COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

2023-P-1461

MICHAEL D. CAVANAGH
Plaintiff – Appellant – Cross Appellee
v.
LYNN A. CAVANAGH
Defendant – Appellee – Cross Appellant

ON APPEAL FROM A JUDGMENT OF THE HAMDEN PROBATE AND FAMILY COURT

BRIEF OF AMICUS CURIAE

MASS FAMILY ADVOCACY COALITION

IN SUPPORT OF THE DEFENDANT/APPELLEE

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Dated: November 18, 2024

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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.

DECLARATION OF AMICUS CURIAE

In accordance with Rule 17(c)(5) 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; (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.

INTEREST OF AMICUS CURIAE

Mass Family Advocacy Coalition (MFAC) is a Massachusetts nonprofit organization founded by mothers dedicated to improving the family law system for all users and their children. Our mission is to support women and children by promoting an efficient, accessible family court system that provides fair, safe, and

uniform justice.[1] 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.

SUMMARY OF ARGUMENT

We submit this amicus in support of Lynn Cavanagh's request that the Family Court issue an order of alimony in accordance with the Supreme Judicial Court's ("SJC") mandate in this case.

Appeals function to correct errors of the lower court as well as to clarify and interpret statutes and case law. The appellate process is a key part of the judicial system, ensuring that the judiciary is impartial and independent and that decisions be made based on the law rather than each judge's individual preferences. The SJC's landmark family law decision Cavanagh v. Cavanagh, 490 Mass. 398 (2022) demonstrates the appellate process is working as intended.

However, the Family Court's disregard of the SJC's remand order shows that there are cases where the appellate court objectives are unfulfilled by the lower court. Family courts everywhere are often criticized for exercising too much discretion in their decision making.[2] This case is emblematic of the Family Court's

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[1] See MFAC, Equitable & Accessible Justice For All – A Working Report On The Massachusetts Family Court System (Dec. 2022).

[2] MFAC, supra note 1, at 34-44. Marsha Garrison, How Do Judges Decide Divorce Cases – an Empirical Analysis of Discretionary Decision Making, 74 N.C. L. Rev. 401, 403 (1996).

unbridled discretionary power that can be abused. The underlying facts together with the SJC's findings in Cavanagh strongly support an order of alimony. Yet, the judge simply denied alimony, disregarding both the SJC's mandated procedure and its findings.

The judge's denial, viewed in a broader context than just this case, exemplifies a serious access to justice issue for caregivers. Alimony is a critical need of caregivers because divorce has a comparatively negative economic impact 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 exacerbate the economic imbalance that results from a divorce between a supporting spouse and a dependent caregiver. (pp. 12-20)

Despite this critical public policy need for alimony, which was expressly called for nearly 40 years ago by the SJC's 1986 Gender Bias Study Committee, most judges in Massachusetts after passage of the 2011 Alimony Reform Act ("Alimony Act" or "Act") were not providing alimony to caregivers whose family income was less than $250,000 (now $400,000). To understand why, it is important to review the development of alimony law in Massachusetts leading up to the Act, which was fueled by payors of alimony; the ensuing conflicting interpretations of whether the Act allows a caregiver to receive alimony in addition to child support, with many in the paid-for-services family bar ("private bar") advocating for no

alimony while the legal services bar, who often represent caregivers of modest means, advocating for alimony; and the consequent backlash to the Cavanagh decision from the private bar. (pp. 20-30)

Lastly, we show the many ways the judge failed to follow the Cavanagh mandate, clearly demonstrating an abuse of discretion. (pp. 30-41)

ARGUMENT

I. THE ECONOMIC IMPACT OF DIVORCE, THE GENDER WAGE GAP, AND A CAREGIVER'S LOSS OF FUTURE EARNINGS AND SAVINGS SUPPORT THE NEED FOR ALIMONY.

"Although so much about divorce has changed over the past few decades, one aspect of divorce has remained quite consistent over time: women's economic disadvantage." Jennifer Bennett Shinall, Settling in the Shadow of Sex: Gender Bias in Marital Asset Division, 40 Cardozo L. Rev. 1857, 1860 (2019). This finding aligns with national and international data[3] that the non-custodial and/or financially superior parties (the majority of whom are men) eventually recover from the financial consequences of divorce and that their overall financial position will far exceed that of primary custodial parents, over 80% of whom are women.[4]

[3] Id.; I-Fen Lin & Susan L. Brown, The Economic Consequences of Gray Divorce for Women and Men, 76 Js. of Gerontology: Series B, 2073, 2073-85 (Dec. 2021).
[4] U.S. Census Bureau, America's Families and Living Arrangements: 2021,Table FG6.

It is settled Massachusetts law that caregivers should be able to live at the pre-divorce lifestyle where funds permit. Cavanagh, 490 Mass. at 407-08 citing Young v. Young, 478 Mass. 1, 6 (2017) and Pierce v. Pierce, 455 Mass. 286, 296 (2009). "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. See Openshaw v. Openshaw, 493 Mass. 599, 606 (2024). However, that is not the reality for most caregivers.[5] As explained in the next section, this economic disparity was recognized in the Family Court as early as the 1980s, and is still evident today.

