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THE MASSACHUSETTS EXPERIENCE: ADDRESSING THE LEGAL NEEDS OF CHILDREN

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Several important legal changes for the children of Massachusetts had their genesis in January, 1986, when the Governor's/Massachusetts Bar Association's Commission on the Unmet Legal Needs of Children began its work. This Article details the process the Commission used to achieve its goals as well as the substantive changes in the law that were attained. It is hoped that the Commission's success can enable others to enact the necessary legislative changes that will enhance the development and potential of every child.

The establishment of the Commission was in itself a strong statement of policy, an acknowledgment of need and a commitment to change.¹ The ultimate goal of the Commission was to make recommendations to address the unmet legal needs of children, including specific legislative changes. To accomplish this goal, those political forces necessary for change—the executive, the legislative and the legal—were arrayed even before the actual work of the Commission began. The membership of the Commission was multi-disciplinarian, including lawyers, judges, state officials, mental health professionals, teachers and others from diverse backgrounds. The first and most arduous task was to eliminate many issues worthy of study in order to focus on those we could pragmatically accomplish. After extensive review, we resolved to focus on those legal needs that were most immediately pressing and were not being addressed by any other commission.

The Commission was divided into seven sub-committees whose task was to generate two or three specific recommendations. The seven sub-committees were: Due Process for Children, Family Needs, Rights and Obligations, Legal Resources and Judicial Education, Guardians ad Litem, Divorce and Custody, and Structure and Jurisdiction of the Courts.² For the next twenty months, the subcommittees participated in committee and sub-committee meetings, engaged in research, consulted

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1. The proposal to undertake a survey of children's needs was initiated by Michael S. Greco, then President of the Massachusetts Bar Association, and presented to Governor Michael Dukakis who immediately accepted a two-year commitment to the project and appointed his legal counsel, Stephen Rosenfeld, and the author, Judge Sheila E. McGovern, as co-chairpersons.

2. Amongst other topics, the Commission explored issues relating to divorce and custody, care and protection and Children in Need of Services (CHINS) cases, termination of parental rights, tracking guidelines to eliminate court delays, uniform rules of procedure, appointment of counsel for children, the redefinition of the role of guardians ad litem, continuing education programs for lawyers, judges and court personnel on developmental, psychological and evidentiary issues pertaining to children, and the creation of

with other experts and held public hearings. In May of 1987, the final Report³ was published incorporating twenty-two recommendations of the Commission,⁴ including specific draft legislation and preliminary

court intake centers and mental health clinics for all courts concerned with child and family issues.

3. See REPORT OF THE GOVERNOR'S/MASSACHUSETTS BAR ASSOCIATION'S COMMISSION ON THE UNMET LEGAL NEEDS OF CHILDREN (on file with the *Denver University Law Review*).

4. The Commission's recommendations included the following:

1. Legislation should be introduced to better define the types of endangerment that justify state intervention in families for the care and protection of children.

2. All courts with authority to intervene in families for the care and protection of children should adopt uniform time guidelines to track cases from beginning to end.

3. The District, Juvenile, and Probate Court Departments should adopt uniform rules and procedures for handling care and protection cases.

4. G.L. c.210, § 3 should be amended to require that in contested cases where parental rights may be terminated, the court shall appoint counsel for the child.

5. G.L. c.210, § 3 should be amended to better define the grounds for termination of parental rights, and to mandate that when children's interests and parental rights conflict, the child's interests shall prevail.

6. Legislation should be introduced creating a Children's Services Division within the Committee for Public Counsel Services, as an experimental pilot project in two courts, to provide children's advocacy and representation through appropriately trained and qualified attorneys and support staff. The Children's Services Division shall supplement, but not replace, representation currently being provided by the private bar.

7. By legislative or administrative order judges, court personnel, attorneys, and Guardians Ad Litem handling cases involving children should attend continuing education programs on developmental, psychological and evidentiary issues pertaining to children. For judges and court personnel, such programs should be regarded as part of their regularly assigned duties.

8. Compensation for attorneys appointed by the court to represent children should be increased to \$60/hour plus reasonable out-of-pocket expenses, exclusive of travel, for work performed in or out of court, and judges should have the discretion to cap the total amount paid.

