

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-13473

AMY SUE OPENSHAW,
Plaintiff-Appellee,

v.

GLEN ROMNEY OPENSHAW,
Defendant-Appellant.

ON APPEAL FROM ORDER OF
THE PLYMOUTH PROBATE AND FAMILY COURT

Brief for Amicus Curiae
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In Support of Plaintiff-Appellee

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Other Authorities

American Assoc. of Univ. Women, *The Simple Truth About the Gender Pay Gap* (Fall 2018 ed.),
<https://www.aauw.org/app/uploads/2020/02/AAUW-2018-SimpleTruth-nsa.pdf>..... 31

American Assoc. of Univ. Women, *Women & Retirement*,
<https://www.aauw.org/issues/equity/retirement/>.....29, 30

Charles P. Kindregan, Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 Suffolk U. L. Rev. 13 (2013).....12, 13, 16

Grace Enda & William Gale, Brookings Gender Equity Series, *How does gender equality affect women in retirement?* (July 2020),
https://www.brookings.edu/articles/how-does-gender-equality-affect-women-in-retirement/#:~:text=https://nationalpartnership.org/wp-content/uploads/2023/02/americas-women-and-the-wage-ap.pdf&utm_source=Women%20are%20more%20likely%20to,increasingly%20remaining%20in%20the%20workforce)..... 29

Jessica Hall, *Gray Divorce Can Be Financially Devastating—Especially for Women*, Morningstar (Sept. 2, 2023),
<https://www.morningstar.com/news/marketwatch/20230902357/gray-divorce-can-be-financially-devastating-especially-for-women> 36

Lela Nargi, *Divorce Can Wreck a Woman’s Financial Future. Here’s How to Rebuild*, N.Y. Times (May 17, 2023) 32

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Michael Madowitz, Alex Rowell, and Katie Hamm, *Calculating the Hidden Cost of Interrupting a Career for Child Care*, Center for American Progress (June 21, 2016), <https://www.americanprogress.org/article/calculating-the-hidden-cost-of-interrupting-a-career-for-child-care/> 30, 32

Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, Pew Research Center (Mar. 1, 2023), <https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/> 30

Rebecca Glauber, *Trends in the Motherhood Wage Penalty and Fatherhood Wage Premium for Low, Middle, and High Earners*, 55 *Demography* 1663-1680 (2018), https://www.jstor.org/stable/45048028?seq=1#metadata_info_tab_contents 31

STATEMENT OF INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the Women's Bar Association of Massachusetts, Inc. (WBA), a professional association of approximately 1,500 Massachusetts attorneys, judges, and policy makers that has as its mission achieving the full and equal participation of women in all aspects of society. For over four decades, the WBA and many of its members have actively advocated for and worked on issues of fairness, equity, and justice in the context of family law issues, including submitting at least three previous amicus briefs in cases involving the issue of alimony. The WBA believes it is important to recognize the particular role many women play in a family, even today, and the real economic consequences that alimony laws can have on women after divorce. Overall, the WBA has a strong interest in protecting the interests of women in the family law context given the historic and continuing discrimination they face in society, and it has relevant knowledge and expertise concerning the impact of alimony awards on the post-divorce economic condition of women. The WBA believes it can provide this Court with a useful perspective on the issues in this case.

DECLARATION

In accordance with Rule 17(c) of the Rules of Appellate Procedure, the signers of this brief make the following declaration:

(A) No party nor party's counsel authored the brief in whole or in part;

(B) No party nor party's counsel contributed money that was intended to fund preparing or submitting the brief;

(C) No person or entity other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief; and

(D) Neither the amicus curiae nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

SUMMARY OF THE ARGUMENT

Women have always been, and presumably remain, the primary recipients of alimony. *See* pages 27-28. Where, as in this case, a couple decides that one partner, usually a woman, will step away from a career, alimony awards can and should include money for savings, particularly

where savings was part of the marital lifestyle. *See* pages 12-18. Overall women face daunting challenges when it comes to retirement income and are strongly disadvantaged versus men, particularly where, as in this case, the wife has curtailed her professional activities and career to care for the home and family. As a result, women as a group face a “retirement savings gap.” *See* pages 28-34. An alimony award that does not include savings for retirement denies women the ability to maintain the marital lifestyle through retirement, thus failing to strike the “fair balance of sacrifice” required by Massachusetts law in the separation of a couple’s finances. *See* pages 27-37.