A. Alimony is Necessary Because of the Negative Economic Impact of Divorce on Women Caregivers.

After the introduction of no-fault divorce in the 1970s, researchers found that it had the unintended effect of markedly reducing the economic status of women following divorce.[6] Social scientists 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….Researchers traced these inequities directly to misinformation on

[5] MFAC, supra note 1, at 7.
[6] Jennifer L. McCoy, Spousal Support Disorder: An Overview of Problems in Current Alimony Law, 33 Fla. St. U. L. Rev. 501, 506, 516-22 (2005).

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 the striking gender disparities in employment and earnings that persist in American society." 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 was formed in the 1980s. It advocated for state courts to establish commissions to study the financial impact of court orders in the individual states family court systems.[7]

In 1986, the SJC responded by establishing the Gender Bias Study Committee. A goal was to determine whether the courts play a contributing role in women's inferior economic status after divorce. The resulting Report of the Gender Bias Study of the Court System in Massachusetts, 24 New Eng. L. Rev. 745 (1990), unequivocally concluded that "women's standards of living consistently decrease more than men's after a divorce because women are left with a disproportionally large share of the cost of raising children and a disproportionately small share of the marriage's wealth and earning power." (emphasis added) Id. at 746.

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[7] Norma J. Wikler, Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts, CT. Rev., fall 1989, 1, 7-10.

The SJC Committee specifically found that:

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 women made by taking on the primary caretaking role of the family.
2. Women generally experienced a greater drop in standard of living postdivorce than men.
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.
4. The courts seemed generally unconcerned about protecting women's financial security for retirement.
5. Unequal power and abuse between the parties can lead to unequal outcomes.

Id. at 746, 774, 777, 789.

Over the next several decades, Massachusetts courts and bar identified similar issues that impact the less financially secure party (typically the caregiving woman) and called for reform. Yet, significant problems persist.[8] Many caregivers

[8] See, e.g., Probate and Family Ct. Dep't Pro Se Committee, Pro Se Litigants: The Challenge of the Future, Apr. 8, 1995; Mass. Access to Just. Comm'n., Access to Attorneys Committee Report, May 2017; Mass. Access to Just. Comm'n, Access to Attorneys Committee Report on Fee Shifting in Family Law Litigation, 2022; MFAC, supra note 1, at 4.

continue to find that their economic position postdivorce is ultimately significantly lower than the non-caregivers' position.[9]

As the SJC Gender Bias Study found, the disparity in lifestyles results in misconceptions about the economic reality of caregivers following divorce.

B. 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 earned 82 cents for every dollar earned by men.[10] The wage gap for older women workers is larger than for younger women, and is widest starting at age 55 at 77.8%.[11]

Studies show that parenthood plays a significant role in this gap. Harvard professor Dr. Claudia Goldin, 2023 winner of the Nobel Prize in Economics for her work studying women in the workforce, spent her 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 occupations, 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.[12]

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[9] I-Fen Lin & Susan L. Brown, supra note 3. MFAC, supra note 1, at 7.
[10] Rakesh Kochhar, The Enduring Grip of the Gender Pay Gap, Pew Research Center (May 1, 2023).
[11] U.S. Dep't of Labor Women's Bureau, Gender Earnings Ratios and Wage Gaps by Age, 2022 Annual Averages.
[12] The Prize in Economic Sciences 2023, Nobel Prize Press Release, October 9, 2023.

Moreover, the gender wage gap does not seem to be driven by a decrease in mothers' earnings, but rather by an increase in fathers' earnings. 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.[13]

C. A Caregiver's Future Earnings Potential Decreases When They Leave the Workforce to be the Caregiver of the Family's Children.

When a couple decides that one parent will be primarily responsible for child-rearing, that parent's financial future is impacted negatively for life.[14] That parent forfeits or reduces their lifetime earnings, reduces the amount accumulated in any 401(k) plan, and pauses contributions to social security. The Center for American Progress estimates that a 26-year-old woman who is earning $30,000 and takes off five years to provide childcare for her family is losing $482,000 over the course of her career—a 19% reduction in lifetime earnings. The longer the caregiving parent is away from a career, the greater the impact. If the same woman took 10 years off to provide childcare for her family, she forfeits a whopping $826,000.[15]

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[13] 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).
[14] Yavorsky, et.al., The Production of Inequality: The Gender Division of Labor Across the Transition to Parenthood, 77 J. Marriage Fam. 662 (2015).
[15] Madowitz, Rowell, and Hamm, Calculating the Hidden Cost of Interrupting a Career for Child Care, Center for American Progress (June 21, 2016).

This negative financial impact to caregivers is especially true in divorces after age 50. "Gray divorce" is the fastest growing segment of divorces, accounting for one in three U.S. divorces.[16] 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.[17] As a result, 27% of women fell below the federal poverty guidelines, compared to 11% of men.[18] Since on average women live longer than men, the risk of exhausting their retirement funds and falling into poverty is increased.