9. In the initial stages of proceedings involving CHINS, care and protection or delinquency the court should consider, on the record, whether the child should be referred to the local educational agency for a Chapter 766 Team evaluation, if the facts indicate possible impairment of the child's ability to progress effectively in a regular education program. Parents or legal guardians—or children themselves, if over 14—should be parties to such consideration. In addition, the Office for Children should receive funds to support research and advocacy related to children's special education and other needs.

10. The Chief Administrative Judge of the Trial Court should establish a committee to develop and promulgate uniform, comprehensive written rules or standards for every Department of the Trial Court, including Probation, which govern Termination of Parental Rights Actions (G.L. c.210); Care and Protection Actions (G.L. c.119, § 24 or § 23C); Children in Need of Services (CHINS) (G.L. c.119, § 52 *et seq.*).

11. Define G.A.L. (*Guardian ad Litem*) Role by Statute: Legislation should be introduced to clarify and define the functions of G.A.L.s in cases where the children are involved. G.A.L.s should function as Next Friend of the Minor, Investigator or Evaluator, but not as Attorneys/Advocates, as they have in the past.

12. G.L. c.215, § 56A should be amended to give the court discretion to appoint counsel for children in cases of disputed custody and in cases where the court determines that visitation, support, or other substantial rights of children are at stake. Judges should also have the authority to assess said counsel's fees and expenses to the parties, on the finding of ability to pay, or to the Commonwealth of Massachusetts, subject to a cap to be determined by the court.

If, in a given case, both a G.A.L. and an attorney are appointed by the court to protect the children's best interests, the G.A.L.'s services shall be to the court on the children's behalf. That means that G.A.L.s, if asked by the court to make recommendations, shall do so based on their own perception of what is in the

guidelines for the judiciary. Although the specific proposals were diverse, the underlying and unifying theme was the best interest of the child, not simply as a legal term of art, but as a shared value and attitude. This thematic principle was emphasized in the Report's introductory statement that our recommendations were designed to effect behavioral changes on the part of parents, lawyers and judges. Legal changes alone, without a corresponding attitudinal change, often become empty formalism. We hoped to make pervasive the principle that children's needs and rights are paramount and that in conflict situations other interests should be subordinated. Ideally, in the course of court proceedings, the parents, their counsel and the judge would come to

children's "best interests," which may or may not coincide with the children's wishes. Attorneys, by contrast, shall represent the children's position, consistent with an attorney's representation of any other client.

13. Motions to appoint a G.A.L. may be made by children's attorneys, attorneys to other parties, or on the court's own initiative, but the decision to appoint a G.A.L. should be at the discretion of the court. The court should also specify whether the appointee will function as a G.A.L. Next Friend, a G.A.L. Investigator, or a G.A.L. Evaluator. A G.A.L. Next Friend should be an attorney; a G.A.L. Investigator should be an attorney, social worker or other appropriate professional; and a G.A.L. Evaluator should be a mental health professional, such as a psychiatrist, psychologist, or licensed independent clinical social worker. The G.A.L.'s duties, and timeframes for submission of reports, should be specified in the court forms.

14. *Economic Support*: G.L. c.208, § 34 should be amended to add an additional mandatory criterion, namely, "the present and future needs of dependent children," in cases of divorce where children are involved. Children's needs shall be the court's primary concern in determining the distribution of marital assets, and in assessing alimony and child support.

15. *Fiduciary Obligations of Parties to Divorce*: To assure full and realistic financial disclosure, Rule 401 of the Domestic Relations Special Rules should be revised to recognize marriage as a "partnership," to impose fiduciary responsibilities of full disclosure upon the parties to divorce, and to authorize sanctions for failure to do so.

16. *Emotional Support*: G.L. c.208, § 31 should be amended to require divorcing parents who request shared legal custody to demonstrate their ability to cooperate in protecting the child's interests by developing a mutually acceptable parenting plan, prior to the date the court renders its final judgment. At a minimum, this plan should provide for decision-making concerning the child's education, regular and emergency health care, religious training and observance (if any), and procedures for resolving parental disputes concerning child-raising decisions and duties after divorce.

17. *Creation of Court Intake Centers*: Intake Centers staffed with clinical social workers should be created within each probate court to provide education and evaluation, as well as direction and access to necessary services, for couples involved in divorce proceeding and custody disputes.

