

**COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT**

SJC-13473

AMY SUE OPENSHAW
Plaintiff - Appellee

v.

GLEN ROMNEY OPENSHAW
Defendant – Appellant

ON APPEAL FROM A JUDGMENT OF THE PLYMOUTH SUPERIOR
COURT

BRIEF OF AMICUS CURIAE

MASS FAMILY ADVOCACY COALITION

IN SUPPORT OF THE PLAINTIFF/APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Mass Family Advocacy Coalition (MFAC) is a non-profit organization organized under the laws of the Commonwealth of Massachusetts. There is no parent corporation or publicly held corporation that owns 10% or more of MFAC's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	4
INTEREST OF AMICUS CURIAE.....	9
SUMMARY OF ARGUMENTS.....	9
ARGUMENT.....	11
I. The Economic Impact of Evolving Alimony Laws, the Gender Wage Gap, and a Caregiver’s Loss of Future Earnings and Savings Power Support the Need to Promote Economic Parity and Justice.....	11
II. A Deeply Entrenched Public Policy Goal is to Keep Individuals Self-Sufficient by Encouraging Them to Save for Education, Medical Needs, and Retirement and Help Prevent Them from Requiring Public Assistance.....	23
III. Alimony Need is Determined by All Factors in G.L. c. 208, Section 53(a), Not Spending at the Time of Divorce.....	25
IV. Savings as an Alimony Need Aligns with Massachusetts Caselaw Principles and Public Policy, and Curbs the Post-Divorce Economic Imbalance between a Supporting Spouse and a Caregiver.....	35
CONCLUSION.....	40
CERFICIATE OF COMPLIANCE.....	41
CERTIFICATE OF SERVICE.....	42
ADDENDUM.....	43

TABLE OF AUTHORITIES

Statutes

G.L. c. 208, § 34.....	12
G.L. c. 208, § 48.....	26
G.L. c. 208, § 49(b)	15
G.L. c. 208, § 53(a).....	10, 26, 27, 29,34
G.L. c. 208, § 53(b).....	9, 10, 26, 28, 29, 30
G.L. c. 208, § 53(e).....	28

Cases (Massachusetts)

<u>Bell v. Bell</u> , 393 Mass. 20 (1984).....	33, 34
<u>Brooks v. Piela</u> , 61 Mass. App. Ct. 731 (2004).....	31
<u>Cavanagh v. Cavanagh</u> , 490 Mass. 398 (2022).....	12, 13, 18, 28, 29, 30, 36
<u>D.B. v. J.B.</u> , 97 Mass. App. Ct. 170 (2020).....	30, 31, 32
<u>Goldman v. Goldman</u> , 28 Mass. App. Ct. 603 (1990).....	29, 36
<u>Gottsegen v. Gottsegen</u> , 397 Mass. 617 (1986).....	26
<u>Hassey v. Hassey</u> , 85 Mass. App. Ct. 518 (2014).....	26, 27, 28, 29
<u>Macri v. Macri</u> , 96 Mass. App. Ct. 362 (2019).....	32
<u>Partridge v. Partridge</u> , 14 Mass. App. Ct. 918 (1982)	29
<u>Pierce v. Pierce</u> , 455 Mass. 286 (2009)... ..	28, 29
<u>Rosenberg v. Rosenberg</u> , 33 Mass. App. Ct. 903 (1992)... ..	30, 32
<u>Ross v. Ross</u> , 50 Mass. App. Ct. 77 (2000).....	6
<u>Sampson v. Sampson</u> , 62 Mass. App. Ct. 366 (2004).....	31
<u>Young v. Young</u> , 478 Mass. 1 (2017).....	18, 28, 29, 31, 36

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In re Marriage of Drapeau, 93 Cal. App. 4th 1086, 1096-97 (Cal. Ct. App. 2001) 40

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Angelo Sarno, Savings/Investing as a Component in Awarding Spousal Support, NJFL, March/April 1997..... 37

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Bello Tax Chart..... 27

Christian E. Weller, Joelle Saad-Lessler, Tyler Bond, Still Shortchanged: An Update on Women's Retirement Preparedness, National Institute on Retirement Security Report, May 2020..... 23

Claudia Goldin, Sari Pekkala Kerr, Claudia Olivetti, When the Kids Grow Up: Women's Employment and Earnings Across the Family Cycle, National Bureau of Economic Research Working Paper, 2022..... 19

Hon. Edward M. Ginsburg, Alimony Act, Support Guidelines Poor Combo for Children, Massachusetts Lawyers Weekly, April 10, 2014..... 12, 13, 27

Hon. Edward M. Ginsburg, The Place of Alimony in the Scheme of Things, Massachusetts Council on Family Mediation, September 1997..... 12, 13, 27

Jana B. Singer, Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony, 82 Geo. L.J. 2423 (1994)... .. 2

Jennifer L. McCoy, <u>Spousal Support Disorder: An Overview of Problems in Current Alimony Law</u> , 33 Fla. St. U. L. Rev. 501 (2005).....	2, 15
Jess Bidgood, " <u>Alimony in Massachusetts gets overhaul, with limits</u> ," New York Times, 27 Sept. 2011.....	13
Jo Ann Jenkins, <u>Women are facing a retirement crisis</u> , TIAA Institute, 2022.....	22
John Scott, <u>How States are Working to Address the Retirement Savings Challenge</u> , Pew Charitable Trusts Report, June 1, 2016.....	24
Julie-Anne G. Stebbins, <u>Family Law—The Rehabilitation Illusion: How Alimony Reform In Massachusetts Fails To Compensate For Caregiving</u> , Western New England Law Review, Volume 36 (2014).....	13
Kris Olson, <u>Family law bar: Need for alimony tax fix urgent</u> , Massachusetts Lawyers Weekly, January 31, 2019.....	13
Leigh Purvis, <u>Prices for Top Medicare Part D Drugs Have More Than Tripled Since Entering the Market</u> , AARP Public Policy Institute, August 10, 2023.....	23
Lin I-F, Brown S.L. <u>The Economic Consequences of Gray Divorce for Women and Men</u> , J Gerontol B Psychol Sci Soc Sci. 2021 Nov 15;76(10):2073-2085.....	18, 20
Lin, I-F, Brown, S. L., & Hammersmith, A. M. (2017). <u>Marital Biography, Social Security Receipt, and Poverty</u> . Research on Aging, 39(1), 86-110.....	21
Madowitz, Rowell, and Hamm, <u>Calculating the Hidden Cost of Interrupting a Career for Child Care</u> , Center for American Progress, June 21, 2016.....	20

