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The Family Resolutions Specialty Court: A Community-Based Problem-Solving Court for Families in Conflict in Hampshire County

By Hon. Linda S. Fidnick
Voice of the Judiciary

Traditional adversarial litigation can be ineffective in meeting the needs of families who are experiencing divorce or separation. Litigation may be an ultimately productive method for resolving conflicts between strangers — someone wins, someone loses, and the parties never see one another again. How profoundly different family cases with children are! Parents usually come to court at a complicated and painful time. Anger, mistrust, fear, grief — powerful emotions grip them. Yet, despite the demise of their personal relationship, parents must (and should) continue as parents. The more effectively they can work together, the easier it is for their children. Typically parents will need to continue to address one of the many unanticipated, yet inevitable, changes to their lives or the lives of their children after the case has concluded. Unfortunately, the traditional court process gives them no tools to resolve their disputes on their own.

The Hampshire Division of the Probate and Family Court is committed to finding better ways to help families through the court process. Our initiatives include a parent education program for divorcing parents that was expanded to include "For the Children" for never-married parents; "Only One Childhood," an educational program for mid-conflict parents; a mediation program; and a program that provides attorneys for children. These programs have inestimably benefited the many families of Hampshire County. In this article I discuss a recent program developed by the Hampshire Probate and Family Court that has shown much promise: the Family Resolutions Specialty Court.

Starting in 2014, a group of Hampshire County-based professionals, including among others, Mike Carey, the Register of Probate, Pam Eldridge, Chief Probation Officer, Noelle Stern, Judicial Case Manager, Hon. Gail Perlman, former First Justice, Kathy Townsend, mediator, and Marsha Kline Pruett, Professor at the Smith College School for Social Work, began to meet and talk about ways to provide families with an alternative to the traditional court process within the court itself. The Family Resolutions Specialty Court ("FRSC") is the result. Loosely based on a process that was developed in Australia's family court, the FRSC has the following goals: to reduce conflict in cases involving children, to keep court proceedings child-focused, to give parents tools via mediation and the assistance of a clinically trained child specialist to address the problems facing their own family, and finally, to increase all parties' satisfaction with the court process. We hoped that the FRSC would be more humane and more efficient than traditional family litigation, and ultimately give parents the ability to communicate well enough to obviate the need for repeated returns to court. We also created an FRSC Advisory Board comprised of a wide variety of professionals in the community. FRSC is available in most cases involving children. It has been used in initial divorces, complaints for modification, and complaints for contempt, whether the parents have counsel or are self-represented.

FRSC serves traditional and non-traditional families of all socio-economic backgrounds with children of all ages. FRSC is voluntary. Initially, both parents must opt in to the program. Either parent may opt out at any time. If a parent opts out, the case returns to the traditional court

process and a different judge is assigned. Once the parties opt in, a probation officer completes an intake and screening. This initial assessment includes meeting with the parties and counsel to explain how FRSC works. If a significant history of domestic violence exists or one or both parents do not have the capacity to participate meaningfully, the family will be screened out. Once the family is screened in, its members are assigned a support team consisting of the family consultant (a mental health professional who remains involved with the case until resolution), an attorney for the children, a probation officer, and a mediator.

The family consultant conducts a guided interview to assess the family's strengths and challenges and discusses various parenting arrangements. What is unique about this step is that the first in-depth conversation about the parenting plan comes to the parents from a mental health and developmental perspective, rather than a legal one. The parents are then referred to mediation. During this confidential process, issues requiring resolution are identified and parents are provided with tools to resolve future conflicts informally.

Next, a court conference is held. The parents, their counsel, the children's attorney, the family consultant, the probation officer, and I attend. We sit at a table with the parents near me and facing each other. The parents bring photographs of the children. I ask each parent what his or her hope is for the outcome for themselves, for the children, and, importantly, for the other parent. Although parents are encouraged to speak directly to me, rather than by representations of counsel, attorneys are critical to the FRSC. Lawyers help participants understand their rights and obligations, identify relevant issues, ensure complete disclosures, and counsel clients to participate in a meaningful way. We use a problem-solving approach. The rules of evidence are suspended. Information is shared freely. The process is open and transparent. If a participant raises a concern that information is being withheld or misrepresented, he or she can request that the case be transferred back to the traditional court process.

At the court conference, we identify the resolved and contested issues, the information needed to determine the outcome of the contested issues, and outline the next steps. As a community-based court, we discuss whether referrals to parent education, substance abuse treatment, family counseling, or early childhood intervention may be helpful to the family. If so, the probation officer is key in referring members of the family to appropriate community agencies. The FRSC team members work with the family between conferences. The parents may choose to meet with the mediator, the family consultant, the probation officer, or attorney for the child in any combination and as often as needed. Court conferences are scheduled at appropriate intervals until all issues are resolved. The goal is resolution by agreement. However, if necessary, I will make a decision, either on a temporary basis or as a final judgment, if the parents are unable to agree.

Because of the attention to the case by all professionals involved from the very beginning, even the most complex case concluded in seven months, half of the time standard in the traditional track. This has been one of the unexpected, but greatly appreciated by the litigants, benefits of participating in FRSC.

The following are some comments of parents from their exit surveys:

> "I now have much more contact with my children than when we began. . . . We have been able to agree on many issues that we did not agree on before."
>
> "FRSC helped ensure my child was enrolled in a high-quality pre-[kindergarten] program which has transformed our entire family's quality of life and gave our child a strong foundation at a time when he was most vulnerable to instability."
>
> "This process was very beneficial to myself as a parent and was minimally stressful. . . . It has helped me to learn to never speak poorly of her dad in front of her . . . We fight almost never now and seem to be more understanding towards each other. . . . I would STRONGLY recommend this process to anyone getting divorced who have children. I hope this becomes the standard."
>
> "I have learned a tremendous amount through the programs associated with FRSC both as a parent and individual. . . . [FRSC] has helped to make me the best father I can possibly be. . . . We still have a long way to go but I am hopeful that in eliminating much of the negativity that typically surrounds divorce, it will allow us to become great co-parents. Truly life changing. I hope this continues and that all divorces with children can be done in this manner."

Thus far, FRSC has succeeded in every aspect of its purpose. Children have a voice from the very beginning, which focuses their parents on the primacy of continuing to raise healthy children despite the marital or relationship dissolution. For those separating and divorcing parents who choose the process, they were able to come to closure in half the time (or less) than allotted for cases under our time standards. The families who have benefited from FRSC have been from all walks of life in our county: people from all manner of socio-economic, religious, health status, gender-identified, and educational backgrounds have benefited from it. Our hope is that the FRSC model will be the default process for all families experiencing divorce and separation throughout the Commonwealth.

