias against women. Additional evidence, however, indicates that women may be less able to afford the lawyers and experts needed in contested custody cases (see "Family Law Overview") and that, in contested cases, different and stricter standards are applied to mothers.

3. When fathers contest custody, mothers are held to a different and higher standard than fathers.

In general, if custody is contested, mothers are scrutinized more closely than fathers. As a Boston attorney stated, "A woman's history of motherhood is subject to intense scrutiny. A father's history of fatherhood is only examined from the time of the petition." A family service officer at the Worcester focus group described a one-sided investigation process. "If a father wants custody then [the family service officer] begins to look for grounds against the mother, like drugs, promiscuity, to prove her unfit." The father's fitness may not be considered. A witness from Greater Boston Legal Services described a case in which a mother under treatment for alcoholism lost custody of her children even after investigations by both the Department of Social Services (DSS) and a psychologist found that her alcoholism had not had negative effects on the children. According to the written testimony of **[*833]** this witness, allegations by the children and others of the father's drug abuse were never investigated.

Even when the conduct of both parties is considered, it is often evaluated according to different standards. Women are often measured against the standard of ideal motherhood, while fathers are measured against a different and lower standard. As Sheera Strick of Greater Boston Legal Services testified,

> The courts, as in the rest of society, expect far more from women as caretakers than as men. Any shortcomings the woman has, whether directly relating to her parenting or not, are closely scrutinized. Whereas, if a father does anything by way of caring for his children, this is an indication of his devotion and commitment.

Merely seeking custody may be viewed as an extraordinary act of commitment by a father. One Boston attorney described how a male probation officer was so happy to find that a father wanted custody that he went to the legal services office with him and urged legal services to give the case priority. According to the testimony of this and other attorneys, such action contrasts sharply with the generally inhospitable treatment given to *pro se* women litigants (see "Family Law Overview").

Double standards are particularly a problem in the areas of work outside the home, temporary relinquishment of custody, and dating and cohabitation.

a. About half of the probate judges surveyed agreed that "Mothers should be home when their children get home from school," and 46% agreed that "A preschool child is likely to suffer if his/her mother works."

In many cases, family service officers have recommended, and judges have approved, awards of primary physical custody to a mother who works full-time. About half of the probate judges surveyed, however, expressed traditional attitudes toward working mothers. Fifty percent of the probate judges surveyed agreed with the statement that

"Mothers should be home when their school-age children get home from school." Forty-six percent agreed that "A preschool child is likely to suffer if his/her mother works."

In the minority of cases in which custody is challenged, these attitudes toward working mothers may be reflected in judicial decisions. Although over 90% of the responding probate judges claimed to disagree with the statement that, "When the father remarries and his second wife is at home full time, children are better off in his custody than with their mother who is at work all day," nearly a quarter of the family law attorneys surveyed reported that sometimes or often, "in cases where working mothers have custody, change of custody is granted to fathers who remarry women who are home full time."

A mother who spoke at one of the regional meetings worked two jobs to support herself and her sixteen-month old daughter; she had **[*834]** never received any of the child support payments ordered by the court. At the custody hearing, the family service officer criticized the mother's work schedule and threatened to place the child in foster care if she did not quit her second job. The probate judge agreed, telling her, "You need to decide whether you want to be a mother or a working woman."

A Boston attorney described another case involving a mother who had had custody of her children since the divorce seven years earlier. The father left Massachusetts after the divorce to avoid making support payments. After six years of absence, and a remarriage, he returned. The mother agreed to allow him reasonable visitation, but he filed for a modification of the custody decree.

> The family service officer who performed the investigation recommended that custody be changed because the father had remarried and was capable of providing a more stable family life for the girls. The mother worked while the children were in school and sometimes was late, returning home 15-30 minutes after the children.

According to the written testimony of this attorney, the case had the following outcome:

> This mother "successfully" mediated her case by agreeing to joint custody and splitting physical custody. The girls stayed with her four nights and with their father three nights. The father was not ordered to pay any arrearage on the earlier support orders nor was he ordered to pay future support especially since he had the children half of the time.

b. Women who are separated from their children temporarily may lose custody, even if they have been primary caretakers.

In most families, mothers have temporary physical custody of children while the divorce is pending. If these temporary arrangements work, family law experts agree that family service officers and judges are reluctant to disturb the status quo. If, however, mothers do not have continuous custody of their children following the divorce, they are likely to be judged much more harshly than fathers, whatever the reason for the temporary separation.

The attitude that "a good mother would never be separated from her children" does not take into account the economic and emotional burdens that disproportionately affect single working mothers. Barbara Hauser, L.I.C.S.W., director of the Family Service Clinic at the Middlesex Probate Court, testified:

> There appears to be a minimal recognition of the difficulties facing single parents, particularly single mothers. Juggling employment, child care and emotional demands of all children is a monumental task. Mothers described as shirking responsibilities are often ones who are desperately trying to perform adequately in all areas but have found it close to impossible, given economic constraints, erratic child support **[*835]** and inadequate day care. In addition, requiring a mother to quickly achieve financial independence may be another overwhelming burden.

Mothers who, under these pressures, become less available to their children or are temporarily out of the home may "be viewed as improper custodians for the future, despite evidence of sensitive childrearing in the past," Ms. Hauser noted. "Fathers, on the other hand, may be encouraged to re-establish contact with their children under similar circumstances following periods of limited involvement or even long absences."

Ms. Hauser's assessment that a history of primary caretaking does not count for much if a woman relinquishes custody temporarily was supported by testimony given in attorney focus groups. According to one attorney,

> If a woman voluntarily gives up custody of her child and then wants custody later on, the judges will not give it. . . . [Women] . . . must demonstrate their parenting commitment all the time. Any deviation from that means that the court will not give the mother custody again.

Women who temporarily relinquish custody may lose not only custody, but visitation, according to family service officers:

> The court treats a mother much more severely than a father if she leaves her family and then returns. She will have a big fight on her hands in order to get any visitation rights. On the other hand if the father leaves and returns, the judge will ask him what visitation does he want.

