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Program Materials

NOVEMBER 15, 2022

Negotiating, Substantiating & Codifying Alimony Agreements

Julie K. Murphy et al.

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Negotiating, Substantiating & Codifying Alimony Agreements

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Section 1
PROGRAM MATERIALS

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NEGOTIATING, SUBSTANTIATING & CODIFYING ALIMONY AGREEMENTS

Presenters

- Hon. Mary Rudolph Black, Essex Probate & Family Court
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2

Alimony Modifications

- **History**
  - **Massachusetts courts have had the statutory authority to award alimony since 1786.**
  - **The statute provided that judges had to consider certain factors in setting an alimony order.**
  - **The alimony statute did not, however, provide any standard for modifying alimony orders.**
  - **The Alimony Reform Act of 2011 codified the standard for alimony modification.**

3

Modifying General Term Alimony

- **M.G.L. c. 208 § 49(e)-(f)**

(e) Unless the payor and recipient agree otherwise, general term alimony may be modified in duration or amount upon a material change of circumstances warranting modification. Modification may be permanent, indefinite or for a finite duration, as may be appropriate. Nothing in this section shall be construed to permit alimony reinstatement after the recipient's remarriage, except by the parties' express written agreement.

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Modifying General Term Alimony

- **M.G.L. c. 208 § 49(e)-(f) (cont.)**

(f) Once issued, general term alimony orders shall terminate upon the payor attaining the full retirement age. The payor's ability to work beyond the full retirement age shall not be a reason to extend alimony, provided that:

(1) When the court enters an initial alimony judgment, the court may set a different alimony termination date for good cause shown; provided, however, that in granting deviation, the court shall enter written findings of the reasons for deviation.

(2) The court may grant a recipient an extension of an existing alimony order for good cause shown; provided, however, that in granting an extension, the court shall enter written findings of:

(i) a material change of circumstance that occurred after entry of the alimony judgment; and

(ii) reasons for the extension that are supported by clear and convincing evidence.

5

Modifying Rehabilitative Alimony

- **M.G.L. c. 208 § 50(b)-(c)**

(b) The alimony term for rehabilitative alimony shall be not more than 5 years. Unless the recipient has remarried, the rehabilitative alimony may be extended on a complaint for modification upon a showing of compelling circumstances in the event that:

(1) unforeseen events prevent the recipient spouse from being self-supporting at the end of the term with due consideration to the length of the marriage;

(2) the court finds that the recipient tried to become self-supporting; and

(3) the payor is able to pay without undue burden.

(c) The court may modify the amount of periodic rehabilitative alimony based upon material change of circumstance within the rehabilitative period.

6

Modifying Reimbursement Alimony

- **M.G.L. c. 208 § 51(b)**

  (b) Once ordered, the parties shall not seek and the court shall not order a modification of reimbursement alimony.

7

Modifying Transitional Alimony

- **M.G.L. c. 208 § 52(b)**

  (b) No court shall modify or extend transitional alimony or replace transitional alimony with another form of alimony.

8

Alimony Modifications

Post-Alimony Reform Act of 2011

- **For alimony orders entered before March 1, 2012:**
  - **Those that exceed the durational limits set forth in the Act need only to file a modification to demonstrate a material change in circumstances.**
  - **The alimony recipient's cohabitation or the payor reaching retirement age do not constitute grounds for a modification for alimony orders entered before March 1, 2012. Chin v. Merriot, 470 Mass. 527 (2015)**
- **Under no circumstances does the Act provide a right to seek or receive a modification of an alimony judgment in which the provision survives judgment and did not merge into the judgment. Lalchandani v. Roddy, 86 Mass. App. Ct. 819 (2015)**
  - **Prior to the Act, the court could modify the alimony obligation if the plaintiff met the higher standard of "something more than" a material change in circumstances.**

9

Alimony Modifications

Post-Alimony Reform Act of 2011 (cont.)

- **Changes in circumstances that may allow for a reduction of alimony include:**
  - **Increased assets or unanticipated employment of the recipient;**
  - **Emancipation of child living with recipient spouse;**
  - **Reduced income of payor due to illness;**
  - **Involuntary financial hardship of payor, such as unemployment, strike, decreased earnings, bankruptcy.**
- **Changes in circumstances that may allow for increase in alimony include:**
  - **Increased income, earnings or assets of the payor;**
  - **Increase in recipient's needs;**
  - **Decrease in payor's needs;**
  - **Decrease in payor's income.**

10

Alimony Modifications

Post-Alimony Reform Act of 2011 (cont.)

- **Complaint for Modification vs. Complaint for Alimony**
  - **Complaint for Modification appropriate when there is an existing alimony award or where the court has considered factors in awarding alimony. Requires a material change in circumstances.**
  - **Complaint for Alimony is appropriate where the issue is before the Court for the first time and the mandatory factors under section 34 have not been considered.**
- **Buckley v. Buckley , 42 Mass. App. Ct. 716, 719 (1997) Held that alimony awarded in the post-divorce modification proceeding was not an initial award that triggered an analysis under G.L. c. 208, § 34-even though alimony had not been previously awarded-because the parties' separation agreement had explicitly reserved the right to claim future alimony and the trial court had "passed on" the issue by incorporating and merging the agreement into the divorce decree.**

11

Cavanagh v. Cavanagh SJC-13222

Background:

- **Mother and Father each sought to modify various provisions of divorce judgment.**
- **Mother's Counterclaim for Modification sought alimony for the first time.**
- **Lower court ruled that the Father shall not pay alimony to the Mother.**

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Cavanagh v. Cavanagh SJC-13222

Background (cont.)