Martine Powers, <u>Legislation Overhauls Bay State Alimony Laws</u> , Boston Globe, Sept. 26, 2011.....	13
Massachusetts Access to Justice Commission <u>Access to Attorneys Committee Report</u> , May 2017.....	18, 32, 34
Massachusetts Access to Justice <u>Access to Attorneys Report on Fee Shifting in Family Law Litigation</u> , May 2022.....	18, 32, 34
Mass Family Advocacy Coalition (MFAC), <u>Equitable & Accessible Justice For All – A Working Report On The Massachusetts Family Court System</u> , December 2022.....	9, 18, 37, 39
Massachusetts Supreme Judicial Court Gender Bias Study Committee, <u>Report of the Gender Bias Study of the Court System in Massachusetts</u> (1989), 24 New Eng. L. Rev. 745 (1990).....	16, 17, 18, 33, 58
Nobel Prize Press Release, <u>The Prize in Economic Sciences 2023</u> , October 9, 2023	19
Norma J. Wikler, <u>Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts</u> , Court Review, Fall 1989.....	15,16
Paula Pant, <u>How much should I save each month</u>	39
Paula Span, <u>Why Older Women Face Greater Financial Hardship Than Older Men</u> , The New York Times, December 26, 2021.....	20
Pro Se Litigants: The Challenge of the Future, April 8, 1995.....	18
Rachel Biscardi, <u>Dispelling Alimony Myths: The Continuing Need For Alimony And The Alimony Reform Act Of 2011</u> , Western New England Law Review, Volume 36, 2014.....	13, 14

Rakesh Kochhar, <u>The Enduring Grip of the Gender Pay Gap</u> , Pew Research Center, Mary 1, 2023.....	18
SB Dusetzina, RJ Besaw, CC Whitmore CC, et al. <u>Cost-Related Medication Nonadherence and Desire for Medication Cost Information Among Adults Aged 65 Years and Older in the US in 2022. JAMA Netw Open.</u> 2023;6(5):e2314211.....	23
Social Security Administration Research, Statistics, and Policy Analysis, <u>Divorce and Women's Social Security Retirement Benefits</u> , March 2015.	22
Sudipto Banerjee, Ph.D., <u>Closing the Gender Gap in Retirement Savings: Addressing barriers to retirement savings for women</u> , March 2023.	22
United States Department of Labor Women’s Bureau, <u>Gender earnings ratios and wage gaps by age, 2022 Annual Averages</u>	19
United States Government Accountability Office (GAO), <u>Retirement Security: Women Still Face Challenges</u> , July 2012.....	21
Yavorsky, et.al., <u>The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood</u> , J Marriage Fam. 2015 Jun; 77(3): 662–679.....	20

INTEREST OF AMICUS CURIAE

Mass Family Advocacy Coalition (MFAC) is a Massachusetts nonprofit organization founded by women dedicated to improving the family law system for all users and their children. All our members are present or past users of the Massachusetts Probate and Family Court (“Family Court”). Users’ input is critical to the Court’s efforts to improve the system. Our mission is to support women and children by promoting an efficient, accessible family court system that provides fair, safe, and uniform justice.¹

ISSUES

This Court has requested amicus input on:

- (1) Whether a spouse’s need for support under general term alimony should be ascertained by looking at the parties’ spending at the time of the separation leading to divorce?
- (2) Whether, for purposes of determining alimony, a spouse’s need may include “savings alimony” and charitable contribution components?

SUMMARY OF ARGUMENT

This case provides an opportunity for the Court to clarify the term “need” in G.L. c. 208, Section 53(b) of the 2011 Alimony Reform Act and to establish a

¹ See Mass Family Advocacy Coalition, Equitable & Accessible Justice For All – A Working Report On The Massachusetts Family Court System, December 2022.

reasonable presumptive floor for calculating alimony based on income of the parties. Given the statutory language, judicial interpretation, and legislative intent to make alimony orders more predictable and consistent, spending is not dispositive of need when setting an alimony amount. Once need is established under G.L. c. 208, Section 53(a), an alimony order that falls within the parameters of Section 53(b)'s formula of 30/35% of the income differential of the parties is fair and reasonable, subject only to the deviations enumerated in the Act.

This case also presents an opportunity for the Court to join the overwhelming majority of jurisdictions that have considered the issue to include saving as an alimony need. Increasing personal savings is a deeply entrenched public policy goal and is especially critical for caregiving spouses, who face much greater financial insecurity post-divorce compared to supporting spouses.

In support of the above, we first provide a brief review of the development of alimony law leading up to the 2011 Alimony Reform Act and the Act's intent to make alimony orders more predictable and consistent. We also review the negative economic impact of evolving alimony law on caregiving recipients, who for the most part, are women. The impact of the gender wage gap together with the loss of both future earnings power and savings ability exacerbates the economic imbalance that results from a divorce between a supporting spouse and a dependent caregiver.

ARGUMENT

I. The Economic Impact of Evolving Alimony Laws, the Gender Wage Gap, and a Caregiver's Loss of Future Earnings and Savings Power Support the Need to Promote Economic Parity and Justice in Determining an Alimony Amount.

A. The development of alimony laws and the 2011 Alimony Reform Act

The 1970s, with its newfound societal focus on individualism, self-reliance, and women's rights, brought many changes to divorce laws, including the emergence of no-fault divorce and the gender-neutrality of alimony laws.² In the prior fault-based divorce, alimony was considered a right, and as a result, the wife generally received a larger property settlement and support award if the husband was found at fault.³ With the advent of no-fault divorce, spousal support became a “conditional means of support,” a temporary measure until the dependent spouse becomes self-sufficient.⁴

In Massachusetts, alimony, which had “enjoyed a clearly defined role in pre-[child support] guidelines and pre-equitable distribution [of assets],” began to be treated as a residuary category, to be considered only after the division of assets

² Jana B. Singer, Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony, 82 Geo. L.J. 2423 (1994) 2423-28.

³ Jennifer L. McCoy, Spousal Support Disorder: An Overview of Problems in Current Alimony Law, 33 Fla. St. U. L. Rev. 501 (2005) 503-04.

⁴ Id. at 518-19.

and the award of child support.⁵ The governing statute at that time, G. L. c. 208, § 34, did not include any formula for calculating the amount or duration of alimony.⁶ Judge Edward Ginsburg, a well-respected Probate and Family Court judge of over 25 years, described the resulting dilemma:

“There is no generally accepted standard or philosophical basis by which a trial judge determines whether to grant alimony, and if so, how much and for how long. Differences exist among judges, and the same judge may not be consistent from case to case. This lack of consistency and predictability fosters litigation and drives up the costs associated with a divorce. Different awards of alimony both with respect to the amount and duration on the same or similar facts give the appearance of inequality and engender disrespect for the law.”⁷

To determine the amount of alimony, informal guidance was articulated by Judge Ginsburg. He believed that the most equitable way to calculate support was based on income.⁸ “If the theory of marriage is one of partnership, both partners

⁵ The Hon. Edward M. Ginsburg, The Place of Alimony in the Scheme of Things, Massachusetts Council on Family Mediation, September 1997, at 1.