The practice of denying custody to a woman who temporarily relinquishes custody creates special pressures on battered women. Shelters for battered women are in short supply; shelters that can accommodate children are even more so. Since vacate orders against batterers may not be enforced, a battered woman may be forced to choose between her own safety and the custody of her children.

The fact that the mother's temporary loss of custody was ordered in an *ex parte* proceeding does not change the result. Legal services attorneys reported that fathers frequently seek, and obtain, custody through *ex parte* orders:

> It happens all the time. Fathers go in *ex parte* even without an emergency. When they go back in, custody often is given to a grandparent. In [one] county where I practice, this is done a lot with no notice.

The legal services attorneys felt that fathers often used this approach to avoid liability for child support and were frequently successful in enlisting the help of DSS to transfer custody away from a primary custodian to a third party.

Family service officers confirmed that a temporary loss of custody affects women more than it does men. As a family service officer at the Worcester focus group noted,

> If a mother has lost the child in a previous court situation, that will **[*836]** raise questions about her fitness. The same is not true for fathers. Questions will not be raised necessarily about his competence because the loss is attributed to the divorce situation.

An attorney in Worcester agreed, putting it more emphatically:

> The temporary order is critical in custody cases. . . . You can't rectify the balance later on if the husband gets the temporary order unless he is an axe murderer.

Mothers may lose custody permanently when the underlying reason for the temporary loss of custody is the father's failure to pay child support. According to written testimony from Greater Boston Legal Services,

> Although . . . much of the time the homelessness was directly or indirectly caused by the father leaving the household without adequate support to pay the rent, the courts will routinely transfer custody to the father when the mother becomes homeless, thereby rewarding him for his misbehavior. If the woman was on AFDC, without her children she will lose her grant and the possibility of getting emergency assistance or housing help, making it less likely that she will ever regain custody.

c. Dating and cohabitation by mothers is still viewed differently than dating or cohabitation by fathers, although it may be less of an issue than formerly.

Over half of the family law attorneys surveyed reported that it was sometimes or often the case that "custody awards set by the court are significantly affected by mothers' dating or cohabitation." [55] Only 36% reported this was sometimes or often true of fathers' dating or cohabitation. Despite this disparity, family service officers in a

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[55] The fact that over half of the family law attorneys surveyed believe this could adversely affect women, even if the perception is not accurate, is significant. For example, an attorney who believes that a mother who has been dating or cohabiting is at serious risk for losing custody may counsel her against seeking enforcement of child support for fear that it might prompt a successful motion for modification of custody.

focus group in New Bedford saw improvement, saying that although fathers continue to raise the issue, judges are less interested in the mothers' sexual activity than they used to be. [56]

Public hearing testimony confirmed that the double standard is still in effect. Barbara Hauser, L.I.C.S.W., director of the Middlesex Family Service Clinic, testified:

> In many divorcing families who appear before the court, the intimate relationships of parents to what are termed 'unrelated third parties' are often used as significant factors relevant to custody and visitation arrangements. **[*837]** Again, it is our impression that the standards applied to mothers and their conduct are often harsher and more rigid than those applied to fathers in similar circumstances.

The new relationships formed by divorcing parents are viewed very differently, as another Boston attorney explained:

> The mother's new husband or boyfriend is seen as distracting her from her role as caretaker [for] the children, as at risk for physically or sexually abusing the children, as proof that the mother is unstable or promiscuous or less than adequate. At best, he is merely irrelevant. However, the father's new wife or girlfriend proves that he is stable, working toward providing a new supportive nuclear family. And she is assumed to be a caring person who can and does more than adequately care for his children.

4. Shared legal custody is being awarded inappropriately, to the detriment of women with physical custody.

The vision of shared legal custody, "a continued mutual responsibility and involvement by both parents in decisions regarding the child's welfare in matters of education, medical care, emotional, moral, and physical development" (M.G.L. c. 208, § 31), is an appealing one. In cases in which both parents have been involved in childrearing and can work cooperatively in the future, an award of shared legal custody appropriately symbolizes the law's recognition of shared parenting and the responsibility both parents continue to have for their children following divorce. In cases in which noncustodial parents decline to exercise the powers given them by law, [57] the award of shared legal custody will have little effect on the physical custodian. In the cases in which parents cannot agree, however, or in which the physical custodian has been abused by the other parent, awarding shared legal custody puts special burdens on the parent with primary physical custody, usually the mother. And the fear women have that shared legal custody will be awarded in inappropriate circumstances weakens their ability to bargain in other areas.

a. Permanent shared legal custody is being ordered inconsistently with existing law.

The current practice concerning awards of shared legal custody is inconsistent with existing law in two respects. First, the Massachusetts statute concerning shared legal custody, M.G.L. c. 208, § 31, creates a presumption in favor of shared legal custody only at the temporary order stage.

> **[*838]** Upon the filing of an action . . . and *until a judgment on the merits is rendered*, absent emergency conditions, abuse or neglect, the parents shall have shared legal custody of any minor child of the marriage; provided, however, that the judge may enter an order for temporary legal custody for one parent if written findings are made that such shared custody would not be in the best interest of the child and that the parties do not have a history of being able and willing to cooperate in matters concerning the child [emphasis added].

The Supreme Judicial Court has emphasized that the statute in no way creates a presumption in favor of joint custody, especially joint *physical* custody (*Yannas v. Frondistou-Yannas, 395 Mass. 704, 708-709* [1985]).

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[56] Just over half of the family law attorneys reported that judges rarely or never "have denied or restricted custody to lesbian or gay parents on the basis of their sexual orientation." Nearly one-fifth of the attorneys, however, reported that judges do this always or often, and another 30% reported that this sometimes happens.

[57] Family service officers meeting in the Boston focus group estimated that only 40-50% of fathers follow through with the responsibilities of joint legal custody.

Nevertheless, many judges and family service officers in Massachusetts have adopted, in practice, a strong presumption in favor of *permanent* shared legal custody.

Over three-quarters of the family law attorneys surveyed reported that "[court affiliated] mediators make remarks indicating that they are applying a presumption of joint legal custody to final custody arrangements." Only 3% reported that this rarely or never happens. The survey done by the Special Commission Relative to Divorce (Divorce Commission) appointed by the Massachusetts State Legislature in 1984, obtained similar results. When it asked, "In practice, have you observed the shared legal custody law being applied to final orders?", 88% of the responding family service officers and 80% of the responding attorneys answered "yes." The percentage of judges who answered "yes" was 50%.

