Read more at www.lynchowens.com/blog

We compare suggestions submitted to the state's Child Support Task Force by three leading Massachusetts legal organizations.

Three leading voices in Massachusetts family law circles – <u>Jane Does Well</u>, the <u>Massachusetts Council on</u> <u>Family Mediation (MCFM)</u> and <u>Community Legal Aid</u> – recently submitted memoranda to the Massachusetts Child Support Task Force providing each organization's suggested changes to the state's Child Support Guidelines in in 2021. The groups' submissions were filed in advance of the Task Force's deadline for <u>written comments of December 15, 2020</u>. The state's Task Force, which meets every four years, is expected to announce changes to the Massachusetts Child Support Guidelines in Spring or Summer of 2021.

MCFM, Jane Does Well and Community Aid are each very different organizations. MCFM is a <u>leading</u> <u>training provider</u> for divorce professionals and its members include many of the leading family law <u>mediators</u>, <u>collaborative law</u> professionals and attorneys in Massachusetts. Jane Does Well provides <u>advocacy and support for divorced women and mothers</u> in Massachusetts. Meanwhile, Community Aid provides free <u>civil legal services to low-income and elderly residents</u> of Central and Western Massachusetts.

Each organization's mission is reflected in its submission to the Child Support Task Force. <u>MCFM's 8-page submission</u> focusing more closely on practical concerns identified by its member-practitioners. <u>Jane Does Well's 49-page submission</u> includes a more substantive critique of the current Guidelines schemes, including a detailed economic analysis across multiple subject areas. <u>Community Legal Aid's 13-page submission</u> focuses on how child support impacts low-income parents.

Despite their differing organizational perspectives, the Task Force submissions by the three organizations include several areas of overlap, which are summarized below. In this blog, we will explore changes to the Guidelines suggested by each organization, followed by points raised separately in each organization's submission to the Task Force.

Consensus Changes to the Child Support Guidelines: Suggested by Multiple Organizations

The task force memos submitted by MCFM, Jane Does Well and Community Legal Aid included similar and/or overlapping concerns on subject areas including the interplay between alimony and child support, the calculation of child support for parents whose combined incomes exceed \$250,000 per year, and the state's stingy approach to calculating child support for parents with multiple children. In addition, Jane Does Well and Community Legal Aid advocated for an across-the-board increase in <u>child support</u> orders under the Guidelines as well as the elimination of new "caps" on cost sharing for child-care costs (and to a lesser degree medical insurance expenses) that the Task Force implemented in 2017.

Encourage Judges to Order Alimony and Child Support Rather than Alimony or Child Support

All three organizations critiqued the ambiguous manner in which the state's Child Support Guidelines address cases in which a parent may be entitled either <u>alimony</u> or child support, or both. The state's <u>current Child Support Guidelines</u> suggest that when a parent may be entitled to both alimony and child support, the court consider entering an order for "<u>unallocated family support</u>" – i.e., a form of

combined child support and alimony that allowed parties to treat the entire support payment like tax deductible alimony. After the most recent Guidelines were released in 2017, however, federal tax law changed, <u>eliminating federal tax deductibility</u> for both alimony and unallocated family support. In its <u>submission</u>, Community Legal Aid articulated the problem with child support and alimony in Massachusetts as follows:

Alimony, which is usually meant to help meet the needs of one person (a former spouse), generally results in higher orders than those determined under the Child Support Guidelines (which by definition are for the benefit of a multi-member household). This illustrates the need for change in two areas of the alimony/child support system: 1) child support amounts are clearly inadequate and should be increased; and 2) judges should be actively encouraged by clear language in the Guidelines to consider alimony in cases involving family incomes of \$250,000 or less and to award both alimony and child support when appropriate.

In its <u>submission</u>, Jane Does Well argued that "Massachusetts is in the distinct minority of states that do not address situations when" both alimony and child support should be paid to a recipient. ... Most states calculate alimony first, and then use the alimony payment to increase the recipient's income and decrease the payor's income when calculating child support." MCFM noted that under the current framework, "an economically dependent spouse with no children could receive more support as alimony than an economically dependent spouse (or unmarried parent) with multiple children would receive from child support, or if child support and/or alimony are calculated separately."