D. A Caregiver's Future Retirement Savings Potential Decreases When They Leave the Workforce to be the Caregiver of the Family's Children.

Social security benefits, pensions/401(k)s, and earnings make up the bulk of income for the U.S. population age 65 and over. For individuals who left their careers to become the family caregivers, retirement funds are insufficient to fund their retirement years postdivorce compared to supporting spouses. [19]

Postdivorce, the supporting spouse continues to contribute to social security and employer-sponsored retirement plans, but the caregiver is either caregiving

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[16] Paula Span, Why Older Women Face Greater Financial Hardship Than Older Men, N.Y. Times, Dec. 26, 2021.
[17] I-Fen Lin & Susan L. Brown, supra note 3, at 2073-2085.
[18] I-Fen Lin & Susan L. Brown, & A.M. Hammersmith, Marital Biography, Social Security Receipt, and Poverty. 39 Res. Aging 86 (2017).
[19] USGOA, Retirement Security: Women Still Face Challenges, July 2012.

full-time or working flexible/part-time jobs that pay less and offer fewer/no benefits. 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.

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

Data confirms that women have greater financial insecurity for retirement compared to supporting spouses:

- The 2022 median 401(k) account balance for women was 65% lower than for men.[20]
- The 2021 average social security payment for men was $1,838.08. For women, it was 20% less ($1,483.75).[21] For divorced women, the average social security payment was $875, less than half that of men.[22]

[20] Sudipto Banerjee, Closing the Gender Gap in Retirement Savings, T. Rowe Price Insights, Mar. 2023.
[21] Annual Statistical Supplement to the Social Security Bulletin, 2022, at 5.46.
[22] Social Security Admin. Res., Stats., and Pol'y Analysis, Divorce and Women's Social Security Retirement Benefits, Mar. 2015.

- Women on average have saved about 30% less money by the time they retire compared to men.[23]

Thus, individual savings is crucial for caregivers to afford retirement. This strongly indicates that saving is a necessary need in alimony cases where there is an ability to pay.[24] Indeed, in Openshaw, 493 Mass. 599 (2024), the SJC recognized this necessity and held that a judge may consider savings as a component of alimony where there is a pattern of marital savings and an ability to pay. Id. at 613.

II. THE APPELLATE PROCESS IS CRITICAL TO ENSURE THE ALIMONY ACT AND CASE LAW ARE ADHERED TO BY FAMILY COURT JUDGES.

A frequent criticism of family court jurisprudence is that the broad discretionary power vested in judges promotes unpredictability in their decision-making. Their discretionary decision-making tends to be limited only by generalized, subjective standards and unprioritized factors. Such wide latitude

[23] Jo Ann Jenkins, Women are Facing a Retirement Crisis, TIAA Inst., 2022.
[24] Christian E. Weller, Joelle Saad-Lessler, Tyler Bond, Still Shortchanged: An Update on Women's Retirement Preparedness, Nat'l. Inst. on Retirement Security Report, May 2020.

allows each judge's predispositions, however unintentional, to seep into their decisions, resulting in inconsistent rulings.[25]

Exacerbating this unpredictability is the fact that judges' decisions go largely unchecked. Substantive motions to reconsider, reviewed by the same judge, are routinely denied, and an appeal is too costly for most parties. According to FY20 Trial Court Data, the Probate and Family Court had the most filings of any of the trial departments (113,863), but only 100 appeals were filed (including appeals of probate decisions, i.e., non-family law matters). This equates to less than 0.1%. The only reason this case reached the appellate stage, resulting in the important Cavanagh decision, is because Lynn, the caregiver, has pro bono counsel. Further, there is no public accountability of Family Court decisions because data is seriously lacking.[26]

This lack of oversight undoubtedly results in a sense of autonomy for the Family Court and a system that is closed to those who do not routinely practice within it, such as Lynn's pro bono counsel. This insular culture is evident by the following comment made by Michael's counsel about the SJC and Cavanagh:

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[25] Hon. Edward M. Ginsburg, The Place of Alimony in the Scheme of Things, Mass. Council on Family Mediation, Sept.1997, at 1.

[26] Mass. Access to Attorneys 2022 Report, supra note 8, at 3. MFAC, supra note 1, at 44.

> "And I would say, with all due respect, because all the judges in the entire Commonwealth of Massachusetts when they have utilized all of the income for child support, there isn't money left to talk about alimony. That's how it was until this case has come down because the SJC, with all due respect, doesn't understand what we do for a living." RAIII/226.

Shockingly, the judge sanctioned Lynn's pro bono counsel for filing a motion to preclude further disparaging remarks against the SJC and Cavanagh. Given the dire need for pro bono representation in Family Court, attorneys should be encouraged, not discouraged, to step forward to ensure parties receive an equitable outcome based on a level playing field of advocacy.

Because it is a rare occurrence that a family law case reaches the SJC, it is imperative that the Court's decision be followed by the Family Court. By the length and breadth of Cavanagh, it is evident that the SJC viewed it as an opportunity to address several areas of family law practice that needed clarification, including the availability of both alimony and child support to caregivers.