The factors delineated in the alimony statute post-reform for determination of the amount of alimony strongly suggest that accounting for family choices and economic realities must be part of alimony awards such that “savings alimony” should be awarded – or, at the very least can be awarded. *See* pages 10-11. The vast majority of the eleven jurisdictions that have addressed this issue have held that money for savings can be part of an alimony award. *See* pages 18-27.

ARGUMENT

This family law divorce case presents two issues: (1) whether the Family and Probate Court's consideration of marital spending rather than post-separation spending and inclusion of money for savings in its determination of the amount of alimony was proper and permissible and (2) whether the trial court judge's division of the marital estate was proper. This brief addresses only the first question, in response to the following request for amicus briefs by this Court:

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; whether, for purposes of determining alimony, a spouse's need may include "savings alimony" and charitable contribution components.

The WBA urges this Court to hold that general term alimony can and should include amounts for savings ("savings alimony") by the recipient spouse, particularly where savings were part of the married couple's pre-divorce lifestyle, as the judge found they were in this case. This Court should make clear that determination of the amount of alimony awards must include consideration of the broader set of economic factors articulated in the Alimony Reform Act, including "lost economic

opportunity as a result of the marriage," "employability of both parties," the "economic and non-economic contribution of both parties," the "marital lifestyle," and the "ability of each party to maintain the marital lifestyle." M.G.L. c. 208, § 53(a). Together, these factors take into account the long-term economic impact of decisions made during the marriage and make clear the importance of including savings as a component of an alimony award.

Such a decision is permissible under the Massachusetts alimony statute, as amended by the Alimony Reform Act in 2011; is consonant with the overwhelming majority of decisions regarding "savings alimony" from other jurisdictions; and is important for the post-divorce financial condition of the recipient, who is usually a woman, often one who stepped back professionally to care for the family, thereby reducing the amount of money she will have in retirement savings.

I. INCLUDING SAVINGS IN ALIMONY AWARDS IS PERMISSIBLE UNDER MASSACHUSETTS LAW AND IN LINE WITH THE MAJORITY OF JURISDICTIONS THAT HAVE ADDRESSED THIS ISSUE.

A. The Massachusetts Alimony Statute, Historically and As Amended, Permits Inclusion of Money for Savings in Alimony Awards.

The “fundamental purpose of alimony ... is to provide for postdivorce economic support of a spouse who was financially dependent during the marriage.” *D.B. v. J.B.*, 97 Mass. App. Ct. 170, 175 (2020) (quoting *Hassey v. Hassey*, 85 Mass. App. Ct. 518, 524 (2014)). In 2011, the Alimony Reform Act was enacted. Among other things, the new statute delineates four types of alimony – general term alimony, rehabilitative alimony, reimbursement alimony, and transitional alimony – and sets presumptive durational limits for general term alimony. *See* M.G.L. c. 208, §§ 48, 49. *See generally* Charles P. Kindregan, Jr., *Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support*, 46 Suffolk U. L. Rev. 13 (2013). “General term alimony,” which is the type of alimony at issue in this case, is defined as “the periodic payment of support to a recipient spouse who is economically dependent.” M.G.L. c. 208, § 48.

Notwithstanding the significant changes brought by the Act, "it [did] not alter the principle that the central issues 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.'" *Id.* See M.G.L. c. 208, § 48 (defining alimony as "the payment of support from a spouse, who has the ability to pay, to a spouse in need of support for a reasonable length of time, under a court order"). See *generally Reforming Alimony*, 46 Suffolk U. L. Rev. at 21 (concluding that significant judicial discretion remains post-reform). The concept of "need" plays a role in both the determination of whether to award alimony and the amount of alimony. For both, the question is how "need for support and maintenance" is defined.