- **Father argued that under the plain language of M.G.L. c. 208 § 53(c)(2), alimony is unavailable to the Mother because child support had been ordered.**
- **The Mother argued that § 53(c)(2) cannot be interpreted according to its plain language, as such an interpretation would conflict with other provisions of the statute as well as the expressed legislative purpose in enacting the Alimony Reform Act.**

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Cavanagh v. Cavanagh SJC-13222

M.G.L. c. 208 § 53(c)(2)

(c) When issuing an order for alimony, the court shall exclude from its income calculation:

(2) gross income which the court has already considered for setting a child support order.

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Cavanagh v. Cavanagh SJC-13222

- **Ultimately the SJC ruled for the Mother, holding that in cases where child support is contemplated, before a judge properly may exercise her discretion to decide whether and in what format and amount to award alimony, the Judge must perform a three step analysis.**
- **Footnote 9 of the decision speaks directly to alimony modification:**

15

Cavanagh v. Cavanagh SJC-13222

Footnote 9:

- Likely the only scenario where a judge may properly avoid articulating why alimony is not warranted where the judge denies alimony is where such denial is pursuant to a valid separation agreement, either independent from or as incorporated into a divorce judgment. However, where a separation agreement providing that no alimony shall issue has been both incorporated and merged into a divorce judgment, a judge should first evaluate a later request for new or modified alimony under the "material change in circumstances" standard. Chin, 470Mass. at534. If a material change in circumstances warranting a modification of the divorce judgment is found, the judge should then proceed according to the three-step framework outlined in this opinion.

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Footnote 9 (cont.):

- As discussed supra, the parties' separation agreement was incorporated and merged into the judgment of divorce. Under the relevant provision, the parties waived only "past and present" alimony and "expressly reserve[d] the right for future alimony." **Thus, a new award of alimony after the entry of the divorce would not require modification of the judgment and, therefore, does not require a finding of a material change in circumstances**. The judge in this case, therefore, should on remand proceed directly to the three-step framework outlined above.

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Prenuptial and Postnuptial Agreements

Presenters

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Prenuptial Agreements

Rosenberg v. Lipnick, 377 Mass. 666 (1979)

- Establishes the fair disclosure rule, requiring that each party to a prenuptial agreement fully and accurately disclose their assets to the other party prior to executing the agreement.
- Did the Agreement contain a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement;
  - Was the contesting party fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth;
  - Was there a waiver by the contesting party set forth.
  - Reasonableness cannot be judged in isolation and parties have freedom to contract although the State has in an interest in protecting the financial interest of spouses when they divorce.
- The monetary provisions of a prenuptial agreement should be considered with reference to factors such as the parties' respective worth, ages, intelligence, literacy level, business acumen and prior family ties or commitments.

3

Prenuptial Agreements

See also:

- Rostanzo v. Rostanzo , 73 Mass. App. Ct. 588, 598 (2009), finding that, "'Full and fair' financial disclosures are a 'significant aspect' of fair dealings between parties entering into an antenuptial agreement and an essential prerequisite for a meaningful waiver of marital rights."
- Allen v. Allen , 90 Mass. App. Ct. 1101 (2016) (unpublished Rule 1:28 decision)
  - The Appeals Court refused to enforce a prenuptial agreement that had been entered into by an English-speaking husband and a predominantly Portuguese-speaking wife. Although the wife had obtained the assistance of a Portuguese-speaking attorney before signing the agreement, the attorney, who did not practice divorce law, had merely read the agreement to her in Portuguese, and had not given her any independent legal advice concerning its terms. Accordingly, the wife had not truly had the advice of independent counsel before signing the agreement.

4

Prenuptial Agreements

Osborne v. Osborne, 384 Mass. 591 (1981)

- Adds the second requirement, that in addition to being fair and reasonable when executed, the Court must consider whether the agreement was fair and reasonable at the time of the entry of Judgment Nisi.
- An agreement may be modified by courts in certain circumstances, such as where it is determined that one spouse is or will become a public charge or where a provision affecting the custody of a minor child is not in the child's best interests. Osborne v. Osborne, 384 Mass. at 599.
  - Pisano v. Pisano, 87 Mass. App. Ct. 403 (2014) husband's partial waiver of alimony provided alimony for husband funded from wife's separate property only if without such alimony husband would become a public charge.

5

Prenuptial Agreements

DeMatteo v. DeMatteo, 436 Mass. 18 (2002)

- Appeal after Probate Court found the Prenuptial Agreement invalid.
- SJC reversed the Probate Court's decision, citing Rosenberg v. Lipnick, 377 Mass. 666 (1979) and Osborne v. Osborne, 384 Mass. 591, 598 (1981), to determine whether the antenuptial is fair and reasonable, but distinguishing the considerations that permit a judge to conclude that a separation agreement is fair and reasonable.
- The SJC holds that the standard in the "second look" test is more appropriately described as "conscionability," which is distinguished from fair and reasonable.
- In reviewing a prenuptial agreement to determine its enforceability, maintenance of lifestyle and standard of living enjoyed during the marriage are not factors taken into consideration.

