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Appealing Child Custody Decisions In Massachusetts

By Jason V. Owens |

[Child Support Family Law Modification Jason Owens](#)

## How Is Child Support Calculated For Unemployed Parents In Massachusetts?

A recent Appeals Court decision indicates that it is not appropriate for judges to assume that unemployed parents can earn full-time minimum wage without specific findings.



Over the years, we have blogged several times about the challenges associated with [income attribution in child support and alimony cases](#) in Massachusetts. Income attribution occurs when a judge feels that a party is underemployed or otherwise earning less than he or she could with reasonable efforts in a case involving child support alimony. In our blogs, we have explored the frequent tension

between Probate and Family Court judges, who sometimes view income attribution as a quick and easy way to ensure that underemployed parties don't get a "free ride" in support cases, and recent appellate decisions that have [limited income attribution](#) by imposing increasingly strict legal standards.

In today's blog, we review a fairly common scenario in Massachusetts support cases: When a Probate Court judge attributes income equal to full-time employment at minimum wage to an unemployed party. A recent unpublished opinion by the Appeals Court, [McCrea v. Clayton \(2022\)](#), suggests that judges who reflexively attribute minimum wage earnings to an unemployed parent, while failing to make the necessary findings for income attribution, may be overstepping their authority.

## **The Legal Standard for Income Attribution in Massachusetts Support Cases**

The [Massachusetts Child Support Guidelines \(2021\)](#) provide a fairly detailed description of the legal standard judges must follow when attributing income to a party, where they provide as follows:

1. Income may be attributed where a finding has been made that either parent is capable of working and is unemployed or underemployed.
2. 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.
3. The Court shall consider the age, number, needs and care of the children covered by the child support order. The Court shall also consider the specific circumstances of the parent, to the extent known and presented to the Court, including, but not limited to, the assets, residence, education, training, job skills, literacy, criminal record and other employment barriers, age, health, past employment and earnings history, as well as the parent's record of seeking work, and the availability of employment at the attributed income level, the

availability of employers willing to hire the parent, and the relevant prevailing earnings level in the local community.

The primary focus of the income attribution inquiry for judges is whether a party has failed to make reasonable efforts to secure employment consistent with that party's earning capacity. In attribution cases involving job loss, the Appeals Court has emphasized the central focus on a party's [efforts to obtain employment](#):

The reasonable efforts inquiry is critical, and is generally the determining factor in whether to affirm the attribution of income to a party based on his prior earning capacity. ... Indeed, as we have previously observed, neither this court nor the Supreme Judicial Court has affirmed an attribution of income made without a finding concerning the party's reasonable efforts to secure employment. (Citations omitted.)

In [Kelly v. Kelly \(2005\)](#), the Appeals Court noted that income attribution "most commonly arises when a judge determines that a support provider is voluntarily earning less than he or she is capable of." The Kelly Court observed that "[l]ess frequently, we have attributed income to a support recipient when considering a complaint for modification." The [Kelly](#) Court went on to say:

More common, however, is the caution expressed against relying unduly on the income-earning potential of a wife and mother who has been out of the regular job market for decades. Such caution is appropriate in this case, where the wife has dedicated herself and expressed commitment to her vocation as an artist, whether or not she could earn more money in a clerical position. (Citations omitted.)

Although the [Kelly](#) decision specifically applies to alimony, the general principle that income attribution is more commonly applied to the support-paying party, rather than the support recipient, is also applicable in child support cases.

## **Attributing Income to Unemployed Support Parties in Massachusetts**

Although our appellate cases generally favor attributing income to support payors, rather than recipients, many Probate Court judges will not hesitate to attribute income to a child support recipient. Nothing prevents a judge from attributing income to a support recipient; however, it can be difficult to establish the earning capacity for a party with a limited work history. In a recent unpublished opinion of the Appeals Court, [CMA v. JTA \(2020\)](#), noted that a modest attribution of income to a support recipient “commensurate with the State minimum wage at twenty-five hours per week” may be permissible to the extent that “the amount of income attributed to the dependent spouse is de minimis in light of the total financial award.”

Although the Appeals Court affirmed an attribution of income to a support recipient equal to minimum wage at twenty-five hours per week, in [CMA v. JTA](#), it is important to note that lower court’s income attribution was supported by the detailed findings of a special master in that case. Presumably, the master’s report included findings touching on some of the considerations outlined in the Child Support Guidelines, including the age and needs of the children; the education, training, and work experience of the recipient; and the employers willing to hire the parent at the attributed income level.

Perhaps most importantly, the Court in [CMA v. JTA](#) found that attributing income to the wife of \$14,300 per year was not an abuse of discretion where the husband’s available income of \$990,911 per year meant that the modest attribution to the wife would have very little impact on the final support order. In cases where the paying party earns far less than the Husband in [CMA v. JTA](#), and attribution of minimum wage to a support recipient can have a much bigger impact on the final support order.