In the context of awarding alimony, Massachusetts courts have repeatedly found, including after alimony reform, that "need" must be defined in relation to the "lifestyle" the parties enjoyed during the marriage. As the Appeals Court recently emphasized, "[w]here the supporting spouse has the ability to pay, '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.” *D.B.*, 97 Mass. App. Ct. at 175 (quoting *Young v. Young*, 478 Mass. 1, 6 (2017)); see *Johnston v. Johnston*, 38 Mass. App. Ct. 531, 537 (1995); *Zeh v. Zeh*, 35 Mass. App. Ct. 260, 267 (1993). Where the marital estate is large, “need, even as related to station in life, recedes as a consideration.” *Rosenberg v. Rosenberg*, 33 Mass. App. Ct. 903, 904 (1992). Thus, even when both parties can provide for their basic necessities, alimony may still be awarded to provide a continuation of the pre-divorce marital lifestyle, to the extent possible.

Once a determination is made that alimony should be awarded, the next question is what the amount should be. This juncture is the point of dispute in this case. That is, Defendant-Appellant (“Husband”) does not challenge that Wife should receive alimony, only whether the amount of alimony should include money for savings and charitable contributions and whether the amount should be based on consideration of only post-separation spending or spending during the marriage.

Relying heavily on a misapplication of the decision in *Cooper v. Cooper*, 62 Mass. App. Ct. 130 (2004), a pre-reform case, Husband argues for a narrow definition of need and marital lifestyle, one that focuses, only or primarily, on spending and consumption and does not include savings and charitable contributions. This narrow definition runs contrary to current Massachusetts law.

Wife sufficiently addresses the flaws in Appellant's analysis of *Cooper*, see Brief For Appellee Amy Sue Openshaw ("Wife's Brief"), at 24-25, which will not be repeated here. Importantly, though, neither Wife nor Husband acknowledge the following brief mention of "savings for the future" contained in that case, a mention that supports the position that money for savings can be part of an alimony award in certain circumstances:

To the extent that the amount of the award relies on the judge's finding that it was made in part to "ensure future continuity of the former marital station," it also was improper. **An alimony award that exceeds current need, so as to permit accumulation of assets or savings for the future, may be appropriate** only when that award is made pursuant to G.L. c. 208, § 34.

Cooper, 62 Mass. App. Ct. at 140 (emphasis added).

On first review, the statement might suggest that “savings for the future” falls outside of “need.” That fact that this case involved a complaint for modification and not an initial divorce clarifies that that is not a correct reading of the court’s words. The reference to “current need” distinguishes a determination of need based on the “marital lifestyle” from need based on a post-marital lifestyle. Thus, the *Cooper* decision supports the view that an alimony award may include “savings for the future” as long as it is made pursuant to the alimony statute.

Further, even if, *arguendo*, savings for retirement was not an appropriate element of an alimony award before the 2011 Alimony Reform Act, the new statutory language makes clear that it is appropriate today. Before alimony reform, an award of alimony presumptively continued through the payor’s retirement, thus effectively eliminating the recipient’s “need” to separately save. *See Pierce v. Pierce*, 455 Mass. 286, 297-298 (2009); *see also Reforming Alimony*, 46 Suffolk U. L. Rev. at 25-26. Since alimony reform, general term alimony presumptively ends upon payor’s attainment of full retirement age and often ends significantly earlier. *See*

M.G.L. c. 208, § 49 (setting forth duration and termination periods for general term alimony). Thus, where once there was not a “need” to include money for savings as an element of an alimony award, now there is.

The factors listed in the alimony statute as amended by the Alimony Reform Act are consistent with this interpretation of “need.” The statute provides:

In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider: 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.

M.G.L. c. 208, § 53(a). Several of these factors are directly relevant to the ability to save for retirement: “lost economic opportunity as a result of the marriage,” “employability of both parties,” the “economic and non-economic contribution of both parties,” the “marital lifestyle,” and the “ability of each party to maintain the marital lifestyle.” Although these terms are not defined, they must mean something. *See Souza v. Registrar*

of Motor Vehicles, 462 Mass. 227, 233 (2012) (“An interpretation of a statute should not fail to give effect to any of its terms or render them ‘inoperative or superfluous.’”) (citation omitted). Looking at the statute as a whole makes clear that “marital lifestyle” means more than simply spending and consumption and can include savings as a component. If spending and consumption were the only determinant of the amount, then the statute would not need to include any other factors. Further, if the Legislature had intended for courts to consider only spending and consumption, it could have expressly used those terms, instead of “marital lifestyle” and the other terms.