6

Prenuptial Agreements

Korff v. Korff , 64 Mass. App. Ct. 94 (2005)

- The probate court judge found the agreement to be valid both at the time of execution and at the time of divorce under the dual-pronged inquiry set forth in DeMatteo v. DeMatteo 436 Mass. 18 , 30 (2002).
- The judge fixed a set amount of alimony to be paid over the life of the antenuptial agreement, which was impermissible given the clear language of the agreement.
- Stands for the proposition that once a prenuptial agreement is found to be a valid agreement, the judge is obligated to enforce its terms as written.

7

Prenuptial Agreements

Austin v. Austin, 445 Mss. 601 (2005)

- Husband appeals Probate Court's finding that Antenuptial Agreement invalid as to alimony waiver and awards alimony to the Wife.
- SJC cites to DeMatteo v. DeMatteo in finding the Agreement Fair and Reasonable when entered into and also valid after a second look.
- In upholding the agreement, the Court pointed to specific provisions included in the agreement that were beneficial to the Wife (including relocation and support from the Husband if there was no jointly owned marital home at the time of a divorce.
- The Court also noted that the Wife's attorney drafted the agreement that was executed, after advising the Wife not to sign one prepared by the Husband's attorney.
- Reiterated that the terms of a valid prenuptial agreement must be enforced unless circumstances exist such as the mental or physical deterioration of the contesting party or erosion of promised support by inflation would lead the court to conclude that enforcing the agreement would leave the contesting spouse without sufficient property, maintenance or appropriate employment to support him/herself.

8

Prenuptial Agreements

Biliouris v. Biliouris , 67 Mass. App. Ct. 149 (2006)

- The prenuptial agreement contained an alimony waiver provision, which was deemed fair and reasonable at the time the agreement was executed – even though the parties agreed that the wife would leave her job to be a stay-at-home mother upon their marriage.
- The Court stated that there was nothing in the record to indicate that the wife would be incapable of working and earning income to support herself in the event of a divorce, as the wife had demonstrated earning capacity when the agreement was executed.

9

Postnuptial Agreements

- Fogg v. Fogg, 409 Mass. 531 (1991)

First look at a "so called "postnuptial" agreement"

Court declined to look at validity of postnuptial agreements but stated if they are valid they would at least have to meet the same threshold requirements of antenuptial and separation agreements.

The Agreement the parties entered in that it was not free from fraud as it "was signed as a result of the Wife's implied fraudulent promise that she would attempt to preserve the marriage. Thus it is invalid".

10

Postnuptial Agreements

- Ansin v. Cravin-Ansin, 457 Mass. 283 (2010)
  - SJC granted direct appellate review to determine if postnuptial agreements are contrary to public policy and if not, is the agreement at issue enforceable.
  - Court found that while marital contracts are not the product of classic arm's-length bargaining that does not meat that it is coercive.
  - More strict requirements than prenuptial agreements and separation agreements.

11

Postnuptial Agreements

- Ansin continued:
  - Marital Agreements are different then Prenuptial Agreements and Separation Agreements and must be carefully scrutinized who must determine at a minimum if

    (1) each party has had an opportunity to obtain separate legal counsel of each party's own choosing;

    (2) there was fraud or coercion in obtaining the agreement;

    (3) all assets were fully disclosed by both parties before the agreement was executed;

    (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and

    (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce.
  - Where one spouse challenges the enforceability of the agreement, the spouse seeking to enforce the agreement shall bear the burden of satisfying these criteria.

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Postnuptial Agreements

Connors v. Connors (Mass. App. 2018)

- Summary decision pursuant to Rule 1:28.
- Court found the Postnuptial Agreement was fair and reasonable at signing, was not a product of duress or coercion which was the Wife's burden to prove, the parties had waivers, and statements they were aware of their marital rights under Massachusetts' law.
- The Court remanded only for the Judge to determine whether the Agreement was fair and reasonable at the divorce and to determine if the Husband breached the Agreement resulting in an award of attorney's fees to the Wife.
  - The Court stated "Among the factors the judge should consider are "the financial and property division provisions of the agreement as a whole" and "the mandatory and, if the judge deems it appropriate, the discretionary factors set forth in G. L. c. 208, § 34."

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Prenuptial and Postnuptial Agreements

Issues:

- Lump-sum alimony payment vs. incremental increase of alimony
- Cavanagh considerations
- Tax considerations, including changes to the tax code

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MCLE: NEGOTIATING ALIMONY

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DEFINITION OF ALIMONY

- General Laws c. 208, §48:
  - "Alimony", the payment of support from a spouse, who has the ability to pay, to a spouse in need of support for a reasonable length of time, under a court order.

LAWS REGARDING ALIMONY

- General Laws c. 208, §34:
  - In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income.
- General Laws c. 208, §53:
  - **(a)** In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider: the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material.
  - **(c)** When issuing an order for alimony, the court shall exclude from its income calculation:
    - (1) capital gains income and dividend and interest income which derive from assets equitably divided between the parties under section 34; and
    - (2) gross income which the court has already considered for setting a child support order.

CALCULATING ALIMONY

- Look to:
  - 1. Receiving Spouse's need for alimony
  - 2. Supporting Spouse's ability to pay alimony
  - 3. Statutory limits and percentages

PREFACE: ASSET DIVISION

WHEN IS THE MARITAL ESTATE DETERMINED?