18. Mechanisms should be established to identify all cases pertaining to a single family unit.

19. Procedures to coordinate and consolidate cases affecting a single family unit should be implemented by the Courts.

20. Mental health clinics should be established, under the aegis of the Department of Mental Health, for all courts in which child and family issues are heard.

21. Legislation should be introduced authorizing court-appointed counsel for minor children alleged to be victims of child abuse in cases where statutory authority for such appointments does not currently exist, and funds should be appropriated by the legislature to underwrite the cost of such representation.

22. Increased funding should be made available to encourage expanded use of mediation by the courts—particularly in CHINS cases—as an informal alternative for families willing to try mediation before resorting to litigation.

understand children's needs and respond to them, so that children's lives are improved by virtue of the court's involvement.

After the Commission Report was officially released at a Governor's press conference, it was disseminated to libraries and published in legal newspapers and periodicals. In addition, several seminars were conducted in various parts of the state. However, the most important step in ensuring that this Report would not die on the vine was the establishment by the Massachusetts Bar Association of a Standing Committee on the Unmet Legal Needs of Children. This Committee, chaired by the author, formed subcommittees to draft specific legislative proposals to implement the Commission's recommendations. As a result of the Committee's efforts, five bills were filed by the Massachusetts Bar Association at the next two legislative sessions. The endorsement by a respected state-wide bar association is critical in establishing credibility with legislators and in being able to utilize the Association's resources and lobbying efforts. In addition, individual members of the standing Committee attended legislative hearings on the various bills, gave testimony at public hearings, wrote letters and made calls in support of the legislation.

The efforts of the Commission have been very successful. Four of the proposed bills have been enacted into law.⁵ These include an Act

5. One of the Commission's proposals was not enacted by the legislature. The proposed legislation would have changed MASS. GEN. L. ch. 215, § 56A (1989), which deals with Guardians ad Litem. The primary goals of the Commission's recommendations in the area of G.A.L.s were as follows:

1. To clarify and define the varying roles fulfilled by G.A.L.s in court proceedings involving children;
2. To distinguish these roles from those of attorneys representing children before the court; and
3. To specify the qualifications needed by G.A.L.s to fulfill their roles.

The proposed legislation incorporated those recommendations. Part I addressed the court's role in appointing G.A.L.s, while Part II addressed the G.A.L.'s duties and role. Part I provided that the court may appoint one of three kinds of G.A.L.s in proceedings involving a child's welfare. It went on to define the three types of G.A.L.s that could be appointed and the qualifications that are necessary for each type of G.A.L. Part I also required the court to specify which type of G.A.L. was being appointed. The three types of G.A.L.s are the Guardian ad Litem Investigator, the Guardian ad Litem Evaluator and the Guardian ad Litem Next Friend.

Part II outlined the G.A.L.'s duties, which included conducting his or her investigation and filing reports with the court. Part II also provided for the court to appoint an attorney for the child when the court determined that the child's interests cannot otherwise be protected. This section clarified the distinction between a G.A.L. and an attorney for the child, stating that the G.A.L. shall not act as the child's attorney. The G.A.L. is not to act as an advocate for the child per se but rather as an independent investigator/evaluator of the child's needs.

The fundamental purpose of the legislation is to clarify the roles and duties of G.A.L.s in the court process and to ensure the promotion of the best interests of children involved in domestic relations proceedings. The text of the proposed legislation read as follows:

MASS. GEN. L. ch. 215, § 56A is hereby amended by striking all of said section and inserting in place thereof the words:

PART I.

- (1) The judge of a probate court, on application of a party or on the court's own motion, may appoint a guardian ad litem at any stage of a proceeding involving the care, custody or maintenance of minor children and as to any matter in-

Providing for Counsel in Certain Proceedings,⁶ an Act Providing for the

volving domestic relations except those for the investigation of which provision is made by section sixteen of chapter two hundred and eight.

(2) The court shall designate in the order of appointment the category of guardian ad litem appropriate to act in the best interests of the child. The court shall designate the guardian ad litem as one or more of the following: (i) Guardian ad Litem Next Friend; (ii) Guardian ad Litem Evaluator; or (iii) Guardian ad Litem Investigator.