To understand why the SJC's clarification of concurrent alimony and child support was necessary, we provide a review of the development of the Alimony Act, which was fueled by payors of alimony; its ensuing negative impact on women caregivers; and the private bar's extreme backlash to Cavanagh. These

factors demonstrate that the appellate process is critical to secure access to justice for caregivers and to ensure equity and predictability in Family Court decisions.

A. The Misinterpretation of the Alimony Act Precluding Caregivers from Receiving Alimony Inequitably Impacted Caregivers, Resulting in Cavanagh.

Prior to the passage of the Alimony Act in 2011, there was no generally accepted standard for a judge to determine whether to grant alimony and if so, how much and for how long. Judge Ginsburg described the problem:

> "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."[27]

Judge Ginsburg believed that the most equitable way to calculate support was based on income, not expenses:[28]

> "If the theory of marriage is one of partnership, both partners are deemed to have invested in the ability to earn income as well as the tangible assets.

[27] Hon. Edward M. Ginsburg, supra note 25, at 1.
[28] Hon. Edward M. Ginsburg, Alimony Act, Support Guidelines Poor Combo for Children. Mass. Lawyers Weekly, Apr. 10, 2014.

Particularly in longer-term marriages, the aim is to leave the parties in relatively comparable positions."[29]

To determine the duration of alimony, no formula existed. This led to inconsistency among judges' orders, with some awarding alimony in both short and long-term marriages.[30] It was this opposition to "permanent" alimony voiced by primarily "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.[31]

An Alimony Task Force was established in 2009 to review the state's alimony statute. Appointed to the task force was a leading representative of the fathers organization pushing for alimony reform.[32] The resulting Alimony Reform Act became law on March 1, 2012. It was heralded by its supporters as a "sweeping overhaul," a long overdue change that would improve the predictability of divorce cases and thus avoid unnecessary and expensive litigation.[33]

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[29] Ginsburg, supra note 25, at 4.
[30] Jess Bidgood, Alimony in Massachusetts Gets Overhaul, with Limits. N.Y. Times, Sept. 27, 2011.
[31] Id.; Rachel Biscardi, Dispelling Alimony Myths: The Continuing Need for Alimony and the Alimony Reform Act of 2011, 36 W. N. E. L. Rev. 1, 2 (2014); Julie-Anne G. Stebbins, Family Law—The Rehabilitation Illusion: How Alimony Reform In Massachusetts Fails To Compensate For Caregiving, 36 W. N. E. L. Rev. 406, 412-13 (2014).
[32] Biscardi, supra note 31, at 3, n.8.
[33] Stebbins, supra note 31, at 407.

However, not everyone applauded the new law. Concerns were expressed that the Act could be unfair to women who made economic sacrifices in their marriages, and that the language was not clear and would continue to result in litigation.[34] 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."[35]

Though there is no language in the Alimony Act stating that caregivers with household income of under $250,000 (now $400,000) were precluded from receiving both alimony and child support, the statute was widely interpreted that way by many judges and many in the private bar. Indeed, some attorneys did not even alert their caregiver clients that there was a possibility for a concurrent order of alimony and child support.[36]

Though some judges correctly interpreted the Act to allow caregivers to receive both alimony and child support, these judges were few in number. Accordingly, the financial future of a qualifying caregiver and her children

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[34] Bidgood, supra note 30, at 11.
[35] Martine Powers, Legislation Overhauls Bay State Alimony Laws, Boston Globe, Sept. 26, 2011.
[36] MFAC, supra note 1, at 35.

depended upon which judge was assigned to their case, leading to more unpredictability and inequity in Family Court orders.

The misinterpretation of the Act has had a long-lasting negative financial impact on caregivers, the majority of whom are women, and their children. Without a concurrent order of alimony, the household income is reduced; and upon the children's emancipation, the caregiver is left without any support. Assuming the caregiver did not give up her right to alimony in a divorce agreement, the caregiver has no alternative but to return to an overburdened, slow-moving court to request alimony. Already in a financially weakened state because of the failure to receive alimony during the original court action, the caregiver is further weakened by the additional legal costs and delay of a second court action seeking alimony—a request that has no predictable outcome because it is left up to the judge viewing the request through their own personal lens whether to order alimony.

The practice of many judges declining to consider the issuance of alimony to a caregiver generated significant criticism from family advocacy groups. They explained to the Massachusetts 2021 Child Support Guidelines Task Force[37] that custodial parents were penalized by receiving less support than they would have

[37] Jason Owens, Massachusetts Legal Organizations Propose Changes to Child Support Task Force, Lynch & Owens P.C. blog, Jan. 12, 2021.

received if they were childless;[38] and that Massachusetts was in the minority of states that did not address situations when both alimony and child support could be paid to a recipient. Most states calculate alimony first, and then use the alimony payment to adjust the recipient and payor's income when calculating child support.[39]

In 2022, the SJC in Cavanagh resolved this longstanding conflict. Finding that alimony and child support serve two distinct purposes, it ruled that the Alimony Act allowed for a concurrent order of alimony and child support to a qualifying spouse. To ensure that an alimony order would be considered, the Court took pains to thoughtfully set forth a detailed procedure that every Family Court judge "must" follow when considering alimony and child support.