B. Nine of the Eleven Jurisdictions That Have Addressed Inclusion of Money for Savings In Alimony Awards Permit It.

As the Wife noted in her brief, among the courts that have addressed the issue presented in this case, the overwhelming majority have held that alimony awards can include savings where savings were part of the parties’ marital lifestyle. Brief For Appellee Amy Sue Openshaw (“Wife’s Brief”), at 26. In addition to the seven states cited in the Wife’s Brief, courts in Iowa and North Dakota have also held that savings can be part of an

alimony award. *See In re Marriage of Stenzel*, 908 N.W.2d 524, 536 (Iowa Ct. App. 2018) (“[R]etirement savings in a reasonable sum may be a part of the needs analysis in fixing spousal support.”); *LaVoi v. LaVoi*, 505 N.W.2d 384, 387 (N.D. 1993) (upholding lower court’s spousal support award, which, among other things, gave the wife “a modest opportunity to plan some retirement savings”). Apart from the two states (Florida and Hawaii) already identified in the Wife’s Brief, at 28 n.8, the WBA has not found any additional jurisdictions in which a court has held that savings cannot be part of an alimony. The cases from states in the majority are instructive and provide a strong basis for this Court to hold that savings can properly be part of an alimony award in appropriate circumstances.

The most recent case of first impression deciding that savings (and charitable contributions) can be part of an alimony award is a 2018 decision rendered by the Court of Appeals of Iowa. *See In re Marriage of Stenzel*, 908 N.W.2d 524. In that case, which, like the case before this Court, involved a long-term marriage, the lower court ordered that the husband, a board-certified pediatrician, pay alimony that included money for charitable

contributions, savings, and gifts to the fifty-five-year old wife who had left the workforce decades earlier when the couple's second child was born and then returned to work only part-time for many years thereafter. After noting that "[t]he issue of donations and retirement savings has been addressed in only a few cases in other states," the Court of Appeals of Iowa concluded that "[o]ur review of those cases suggests that the resolution of the issue is dependent upon whether support is statutorily to be set to meet only basic needs or to the station in life to which the spouse was accustomed." *Id.* at 535. The court explained: "Because [the Iowa alimony statute] requires us to consider the past standard of living of the parties, and not just basic needs or necessities, we conclude – as have other courts with a similar statutory standard – that charitable donations and retirement savings in a reasonable sum may be a part of the needs analysis in fixing spousal support." *Id.* at 536. As such, the court found that it had "no difficulty with [the wife's] expense item of \$500 for retirement savings in light of the parties [sic] significant past history of preserving assets for retirement." *Id.*

In re *Marriage of Stenzel* was approvingly cited earlier this year by the Court of Appeals of Utah. See *Mintz v. Mintz*, 2023 Utah App. 17, ¶25.

In that case, the court reaffirmed its 2003 holding in *Bakanowski v.*

Bakanowski, 2003 Utah App. 357, which the Iowa Court of Appeals had, in turn, cited in its decision In re *Marriage of Stenzel*, 908 N.W.2d at 536. In

Bakanowski, the Court of Appeals of Utah held that

[w]hile the recipient spouse’s need to fund post-divorce savings, investment, or retirement accounts may not ordinarily be factored into an alimony determination, we cannot say that the ability to fund such post-divorce accounts may never be taken into account as part of a needs analysis. The critical question is whether funds for post-divorce savings, investment, and retirement accounts are necessary because contributing to such accounts was standard practice during the marriage and helped to form the couple’s marital standard of living.

2003 Utah App. at ¶16. Utah’s alimony standard, like the alimony standards

of Iowa and Massachusetts, requires the court to consider the parties’

marital lifestyle or standard of living when they were still married. See, e.g.,

Rudman v. Rudman, 812 P.2d 73, 76 (Utah Ct. App. 1991) (“A trial court

must also consider that one of the principal underlying purposes of alimony

is to enable “the receiving spouse to maintain, as nearly as possible, the

standard of living enjoyed during the marriage.”).

