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Appendix A: Order of the Massachusetts Supreme Judicial Court
Denying Further Review

497 Mass. 1104

(This disposition is referenced
in the North Eastern Reporter.)
Supreme Judicial Court of Massachusetts.

Marcie E. **LOMBARD**

v.

Brian M. **MCCARTHY**

February 12, 2026

Reported below: 106 Mass. App. Ct. 1115 (2025).

Opinion

Appellate review denied.

All Citations

497 Mass. 1104, 275 N.E.3d 62 (Table)

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Brian Mccarthy <coltoncustody@gmail.com>

FAR-30719 - Notice: FAR denied

1 message

SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us>
To: Coltoncustody@gmail.com

Thu, Feb 12, 2026 at 4:00 PM

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: Docket No. FAR-30719

MARCIE E. LOMBARD

vs.

BRIAN M. MCCARTHY

Middlesex Probate & Fam No. MI22W0550WD

A.C. No. 2024-P-0916

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on February 12, 2026, the application for further appellate review was denied.

Very truly yours,
The Clerk's Office

Dated: February 12, 2026

To: Victoria Arend Carbone, Esquire
Brian M. McCarthy

Appendix B: Memorandum and Order of the Massachusetts
Appeals Court

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

24-P-916

MARCIE E. LOMBARD

vs.

BRIAN M. MCCARTHY.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The father, Brian McCarthy, appeals from (1) a Probate and Family Court judgment regarding custody of a nonmarital child and numerous related postjudgment orders¹; and (2) a single justice order denying his request for a stay of the judgment pending appeal.² We affirm.

Discussion. 1. Exclusion of evidence. Following a status conference on November 27, 2023, the judge issued a trial scheduling order (order) that the parties produce any documents

¹ The father appeals from orders dated May 16, 2024 (denying his motions for relief from judgment and for evidentiary hearing); May 29, 2024 (denying his motions for reconsideration and to strike exhibits); and June 20, 2024 (denying his motion for relief from judgment).

² The father's appeal from the single justice order was consolidated with his appeal from the Probate and Family Court judgment and orders.

they wished to present at trial "no later than December 15, 2023." During the status conference, the judge addressed the father directly, explaining the importance of reading the order thoroughly. Specifically, the judge stated,

"[W]hen you receive it, read it, all of it . . . [b]ecause it has very tight deadlines, and very particular deadlines. And if you don't follow them, there are evidentiary sanctions meaning that you may not be able . . . to put them in."

The father responded, "Yes, yes."

The father sent his evidence to the mother's attorney by e-mail at or around 6:09 P.M. and 10:56 P.M. on December 15, 2023, and 1:10 A.M. on December 16, 2023. In response, the mother's attorney filed a motion in limine to exclude this evidence arguing that it violated the deadline in the order. At the pretrial conference on January 3, 2024, the mother's attorney notified the judge that the father had sent his evidence after 5 P.M. on December 15. The judge then addressed the father: "So the deadline, generally it's 4:00, even if I gave you until 5:00 which is end of business. Why was it not sent within the deadline?" The father responded, "I thought we had until the end of the day on the 15th." The mother's attorney also explained that the evidence the father had produced on December 15 and 16 was "an absolute document dump." She stated that it contained "700 text messages, 635 pages of [Our Family Wizard], 317 photographs . . . six videos . . . 207 pages of various

studies and reports he researched, letters from people," and affidavits. She represented that the father had not created an index or list of documents and media to facilitate the creation of the joint exhibit list the judge had ordered the parties to create. Nevertheless, the mother's attorney and her staff had reviewed this information, identified documents that they agreed were admissible, generated a list of these documents, and notified the father. Moreover, pursuant to the scheduling order, the mother's attorney created binders of these uncontested items for the father and the judge.

The mother's attorneys also notified the father that they would contest the admission of the remaining information he had produced and explained that, pursuant to the order, it was his obligation to generate a list of any contested exhibits he wanted to introduce. The mother's attorneys then created binders of the father's contested information and gave them to him.

The judge then instructed the father to "pare down your exhibits" before trial. The father responded that he did not have any contested exhibits because he had sent them after 5 P.M. on December 15. The judge and the mother's attorney then reminded the father that the mother's attorney had agreed that he could introduce some of the evidence he had produced after 5 P.M. on December 15.

After the trial conference, the judge endorsed the mother's motion in limine as follows: "Parties shall meet and agree on the uncontested exhibits. Any exhibits forwarded after 5 P.M. on 12/15/23, to which plaintiff does not agree, are precluded from entry." Based on the judge's statements at the hearing and this order, it appears that the judge expected that, if the father wanted to introduce any of his "contested" evidence, he could discuss it with the mother's attorney prior to the trial, and if she agreed, he could introduce it. The father contends that the judge erred by granting the mother's motion in limine to exclude his trial exhibits and the exclusion of this evidence violated due process and his right to present a defense.

"Trial judges have broad discretion to make discovery and evidentiary rulings conducive to the conduct of a fair and orderly trial" (quotation and citation omitted). Mattoon v. Pittsfield, 56 Mass. App. Ct. 124, 131 (2002). A trial judge's ruling on the exclusion of evidence as a sanction is reviewable for an abuse of discretion. Commonwealth v. Sanford, 460 Mass. 441, 445 (2010). A reviewing court will not find an abuse of discretion unless "the judge made a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives" (quotation and citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The father argues that he complied with the order by providing his materials before 11:59 P.M. on December 15, 2023. Assuming without deciding that the father was permitted to submit evidence to the mother's attorney until midnight on December 15, 2023, we disagree that he complied with the order.

The order required much more than simply serving evidence on the opposing party by a specific deadline. It also required the parties to work together to determine what evidence they could agree would be introduced at trial, and to develop a process to introduce it in an orderly and efficient manner. To the extent that the parties disagreed, the order required the parties to generate a "joint contested exhibit list with binder of exhibits all to be filed with the court at the trial status conference."

The father failed to comply with the order in numerous ways. First, he produced the evidence he intended to introduce in a chaotic disorganized format that frustrated the judge's intent that the parties work together in an orderly manner to identify and address evidentiary issues prior to trial. Second, he failed to work cooperatively with the mother's attorney to resolve the disputes that his disorganized evidence production created. Third, he failed to comply with the order's requirement that, to the extent that he wanted to introduce contested evidence as exhibits, he create a proposed exhibit

list by December 20, 2023, that was particularized and not generic. Notwithstanding that the mother's attorneys worked with the father to identify evidence that they would not contest, assembled that uncontested evidence in a binder which they presented to the judge,³ assembled the remaining contested evidence in a second binder which they made available to the father, and reminded him that it was his obligation, pursuant to the scheduling order, to generate a particularized proposed contested exhibit list for the court by December 20, 2023, he failed to do so. In fact, he still had not generated the list by the pretrial conference on January 3.

Finally, any prejudice from the judge's exclusion of the father's evidence was mitigated by the fact that the mother's counsel reviewed as much of it as she could, identified documents that appeared admissible, and included them in the uncontested evidence binder she prepared for the judge. Beyond that, the judge reminded the father that, even after January 3, he could "pare down [his] exhibits" (presumably contested) and "work together" with the mother's counsel to agree on other uncontested exhibits prior to trial. For all of these reasons,

³ Given that the mother's counsel agreed not to contest some of the evidence the father disclosed on or after December 15, 2023, the judge did not exclude all of that evidence.

the judge did not abuse her discretion in excluding the father's evidence.

Additionally, the father has failed to demonstrate that he suffered any prejudice from the exclusion of his evidence. The father has not identified any specific evidence which the judge excluded and which the father claims was both admissible and material. An appellant bears the burden of presenting appellate arguments and producing a record appendix that are adequate for appellate review. See Mass. R. A. P. 16 (a) (9), as appearing in 481 Mass. 1628 (2019); Mass. R. A. P. 18 (a), as appearing in 481 Mass. 1637 (2019). The rule "is more than a 'mere technicality. It is founded on the sound principle that the right of a party to have this court consider a point entails a duty; that duty is to assist the court with argument and appropriate citation of authority.'" Cameron v. Carelli, 39 Mass. App. Ct. 81, 85-86 (1995), quoting Lolos v. Berlin, 338 Mass. 10, 14 (1958). While we recognize the inherent challenges in proceeding pro se, both parties represented by counsel and pro se litigants are required to present materials necessary for appellate review. See Brown v. Chicopee Fire Fighters Ass'n, Local 1710, IAFF, 408 Mass. 1003, 1004 n.4 (1990) ("Although some leniency is appropriate in determining whether pro se litigants have complied with rules of procedure, the rules nevertheless bind pro se litigants as all other litigants").