⁶ Ross v. Ross, 50 Mass. App. Ct. 77, 79 (2000).

⁷ Ginsburg, *supra* note 5, at 1. See Cavanagh v. Cavanagh, 490 Mass. 398, 406 (2022).

⁸ Judge Ginsburg espoused this principle as early as 1978 when he proposed that “support should be based on an allocation of income rather than a bottom-up determination of need and ability to pay.” The Hon. Edward M. Ginsburg,

are deemed to have invested in the ability to earn income as well as the tangible assets. Particularly in longer-term marriages, the aim is to leave the parties in relatively comparable positions.”⁹ His position “became known as the ‘Ginsburg formula’: a third for him, a third for her, and a third for Uncle Sam.”¹⁰

To determine the duration of alimony, there was no formula. This led to inconsistency among judges’ orders, with some awarding alimony in both short- and long-term marriages.¹¹ It was this opposition to “permanent” alimony voiced by special-interest groups comprised primarily of “alimony-paying men” and self-proclaimed “second wives” that sought legislative solutions in the first decade of the 2000s to limit the duration and amount of alimony.¹²

An Alimony Task Force was established in 2009 to review the state’s existing alimony statute. Appointed to the task force was Steve Hitner, the leading

Alimony act, support guidelines poor combo for children. Massachusetts Lawyers Weekly, April 10, 2014.

⁹ Ginsburg, *supra* note 5, at 4.

¹⁰ Kris Olson, Family law bar: Need for alimony tax fix urgent, Massachusetts Lawyers Weekly, January 31, 2019.

¹¹ Jess Bidgood, "Alimony in Massachusetts gets overhaul, with limits." *New York Times*, 27 Sept. 2011.

¹² Rachel Biscardi, Dispelling Alimony Myths: The Continuing Need For Alimony And The Alimony Reform Act Of 2011, 36 Western New England Law Review 1 (2014) at 2; Bidgood, *supra* note 11; Julie-Anne G. Stebbins, Family Law—The Rehabilitation Illusion: How Alimony Reform In Massachusetts Fails To Compensate For Caregiving, Western New England Law Review, Volume 36, 406 (2014) at 412-13.

representative of the fathers organization pushing for alimony reform.¹³ The resulting Alimony Reform Act passed in September 2011 and became law on March 1, 2012. The Act was heralded by its supporters as a “sweeping overhaul,” a long overdue change that would improve the predictability of divorce cases in the Commonwealth and thus avoid unnecessary and expensive litigation.¹⁴

However, not everyone applauded the new law. Concerns were expressed that the Act could be unfair to women who made sacrifices in their marriages and that the language was not clear and would continue to result in litigation.¹⁵ A former president of the International Academy of Matrimonial Lawyers called the limits that the Act imposed on alimony “mean-spirited and draconian.” The question remained “whether this law is going to be interpreted where women will be treated fairly in the courts, or not.”¹⁶

Although some aspects of the Act have been helpful, the legislation has negatively impacted women caregivers in the past decade by its: (1) misinterpretation to preclude alimony to qualifying caregiving spouses;¹⁷ (2) termination of alimony at a payor’s retirement age; (3) retroactive application to

¹³ Biscardi, *supra* note 12, at 3, footnote 8.

¹⁴ Stebbins, *supra* note 12, at 407.

¹⁵ Bidgood, *supra* note, at 11.

¹⁶ Martine Powers, Legislation Overhauls Bay State Alimony Laws, Boston Globe, Sept. 26, 2011.

¹⁷ This court corrected that misinterpretation in the recent case of Cavanagh v. Cavanagh, 490 Mass. 398 (2022).

limit the duration of support;¹⁸ and (4) failure to articulate a clear method to calculate the amount of alimony. It is this last problem that we focus on in this amicus brief.

B. Detrimental economic impact of changing alimony laws on women caregivers

After the introduction of no-fault divorce in the 1970s, researchers and academics found that the no-fault divorce law and its accompanying rationale of conditional spousal support had the unintended effect of markedly reducing the economic status of women following divorce.¹⁹

Social scientists studying the consequences of no-fault divorce in California found that “seemingly minor” family court orders were inadvertently contributing to the feminization of poverty. “A new underclass of women and children was coming into being through inadequate support awards....”²⁰ “Researchers traced these inequities directly to misinformation on the judges’ part about the economic and social realities of women and men. Disposable income for males, meanwhile, typically increased after divorce because of a combination of court decisions and

¹⁸ G.L. c. 208, §49(b).

¹⁹ McCoy, *supra* note 2, at 506, 516-22.

²⁰ Norma J. Wikler, Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts, *Court Review*, Fall 1989, at 7.

the striking gender disparities in employment and earnings that persist in American society.”²¹

As a result of the growing documentation of this economic imbalance and a rising concern among the legal profession of gender bias in the courts, the National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) was formed in the early 1980s. It advocated for all state courts to establish commissions to study the financial impact of court orders in the individual states family court systems.

In 1986, Massachusetts Supreme Judicial Court responded by establishing the Gender Bias Study Committee. A primary goal was to determine whether the courts play a contributing role in women’s inferior economic and social status after divorce.²² The resulting *Gender Bias Study of the Court System in Massachusetts* unequivocally concluded that “women’s economic position declined disproportionately after 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.”²³

The Committee specifically found that:

²¹ Id.

²² Massachusetts Supreme Judicial Court Gender Bias Study Committee, Gender Bias Study of the Court System in Massachusetts, 24 New Eng. L. Rev. 745, 763 (1990).

²³ Id. at 746.

1. Alimony orders were not based on a realistic understanding of the impact of lost opportunities for future earnings or the sacrifice of earning potential many women made by taking on the primary caretaking role of the family.²⁴
2. Women generally experienced a greater drop in standard of living post-divorce than men.²⁵
3. Women who postponed their careers to raise children were often economically disadvantaged by their inability to have an income stream to acquire future assets, both at the time of their divorce and for many years after divorce.²⁶
4. The courts seemed generally unconcerned about protecting woman's financial security for retirement.²⁷
5. Signs of unequal power and effects of abuse on the dynamics between the parties can lead to unequal outcomes.²⁸

Over the next several decades, the courts and bar have identified similar issues that impact the less financially secure party (typically the caregiving

²⁴ Id. at 777.

²⁵ Id.

²⁶ Id. at 793.

²⁷ Id. at 789.