Building on both of these decisions, the court in *Mintz* agreed with the wife that the lower court erred in excluding from the alimony award an amount reflective of the couple's historical practice of investing their income. *Mintz*, 2023 Utah App at ¶¶ 16, 28. As in the case before this Court, the wife in *Mintz* argued that that the parties made deposits into investment accounts as a "standard practice" that contributed to their marital "standard of living" and, therefore, she should have received a higher alimony award to be able to continue this practice and maintain her standard of living. *Id.* at 540-541, ¶16. The court agreed. The court first found that the parties' recurring and regular practice of investing substantial amounts of income at least yearly, even if not routine or periodic, was a "standard practice" in the marriage. *Id.* at 541-542, ¶¶ 18-21. The court then held that the parties' investment practice contributed to the marital standard of living, which it defined as "'a minimum of necessities, *comforts*, or *luxuries* that is essential to maintaining a person in customary or proper status or circumstances.'" *Id.* at 542, ¶ 22 (quoting *Howell v. Howell*, 806 P.2d 1209, 1211 (Utah Ct. App. 1991) (emphasis in

original). In so holding, the court noted that “[i]ncluding saved money in the ‘marital standard of living’ ... does not require a party to spend it” *Id.* at 543, ¶ 26. The court further explained:

Our precedent does not exclude prudent saving from the definition of the marital standard of living. Indeed, it would be a perverse state of the law if we, as a rule, always included in an alimony calculation all sums parties spent, even imprudently, but excluded sums wisely saved. ... An understanding of the marital standard of living that is restricted to direct and immediate expenses is simply too limited. Instead, the use of marital funds to cover the parties’ investments and savings—provided it was standard practice during the marriage—is a proper consideration in determining the marital standard of living.

Id. at 543, ¶26. Having so explained, the court concluded:

[T]he district court here did not fully consider how the parties chose to “allocate” their income. ... The parties’ choice to devote a substantial portion of income to investment and savings ... contributed to the parties’ marital standard of living. The court should consider this evidence in determining the amount of investment and savings expenditures to include in its alimony calculations.

Id. at 542, ¶25 (citing *Knowles v. Knowles*, 2022 Utah App. 47 (holding that charitable contributions can be included in alimony where the parties customarily made such contributions during the marriage)).

Similar to these decisions by the courts in Iowa and Utah, the North Carolina Court of Appeals has held not only that courts are permitted to consider the parties' historical pattern of savings in determining the amount and duration of an alimony award, *see Glass v. Glass*, 131 N.C. App. 784, 790 (1998), but also that courts must consider a couple's historical pattern of saving in determining the parties' pre-divorce standard of living, even if the parties' pattern of savings may not be determinative of a claim for alimony, *see Vadala v. Vadala*, 145 N.C. App. 478, 481 (2001). Based on these principles, the Court of Appeals of North Carolina recently reversed a lower court's award of alimony that did not consider savings as part of the marital standard of living in its determinations regarding alimony. *See Myers v. Myers*, 269 N.C. App. 237, 261-263 (2020).

In *Myers*, the wife argued that the alimony award was improper because it considered only her post-divorce actual expenses and not the parties' marital lifestyle, which included a pattern of savings. The result of this failure was that the husband was able to continue to save and invest for retirement after the parties separated, while the wife, whose post-

separation standard of living was reduced, was unable to maintain the same standard of living as established during the marriage, including not being able to maintain the pattern of saving the parties had maintained during the marriage. *Id.* at 262. The court agreed with the wife, rejecting the husband's argument that the trial court was not required to consider the wife's standard of living during the marriage. *Id.* at 260-261. The court first noted that the North Carolina Supreme Court "has made it clear that the 'accustomed standard of living' established during the marriage is 'more than a level of mere economic survival.'" *Id.* at 260-261 (quoting *Rea v. Rea*, 262 N.C. App. 421, 428 (2018) (further citations omitted) ("[Maintenance and support] clearly means more than a level of mere economic survival. ... [I]t contemplates the economic standard established by the marital partnership for the family unit during the years the marital contract was intact. It anticipates that alimony, to the extent it can possibly do so, shall sustain that standard of living for the dependent spouse to which the parties together became accustomed."). Following this analysis, the North Carolina Court of Appeals held that "[w]here the parties have established a

pattern of saving for retirement as part of their accustomed standard of living during the marriage, this expense can be part of the standard of living and should be considered for purposes of alimony." *Id.* at 262.