The father has not identified any specific evidence which he provided to the mother's counsel, which the mother's counsel contested, and which he believes is admissible. Therefore, we cannot determine whether the judge erred in excluding any of the father's contested evidence and whether any error was prejudicial.

2. Factual errors. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge . . . the credibility of the witnesses." R.D. v. A.H., 454 Mass. 706, 718 (2009), quoting Mass. R. Dom. Rel. P. 52(a). We will not disturb the trial court's judgment based on minor factual errors where the judge's overall conclusion is fully supported by the record. See Adoption of Sherry, 435 Mass. 331, 336 (2001) (although some of judge's findings were erroneous, judgment not dismissed "when error did not affect the outcome"); Adoption of Helen, 429 Mass. 856, 859 (1999) (notwithstanding that some of judge's subsidiary findings were erroneous, judgment was affirmed because he amply supported his overall conclusion).

None of the factual findings that the father contests go to the heart of the judge's rationale. For example, the father disputes finding 45, which states, "In April of 2022, as a result of a missed Soberlink test, Father did not see [child] for 9.5 weeks. During that time, he had no contact with his

son." The father contends that this period of no contact with his son was because of a conflict between himself and the mother's family, and not because of a missed Soberlink test.⁴

The fact that the father had no contact with the child for nine and one-half weeks from April to June in 2022 because of conflict with the mother's family rather than a missed Soberlink test was not important to any of the judge's ultimate rulings. Indeed, the judge found that there was conflict between the father and the mother's family that resulted in lost parenting time for the father. Moreover, the judge found, correctly, that the father later lost parenting time because of missed Soberlink tests. Both of these findings were supported by the record.

Additionally, the father contends that finding 33 erroneously states that he "took steroids and injected himself with Human Growth Hormone." Given that there is nothing in the record that indicates the father was taking steroids, we agree the court erred in this regard. However, the fact that there is no evidence that the father was taking steroids is immaterial to the judge's rationale which ultimately turned on her conclusions that the father does not have a "serious plan to understand his addiction, regulate his emotions, and maintain his sobriety."

⁴ We agree with the father that this finding of fact was erroneous. The trial court did not order the father to begin Soberlink testing until June 13, 2022.

By contrast, findings 25 and 26, also disputed by the father, were important to the judge's rationale. Finding 25 states, "Mother testified credibly that Father would drive while alcohol impaired." Given that the mother did testify to this, we find no error. Finding 26 states, "Father's medical records confirm that he consumed 10 to 15 vodka drinks per day." Again, this finding is supported by the record and thus not erroneous.

Further, the father claims that the judge demonstrated a clear bias in favor of the mother by "mischaracterizing" and "ignoring" certain evidence. These claims are meritless. "[T]he judge's assessment of the weight of the evidence and the credibility of the witnesses is entitled to deference." Custody of Eleanor, 414 Mass. 795, 799 (1993). The father's dissatisfaction with the judge's credibility determinations does not create a cognizable claim of judicial bias. See Adoption of Jacob, 99 Mass. App. Ct. 258, 266 (2021).

3. Refusal to release the GAL report. The father also argues that the court's refusal to release the GAL report to him to use in his appeal was a violation of due process because it "obstruct[ed] the appellate court's ability to evaluate whether the custody decision was fair and impartial." The record contradicts this claim.

The trial court's order denying the release of the report to the father states that the report "shall be included by the

Middlesex Registry in the Exhibits compiled and forwarded to the Appeals Court." Indeed, we received the report and have reviewed it.

4. Custody determination. The father argues that the court erred in awarding sole legal custody to the mother because there was not clear and convincing evidence of the father's unfitness. The father relies on an incorrect legal standard. "[C]ustody orders and judgments [including those under G. L. c. 209C] are made on the basis of a determination of the best interests of the child . . . and a judge may consider any factors found pertinent to those interests in the circumstances of the dispute." Custody of Zia, 50 Mass. App. Ct. 237, 243 (2000). This standard vests the trial judge with considerable discretion. See Charara v. Yatim, 78 Mass. App. Ct. 325, 334 (2010) ("What is in a child's best interest depends upon the particular needs of the child, and is left largely to the discretion of the judge"). The trial judge's custody determination correctly focused on the best interests of the child and was well-supported by the record. We discern no abuse of discretion.

5. Other constitutional claims. The father contends that the judge's order requiring him to remove his firearms from his home violates his right to bear arms under the Second Amendment to the United States Constitution. The GAL proposed this

requirement in her report. In the order, the judge announced the GAL report would be entered as an exhibit at trial. The judge then reminded the father of this fact at the final trial conference. Therefore, the father had clear notice of this recommendation but did not challenge it at trial or assert that it would violate his constitutional rights. Accordingly, the father has waived this claim. See Care and Protection of Zeb, 489 Mass. 783, 787 (2022) (mother's claim that plan for permanent guardianship was too vague was waived when mother failed to object to permanency plan at trial); Adoption of Willow, 433 Mass. 636, 651 (2001) (claim that separation would not be in children's best interest was waived; "it was abundantly clear the department was recommending separate placements," and mother failed to object to this at trial).

Further, the father argues that the admission of the GAL report violated his right to confrontation under the Sixth Amendment to the United States Constitution because he was not provided an opportunity to cross-examine the GAL. "There is no right of confrontation in civil proceedings." Covell v. Department of Social Servs., 439 Mass. 766, 788 (2003).⁵

⁵ In light of the above, we discern no error in the single justice's denial of the father's request for a stay pending appeal on the basis that the father failed to establish a likelihood of success on the merits.

Conclusion. The judgment dated March 12, 2024, is affirmed. The orders dated May 16, 2024, May 29, 2024, and June 20, 2024, denying the father's postjudgment motions, are affirmed. The single justice order dated February 13, 2025, denying the father's request for a stay, is affirmed.⁶

So ordered.

By the Court (Ditkoff,
D'Angelo & Wood, JJ.⁷),


Clerk

Entered: December 18, 2025.

⁶ The mother's motion for appellate attorney's fees is denied.

⁷ The panelists are listed in order of seniority.

Appendix C: Judgment of the Middlesex Probate and Family Court

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

MIDDLESEX, SS

DOCKET NO.: MI22W0550WD

MARCIE E. LOMBARD,
Plaintiff,

v.

BRIAN M. MCCARTHY,
Defendant.

JUDGMENT
ON COMPLAINT FOR CUSTODY-SUPPORT-PARENTING TIME,
FILED MARCH 18, 2022

IT IS HEREBY ADJUDGED AND ORDERED that:

Custody and Parenting Plan

1. Legal Custody: Mother shall have sole legal custody of the minor child, [REDACTED], born 11/30/2019.
2. Physical Custody: Mother shall have primary physical custody of [REDACTED]. Mother's residence shall be the legal residence of [REDACTED] for schooling purposes. The parties have agreed to have [REDACTED] attend preschool in Framingham.
3. Recurring Parenting Time: Father shall have the following parenting time:
 - a. Father shall have parenting time each Monday from 10:00AM until Wednesday at 10:00AM;
 - b. **IF** Father meets the benchmarks set forth in paragraphs 21 and 22, following Father's summer vacation parenting time with [REDACTED] in 2024, the schedule in 3(a) shall terminate and Father shall have recurring parenting time as follows:
 - i. on alternating weekends, Father shall pick up the child from preschool on Fridays at the end of the program [or at 9:00am at Mother's home if there is no school] and return the child to preschool on Mondays [or at 9:00am to Mother's home if there is no school];
 - ii. following Mother's weekend parenting time, Father shall have parenting time with the child on Monday, pick up from preschool [or at 9:00am at Mother's home if there is no school] until Tuesday at 6:00PM, return to Mother's residence; and