(a) Guardian ad Litem Next Friend shall be an attorney appointed under the provisions of section thirty-four of chapter two hundred and one and governed by the provisions thereof.

(b) Guardian ad Litem Evaluator shall be a psychiatrist, psychologist, licensed independent clinical social worker or other appropriate mental health professional appointed by the probate court to evaluate the mental and emotional needs of the child and the parties to the proceeding or any other mental health issues pertinent to a determination of the best interests of the child and make recommendations and report thereon.

(c) Guardian ad Litem Investigator shall be an attorney, social worker or other appropriate professional or lay person appointed by the court to conduct an investigation into the facts of the proceeding at issue and make recommendations and report thereon.

(3) When appointing a Guardian ad Litem Evaluator, the court shall specify in its order who is to be evaluated and the purpose of such evaluation.

(4) The court shall designate the term of a guardian ad litem's service.

(5) The court shall fix compensation for guardians ad litem and such compensation and any expenses approved by the court shall be paid by the parties or the commonwealth upon order of the court.

PART II.

(1) The duties of a Guardian ad Litem Next Friend shall be those specified in section thirty-four of chapter two hundred and one. The duties of a Guardian ad Litem Evaluator or Guardian ad Litem Investigator shall include performing an evaluation or making an investigation to determine the facts, the needs of the child and the family and the available resources within the family and community to meet those needs; to make a written report; and to promote the best interest of the child until formally relieved of such responsibility by the court.

(2) Upon request, any agency, person, police officer or probation officer shall provide a guardian ad litem with all reports made to or by such agency, person or officer and all records of such agency, party or officer relating to the child.

(3) A guardian ad litem shall be given immediate notice of any hearings in the pending case. A guardian ad litem shall report to the court in writing not less than once during each six month period following the date of appointment or as is otherwise ordered by the court, regarding such guardian ad litem's activities on behalf of the child. In any proceeding in which a guardian ad litem is appointed, the guardian ad litem shall file a current report with the Clerk of Court or Register of Probate no later than seven days prior to any final hearing involving the placement or custody of the child unless otherwise ordered by the court. No judgment or decree shall enter until the court has reviewed the guardian ad litem's report. Such reports shall be admissible into evidence in lieu of testimony by the guardian ad litem, subject to the right of the parties to cross examine the guardian ad litem. Parties may depose guardians ad litem in anticipation of trial or evidentiary hearing only by order of the court, for good cause shown.

(4) A guardian ad litem shall not act as the child's attorney. Upon a determination by the court that the best interests of the child would not otherwise be protected, the court may appoint special counsel for the child to serve as the child's legal advocate. The court in such cases may assess the child's reasonable attorney's fees and costs against the parties or against commonwealth.

6. This proposal amended MASS. GEN. L. ch. 210, § 3(b) and read as follows:

AN ACT PROVIDING FOR THE APPOINTMENT OF COUNSEL FOR A CHILD IN CERTAIN PROCEEDINGS

SECTION 1. MASS. GEN. L. ch. 210, § 3(b) as appearing in the 1986 Official Edition, is hereby amended by adding after the second sentence the following sentence:

The court shall appoint counsel to represent the child in the proceeding unless the petition is not contested by any party.

Future Needs of Children in Divorce,⁷ an Act Relative to Shared Custody⁸ and an Act Relative to the Support of Children.⁹ The latter three

7. This proposal amended MASS. GEN. L. ch. 208, § 34 and read as follows:

AN ACT PROVIDING FOR THE FUTURE NEEDS OF CHILDREN
IN DIVORCE

SECTION 1. MASS. GEN. L. ch. 208, § 34, as amended by section 67 of chapter 23 of the acts of 1988, is hereby amended by inserting after the word "estate" in the third sentence:

the present and future needs of the dependent children of the marriage.

So the statute would read "the court . . . shall consider the length of the marriage, the conduct of the parties . . . the vocational skills, employability, estate, present and future needs of the dependent children of the marriage, liabilities and needs of each of the parties . . ."