Importantly, in so holding, the court made clear that savings alimony is not curtailed by a distribution of marital assets that includes a distribution of the results of the parties' historical savings: "We realize the trial court distributed the marital assets accrued during the marriage in the equitable distribution provisions of the order, but that distribution does not negate the need to consider the pattern of savings and investment as a part of the accustomed standard of living during the marriage for purposes of alimony." *Id.*

At times, courts in other states have permitted amounts for savings to be included in alimony awards even in the absence of explicit findings that savings was part of the marital lifestyle. For example, in 1993 the North Dakota Supreme Court held that an alimony award that permitted the wife, who had primarily cared for the parties' five children during their long-term marriage, "a modest opportunity to plan some retirement savings" was not

in error. *LaVoi v. LaVoi*, 505 N.W.2d 384, 387 (N.D. 1993). Unlike in the case before this Court and many of the decided cases discussed in this brief, *LaVoi* did not involve a wealthy family. In that regard, the court noted – in discussing the imposition of permanent, rather than rehabilitative, spousal support – that

[i]n this case, like many others, “when the property is divided between the parties, it is not sufficient to permit each of the parties to have the same standard of living after the dissolution of the marriage as each enjoyed during the marriage.” ... Often, in deciding spousal support, “[t]he determinative factor is the sufficiency of income to permit each party to maintain apart the standard of living enjoyed together.” ... Here, there is not enough total present or anticipated income for each spouse to maintain separately the standard of living that they enjoyed together. ...

Permanent spousal support also need not be limited to the prevention of destitution. As we have already explained, maintenance of a supported spouse’s standard of living is an appropriate consideration, as is balancing the burdens created by separation where it is impossible to maintain two households at the parties’ pre-divorce standard of living. The amount of spousal support awarded recognizes the parties’ disparate earning abilities, allows [the wife] a modest opportunity to plan some retirement savings, and appears to be “an attempt to provide an equitable *sharing of the overall reduction in the parties’ separate standards of living.*”

Id. at 387 (internal citations omitted).

II. INCLUDING MONEY FOR SAVINGS IN GENERAL TERM ALIMONY AWARDS IS NECESSARY TO ADDRESS THE REALITY THAT WOMEN FACE A LIFETIME EARNINGS GAP, TO WHICH FAMILY DECISIONS OFTEN CONTRIBUTE, THAT LEADS TO A RETIREMENT SAVINGS GAP.

The determination of whether to include money for savings in alimony awards will have a disproportionate impact on women because women have always been the primary recipients of alimony and, presumably, have remained so in Massachusetts despite the alimony law's gender neutrality. See Louise Rafkin, *The Paradox of Alimony for Men*, N.Y. Times, Oct. 30, 2021.¹ Women overall face daunting challenges when it comes to retirement income and are strongly disadvantaged versus men, particularly where, as in this case, the wife has curtailed her professional activities and career to care for the home and family. On average, women earn less over a lifetime than men, resulting in what we will call a "lifetime earnings gap." Grace Enda & William Gale, *How Does Gender Equality Affect Women in Retirement?*, Brookings Inst. Gender Equity Series (July

¹ <https://www.nytimes.com/2021/10/30/style/men-alimony-spousal-support.html>

2020).² This lifelong earnings gap “culminates in the fact that women have significantly less income than men during their retirement years, a time when they are particularly vulnerable” – essentially, a “retirement savings gap.” American Assoc. of Univ. Women, *Women & Retirement*.³

The lifetime earnings gap between men and women is the result of a layering of multiple economic penalties women incur over their lifetime due to discrimination, traditional family roles, and shared family choices. Overall, women have 70% of the income that men have during retirement.

Id.