Second, c. 208, § 31, requires parents to "submit a plan in writing to the court within thirty days of the entry of the temporary custody order setting forth the details of shared legal custody" and requires the court to review the plan, and its operation, at the time of the hearing on the merits. This legal requirement, designed to ensure that permanent shared legal custody will be awarded only when parents have demonstrated some ability to resolve issues concerning their children, is routinely ignored. The Divorce Commission asked, "Have you ever seen or drawn up a parenting plan?" Ninety-three percent of the judges and 92% of the family service officers who responded to the Divorce Commission survey reported that they saw such plans never or rarely; indeed, over half of each group said they had never seen such a plan.

The absence of written parenting plans is not merely a technical deficiency. Most courts simply presume that permanent shared legal custody is appropriate. According to testimony from Greater Boston Legal Services,

> Only a few judges routinely ascertain whether the parents are able to communicate with one another; able to work together regarding the child's education, religious training and medical needs or even share the same basic philosophy regarding discipline or social contacts of their children.

[*839] The Governor's/Massachusetts Bar Association's Commission on the Unmet Legal Needs of Children (1987) considered the impact on children of current practices concerning shared legal custody. It found that provisions of c. 208, § 31,

> have led to confusion and unrealistic demands for immediate joint legal and physical custody upon separation of the parents, by parents and lawyers who fail to understand what shared custody involves, and how to implement an effective shared custody plan . . . . Parents who lack the goodwill, capacity, and ability to cooperate are enabled, through a joint custody order, to further exacerbate and prolong the damaging impact of divorce upon the child. In addition, joint physical or legal custody may be awarded with complete disregard for the age and developmental stage of the child, thus causing severe hardship and trauma to the minor in order to serve the parents' need (p. 31).

Working from the child's point of view, that Commission recommended that

> M.G.L. c. 208, § 31, should be amended to require divorcing parents who request shared legal custody to demonstrate their ability to cooperate in protecting the child's interests by developing a mutually acceptable parenting plan, prior to the date the court renders its final decree.

b. Shared legal custody is being ordered when parents are unable to agree about childrearing, and even when there is a history of spouse abuse.

Although Massachusetts judges and family service officers are appropriately reluctant to order shared *physical* custody unless parents agree to it and have a plan for implementing it, we found that shared *legal* custody was frequently awarded when parents are in conflict. Nearly half of the family law attorneys surveyed reported that joint legal custody is often ordered over the objections of one or both parents, and an additional 30% said that this happens sometimes. According to attorneys participating in focus groups, these awards often represent an attempt to close out the immediate dispute, rather than a conclusion that, despite current differences, the parents will be able to cooperate in the future. Comments by family service officers in Worcester supported this view:

> *I* recommend [permanent shared legal custody] 90% of the time, if for nothing else to appease the non-custodial parent. Even when the parties can't work it out and can't talk to each other, I'll still recommend it.

When asked under what circumstances they thought shared legal custody was inappropriate, family service officers meeting in focus groups in Boston, Worcester, and New Bedford cited only extreme cases of misconduct: parental unfitness, child abuse, desertion, or complete lack of interest in future involvement with the child. Public hearing testimony confirmed that these are the standards many family **[*840]** service officers apply. Only at the Northampton focus group did a family service officer respond, "When one person doesn't get along with the other party, it's asking for disaster. It's like asking for contempt after contempt."

Because the family service officers who "mediate" custody disputes view opposition to shared legal custody negatively, the extreme position [58] in favor of shared legal custody that most family service officers take puts the prospective physical custodian in an extremely difficult position. Over half of the family law attorneys report that "[court-affiliated] mediators make remarks indicating that a primary caretaker's opposition to joint legal custody reflects adversely on her/him." If one parent appears hostile and uncooperative, custody may be awarded to the other parent. This attitude effectively discourages primary caretakers -- usually mothers -- from pursuing objections. As one family service officer put it when asked what happens when one parent wants shared legal custody and the other does not: "The current legal presumption of shared legal custody means that this problem does not arise too often."

Even more disturbing are our findings concerning awards of shared legal custody when a mother has been battered. Three-quarters of the family law attorneys surveyed reported that in cases in which a woman alleges that she has been physically abused, court-affiliated mediators sometimes or often make remarks indicating they are applying a presumption of joint legal custody. And attorneys speaking in Worcester and Boston confirm that some family service officers press for, and some judges order, shared legal custody in cases involving spouse abuse.

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

The inappropriate use of a presumption of permanent shared legal custody and inappropriate awards of shared legal custody disadvantage women in several ways. First, as the Governor's/MBA's Commission on the Unmet Legal Needs of Children found,

> when the statute [c. 208, § 31] is erroneously interpreted as presuming joint custody, a bargaining advantage accrues to a parent who would be an unlikely candidate for custody in the final decree. The more appropriate **[*841]** parent, aware of the deficiencies of the other adult, will often bargain away needed financial assets or income in order to win agreement for sole custody of the child.

Second, when shared legal custody is ordered and parents are unable to agree, the burden falls most heavily on the parent with primary physical custody, usually the mother. As the physical custodian, she bears primary responsibility for seeing to it that the child's needs are met. If important issues are unresolved, she must deal with the consequences. Thus, she must compromise to get agreement; the father has the option of becoming involved or not.

Third, ordering a battered woman to share legal custody with her abuser can threaten her security. Studies of battering show that battering is part of a pattern of conduct that seeks to establish total control over the woman (see

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[58] Even at the temporary order stage, use of this standard is not required. Temporary legal custody may be ordered for one parent if written findings are made "that such shared custody would not be in the best interest of the child and that the parties do not have a history of being able and willing to cooperate in matters concerning the child" (M.G.L. c. 208, § 31). And there is no doubt about the authority of the court to award sole custody when parents, though both fit, are unable to agree or cooperate on childrearing practices (*Rolde v. Rolde, 12 Mass. App. Ct. 398* [1981]).