²⁸ Id. at 774.

woman) and have called for reform.²⁹ Though some improvements have taken place, significant problems persist.³⁰ Many caregivers continue to find that their economic position post-divorce is ultimately significantly lower than the non-caregivers' position.³¹ Although it is well established under Massachusetts law that caregivers should be able to live at their pre-divorce lifestyle where funds permit,³² that is not the post-divorce reality of many caregivers.³³

As the Gender Bias Study found, the disparity in lifestyles results in large part from misconceptions about the economic reality of caregivers following divorce:

i. Gender wage gap lowers lifetime pay for women

A woman caregiver reentering the job market will have lower average earnings than men due to the gender wage gap. In 2022, American women in total earned 82 cents for every dollar earned by men.³⁴ The wage gap for older women

²⁹ See e.g., 1995 Pro Se Committee Report, Pro Se Litigants: The Challenge of the Future, April 8, 1995; Massachusetts Access to Justice Commission Access to Attorneys Committee Report, May 2017; Massachusetts Access to Justice Access to Attorneys 2022 Report on Fee Shifting in Family Law Litigation, 2022.

³⁰ See Id., MFAC, Working Report, supra note 1, at 4.

³¹ I-Fen Lin & Susan L. Brown, The Economic Consequences of Gray Divorce for Women and Men, *The Journals of Gerontology: Series B*, Vol. 76, Issue 10, December 2021, 2073-85.

³² Cavanagh, 490 Mass. 407-08; Young v. Young, 478 Mass. 1, 6-7 (2017).

³³ MFAC, Working Report, supra note 1, at 7.

³⁴ Rakesh Kochhar, The Enduring Grip of the Gender Pay Gap, Pew Research Center, May 1, 2023.

workers is larger than for younger women and is the widest at age 55 or older at 77.8%.³⁵

Studies show that parenthood plays a significant role in this wage gap. Harvard professor Dr. Claudia Goldin, the 2023 winner of the Nobel Prize in Economics for her work in studying women in the workforce, has spent an entire career researching and analyzing the gender wage gap over time. Her research shows that while historically, the wage gap could be explained through differences in education and occupational choices, most of the earnings difference today is between men and women in the same occupation, and that it largely arises after the birth of the first child.³⁶ Moreover, the gender wage gap does not seem to be driven by a decrease in mothers' earnings, but rather driven by an increase in the earnings of fathers. This phenomenon is known as the "fatherhood wage premium". For men, having children and a wife who is the caregiver is related to their earnings boost.³⁷

ii. A caregiver's future earnings potential decreases when they leave the workforce to be the caregiver of the family's children

³⁵ US Department of Labor Women's Bureau, Gender earnings ratios and wage gaps by age, 2022 Annual Averages.

³⁶ The Prize in Economic Sciences 2023, Nobel Prize Press Release, October 9, 2023.

³⁷ Claudia Goldin, Sari Pekkala Kerr, Claudia Olivetti, When the Kids Grow Up: Women's Employment and Earnings Across the Family Cycle, National Bureau of Economic Research Working Paper, 2022.

When a couple decides that one parent will be primarily responsible for child-rearing, that parent's financial future is impacted negatively for life.³⁸ That parent forfeits or reduces their lifetime earnings, reduces the amount accumulated in any 401(k) plan, and pauses contributions to social security. A study by The Center for American Progress estimates that a 26-year-old woman who is earning \$30,000 and takes off five years to provide unpaid childcare for her family is losing \$482,000 over the course of her career—a 19% reduction in her lifetime earnings. The longer the caregiving parent is away from a career, the greater the impact. If the same woman took 10 years off her career to focus on unpaid childcare for her family, she forfeits a whopping \$826,000.³⁹

This negative financial impact to caregivers is especially true in “Gray Divorces,” namely, divorces after age 50. Gray divorce is the fastest growing segment of divorces, accounting for one in three U.S. divorces.⁴⁰ A recent Government Accounting Office study found that women's household incomes fell by an average of 41% when divorcing after age 50, almost twice the decline that men experienced.⁴¹ As a result, 27% of women fell below the federal poverty

³⁸ Yavorsky, et.al., The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood, J Marriage Fam. 2015 Jun; 77(3): 662–679.

³⁹ Madowitz, Rowell, and Hamm, Calculating the Hidden Cost of Interrupting a Career for Child Care, Center for American Progress, June 21, 2016.

⁴⁰ Paula Span, Why Older Women Face Greater Financial Hardship Than Older Men, The New York Times, December 26, 2021.

⁴¹ Lin IF, *supra* note 31, at 2073-2085.

guidelines, compared to 11% of men according to a 2010 marital study.⁴² Since on average women live longer than men, the risk of exhausting their retirement and falling into poverty is greatly increased.

iii. A caregiver's future retirement savings potential decreases when they leave the workforce to be the caregiver of the family's children

Although the composition of retirement savings varies greatly for individual households, social security benefits, pension/401(k) income, and earnings make up the bulk of income for the U.S. population age 65 and over.⁴³ For individuals who left their careers to become the family caregivers, retirement funds are insufficient to fund their retirement years post-divorce compared to supporting spouses.⁴⁴ After divorce, the supporting spouse continues to contribute to social security and employer-sponsored retirement plans, but the caregiver can be either caregiving full-time or working flexible/part-time jobs that pay less and offer fewer/no benefits while she continues her caregiving role. If a long-term caregiver returns to work full-time, she is unable to reenter the job market in her previous or similar career on the same wage trajectory.

⁴² Lin, IF, Brown, SL, & Hammersmith, AM, Marital Biography, Social Security Receipt, and Poverty. Research on Aging, 2017, 39(1), 86-110.

⁴³ United States Government Accountability Office (GAO), Retirement Security: Women Still Face Challenges, July 2012.

⁴⁴ Id.

Since social security benefits are based on the highest 35 years of earnings, caregiving spouses are disadvantaged. A divorced spouse can only receive the greater of their own social security benefits or no more than 50% of their ex-spouse's full retirement benefit. In comparison, the higher wage-earner is able to keep 100% of their social security benefits.

Accordingly, overall women have greater financial insecurity for retirement compared to supporting spouses, as this data demonstrates:

- The median 401(k) account balance for women was 65% lower than for men in 2022.⁴⁵
- As of December 31, 2021, the average social security payment for men was \$1,838.08. For women, the average was \$1,483.75 — or 20% less than that of men.⁴⁶ For divorced women, the average social security payment was \$875, or less than half that of men.⁴⁷
- Women on average have saved about 30% less money by the time they retire compared to men.⁴⁸

⁴⁵ Sudipto Banerjee, PhD, Closing the Gender Gap in Retirement Savings, T. Rowe Price Insights, March 2023.

⁴⁶ Annual Statistical Supplement to the Social Security Bulletin, 2022, at 5.46.

⁴⁷ Social Security Administration Research, Statistics, and Policy Analysis, Divorce and Women's Social Security Retirement Benefits, March 2015.

⁴⁸ Jo Ann Jenkins, Women are facing a retirement crisis, TIAA Institute, 2022.

Thus, individual savings is crucial for caregivers to afford retirement, strongly indicating that saving is a necessary need.⁴⁹

II. A Deeply Entrenched Public Policy Goal is to Keep Individuals Self-Sufficient by Encouraging Them to Save for Education, Medical Needs, and Retirement and Help Prevent Them from Requiring Public Assistance.