One primary cause of the gender lifetime earnings gap is that many women take time out of the paid workforce to care for children, effectively prioritizing the career and career growth of the other spouse. Michael Madowitz, Alex Rowell, and Katie Hamm, *Calculating the Hidden Cost of*

² https://www.brookings.edu/articles/how-does-gender-equality-affect-women-in-retirement/#:~:texhttps://nationalpartnership.org/wp-content/uploads/2023/02/americas-women-and-the-wage-ap.pdf&utm_source=Women%20are%20more%20likely%20to,increasingly%20remainin%20in%20the%20workforce.

³ <https://www.aauw.org/issues/equity/retirement/>

Interrupting a Career for Child Care, Center for American Progress (June 21, 2016).⁴ “Mothers ages 25 to 44 are less likely to be in the paid labor force than women of the same age who do not have children at home, and they tend to work fewer hours each week when employed.” Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, Pew Research Center (Mar. 1, 2023).⁵ This time out of the workforce means less money paid into the “three components of the ‘three-legged stool’ of retirement security – Social Security, pension and savings.” *Women & Retirement, supra*. In addition, such unpaid domestic labor reduces women’s future earning capacity because reduced time in the paid workforce means missed promotions, raises, and other forms of increased compensation over the course of a career. Then, when women return to the paid workforce, they often encounter a “motherhood penalty,” which further limits their income-earning capacity. American Assoc. of University Women, *The Simple Truth*

⁴ <https://www.americanprogress.org/article/calculating-the-hidden-cost-of-interrupting-a-career-for-child-care/>

⁵ <https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/>

About the Gender Pay Gap (Fall 2018 ed.), at 16.⁶ Although this premium has decreased over time for high-earning women, it remains significant for low-earning women. Rebecca Glauber, *Trends in the Motherhood Wage Penalty and Fatherhood Wage Premium for Low, Middle, and High Earners*, 55 *Demography* 1663-1680 (2018).⁷

In contrast, and interestingly, men who are parents are more likely to be in the labor force – and to work more hours each week – than men without children at home. Notably, this work differential leads to an increase in the pay of fathers, a phenomenon referred to as the “fatherhood wage premium,” which further exacerbates the gender earnings gap between divorcing spouses. *Id.*

The Center for American Progress explains the connection between the time women step out of the workforce for home and family and the retirement savings gap:

⁶ <https://www.aauw.org/app/uploads/2020/02/AAUW-2018-SimpleTruth-nsa.pdf>

⁷

https://www.jstor.org/stable/45048028?seq=1#metadata_info_tab_contents

[M]any families are opting to have a stay-at-home caregiver, usually the mother, in the face of exorbitant child care costs. A multidecade rise in mothers' labor force participation peaked in 1999, when 23 percent of mothers did not work outside the home. However, the share of mothers not working outside the home rose to 29 percent in 2012. Child care costs also increased over the same time period. . . .

[W]orkers can expect to lose up to three or four times their annual salary for each year out of the workforce. These losses add up because most parents have children when they are relatively young, so even a modest reduction in annual income can result in a very large lifetime earnings reduction over 30 years or more of work.

A woman earning the median salary for younger full-time, full-year workers—\$30,253 annually in 2014—who takes five years off at age 26 for caregiving would lose \$467,000 over her working career, reducing her lifetime earnings by 19 percent.

Calculating the Hidden Cost of Interrupting a Career for Child Care, supra.

While divorced couples are more likely than those who have never experienced divorce to have insufficient savings to retire at 65 with their accustomed quality of life, "mothers often take the brunt of the financial hit because of 'both the expense of raising children and the negative consequences for their earnings of having child care and family responsibilities.'" Lela Nargi, *Divorce Can Wreck a Woman's Financial Future. Here's How to Rebuild*, N.Y. Times (May 17, 2023) (quoting Maria

Cancian, dean of the McCourt School of Public Policy at Georgetown University).⁸

Overall, the lifetime earnings gap makes savings for retirement an important issue in alimony awards for women from all economic strata, not just ones whose families were upper-middle-class or wealthy during marriage, like the one in the case on appeal. Even where there is an equitable division in property in the divorce decree, that distribution alone may not adequately compensate for the reduced income-earning ability one spouse may suffer for the rest of her career, reducing her ability to continue to save for retirement post-divorce. Alimony is an appropriate tool to use to address the lifetime impact of decisions made during the marriage. Even where there is not enough income to maintain the parties' marital lifestyle post-divorce, the court "must consider all the statutory factors and reach a fair balance of sacrifice between the former spouses

⁸ <https://www.nytimes.com/2023/05/13/business/divorce-retirement-savings-planning.html>.

when financial resources are inadequate to maintain the marital standard of living." *Pierce*, 455 Mass. at 296.