"Domestic Violence"). Shared legal custody provides a court-mandated opportunity for the abuser to continue to exercise control, divorce and protective orders notwithstanding.

5. 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.

The approach probate judges should use in deciding whether a minor child may be moved from the Commonwealth pursuant to M.G.L. c. 208, § 30, was articulated in *Yannas v. Frondistou-Yannas, 395 Mass. 704 (1985).* "The first consideration is whether there is a good reason for the move, a 'real advantage.'" The "best interests of the child" remain the paramount concern, but this requires considering "whether the quality of the child's life may be improved by the change (including an improvement flowing from an improvement in the quality of the custodial parent's life)." Courts should also consider "the possible adverse effect of the elimination or curtailment of the child's association with the noncustodial parent, and the extent to which moving or not moving will affect the emotional, physical, or developmental needs of the child." They should avoid "inequitably identifying constitutional rights in favor of one person against another."

The *Yannas* decision continued the approach first set forth by the appeals court in *Hale v. Hale, 12 Mass. App. Ct. 812 (1981).* For eight years, then, case law in this Commonwealth has emphasized that probate judges may not consider only the impact the removal will have on the noncustodial parent. Because the best interests of the child are interwoven with the well-being of the custodial parent, both *Yannas* and *Hale* require that the interest of the custodial parent be taken into account. The survey of probate judges, however, raises serious questions about whether this standard is being properly applied.

Eighty-eight percent of the probate judges said they gave "considerable" weight to "the relationship of the noncustodial parent with the **[*842]** child" when ruling on motions by the primary physical custodian to move out of the state with the child. The remaining 12% gave this factor "some" weight. None gave it "little" weight. Sixty-three percent gave "considerable" weight to "the educational advantages of the move to the child involved in the move." A third gave this factor "some" weight, and 4% gave it "little" weight. Benefits to the custodial parent were viewed as least important. Only 54% of the judges said they gave "considerable" weight to the economic advantages of the move to the custodial parent, and only 50% said they gave "considerable" weight to the social and psychological advantages of the move to the custodial parent. Eight percent reported that they gave this last factor "little" weight. When family law attorneys were asked whether judges give "serious consideration to the mother's interests" when a mother with custody seeks permission to leave the state, over a quarter of the attorneys surveyed reported that this occurs only sometimes or rarely.

6. In determining custody and visitation, many judges and family service officers do not consider violence toward women relevant.

Over a quarter of the family law attorneys reported that child custody awards rarely or never consider the father's violence against the mother. An additional 30% reported that this consideration occurs only sometimes. Nearly half of the attorneys reported that, in cases in which a woman alleges that she has been abused, court-affiliated mediators sometimes or often make remarks indicating that such abuse is not relevant to the determination of child custody and visitation issues. These observations are confirmed by the statements of judges and family service officers themselves.

In cases involving spouse abuse, over a quarter of the probate judges responding to the survey reported that they rarely order supervised visitation, and over a third of the judges reported that they did so only sometimes. A family service officer at the Boston focus group expressed the common attitude:

> It is important here to distinguish between violence against the mother and that against the children. A number of women will try to prevent visitation because they have been beaten, but if there is no incidence of the husband beating the children, the father should get visitation rights.

There are several problems with this attitude. Research studies indicate that witnessing, as well as personally experiencing, abuse within the family causes serious harm to children (Note, 1985; Buell, 1988). Moreover, a boy

who witnesses his father beating his mother is more likely to become a wife abuser than if he were abused himself. [59] In **[*843]** addition, there is a strong correlation between wife abuse and child abuse (Straus, 1981; Guarino, 1985). These facts make it crucial that the abuse of any family member be taken into account when determining abuse and visitation.

Attorneys stated that courts other than the probate court order visitation even when they lack jurisdiction to do so. Attorneys reported that in 209A cases, district court judges order, or pressure women to agree to, visitation, despite the absence of legal authority. [60] According to attorneys at a Boston attorney listening session, in one district court a male clerk will call women with restraining orders and yell at them and tell them that they must allow visitation. Even in criminal cases, attorneys reported, visitation may be ordered. In one case, a man who fired into the home of his ex-girlfriend, killed her friend, and was charged with attempted murder of his child was given visitation rights; in another, a man who was in court to plead guilty to raping a woman was asked whether he wanted visitation rights over the child who was conceived as a result of the rape. Finally, an attorney described a case in which a court clinic recommended that custody go to the father; that is, as soon as he was released from prison for killing his wife, the child's mother.

7. A majority of the probate judges surveyed agreed that "mothers allege child sexual abuse to gain a bargaining advantage in the divorce process."

Although representatives of fathers' groups testified at public hearings and litigant meetings that judges presume guilt when allegations of sexual abuse are made, the attitudes expressed by judges themselves indicate skepticism in the other direction. Over half the probate judges who responded to our survey agreed that "mothers allege child sexual abuse to gain a bargaining advantage in the divorce process." [61]

Attorneys from different parts of the state reported inconsistent and sometimes questionable judicial decision making with regard to sexual abuse in divorce cases. [62] Attorneys in the western part of the state noted that one judge has taken the time to educate himself on the topic, while another judge refuses to use and rely on experts, views allegations with "disdain" and "suspicion," and has allowed unsupervised visitation despite "clear indications of sexual abuse." Attorneys elsewhere reported similar concerns.

A family law attorney in the Boston focus group stated: "In sex **[*844]** abuse cases when a small child describes explicit abuse and the experts corroborate that there has been abuse the court's reaction is disbelief." Another attorney agreed, seeing the problem as one of gender bias. "The feeling is that the woman is using abuse to control the husband. There is an immediate bias in favor of not believing the story." In Worcester, attorneys agreed, "Women and children who allege sexual abuse are simply not believed," and they recommended educational programs on sexual abuse for family service officers and judges.

A number of the attorneys felt that many family service officers were similarly inclined to disbelieve allegations of child sexual abuse made in the context of divorce. Statements made by some family service officers in focus group meetings confirmed this attitude.

Further discussion with judges on the issue of allegations of child sexual abuse in divorce proceedings indicates that judges may be skeptical of these allegations because of their timing, wondering why the allegations were not raised prior to the divorce. While the Committee understands the tendency to view last minute charges of sexual abuse with skepticism, we believe that educational programs familiarizing judges (and family service officers) with

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[59] Testimony of David Adams, director and founder of EMERGE, a counselling program for batterers.