- iii. every Tuesday pick up from preschool at the end of the program [or 3:00pm at Mother's home if there is no school] until 6:00PM, return to Mother's residence.
- c. All other times the child shall be with Mother.
- 4. Father shall be present for all of his parenting time and may not delegate the care of the child to a third party without Mother's written prior authority. Nothing herein prevents Father's family from being present during Father's parenting time.
- 5. Pick up and drop off shall take place at Mother's residence. Father shall remain in his vehicle and Mother, or her designee, shall transfer the child at Father's car.
- 6. At [REDACTED] request, Mother may utilize OurFamilyWizard (OFW) to facilitate phone/video calls between [REDACTED] and Father.
- 7. All clothing and items sent between the homes with [REDACTED] shall be returned at the end of parenting time.
- 8. Holiday/Vacation Parenting Schedule: The parties agree to adhere to the following Holiday/Vacation Schedule which shall take precedent over recurring parenting time. When the child enters 1st Grade, the holiday shall extend to return to school the following day.
 - a. Easter: Mother shall have even-numbered years and Father shall have odd-numbered years. Easter Sunday shall be from 10AM to 7PM.
 - b. Memorial Day: Father shall have even-numbered years and Mother shall have odd-numbered years. Memorial Day shall be from 10AM to 7PM.
 - c. Mother's Day: Mother shall spend Mother's Day with [REDACTED] from 10AM to 7PM, if it falls on Father's parenting time.
 - d. Father's Day: Father shall spend Father's Day with [REDACTED] from 10AM to 7PM, if it falls on Mother's parenting time.
 - e. July 4th: Father shall have even-numbered years and Mother shall have odd-numbered years. July 4th shall be from 10AM to 7PM.
 - f. Labor Day: Mother shall have even-numbered years and Father shall have odd-numbered years. Labor Day shall be from 10AM to 7PM.
 - g. Halloween: Mother shall have odd-numbered years and Father shall have even-numbered years. Halloween shall be from pick up at school or 4PM to 8PM.
 - h. Thanksgiving: Mother shall have even-numbered years and Father shall have odd-numbered years. Thanksgiving shall be from Wednesday release from school to Thursday at 7PM.

- i. Christmas Eve Day: Mother shall have odd-numbered years and Father shall have even-numbered years. Christmas Eve shall be from 5PM to 11AM on December 25th.
 - j. Christmas Day: Mother shall have even-numbered years and Father shall have odd-numbered years. Christmas Day shall be from 11AM to 5PM on December 26th.
 - k. New Years Eve: Mother shall have New Years' Eve each year unless the parties agree.
 - l. Summer Vacation:
 - i. Mother shall have [REDACTED] for two consecutive weeks (14 consecutive days of her selection) each and every summer for the last week in July and first week of August based upon her historic vacation schedule.
 - ii. IF Father has met the benchmarks below, in 2024, Father shall have summer vacation with [REDACTED] from August 12 through 15.
 - iii. IF Father has met the benchmarks below, in 2025, and thereafter, Father shall have two nonconsecutive weeks (7 consecutive days of his selection including his recurring weekend). Father shall provide Mother with his proposed weeks by April 1 of each year, including his weekend and 5 weekdays. Father's selected dates shall not interfere with Mother's birthday (August 19th) or her designated holidays as identified herein.
9. [REDACTED] Birthday: A party not scheduled to have parenting time with [REDACTED] on the evening of his birthday pursuant to the regular parenting plan shall nevertheless be entitled to spend two (2) hours with the child on his birthday at a time that does not conflict with any scheduled plans of the other parent. The parties shall agree on the times for this birthday parenting time at least two (2) weeks in advance of the child's birthday and shall confirm their agreement in writing through OFW. If the parties are unable to agree, then the visit shall be from 3PM to 5PM.
10. Our Family Wizard: The parties shall communicate exclusively through Our Family Wizard and relative to child-related issues only.
- a. At no time shall either party communicate via email or text absent a medical emergency of the child
 - b. All communication between the parties shall be civil and respectful.
 - c. All receipts for reimbursement shall be shared through Our Family Wizard.

Child Support and Extracurricular Expenses

11. Child Support: Effective January 5, 2024 and on each and every Friday thereafter, Father shall pay Mother \$312 weekly child support to Mother, pursuant to the Child Support Guidelines. Said payments shall continue to be made by Father to Mother through the DOR/CSEU.

12. Health Insurance: Father shall continue to maintain his present health, dental and vision insurance plan for the benefit of [REDACTED] or the substantial equivalent that covers the child's pediatrician.
13. Life Insurance: Within sixty (60) days of this Judgment, each party shall obtain or maintain life insurance with a death benefit of \$100,000 for the benefit of the other until [REDACTED] is emancipated or in the alternative the parties may each designate a trust for the benefit of [REDACTED] as the beneficiary.
14. Extracurricular Activities: The parties shall share equally the costs of all of the agreed-upon extracurricular activities of [REDACTED] including but not limited to preschool, camps, after-school activities, and sports. Neither party shall make a commitment to a program or register [REDACTED] for any extracurricular activity without obtaining the other party's consent, (via Our Family Wizard "OFW") such consent shall not be unreasonably withheld, conditioned, or delayed. Neither party shall enroll [REDACTED] in an activity during the other parties' parenting time without written consent.

Neither party shall enroll the child in or permit the child to participate in a hazardous activity, including but not limited to activities involving firearms and weapons.

15. Uninsured Expenses: The parties shall share the cost of [REDACTED] uninsured medical, dental and optical expenses each year, provided that neither party may incur any single, nonemergency uninsured medical expense over \$200 without the consent of the other party. For any expense paid by either party, the payor shall provide a receipt to the other party through Our Family Wizard, who shall reimburse the payor within fourteen (14) days.
16. Tax Deductions and Child Tax Credits: Mother shall claim the child on her taxes and receive the child tax credits in all even-numbered years and Father shall have all odd-numbered years. In odd-numbered tax years, if Father is not current with his child support obligation and has an arrearage in excess of 3 weeks of support as of December 31, then Mother may claim the child.
17. Non-Disparagement: Neither party shall disparage the other parent or their respective family members to the child or in his presence.
18. Firearms: Father shall have all firearms and ammunition removed from his home and secured at alternate locations where [REDACTED] will not be spending time. He shall send Mother an OFW message confirming the same prior to his next scheduled parenting time with [REDACTED]
19. Alcohol and Nonprescription Drug Use: Father shall not use alcohol and/or non-prescription drugs.
20. Soberlink: Father shall continue to be enrolled in and participate in Soberlink Monitoring under the following conditions:
 - a. The parties shall sign any required documents to use Soberlink service and shall update their email and phone.
 - b. Family Monitoring Program: Level 1 – Parenting Time Only.
 - c. How Testing Activity is Reported to Contacts: Plus Plan - Emailed test results in real-time to both parties.

d. Specifically, Father shall submit to:

- i. Three (3) tests at 9:00 AM, 1:00 PM (before pick up), and 10:00 PM on every day of his parenting time. For overnight parenting time the three (3) tests shall be 9:00 AM, 3:00 PM and 10:00 PM.
- ii. The same schedule shall apply to any additional day time parenting time as agreed to by the parties.

e. Monthly Monitoring Fees: Father shall pay for all Soberlink fees.

f. Real Time Results: Test results shall be provided in real time to Father and Mother, via e-mail.

g. Suspension of Parenting Time: Father's parenting time shall be suspended in the event of a positive test result. If Father misses a test, and does not retake same within 10 minutes, parenting time shall be suspended. Parenting time shall not be reinstated until Father provides 3 days of clean test results (administered at 9:00 AM, 3:00 PM and 10:00 PM daily).

h. If Father meets the benchmarks in para. 20 and 21, with no missed or positive tests, Soberlink shall terminate on August 1, 2024.

21. In order to address his alcohol substance use disorder, Father shall, commencing March 15, 2024:

a. engage with an AA sponsor; and

b. attend 4 AA meetings per week, at a minimum, as follows:

- i. 4 meetings must be in person,
- ii. one meeting per week must be a men's group, and
- iii. one meeting per week must be a discussion meeting.

c. Proof of attendance must be provided to Mother at the end of each month, in a writing by a third party. Proof of attendance shall be provided to Mother until July 31, 2024.

d. Father shall attend therapy with Mr. Webber each week. At least 2 sessions per month shall be in person, if in person sessions are available. Proof of attendance shall be provided to Mother by Father at the end of each month by third party documentation. (ie. Receipt)

22. Each party shall be responsible for the payment of their own attorneys' fees and costs incurred in litigating this matter.