The following proposal was rejected by the Family Law bar:

PROPOSAL NO. 2. To add an additional paragraph to MASS. GEN. L. ch. 208, § 34 as follows:

In making an assignment of property under Section 34 of this chapter, the court, in order to protect the best interests of any dependent children of the marriage, may set aside or assign a portion of the estate of the parties to secure the present and future financial needs of the dependent children of the marriage. In determining the financial needs of each child, the court shall consider the following needs in the context of the parties' station in life: housing, food, clothing, social and recreational, medical and other special needs, and the educational needs and capacity of each child including higher education. An order under this paragraph shall be in addition to and shall not be in lieu of any order for support. An order made pursuant to the provisions of this paragraph, to assign or set aside a portion of the estate of the parties for a dependent child, may be modified only upon a finding that the original order no longer serves its intended purpose.

8. This proposal amended MASS. GEN. L. ch. 208, § 31 and read as follows:

AN ACT RELATIVE TO SHARED CUSTODY OF CHILDREN

SECTION 1. MASS. GEN. L. ch. 208, § 31, as appearing in the 1986 Official Edition, is hereby amended by striking out section 31 and inserting in place thereof the following section:

Section 31. For the purposes of this section, the following words shall have the following meaning unless context requires otherwise:

"Sole Legal Custody," one parent shall have the right and responsibility to make major decisions regarding the child's welfare, including matters of education, medical care, emotional, moral and religious development.

"Shared Legal Custody," continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare, including matter of education, medical care, emotional, moral and religious development.

"Sole Physical Custody," a child shall reside with and under the supervision of one parent, subject to reasonable visitation with the other parent, unless the court determines that visitation would not be in the best interest of the child.

"Shared Physical Custody," a child shall have periods of residing with and under the supervision of each parent. Physical custody shall be shared by the parents in such a way as to assure a child frequent and continued contact with both parents.

In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody. When considering the happiness and welfare of the child, the court shall consider whether or not the child's present or past living conditions adversely affect his or her physical, mental, moral or emotional health.

Upon the filing of an action in accordance with the provisions of this section, section twenty-eight of this chapter, or section thirty-two or chapter two hundred and nine and until a judgment on the merits is rendered, absent emergency conditions, abuse or neglect, the parents shall have temporary shared legal custody of any minor child of the marriage; provided, however, that the judge may enter an order for temporary sole legal custody for one parent if written findings are made that such shared custody would not be in the best interest of the child.

Nothing herein shall be construed to create any presumption of temporary shared physical custody.

In determining whether temporary shared legal custody would not be in the best interest of the child, the court shall consider all relevant facts, including, but not limited to, whether any member of the family has been the perpetrator of domestic violence, abuses alcohol or other drugs, has deserted the child, and whether the parties have a history of being able and willing to cooperate in matters concerning the child.

If, despite the prior or current issuance of a restraining order against one parent pursuant to chapter two hundred and nine A, the court orders shared legal or physical custody either as a temporary order or at a trial on the merits, the court shall provide written findings to support such shared custody order.

There shall be no presumption either in favor of or against shared legal or physical custody at the time of the trial on the merits.

At the trial on the merits, if the issue of custody is contested and either party seeks shared legal or physical custody, the parties, jointly or individually, shall, submit to the court at the trial a shared custody implementation plan setting forth the details of shared custody, including, but not limited to, the child's education; the child's health care; procedures for resolving disputes between the parties with respect to child-raising decisions and duties; and the periods of time during which each party will have the child reside and/or visit with him or her, including holidays and vacations, or the procedure by which such periods of time shall be determined.

At the trial on the merits, the court shall consider the shared custody implementation plans submitted by the parties. The court may issue a shared legal and/or physical custody order and in conjunction therewith accept the shared custody implementation plan submitted by either party or by the parties jointly or may issue a plan modifying the plan or plans submitted by the parties. The court may also reject the plan and issue a sole legal and/or physical custody award to either parent. A shared custody implementation plan issued or accepted by the court shall become part of the judgment in the action, together with any other appropriate custody orders and orders regarding the responsibility of the parties for the support of the child.

Provisions regarding shared custody contained in an agreement executed by the parties and submitted to the court for its approval that addresses the details of shared custody shall be deemed to constitute a shared custody implementation plan for purposes of this section.

An award of shared legal or physical custody shall not eliminate responsibility for child support. An order of shared custody shall not constitute grounds for modifying a support order absent demonstrated economic impact that is an otherwise sufficient basis warranting modification.

