

**91 Mass.App.Ct. 1125
86 N.E.3d 250 (Table)**

**Paul E. COURNOYER
v.
Christine M. COURNOYER.**

16-P-1138

Appeals Court of Massachusetts.

Entered: May 30, 2017

**MEMORANDUM AND ORDER PURSUANT TO
RULE 1:28**

Paul E. Cournoyer appeals from a modification judgment dated January 15, 2016, entered after a trial in the Probate and Family Court. We vacate the modification judgment in part and remand.

Background. Paul E. and Christine M. Cournoyer² were divorced by a judgment of divorce nisi on April 13, 2001, following more than eighteen years of marriage. As is relevant here, the divorce judgment required Christine to pay alimony to Paul in the amount of \$85,000 per year. The judgment also provided that Christine was to pay Paul additional alimony³ in the event her base salary, bonuses, and incentive compensation exceeded \$255,000 per year. The provisions relating to alimony merged in the judgment of divorce.

The parties filed a series of complaints for modification in the ensuing years. In 2005, Christine's alimony obligation to Paul was decreased to \$44,200 per year as a result of her involuntary termination from employment. Paul's child support obligation was suspended at that same time. The modification judgment provided that these obligations could be reviewed upon either party's reemployment.

In 2006, the parties further modified their obligations by agreement as follows: Christine was to pay Paul alimony of \$100,000 per year; if Christine's income exceeded \$300,000, she was to pay Paul additional alimony of 33.3 percent, up

to \$600,000; income over \$600,000 or income from certain board positions was excluded for purposes of calculating alimony.

The complaint for modification at issue here was filed in May of 2013 by Christine seeking to terminate her alimony obligation on the basis of her loss of employment and decline in income. Paul filed an answer and counterclaim for modification opposing termination and asserting affirmative defenses, including that he needs alimony to continue due to his chronic illness and unusual health circumstances.⁴ Paul also cited Christine's remarriage, earning capacity, unearned income, and ability to pay alimony and maintain the marital lifestyle as reasons for alimony to continue. In August of 2015, Christine amended her complaint citing the durational limits of the alimony reform act (act) as a basis for termination of her alimony obligation.⁵ Paul answered and counterclaimed reasserting his original claims and contending that Christine's alimony obligation should be reduced, but not terminated.

After trial, a modification judgment entered which terminated Christine's alimony obligation effective December 31, 2016. Until that date, Christine was ordered to pay alimony to Paul of \$5,564.80 per month.⁶ Paul was ordered to grant Christine a blanket mortgage on property he owns in Falmouth and Pocasset in the amount of \$88,592.96 to secure the repayment of alimony to Christine as a result of the retroactive order. This appeal followed.

1. Termination date. Paul claims that it was an abuse of discretion to arbitrarily terminate Christine's alimony obligation fourteen months after the durational limit.⁷ He argues that this is inconsistent with the finding that he has a continuing need for alimony beyond that limit. Christine counters that the judge considered all the mandatory factors set forth in G. L. c. 208, § 53, as to both the amount and duration of her obligation to Paul.⁸

The fundamental purpose of alimony has remained constant despite the provisions of the

act. Alimony is the payment of support from one spouse, who has the ability to pay, to the other spouse in need of support. Gottsegen v. Gottsegen, 397 Mass. 617, 624 (1986). However, the act imposed presumptive durational limits based, in part, on the length of the marriage. Notwithstanding these limits, upon written findings, a judge may find that deviation from the durational limits is required in the interests of justice. G. L. c. 208, § 49(b). Among the potential grounds for deviation, as set forth in G. L. c. 208, § 53 (e), as inserted by St. 2011, c. 124, § 3, is the "chronic illness; or unusual health circumstances of either party." That is precisely what the judge relied upon in extending the durational limit beyond the presumptive termination date. Notably, neither party contests the fact that deviation was appropriate. Rather, Paul contends that the date selected by the judge for termination was arbitrary and not supported by any clear rationale. We agree.