[60] Letter of Joan Zorza, Esq. to the Committee, 10/13/88.

[61] The question referred to "mothers" because it is usually the mother who makes the allegation of sexual abuse in divorce cases. Overall in the universe of sexual abuse cases, 95% of alleged perpetrators are male (testimony of Dr. Jan Paradise, Boston public hearing).

[62] We emphasize that the discussion in this section applies only to sexual abuse allegations in the divorce context.

the problem of child sexual abuse would lead to an awareness of the reasons, other than the desire to gain a bargaining advantage, that allegations of child sexual abuse might arise during the divorce process.

A two-year national study published in 1988 by the American Bar Association's (ABA) National Legal Resource Center for Child Advocacy and Protection and by the Research Unit of the Association of Family and Conciliation Courts found that "deliberately false allegations made to influence the custody decision or to hurt an ex-spouse do happen, but they are viewed by knowledgeable professionals as rarities" and that "there is no evidence to suggest that allegations arising at the time of divorces or custody disputes are more likely to be false" (Nicholson, 1988). Addressing the issue of the timing of the allegation directly, the study concluded:

> Allegations may arise only after a custody study or other court action has begun. *There is no reason to believe that these cases are necessarily false*. Many parents hope to divorce, gain custody, and restrict visitation without mentioning sexual abuse and inviting [child protective service] agency involvement [emphasis added].
>
> Abuse may begin only after the divorce. Cases alleging such behaviors should not be dismissed as implausible.

The conclusion of the ABA's study is further substantiated by recent research suggesting that changes in living situations brought about by a divorce may prompt a child to disclose previous or current sexual abuse for the first time (McFarlane, 1986). Furthermore, other experts note that under the stress of divorce, a parent may become abusive for the first time, sexualizing affection and behaving in inappropriate ways (Schuman, 1984).

[*845] Greater knowledge of the issues surrounding child sexual abuse would lead to an understanding not only of the timing of abuse allegations, but also to an appreciation of the factors that inhibit the making of allegations. Research shows that it is clearly not in a parent's self-interest to bring a charge of child sexual abuse, for parents who are seen as vindictive and angry are at a substantial risk of losing custody. A recent comprehensive study of child sexual abuse allegations notes that

> One factor repeatedly cited as a deterrent to deliberate false reporting is the potential damage an allegation may do to the alleging parent's reputation. One guardian ad litem observed, "If mom does bring it up, people are going to ask, 'what did she do about it?' So, if you are just manufacturing a story, you'd better get ready for criticism." The sentiment that the allegation hurts the parent making the charge is echoed by others who believe that the court is likely to view most parents bringing such allegations as vindictive and angry (Pearson and Thoennes 1988).

Recent stories in the media characterizing charges of sexual abuse as a new tactic in divorce cases have prompted research into the issue of false allegations (Paradise et al., 1988). The results of one such study were reported to the Committee in public testimony.

Dr. Jan Paradise of the Harvard Medical School compared the rate at which sexual abuse allegations were substantiated [63] when there was, and when there was not, parental conflict over custody or visitation. [64] The study found that two-thirds of the cases involving parental conflict were substantiated. This was a lower substantiation rate than for the cases without parental conflict, but the difference was not statistically significant. Dr. Paradise also noted that the children involved in the disputed custody cases were significantly younger, and that, because of the difficulty in obtaining information from younger children, this may have accounted for the lower substantiation rate. As she emphasized, "failure to substantiate a case of alleged sexual abuse does not necessarily mean abuse did not occur or that a falsehood was involved" (1988, pp. 836-38).

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[63] Substantiation" was defined as a child abuse report that is either "indicated" or "founded." A report is "indicated" if substantial evidence of the alleged abuse exists based on medical evidence, the child protective services investigation, or the perpetrator's admission. A report is "founded" if there was a courtroom adjudication that the child was abused.

[64] Dr. Paradise's study was published following the hearing as Paradise et al., "Substantiation of Child Sexual Abuse Charges When Parents Dispute Custody or Visitation," *Pediatrics* 81 (1988):835. The study was conducted at the Children's Hospital in Philadelphia in 1985 and 1986. Dr. Paradise stated that there was reasonable basis to assume that the situation in Massachusetts is substantially similar.

[*846] 8. The courts are demanding more of mothers than fathers in custody disputes.

We found that in fashioning orders concerning child custody, many courts put the needs of noncustodial fathers above those of custodial mothers and children. We also found gender bias in the way orders are enforced.

In one court, attorneys at a Boston attorney listening session said, women who violate the terms of child custody are threatened with jail while the attitude toward men who fail to comply is "boys will be boys"; in another, women are much more likely to be reprimanded for violation of the terms than men. A family service officer in Worcester reported that "[a] good mother can lose custody if she refuses visitation to a good father who has visitation rights from court." Attorneys note that this may happen even if there was no actual interference with visitation. An attorney at the Hyannis attorney listening session related the following incident:

> In one instance in a pretrial conference, a father claimed he was denied visitation. Without even listening to the mother or her attorney, the judge gave custody to the father. In reality, the father's visits were irregular. He arrived hours late on his visitation days and brought the children back late. The custody decision was changed after hearing only the father's statements.

According to attorneys at listening sessions, there is another type of bias in the enforcement of visitation orders that reflects the different situation of custodial parents, usually mothers, and noncustodial parents, usually fathers. Although the child's interest is supposed to be primary, courts will not order a father to visit his child, even if his failure to visit distresses the child. The psychological harm that missed visits cause children also has an impact on the custodial mother, for it is she who must deal with her child's distress. In addition, female litigants participating in focus groups noted the havoc caused to their lives when fathers fail to exercise visitation or change plans at the last minute. Last minute changes make it necessary for women to scramble to find appropriate child care and impose extra monetary costs. Women expressed anger that the courts do not listen to their complaints in these matters. The essence of their concern is that visitation seems to be viewed entirely as a right of the father, rather than as a responsibility of the father toward the child and the other parent.