- Schulz v. Schulz, 101 Mass. App. Ct. 1117 (2022) M.A.C. Rule 23.0 formally referred to as 1:28 decision
  - Facts: After 15 years of marriage, Wife filed a complaint for Divorce from Husband. Following trial, the judge issued a judgment of divorce nisi. The judge included in the marital estate the Husband's personal injury settlement proceeds from an injury sustained years earlier but received after separation. The judge found that the Husband sustained the injury during the marriage and that the wife was entitled to 33% of the net proceeds. The husband challenged the judge's division of the marital estate.
  - Holding: The marital estate is typically determined as of the date of the divorce trial, rather than at the time of separation. Citing to Moriarty v. Stone 41 Mass.App.Ct.151, 154 (1996).
  - Husband's personal injury settlement proceeds he received after separation, but before divorce trial, were properly included in the marital estate.
  - "In making an equitable division of the parties' property, the judge had available for distribution 'all or any part of the estate of the other'". Citing to Heins v. Ledis, 422 Mass 477, 483-484 (1996)
  - There was no alimony award.

Note: The 3 panel Court had an incomplete record before them as the Husband did not obtain most of the transcripts.

PREFACE: ASSET DIVISION

WHEN IS THE MARITAL ESTATE DETERMINED CONTINUED. . .

However, contrast with:

- Savides v. Savides, 508 N.E.2D 617 (1987)
  - Facts: Husband and Wife married in 1956 and lived together until 1974, when both parties began extramarital relationships. The Court found that the parties' marriage terminated in 1974, when they no longer held themselves out as a married couple. After 1974, Wife contributed nothing to the acquisition of assets, while Husband's business grew substantially.
  - SJC affirmed valuation of the marital estate at the time of separation where the parties were separated for nine years before Husband filed a complaint for divorce, and post-separation appreciation of the Husband's assets was not attributable to the Wife's efforts.

Consider: (1) the amount of time between the separation and divorce trial, and (2) any post-separation contributions of each spouse to asset appreciation.

ASSET DIVISION

WHAT HAPPENS WHEN THERE IS AN EXPECTED INHERITANCE?

- Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105 (2016)
  - Facts: Parties were married in 2000 and Husband filed complaint for divorce in 2010. Husband was a beneficiary of an irrevocable discretionary trust formed in 2004 that benefited an open class. At the time of trial, there were 11 living beneficiaries, meaning that Husband had a 1/11 interest totaling $2,265,474.
  - The Court found Husband's present right to distributions from the trust was speculative, because the terms of the trust permit unequal distributions among an open class of numerous beneficiaries, and because his right to receive anything was subject to the trustee having first exercised discretion in determining the needs of an unknown number of beneficiaries. Therefore, Husband's future acquisition of assets from the trust was not sufficiently certain such that it may be included in the marital estate.
  - Holding: An expectancy (such as a future inheritance) is generally deemed too speculative to be included in the divisible marital estate and is thus appropriately considered under the § 34 criterion of opportunity for future acquisition of capital assets and income in determining what disposition to make of the property that is subject to division. This is because expectancies have only theoretical value, and do not create a fixed entitlement to income.
- Frasca v. Frasca, 93 Mass. App. Ct. 1101 (2018) Rule 23.0 Decision.
  - Facts: Parties were married for 34 years and lived a lifestyle funded in large part by the Husband's mother. The Judge found the Wife was completely financially dependent on the Husband and his family's wealth and assigned to the Wife 35% of any future inheritances that the Husband may receive.
  - When allocating the marital property, the Court found it was well within the judge's discretion to consider the high probability that the Husband would inherit from his still-living mother at some point in the future. However, because he had no vested interest in an inheritance at the time of divorce, it was error for the judge to assign any of Husband's future inheritance to the Wife.
  - Holding: When interests are properly characterized as mere expectancies they may not be included in the divisible estate of the divorcing parties however can be considered in dividing marital property. See Davidson v. Davidson, 474 N.E.2d 1137 (1985)

ASSET DIVISION

WHAT HAPPENS WHEN THERE IS AN EXPECTED INHERITANCE CONT.

- Zeh v. Zeh, 35 Mass. App. Ct. 260 (1993)
  - Facts: Parties were married in 1964. From 1970-1984, the Husband's father supplemented the parties' income. After his father's death in 1984, Husband was to receive $421,918. The wife left the marital home and brought an action for divorce in 1988. However, at the time of the divorce hearing, the Husband's legacy had not yet been distributed.
  - Holding: While an expectancy of an inheritance does not qualify as property subject to division under MGL c. 208, § 34, it may be considered by the judge under the criterion of opportunity of each for future acquisition of capital assets and income in determining what disposition to make of the property which is subject to division. However, an inheritance in possession clearly stands on different footing and constitutes part of the estate of the recipient subject to division under § 34.
  - In these circumstances, the Husband's inheritance falls within the category of assets subject to division because it vested as of the date of the father's death.

HOW DOES THIS RELATE TO ALIMONY?

MGL C. 208 §34:

- "In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other…"
- Therefore, alimony and equitable division are interrelated remedies. While equitable division may involve consideration other than those determinative of alimony, an order for division of property cannot be viewed apart from alimony.
    - Quoting Grubert v. Grubert, 20 Mass. App. Ct. 811 (1985)

ALIMONY CASES

- Gottsegen v. Gottsegen, 397 Mass. 617 (1986)
  - "The statutory authority of a court to award alimony continues to be grounded in the recipient spouse's need for support and the supporting spouse's ability to pay. A court may not limit alimony for reasons unrelated to its statutory base."