The entry of an order or judgment relative to the custody of minor children shall not negate or impede the ability of the parent not granted custody to have such access to the academic, medical, hospital, or other health records of the child, as he or she would have had if the custody order or judgment had not been entered; provided however, that if a court has issued an order to vacate against the noncustodial parent or an order prohibiting the noncustodial parent from imposing any restraint upon the personal liberty of the other parent or if nondisclosure of the present or prior address of the child or a party is necessary to ensure the health, safety or welfare of such child or party, the court may order that any part of such record pertaining to such address shall not be disclosed to such noncustodial parent.

Where the parents have reached an agreement providing for the custody of the children, the court may enter an order in accordance with such agreement, unless specific findings are made by the court indicating that such an order would not be in the best interests of the children.

9. This proposal amended MASS. GEN. L. ch. 208, § 28 and read as follows:

AN ACT RELATIVE TO THE SUPPORT OF CHILDREN

SECTION 1. MASS. GEN. L. ch. 208, § 28, as appearing in the 1988 Official Edition, is hereby amended by inserting after the second sentence the following sentence:

The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance.

statutes were drafted by the Divorce and Custody Subcommittee.¹⁰ It is in the arena of divorce that children's needs are most often subsumed with parental needs or worse, when they are perceived as being aligned with one or another parent in the oppositional camp. Too often the ends of justice were deemed served by "cutting the baby in half," in an effort to appease both parents. This was especially revealing in joint custody situations where a child was shuttled back and forth between parental homes, too often with little regard for his or her best interest.

To remedy this problem and to clarify the widespread confusion between legal and physical custody, and shared and sole custody, the amended statute provides a definitional section for these terms. The statute explicitly requires a court to consider certain factors in the determination of whether temporary shared legal custody is appropriate, including incidents of domestic violence, alcohol or substance abuse or child neglect. As a prerequisite to the granting of shared custody at the trial on the merits, the new statute also requires the submission of a shared custody implementation plan prepared by the parties including provisions for the child's education, health care and a schedule of shared parental time as well as procedures for resolving disputes between the parties regarding the child. To minimize the misuse of shared custody to exact monetary concessions, the amended statute explicitly deals with the relationship between shared custody orders and responsibility for child support.

Another area of divorce in which children's needs were often ignored was in the area of property division. One of the most controversial proposals involved amending our equitable distribution statute to include the present and future needs of dependent children as a mandatory factor for the judge to consider in making a division of property in divorce. Under the law as it existed, the trial judge was required to make specific findings on the parties' automobiles, but not on their children in reallocating the family's resources. The amended statute requires the judge to consider the present and future needs of the dependent children of the marriage in making an award of property.¹¹

SECTION 2. MASS. GEN. L. ch. 209, § 37, as appearing in the 1988 Official Edition, is hereby amended by inserting after the first sentence the following sentence:

The probate court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance.

10. This subcommittee was chaired by then-attorney Beverly Weinger Boorstein, now a Judge of the Middlesex Probate and Family Court.

11. The amended law reads as follows:

MASS. GEN. L. ch. 208, § 34. Alimony; assignment of estate; rights and funds accrued during marriage; determination of amount of alimony or value of property; health insurance.

Section 34. Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other. In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the

Although it will probably take another ten years before the scope of this amendment has been fully defined by case law, we are already seeing its effect at the trial level in both contested and uncontested cases. The areas specifically affected are the disposition of the marital home and the setting aside of educational funds. There is growing consensus that, if there are enough financial resources, the marital home should be preserved if possible if it is in the best interests of the child to do so. Additionally, some judges have taken the position that the statute permits them to set aside funds in trust for future college expenses. In any event, the statutory changes have sparked much discussion and renewed emphasis on children's needs, even where there is not total agreement on how to meet them. To foster this discussion, the Committee members gave several seminars across the state to members of the bench and bar. The purpose was not only to apprise them of the statutory changes, but also to sensitize them to the needs of children and to foster a judicial construction of those needs which would incorporate the best interest standard. These seminars were well received and promoted much discussion and implementation into pending cases. Appellate decisions have supported this construction, including assessing children's needs in the context of parental station in life.¹²

On July 29, 1991, another bill was passed amending the child sup-

estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. *In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage.* The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.