B. The Backlash to Cavanagh Undermines the Well-Reasoned SJC Resolution to the Availability of Both Alimony and Child Support to a Caregiver.

The backlash to Cavanagh by the private bar was immediate. Shortly after the decision, Massachusetts Lawyer's Weekly ran a front-page, one-sided article,[40]

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[38] Massachusetts Council on Family Mediation letter to Massachusetts Trial Court Child Support Guidelines Task Force, Dec. 15, 2020.
[39] Jane Does Well, Jane Does Well Recommendations to the 2020 Massachusetts Child Support Guidelines Task Force, Dec. 14, 2020, at 29.
[40] Eric T. Berkman, Sweeping SJC Alimony Decision Alarms Divorce Bar, Mass. Lawyers Weekly, Aug. 19, 2022.

entitled "Sweeping SJC alimony decision alarms divorce bar." One attorney was quoted in the article:

> "I think that in most cases where the combined income is under $400,000 judges will still simply be running the child support guidelines to determine what is appropriate."[41]

Private bar lawyers on panels tasked with educating lawyers on implementation of Cavanagh were disparaging of the decision. Most recently, a family law practitioner on a 2024 MCLE panel compared the "dreaded" Cavanagh calculations to the SJC dropping a "napalm" bomb.[42]

Let's be clear on what the SJC directed: to fashion an order that is most equitable to the family as a whole. Isn't this what family court judges should be doing all along?

In response to the private bar's outcry, legal aid groups, domestic abuse and women and children's advocates, Massachusetts Law Reform Institute, and the Women's Bar Association stated that the criticism of Cavanagh was "unfair" and "undermines the decision" which was a "long-needed and well-reasoned resolution to persistent confusion about the availability and distinct purposes of alimony and

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[41] MFAC, supra note 1, at 38.
[42] MCLE webinar, Navigating the Nuances of Alimony & Child Support Interplay Post-Cavanagh, Oct. 1, 2024.

child support in modest-income cases." They described the magnitude of the unintended consequences of the misinterpretation of the Alimony Act:

> "Perversely, this interpretation has denied relief to many of the very people who need it most. Consider survivors of domestic violence who faced financial, as well as physical, abuse in their marriages; career homemakers whose earning capacities have been forever reduced by years out of the workforce; and spouses who delayed career advancement to care for children and support their spouses' educations or careers."[43]

Despite the labeling of Cavanagh as a game-changer, the concept of a caregiver receiving a concurrent alimony order was not novel or unforeseen. A year earlier the Appeals Court in Calvin C. v. Amelia A., 99 Mass. App. Ct. 714, 721 (2021), acknowledged that both alimony and child support could be ordered to a qualifying spouse and that alimony could be calculated first, before child support, which is exactly what the SJC ruled in Cavanagh. Likewise, a 2021 revision to the Child Support Guidelines released immediately after Calvin stated that the "Task Force strongly urges the Court and parties to proactively run different support scenarios to determine what support order is appropriate for the family – specifically whether determining alimony first and then child support provides the

[43] Letter to the Editor, Unhappy with 'Negative Presentation' on Alimony Ruling, Mass. Lawyers Weekly, Sept. 22, 2022.

appropriate support."[44] Yet, despite Cavanagh, Calvin, and the 2021 Child Support Guidelines revision, there are judges and attorneys who are still resistant to concurrent alimony and child support orders.[45]

The judge's denial of alimony in this case exemplifies this resistance, as explained below.

III. THE FAMILY COURT JUDGE ABUSED HER DISCRETION BY FAILING TO FOLLOW THE SJC'S REMAND ORDER AND NOT ORDERING ALIMONY.

The remand instructions by the SJC could not be clearer: "On remand, the judge shall determine whether an alimony award is appropriate and, if so, in what form and amount, pursuant to the interpretation and procedure set forth in this opinion." (emphasis added) Cavanagh, 490 Mass. at 431. To ensure that an alimony order would be considered, the Court specified a multi-step process that a judge "must" undertake. Id. at 410.

The same judge who had refused to consider an alimony order in the first trial failed again to meaningfully consider alimony by not following the SJC's mandate to:

1. Treat alimony and child support separately. Id., at 409.

[44] Massachusetts Child Support Guidelines, 2023, at 16.
[45] MFAC, supra note 1, at 35.

2. Consider all the relevant factors in § 53 (a) "and the principle that . . . the amount of alimony should be determined with reference to the recipient spouse's need for support to allow the spouse to maintain the lifestyle enjoyed prior to the termination of the parties' marriage. Young, 478 Mass. at 6." Id., at 407-08.

3. "[F]ashion an order which would be the most equitable for the family before the court, considering the mandatory statutory factors set forth in G. L. c. 208, §53(a) and the public policy that children be supported as completely as possible by their parents' resources, G. L. c. 208, §28,…" Id., at 410.