Judge Fidnick is the First Justice of the Hampshire Probate and Family Court.

60 is the New 50: A Look at Age-Based Legislation Through the Eyes of a Reluctant 'Elder'

By Hon. Linda E. Giles
Voice of the Judiciary

Age-based criteria are entrenched in Massachusetts law. I have found over two dozen statutes providing for sixty-or-over age classifications, on matters ranging, *inter alia*, from the Department of Elder Affairs' definition of "elderly person" as an individual sixty years of age or over, G. L. c. 19A, § 14; to the Department of Labor Standards' provision of an extra day of family and medical leave to care for an "elderly relative," *i.e.*, one at least sixty years of age, G. L. c. 149, § 52D; to the right to a speedy civil trial for sixty-five-year-olds, G. L. c. 231, § 59F; to enhanced penalties for various crimes against the person of victims sixty or sixty-five years of age and older, G. L. c. 265, §§ 13K, 15A, 15B, 18, and 19 and G. L. c. 266, §§ 25 and 30; to the right of tenants aged sixty or more to a six-month stay in summary process proceedings, G. L. c. 239, § 9; and to the entitlement of "aged" persons sixty-five years or older to receive state supplementary payments from the Department of Transitional Assistance, G. L. c. 118A, § 1.

Perhaps I am not the most impartial arbiter on the subject of age-based legislation. As a sexagenarian fast approaching mandatory retirement age and acutely aware that Vermont judges do not need to retire until ninety (and federal judges not at all), I confess to being a reluctant "elder." Moreover, some may argue that any attack on ageism in the law may be a "Trojan Horse" that could open the floodgates to subverting age-based benefits and entitlements. Nevertheless, I question the arbitrariness and effectiveness of many older-age-specific laws and issue a clarion call for the legislature to re-examine them.**[1]** (Youth age classifications, *e.g.*, the Juvenile Court cut-off age of eighteen when compared to the drinking age of twenty-one, G. L. c. 119, § 58; G. L. c. 138, § 34A, also are worthy of scrutiny but beyond the scope of this article.)

The battle for this not yet over-the-hill individual seems uphill at first. Some forms of age discrimination are undeniably necessary and reasonable, *e.g.*, compelling children but not adults to be educated, or allowing adults but not children to vote. Age-based laws also are well-settled and plentiful. The federal Age Discrimination in Employment Act of 1967 (ADEA), which prevents age discrimination against persons forty years of age or older, is celebrating its fiftieth anniversary this year. Over forty years ago, the constitutionality of age-based classifications was enshrined in the United States Supreme Court's holding in a Massachusetts case, *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); in *Murgia*, the Court concluded that uniformed state police troopers facing mandatory retirement at fifty did not constitute a suspect class for purposes of equal protection analysis. Over the past several decades, there has been a proliferation of legislation aimed at protecting "elders," commonly defined as sixty-five or older, from abuse, neglect, and discrimination.

To be sure, protecting vulnerable senior citizens from abusive or unfair treatment is a laudable government interest. Furthermore, "[t]he problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific." *McGinnis* v. *Royster*, 410 U.S. 263, 270 (1973), quoting *Metropolis Theatre*

Co. v. *City of Chicago*, 228 U.S. 61, 69-70 (1913). Even so, chronological age has served as an arbitrary, overbroad, and expedient proxy for more relevant but difficult-to-quantify characteristics, such as frailty, vulnerability, or need. Older adults are subjected to disparate treatment on the basis of stereotyped assumptions about their abilities and disabilities; and protections for "elders" are premised on the inaccurate pigeon hole that they are impaired cognitively or are physically- or decisionally-challenged. Policy-makers lump older individuals into age-based, monolithic categories (*e.g.*, middle-old, old, the oldest) without account for very real differences among the age cohorts. *Cf.* Kenneth F. Ferraro, "The Evolution of Gerontology as a Scientific Field of Inquiry," *Gerontology: Perspectives and Issues* 13, 13-33 (3rd ed. 2007). As the average life expectancy has increased to 78.8 years, Centers for Disease Control and Prevention FastStats – Deaths and Mortality, and one in five over age sixty-five in Massachusetts is still working, "1 in 5 over 65 still on the job," *Boston Globe*, June 12, 2017, elderly status, widely assumed to start at age sixty-five, has become an increasingly poor predictor of physical and mental limitations. Centers for Disease Control and Prevention, Quickstats: Estimated Percentage of Adults with Daily Activity Limitations by Age Group and Type of Limitation – National Health Survey, United States. Accordingly, fixed age thresholds for classifying people as old, which do not take into account improvements in health and longevity, seem increasingly anachronistic.

Furthermore, some protections for "elderly" persons, albeit well-intentioned, may not be so benign. For example, a mandatory reporting system in Massachusetts requires individuals in nineteen specified occupations, including physicians and nurses, to report suspected abuse of "elderly persons" sixty years of age or over to the Department of Elder Affairs. G. L. c. 19A, §§ 14, 15. Mandated disclosures under the law may implicate the release of the alleged victim's privileged medical information, which, if done without that "elder's" consent, would undermine his/her right to informational privacy. At least one legal scholar has argued that age-specific legislation may violate the civil rights of older adults and has called for expanding the scrutiny of age-based classifications from rational basis to intermediate. See Nina A. Kohn, "Rethinking the Constitutionality of Age Discrimination: A Challenge to a Decades-Old Consensus," 44 U.C.Davis L.Rev. 213 (2010); Nina A. Kohn, "Outliving Civil Rights," 86 Wash.U.L.Rev. 1053, 1058-59 (2009). In yet another context, health care systems sometimes rely on age-based classifications to deny older adults the right to obtain certain medical procedures regardless of need. Although doctors routinely tell patients over sixty-five that they are not good candidates for organ transplants, Johns Hopkins' investigators have found that older adults can enjoy excellent transplant outcomes in this day and age. See Dorry L. Segev, M.D., Ph.D., et al., "Candidacy for Kidney Transplantation of Older Adults," *Journal of the American Geriatrics Society*, Vol. 60, Issue 1 (January 12, 2012).

Maybe it is time to rethink the cavalier use of imperfect age-based criteria in our laws, starting with our very definition of "old age." After all, population experts have concluded that sixty really *is* the new fifty. See, *e.g.*, W. Sanderson, S. Scherbov, "Faster Increases in Human Life Expectancy Could Lead to Slower Population Aging," *PLOS ONE* (April 2015). A number of research demographers have suggested that policymakers focus less on chronological age and embrace measures based on *prospective* age, *i.e.*, the expected remaining years of life for a given age range. See W. Sanderson, S. Scherbov, "Rethinking Age and Aging," *Population Bulletin* vol. 63, no. 4, Population Research Bureau (December 2008). Prospective age is a

population-based concept that takes into account improvements in health and life expectancy which the static concept of chronological age does not. *Id.* Perhaps Oliver Wendell Holmes, Jr., one of Massachusetts' greatest native sons, had the notion of prospective age in mind when, at the age of sixty-three, he quipped, "[o]ld age is fifteen years older than I am." In the humble opinion of this purported "old ager," truer words were never spoken.