Similar bias exists concerning moves out of state. A noncustodial father is free to leave the state at any time, even if his children will miss their association with him. However, a good mother who leaves the state without permission may find custody taken away by the probate court. [65]

[*847] The punitive approach taken by some courts toward women who interfere with fathers' visitation rights contrasts with the tolerance shown by some judges to fathers who fail to pay court ordered child support (see "Child Support") and to men who commit acts of violence against women, in violation of the criminal law and court orders (see "Domestic Violence").

Inappropriately harsh punishment for violation of a court order is troubling enough, but the possibility that mothers might be punished for violating orders rooted in gender bias that put them or their children at risk is even more troubling. And this possibility, according to attorneys' testimony in focus groups, is very real. Even if all errors were obvious enough to be corrected on appeal, many women do not have access to legal help. Correcting the bias in the trial court is the only answer.

CONCLUSION

Our charge was to study and make recommendations concerning gender bias. Thus, the goal of the recommendations that follow is to eliminate the gender bias we observed. Before making any recommendation, however, we also considered the effects our recommendations would have on the welfare of children.

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[65] See *Delmolino v. Nance, 14 Mass. App. Ct. 209 (1982); Haas v. Puchalski, 9 Mass. App. 555 (1980).* While mothers may have these decisions reversed on appeal, many women do not have the resources to appeal a case.

Family service officers, probate judges, and appellate judges all say that giving primary consideration to the parent who has been the primary caretaker and psychological parent is in the best interests of children. [66] In practice, however, it appears that as soon as physical custody is contested, any weight given to a history of primary caretaking disappears. Mothers who have been primary caretakers throughout their child's life are subjected to differential and stricter scrutiny, and may lose custody if the role of primary caretaker has been assumed, however briefly and for whatever reason, by someone else.

We believe there is a need for a clear statement that primary consideration should be given in child custody disputes to the parent who has been the primary caretaker and psychological parent. Such a statement would advise lawyers and litigants about the applicable legal standard, **[*848]** and would reduce both the possibility of judgments influenced by bias and the bargaining advantage that men who have not been primary caretakers can gain by merely threatening to seek custody. The requirement that the identity of the primary caretaker and psychological parent be determined by considering each parent's commitment to the child throughout the child's life would promote fairness for both men and women. On the one hand, it would ensure that the actual behavior of individual men is considered, and not stereotypes about fathers. On the other hand, it would ensure that temporary relinquishment of custody does not result in permanent loss of custody, without regard to what went before.

Our research also considered gender bias in the awarding of shared legal custody. We found that the presumption in favor of shared legal custody which is currently held by many family service officers results in the awarding of shared legal custody in inappropriate circumstances. Such custody is being ordered over the objections of parents, when parents cannot agree about childrearing, and even when there is a history of spouse abuse.

The more cautious approach to awarding shared legal custody recommended by our Committee, and by the Commission on Children's Unmet Legal Needs, is now gaining support from some early supporters of joint custody. California, the first state to adopt a presumption of joint custody, has modified its position. Dr. Judith Wallerstein, coauthor of a book frequently cited in support of joint custody (Wallerstein and Kelly, 1980), has concluded some new research at the Center for the Family in Transition, which she directs. A study of 184 middle-class, college-educated families found "no evidence that joint custody arrangements promote child adjustment postdivorce" (Kline et al., 1988). More important, a second study of 100 families who were involved in custody disputes found substantial evidence that, where parents were in conflict, joint custody inflicted significant additional harm on the children. The authors concluded, "these findings caution against encouraging or mandating joint custody or frequent access when parents are in ongoing disputes" (Johnston et al., 1988). More locally, a 1983 study in Middlesex County found that significantly more joint custody cases returned to court to modify the original agreement than sole custody cases and that significantly more joint custody than sole custody parents returned to court to resolve child-related matters, "reflecting an additional and possibly continuing source of stress to the children involved" (Phear et al., 1983).

We found that many probate judges and family service officers do not consider violence against women relevant in determining custody and visitation. Before recommending that this policy change, we considered whether the current policy is in the "best interests of the child." We concluded that such a policy is not justified in the name of the children's **[*849]** best interests, and indeed may adversely affect them. Witnessing, as well as personally experiencing, abuse within the family causes serious harm to children. Indeed, David Adams, the director and founder of EMERGE, a counseling program for batterers, stated at a Committee meeting that a boy who witnesses

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[66] In *Rolde v. Rolde, 12 Mass. App. Ct. 398, 405-6 (1981),* the appeals court upheld an award of sole custody by a trial judge who found that the wife had been the "primary nurturing parent" and "primary caretaker" and that the children had the "strongest bond" with their mother:

> These factors are highly significant for the welfare of the children and are thus critical considerations for the judge in deciding on a custody arrangement which minimizes disruption and fosters a healthy environment for the growth and development of the children.

However, because the standard of review on appeal was whether the action of the trial judge was "clearly wrong" (at 403), *Rolde* does not create a clear standard.

his father beating his mother is more likely to become a wife abuser than if he were abused himself. Thus, such abuse should be considered misconduct toward the child warranting restriction on visitation.

The possibility of future harm to children in cases where one family member has already been abused should also be considered. The strong correlation between wife and child abuse warrants consideration of conditions of supervision (Straus, 1981; Guarino, 1985). And the additional stress that children are put under when there is extreme tension and conflict between the parents justifies some limitation on visitation (see Johnston et al., 1988).

RECOMMENDATIONS

1. 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; [67] **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.** [68]

2. 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 [*850] parent, is unfit, or has abandoned the child. The Legislature should amend M.G.L. c. 208, § 31, to make these standards explicit.

3. 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.

4. 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.

Civil Damage Awards

SUMMARY OF FINDINGS

Gender bias can affect the outcome of a trial in many different ways. One of the most direct ways is through the impact of the decision making of biased jurors. In our research efforts, we tried to determine whether the amount of damages awarded in civil actions depends on whether the plaintiff is male or female. The Committee found that:

> Although Middlesex County jurors as a whole appear to be evenhanded in their verdicts, male jurors as a group may be influenced in their individual decision making by stereotypical notions about men and women.