Like Jane Does Well, MCFM's argued that there should be a "presumption that in alimony AND child support cases, alimony will be calculated FIRST, and the resulting (i.e., alimony adjusted) incomes of the parents would then be applied for [child support guidelines] calculations."

The strong consensus among the three organizations is that the Child Support Guidelines should stop the common practice among Probate & Family Court judges of only awarding alimony in cases where (a.) there is no child support order or (b.) the parties earn combined income of greater than \$250,000 per year. All three organizations advocate for Massachusetts to follow those states who encourage judges to first calculate alimony – without regard to the parties' children – and then calculate child support after alimony has been allocated.

Increasing Child Support in Cases for Parents Earning more than \$250,000 per Year

MCFM and Jane Does Well expressed concerns about the method for calculating <u>child support for</u> <u>parents whose combined incomes exceed \$250,000 per year</u> in Massachusetts. Since 2013, the state's Guidelines have included no formula for judges to calculate child support when the parties' combined incomes exceed the \$250,000 threshold. Although Massachusetts judges have the discretion to order higher child support in such cases, the absence of a clear framework for doing so makes such orders rare in many courtrooms.

In its memo, Jane Does Well suggests increasing the minimum presumptive to cover the first \$400,000 in combined income, calculate child support at 11% for combined income over \$250,000 per year, and require courts to compare a child support order based on all available income with the child's needs and standard of living. MCFM offered a similar range of suggestions, including eliminating the presumptive minimum "cap" completely, raising the current "cap" from \$250,000, and/or including a separate

formula or calculation on the Child Support Guidelines worksheet for income exceeding \$250,000 per year.

Given its focus on low-income parents, Community Legal Aid's Task Force <u>submission</u> does not directly address the cap on child support based on the first combined \$250,000 earned by the parties. However, CLA criticizes the common Probate Court practice of judges only ordering alimony in cases with children when the first \$250,000 in combined income has been used to calculate child support, while broadly criticizing the Task Force's failure to increase child support in all cases.

Increasing Child Support in Massachusetts for Parents with Multiple Children

Jane Does Well and MCFM each criticized the current Guidelines for failing to increase child support orders for parents with multiple children. MCFM succinctly described the problem and its proposed solution as follows:

The percentage raise for multiple children and the presumption limit to five children is unrealistic given the cost of raising larger families. This is especially true in the disparity between households that can be created in higher income families. To account for this, the formula could be adjusted to reflect a higher multi-child multiplier at higher income levels.

In its memo, Jane Does Well criticizes the methodology used in the Task Force's 2016-2017 Economic Review, provides a detailed economic analysis, and reviews the approaches used by other states for increasing child support for families with more children. According to Jane:

The current adjustments for the number of children used to calculate child support for additional children in Massachusetts are significantly lower – almost 50% lower – than national averages and adjoining state benchmarks.

Like MCFM, Jane Does Well argues for a robust increase in the child support "multiplier" for families with more than one child. Jane proposes using multipliers similar to those used in neighboring states, while taking into account the high cost of living in Massachusetts. Although Community Legal Aid does not specifically address child support "multipliers" for parents with more than one child, the CLA <u>submission</u> is sharply critical of the Task Force's failure to update child support to reflect the rapidly increasing cost of living in Massachusetts, writing:

The real costs of living that burden families are higher in Massachusetts than in most other places in the country. As stated rather breezily in the [2017] Economic Review, there "may not be enough money to go around at lower income levels." Massachusetts's current Child Support Guidelines reflect a policy decision to place the burden of this poverty most squarely on children.

Eliminating the 15% Cap on Cost Sharing for Child Care and Medical Insurance Costs

The Task Force submissions of Jane Does Well and Community Legal Aid place a major focus on the 15% cost-sharing "cap" that the Task Force applied to child-care costs and medical insurance expenses in 2017. The 15% cap appears to have been suggested to the Task Force by <u>economic consultants from the</u> <u>Brattle Group</u>, who were hired by the state's Trial Court to advise the 2013 and 2017 Task Forces – and have been placed in that role by the Trial Court again in 2021. The 15% cap on cost sharing for child-care and medical insurance costs appears to be largely unique to Massachusetts. Most other states apportion

these costs proportionally, with the higher-earning parent responsible for a larger share the combined child-care and medical insurance costs.