Another recent unpublished opinion of the Appeals Court, [McCrea v. Clayton \(2022\)](#), generated a different outcome.

### **McCrea v. Clayton: Income Attribution of Full-Time Employment at Minimum Wage Disallowed**

In [McCrea v. Clayton](#), the mother was the non-custodial parent, and therefore obligated to pay child support for the one child she shared with

the father. On appeal, the mother argued “that the judge erred in attributing full-time, minimum-wage income to her without making the required finding that she could earn more with ‘reasonable effort.’” In its factual summary, the Appeals Court indicated that the mother had previously “pleaded guilty to various criminal offenses and was sentenced to a term of incarceration.” Although the mother was released from incarceration at the time of trial, she remained unemployed.

At the trial, the father argued that the mother “should be required to pay child support based on an attributed income consistent with full-time, minimum-wage employment.” The mother “asserted that her status as a felon and the lack of job opportunities due to the COVID-19 pandemic prevented her from obtaining employment.” The Probate Court judge agreed with the father, attributing income to the mother consistent with full-time minimum-wage employment before applying the Child Support Guidelines, which resulted in a child support obligation to mother of \$129 per week. The judge made no specific findings regarding attribution of income.

The Appeals Court quickly disposed of the case, reserving the judgment setting child support at \$129 per week based on the lower court judge’s failure to enter findings supporting the income attribution. Specifically, the Appeals Court held:

We agree, as [the mother] argues, that the judge erred in attributing full-time, minimum-wage income to her without making the required finding that she could earn more with “reasonable effort.” .... Here, the absence of findings for attribution of income as required by the guidelines warrants the conclusion that the order denying McCrea's motion to alter or amend the modification judgment must be vacated. Accordingly, the case is remanded to the Probate and Family Court for specific findings regarding McCrea's earning capacity.

In a [footnote](#), the Appeals Court noted the numerous factors a Probate Court judge must consider in its findings of fact when attributing income, which include specifically include a party’s “criminal record and other employment barriers”.

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## Why is an Automatic Attribution of Full-Time, Minimum Wage Employment Problematic in Support Cases?

Obviously, and attribution of income based on full-time, minimum wage employment presents a simple and logical method for busy judges tasked with calculating support in cases involving an unemployed party. However, reflexing ordering child support at minimum wage levels simply is not supported by the Child Support Guidelines. Indeed, one of the significant changes between the 2018 and 2021 Guidelines involved the **lowering** of minimum child supports under the 2021 Guidelines. Specifically, the 2021 Guidelines provide:

To that end, for those parents obligated to pay child support whose gross income is \$210 per week or less, **a minimum order of \$12 per week** should enter. For parents obligated to pay child support whose gross income is between \$211 and \$249 per week, the minimum order will vary between \$12 per week and \$20 per week. These minimums should not be construed as limiting the Court's discretion to set a higher or lower order, including setting a child support order at \$0, should circumstances warrant, as a deviation from the guidelines. (Emphasis added.)

The 2021 Guidelines cut minimum child support in half compared to the 2018 Guidelines, which provided:

These guidelines are intended to protect a minimum subsistence level for those parents obligated to pay child support whose gross income is \$115 per week or less. However, it is the obligation of all parents to contribute to the support of their children. To that end, **a minimum order of \$25 per week should enter**. This minimum

should not be construed as limiting the Court's discretion to set a higher or lower order, should circumstances warrant, as a deviation from the guidelines.

To be clear, the Child Support Task Force clearly had the authority to make an attribution of income based on full-time, minimum wage employment presumptive in all cases involving unemployed parents. However, with Massachusetts minimum wage [set to reach \\$15.00 per hour by January 1, 2023](#), such a presumption would have effectively resulted in a minimum attribution of income of \$600 per week for most Massachusetts parents, which equates to minimum child support of \$130.00 per week for one child if both parents are unemployed.

Although cases like [CMA v. JTA](#) suggest that a court may attribute part-time employment at minimum wage to a parent, if the amount of attributed income has a minimal impact on "the total financial award", [McCrea v. Clayton](#) makes clear that judges are expected to provide detailed findings in support of an attribution of income for minimum wage, particularly if the attribution has a significant impact on the final support level.

The simple reality is this: the median income for an individual in Massachusetts as of 2019 was \$37,886. In other words, half of all Massachusetts residents earn less than \$37,886 per year. By 2023, when the state's minimum wage reaches \$15 per hour, full-time employment at minimum wage will be \$31,200 per year. (Meanwhile, only [35% of working-age residents](#) of Massachusetts do not participate in the workforce at all, one of every nine households [lives below the poverty line](#), including 16% of households with children under 6.)

With the increasing growth of the gig economy, and many employers turning to part-time workers in the face of rising minimum wage, it is simply inaccurate to suggest that an individual with limited work experience and/or education can automatically earn \$31,000 per year for support purposes - much less automatically transform themselves into a full-time, 40-hour per week employee after spending years outside the work force.

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