To illustrate this point, imagine a middle-class family in which both spouses are educated and both worked before having children. Then imagine that upon having children, the couple decide (consciously or by default) that one spouse, typically a woman, will curtail her career either by working reduced hours or not working at all outside the home, while the other spouse, usually a man (though it could be a woman in a same-sex marriage), continues to work. Some number of years pass during which the working spouse's income continues to increase while the other spouse's income stagnates or increases at a reduced rate. Perhaps the latter spouse returns to the workforce after the couple's children have reached a certain age. Now the couple divorce, perhaps after a long-standing marriage, meaning that the woman is maybe 45, 50, or 60 years old at the time. At this point, the compensation of the spouse who earned income continuously throughout the marriage will usually be significantly higher than that of the spouse who stepped back or away from paid work for a

period of time. As a result, even though both spouses might be working at the time of the divorce, decisions made during the marriage have put the two on very different earning trajectories. The spouse who stepped out of the workforce has little chance of ever achieving the earning capacity that her spouse has at the time of divorce, even leaving aside the gender pay gap or differences in profession or careers. She might now be contributing again to her retirement savings, but not at the rate her spouse can afford to do. Putting this into the words of the alimony statute, the couple's marital lifestyle included saving money for retirement (whether in the form of actual savings or in the form of retirement benefits and Social Security earnings), but after divorce the man's income enables him to continue, and possibly improve, that lifestyle, both in spending and in saving, while the woman's income does not. An alimony award that does not include savings for retirement denies women the ability to maintain the marital lifestyle through retirement. She must either curtail her spending today to secure her future financial security or sacrifice her retirement in order to have

enough to meet current spending expenses. Such an outcome would not reflect *Pierce's* "fair balance of sacrifice."

Notably, over a third of divorces in the United States in 2020 involve people who were aged 55 or older, like the couple in this case. Jessica Hall, *Gray Divorce Can Be Financially Devastating—Especially for Women*, Morningstar (Sept. 2, 2023).⁹ While divorced couples are more likely than those who have never experienced divorce to have insufficient savings to retire at 65 with their accustomed quality of life, these so-called "gray divorces" can be financially devastating, especially for women. *Id.* Older women who experience a divorce see their standard of living decline by 45%. That's much more severe than for men, who see a decline of 21%." *Id.*

The likelihood that women will leave marriage with reduced income-earning potential compared to their spouses is an element of divorce that must be addressed if a judgment of divorce is to be equitable. Statutory law specifically identifies various factors that permit – and, in fact, require –

⁹ <https://www.morningstar.com/news/marketwatch/20230902357/gray-divorce-can-be-financially-devastating-especially-for-women>

courts to consider this reality, such as “lost economic opportunity as a result of the marriage,” “employability of both parties,” the “economic and non-economic contribution of both parties,” and the “ability of each party to maintain the marital lifestyle” *See* M.G.L. c. 208, § 53(a). For the reasons explained in this section, these factors weigh in favor of a holding that including savings in the alimony award is permissible under the Commonwealth’s alimony law.

CONCLUSION

For the reasons set forth above, the WBA respectfully requests that the Court decide that money for savings can be included in alimony awards and should be included under the proper circumstances.

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Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief for Amicus Curiae The Women's Bar Association of Massachusetts in Support of Plaintiff-Appellee complies with all relevant provisions of Rules 16, 17, 19, and 20 of the Massachusetts Rules of Appellate Procedure with respect to the contents, format, filing, and service of this brief. In compliance with Rule 20 of the Massachusetts Rules of Appellate Procedure, this brief was prepared in printed in a 14-point proportionally-spaced font (Segoe UI Historic) and it contains 5,600 non-excluded words as counted by Microsoft Word.

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CERTIFICATE OF SERVICE

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