- Pierce v. Pierce, 455 Mass. 286 (2009)
  - Facts: As part of their separation agreement, Husband was required to pay Wife $110,000/year as alimony. Husband later retired at the age of 65 and filed a motion asking the court to eliminate his alimony obligation. The court reduced his payments to $42,000/year, finding that he had the financial ability to pay, despite his diminished income. Husband argued that his obligation should have been terminated.
  - Issue: Should a former spouse's voluntary retirement from employment at or beyond the customary age of 65 create a rebuttable presumption that any alimony obligation owed by the retiring spouse should be terminated?
  - Answer: No, voluntary retirement at a customary age is simply one factor to be considered by the judge in deciding whether to modify the alimony obligation set forth in a divorce judgment.
  - "If a supporting spouse has the ability to pay, the recipient spouse's need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to the termination of the marriage."

ALIMONY AND ASSET DIVISION IS THERE NEED IF YOU HAVE ASSETS?

- Downey v. Downey, 55 Mass. App. Ct. 812 (2002)
  - Facts: Divorce agreement provided Husband would pay Wife $225/week for alimony and child support. When Husband was no longer required to pay child support, Husband was ordered to pay $300/week to meet the present financial needs of Wife.
  - At time of modification trial: Wife's Assets = ~$101,000. Husband's Assets = ~$267,500.
  - The judge found that Wife's weekly expenses substantially exceed her weekly income, and that the Wife is unable to provide adequately for her needs. Although the Wife possesses assets worth in excess of $100,000, the judge properly could conclude that the wife "should not be required to deplete her assets in order to maintain herself."

- Doktor v. Doktor, 470 Mass. 547 (2015)
  - On appeal, Husband alleged judge erred by not considering Wife's use of principle of her assets to meet her reasonable expenses.
  - The judge considered the Parties' station in life during the marriage; the nature, source, and value of the Wife's assets; her current income and reasonable expenses; and Husband's stipulated ability to pay alimony and properly concluded that without the alimony, the Wife's weekly expenses exceeded her income, and she should not be required to deplete her assets in order to maintain herself.

ALIMONY AND ASSET DIVISION CONTINUED...

- Cournoyer. Cournoyer, 91 Mass.App.Ct. 1125 (2017)
  - Facts: Parties divorced after 18 years of marriage.
  - Wife ordered to pay Husband alimony.
  - Wife lost job and sought to terminate alimony.
  - At trial, alimony terminated, and court found Husband could liquidate his assets to reduce expenses.
  - Issues included durational limits of which Husband argued extension due to medical chronic illness. Case also addressed other issues but reiterated Doktor v. Doktor and Downey v. Downey, that "a recipient spouse "should not be required to deplete her assets in order to maintain herself"".
  - Remanded. Holding that Husband could use his assets was in conflict with Doktor.

ATTRIBUTION OF INCOME IN ALIMONY CASES

WHAT IS ATTRIBUTION OF INCOME?

- 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 determines 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.
- Considerations:
  1. Age, number, needs, and care of the children covered by the child support order,
  2. 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,
  3. The parent's record of seeking work and the availability of employment at the attributed income level, as well as the availability of employers willing to hire the parent, and
  4. The relevant prevailing earnings level in the local community.

CASES WHERE ATTRIBUTION OF INCOME WAS APPLIED

Schuler v. Schuler, 382 Mass. 366 (1981)

- Facts: at the time of divorce, Husband's income was approximately $46,500. Two years later, Husband's employment was terminated. At the time of the modification hearing, Husband had not accepted other employment and had instead formed a consulting business with an income of $21,000. Although positions in his line of work (design engineering) paid $24,000/year and were reasonably available, Husband had decided not to pursue those opportunities because he hoped to become the president of a small corporation.
  The judge found that Husband had not sought new employment and did not intend to do so and relied on his potential income as a design engineer rather than his actual income in setting alimony obligations. It was also unreasonable for Husband to wait indefinitely upon the limited prospect of becoming president of a corporation, when a position with a $24,000 salary was reasonably available. Husband appealed.
- Holding: The general rule is that "where the support provider is earning less than he could with reasonable effort, the trial judge may consider potential earning capacity rather than actual earnings." Therefore, it was not an abuse of the judge's discretion to consider Husband's potential rather than actual income as one factor in his decision not to modify the original separation agreement.
- Note: a judge may also weigh a party's ownership of "substantial assets," and continued standard of living following a job loss, in determining whether attribution is proper.

ATTRIBUTION OF INCOME CONTINUED

Macri v. Macri, 96 Mass. App. Ct. 362 (2019)

- Facts: The parties divorced in 2008. Between 2008-2011, the Husband earned an annual income between $700,000-$1 million. After an appeal and remand on the issue of attribution, the trial judge attributed an annual income of $400,000 to the Husband, who was unemployed at the time of trial, finding that he had not exercised reasonable efforts to obtain appropriate employment.
    - In attributing income, the judge found that the husband was 51 years old and in good health. He had worked in the financial sector for over 25 years and had voluntarily terminated his job. At trial, a vocational expert witness testified that the Husband was "highly employable," that over 5,000 positions were available in the Boston area, and that his annual earning capacity was ~$440,000. These factors led the judge to conclude that the Husband was unreasonably unemployed.
- Holding: The trial court did not err in attributing an income of $400,000/year to the Husband because the judge's detailed findings demonstrated appropriate consideration of the availability of employment at the attributed income level, the availability of employers willing to hire him, and the relevant prevailing earnings level in the Boston area. The findings reflected consideration of all factors required by the guidelines.