[1] The opinions I express are my own and do not reflect the view of the Massachusetts Superior Court. Though I recommend legislative reform, I of course will continue to follow the law as it exists.

Judge Linda Giles has served as an Associate Justice of the Superior Court since 1998. She is an adjunct professor of law at Suffolk University Law School and a member of the Board of Editors of the Boston Bar Journal. Judge Giles is a graduate of McGill University and New England School of Law.

"Dramatic Change in the Administration of Justice"

By Court Administrator Jonathan S. Williams
Voice of the Judiciary (Guest Contributor)

The members of the Boston Bar Association know that Massachusetts is in the midst of dramatic change in the administration of justice. Both necessity and opportunity are playing a part. Leaders in all three branches of government are looking more imaginatively at the forms and substance of justice than at any time since the days of *Gideon* and of the demurrer. An animating principle in the Trial Court's thought is a strategic focus on the "user experience." Looking through the public's eyes demands that we reduce barriers to access, reduce unnecessary delays, and ensure that court action seeks to address underlying causes of legal conflict where possible. Specialty courts, alternative dispute resolution, opioid response, and justice reinvestment reforms are engaging everyone. Technology offers new kinds of opportunities to make court more accessible and efficient. It has dramatically changed law practice, and the public's appetite for new technologies to engage their justice system electronically has never been greater.

My predecessor Harry Spence wrote last winter about the strength of the unique Massachusetts court governance model put in place in 2012. It pairs Trial Court leadership in myself and Chief Justice of the Trial Court, Paula Carey. She brings deep judicial knowledge and experience leading on matters of judicial policy and innovation. My job is to maintain and increase our administrative capacity to manage change. My varied preparation in North Carolina includes years of private law practice and years of state government administration in the justice field. It is a familiar challenge to take responsibility for finance, human resources and technology at a judicial system's statewide scale. And over the past two years I was deeply engaged at looking at the future of North Carolina's courts—and realized that state courts across the nation face the same necessities and opportunities. What drew me here is that the Massachusetts Trial Court today is action-oriented and is already deeply engaged in change.

If you are the managing partner of a large law firm, or manage your own solo practice, you know that few decisions weigh more heavily than workforce and technology investments. Likewise for the courts our workforce and our technology are fundamental to our success.

Workforce.

The work of every court employee is becoming more interesting and more demanding. One reason is the growing diversity of the communities we serve. To meet that need we are recruiting to broaden the diversity of our workforce, and helping new and current employees to expand their cultural appreciation and competency. This is a natural and necessary element of our strategies to reduce the influence of bias—implicit or explicit, whether based in race, ethnicity, religion or gender—in administering justice.

We not only need to do it, but talented potential employees expect us to model and support our core value of equal justice under the law. Today 23% of our employees are from minority groups compared to 24% of the state's population in the last census. We need to continue targeted outreach in our recruiting so that talented minority candidates don't overlook the justice system as a personally and professionally rewarding career in public service, and know that no avenue within the justice system is closed to them.

The nature of work in the courts is changing too, meaning we need to recruit for higher skills than ever. Technology will free our employees from much of the drudgery of managing the tide of paper, and allow more time to interact with and serve the public. Our facilities staff supports advanced energy management and other technologies, and maintains both historic and modern architectural properties. Professionalizing Court Security to counter contemporary risks has involved creating a formal academy that graduated its seventh class this summer, and recently achieved national accreditation as a law enforcement training program. We are supporting our workforce overall with more and more training. Working with our unions, we have made continuing education a core piece of Trial Court employment, almost doubling the number of attendees in the past four years.

Caring for our current employees and urgency in recruiting and hiring a talented new generation of employees are both critical to the strength of our justice system.

Technology.

We all recognize the gap that has opened between court technology and the consumer technology demonstrated in the experiences of retail, finance, and health care. We are playing catchup but have made some wise strategic choices in technology that are beginning to pay off.

The creation and implementation of MassCourts retired 14 separate systems built in-house, designed with different philosophies and architectures dating back to the 1980's. This change required two tough strategic choices. The first tough choice: stop hiring and retaining staff for continuous custom software development, and instead outsource the new IT case management system to a vendor specialized in court applications. Our in-house staff is focused on the infrastructure, service delivery, and better understanding the evolving needs of the courts. The second tough choice: close down the old systems completely and move all the old data into a completely modern database and middleware platform. Massachusetts chose this harder course and completed the major turn just 20 months ago. MassCourts will continually evolve not only to help manage the work of the courts now but to enable new ways for the courts to get their business done.

E-filing has just begun racing forward toward this future. On the criminal side tens of thousands of Electronic Applications for Criminal Complaint are being e-filed by police this calendar year. Civil e-filing is now rolling out, this year receiving thousands of pleadings and attachments, and more than 4,500 attorneys have enrolled. More and more the bar will be able to save time and client money by e-filing without running to the courthouse and managing snail mail, following the lead of our appellate courts. Inside the courthouse we will look to use e-filings to reduce reliance on paper, and enable judges and litigants to access and work with their documents both remotely and online.

The ability to pay many obligations online is being added to MassCourts over the next few months. It might sound odd at first, but we don't want you or your clients coming to court to pay an outstanding fine or probation charge. Or more exactly, we want you to pay from wherever is most convenient. We do want you coming to court to accomplish something meaningful to advance your case or issue to resolution. We don't want you or the public to spend time and money away from work, arranging child or parent care, finding transportation, and standing in security and cashier lines just to make a payment.

Digital recording of court proceedings has been in place for years in all but Superior Court criminal sessions; we have now finished installing or upgrading this technology in almost 300 of 429 courtrooms throughout the Commonwealth in all court departments. This latest generation technology supports two great changes for the bench and the bar: audio recordings can be streamed the next day remotely online, and production of official transcripts for most cases is being cut from 90 days to 30 days.

And over the past several years we have added more and more video connectivity. In the first six months of this year there were approximately 3,000 video events including jail-to-court arraignments, court-to-court probation hearings and emergency protection hearings, and even law office-to-court civil motions hearings to save counsel driving across the state for brief matters.