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[67] These factors are adapted from *Garska v. McCoy, 278 S.E.2d 357 (W. Va. 1981).*

[68] From Barbara Hauser, L.I.C.S.W., Middlesex Court Clinic. See also, Goldstein, Freud, and Solnit, 1973.

METHODOLOGY

For our research on civil damage awards we reviewed the literature on jury decision making and convened a focus group of experienced personal injury attorneys who discussed the impact of gender on the awarding of civil damages. Finally, we surveyed jurors to determine whether the gender of the plaintiff alone has the potential to affect the amount a jury will award for a given personal injury.

The survey was completed by jurors called for service but not selected to serve on a jury. They were shown a videotape of a hypothetical personal injury trial without being told that the survey was focused on gender bias. Each juror viewed one of two versions of the videotape which were identical, except that in one version the plaintiff was referred to by the expert witness as a man and in the other version the **[*851]** plaintiff was referred to as a woman. [69] After viewing the tape, the jurors completed the survey giving the amount they would award for medical expenses, for diminished earning capacity, and for pain and suffering.

The data upon which the study is based consist of 676 questionnaires collected from jurors in Middlesex County. Out of the 676 people surveyed, 368 people (196 women and 172 men) saw the female version of the video and 308 people (164 women and 144 men) saw the male version. The statistical results are summarized below. [70] The dollar figures in the tables are the average, or mean, awards. Simple comparison of average awards can be misleading, however, because differences in the averages may not be statistically significant, and thus the awards would not be representative of what the juror population as a whole would award. Accordingly, a T-test was performed on all data in order to determine the statistical significance of the results. For an explanation of the test, see "Methodology."

DISCUSSION OF FINDINGS

Although some research has been done on this topic, we could not locate any research that has focused as precisely on the influence of gender as our study did. While there have been indications that bias affects jury decision making in civil damages cases, the results of existing research are not conclusive. For example, the New York and New Jersey Task Forces on Women in the Courts both surveyed practitioners on their opinions of the impact of gender on civil damage awards (neither report analyzed the responses by age or sex). The New York Task Force reports that about half of the attorneys who responded believe that men receive higher awards for pain and suffering than women do, although another study by a New York personal injury lawyer suggests that juries are awarding men and women comparable damages for comparable injuries (*Report of the New York Task Force on Women in the Courts*, 1986). The perceptions of New Jersey attorneys is that in general male wage-earners receive higher awards than female wage-earners (Loftus, 1986).

Jury Verdict Research, Inc. (JVRI), an Ohio-based corporation, compiles statistics on awards from thousands of civil cases from across the country. A recent JVRI study of nationwide jury awards in personal injury cases shows that, when all such cases are analyzed together, women in all age groups except two, sixty to sixty-four and eighty and **[*852]** over, receive significantly lower mean and median awards for compensatory damages than males receive (JVRI, *Adults as Plaintiffs, Part II*, 1987; JVRI, *The Aged as Plaintiffs*, 1987). For instance, females age 20-29 received an average verdict of $ 76,117, but the average award for males in the same group was $ 236,869. For females and males age 30-39, the average awards were $ 105,223 and $ 362,466 respectively (JVRI, *Adults as Plaintiffs: Part I*, 1987).

On the surface, those differences are substantial and pervasive. One cannot, however, safely conclude that the differences are the handiwork of jurors displaying gender bias, for the results are based on an examination of all

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[69] The use of an expert witness to tell the plaintiff's story was a conscious decision in order to avoid having the likability and attractiveness of the actors affect the respondents' decisions (*see* Tully, 1977: attractive plaintiffs are awarded significantly more in damages than unattractive plaintiffs).

[70] The statistical analysis that is the basis for this section was performed by Dr. Nancy Marshall of the Wellesley Center for Research on Women.

awards in tort cases regardless of the nature of the injury. When comparable injuries are identified and compared, men and women in the same age categories can expect to recover about as often and about as much (JVRI, *Adults as Plaintiffs: Part 1*, 1987, and *Part II*, 1987; JVRI, *The Aged as Plaintiffs: Part I*, 1987). This does not, however, conclusively dismiss the differences in the average figures since variables remain that are not identified or well-defined, such as how injuries were compared.

Our own research suggests that male jurors may be influenced by stereotypical notions. We calculated the survey results from Middlesex County by different populations: surveys completed by the entire group, those completed by women, and those completed by men (See tables in "Methodology"). The awards of these three groups show no statistically significant differences. However, when the men and women respondents are divided into age groups based on the demographic data they provided, evidence of gender bias emerges. The respondents were divided into two age groups: those under 40 and those over 40. Forty was chosen as the dividing line because the average age for the total sample was forty.

The data suggest that women respondents, no matter what age group, treat male plaintiffs and female plaintiffs the same. In contrast, both groups of men (under forty and over forty) exhibited some gender bias. Table 1 reveals that men under forty gave the female plaintiff higher awards for medical expenses than they gave to the male plaintiff. Table 2 shows that men over forty favored the male plaintiff in the awarding of damages for both diminished earning capacity and pain and suffering. **[*853]**

TABLE 1 AWARDS GIVEN BY MEN UNDER 40 IN MIDDLESEX

	Female Plaintiff	Male Plaintiff
Medical Expenses	$ 82,611	$ 51,119
		t = 1.9306; p = .0567 *
Diminished Earning Capacity	$ 1,075,618	$ 1,060,112
	NS	
Pain and Suffering	$ 985,722	$ 914,552
	NS	

NS = Not Significant
* = Marginally Significant
** = Significant

TABLE 2 AWARDS GIVEN BY MEN OVER 40 IN MIDDLESEX

	Female Plaintiff	Male Plaintiff
Medical Expenses	$ 54,198	$ 72,584
	NS	
Diminished Earning Capacity	$ 1,101,543	$ 1,209,208
		t = -1.9667; p = .051 *
Pain and Suffering	$ 551,430	$ 763,253

TABLE 2 AWARDS GIVEN BY MEN OVER 40 IN MIDDLESEX

	Female Plaintiff	Male Plaintiff
	t = -2.0326; p = .044 **	

NS = Not Significant
* = Marginally Significant
** = Significant

These results were in general accurately predicted by the attorneys in the focus group. Most notably, these attorneys said repeatedly that older male jurors are more likely to have out-dated notions about women that would affect damage awards. Two specific notions cited by the attorneys in their discussion of the videotape are: 1) an assumption that a woman would want to spend more time with her children, and thus would choose her career accordingly; and 2) a perception that the female plaintiff would be less likely to become a partner in a large Boston law firm.