(Emphasis added).

12. See, e.g., *Pare v. Pare*, 565 N.E.2d 1195 (Mass. 1991) (court held that property division following divorce was inequitable and that the husband was required to set aside a portion of the proceeds of the sale of the marital home as security for future child support obligation); *LoStracco v. LoStracco*, 584 N.E.2d 633 (Mass. App. Ct. 1992) (court held that marital home could not be sold following divorce because the children's psychological and emotional well-being required stability); *Dennis v. Dennis*, 558 N.E.2d 991 (Mass. App. Ct. 1990) ("a judge may consider a child's 'standard of living' in deciding whether the level of available support for that child is adequate.").

port statute¹³ extending the age until which an order of support for purposes of education may be made from age twenty-one to age twenty-three.¹⁴ This bill was to prevent the stranding of college students on the educational beaches when their support suddenly ebbed at age

13. The new legislation amended § 28 of MASS. GEN. L. ch. 208 and § 37 of MASS. GEN. L. ch. 209. The amended law reads as follows:

MASS. GEN. L. ch. 208 § 28: Children, care, custody and maintenance provisions for education and health insurance.

Section 28. Upon a judgment for divorce, the court may make such judgment as it considers expedient relative to the care, custody and maintenance of the minor children of the parties and may determine with which of the parents the children or any of them shall remain or may award their custody to some third person if it seems expedient or for the benefit of the children. Upon a complaint after a divorce, filed by either parent or by a next friend on behalf of the children after notice to both parents, the court may make a judgment modifying its earlier judgment as to the care, custody and maintenance of the minor children of the parties provided that the court finds that a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the children. The court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree. When the court makes an order for maintenance or support of a child, said court shall determine whether the obligor under such order has health insurance or other health coverage on a group plan available to him through an employer or organization or has health insurance or other health coverage available to him at a reasonable cost that may be extended to cover the child for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of the child or obtain coverage for the child.

MASS. GEN. L. ch. 209 § 37: Support orders for children of separated parents; provisions for education and health insurance.

Section 37. If the parents of minor children live apart from each other, not being divorced, the probate court for the county in which said minors or any of them are residents or inhabitants, upon complaint of either parent, or of a next friend in behalf of the children after notice to both parents, shall have the same power to make judgments relative to their care, custody, education and maintenance, and to revise and alter such judgments or make new judgments. The probate court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree. When the court makes an order for support or maintenance on behalf of a child, and such child is not covered by a private group health insurance plan, said court shall determine whether the obligor under such order has health insurance on a group plan available to him through an employer or organization that may be extended to cover the spouse or child for whom support is ordered. When said court has determined that the obligor has such insurance, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of such child.

14. The following proposal is still pending in the Massachusetts legislature:

MASS. GEN. L. ch. 209C, § 9, as appearing in the 1990 Official Edition, is hereby

twenty-one before most of them had a chance to graduate. The resistance with which this proposal was originally met subsided rather dramatically when it was pointed out to critics that the legislature had previously changed the legal entrance age of a child into school from five to six years of age with the inevitable result that the age of graduation from college had thereby been delayed one year. Therefore, the majority of college students would not graduate until age twenty-two.

In addition to these enacted bills, three more are pending in the Massachusetts legislature. They include an Act Relative to Guardians Ad Litem;¹⁵ an Act Expediting Resolution of Legal Proceedings Involv-

amended by inserting after the first sentence of subparagraph (a) the following sentences:

The Court may make appropriate orders of maintenance, support and education for any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The Court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree.

15. The text of the proposed law is as follows:

AN ACT RELATIVE TO GUARDIANS AD LITEM

SECTION 1. Chapter 215 of the General Laws, as appearing in the 1986 Official Edition, is hereby amended by striking section 56A and inserting in place thereof the following sections:

Section 56A. During the pendency of any proceeding, a justice of the probate and family department of the trial court may appoint a guardian ad litem to investigate or evaluate any questions or issues raised in the proceeding and related to the care, custody or maintenance of minor children or related to any domestic relations issue except where the investigation is for such issues governed by section sixteen of chapter two hundred and eight.