CONTRAST WITH CASES WHERE THERE WAS NO ATTRIBUTION OF INCOME

Flaherty v. Flaherty, 40 Mass. App. Ct. 289 (1996)

- Facts: Husband was a 46-year-old professional with a Ph.D. Two months prior to trial, Husband was laid off from his job. At the time of trial, he was receiving unemployment benefits and was readying himself to seek new employment. The trial judge ordered him to pay $400/week in child support based on a computation attributing to the Husband full-time employment income, instead of his unemployment income he was actually receiving. However, the judge made no specific findings in support of attribution. Husband appealed.
- Holding: the trial judge's findings were inadequate to support the attribution of income.
- Attribution of income may be appropriate when a judge determines a career change is voluntary or where a party fails to take another job despite its easy availability (*Schuler*). A party's ownership of substantial assets also may be weighed in determining whether attribution is proper.
- Where, however, as here, there is no evidence that a change in job status was voluntary, the party is making a reasonable effort to secure additional income, and he or she has no additional assets with which to pay the increased support order, child support orders must be based upon present income.

ATTRIBUTION NOT PERMITTED CONTINUED

Emery v. Sturtevant, 91 Mass. App. Ct. 502 (2017)

- Modification filed at the end of the divorce trial but before entry of Judgment.
- The Husband resigned from his employment after having an affair with a subordinate.
- The Husband accepted employment making $135,000. Previous compensation package exceeded $450,000.00.
- Court stated "[w]hen determining the earning capacity of a party who has recently undergone a career change, we have said that "[a]ttribution of income may be appropriate when a judge determines a career change is voluntary." Flaherty v. Flaherty, 40 Mass.App.Ct. 289 (1996).
- In Flaherty v. Flaherty, attribution based on a party's prior earning capacity applied when party voluntarily left his or her job and then failed to make reasonable efforts to secure comparable employment. "This may occur when a party has taken an early retirement or has chosen to pursue work in a totally unrelated field at a substantially reduced salary, despite the availability of higher-paying jobs commensurate with that party's education, training, and experience." See, Bassette v. Bartolucci, 38 Mass.App.Ct. 732, 735-736 (1995) (affirming attribution where husband voluntarily retired from his job as letter carrier earning $735 per week to work as missionary with pension income of $235 per week).
- Here, the judge attributed income because of a voluntary career change. The appeals court found this to be error. "The facts of this case are distinguishable from the voluntary career change line of cases".
- Judge was required to determine Husband could earn more with reasonable effort. "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. See, e.g., C.D.L. v. M.M.L., 72 Mass. App. Ct. at 157 (in affirming attribution of income to husband, court gave "special weight to the judge's finding that the husband was 'earning less than he could with reasonable efforts'"). 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." Ulin v. Polansky, 83 Mass. App. Ct. at 307. "

Emery v. Sturtevant Continued

- Court should "consider all relevant factors including without limitation the education, training, . . . past employment history of the party, and the availability of employment at the attributed income level." Guidelines § I-E. See Flaherty v. Flaherty, 40 Mass. App. Ct. at 291 ("judge should determine by specific and detailed findings of fact whether an individual will be able to earn additional income with reasonable effort before attributing income"). The Judge did not make a specific finding regarding the reasonableness of the husband's efforts to secure employment. Instead, the judge simply "credit[ed] the [h]usband's testimony about his job search efforts after his resignation from NMH." The testimony credited by the judge details the husband's extensive job search spanning eleven months (from June, 2011, to May, 2012) (see case for full job search efforts the husband accepted)"
- "Rather than assessing the reasonableness of the husband's job search leading up to his acceptance of the SEED position, the judge instead found that "once the [h]usband obtained his position with the SEED Foundation in May, 2012, he ceased making any efforts to find employment that paid a salary commensurate with that he had made at NMH." It is neither reasonable nor fair to expect the husband, after he has engaged in an extensive job search in his field of expertise and has secured employment commensurate with his training and experience, to continue his job search efforts indefinitely to avoid the risk of income attribution. Compare Schuler v. Schuler, 382 Mass. at 371-372; C.D.L. v. M.M.L., 72 Mass. App. Ct. at 150, 158. Accordingly, not only did the judge fail to make a specific finding that the husband could earn more with reasonable effort, it is apparent that such a finding cannot be made on this record. "
- Court found criteria was not met. Remanded for support order based on actual income

FURTHER ISSUES OF ATTRIBUTION

Second Jobs: Attributed Income

- Zaleski v. Zaleski, 469 Mass., 230 (2014)

Here the Wife payee was educated and had been employed outside the home, had been unemployed about 2 years at filing and was highly employable. The judge ordered rehabilitative alimony instead of generally term in this 16-year marriage. Also look to this case for rehabilitative alimony where a spouse is expected to become self-supporting in the future.

Vedensky v. Vedensky, 86 Mass.App.Ct.768 (2014)

Appeal, included issue of attribution of income to former Wife (payor) on her second job. The Probate found the Wife was earning $214,000 working full time at the hospital and was also working part-time per diem at a rehabilitation hospital. The judge not only took the second job into account in calculating alimony but considered payor's ability to work additional hours at the second job and attributed income to her.