My confidence in our ability to do these things is immense. I have been visiting courthouses and meeting employees who are eager to share the initiatives they have undertaken. I have met scores of our new employees across all job types, and we are attracting great young people and mid-career movers. I have reviewed workforce diversity statistics and workshop reports that show our employees gaining capacity to work with diverse communities. I have visited a District Court that runs every small claims calendar with no paper files in the courtroom, and I have sat in on a Superior Court session where a judge in one county held court by video for probationers and counsel in another county. I see our e-filing numbers climbing every month. In other words, the action and engagement in change that drew me to the Massachusetts courts is being demonstrated every day.

The Supreme Judicial Court appointed Jonathan Williams to a five year term as Court Administrator for the Massachusetts Trial Court as of May 1, 2017. Williams previously served as the Senior Deputy Director of the North Carolina Administrative Office of the Courts. He has almost thirty years' combined experience in government and in private law practice.

The 2017 Massachusetts Child Support Guidelines

By Holly A. Hinte
Heads Up

It is the public policy of the Commonwealth that dependent children be maintained, as completely as possible, from the resources of their parents. The Court's authority to award child support is defined by statute and applies in a variety of cases including divorce, paternity, and abuse prevention cases to name a few. Broadly speaking, child support is an amount paid from one party to another for the support of the dependent child. Unlike alimony orders, such amount is neither taxable to the payee nor deductible by the payor.

In order to receive certain federal funding, each state must establish guidelines for child support and review them once every four years to ensure that their application results in the determination of appropriate award amounts. 42 U.S. Code § 667; 45 CFR § 302.56. In Massachusetts, the Guidelines are promulgated by the Chief Justice of the Trial Court and used by the judges of the Probate and Family Court in determining the appropriate level of child support.

As required by said federal regulations, in March 2016, the Chief Justice of the Trial Court, Paula M. Carey, convened a Task Force, consisting of judges, practitioners, and economists, to review the 2013 Guidelines and the current economic climate. This review lasted over a year and included public forums, discussions, reports, and feedback from the public, the bench and the bar.

The new 2017 Guidelines were published and became effective on September 15, 2017. For the first time, the Task Force's comments are included within the actual text of the Guidelines. There are also new forms and worksheets to be used by practitioners and the court. All of the new documents are available on the court website: **www.mass.gov/courts/selfhelp/family/child-support-guidelines.html**.

Compared to the 2013 Guidelines, the 2017 Guidelines contain edits made for clarification purposes, substantive changes, and in-depth instructions and commentary. Some of the notable changes are as follows:

Child Support for Children Between the Ages of 18 and 23

The 2017 Guidelines now apply in all cases in which child support is awarded, no matter the age of the child, which is a marked difference from the prior guidelines and prior federal regulations which only required application of the guidelines up to age 18. This has always been a conflict, as under the Massachusetts statutory scheme, the Court has the discretion to award child support for a child over 18 to 21, if said child is domiciled with, and principally dependent upon, a parent, and the Court has the discretion to award child support for a child between the ages of 21 to 23 so long as the child is domiciled with, and principally dependent upon, a parent, and enrolled in an educational program (undergraduate only).

The 2017 Guidelines address this conflict by providing instructions for handling child support for children between the ages of 18 and 23, including providing factors to consider when determining whether or not to enter such an order. Additionally, in recognizing the unique

factors present with children between the ages of 18 and 23, the 2017 Guidelines reduces the base amount of child support in this age-range by twenty-five percent (25%). Such presumptive order may be deviated from if appropriate.

Contribution to Post-secondary Educational Expenses

In addition to the concerns regarding child support for children between the ages of 18 and 23, there was also a lack of clarity and uniformity as it related to contributions to post-secondary educational expenses of a child. The prior guidelines did not address such contributions despite statutory authority giving the Court discretion to order a party to contribute to such expenses.

The Task Force recognized the concerns voiced by the public, the bench and the bar- namely, many parents cannot afford to pay college expenses from their income while also meeting other expense obligations, often being forced to incur substantial loan liability. As such, the 2017 Guidelines include a new section addressing such contributions.

In determining whether or not to order such contribution, the 2017 Guidelines provides a list of factors the Court must consider including cost, the child's aptitudes, the child's living situation, the available resources of the parent and the child, the availability of financial aid, and any other relevant factors.

If it is determined to order such contribution, the 2017 Guidelines cap such contribution at 50% of the undergraduate, in-state resident costs of the University of Massachusetts-Amherst (as set out in the "Published Annual College Costs Before Financial Aid" in the College Board's Annual Survey of Colleges). While such cap is not an absolute limitation, any order requiring a parent to contribute more than 50% requires written findings that a parent has the ability to pay the higher amount.

The Task Force makes clear that this limitation is not meant to apply in situations where: (1) children are already enrolled in college (prior to September 15, 2017) or (2) parents are financially able to pay educational expenses using assets or other resources.

If the Court exercises its discretion and orders child support for a child over the age of 18 along with contribution to post-secondary educational expenses, the Court is to consider the combined amount of both orders and the impact of such on the obligor.

Attribution and Imputed Income

The 2017 Guidelines distinguish "imputation of income" and "attribution of income" in a more coherent and refined manner. Imputed income is undocumented or unreported income. Attributed income is a theoretical amount assigned to a parent after it is found that the parent is capable of working and is unemployed or underemployed. In addition to the clarification of the types of income, the 2017 Guidelines provide new factors the Court is to consider when determining whether or not to attribute income.

Holly A. Hinte is an associate at Lee & Rivers, LLP, a boutique domestic relations law firm in Boston and a member of the Boston Bar Association & Massachusetts Bar Association.

Massachusetts High Court Rules State Law Does Not Authorize Detention Based on ICE Detainers Alone

By Tad Heuer and Daniel McFadden

Case Focus

On July 24, 2017, in *Lunn v. Commonwealth*, the Massachusetts Supreme Judicial Court ruled that state and local officials are not authorized to arrest immigrants based on civil immigration detainers issued by U.S. Immigration and Customs Enforcement ("ICE"). As a result, public safety officials in Massachusetts generally cannot detain or hold a person in custody based solely on the existence of an ICE detainer. It appears that the SJC is the first state highest appellate court to reach and decide this issue.

The Detainer Controversy

Although ICE officers frequently detain people accused of being "removable" (*i.e.*, subject to deportation), ICE does not always make the initial arrest. Rather, ICE often issues "detainers" to the state or local public safety officials who have certain immigrants in their custody. A detainer is ICE's "request" that, if an immigrant of interest to ICE is in the custody of local authorities for any reason, the authorities voluntarily delay that individual's release by up to 48 hours to allow ICE to transfer him or her into immigration custody. This is an efficient mechanism for ICE to seize immigrants who are being released from prison, who have been arrested, or who have simply been pulled over for a traffic stop.