[*854] Our study suggests that for male jurors some part of the value of a case does depend on the plaintiff's gender. As noted, younger male jurors awarded more to the female plaintiff than to a male for medical expenses and older male jurors appeared to favor their own sex in making awards both for diminished earning capacity and for pain and suffering. Other fascinating results flow from a comparison of pain and suffering awards made by those over 40. As shown by tables 2 and 3, women over 40 awarded more for pain and suffering both to men and to women than men awarded. Except for awards made by women over 40 to men, all of the awards for pain and suffering made by those over 40 were substantially less than the awards made by those under 40.

TABLE 3 AWARDS GIVEN BY WOMEN OVER 40 IN MIDDLESEX

	Female Plaintiff		Male Plaintiff
Medical Expenses	$ 60,337		$ 61,918
		NS	
Diminished Earning Capacity	$ 1,117,849		$ 1,155,555
		NS	
Pain and Suffering	$ 750,908		$ 933,486
		NS	

NS = Not Significant
* = Marginally Significant
** = Significant

FOR ADDITIONAL DATA SEE METHODOLOGY SECTION.

The Massachusetts Gender Bias Study goes beyond previous gender bias studies because it is the first that attempts to factor out every influence in the jury's award save the plaintiff's gender. As was mentioned earlier, the two versions of the video used in the study are identical except for the gender of the plaintiff. The plaintiff's gender thus provides the only logical explanation for any observed difference in the amounts awarded to the two plaintiffs.

As is evident from the discussion of methodology, however, the results of our study are drawn from the responses of *individual* jurors to the questions each was asked. In a real-life case, jurors talk and reason together about damages as well as liability. It would be helpful to know whether that deliberative process would significantly alter the decisions made by individual jurors with respect to male and female plaintiffs in civil damages cases. To determine this would require further study. Even if the results of such a further study did not suggest any ready **[*855]** answers to problems it might uncover, those results, if published and available to the bar, would assist lawyers in the process of jury selection so that they can attempt to minimize the impact that likely gender biases may have on the outcome of their case.

The results of this research also raise for discussion the role that judges' instructions to the jury can play in limiting bias in jury decision making. The Committee encourages judges to add an instruction reminding jurors not to be influenced by the sex of the plaintiff or defendant when making their decision. This instruction would be added to the other instructions the judge gives to the jury immediately before the jurors retire for their deliberations. Studies have shown that jurors do try to follow the instructions the judge gives to them ("Toward Principles of Jury Equity," 1974; Schott, 1977). Indeed, the entire jury system has at its heart the notion that jurors will carry out the judge's instructions to the best of their abilities. In addition to the recommended general charge, thought should be given to the content of the charge on specific damage issues in particular cases to ensure that the charge adequately focuses the attention of the jury on the standards it must employ in making a damage award. The following, for example, is the New York pattern charge (New York Pattern Jury Instructions 2:320.2, Cum. Supp., February 1986) on the value of homemaker and maternal services in a wrongful death case:

> In fixing [the value of such services] you must take into consideration the circumstances of [the decedent's] husband and children; the services she would have performed for her husband and children in the care and management of the family home, finances and health; the intellectual, moral and physical guidance and assistance she would have given the children had she lived. In fixing the money value of the decedent to the widower and children you must consider what it would cost to pay for a substitute for her services, considering both the decedent's age and life expectancy and the age and life expectancy of her husband and each of her children.

CONCLUSION

Obviously, differences in the amounts of jury awards in civil actions are disturbing if those differences are purely the product of the plaintiff's gender. Like race and religion, gender, *per se*, has no necessary or logical relation to the amount of harm resulting from the tortious conduct of another. In that regard, the results of the study are reassuring on a broad scale for they suggest that a jury truly composed of a cross-section of the community is unlikely to make discriminatory awards to a plaintiff on the basis of that plaintiff's gender.

The Committee believes that greater knowledge about the way in which juries respond to differences in gender, as well as in race, color, and religion, can only aid in the process of ensuring justice for all.

[*856] In sum, through its study, the Committee has come to some tentative conclusions about the presence and absence of gender bias among jurors hearing and deciding civil cases. The Committee, however, believes that its study is only a beginning. More research is needed. Certainly, if equal justice for all of our citizens is to be achieved in our courts, such studies are not only worthwhile but essential.

RECOMMENDATIONS

1. The handbook all jurors receive should be modified to stress that the gender of litigants, without more, is an impermissible basis for making decisions. This would result in the Juror's Handbook reading as follows: "The juror must treat with equal fairness the rich and the poor, the old and the young, corporations and individuals, government and citizens, and must render justice without any regard for sex, race, color, or creed."

2. The juror orientation video should be modified to stress the impropriety of making decisions on the basis of the gender of the parties or witnesses. The video should stress that the evidence that the jurors must analyze in reaching their decision should not include the gender of the plaintiff or the defendant.

3. The Committee encourages judges to include in their instructions an instruction that, in making decisions, the jurors are not to be influenced by the gender of the parties. The following short and straightforward instruction could be used in virtually all cases: "Your verdict must be based solely on the evidence developed at trial. It would be improper for you to consider any personal feelings about the defendant's race, religion, national origin, sex, or age. Those personal feelings are not a proper basis for deciding any issue of fact you are required to decide in this case, and you must not allow them to influence you in making the important decision you are about to make."

4. The Trial Court should encourage and assist responsible groups from the bar or from academic institutions to conduct further studies to determine whether the results of the Committee's study truly reflect the likely behavior of a majority of jurors and, if so, to recommend further appropriate steps designed to correct imbalances the research reveals. Other potential areas for study include whether the presence of a female attorney or judge has any impact on the verdict, whether jurors make different awards to men and women who do not hold income-producing jobs, whether jurors make different awards to men and women who hold "unskilled" jobs, and whether group deliberations have a significant impact on individual biases. $