The court shall include in the written order of appointment a specific description of the role and duties which the guardian ad litem is to perform and assume in the investigation or evaluation in the proceeding in which the appointment is ordered. The court shall designate the term of a guardian ad litem's service and shall designate the guardian ad litem as one or both of the following: (i) A Guardian ad Litem Evaluator; or (ii) A Guardian ad Litem Investigator. When appointing a Guardian ad Litem Evaluator, the court shall specify in its order who is to be evaluated and the purpose of such evaluation.

A Guardian ad Litem Evaluator shall be a psychiatrist, psychologist, licensed independent clinical social worker or other appropriate mental health professional appointed by the probate court to evaluate the mental and emotional health of the child or any party to the proceeding or any other mental health issues pertinent to a determination of the best interests of the child and make written recommendations and report thereon.

A Guardian ad Litem Investigator shall be an attorney, social worker or other appropriate professional or lay person appointed by the court to conduct an investigation into the facts of the proceeding at issue and make written recommendations and report thereon.

The court shall fix compensation for any guardians ad litem and all such compensation and any expenses approved by the court shall be paid by the parties or the commonwealth as ordered by the court.

A Guardian ad Litem shall have access to all records of the child which are available to either parent, unless otherwise ordered by the court.

A Guardian ad Litem shall be given timely notice of any hearings in the pending case.

Within a time period specified in the order of appointment, the guardian ad litem shall file with the court a written report detailing the results of the investigation or evaluation or any interim report as ordered by the court, setting forth any recommendation, if a recommendation is requested by the written order of ap-

ing Children in Need of Care and Protection; and an Act Clarifying Child Abuse and Adoption Procedures.

The Committee continues its task of implementing the Commission's recommendations. Among other issues, we are studying revisions to financial statements filed in divorce proceedings and proposed methods of establishing a fiduciary duty between spouses to report their assets fully and accurately in divorce and the imposition of penalties for failure to do so. It is the consensus of the Committee that these financial aspects have not been adequately recognized in assessing the best interests of the child. The expense and time involved in complicated discovery procedures inevitably involve a serious depletion of economic resources that would otherwise benefit the family unit after the divorce. As the Report noted, there was one final theme that transcends all others, and this is the link between children's unmet legal needs and children's poverty. At the time of the Report, children in Massachusetts constituted thirty-eight percent of the poor. Other studies have corroborated that poverty among children is growing.

Our ideal is to move beyond basic needs to the enhancement of the full potential of each child. This is the best interest of the child. If this cannot be realistically achieved all of the time, it should nevertheless remain our goal. To achieve this goal we must forge a new ethic, an ethic that recognizes the primacy of the child's interests.¹⁶

pointment. If any proceeding in which a guardian ad litem is appointed, the guardian ad litem shall file a current report with the Clerk of Court or Register of Probate no later than thirty days prior to any final hearing involving the placement or custody of the child unless otherwise ordered by the court. The written report shall be open to inspection by the parties and their counsel. Upon a request of the guardian ad litem or any of the parties, a judgment or order shall not enter until the court has reviewed the guardian ad litem's report.

A Guardian ad Litem shall not act as the child's attorney. Upon a determination by the court that the best interests of the child would not otherwise be protected, the court may appoint special counsel for the child to serve as the child's legal advocate. The court in such cases may assess the child's reasonable attorney's fees and costs against the parties or against the commonwealth.

16. Professor Mary Ann Glendon has characterized the idea that children's needs should be considered foremost as the "children-first principle." See Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 *LA. L. REV.* 1553, 1559 (1984). This principle requires that property division following a divorce should provide for the children's support before the spouses' needs are addressed. In another work, Professor Glendon stated:

To apply this principle consistently in divorces involving minor children, would mean that the judge's main task would be to piece together . . . the best possible package to meet the needs of the children and their physical custodian. Until the welfare of the children had been adequately secured in this way, there would be no question or debate about "marital property." All property, no matter when or how acquired, would be subject to the duty to provide for the children. Nor would there be any question of "spousal support" as distinct from what is allocated to the custodial spouse in his or her capacity as physical custodian. In cases where there is significant income and property left over after the children's needs have been met, the regular system of marital property division and spousal support could be applied as a residual system.

MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 95 (1987).