Increasing personal savings is a critical public policy goal. Households need savings to cope with unforeseen disruptions to their income and unanticipated consumption needs. Many older households need to supplement pension income and social security with accumulated wealth to maintain an adequate standard of living. This is especially true due to the skyrocketing costs of medication.⁵⁰ Prices for 25 top Medicare Part D drugs have increased by an average of 226 percent since they first entered the market, greatly exceeding the corresponding rate of general inflation.⁵¹

⁴⁹ Christian E. Weller, Joelle Saad-Lessler, Tyler Bond, Still Shortchanged: An Update on Women's Retirement Preparedness, National Institute on Retirement Security Report, May 2020.

⁵⁰ SB Dusetzina, RJ Besaw, CC Whitmore CC, et al. Cost-Related Medication Nonadherence and Desire for Medication Cost Information Among Adults Aged 65 Years and Older in the US in 2022. *JAMA Netw Open*.2023;6(5):e2314211.

⁵¹ Leigh Purvis, Prices for Top Medicare Part D Drugs Have More Than Tripled Since Entering the Market, AARP Public Policy Institute, August 10, 2023.

Higher savings is also important to younger households because data indicates that income will be insufficient for retired Americans.⁵²

- A 2012 study by the Urban Institute estimated that 30 to 40 percent of baby boomers (those born from 1946 through 1964) will not have enough income at age 70 to replace 75 percent of their pre-retirement earnings, a common standard for judging income adequacy in retirement.
- The Center for Retirement Research's National Retirement Risk Index provides a measure of the percentage of working-age American households at risk of being financially unprepared for retirement. The index indicates that the proportion of households facing a decline in their standard of living in retirement increased from 30 percent in 1989 to 52 percent in 2013.

The importance of savings as a public policy is evident by the numerous provisions in the Internal Revenue Code that encourage household saving for tuition, home ownership, and retirement. Traditional IRAs and employer-sponsored 401(k), 403(b), and 457 plans allow deductions from income, resulting in lower taxes for the year of contributions. Income and interest are accumulated tax-free and are only taxed when amounts are distributed at retirement. After-tax money invested in a Roth IRA will not be subject to any tax when the money is

⁵² John Scott, How States are Working to Address the Retirement Savings Challenge, Pew Charitable Trusts Report, June 1, 2016.

withdrawn for retirement. Other vehicles specifically implemented by the government to encourage saving include flexible spending accounts, health savings accounts, 529 plans, and mortgage interest deductions.

Savings provides a financial safety net to help pay for life's uncertainties and emergencies and increases feelings of security and peace of mind. Savings help finance substantial purchases such as a children's education, home, automobiles, medical bills, and vacations. Savings is a major factor in determining how and when individuals can retire. Lack of retirement savings results in dire circumstances for many individuals, forcing them to forgo basic needs, such as transportation, food, and medicine. Accordingly, increasing personal savings is an extremely important public policy goal.

III. Alimony Need is Determined by All Factors in G.L. c. 208, Section 53(a), Not Spending at the Time of Divorce.

As explained (see *supra* at 11-15), the intent of the 2011 Alimony Reform Act was to provide more specificity on how to set both the amount and duration of alimony. More specificity would reduce inconsistency among alimony orders and encourage parties to negotiate settlements. In furtherance of its intent, the legislature set forth factors and, for the first time, a formula to consider in setting the amount of alimony. Importantly, “[t]he Act makes no change in the fundamental purpose of alimony, which is to provide for post divorce economic

support of a spouse who was financially dependent during the marriage.” Hassey v. Hassey, 85 Mass. App. Ct. 518, 524 (2014) citing Gottsegen v. Gottsegen, 397 Mass. 617 , 623 (1986). See G.L. c. 208, §48.

G.L. c. 208, §53(a) provides the factors the court “shall” consider in determining the amount and duration of support:

- the length of the marriage;
- age of the parties;
- health of the parties;
- income, employment, and employability of both parties, including employability through reasonable diligence and additional training, if necessary;
- economic and non-economic contribution of both parties to the marriage;
- marital lifestyle;
- ability of each party to maintain the marital lifestyle;
- lost economic opportunity as a result of the marriage;
- and such other factors as the court considers relevant and material.

None of the enumerated factors above includes “spending of the parties.”

The next section, §53(b), sets forth the formula for setting the amount of alimony:

“the amount of alimony should generally not exceed the recipient's need or 30 to 35 percent of the difference between the parties' gross incomes established at the time of the order being issued.”

Like §53(a), “spending of the parties” is not included in this section. Accordingly, an interpretation that the amount of alimony is determined by a recipient’s expenses does not comport with the statutory language. See Cavanagh, 490 Mass. at 405.

Rather than focusing on expenses, the legislature expressly set forth a formula based on the parties’ income. It is no coincidence that the 30/35% formula⁵³ in §53(b) tracks Judge Ginsburg’s informal “a third/a third/a third” formula that had guided parties and judges for decades (see *supra* at 12). Judge Ginsburg was a strong advocate for an income-based approach to both child support and alimony because it is self-evident that “[t]he needs of the parties will have to be adjusted in accordance with the income.”⁵⁴

Massachusetts courts have embraced the reasonableness of the 30/35% income formula. One of the first cases interpreting this section is Hassey v. Hassey, 85 Mass. App. Ct. 518 (2014). In a decision written by Justice Peter Agnes, the court held that, “[t]he Legislature’s decision to use the emphasized word ‘or’ in

⁵³ Because of subsequent changes in the tax law, the 30/35% formula now equates to 21/30% depending on the payor’s income. See Bello Tax Chart.

⁵⁴ Ginsburg, *supra* note 5 and note 8.

[Section 53(b)] means that, ‘except for reimbursement alimony or circumstances warranting deviation for other forms of alimony,’ an alimony award that is equivalent to thirty to thirty-five percent of the difference between the parties’ gross incomes as determined when the order issues will be deemed reasonable and lawful. G.L. c. 208, §53(b).” Id. at 525.⁵⁵ An interpretation that an alimony order between 30% and 35% of the income differential between the parties is presumptively reasonable aligns with the statutory language taken as a whole and the purpose of the statute to provide predictability and consistency. See Cavanagh v. Cavanagh, 490 Mass 398, 405 (2022).

In determining “need” where there is an ability to pay, it is well settled that “the recipient spouse's need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage.” Id. at 408 quoting Young v. Young, 478 Mass. 1, 6 (2017), quoting Pierce v. Pierce, 455 Mass. 286, 296 (2009). This Court specifically noted in Young that the trial judge in the higher-income case “appropriately recognized that ‘the parties’ needs expanded in accordance with the increasingly available income’ during the marriage....” Id. at 7.

⁵⁵ The reasons for deviations are set forth in §53(e). No enumerated reason states that a party’s expenses are a reason to deviate from the 30/35% formula.