SO ORDERED.

Dated: March 12, 2024

Chilleri

Jennifer M. Allen, Associate Justice
Middlesex Probate and Family Court

Appendix D: Findings of Fact, Rationale, and Conclusions
of Law of the Trial Court

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

MIDDLESEX, SS

DOCKET NO.: MI22W0550WD

MARCIE E. LOMBARD,
Plaintiff,

v.

BRIAN M. MCCARTHY,
Defendant.

**FINDINGS OF FACT, RATIONALE AND FURTHER FINDINGS, AND CONCLUSIONS
OF LAW**

(on Complaint for Custody-Support-Parenting Time, filed March 18, 2022)

This matter came before the Court, Allen, J., for trial on January 5, 2024. Plaintiff, Marcie E. Lombard (hereinafter "Mother"), was present and well-represented by Attorney Deborah A. Katz and Attorney Peri S. Kutchin. Defendant, Brian M. McCarthy (hereinafter "Father"), was present and represented himself. The Court received 104 exhibits and an Amended Stipulation of Uncontested Facts, filed January 5, 2024, which is incorporated into and made a part of these findings. The following witnesses testified at trial: Mother, Father, and Ms. Colleen O'Brien.

After trial, assessment of the credibility of the witnesses, review of the pleadings and exhibits, together with all reasonable inferences drawn therefrom, the Court enters the following Relevant Procedural History, Findings of Fact, Rationale and Further Findings, and Conclusions of Law in support of the Judgment of Custody-Support-Parenting Time entered on Mother's complaint filed March 18, 2022, the Judgment of Contempt entered on Father's complaint filed July 17, 2023, and the Judgment of Contempt entered on Father's complaint filed July 24, 2023.

I. BRIEF PROCEDURAL HISTORY

1. On March 17, 2022, Mother filed a Complaint for Custody-Support-Parenting Time pursuant to G. L. c. 209C (hereinafter "209C Complaint"), seeking custody and a suitable amount of support for the child, [REDACTED] (hereinafter [REDACTED] / "Child"). Mother also requested that the Court order Father to provide health insurance for the benefit of the child and prohibit Father from imposing any restraint on the personal liberty of Mother.
2. On April 21, 2022, Father accepted service of the summons and complaint.
3. On May 11, 2022, Father filed an Answer to the 209C Complaint, which he amended on May 12, 2022. Father did not file a counterclaim.
4. On June 9, 2022, after hearing, the Court (Anthony, J.) entered a Temporary Order, providing as follows:
 - a. that the parties have joint legal custody of [REDACTED]
 - b. commencing June 17, 2022, Father shall have parenting time each Friday and Monday from 10:00AM until 5:00PM;
 - c. commencing September 2, 2022, Father shall have parenting time each Friday from 10:00AM until Saturday at 10:00PM and each Monday from 10:00AM until Tuesday at 10:00AM, any other time as the parties may agree to in writing;
 - d. Father shall be present for all of his parenting time and may not delegate the care of the Child to any third party;
 - e. pick up and drop off shall take place at the Mother's residence;
 - f. Father shall remain in his vehicle and the Mother (or her designee) shall bring the child to his car;
 - g. the parties shall communicate via "Our Family Wizard App" (hereinafter "OFW"), regarding child related issues only;
 - h. Father shall not use alcohol and/or non-prescription drugs;
 - i. commencing Friday, June 10, 2022 Father shall pay to Mother \$210.00 per week as child support through DOR;
 - j. the issue of retroactive child support, if any, is reserved for further hearing;
 - k. Father shall ensure that all firearms are properly stored and locked in his home;

- l. Father shall participate in Soberlink monitoring and shall submit to three (3) tests at 9:00AM, 1:00PM and 4:00PM on every day of his parenting time, the same schedule shall apply to any additional day time parenting time as agreed to by the parties;
 - m. when overnights commence, the schedule shall be 9:00AM, 3:00PM and 10:00PM;
 - n. Father shall pay the Soberlink fees; and
 - o. Father's parenting time shall be suspended in the event of a positive test or a missed test and parenting time shall not be reinstated until Father provides 14 days of clean test results.
5. On June 9, 2022, the parties entered into a partial Joint Stipulation, wherein they agreed that the parties equally share the payment of [REDACTED] uninsured medical, dental and optical expenses.
6. On June 13, 2022, the Court (Allen, J.) appointed Kathleen A. Rice, LMHC as Category E Guardian *ad litem* to report to the court on issues of custody and parenting plan on or before September 11, 2022.
7. On December 11, 2022, the Guardian *ad litem* filed a 54-page report, which was entered into evidence as an exhibit of the Court.
8. On January 23, 2023, the parties entered into a Stipulation, which the Court incorporated into a Temporary Order, wherein they agreed as follows:
 - a. Father shall pay child support to Mother of \$300 per week through DOR;
 - b. the parties limit communication to one message per day and only if necessary, through OFW;
 - c. the parties respond within 24 hours;
 - d. Father ensure at all times his firearms are stored and locked in their respective safes;
 - e. either party may schedule an appointment for the pediatrician;
 - f. one parent shall not cancel the other parent's appointment and either party may attend all appointments;
 - g. Father shall supplement his Venmo statements and identify Traveling Tavern and Handyman income, supplement his Citizens bank statements, and identify all income; and
 - h. Father shall pay to Mother attorney's fees in the amount of \$2,500.00.
9. On March 9, 2023, Mother filed a Complaint for Contempt, which she amended on May 22, 2023.

10. On June 27, 2023, the Court (Allen, J.) entered a Judgment on Mother's Complaint for Contempt, as amended May 22, 2023. The Court found Father guilty of contempt for failing to timely provide his Rule 401 Financial Statement and discovery. The Court deferred until trial a decision regarding an award of attorney's fees, after hearing on the merits.
11. On June 28, 2023, Father filed a Complaint for Contempt.
12. On July 24, 2023, Father filed a Complaint for Contempt.
13. On January 5, 2024, the parties filed an Amended Stipulation of Uncontested Facts.

II. FINDINGS OF FACT

Background

1. The parties never married but have one child together, [REDACTED], born November 30, 2019. At the time of trial, [REDACTED] was 4 years old.
2. Mother resides at [REDACTED] with [REDACTED] the maternal grandparents, and her two daughters from a prior marriage, [REDACTED] born November 10, 2008, and [REDACTED], born June 12, 2012. Mother shares legal and physical custody of [REDACTED] with her former husband, David Lombard.
3. Father resides at [REDACTED].

Relationship between the Parties

4. In 2001, Mother and Father met and dated briefly as young adults.
5. In 2006, Mother married Mr. Lombard, and together they had their two daughters. Mother and Mr. Lombard divorced in 2017.

6. Mother testified credibly that she and Mr. Lombard co-parent their children amicably pursuant to their shared custodial arrangement. Mother and Mr. Lombard are able to make decisions jointly, attend parent-teacher conferences together, and speak in person, over the telephone, and by text-message.
7. Mother testified credibly that [REDACTED] have an excellent relationship with each other and are very close.
8. Mother and Father began dating in 2013 when Mother was divorcing Mr. Lombard. In 2018, Mother and Father moved into a rental home together in Natick, Massachusetts.
9. At the beginning of 2019, the parties learned that Mother was expecting a child, and on November 30, 2019, [REDACTED] was born.
10. In April of 2020, when [REDACTED] was only 5 months old, and during the beginning of the COVID-19 pandemic, the owner of the Natick rental home sold the property and the parties moved to Framingham, Massachusetts to reside with, and in the home of, the maternal grandparents.
11. Mother, Father, [REDACTED] and Mother's daughters lived with the maternal grandparents from April of 2020 until January of 2021. Both parties testified that the period of cohabitation was difficult due to having a new baby, the challenges of raising three children, having many individuals living in a confined space during the COVID-19 lockdown-period, Father's excessive drinking and the parties' frequent arguments.
12. Father credibly testified that when living with the maternal grandparents he felt as though he could not raise issues with Mother relative to her daughters or [REDACTED] Father felt marginalized within the home and that, if he spoke up, his concerns were dismissed by Mother. Father admitted that he took his frustrations out on Mother.
13. In January of 2021, at the request of the maternal grandparents, Father moved out of the Framingham home, and thereafter, rented an apartment in Marlborough, Massachusetts.