Detainers have been controversial because they essentially ask state and local officials to hold people in custody absent a judicial warrant or probable cause. Most violations of immigration law are not crimes, and most removal proceedings are purely civil matters handled by administrative courts within the Department of Justice. Nor do detainers typically provide information establishing probable cause. Critics of current ICE practice have contended that neither state law, nor the state or federal constitutions, permit a warrantless arrest in such circumstances.

Prior to *Lunn*, challenges to the legality of compliance with ICE detainers had met with some success. In 2014, the Maryland Attorney General issued a memorandum concluding that "an ICE detainer, by itself, does not mandate or authorize the continued detention of someone beyond the time at which they would be released under State law." The Virginia Attorney General issued an official opinion reaching the same conclusion in 2015. In Massachusetts, a Single Justice of the SJC ruled in May 2016 that law enforcement officials are "without authority to hold [a person], or otherwise order him held, on a civil [ICE] detainer." *Moscoso v. A Justice of the East Boston Div. of the Boston Mun. Court*, No. SJ-2016-0168, slip op. at 1 (May 26, 2016). However, until *Lunn*, it appears that no state's highest appellate court had squarely addressed the question.

The *Lunn* Decision

The *Lunn* case arose from the detention of Sreynoun Lunn, an immigrant ordered removed from the United States in 2008. However, ICE was apparently unable to execute that order because Mr. Lunn's country of origin declined to issue the necessary travel documents, and he was therefore released.

In 2016, Mr. Lunn was held by Massachusetts authorities on a larceny charge, which the state court dismissed for lack of prosecution. Ordinarily, Mr. Lunn would have been free to go. However, ICE had issued an immigration detainer requesting that Massachusetts authorities continue holding Mr. Lunn for up to two days beyond when he would otherwise have been released. Consequently, even though all charges had been dismissed, court officers detained Mr. Lunn for several more hours, until ICE agents arrived and took him into federal custody.

Mr. Lunn promptly sought a ruling that state officials were wrong to hold him based solely on ICE's civil immigration detainer. A single justice of the SJC reserved and reported this question to the full Court.

In agreeing with Mr. Lunn, the SJC first explained that "the administrative proceedings brought by Federal immigration authorities to remove individuals from the country are civil proceedings, not criminal prosecutions." The Court further explained that ICE detainers are issued for the purpose of this "civil process of removal," and are purely requests for voluntary state or local assistance. In its briefing, the federal government even expressly conceded that state authorities are not obligated to enforce ICE detainers.

The Court then turned to the question of whether Massachusetts officials have statutory or common-law authority to arrest people solely because the officials received a voluntary request from the federal government to hold the person for a civil proceeding. The Court found no such authority. The Court also rejected the federal government's argument that state law enforcement officers possess "inherent authority" to enforce detainers. Accordingly, it is generally unlawful for Massachusetts state and local officials to arrest and detain a person based solely on an ICE detainer.

However, *Lunn* does not preclude executing an arrest for other independent reasons (for instance, if the person is subject to a state or federal warrant arising out of suspected criminal activity). Nor does *Lunn* prevent officials from providing ICE with advance notice of a given detainee's or inmate's intended release date.

The *Lunn* decision could also carry implications beyond the immigration context, particularly its conclusion that a law enforcement officer has no arrest powers outside of those expressly granted by statute or common law. As the Court stated, "[t]here is no history of 'implicit' or 'inherent' arrest authority having been recognized in Massachusetts that is greater than what is recognized by our common law and the enactments of our Legislature." Further, the Court indicated its discomfort with any expansion of common-law arrest powers, explaining that "[t]he better course is for us to defer to the Legislature to establish and carefully define" new arrest powers. This language likely will be useful to future criminal defendants and civil rights plaintiffs who seek to challenge other forms of warrantless detention.

Notably, authorship of the *Lunn* decision was attributed as "By The Court," rather than to any specific justice, and the reasons for the Court doing so remain unclear. What is known is that this approach is rare, having last been employed over two decades ago. While typically employed in cases (like *Lunn*) involving regulation of the judicial branch or the practice of law, it is infrequent even then: in the vast majority of decisions in such cases, opinions are authored by specific and identified justices.

Open Questions

The *Lunn* decision leaves several open questions. For example, the SJC did not reach the question whether Mr. Lunn's arrest would, if nominally authorized by state statute, be permitted by the state and federal constitutions. This is not strictly academic. Governor Baker has drafted legislation that would authorize such detention in at least some circumstances. Critics have expressed strong opposition to any such law on multiple constitutional grounds.

The SJC also did not reach the question of whether an arrest would be lawful if a particular detainer form provided sufficient information to establish probable cause that the individual had committed a federal crime. Nor did the SJC address whether an arrest would be permissible if made by a state or local official acting pursuant to a state-federal partnership under 8 U.S.C. § 1357(g). That statute permits ICE to specially deputize state and local officials to act with the authority of ICE officers. In Massachusetts, ICE has executed such agreements with the Massachusetts Department of Corrections and the Sheriff's Offices of Bristol and Plymouth counties. These outstanding questions will have to await resolution in future cases.

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Endrew F. v. Douglas County and its Impact on Special Education Law

By Daniel T. S. Heffernan
Heads Up

"Anxiously awaiting" was an apt description of the feeling among the lawyers who represent school districts and families of the approximately two hundred thousand students currently eligible for special education in Massachusetts, as they waited for the Supreme Court's decision in ***Endrew F. v. Douglas County*, 137 S.Ct. 988 (2017)**. The Court was expected to delineate the level of services school districts must provide to students with special needs, an issue that it had not addressed in-depth since ***Board of Education v. Rowley, 458 U.S. 176 (1982)***.

The Individuals with Disabilities Education Act ("IDEA"), **20 U.S.C. §1400 et seq**., provides that each special education eligible student must receive a "free appropriate public education" ("FAPE"). FAPE includes special education and related services that are provided at public expense and under public supervision, and that meet the state's education standards. The school district must provide special education and related services "in conformity with the [student's] individualized education program," or IEP. **§1401(9)(D).** This IEP is "the centerpiece of the statute's education delivery system for" the eligible student. ***Honig v. Doe, 484 U.S. 305, 311 (1988)***. The IEP must describe the student's present level of performance and must detail measurable goals for the student and how their progress is to be gauged.

In assessing the adequacy of the school district's IEP for a particular student, the key inquiry is whether the IEP will enable the student to make "effective progress." The Court first addressed the "effective progress" standard in *Rowley*. The student in *Rowley* received her special education services and accommodations in a regular education setting ("inclusion" program), was performing better than many others in her class, and was advancing easily from grade to grade. The district argued that FAPE requirements were merely aspirational while the parents pushed for additional programming, arguing that districts were required to provide students with disabilities the educational opportunities that were exactly equivalent to their non-disabled peers. The *Rowley* Court charted a middle path, requiring school districts to provide an IEP that was "reasonably calculated to enable the child to receive educational benefits." ***Rowley, 458 U.S. at 207***. The Court noted that for students in regular-education classes, an IEP may generally be required to facilitate grade advancement. However, recognizing the wide spectrum of students with IEPs, the Court refrained from establishing "any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." ***Id. at 202***.