Reiterating the Young/Pierce predivorce lifestyle standard in the Cavanagh decision, this Court explained: “Absent good reason, in a long[-]term marriage, there is no justification for the life-style of one spouse to go down while the other remains high.” Goldman v. Goldman, 28 Mass. App. Ct. 603, 611 (1990).” Cavanagh, 490 Mass. at 408. Cavanagh expressly rejected the supporting spouse’s argument that alimony should be defined by the current expenses of the caregiver: “In light of this caselaw, contrary to the implication made by the father, a recipient spouse’s need is not defined as an amount required to maintain a former spouse at a subsistence level based on current reported expenses.” Id. at 408 note 6. Although the Act created express guidelines to aid judges in fashioning alimony awards, “it [did] not alter the principle that the central issue relevant to a financial award is the dependent spouse’s ‘need for support and maintenance in relationship to the respective financial circumstances of the parties.’” Hassey, 85 Mass. App. Ct. at 524-525, quoting Partridge v. Partridge, 14 Mass. App. Ct. 918, 919 (1982).

Higher-income payors such as Mr. Openshaw (“Husband”) have seized on both the term “marital lifestyle” in §53(a) and the conjunction “or” in §53(b) to argue that their spouses who took on the caregiving role for the family should not receive anything more than their exact spending predivorce or should not receive any alimony at all because they don’t “need” it. Such arguments fail. The legislature’s inclusion of the word “shall” in §53(a) requires a judge to consider all

eight specified factors in that section, not just the two mentioning marital lifestyle. Cavanagh, 490 Mass. at 407. Included in the other six are factors that promote alimony for long-term caregivers, including “lost economic opportunity as a result of the marriage.” See D.B. v. J.B., 97 Mass. App. Ct. 170, 177 (2020) (“a dependent spouse’s ‘need’ for postdivorce support is but one of the many factors to be considered by the judge in fashioning an alimony order. G.L. c. 208, §53 (b).”). See also Rosenberg v. Rosenberg, 33 Mass. App. Ct. 903, 904 (1992) (in a large marital estate, “need, even as related to station in life, recedes as a consideration....”).⁵⁶

In D.B., the husband-payor was the primary wage earner during the marriage, and the wife made significant noneconomic contributions that permitted the husband to focus on his career. Id. at 172. The well-heeled payor argued that the Family Court's alimony order that constituted 34% of payor’s income was an abuse of discretion because it exceeded the wife’s needs. Id. at 177. The court rejected his argument: “[G]iven the husband's substantial ability to pay, and the wife's limited income and stated need for support, the judge permissibly determined that the wife

⁵⁶ In Rosenberg, the court rejected the wealthy payor’s argument that the caregiver’s needs could be met with income from capital assets. “The answer to that point may be King Lear's cry, ‘O, reason not the need!’ Shakespeare, King Lear, Act II, sc. 2.” Id. at 903.

needed the alimony in order ‘to maintain the lifestyle she enjoyed prior to the termination of the marriage.’ Young, 478 Mass. at 7. By contrast, an award on these facts that focused on need for bare necessities alone would have produced a material disparity in the parties' post divorce lifestyles.” D.B., 97 Mass. App. Ct. at 176-77. See Sampson v. Sampson, 62 Mass. App. Ct. 366, 370 (2004) (“Where, as here, the judge's financial disposition leaves one party (the wife) presently in economically straitened circumstances while the other party (the husband) is virtually guaranteed continued enjoyment of the secure, comfortable marital lifestyle, the order for alimony cannot stand.”).

An alimony order limited to the party’s spending at the time of divorce deepens the material disparity in the parties’ economic positions post-divorce. As in child support cases, where children are entitled to participate in the non-custodial parent’s higher standard of living post-divorce when available resources permit, Brooks v. Piela, 61 Mass. App. Ct. 731, 737 (2004), “[s]o, too, in calculating alimony it is appropriate to view the need of the recipient spouse in light of the affluence of the family as a whole, keeping in mind the ability of the other spouse to pay.” D.B., 97 Mass. App. Ct. at 176.

Unfortunately, a payor’s focus on recipient’s expenses to determine alimony is now commonplace. Appellate cases, published and unpublished, are riddled with the argument that economically dependent caregiving spouses do not “need”

alimony.⁵⁷ Arguing “need” needlessly results in increased court time, increased legal expenses,⁵⁸ and excessive scrutiny of caregiver’s expenses. Caregivers’ personal lives, through their expenses, are an open book for the payor to comb through, question, and demean.⁵⁹ Caregivers are subjected to endless hours of withering examination in depositions and at trial over often miniscule expenses. Arguing need provides opportunities for spouses to subject the caregivers to abusive litigation or continue their coercive control over them.⁶⁰ These tactics harm caregivers, such as the Wife here,⁶¹ and cost caregivers thousands of dollars in

⁵⁷ To name just a few, Rosenberg, 33 Mass. App. Ct. 903 (1992) (“his contention that the wife does not ‘need’ alimony”); D.B. v. J.B., 97 Mass. App. Ct. 170 (2020) (“he argues, the wife does not need the amount of alimony that the judge ordered him to pay”); Macri v. Macri, 96 Mass. App. Ct. 362 (2019) (husband claims the unallocated support order is excessive...and “substantially exceeds the needs of the wife and the child. We disagree.”).

⁵⁸ A related issue to need is the ever-rising costs of legal expenses that caregivers are faced with to obtain a divorce. See MFAC, Working Report *supra* note 1, at 11-20; 2017 Massachusetts Access to Justice Access to Attorneys Report, May 2017, at 4; Massachusetts Access to Justice Access to Attorneys 2022 Report on Fee Shifting in Family Law Litigation (May 2022) at 3.

⁵⁹ For example, Husband labels Wife’s inclusion of savings on her Financial Statement as “Wife’s Slush fund theory of savings” and “a blanket demand for more money.” Appellant Reply Brief at 17.

⁶⁰ Bills to curb both coercive control and abusive litigation were introduced in the current session of the state legislature. H.1399, An Act Relative to Controlling and Abusive Litigation, and H. 4115, An Act to Prevent Abuse and Exploitation received over 7 hours of testimony from over 60 court users in the September 12, 2023 Massachusetts joint Judiciary Committee hearing.

⁶¹ Financial abuse is a common tactic used by abusers to control or harm the other party. In this case, Husband engaged in financially abusive behavior including: controlling the parties’ finances; refusing to pay court-ordered child support and alimony, failing to provide health insurance, children’s tuition and related

unnecessary legal fees, depleting them of money that could be used for their needs or financial security. The willful financial depletion of the marital estate and humiliation of caregivers cannot be the results the legislature intended by including the word “need” in the Act.