14. Father reported that the maternal grandparents would strictly control his parenting time when he visited [REDACTED] in Framingham and that, at times, he still feels belittled. Father testified that the maternal grandparents would yell at him in front of his son and follow him during his parenting time. The Court credits Father's testimony.
15. In April of 2021, the parties reconciled. However, Mother remained at the home of her parents during her custodial time with her daughters. When Mother's daughters were with their father, Mother and [REDACTED] stayed with Father in Marlborough.
16. Mother testified credibly that she ended her relationship with Father on March 12, 2022. She testified credibly that on that day, [REDACTED] had a fever and Mother texted Father informing him that she and [REDACTED] were going to remain at the maternal grandparents' home due to his illness. Mother credibly described that Father immediately became very upset and wanted to insist on bringing [REDACTED] to Marlborough. In an effort to find middle ground, Mother suggested that Father stay in Framingham with [REDACTED] at her parent's home. However, Father rejected this suggestion and Mother credibly testified that in response Father angrily threatened her with "lawyers" and "having rights."
17. Mother described Father's conduct after their separation as being very aggressive, angry, and verbally and mentally abusive. The Court credits this testimony.

History of Caretaking / Father's Substance Use Disorder

18. Mother testified credibly that since [REDACTED] birth, she has been his primary caretaker. Father encouraged Mother to leave her employment when [REDACTED] was born and to stay home with him for one year. At the time of [REDACTED] birth, Father bartended at two locations, the Green House Pub and the Cherry Tree and supplemented this income by delivering for Door Dash.
19. Mother testified credibly that Father's employment was not steady and that he often left his places of employment because he quit or was fired. Father conceded that he "bounced around" as a bartender but that he always earned enough income to pay the bills. Father worked at The Met Bar but was fired for consuming alcohol during work hours.

20. Mother credibly testified that while the parties had some good times, co-parenting with Father has been stressful, conflictual, and difficult. Mother credibly testified that the co-parenting difficulties have arisen because of Father's quick temper and insistence to always have his own way. Mother testified that when the parties had disagreements, Father would become very angry and they would engage in multiple argumentative text message conversations and verbal arguments.
21. Mother stated that she walked on eggshells around Father. Mother admitted that she avoided saying things to Father, in hopes of keeping the peace.
22. Colleen O'Brien, maternal grandmother, testified credibly that she also observed Father's angry behavior and his treatment of her daughter; this conduct was one factor that ultimately led to maternal grandmother asking Father to move out of the home.
23. During the COVID-19 pandemic, neither party worked outside the home. Father admitted that during this time his alcohol intake increased further and that he was drinking excessively. Father admitted that it had been a problem before COVID, but that at this juncture that it was out of control. Father credibly testified that his alcohol consumption took a toll on his body, and knowing this, he attempted to stop drinking and remain sober, but he was unable to do so.
24. Mother credibly testified to the amount of Father's alcohol consumption during their relationship. Mother described that Father consumed over 12 alcoholic drinks per day, but that he would lie about or deny the amount he drank. Mother credibly testified that she found bottles and nips of alcohol hidden throughout their home, including behind the boiler, in drawers, in the car, and in the garage.
25. Mother testified credibly that Father would drive while alcohol impaired. Mother did not specify whether this occurred while [REDACTED] was in the vehicle.
26. Father's medical records confirm that he consumed 10 to 15 vodka drinks per day.
27. Father was hospitalized due to his substance use twice in 2021 and once in 2022. Father suffered from seizures from alcohol withdrawal that led to inpatient care. In January of 2022, Father was taken to the

emergency department by ambulance due to alcohol withdrawal. While hospitalized, Father was diagnosed with cirrhosis of the liver.

28. Maternal grandmother credibly testified to observing Father's use of and struggle with alcohol. She described finding numerous alcohol bottles in the trash; witnessing Father's hands tremble in the morning; seeing large amounts of alcohol in the refrigerator; and seeing Father drink alcohol at night. Maternal grandmother testified credibly that she saw nips of alcohol in Father's clothing and smelled the odor of alcohol on his body and in his bedroom. Maternal grandmother testified that she tried to convince father to enroll in a day program to address his substance use disorder.
29. Maternal grandmother further testified that when she allowed Mother and Father to live within her home, it was on the condition that no firearms were kept within the home. Maternal grandmother credibly testified to her concern of having firearms in a home with curious young children.
30. Father testified that when he resided in the maternal grandparents' home, he brought his firearms and kept them in a locked closet, not a safe. Father credibly testified that he had 3 firearms: 2 rifles, and one pistol. Father and Mother both were aware that Father had the firearms in the home. Mother assumed that Father kept the firearms locked away. She testified to "not paying a lot of attention" to this issue. In 2017, Mother had bought Father a safe for him to lockup his firearms, which had an electronic code. Mother had the code to that safe and saw ammunition and documents stored inside and knew that cash was kept in the safe. Mother admitted that she did not see a firearm in the safe.
31. Mother testified credibly that she did not confront Father about the firearms not being in the safe because she did not want to get "in trouble".
32. When maternal grandmother discovered that firearms were in the home, she asked Father to move out. Father felt that Mother was equally complicit in keeping the information about the guns from the grandparents and was angry that she did not defend him to maternal grandmother. As a result, Father lost his residence and his daily access to [REDACTED] Father moved out in January of 2021 as a result of this firearm issue.

33. Mother testified credibly that during the relationship Father took steroids and injected himself with HGH (Human Growth Hormone). Mother testified credibly that when she visited him in Marlborough during the period of reconciliation, she saw needles left out in the apartment and found needles in Father's clothing. Father testified that he received steroids from a friend.
34. Father testified that the firearms are currently locked in a safe in his apartment, but that he intends to move the safe to the basement. Father owns a biometric safe and stores the ammunition separately from the firearms.
35. In February of 2021, Father sent maternal grandmother a written apology on Facebook for his conduct.
36. Father testified credibly that his sober date is January 17, 2022.
37. Father attended a detox program at Spectrum Health. Father initially agreed to stay and attend the rehabilitation program, but Father checked himself out of the detox program without any plan for aftercare.
38. On March 17, 2022, Mother and a friend entered Father's apartment in Marlborough to retrieve her personal belongings. Mother credibly described the apartment as being "a mess" with marijuana, a pipe, and other drug paraphernalia stored in location where a child could reach them.
39. Father challenged Mother's description of his apartment at that time. Father testified that it was clean and "ok" for his son. The Court does not credit this testimony.
40. Father denied smoking marijuana. He testified that he last smoked marijuana in March or April of 2022. This testimony is not credited, as Father admitted that he tested positive for THC following a hair follicle test administered in June of 2022.
41. Father attends one Alcoholics Anonymous (AA) meeting per week, over zoom, some of which have had 100 or more participants. The Court did not receive evidence as to the format or content of this meeting.

42. Father does not attend any AA meetings in person; and he does not have a sponsor. Father admits to not reading from the Big Book or any other AA-endorsed text or materials.
43. Father attends weekly therapy with Mr. Alan Webber by zoom. Father testified that Mr. Webber specializes in substance abuse.
44. Father credibly testified that he no longer drinks alcohol.
45. In April of 2022, as a result of a missed Soberlink test, Father did not see Colton for 9.5 weeks. During that time, he had no contact with his son.
46. Pursuant to the Court's Temporary Order of June 9, 2022, Father was required to submit to Soberlink monitoring at 9:00AM, 1:00PM, and 4:00PM every parenting time day and at 9:00AM 3:00PM, and 10:00PM, when overnight parenting time began.
47. On September 27, 2022, he missed his 10:00PM Soberlink test, which triggered a suspension of his parenting time. On September 28, 2022, Father missed his 3:00PM Soberlink test. On September 29, 2022, Father took his 10:00PM Soberlink test at 9:00PM. This pattern of taking the 10:00PM Soberlink test early at 9:00PM occurred from October 2 – 12, 2022. On November 22, 2022, Father missed his 3:00PM Soberlink test, which again triggered a suspension of his parenting time. On November 24, 2022, Father missed the 10:00PM Soberlink test and took it at 11:00PM. On November 25, 2022, Father missed his Soberlink test. On November 26, 2022, Father took a Soberlink test at 12:30AM and missed the 3:00PM test. Father tested at 4:30PM that day.
48. While under the scrutiny of the temporary order, Father has tested positive on Soberlink by missing tests. As a result, he has lost 14 days of parenting time, on two separate occasions.
49. In June of 2023, Father failed Soberlink testing twice, by missing the required test times. The Court notes that these missed tests were before and after a scheduled court appearance.