In fashioning a termination date, the judge found that Paul could liquidate his assets before alimony ended, thereby reducing his expenses. This finding is not supported by the record and is at odds with the holding of Doktor v. Doktor, 470 Mass. 547, 553 (2015), quoting from Downey v. Downey, 55 Mass. App. Ct. 812, 818 (2002) (a recipient spouse "should not be required to deplete her assets in order to maintain herself"). The judge also reasoned that the termination date was related to Christine attaining full retirement age. As this divorce judgment was entered before the act, full retirement age cannot serve as a basis for modifying a payor's alimony obligation. Chin v. Merriott, 470 Mass. 527, 529 (2015). Rodman v. Rodman, 470 Mass. 539, 545-546 (2015).

Additionally, the judge did not have the benefit of the Supreme Judicial Court's holding in George v. George, 476 Mass. 65 (2016), at the time this modification judgment entered. In applying the interests of justice standard in determining whether to deviate from the presumptive termination date, the court must "evaluate the circumstances of the parties in the here and now." George, 476 Mass. at 70. A remand will give the judge an opportunity to consider the temporal

focus required by George as well as the statutory factors set forth in the act. See Duff-Kareores v. Kareores, 474 Mass. 528, 535 (2016), citing Zaleski v. Zaleski, 469 Mass. 230, 235-236 (2014).

2. Retroactive award. In determining that a retroactive reduction in alimony was appropriate, the judge required Paul to mortgage his assets to ensure that Christine is repaid in excess of eighty-eight thousand dollars. This aspect of the judgment recognized both the illiquid nature of Paul's assets and his minimal income derived primarily from Social Security disability. "The judge must consider all the statutory factors and reach a fair balance of sacrifice" in establishing alimony. Pierce v. Pierce, 455 Mass. 286, 296 (2009). Based on the vast disparity in the financial positions between Paul and Christine, it was an abuse of discretion to enter a retroactive alimony award and require security for the repayment.

3. Tax implications. Paul claims that the judge erred by not considering the tax consequences related to the retroactive alimony award. This issue is raised for the first time on appeal and is therefore waived. Moreover, there was no evidence presented as to the tax consequences of any aspect of the requested relief. See Vedensky v. Vedensky, 86 Mass. App. Ct. 768, 776 & n.10 (2014).

4. Conclusion. Paragraphs one and three of the January 15, 2016, judgment of modification are vacated. Pending further hearing, the amount of alimony set forth in paragraph one shall be paid as temporary alimony without prejudice to either party. Paragraphs two and four of the modification judgment are affirmed. The matter is remanded for further proceedings consistent with this memorandum and order.⁹ ¹⁰

So ordered.

Affirmed in part, vacated in part, and remanded.

Notes:

² We refer to the parties by their first names as they share a surname.

³ This was calculated as 33.3 percent of the difference between \$255,000 and the amount actually earned, up to \$600,000.

⁴ In 1998, Paul underwent brain surgery for an arterial venous malformation. He then underwent proton beam therapy and suffered a grand mal seizure thereafter. As a result, Paul has not earned income since 1999 and has received Social Security disability income since 2002.

⁵ Christine will reach full Social Security retirement age on December 20, 2017.

⁶ Paragraph two of the modification judgment also provided that Christine's obligation to maintain a life insurance policy for the benefit of Paul was terminated immediately. Paul did not appeal from this aspect of the judgment.

⁷ Pursuant to G. L. c. 208, § 49(b)(4), Christine's alimony obligation to Paul should have terminated no later than October 1, 2015, in the absence of deviation.

⁸ Christine also relies on the judge's finding that Paul holds significant assets and does not need to rely on her for support indefinitely. Paul had in excess of 1.3 million dollars in assets and liabilities of \$6,716.95. Christine had assets of in excess of nine million dollars. At the time of the divorce, the parties equally divided their \$2.2 million dollar marital estate.

⁹ The judge may take additional evidence or receive additional briefing, in her discretion.

¹⁰ Neither party is awarded appellate attorney's fees and costs.