In its <u>submission</u>, Community Legal Aid sharply criticizes the trial court's <u>economic consultants</u> for excluding child care and health insurance costs from its comparison of child support in Massachusetts to other states. "This shortcut is shocking," the CLA submission says, noting "that after accounting for childcare and health care costs, the Massachusetts Guidelines were lower by approximately 20% on average in the low-income range as compared to New Hampshire's child support amounts" in 2013. The CLA submission notes that Massachusetts childcare costs are 41% higher than the rest of the country and provides illustrative examples of how the 15% cap impacts parents, before concluding that the "structure of the current formula produces absurd results for Recipients and children."

Jane Does Well is similarly critical of the 15% cap imposed by the 2017 Task Force. Its <u>submission</u> includes a detailed analysis of the current methodology and summarizes the problem as follows:

In 2017, a 15% cap on childcare and healthcare expenses was added to the Massachusetts child support worksheet. This cap places an extremely onerous burden on custodial parents, violates the income shares concept and is also inconsistent with almost every other states' child support guidelines. The task force should remove the 15% cap from the worksheet. These expenses should be included as additions to basic child support obligations and divided between the parents based on their respective income.

MCFM does not directly address the 15% cap in its <u>submission</u> but argues in favor of allowing parents to apportion childcare and medical insurance costs separately from the child support calculation. MCFM further notes that under the current Guidelines, "the presumptive apportionment saddles one parent with a greater cost of childcare and health insurance not for any logical reason other than being the parent who started paying it, or whose employer offers a better option."

Jane Does Well and Community Legal Aid Criticize Work of Economic Consultants from Brattle Group

In their submissions, Jane Does well and Community Legal Aid include several criticisms of the economic <u>consultants retained by the Trial Court</u> to advise the Task Force. The Brattle Group consultants, led by Dr. Mark Sarro, were the subject of a major blog in December 2020 and served as economic advisors for the Task Force in 2013 and 2017. In June 2020, the Trial Court again selected the Brattle Group to advise the Task Force in 2021, despite receiving a bid from economic consultants Blum Shapiro to perform the work at a lower cost.

In its <u>submission</u>, Community Legal Aid criticizes Sarro's team for "breezily" noting that "there may not be enough money to go around at lower income levels" when the Task Force lowered Massachusetts child support across the board in 2013. CLA holds that the economic consultants took a "shocking" shortcut by excluding child-care costs from its comparison of child support in Massachusetts to other states. CLA's memorandum also pointed states the following:

As stated frequently throughout the economic literature in this area, setting child support guidelines amounts requires more than economic analysis; it is ultimately guided by policy decisions.

The statement appears to be an implicit critique of the child support model advocated for by Sarro and his colleagues at the Brattle Group, which holds that state Child Support Guidelines are merely a legal

presumption and not a policy determination, and that child support levels should be based on the Sarro's team model for calculating child-rearing costs.

Jane Does Well is more direct in its criticism of the Trial Court's economic consultants. Under the heading, "Recognize consultant bias and stated predisposition for lower child support", Jane Does Well states:

Previous research and statements by the consultants that have been hired for the last three quadrennial reviews reflect a perspective contrary to the principles of child support and indicate they are predisposed to recommend reductions in the child support obligations of noncustodial parents. The task force should recognize that their obligation is to the children of Massachusetts and resolve to send out future economic analysis RFPs to Public Policy Universities or academic institutions in Massachusetts or to non-profit research institutions with expertise in child support analysis.

The <u>49-page submission</u> by Jane Does Well argues that the "2016-2017 Economic Review advocates lower support without clear economic evidence", and supports its arguments with detailed tables, footnotes and economic analysis that directly rebut many of the claims set forth in the Economic Reviews led by Sarro's team. Their pointed conclusion:

We question several conclusions that resulted from this review and are concerned not only by the lack of economic rigor and supporting data behind implemented changes to current Massachusetts child support guidelines, but also with the biased perspective of the consultants that wrote the previous economic reviews.

The Jane Does Well <u>submission</u> details the historical advocacy of Dr. Sarro and his consulting team for lowering child support in Massachusetts and across the United States, as well as the connections between Sarro's past and present team members, including R. Mark Rogers and William Comanor, with Father's Rights groups. Their closing argument:

In our view, hiring Sarro, Comanor and Rogers to analyze Massachusetts child support guidelines is analogous to hiring oil industry consultants to analyze climate change.