In in *Endrew F.*, a student with autism was educated in Colorado's Douglas County School District from preschool through fourth grade. Dissatisfied with his progress, his parents placed him in a private special education school and sought reimbursement and prospective funding for that placement. The key issue in the dispute was whether Endrew would make effective progress in the public school program that was essentially a continuation of the programming he had been receiving. The fact that his IEPs had essentially carried over the same goals and objectives from year to year demonstrated to the parents that he was not making effective progress. Endrew clearly had done much better in his private placement.

Endrew's parents litigated the matter through an administrative proceeding at the Colorado

Department of Education, which deemed Endrew's IEPs appropriate and, therefore, denied their claims for reimbursement and for placement in the private school going forward.
The federal district court reviewing the administrative determination found that while Endrew had not made "immense educational growth," he had at least made "minimal progress." ***Endrew F. v. Douglas County, No. 12-2620, 2014 WL 4548439, at 9 (D. Colo. 2014)***. On appeal, the Tenth Circuit affirmed, holding that an IEP was sufficient if it conveyed an educational benefit that was merely more than "de minimis." ***Endrew F. v. Douglas County, 798 F.3d 1329, 1341 (10th Cir. 2015)***.

The Supreme Court, however, unanimously rejected the "de minimis" standard. The Court examined the history surrounding the passage of IDEA, noting that the IDEA was an "ambitious" piece of legislation aimed at remedying the pervasive and tragic stagnation of students with disabilities. The Court stressed the importance of the unique needs and abilities of the particular student when assessing the adequacy of the *individualized* educational plan of that student, noting that "[a] focus on the particular child is at the core of the IDEA." ***Endrew F., 137 S.Ct. 988 at 12***.

The Court restated *Rowley*'s general principle that the school district must provide an IEP reasonably calculated to enable the student to make progress that is *appropriate in light of the student's particular circumstances*. For some students, like the student in *Rowley*, keeping pace with their non-disabled peers and advancing from grade to grade may be appropriate progress. But for students like Endrew, who were in programs substantially or completely separate from their non-disabled peers, the student's own potential determines what achievement is "appropriate in light of the student's circumstances." For these students, the educational program must be "appropriately ambitious" and provide "the chance to meet challenging objectives." ***Endrew F., 137 S.Ct. 988 at 14.***

Even before *Endrew F.*, some of the hearing officers with the Massachusetts "court" of original jurisdiction for special education disputes, the Bureau of Special Education Appeals (BSEA), had ordered private residential placements when day placements alone were inadequate to allow the students to acquire independent living skills in preparation to successfully transition to group homes as young adults. *See* ***In Re: Boston Pub. Schs., BSEA # 1702809, 22 MSER 239 (Figueroa, 2016)***; ***In Re: King Philip Reg'l Sch. Dist., BSEA # 12-0783, 18 MSER 20 (Crane, 2012)***. While one hearing officer's decision is not binding on another hearing officer, the few BSEA decisions to interpret *Endrew F.* thus far have construed it as either equivalent to the standard already being applied in Massachusetts or, in two opinions, as adding an "appropriately ambitious" overlay to that standard. ***In Re: Norton Pub. Schs., BSEA #1609348, 22 MSER 169 (Berman, 2017)***; ***Boston Publ. Schs. & Mass. Dept. of Mental Health, BSEA #1707097, 23 MSER 59 (Berman, 2017).***

It therefore appears that, after *Endrew F.*, students with special needs can continue to demand IEPs designed to tap their particular potential to make reasonable progress towards realistic educational goals.

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Barbuto v. Advantage Sales & Marketing, LLC: Employers May Risk Disability Discrimination Claims by Prohibiting Use of Medical Marijuana by Qualified Disabled Employees

By David B. Wilson and Jason McGraw

Case Focus

Since 2013, Massachusetts has allowed qualifying patients with certain medical conditions to lawfully obtain and use marijuana for medical purposes under the Medical Marijuana Act. **St. 2012, c. 369, §1 *et seq***. Even so, the possession of marijuana remains a federal crime. **21 U.S.C. §§ 812(b)(1), (c)**, and **844(a)**. Thus, many Massachusetts employers maintain strict drug-free workplace and testing policies that prohibit the use of all "illegal drugs" and make no exception for the use of lawfully prescribed medical marijuana. In the landmark decision ***Barbuto v. Advantage Sales & Marketing, LLC*, 477 Mass. 456 (2017)**, the Supreme Judicial Court ("SJC") held that an employer with such a policy may be subject to a disability discrimination claim under Massachusetts law if the employer takes an adverse employment action or otherwise discriminates against a "qualified handicapped employee" based on the employee's off-site, off-duty use of lawfully-prescribed medical marijuana. *Id*.

Background

In 2014, Cristina Barbuto was hired for an entry-level position with Advantage Sales and Marketing, LLC ("Advantage"), contingent upon her passing a mandatory drug test. Barbuto disclosed to her soon-to-be supervisor that she would test positive for marijuana because she used lawfully-prescribed medical marijuana to treat her Crohn's disease. *Id.* at 458. She also told the supervisor that she did not use medical marijuana daily and would not use medical marijuana before or at work. Although the supervisor initially told Barbuto that her use of medical marijuana "should not be a problem" and called later to "confirm[] that her lawful medical use of marijuana would not be an issue with the company," Advantage terminated Barbuto's employment after her drug test results came back positive for marijuana. *Id*.

Barbuto filed suit alleging the mandatory drug test was an invasion of her privacy and that her termination was unlawful. The SJC addressed the termination claim.

Key Holdings In *Barbuto*

Massachusetts Disability Discrimination Law Applies to Qualified Handicapped Employees Who Use Medical Marijuana as Treatment

Under the Commonwealth's anti-discrimination law, a "qualified handicapped employee" has: (1) a right to reasonable accommodation for a handicap to enable the employee to perform the essential functions of their job, and (2) a right to be free from discrimination because of their handicap. *Id*. at 460 & n.4. In *Barbuto*, the SJC held for the first time that these protections extend to qualified handicapped employees who lawfully use medical marijuana to treat their handicaps. *Id*. at 464. Therefore, where an employer's drug policy prohibits the use of marijuana and a qualified handicapped employee requests an accommodation to use medical marijuana, the employer has an obligation to: (1) participate in an interactive process, and (2) provide a reasonable accommodation, unless such an accommodation would impose an undue hardship on the employer's business.