50. Father testified that he missed tests because of a problem with his alarm on his phone that he uses to remind him to test. The Court credits Father's testimony.

The Guardian ad litem

51. The Court appointed Kathleen A. Rice, LMHC as Guardian *ad litem* to report on issues of custody and parenting plan.
52. The Court finds that Father has experienced tremendous loss. Ms. Linda McCarthy, Father's aunt, spoke with the GAL, who shared that her husband, who has since died, was very involved in helping raise Father and one of his sisters.
53. Father testified credibly that his other brother, Jonathon, had been addicted to opioids, but currently uses CAVA. Father described his father, James McCarthy, as a "drinker" who had little time for him and his sisters, growing up.
54. Father's brother, Curt, died of a drug overdose at 29, and his death had a profound effect on Father. Father admitted that he drank excessive alcohol and smoked a lot of marijuana after his brother's death. He testified credibly that a fundraiser was held in honor of what would have been Curt's 30th birthday.
55. On December 11, 2022, the Guardian *ad litem* filed her report with recommendations. The Guardian *ad litem* report entered as an exhibit of the Court. Neither party called the Guardian *ad litem* as a witness for cross-examination.
56. The Court finds that the Guardian *ad litem* conducted a thorough investigation pursuant to the Category E GAL/Evaluator Standards, in accordance with Standing Order 1-08. The Court credits the report of the Guardian *ad litem*.

Best Interest of the Child

57. Mother seeks sole legal custody of [REDACTED]. She testified that she is in the best position to protect [REDACTED] and that she and Father are unable to co-parent to discuss and make decisions together. Mother testified credibly to being afraid of Father. Mother believes that [REDACTED] is unsafe in Father's care because of Father's alcohol addiction and unsecured firearms. Mother credibly testified that she finds their relationship to be damaged due to the years of lying, hiding alcohol, and manipulation.
58. The Court finds that Mother is and has been the primary caretaker of the child. The child has resided with Mother since birth.
59. The GAL's review of [REDACTED] medical records indicates that of the 21 office visits for Colton, the child attended 1 with his grandmother, 2 with both his mother and his grandmother, and 17 with his mother.
60. In January of 2023, Mother called the pediatrician's office when [REDACTED] presented with a fever. She was instructed to bring [REDACTED] in for an appointment. Mother testified credibly that she and maternal grandmother went to the pediatrician's office. Mother testified that she will not go to any of the child's appointments unaccompanied, if she believes Father will attend. Mother testified credibly that when Father arrived and saw the maternal grandmother was present at the appointment, he became angry and made a scene in the waiting room.
61. Father admitted that he was upset when he saw the maternal grandmother at the pediatrician's appointment. Father reported that he did not yell at anyone, but rather stated that "this needs to stop". Father credibly testified that he was upset that he was not being informed of appointments in a timely manner.
62. Both parties testified that the current parenting schedule is Monday at 10:00AM to Wednesday at 10:00AM, pick up and drop off at Mother's residence.
63. The maternal grandparents provide daycare for [REDACTED] on Thursdays when Mother is working.

64. Mother credibly testified that [REDACTED] will ask Mother to call Father, which she is able to do via OFW. Mother seeks for Father to have a recurring weekly dinner with [REDACTED]. The Court finds that Mother is supportive of their relationship.
65. Father credibly testified that his self-employment gives him flexibility and he can work when he does not have parenting time with [REDACTED].
66. In September of 2024, [REDACTED] will begin preschool. The parties agreed that [REDACTED] attend preschool in Framingham. In November, [REDACTED] will be five years old.
67. Father resides in Marlborough; in the same 2-bedroom apartment he has rented since April of 2021. Father credibly described his apartment as being a safe and stable environment. His apartment is in close proximity to a library, park, and zoo. Father credibly testified to the activities he does with his son, including on one occasion, when Father and [REDACTED] built a lemonade stand together.
68. Father's current parenting schedule with [REDACTED] is Monday at 10:00AM until Wednesday at 10:00AM, pick up and drop off at Mother's residence.
69. Father records his parenting time with [REDACTED] in the journal feature in OFW. The Court finds his entries to be excessive. If Father wishes to capture the history of his parenting time for himself, Father can utilize his own journal outside of OFW.
70. Father testified that Mother does not provide him with updates about how [REDACTED] is doing.
71. Father would like his family to have more time with [REDACTED].
72. In the Amended Stipulation of Uncontested Facts, the parties agreed to a comprehensive holiday parenting schedule. Mother seeks two consecutive weeks of summer vacation with [REDACTED] each year, the last week in July and the first week of August. Mother credibly testified that her family has a summer home in New Hampshire, and she takes the same two consecutive weeks off every year to bring the children to New Hampshire to spend time with their extended family.

73. The Court finds that it is in [REDACTED] best interest to have extended vacation time with Mother and her extended family.

74. The Court finds that it is in [REDACTED] best interest to have parenting time with Father, that remains contingent upon his use of Soberlink testing and his earnest engagement with AA and Mr. Webber. Father's parenting time shall continue to expand upon meeting the benchmarks set forth in the Judgment.

75. The Court finds that it is in the best interest of the child for Father to continue Soberlink testing until Mother's vacation in July. However, for Father's parenting time to advance and be expanded, Father must meet all of the benchmarks set forth in the Judgment.

Mother's Income

76. Mother is currently employed by Wellesley Dental Implants & Periodontics as an administrative assistant. On her financial statement filed at the time of trial, Mother reported total gross weekly income of \$1,145.71, specifically \$789.90 in wages, \$300 in child support from Father, and \$55.81 in child support from Mr. Lombard. Mother does not report weekly expenses for health insurance or childcare. The Court credits Mother's trial financial statement.

77. Mother testified credibly that she earns \$30 per hour and that she works between 24 to 26 hours per week. Mother works Monday, Tuesday, and Thursday from 7:30AM to 5/5:30PM.

78. The Court finds that Mother is capable of working full-time, could earn more income with reasonable effort, and is underemployed. Mother. For purposes of calculating child support, the Court attributes full-time employment of 37.5 hours per week to Mother at a rate of \$30 per hour, or \$1,125 per week.¹ This amount excludes from consideration child support received.

¹ Calculated as: \$30 per hour x 37.5 hours per week = \$1,125 gross weekly income.

Father's Income

79. In April of 2021, the parties established the Traveling Town Tavern LLC (hereinafter "Traveling Tavern"), a bartending service. Mother testified credibly that the Traveling Tavern is a tavern built out onto a luggage carrier, which is towed by a pick-up truck. Clients provide the alcohol, and the Traveling Tavern provides the bartending services within the tavern.
80. In March of 2022, when the parties ended their relationship, Mother stopped working the Traveling Tavern and Father took over operations of the business individually.
81. Father credibly testified that he is self-employed and earns income from three separate sources: 1) the Traveling Tavern; 2) his Handyman business; and 3) a T-Shirt business. Father credibly testified that he had just begun the T-Shirt business.
82. In October of 2023, Father worked as a carpenter renovating a client's home. Father admitted that he worked most days in October 2023 when he did not have parenting time and was paid \$550 per day. He was reimbursed for any supplies that he purchased, though the client usually paid for their own supplies.
83. On Father's financial statement filed at the time of trial, he reported total gross weekly income of \$1,113.17 from self-employment. Father does not report weekly expenses for health insurance or childcare. While Father reported that he is self-employed as a carpenter, he attached three Schedule As to his financial statement. Within the Schedule As, Father reported weekly business income of \$297.87 from the Traveling Tavern; \$800.50 from the Handyman business; and \$14.80 from the T-Shirt business. The Court does not credit Father's trial financial statement relative to gross monthly receipts from the businesses.
84. Between January 7, 2022 and December 6, 2022, Father maintained Citizens Bank [REDACTED] for all business and personal transactions. At the end of 2022, Citizens Bank x1606 had a balance of \$79,369.35. Father maintained no other bank accounts relative to his business or personal transactions.