Jane Does Well: A Focus on Task Force Economic Advisors, Multiple Children, and New "Caps" on Cost Sharing and Child Support for Adult Children

In addition to the concerns shared with MCFM and/or Community Legal Aid, Jane Does Well asks the Task Force to reaffirm the state's use of the "income shares" model for calculating child support, increase child support all levels, remove the automatic 25% reduction in child support for children over 18, and incorporate sharing of all child-related expenses on a pro rata basis. Below are some of the specific issues emphasized by Jane Does Well:

- Basis of Massachusetts Child Support: Income Shares Model. Jane Does Well criticizes the Task Force was deviating from the Income Shares Model since 2013 by reducing child support in the state and imposing arbitrary caps on specific costs and subgroups based on suggestions made by its economic consultants rather than public policy considerations.
- **Remove the 25% reduction in child support at age 18**. Jane Does Well criticizes the Task Force's decision to unilaterally reduce child support for children over the age of 18 by 25%, where it

argues that data suggests that the cost of housing and caring for such children is greater than the cost of raising younger children.

- Increase child support amounts at all income levels. Noting that child support levels have not increased in Massachusetts since 2009, and actually decreased in 2013. Jane Does Well cites the skyrocketing cost of living increases Massachusetts has seen since 2009, which have far outstripped modest increases in income over the same period and urges the Task Force to increase child support across all income levels.
- Incorporate sharing of all expenses on a pro rata basis. Jane Does Well identifies the numerous child-related costs that are generally apportioned between parents, including childcare costs, medical and dental insurance premiums, uninsured medical and dental expenses, extracurricular costs and educational costs. It argues that the "Task Force should incorporate language in the guidelines to ensure all children's expenses, including any extracurricular expenses and college, if applicable, in addition to child support are allocated on a pro rata basis." In other words, the parent with greater income should pay a greater share of said costs.
- Simplify and improve the Child Support Worksheet. Jane Does Well encourages the Task Force to implement the use of child support tables or charts like the majority of other states, rather than continuing to use the current "formula" framework. It also argues that the Task Force should prepare additional worksheets to aid attorneys, mediators and courts in understanding how a presumptive child support order would economically impact both custodial and non-custodial parents, including a comparison to basic self-sufficiency standards. In general, Jane Does Well argues that the core worksheet should be simplified, but that technology such as webforms and fillable PDFs create opportunities for the Task Force to provide additional supporting worksheets and tables that provide additional detailed economic data available to the parties based on their respective incomes and expenses.

MCFM: Seeking Clearer Language to Reduce Litigation and Closing Gaps in the Guidelines

In its <u>submission</u>, MCFM raised a number of issues concerned with clarifying the Guidelines to reduce conflict and litigation that arises out of ambiguities in the current Guidelines language. MCFM seeks clarifying language on the purpose of child support, as well new language encouraging judges to accept negotiated agreements by parents that deviate from the Guidelines. MCFM's memo also sought additional language in the Guidelines focused on the treatment of regular family gifts as well as tax-free spending accounts for health care costs. With respect to self-employment income, MCFM suggested a mandatory exchange of business records by self-employed parents, including business tax returns and profit and loss statements that reflect a business's gross revenue and business expenses. A brief summary of the additional issues raised by MCFM is below:

- What is child support? MCFM seeks clarification in the Guidelines regarding the purpose of child support and the child-related costs it is intended to cover. MCFM suggests this clarification would reduce disagreement and aid court and mediators in helping parties reach settlement on child support and other financial issues between parents.
- Not all Parents are Litigants. MCFM criticizes the Guidelines' use of the term "litigants" to describe parents and seeks language aimed at assisting mediators, attorneys and parents in the

process of reaching agreement without court intervention. In short, MCFM asks the Task Force to think of a Guidelines as a settlement tool, not just a legal presumption for cases that reach trial.