The Gender Bias Study expressed much concern about the unequal power between moneyed-spouses and caregivers and the impact of abuse on the caregivers and their children.⁶² The thoughtful dissent by Justice Ruth Abrams⁶³ in Bell v. Bell, 393 Mass. 20, 25-28 (1984), a case about co-habitation, explains why judicial supervision is so critical in caregivers support cases:

“Although wives today may be less economically dependent on their husbands than was the case in the past, it remains true that the typical alimony recipient is a woman who has sacrificed her earning capacity to her marriage and who, as an equitable and practical matter, must look to her former husband for financial support following a separation or divorce. Such women have little bargaining power and to a large extent must rely on judicial supervision to ensure that their entitlement to support is not made contingent on unjust and unreasonable conditions.”

expenses; forcing Wife to go back to court for contempt twice to compel payment; removing \$50,000 from a joint account; taking away cars, phones, and credit cards when Wife or children didn’t do as he wanted; and cancelling Wife’s credit card.

⁶² Gender Bias Study, *supra* note 30, at 749.

⁶³ The first female justice of this Court.

Id. at 26. The multiple dissents in Bell forty years ago exemplify judicial recognition of the need to help caregivers level the financial playing field when setting the alimony amount.

A presumptive income-based formula to determine alimony most mirrors the marital lifestyle and levels the financial playing field at the time of divorce.

Assuming the court establishes need by considering all the factors in §53(a), an income-based presumptive formula that sets alimony between 30% to 35% has many benefits. It:

1. Increases predictability and consistency of alimony orders, which is the stated intent of the Act.
2. Promotes negotiations of settlements, thereby reducing (a) litigation expenses, which are becoming increasingly less affordable, especially to the less-moneyed spouse,⁶⁴ (b) emotional costs to the parties and their children as cases drag on, and (c) court time, decreasing backlogs in the overburdened Family Court.
3. Disincentivizes both parties from manipulating expenses at the time leading up to the divorce judgment to show either increased spending (as Husband

⁶⁴ See *supra* at note 58.

alleges against Wife in this case), or reduced spending (as Husband did here by limiting Wife's access to funds⁶⁵).

4. Encourages the less-moneyed spouse to save and spend judiciously at a time when her future income and marital assets will be decreased.
5. Uses the same measure as the child support guidelines to determine child support, i.e., income.
6. Reduces post-separation abuse by a spouse who uses the court to harm the other party financially or emotionally.

Based on statutory language, judicial interpretation, and legislative intent to make alimony orders more predictable and consistent as described above, it is reasonable to conclude that alimony is not to be measured by spending of the party, but rather by a presumptive income-based formula that most mirrors the marital lifestyle and levels the economic playing field at the time of divorce.

IV. Savings as an Alimony Need Aligns with Massachusetts Caselaw Principles and Public Policy, and Curbs the Post-Divorce Economic Imbalance between a Supporting Spouse and a Caregiver.

As Appellee explains in her brief, courts in other jurisdictions have overwhelmingly affirmed the inclusion of savings as an alimony need.⁶⁶ Florida is

⁶⁵ See *supra* at note 61.

⁶⁶ At minimum, these states have permitted alimony savings: California, Colorado, Iowa, Illinois, Minnesota, New Jersey, North Carolina, Utah, and Virginia.

the only outlier when, after years of including a savings component, it changed its position in Mallard v. Mallard, 771 So. 2d 1138 (Fla. 2000), but with a strong dissent.⁶⁷

Although technically it is an issue of first impression in Massachusetts, saving as an alimony need is a logical extension of well-settled caselaw. “The recipient spouse’s need for support is generally the amount needed to allow the spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage.” Young, 478 Mass. at 6. Accordingly, if savings were part of a marital lifestyle, it is self-evident that it should be a component of alimony.

It is also a longstanding principle in Massachusetts caselaw that “[a]bsent good reason, in a long[-]term marriage, there is no justification for the life-style of one spouse to go down while the other remains high.” Cavanagh, 490 Mass. at 408 quoting Goldman, 28 Mass. App. Ct. at 611. As explained (see supra at 15-23), a dependent spouse without a savings component to alimony will eventually be at a standard of living far below that enjoyed during the marriage. The ability to save would ameliorate the imbalance:

“After a divorce, both parties should be left in the same or as similar a financial position as possible; no one party should be placed at a financial

⁶⁷ We agree with Appellee’s brief at p. 28 that the comment by the 1998 Hawaii court is dictum only.

advantage at the expense of the other. While it is difficult to balance all the equities, a court should look at a party's future ability to acquire assets.

Existing savings and investments acquired during the marriage can easily be equally divided, and the same result should occur for the division of the 'ability to save or invest' when such an ability existed during the marriage.”⁶⁸

Without a savings component, the non-custodial working parent has the opportunity to continue to accrue retirement savings post-divorce, but the caregiver often does not. Without a savings component, the caregiver will not be able to save for future large replacement needs such as a car, a roof, and a furnace. Ultimately, the caregiver is forced to either forego an essential need or spend down their assets (if any). If there is a material change in circumstances, she has to return to court for another costly, lengthy modification proceeding, which further burdens an already overburdened court. Indeed, modification and contempt claims comprise the bulk of the Family Court filings.⁶⁹

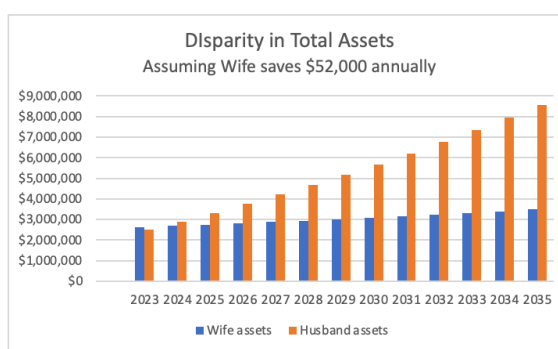
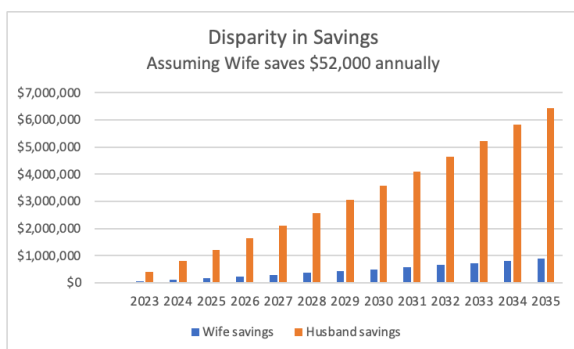
In this case there is no question that saving was part of the marital lifestyle. There is also no question that the economic imbalance between the parties, which will likely occur even with a saving component because the Wife had taken on the

⁶⁸ Angelo Sarno, Savings/Investing as a Component in Awarding Spousal Support, NJFL, March/April 1997 at 89.