"We conclude that a party who works at a full-time or full-time equivalent job many not be found to be "unemployed" or "underemployed" based on the level compensation received from a second job obtained 'after entry of the initial order" unless the judge concludes, based on finding supported by the evidence, that a basis exists for rebutting the presumption of immateriality applicable to the income earned from the second job'".

The Court found that was in error citing to the Alimony act "[i]ncome from a second job or overtime work shall be presumed immaterial to alimony modification if: (1) a party works more than a single full-time equivalent position; and (2) the second job or overtime began after entry of the initial order." G.L. c. 208, § 54(b)." Vedensky v. Vedensky, 86 Mass. App. Ct. 768, 22 N.E.3d 951 (Mass. App. 2014).

TAKEAWAY

- "[T]he voluntariness of a career change is not dispositive for purposes of income attribution, and we do not suggest here that a party is foreclosed from making a good faith, voluntary career change simply because the change results in less income. The relevant inquiry in all income attribution cases, whether the party "could earn more with reasonable effort," requires consideration of the party's "specific circumstances," including a broad list of factors specified in the Guidelines. The weight afforded to each factor is a matter within the trial judge's discretion, and depending on the circumstances of a particular case, certain factors may be weighed more heavily than others."
  - Quoting Macri v. Macri, 96 Mass. App. Ct. 362 (2019)
- Therefore, a judge will generally not attribute income without persuasive evidence that:
  - 1. One party failed to make reasonable efforts to find employment, and
  - 2. That jobs are available at the income level being attributed

THE COMMONWEALTH OF MASSACHUSETTS

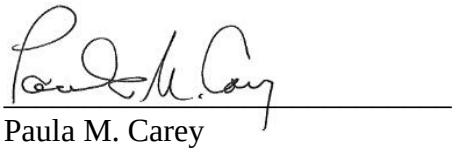
MASSACHUSETTS TRIAL COURT

EXECUTIVE OFFICE OF THE TRIAL COURT

BOSTON, MASSACHUSETTS

CHILD SUPPORT GUIDELINES

The attached CHILD SUPPORT GUIDELINES supersede any previous Guidelines and are effective October 4, 2021.



Paula M. Carey
Chief Justice of the Trial Court

August 2, 2021
Date

Preamble

These child support guidelines shall take effect on October 4, 2021, and shall be applied to all child support orders and judgments entered as of October 4, 2021. In recognition of the priority of the interests of the children of the Commonwealth, these guidelines are formulated to be used by all of the justices of the Trial Court. There shall be a rebuttable presumption that these guidelines apply in all cases establishing or modifying a child support order, regardless of whether the parents of the child are married or unmarried, the order is temporary or final, or the Court is deciding whether to approve an agreement for child support. There shall also be a rebuttable presumption that the amount of the child support order calculated under these guidelines is the appropriate amount of child support to be ordered. These guidelines are based on various considerations, including, but not limited to, each parent's earnings, income, and other evidence of ability to pay. These guidelines are intended to be of assistance to attorneys and to parties in determining what level of payment would be expected given the relative income levels of the parties. In all cases where an order for child support may be established or modified, a guidelines worksheet must be filled out, regardless of the income of the parties.

Commentary 2021 – Preamble

The Child Support Guidelines Task Force for the 2020-2021 review ("Task Force") was convened by Chief Justice of the Trial Court Paula M. Carey in the summer of 2020 to undertake the quadrennial review of the Massachusetts Child Support Guidelines ("guidelines") as required by federal regulations. See 45 C.F.R. § 302.56. An economic consultant, The Brattle Group, was selected after the Trial Court published a Request for Proposals through the Commonwealth's official online procurement record site, COMMBUYS. The economic consultant provided information and research to the Task Force. The Task Force's comprehensive review included assessing each section of the guidelines, line by line, as a whole and in subcommittees.

Throughout its review, the Task Force was cognizant that child support in Massachusetts seeks to reflect the incremental cost of raising a child, separate and distinct from expenses of other household members.

The Task Force's role was limited to reviewing the guidelines and making recommendations to Chief Justice Carey. The Task Force heard testimony and reviewed the submissions of members of the public, attorneys, judges, and court staff. A number of the submitted comments addressed topics and issues beyond the scope of the Task Force, such as the statutory provisions relating to custody determinations, child support for children between the ages of 18 and 23, and the interplay between alimony and child support. The Task Force recognizes and agrees that these are important issues, however, the remedy for making statutory changes to address these issues is with the Legislature and not with the Task Force.

In formulating its recommendations, the Task Force considered public comments, written testimony, legal and economic research, information from the economic consultant, and the comments and experience of Task Force members. The Task Force recommended edits to simplify and clarify portions of the guidelines, as well as for policy considerations.

These guidelines include commentary to indicate the reasoning and intent behind the recommendations of the Task Force. Trial Court departments, parties, and attorneys may use the commentary to resolve questions of interpretation or application of the guidelines.

The Task Force recommended eliminating the word "litigant" from the Preamble and instead inserting "parties", recognizing that not all cases involve litigation.