85. Between December 7, 2022 and June 6, 2023, Father maintained Citizens Bank [REDACTED] for all business and personal transactions, including deposits from the Handyman business and the Traveling Tavern.
86. On June 13, 2023, Father opened Citizens Bank [REDACTED] where he deposited money earned from the Traveling Tavern. Between June 13 and December 12, 2023, Father deposited \$12,079.18 into Citizens Bank [REDACTED]
87. On July 14, 2023, Father opened Citizens Bank [REDACTED] where he deposited money earned from The Handyman business. Between July 14 and December 12, 2023, Father deposited \$25,099.71 into Citizens Bank [REDACTED]
88. Between December 7, 2022 and October 5, 2023, Father deposited \$67,697.40 into Citizens Bank [REDACTED]
89. From December 7, 2022 to December 12, 2023, Father had total gross business receipts of \$104,876.29, from all sources.² The Court credits this amount and finds it to be a more accurate and reliable reflection of Father's gross business receipts, for purposes of calculating child support.
90. Based on the foregoing, the Court uses \$2,016, as Father's gross weekly business receipts from the Handyman business and the Traveling Tavern.³ Father reported monthly business expenses of \$258.72 for the Traveling Tavern and \$989.93 for the Handyman business, or \$288.15 total weekly business expenses. The Court credits the business expenses as reported on Father's Schedule As, filed with his financial statement.
91. For purposes of calculating child support, the Court finds that Father's weekly business income from self-employment (the Traveling Tavern and the Handyman business) is \$1,728.70.⁴
92. At the time of trial, Father had just started the T-Shirt business, a third business. The Court declines to include any of the income from this third business when calculating Father's child support

² Calculated as: \$12,079.18 (Citizens Bank x1349) + \$25,099.71 (Citizens Bank x8663) + \$67,697.40 (Citizens Bank x1606) = \$104,876.29.

³ Calculated as: \$104,876.29 ÷ 52 weeks = \$2,016.85.

⁴ Calculated as: \$2,016.85 (gross weekly receipts) - \$288.15 (weekly business expenses) = \$1,728.70 weekly business income.

obligation. In doing so, the Court has considered the income earned from the two other businesses, the unknown of whether this third business will generate any income, and the economic needs of the parties and Colton.

Child Support

93. The parties have historically agreed to a downward deviation of child support, inconsideration of the monthly fees Father pays for Soberlink testing. On June 13, 2022, the parties stipulated that Father pay weekly child support of \$210, instead of the presumptive amount pursuant to the Massachusetts Child Support Guidelines (hereinafter "Guidelines") of \$249, in consideration of his monthly Soberlink expense. The parties agreed to a 16% downward deviation.
94. From January 23, 2023 and through the time of trial, Father paid \$300 per week in child support to Mother, instead of the Guidelines amount of \$317, in consideration Father's monthly Soberlink expense. The parties agreed to a 6% downward deviation.
95. The Court calculates child support pursuant to the Guidelines, attributing \$1,125 as Mother's gross weekly income and \$1,728.70 as Husband's gross weekly income. Neither party reported any weekly expense relative to health insurance or childcare. Notwithstanding, Father shall continue to maintain his present health, dental and vision insurance plan for the benefit of [REDACTED] or the substantial equivalent that covers the child's pediatrician.
96. The presumptive weekly child support amount, calculated pursuant to the Guidelines, is \$332 for one child, under the age of 18, who resides primarily with Mother, under a 2/3 parenting time schedule.
97. Under the circumstances of the family and the accompanying requirement that Father use Soberlink, the Court finds that a 6% downward deviation from the presumptive child support amount is warranted, is in keeping with the parties' own stipulation from January 23, 2023, and that deviation continues to be in the child's best interest. Accordingly, Father shall pay child support of \$312 per week to Mother, through DOR/CSEU.

98. The parties' income has changed during the pendency of these proceedings. Father has started a new business and remains self-employed, now from three different sources. Mother began a new position at a dental practice and the Court finds could earn more with reasonable effort. The Court declines to modify retroactively the increased child support order, as doing so would be unjust under the circumstances.
99. The Court finds that Father is able to pay his monthly Soberlink expenses with income earned from the T-Shirt business, which was excluded from consideration when calculating Father's child support obligation.

Complaints for Contempt

14. Father asked that the complaints be dismissed. Accordingly, separate judgments of dismissal shall enter on each complaint.

Counsel Fees

100. On June 27, 2023, the Court (Allen, J.) entered a Judgment of Contempt on Mother's Amended Complaint for Contempt, filed on May 22, 2023, wherein Father was found guilty of contempt for failing to timely provide financial statements and discovery. The issue of attorney fees was deferred to a hearing on the merits and scheduled for January 5, 2024. Mother seeks counsel fees of \$2,685. Based on the credible evidence received, the Court awards attorney fees and costs relative to the Judgment of Contempt in the amount of \$2000 which shall be paid at a rate of \$167 per month.
101. The Court has considered Mother's request for attorneys' fees incurred in connection with pursuing this 209C Complaint, Father's non-compliance with the Trial Scheduling Order, and the efforts required to receive Father's financial documents. Mother seeks an award of fees of \$9,308. In consideration of the totality of the circumstance, including but not limited to, the importance of the issues and the amount of time spent by counsel, the Court declines to enter an award of attorneys' fees. Each party shall be responsible for the payment of their own attorneys' fees and costs incurred in litigating the underlying complaint.

III. RATIONALE AND FURTHER FINDINGS

Both parties present as parents who treasure [REDACTED] and look forward to their respective time with him. Mother is a committed and nurturing caretaker, and the Court finds that she has been [REDACTED] primary caretaker since birth and that she has excelled in her role as Mother. [REDACTED] appears to be sweet, smart, and well-adjusted. He has many family members who love him. Father is a devoted parent and takes his role as [REDACTED]'s father seriously. Father seeks more time with [REDACTED]. The Court notes that despite the contested issue of parenting time and legal custody, Father's parenting time has progressed without incident. The Court received no evidence that Father's care of the child on Mondays and Tuesdays has been problematic. Mother's concerns surround Father's history of substance use disorder and her inability to trust his sobriety without ongoing monitoring. Both parents credibly informed the Court that Father's alcohol use and abuse, and the consequent anger, dishonesty, mistrust, and arguments, were fatal to the relationship. Father is commended for reaching the point where he realized total sobriety was his only option. The Court credits Father's sobriety date.

However, the Court finds that Father has not undertaken a much-needed serious plan to understand his addiction, regulate his emotions, and maintain his sobriety. Father is under the mistaken assumption that all is cured now that he is sober, and Father is unable to understand why he is not trusted by Mother, her family, and the Court, to maintain his sobriety and to be awarded all the rights and responsibilities of a parent who has never been victim to a substance use disorder. Father quickly escalates to anger, insults, and threats of his 'rights' whenever he feels that he is being challenged or not included. Father has experienced significant loss in his lifetime, and the potential further loss of his son, through a perceived diminution of his rights and/or custodial time, causes Father great distress. Father is intelligent, and if motivated, can undertake the tasks and meet the benchmarks set forth in the Judgment. The Court finds that it is in the best interest of the child for Father to attend 4 weekly AA meetings, *in person*, including at least one men's meeting per week, and one discussion meeting per week. Father needs a sponsor, preferably someone with experience in divorce/parenting issues. And Father needs to continue in his weekly therapy, with Mr. Webber preferably in person at least twice per month to address his reliance on alcohol and to develop a co-parenting relationship with Mother. It is preferable that

this Court's judgment and findings be provided to Mr. Webber by Father or Mother's counsel so that Mr. Webber understands the anticipated trajectory and the benchmarks. IF Father meets the benchmarks set forth in the judgment, parenting time shall increase and his Soberlink testing shall terminate. Mother should also continue in her therapy each week so that she can navigate the co-parenting relationship as it evolves.