⁶⁹ MFAC, Working Report, *supra* note 1, at 47-49.

caregiving role for the family (see supra at 15-23), will only be made greater if she is not allowed the ability to save post-divorce. The annual alimony amount, including a surplus/savings line item of \$52,000,⁷⁰ equals 19.53% of Husband's gross income. If this Court eliminates the surplus/savings component, alimony is reduced to only 15.64% of Husband's income.⁷¹

If this Court affirms the alimony order, Husband still has an annual surplus of \$373,705, seven times greater than the Wife's \$52,000 surplus. By 2035, Husband's retirement age (assuming all things equal), Wife will have a total of only \$900,000 in savings, while Husband would have \$6.5 million, a benefit of over \$5.5 million to Husband. If Wife is not allowed to save, her savings will be \$0 in 2035 while Husband's will be a whopping \$7.4 million.⁷²



⁷⁰ The Wife's financial statement included \$1,000 per week in savings as a need for alimony. FS 141.

⁷¹ These calculations are based on figures in the Findings of Fact and Rationale in Appellant's brief: Payor's annual gross income: \$1,586,728 (Findings, at p. 53, ¶ 14); Payor's annual expenses (including \$312,000 in alimony and child support): \$579,332 (Findings, at p. 56, ¶ 35); and Payor's taxes, assuming a 40% tax rate: \$634,691.

⁷² See Addendum infra at p. 43 for analysis.

Surely, this cannot be the result the legislature intended or that a court of equity finds fair and consistent with Massachusetts caselaw.

Parties, especially long-term caregivers who are in predictably vulnerable economic circumstances, should be encouraged, not discouraged, to save and to spend wisely.⁷³ This is not the case when alimony is determined by expenses. On the contrary, the current system discourages savings. There is no line item on the Massachusetts Financial Statement for savings, and caregivers report they are not counseled to include savings as a need.⁷⁴ Rather, they are counseled from the very beginning to “use it or lose it.” In other words, if you don’t spend money, your “need” will be reduced from the very start with temporary orders or the divorce judgment, or in a subsequent modification action. A caregiver’s ability to save support for her children’s future education needs was used against her in a modification action to decrease support. Further, she was admonished by her own counsel for keeping a budget.⁷⁵

⁷³ Paula Pant, How much should I save each month, TIAA Personal Finance 101. Financial planners promote the 50/30/20 rule of thumb: at least 20% of income should go towards savings, a maximum of 50% toward necessities, and the remaining 30% toward discretionary items.

⁷⁴ Adding a line-item for savings on the court’s financial statement would legitimize savings as a non-discretionary expense.

⁷⁵ MFAC, Working Report *supra* note 1, at 48.

As the court stated *In re Marriage of Weibel*, 965 P.2d 126, 129-130 (Colo. App. 1998), when upholding savings as a need:

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

Though there was a pattern of predivorce savings in several cases in other jurisdictions, savings should be an essential element of alimony regardless of whether the parties saved during their marriage. No individual should be deprived of a right to save for the sole reason that they hadn’t prioritized savings during their marriage. Spending habits change, especially when a caregiver who put aside her future earning and saving potential to assume the caregiving role in the family is faced with the economic consequences of divorce. By legitimizing savings as a need, courts are promoting the public policy of savings “which benefits both the individuals concerned and society as a whole.” *In re Marriage of Drapeau*, 93 Cal. App. 4th 1086, 1096-97 (2001).

CONCLUSION

For the foregoing reasons, we respectfully request the Court to affirm the Judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure we hereby certify that the forgoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: M.R.A.P 16 (a)(13) (addendum); M.R.A.P 16 (e) (references to the record); M.R.A.P 18 (appendix to the briefs); M.R.A.P. 20 (form and length of briefs, appendices, and other documents); and M.R.A.P 21 (redaction). We further certify that the foregoing brief complies with the applicable length limitation in M.R.A.P 20 because it is produced in the proportional font Times New Roman at size 14, and contains fewer than 7,500 total non-excluded words as counted using the Word-count feature of Microsoft Word.

s/Lori S. Johnson and Margaret J. Palladino
Lori S Johnson
Margaret J. Palladino

CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. 13(e), we hereby certify that on this date we filed this Amicus Brief via electronic service through efileMA.com and via separate email to jowens@lynchowens.com and shaunbspencer@gmail.com.

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Dated: November 20, 2023

Addendum 1: Pro Forma Alimony “Savings”

	2023	2024	2025	2026	2027	2028	2029	2030	2031	2032	2033	2034	2035
Annual													
Wife Total Alimony	\$261,040	\$261,040	\$261,040	\$261,040	\$261,040	\$261,040	\$261,040	\$261,040	\$261,040	\$261,040	\$261,040	\$261,040	\$261,040
Wife "Savings" (plus interest)	\$54,080	\$56,243	\$58,493	\$60,833	\$63,266	\$65,797	\$68,428	\$71,166	\$74,012	\$76,973	\$80,052	\$83,254	\$86,584
Husband Gross Income	\$1,586,728	\$1,586,780	\$1,586,832	\$1,586,884	\$1,586,936	\$1,586,988	\$1,587,040	\$1,587,092	\$1,587,144	\$1,587,196	\$1,587,248	\$1,587,300	\$1,587,352
Husband expenses	\$579,332	\$579,332	\$579,332	\$579,332	\$579,332	\$579,332	\$579,332	\$579,332	\$579,332	\$579,332	\$579,332	\$579,332	\$579,332
Husband taxes	\$634,691	\$634,691	\$634,691	\$634,691	\$634,691	\$634,691	\$634,691	\$634,691	\$634,691	\$634,691	\$634,691	\$634,691	\$634,691
Husband "Savings"	\$372,705	\$372,757	\$372,809	\$372,861	\$372,913	\$372,965	\$373,017	\$373,069	\$373,121	\$373,173	\$373,225	\$373,277	\$373,329
Husband "Savings" (plus interest)	\$387,613	\$790,731	\$1,209,973	\$1,645,985	\$2,099,437	\$2,571,027	\$3,061,482	\$3,571,554	\$4,102,029	\$4,653,723	\$5,227,485	\$5,824,197	\$6,444,778
Cumulative													
Wife "savings" (interest)	\$54,080	\$110,323	\$168,816	\$229,649	\$292,915	\$358,711	\$427,140	\$498,305	\$572,318	\$649,290	\$729,342	\$812,596	\$899,179
Husband "Savings" (plus interest)	\$387,613	\$790,731	\$1,209,973	\$1,645,985	\$2,099,437	\$2,571,027	\$3,061,482	\$3,571,554	\$4,102,029	\$4,653,723	\$5,227,485	\$5,824,197	\$6,444,778
Additional "Savings" to husband	\$333,533	\$680,407	\$1,041,157	\$1,416,336	\$1,806,522	\$2,212,316	\$2,634,342	\$3,073,248	\$3,529,711	\$4,004,433	\$4,498,143	\$5,011,602	\$5,545,599

Assumptions: 4% annual interest rate; 40% tax rate