- Additional Income Sources: Family Gifts. MCFM seeks clarification on whether regular family gifts (such as annual transfers of \$15,000 between family members made for gift tax purposes) may be defined as sources of income, to the extent such gifts are regular and predicable.
- Self-Employment and other business income. MCFM asks the Task Force to provide a clearer list of what business expenses are includible or excludable from "ordinary and necessary expenses", as compared to the tax code, for self-employed parents. MCFM also suggest that self-employed parents whose income is derived from a closely held business should be required to share corporate tax returns and profit and loss statements with the other parent.
- Variable Income and self-adjusting child support orders. MCFM notes the challenges associated with parents whose income varies widely from years, including parents who receive unpredictable bonuses, <u>stock options or RSUs</u>, or commissions. The solution for many parents is to enter agreements for self-adjusting child support order. MCFM seeks guidance from the Task Force on how parents should structure such agreements.
- Imputation of Income / Attribution of Income: Minimum wage. MCFM suggest that it could reduce litigation if there was a minimum presumed attribution of income for parents with ⅓ of parenting time or less (or with children above a certain age) at minimum wage for a reasonable number of hours per week.
- Post-Secondary Education Expenses: Child's Share of College and Historical Savings. MCFM suggests that the Guidelines recognize that adult children bear some responsibility for the cost of college and give greater weight to parents who agree to assign a reasonable share of the burden of paying for college to their children. In addition, MCFM asks the Task Force to consider a family's historical plan for saving for college (i.e., the parents' college savings plan prior to the divorce or separation) when determining each parent's contribution to college.
- Health Insurance Deductibles and HSA/FSA contributions as they relate to Health Care Coverage and Uninsured medical and dental / vision expenses. MCFM notes that an increasing number of employers are offering high-deductible medical insurance plans, as well as tax-free health savings plans. It notes that deductible payments may require different treatment than ordinary uninsured medical expenses, and that a parent's access to an HSA or FSA account should be a consideration in apportion medical and dental insurance costs.
- Additional Deviation Factors: Parenting Time and Agreements to Apportion Child Care or Medical expenses. Consistent with its positions on parenting time and apportioning child-care and medical insurance costs, MCFM argues that these issues should be addressed more clearly as grounds for <u>deviation</u> from the Guidelines.
- Deviation due to Agreement of the Parents. MCFM expresses a degree of frustration over judges "often refusing to approve agreements that deviated from the guidelines for reasons considered sufficient by the parents". MCFM suggests that the Task Force expands its language surrounding <u>child support deviations</u> based on the agreement of the parties and include

language in the Guidelines indicating that judges should show deference to agreements entered by parents in most instances.

- Accessibility of Language / Online Child Support Guidelines Worksheet. MCFM encourages the Task Force to make the language of the Guidelines more accessible to non-lawyers "and answer the primary questions that parents have." It suggests supplementing the Guidelines with a FAQ for parents answering basic questions about child support. MCFM also asks the Task Force to ensure that all future versions of the Child Support Guidelines Worksheet remain available in the new "interactive webform" format recently released by the Trial Court.
- **Testing and Comment Period**: Finally, MCFM suggest that in "order to <u>prevent the form issues</u> <u>that occurred in 2017</u>, the Task Force should release any proposed updates for a comment period allowing for the discovery and correction of any inconsistencies or issues prior to finalizing."

Community Legal Aid: Child Support Too for Struggling Low-Income Parents

Community Legal Aid's <u>submission</u> to the Task Force begins with a grim reminder that the organization's 2017 submission to the Task Force fell on deaf ears:

Sadly, our testimony today is nearly identical in substance to that which we submitted in the last round of review. Very little changed in the Massachusetts Child Support Guidelines in 2017, and the economic situation of our clients and their children has only declined further since that time. The Guidelines continue to result in awards that are inadequate to meet the needs of low-income custodial parent households. The percentages used are too low, childcare costs are underweighted, permissible health insurance deductions are overly broad, and alimony is too-often overlooked. As stated frequently throughout the economic literature in this area, setting child support guidelines amounts requires more than economic analysis; it is ultimately guided by policy decisions. We are asking you to use this quadrennial review to put the focus of the Massachusetts Child Support Guidelines back on children.

As set forth above, most of the concerns raised by Community Legal Aid in its submission were shared by Jane Does Well and MCFM. However, Community Legal Aid's submission places a significant individual emphasis on the concerns of low-income parents. CLA notes that wealthier families spend less of their disposable income on raising children, but "lower family incomes require a higher percentage of family income to raise children." CLA cites statistics indicating that Massachusetts child-care costs are the highest in the nation, while home ownership is 37% higher and rent is 20% higher in Massachusetts than nationwide. CLA argues that instead of keeping pace with huge cost of living increases in Massachusetts, the Task Force lowered child support in 2013, and has not increased child support since 2009.