The Court wishes the parties well.

IV. CONCLUSIONS OF LAW

1. "In awarding custody to one of the parents, the court shall, to the extent possible, preserve the relationship between the child and the primary caretaker parent. The court shall also consider where and with whom the child has resided within the six months immediately preceding proceedings pursuant to this chapter and whether one or both of the parents has established a personal and parental relationship with the child or has exercised parental responsibility in the best interests of the child." G. L. c. 209C, §10 (a).
2. "In awarding the parents joint custody, the court shall do so only if the parents have entered into an agreement pursuant to section eleven or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interests." G. L. c. 209C, §10 (a).
3. "[C]ustody orders and judgments [including those under G.L. c. 209C] are made on the basis of a determination of the best interests of the child. . . .' and a judge may consider any factors found pertinent to those interests in the circumstances of the dispute." Custody of Zia, 50 Mass. App. Ct. 237, 243 (2000), quoting R.H. v. B.F., 39 Mass. App. Ct. 29, 39 (1995).
4. "[I]n the context of c. 209C, . . . a parent's role as primary caregiver 'should not be afforded substantial weight without a determination as to the quality of that care.'" Custody of Zia, 50 Mass. App. Ct. 237, 242 (2000), quoting R.H. v. B.F., 39 Mass. App. Ct. 29, 42 (1995).

5. "[I]t is in the 'best interests of the child' to preserve the current placement with a parent, if it is a satisfactory one, and that stability and continuity with the child's primary caregiver is itself an important factor in a child's successful upbringing." Custody of Kali, 439 Mass. 834, 842 (2003).
6. "General Laws c. 209C, § 10 (a) . . . cautions against rearranging a child's living arrangements in an attempt to achieve some optimum from all the available permutations and combinations of custody and visitation, when it is generally wiser and safer not to meddle in arrangements that are already serving the child's needs. If the parenting arrangement in which a child has lived is satisfactory and is reasonably capable of preservation, it is ordinarily in the child's best interests to maintain that arrangement, and contrary to the child's best interest to disrupt it. Stability is itself of enormous benefit to a child, and any unnecessary tampering with the status quo simply increases the risk of harm to the child." Custody of Kali, 439 Mass. 834, 843 (2003).
7. "Joint custody is synonymous with joint decision making and a common desire to promote the children's best interests. 'It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion,' and where their respective concepts of child rearing are equally commensurate with the children's best interests. Children are entitled to the love, companionship and concern of both parents, and they usually are better off if the parents can agree to share in the responsibility of their rearing as well as in physical custody." Rolde v. Rolde, 12 Mass. App. Ct. 398, 405 (1981), quoting Braiman v. Braiman, 44 N.Y.2d 584, 589-90 (1978).
8. "Discretion allows the judge, when determining the best interests of children, to consider the widest range of permissible evidence, including the reports and testimony of a court appointed investigator or G.A.L., evidence of the history of the relationship between the child and each parent, evidence of each parent's present home environment and over-all fitness to further the child's best interests, and the judge's own impressions upon interviewing the child privately in chambers." Ardizoni v. Raymond, 40 Mass. App. Ct. 734, 738 (1996).
9. G. L. c. 210, § 10 (a) recognizes "that involving both parents in decision making is in the child's best interests 'only if the parties demonstrate an ability and desire to cooperate amicably.'" Smith v. McDonald, 458 Mass. 540, 553 (2010), quoting Mason v. Coleman, 447 Mass. 177, 182 (2006).

10. "A custody determination requires a 'realistic, commonsense judgment,' which takes account of the fact that the 'determination of custody is a choice among limited alternatives, all of which, invariably, have imperfections' and evaluates them in light of the 'well-being of the child and [her] future development.'" Murphy v. Murphy, 82 Mass. App. Ct. 186, 193 (2012), quoting B.B.V. v. B.S.V., 68 Mass. App. Ct. 12, 18 (2006).
11. "Our decisional law has not required a 'definitive list of criteria that must be considered in determining what is in a child's best interest[, but certain] constants are revealed in our [cases].' Such constants, or factors, include, for example, consideration of which parent has been the primary caretaker of, and formed the strongest bonds with, the child, the need for stability and continuity in the child's life, the decision-making capabilities of each parent to address the child's needs, and the living arrangements and lifestyles of each parent and how such circumstances may affect the child." El Chaar v. Chehab, 78 Mass. App. Ct. 501, 506 (2010), quoting Charara v. Yatim, 78 Mass. App. Ct. 325, 334 (2010).
12. "The best interests of the child standard is applied in the context of the particular needs and circumstances of the child in question. . . . Factors a judge may weigh are whether, one parent's home is more stable in terms of a parent's work schedule, whether siblings are being raised together, and whether one parent seeks to undermine the relationship a child has with the other parent." Hunter v. Rose, 463 Mass. 488, 494 (2012).
13. "For purposes of these guidelines, income is defined as gross income from whatever source, regardless of whether that income is recognized by the Internal Revenue Code or reported to the Internal Revenue Service or state Department of Revenue or other taxing authority. Sources of income include, but are not limited to, . . . salaries, wages, overtime and tips . . . interest and dividends . . . annuities; distributions and income from trusts" Massachusetts Child Support Guidelines § I (A) (2021).
14. "Income may be attributed where a finding has been made that either parent is capable of working and is unemployed or underemployed. . . . If the Court makes a determination that either parent is earning less than he or she could earn through reasonable effort, the Court should consider potential earning capacity rather than actual earnings in making its child support order" Massachusetts Child Support Guidelines § I (E) (1) – (2) (2021).

15. "[I]n determining income from self-employment, a judge must determine whether claimed business deductions are reasonable and necessary to the production of income, without regard to whether those deductions may be claimed for Federal or State income tax purposes." Whelan v. Whelan, 74 Mass. App. Ct. 616, 626-27 (2009).
16. "There shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered." G. L. c. 209C, § 20.
17. "It has been established that, during a period in which a complaint for modification is pending, a party is entitled to retroactive modification of a child support order 'where a judge finds that the parties' circumstances have materially changed and that such modification is in the best interests of the children.'" Hoegen v. Hoegen, 89 Mass. App. Ct. 6, 11 (2016), quoting Whelan v. Whelan, 74 Mass. App. Ct. 616, 627 (2009).
18. "A judge is not required to make an order for modification retroactive, but 'absent a specific finding that retroactivity would be contrary to the child's best interest, unjust, or inappropriate,' these factors should be considered." Whelan, 74 Mass. App. Ct. at 627, quoting Boulter-Hedley v. Boulter, 429 Mass. 808, 812 (1999).
19. "A judge has discretion to award fees even in the absence of bad faith or frivolous claims or defenses." Wasson v. Wasson, 81 Mass. App. Ct. 574, 582 (2012).

Dated: March 12, 2023



Jennifer M. Allen, Associate Justice
Middlesex Probate and Family Court

Appendix E: Constitutional and Statutory Provisions

I. United States Constitution, Article VI, Clause 2 (Supremacy Clause)

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

II. United States Constitution, Amendment XIV, Section 1 (Due Process and Equal Protection Clauses)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

III. United States Constitution, Amendment II (Second Amendment)

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

IV. Massachusetts General Laws Chapter 208, Section 31

"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 physical, mental, moral or emotional health."

[Note: Include the remaining baseline statutory definitions of "Sole legal custody", "Shared legal custody", "Sole physical custody", and "Shared physical custody" from your current App. 43a-46a layout to ensure the Clerk has the full mechanics of the statute.]

V. Massachusetts General Laws Chapter 119, Section 24 (The Statutory Comparison Provision)

"The [court]... may upon the petition of any person... alleging on behalf of a child... that said child is without: (a) necessary and proper physical or educational care and discipline; or (b) is growing up under conditions or circumstances damaging to the child's sound character development; or (c) who lacks proper attention... or (d) whose parents... are unwilling, incompetent or unavailable to provide any such care, discipline or attention... [issue a] cautionary order."