Advantage, which had not engaged in an interactive process, argued that Barbuto was not a qualified handicapped employee because the only accommodation she sought (the continued use of medical marijuana) was a federal crime, and was therefore unreasonable. *Id*. at 462. The SJC disagreed, and held that under the Medical Marijuana Act "the use and possession of medically prescribed marijuana by a qualifying patient is as lawful as the use and possession of any other prescribed medication." *Id*. at 464.

Advantage also argued that *even assuming Barbuto was a qualified handicapped employee*, it had not engaged in handicap discrimination where Barbuto had been terminated not because of her handicap, but rather because she had failed a drug test that all employees were required to pass. *Id*. at 462. The SJC disagreed, holding that termination for violating such a policy "effectively denies a handicapped employee the opportunity of a reasonable accommodation, and therefore is appropriately recognized as handicap discrimination." *Id*. at 467.

Failure to Engage in the Interactive Process Is Sufficient to Support a Claim of Disability Discrimination

The SJC permitted Barbuto's claims for disability discrimination under Massachusetts law to survive the defendant's motion to dismiss because the employer had wholly failed to participate in the interactive process. The Court emphasized that the "failure to explore a reasonable accommodation alone is sufficient to support a claim of handicap discrimination" where an employee can prove that a reasonable accommodation existed that would have enabled that employee to perform a job's essential functions. *Id*. at 466.

An Employer's Undue Hardship Defense Can Be Proven in a Number of Ways

Although the Court did not need to reach the defense of undue hardship in this case, the Court provided guidance for employers as to when an accommodation would not be required because it would cause the employer undue hardship. An undue hardship may be proven where the use of medical marijuana would: impair the employee's work performance; pose an unacceptably significant safety risk to the public, the employee, or fellow employees; or violate an employer's contractual or statutory obligations, thereby jeopardizing its ability to perform its business. *Id*. at 467-68. The Court also noted that the Medical Marijuana Act does not require employers to permit *on-site* medical use of marijuana as an accommodation to an employee. *Id*. at 464–65.

No Cause of Action under the Medical Marijuana Act or for Wrongful Termination in Violation of Public Policy

The SJC rejected Barbuto's other claims – that her termination amounted to a violation of the Medical Marijuana Act and wrongful termination in violation of public policy. The Court held that aggrieved employees do not have a private right of action under the Medical Marijuana Act, "where such employees are already provided a remedy under our discrimination law, and where doing so would create potential confusion." *Id*. at 470. Similarly, the Court declined to recognize a cause of action for wrongful termination in violation of public policy, "[b]ecause a competent employee has a cause of action for handicap discrimination where she is unfairly terminated for her use of medical marijuana to treat a debilitating medical condition." *Id*. at 471.

More to Come on Marijuana and the Workplace

While *Barbuto* provided employees and employers with much guidance, many questions remain. For example, nothing in *Barbuto* requires employers to tolerate the *recreational* use of marijuana by an employee. But what about accommodating a qualified handicapped employee without a medical marijuana card who lawfully uses marijuana purchased at a recreational dispensary to self-treat their handicap? That question remains unanswered in Massachusetts.

May employers require post-offer, pre-employment drug testing for all employees, regardless of their job duties or the potential safety risks to the employer, the employee, or the public? Although the issue has not yet been addressed by the SJC (the issue was stayed in the Superior Court while the unlawful termination claims were appealed), Barbuto's claim under the Massachusetts Privacy Act survived the defendant's motion to dismiss. Barbuto alleged that Advantage's "drug test was unreasonable and not commensurate with her [entry-level, non-safety sensitive] job duties or with the type of business and industry in which [it] is engaged." ***Barbuto v. Advantage Sales & Marketing, LLC*, 2016 WL 8653056, at *2 (Mass. Super. May 31, 2016)**. In denying the motion to dismiss, the Superior Court noted that "[t]he only time the Supreme Judicial Court has held that a drug testing procedure violated [the Massachusetts Privacy Act] was in a case where the employee being tested *was not engaged in a dangerous or safety-sensitive occupation*." *Id.* (emphasis added and citation omitted).

Whether the Medical Marijuana Act is preempted by federal law is another interesting question that has yet to be addressed, although other state courts have dealt with the issue of preemption of their state medical marijuana laws. *See, e.g.*, ***Noffsinger v. SSC Niantic Operating Co. LLC*, — F.Supp.3d –, 2017 WL 3401260 (D. Conn. Aug. 8, 2017)** (holding that the Connecticut medical marijuana statute is not preempted by the federal Controlled Substances Act, the Americans with Disabilities Act, or the federal Food, Drug, and Cosmetic Act).

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Unanswered Questions About Public Corruption Prosecutions After *O'Brien*

By William Fick

Case Focus

On April 21, 2017, the First Circuit Court of Appeals denied the government's petition for rehearing of ***United States v. Tavares***, 844 F.3d 46 (1st Cir. 2016) ("*O'Brien*"), leaving in place the published opinion that ordered judgments of acquittal and brought the Massachusetts Probation Department "patronage" prosecution to a close. While the Court found that the government "overstepped its bounds in using federal criminal statutes to police the hiring practices" of state officials, *id*. at 49, the Court actually decided the case on narrow grounds and left unanswered a key looming question in public corruption investigations: can federal authorities prosecute allegedly dishonest but purely "political" *quid pro quo* exchanges, where there is no allegation of corrupt personal gain?

The *O'Brien* indictment alleged that state Probation Commissioner Jack O'Brien and two co-defendant officials ran "a rigged hiring system that catered to requests from state legislators and others to employ and promote candidates for employment" in the Probation Department. The indictment did not allege that the defendants, career public servants, put a penny in their pockets or did anything illegal for *personal* gain. Nor did the government claim that the defendants hired *unqualified* candidates. Yet prosecutors charged that the defendants committed federal crimes because, in considering and sometimes acting on recommendations from legislators, they violated a policy obligation to hire the "most qualified" candidates and did so with the intent to influence the legislature.

The government recognized that it could not prosecute the defendants for depriving the public of the "intangible right to honest services." Several years earlier, in ***Skilling v. United States***, 561 U.S. 358 (2010), the Supreme Court had limited "honest services" prosecutions to traditional bribery and kickback schemes and had warned against construing a criminal statute "in a manner that leaves its outer boundaries ambiguous and involves the federal government in setting standards of disclosure and good government for local and state officials," *id*. at 402.

Instead, the government charged O'Brien and his co-defendants with conspiracy and racketeering based on predicate acts of mail fraud, bribery, and gratuity. The indictment alleged that rejection letters mailed to unsuccessful job candidates provided the jurisdictional "hook" for mail fraud. It further alleged bribery and gratuity in connection with the hiring of Representative Thomas Petrolati's wife and employees recommended by Representative Robert DeLeo on behalf of other representatives at the time he was preparing to run for Speaker of the House and was allegedly seeking their votes. After a lengthy trial, the jury convicted the defendants on some of the mail fraud and gratuity charges.