Again and again, CLA cites data and statistics indicating that Massachusetts fails low-income children by providing insufficient child support in one of the most expensive states to live. Most troublingly, CLA cites the Massachusetts Child Support Task Force's failure to seriously grapple with issues impacting low-income parents, despite the issues being raised repeatedly by CLA and similar organizations during each quadrennial review.

<u>CLA's 13-page submission</u> sharply criticizes the Task Force ignoring issues relating to poverty and failing to increase child support levels based on the actual cost of raising children in Massachusetts:

The current Massachusetts Guidelines are not related to estimates of child expenditures, do not adequately account for direct child expenditures, and are based on lower percentages than those used to calculate alimony.

CLA's suggested revisions to the Child Support Guidelines

Unlike Jane Does Well and MCFM, whose submissions to the Task Force include dozens of specific suggestions and recommendations, CLA consolidates its requested changes to the Guidelines down to five bullet points, which are reproduced below:

- the Massachusetts Child Support Guidelines support amounts be increased by at least 36% across the board to account for increases in cost of living;
- the percentages of income used at the lower end of the Guidelines amounts be pegged more closely to the true percentages of income necessary to support children;
- the formula be changed to allocate the cost of childcare between the parents in proportion to their incomes;
- only the cost difference between an individual plan of health insurance and the plan that covers the subject child or children be deducted from the formula; and
- the Guidelines state that parties are required to provide an alimony-first Guidelines calculation to the courts and clarify that courts can and should order both alimony and child support when appropriate, including in cases of family income below \$250,000.00.



How Much Attention Does the Task Force Pay to Public Submissions?

As noted many times in this blog, despite a <u>few recent improvements</u>, <u>the Massachusetts Child Support</u> <u>Task Force operates with virtually no transparency</u>. In our <u>recent blog</u> about the Task Force's economic consultants, we touched on this lack of transparency:

What is more clear is that the Trial Court's control over the state's Child Support Guidelines – which effect hundreds of thousands of Massachusetts citizens – is nearly absolute. The Task Force is selected and overseen by unelected judges and trial court employees with the power to make or break the financial lives of divorced and separated parents across the state. Its decisions are not voted on, cannot be vetoed by the governor, and are not subject to public scrutiny. Against this backdrop, the Trial Court's selection of the Brattle Group as the Task Force economist is only one small part of much larger, secretive process.

Although child support is quite obviously a public policy issue, and Task Force members are clearly acting as quasi-public officials in dictating child support for tens of thousands of residents, virtually all Task Force business is conducted behind closed doors. The Trial Court's position is that the Task Force's minutes are not subject to the <u>state's public record laws</u>. The <u>selection of the Task Force's economic advisor</u>, as well as the members of the Task Force itself, is conducted without any public oversight or scrutiny.

In its 2016-2017 Task Force Report, the Child Support Task Force states that it reviewed "oral and written comments submitted at public forums throughout Massachusetts [and] written comments submitted to the email address established for public comments". Because Task Force meetings are conducted in secret, there is no way to know how time – if any at all – the Task Force spent reading the public submissions received by the Trial Court. Did each Task Force member read each submission? Were submissions curated by Trial Court staff or the Trial Court's hand-picked economic consultant, Dr. Mark Sarro? We simply do not know.

About the Author: Jason V. Owens is a Massachusetts divorce lawyer and family law attorney for Lynch & Owens, located in <u>Hingham</u>, Massachusetts and <u>East Sandwich</u>, Massachusetts. He is also a mediator for South Shore Divorce Mediation.

Schedule a consultation with Jason V. Owens today at (781) 253-2049 or send him an email.

© Lynch & Owens, P.C. and <u>www.lynchowens.com, 2019</u>. Unauthorized use and/or duplication of this material without express and written permission from this site's author and/or owner is strictly prohibited. Excerpts and links may be used, provided that full and clear credit is given to Lynch & Owens, P.C. and <u>www.lynchowens.com</u> with appropriate and specific direction to the original content.