4. Articulate why an order that does not include alimony is warranted in light of the § 53(a) factors. Id., at 410-11.

Rather than following the required steps, the judge devised her own process. She reduced Lynn's expenses by 30%, citing only that they "cannot possibly be a realistic annual figure for such expenses currently or going forward." (RAI/72). She credited Lynn with no funds to repay her non-mortgage debt (the bulk of which was accumulated to pay the basic living expenses of her and her son, and to fund her son's tuition that Michael has yet to repay). She then ordered child support and denied alimony because Michael was paying for their son's private school tuition in addition to child support. She did not analyze the parties' respective financial situations or fashion an order that was most equitable for the

family as a whole. The judge's rationale completely disregarded the SJC's mandate.

A. The Judge Failed to Treat Alimony and Child Support Separately Despite the SJC's Ruling that They Serve Different Purposes.

The SJC states, "it makes little sense to tie the availability of alimony to the provision of child support where child support and alimony serve distinct purposes: child support is intended to provide financial support for children of the parties, whereas alimony is intended to provide financial support to an economically dependent former spouse." It ended this statement with this footnote: "For this reason, the father's argument that the mother can have no need for alimony so long as she receives child support is without merit." Id., at 409 and n.7.

The SJC's finding that alimony serves a different purpose than child support is correct. Child support in Massachusetts, like all other states, is based on economic studies used to estimate the marginal cost of a child. Both parents' incomes are added together to calculate a total child support amount. That amount, specifically intended to cover only the cost of the child, is then apportioned to each parent based on their respective incomes.

Here, the total amount of child support calculated was approximately $868/week. Of this amount, Michael was responsible for 75% of the total, ($650/week), making Lynn responsible for the remaining 25% ($218/week). Therefore, to adequately analyze alimony need for Lynn, we look to what income

she has available for her expenses after taxes and the amount apportioned to her for child support. Lynn's available income, net of taxes and child support, is approximately $50,000, compared to Michael's available income, net of taxes, child support and tuition, of $116,000. Although this clearly indicates that Michael and Lynn are in much different economic positions, the judge did exactly what the SJC directed her not to do, and decided that Lynn has no need for alimony because her son's child support "covers" her need. (RAI/75)

B. The Judge Failed to Consider the Mandatory Factors of §53 (a) and the Recipient Spouse's Need for Support to Allow the Spouse to Maintain the Lifestyle Enjoyed Prior to the Termination of the Parties' Marriage.

The judge determined that ordering child support only would be the most equitable outcome because of Michael's obligation to pay child support and private school tuition. (Id.) Missing from her decision is any weighing of the mandatory factors of §53 (a), as the SJC directed, such as the "economic and non-economic contribution of both parties to the marriage"; "marital lifestyle"; "ability of each party to maintain the marital lifestyle"; and "lost economic opportunity as a result of the marriage". Cavanagh, 490 Mass. at 407, n.5.

Had the judge compared the two households, she would have immediately discerned a significant economic imbalance between the lifestyle of Michael, on one hand, and Lynn and their unemancipated son who is with Lynn the vast majority of the time, on the other. A cursory comparison of Michael's total annual

income of $223,850 to Lynn's current income of $73,000 clearly indicates that Lynn is financially dependent and that Michael has an ability to pay. "The Alimony Act makes no change in the fundamental purpose of alimony, which is to provide for postdivorce 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).

The child support order of $33,800 annually equals only 15% of Michael's gross income of $223,850. (RAI/71) This means Michael is allowed to shelter 85% of his income from the family. After Michael pays child support ($33,800), his taxes, his son's tuition ($20,000), and contributes to his 401(k) ($27,000), he is left with over $90,000 in surplus income to spend on his living expenses or to save. (This does not include the additional $10,000 in savings that his employer contributes annually to his 401(k)). See Addendum for analysis. $90,000 is $47,000 more than the living wage necessary for a single adult in Hamden County of $43,000.[46] It is also greater than Lynn's entire annual expenses as determined by the judge for her and their unemancipated son ($62,868). (RAI/71)

Lynn, on the other hand, is unable to maintain the lifestyle the parties enjoyed during their marriage, which the judge acknowledges was a comfortable middle-class lifestyle. Without an alimony order, Lynn is left with a deficit of

[46] MIT Living Wage Calculation for Hamden County, Massachusetts.

almost $12,000 after she pays her living expenses included in her Financial Statement, debt repayment, and taxes.[47] While Michael has more than sufficient funds to maintain his home, pay off his debt, and save his 401(k) contribution each year, Lynn lives paycheck to paycheck and only has $4,000 in her bank account, which she uses to pay her current bills. (RAI/319-20, 339) Lynn does not have the means to pay to upkeep the family home, pay off debt, or save—all of which were part of the marital lifestyle.