In reversing the convictions and ordering judgments of acquittal, the First Circuit used broad language critical of the attempted reach of the prosecution: "This case involves state officials' efforts to increase funding for their department through closed door arrangements with state legislators and other public officials. But not all unappealing conduct is criminal. As sovereigns, states have 'the prerogative to regulate the permissible scope of interactions between state officials and their constituents.'" *O'Brien*, 844 F.3d at 54 (quoting ***McDonnell v. United States***, 136 S. Ct. 2355, 2373 (2016)). The decision also reiterated Supreme Court warnings about

federal meddling in state government. *See id*. But the court actually decided the case under much narrower, longstanding elemental principles.
With regard to the mail fraud counts, the court found that the rejection letters at issue were not mailed "in furtherance" of the alleged scheme to defraud, as the statute requires. *See id.* at 59-61. The government had argued that "rejection letters in a corrupt hiring system . . . help to maintain a facade of a merit-based system." *Id*. at 59. But the court found that the government "presented no evidence that would allow the jury to infer that the rejection letters in this case served this duplicitous purpose." *Id*.

With regard to the gratuity counts, the court held that the "evidence as to the gratuities predicates does not show adequate linkage between the thing of 'substantial value' conferred by O'Brien (the jobs) and an 'official act' performed or to be performed." *Id*. at 55. The "government cannot show the requisite linkage merely by demonstrating that the gratuity was given 'to build a reservoir of goodwill that might ultimately affect one or more of a multitude of unspecified acts, now and in the future.'" *Id*.

The *O'Brien* decision thus confirms the continuing vitality of basic elemental limits on mail fraud, bribery, and gratuity prosecutions. Not every incidental mailing in a fraud scheme can trigger federal prosecution under the mail fraud statute. Bribery and gratuity crimes require a clear connection between a specific "official act," on the one hand, and a particular "thing of value" provided, on the other hand.

But the First Circuit's decision did not directly address whether "personal gain" is required to sustain a public corruption case, nor did it establish any clear limits on federal criminal prosecution of political "horse-trading" among state and local officials. What would happen if the facts established the basic elements more clearly? Take, for example, an arrangement where "You vote for my funding bill and I vote for yours," with a false denial of the deal contained in a mailing that more squarely is in furtherance of this arrangement? Untangling such questions will be left to future cases. The stakes are high because expansive federal investigations, as in *O'Brien*, can cast a chill over the State House, distracting and draining resources from legislators and their staffs for years.

William Fick, a founding partner of Fick & Marx LLP, was part of the trial team that defended Probation Commissioner Jack O'Brien.

The Supreme Judicial Court's Decision in *Beacon Residential v. R.P.* Gives Survivors of Domestic Violence Their Day in Housing Court

By Julia Devanthéry

Case Focus

The link between domestic abuse and housing instability is undeniable; survivors often face housing loss as a direct result of abuse or find themselves homeless after fleeing violence. In an all-too-common scenario, a survivor lives with her abuser, but is not on the lease because the abuser intentionally withholds housing stability as a method of abuse. In those cases, survivors may have to choose between their safety and their housing if they decide to separate from their abusers. Now, however, under the Supreme Judicial Court's ("SJC") recent decision in *Beacon Residential v. R.P.*, survivors of domestic violence—including those who aren't on the lease and are alleged to be "unauthorized occupants" by the landlord—are allowed to intervene as of right in summary process cases under Mass. R. Civ. P. 24 (a)(2) if they claim an interest relating to the apartment subject to the eviction proceedings. *Beacon Residential Management, LP v. R.P.*, SJC-12265, slip op. (Sept. 14, 2017). As a result, thousands of survivors across the Commonwealth, formerly excluded from summary process cases, will have a right to their day in Housing Court.

In *Beacon*, the proposed intervener testified that she was a survivor of domestic violence who lived with her abuser, who was her husband, and their children in a federally subsidized apartment that was leased in the husband's name. Although she lived at the apartment, she testified that her abusive partner prevented her from being added formally to the lease. The landlord's witness testified that the landlord's policy was to give an "add-on" application to all who inquired and that if the survivor in this case applied, she would have been added so long as she qualified and the husband approved. However, the survivor was not given an application when she asked for one; rather, she was told only her husband could add her to the lease. He, she testified, refused to do so as a means of controlling her. When the mother obtained a G.L c. 209A restraining order against her husband (which required him to leave the shared home and awarded custody of the two children to her), the landlord immediately initiated eviction proceedings against the family based on the mother's "unauthorized" status at the unit.

The abuser failed to attend the summary process trial and was defaulted. The mother attended the hearing and filed a motion under Mass. R. Civ. P. 24 to intervene both as of right and permissively along with a proposed answer and jury claim. She argued that she had a defense to the eviction under the Violence Against Women Act ("VAWA"), which prohibits evictions of qualified applicants for public housing based on the applicant being a victim of domestic violence, and G.L. c. 239, §2A, which prohibits retaliation against survivors who obtain restraining orders. The landlord opposed her intervention. The Housing Court judge denied her motion to intervene based on a finding that she would not be able to prevail on her defenses at trial. The mother then filed a new motion to intervene on behalf of her children, which was also denied.

The SJC's decision in favor of the mother makes clear that at the intervention stage, a trial court's inquiry should be limited to whether the proposed intervener has stated a plausible claim to the property, and that the judge should not reach the merits of the underlying claim until the trial. *Beacon*, slip op. at 7-11. In this case, the Court held that the proposed intervener stated a plausible claim to the apartment under VAWA and G.L. c. 239, §2A, and therefore she should

have been allowed to intervene on behalf of herself and the children. *Id*. at 11-17. While the Court stressed that intervention does not guarantee success on the merits, it unambiguously held that the standard should be broadly applied to allow intervention when a litigant claims an interest in the property at issue in the eviction case. *Id*. at 17. In the wake of this groundbreaking decision, a greater number of survivors will now have access to justice in the Housing Court, and an opportunity to fight to save their homes.

Julia Devanthéry is a Lecturer on Law at the WilmerHale Legal Services Center of Harvard Law School. This article is an update of her recent article, Early Lease Termination Under G.L. c. 186, § 24: An Essential Escape Route for Tenants Who Are Facing Domestic Violence, Sexual Assault, or Stalking, 61 Boston Bar Journal (Summer 2017). In the case discussed here, Ms. Devanthéry filed an amicus brief with the Supreme Judicial Court in support of the survivor.