While Michael "maxes-out" his 401(k) contribution ($27,000) and has amassed approximately $1,000,000 in retirement accounts, Lynn has no money to save, even though savings was part of their marital lifestyle. Openshaw, Mass 493 at 613. The judge's finding that Lynn saves by participating in the Massachusetts State Retirement System pension plan is misguided. (RAI/71) Massachusetts is one of a handful of "non-Social Security" states, meaning that Lynn pays into the system instead of Social Security, and must work in the system for ten years before she even qualifies for any retirement benefit.[48]

Further, the child support order alone does not allow their son to enjoy his father's increase in lifestyle since the divorce. Children's needs are to be defined in part by their parents' standard of living. As in child support cases, where children

[47] See Addendum.
[48] MTRS website.

are entitled to participate in the noncustodial parent's higher standard of living postdivorce 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. v. J.B., 97 Mass. App. Ct. 170, 176 (2020).

Not only did the judge ignore the SJC's explicit instructions to weigh the §53 (a) factors, she disregarded the Court's findings that clearly support an alimony order. These include:

- Lynn's economic support early in their marriage allowed Michael to pursue his graduate degree, pay off his school loans, and the family to purchase a home. ("The parties lived with the mother's parents before moving into a house purchased by the mother with her father. The father was not able to be on the mortgage due to his debt. The entirety of the father's debt was paid off during the marriage.")
- Lynn sacrificed her career trajectory potential to be the primary caregiver. ("The mother continuously was out of the work force to raise the parties' three sons.")
- Lynn's support of the children and household allowed Michael to focus on and further his career. ("The mother briefly returned to the work force as a

substitute teacher from November 2014 to around February 2015. At that time, the father was 'gone early in the morning until night.' The mother was responsible for the children both in the morning before school and after they returned home from school….") Cavanagh, 490 Mass. at 400-01.

The judge ignored Lynn's economic and non-economic sacrifices that the SJC included in its decision, and instead minimized Lynn's economic loss. The judge states that, although Lynn "*presumably* missed some economic opportunities as a result of her staying at home to care for the children and household" (emphasis added), she "obtained her current job and essentially doubled her income shortly after the modification originally was concluded in this Court." (RAI/71) What the judge fails to consider is that Lynn's increased income still results in a substantial income disparity between the parties. Though her income "doubled" by the time of the remand hearing, her current salary of $73,000 is still only 34% of Michael's wage income of $214,700 (not including the $10,000 employer contribution to his 401(k) or interest income on his savings).

Further, the judge did not acknowledge that Lynn has substantially all parenting responsibility for their son, creating a more demanding economic burden on her, while also assisting their newly emancipated son who was living with her while he attended graduate school (just like Michael lived with Lynn's parents while he attended graduate school). Instead, the judge only credited an economic

burden to Michael because he was required to pay their son's private school tuition in addition to child support.

Though the SJC in Pierce, Young, Cavanagh, and Openshaw has defined need for support where the supporting spouse has the ability to pay as "generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage," Cavanagh, 490 Mass. at 407-08, a payor's focus on recipient's expenses to determine "need" for alimony is now commonplace, even though "it is the manner in which a couple allocated marital income – not just how they spent it on day-to-day expenses…that determines their standard of living during the marriage…." Openshaw, 493 Mass. at 607-08. Unfortunately, appellate cases are riddled with payors' argument that economically dependent caregiving spouses do not "need" alimony. See, e.g., D.B. v. J.B., 97 Mass. App. Ct. 170 (2020); Macri v. Macri, 96 Mass. App. Ct. 362 (2019); Rosenberg v. Rosenberg, 33 Mass. App. Ct. 903 (1992).

Here, Michael and his attorney attempt to invalidate Lynn's "need" for alimony. For example, 25 pages of trial transcript is filled with cross-examining Lynn about her gas expense to try to prove that she may have occasionally filled up their newly emancipated child's gas tank. (RAI/283-309) In another exchange, Michael's attorney chides Lynn for asking for alimony because Lynn had $4,000 in her bank account, clearly intending to shame Lynn for advocating for support for

her and their child. (RAI/319-20) These lines of questioning were allowed by the judge.

Arguing "need" needlessly results in increased court time, increased legal expenses, 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. Caregivers are subjected to endless hours of withering examination over often miniscule expenses. Meanwhile, the payor can spend whatever he wants without any consequence. Arguing need provides opportunities for spouses to shame the caregivers and subject the caregivers to abusive litigation and coercive control. These tactics harm caregivers and cost caregivers thousands of dollars in unnecessary legal fees, depleting them of money that could be used for their needs or financial security.[49] The willful financial depletion of the marital estate and humiliation of caregivers cannot be the results the legislature intended by enacting the Alimony Act.

C. The Judge Failed to Analyze What is Most Equitable for the Family in Light of the Mandatory Factors of §53 (a).

It is clear the judge employed a double standard in analyzing Lynn and Michael's circumstances. See Katz v. Katz, 55 Mass. App. Ct. 472, 478 (2002) ("The judge's flawed rationale supporting her [alimony]termination decision

[49] MFAC, supra note 1, at 11-20; Mass. Access to Attorneys 2017 Report, supra note 8; Mass. Access to Attorneys 2022 Report, supra note 8.

flowed in large part from her employment of a double standard in analyzing the parties' respective circumstances.") The judge's failure to follow the SJC's remand order was a clear abuse of discretion. See Id. ("The termination of Charlotte's alimony constituted, on this record, an abuse of that discretion and legal error. The judge failed to evaluate and balance, fairly and equitably -- as was required -- all of the circumstances relevant to the totality of the parties' situations, see [Schuler v. Schuler, 382 Mass. 366,] 370-373, 376 (1981), and to keep in mind 'the fundamental purpose of alimony: to provide economic support to the dependent spouse.' Gottsegen v. Gottsegen, 397 Mass. 617, 623 (1986). See Grubert v. Grubert, 20 Mass. App. Ct. 811, (1985) (even 'scrupulous and careful' effort by the probate judge is inadequate if it failed 'adequately to take into account traditional alimony considerations and resulted in an inequitable award'); Fugere v. Fugere, 24 Mass. App. Ct. 758, 760 (1987) (modification decision must be based upon a balancing of all the financial and equitable factors); Huddleston v. Huddleston, 51 Mass. App. Ct. 563, 570 (2001) (modification must be 'consistent with common sense and justice')."

D. The Judge Failed to Articulate Why Alimony was not Allowed in Light of the Mandatory Factors of §53 (a).

Despite all the undisputed evidence, the judge simply found that "the most equitable outcome" was to deny alimony because Michael is paying for their son's private education (which will end in one year and for which he still owes $40,000

to Lynn by virtue of continuing this lawsuit) in addition to child support. Had the judge (1) considered and weighed all the facts in light of the §53(a) factors and (2) analyzed the equitable outcomes for the family as required by the remand order, it is very reasonable to conclude that an alimony order was "most equitable for the family before the court."

Rather than analyzing the facts of the remanded case with impartiality and in alignment with the SJC's findings in Cavanagh, the judge's findings were not impartial, as they were solely sympathetic towards Michael. Her decision does not demonstrate a fair analysis of the equities or balance of sacrifice. Young, 478 Mass. at 7. As the Appeals Court found in Katz, "the judge's analysis fell seriously short of the requisite full, fair and equitable consideration…." Id., 55 Mass. App. Ct. at 479.

CONCLUSION

We request this Court rule that the judge abused her discretion by failing to issue an alimony order. Given the length of this case (nine years and counting) and the judge's failure to analyze the facts in line with the SJC's mandate, we request:

(1) This Court issue an order of alimony within 30 days of entry of judgment;

(2) This action be remanded to a different judge in the Family Court; and

(3) The appointed judge compute the calculations in accordance with Cavanagh and the evidence at the 2021 trial.

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/ 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 jeff.goldman@morganlewis.com and anndargie@jenniferthornlaw.com.

/s/ Margaret J. Palladino

Dated: November 18, 2024

Addendum 1: Cavanagh Analysis

	As ordered 2024 Michael		As ordered 2024 Lynn	
Tax Rate	24.40%	(a)	16.00%	(a)
Wages				
Base	$150,000		$73,000	
Annual Stipend	$12,500		$0	
Bonus	$35,000		$0	
Misc perquisites	$7,200		$0	
Employer's matching 401(k) contribution	$10,000		$0	
Child Support	$0		$33,800	
Alimony	$0		$0	
Gross Taxable Income	$177,700		$73,000	
Gross income	$204,700		$106,800	
Interest/Other Income	$9,150		$0	
Income for Child Support (in judgment)	**$223,850**	(b)	**$73,000**	(b)
Income (not including employer 401(k))	**$213,850**		**$73,000**	
Taxes	**($43,359)**		**($11,680)**	
Income after taxes	**$170,491**		**$61,320**	
Child Support	($33,800)	(c)	$33,800	
Alimony				
Income after taxes and support	**$136,691**		**$95,120**	
Living Expenses	$0	(d)	($87,828)	(e)
Debt Repayment			($19,136)	(f)
Income after taxes, support, and expenses	**$136,691**		**($11,844)**	
College				
Private School	($20,000)			
Income available after taxes, support, debt, and education	**$116,691**		**($11,844)**	
Savings:				
401(k)	($27,000)	(g)		
Income available after taxes, support, debt, education, and 401(k)	**$89,691**		**($11,844)**	
Savings				
401(k)	$27,000		$0	
Matching 401(k)	$10,000		$0	
Total 401(k) Savings	**$37,000**		**$0**	

Assumptions:

(a) Taxes calculated using Mass. Income Tax Calculator (https://www.forbes.com/advisor/income-tax-calculator/massachusetts/)
(b) Income per corrected rationale RAI/71
(c) Child Support at $650/week as ordered
(d) Michael's household expenses set at 0 to assess total income surplus allowed for expenses
(e) Lynn's expenses in her financial statement RAI/72
(f) Lynn's debt repayment of $368/week, which the court disregarded
(g) Michael's annual contribution to his 401(k), which he "maxes out" RAI/339