Commentary 2018 - Preamble

After the promulgation of the Child Support Guidelines in September 2017, the Trial Court reviewed two issues on which it received questions: the application of the adjustment factors for children 18 years of age or older, and the adjustment for child care, health care coverage, and dental/vision insurance costs when parents share financial responsibility and parenting time approximately equally. In the June 2018 amendments, the Trial Court revised the age adjustment factors in the worksheet to eliminate counterintuitive outcomes in support orders for four or five children, at least one being 18 years of age or older. The Trial Court also redesigned the worksheet so that one worksheet can be used regardless of whether the parenting plan is shared, split, or approximately 2/3 and 1/3. It is no longer necessary to use multiple worksheets to determine the child support amount where there is shared or split parenting plans. The June 2018 amendments do not address the 2018/2019 changes to the federal tax code with regard to alimony and dependency exemptions.

Commentary 2017 – Preamble

The Child Support Guidelines Task Force for the 2016-2017 review ("Task Force") was convened by Chief Justice of the Trial Court Paula M. Carey in the spring of 2016 to undertake the quadrennial review of the Massachusetts child support guidelines ("guidelines") as required by federal regulations. See 45 C.F.R. § 302.56. In January 2017, amendments to § 302.56 became effective. The Task Force for this quadrennial review was not required to implement the January 2017 amendments, and thus did not do so in this review. However, where appropriate and constructive, the Task Force considered the policies underlying the 2017 amendments when making its recommendations.

The comprehensive review of the Task Force included reviewing each section of the guidelines, line by line, as a whole and in subcommittees. In formulating its recommendations, the Task Force considered public comments, relevant research, information from economic consultants, and the comments and experience of Task Force members. The Task Force was cognizant that child support in Massachusetts seeks to reflect the incremental cost of raising a child, separate and distinct from expenses of other household members. The Task Force recommended edits for simplification, clarification, and policy considerations. These guidelines include commentary to indicate the reasoning and intent behind the recommendations of the Task Force. Trial Court departments, litigants and attorneys may use the commentary to resolve questions of interpretation or application of the guidelines.

The changes made in the Preamble reflect that the guidelines apply to child support orders entered as of September 15, 2017. The fifth sentence of the Preamble was added for clarification and is consistent with the January 2017 changes to 45 C.F.R. § 302.56 (c). The Task Force further clarified that the guidelines worksheet must be completed in all cases where a child support order may be established or modified. A guidelines worksheet is necessary for the Court to determine whether there is a deviation from the presumptive child support order such that findings must be completed. See Section IV.

Principles

In establishing these guidelines, due consideration has been given to the following principles:

1. promoting parental financial responsibility for children;
2. meeting the child's survival needs in the first instance, but, to the extent either parent enjoys a higher standard of living, allowing the child to enjoy that higher standard;
3. minimizing negative changes to the child's standard of living;
4. protecting a basic subsistence level of income of parents;

5. recognizing that deviations should be used when appropriate to tailor a child support order to the unique circumstances of a particular family;

6. recognizing that parents should bear any additional expenses resulting from the maintenance of two separate households;

7. recognizing the non-monetary contributions and involvement of both parents;

8. recognizing the monetary and/or in-kind contributions of both parents in addition to the child support order;

9. recognizing the importance, availability, and cost of health care coverage for the child;

10. promoting simplicity and consistency in establishing and modifying child support orders; and

11. streamlining administration and minimizing problems of proof.

Commentary 2021 – Principles

The Task Force considered and discussed each of the principles in this section. The Task Force noted that the principles reflect a wide range of considerations in setting appropriate child support orders. Ultimately, the Task Force did not recommend any changes to this section.

Commentary 2017 – Principles

The Task Force refined and reorganized the Principles section for clarification. The Task Force included Principle 5 regarding deviation to highlight that, where appropriate, the Court should deviate from the presumptive child support order amount and that attorneys and litigants should offer reasons as to why a deviation may be warranted. In making this change, the Task Force acknowledged the sentiments expressed by attorneys and litigants that there may be hesitation by the Court to deviate from the presumptive child support order. The Principles section has also been revised to reflect the January 2017 changes to 45 C.F.R. § 302.56 (c) by adding "basic" in Principle 4 of the Principles and changing "health insurance coverage" to "health care coverage" in Principle 9 of the Principles.

I. INCOME DEFINITION

A. Sources of Income

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. However, income derived from a public assistance program or benefit that is based on the person's financial circumstances (for example: TAFDC, SNAP, certain veterans' benefits and supplemental security income (SSI) benefits) shall not be counted as income for either parent.

Sources of income include, but are not limited to, the following:

1. salaries, wages, overtime and tips;

2. income from self-employment;

3. commissions;

4. severance pay;

5. royalties;

6. bonuses;

7. interest and dividends;

8. income derived from businesses/partnerships;

9. social security retirement and social security disability insurance (SSDI), excluding any benefit due to a child's own disability[1];

10. veterans' benefits that are not based on a person's financial circumstances;

11. military pay and allowances, before allotments are deducted;

12. insurance benefits, including those received for disability and personal injury, but excluding reimbursements for property losses;

13. workers' compensation;

14. unemployment compensation;

15. pensions;

16. annuities;

17. distributions and income from trusts;

18. capital gains in real and personal property transactions to the extent that they represent a regular source of income;

[1] If a parent receives social security retirement or SSDI benefits and the children of the parties receive a dependency benefit derived from that parent's benefit, the amount of the dependency benefit shall be added to the gross income of that parent. See Rosenberg v. Merida, 428 Mass. 182 (1998); Schmidt v. McCulloch-Schmidt, 86 Mass. App. Ct. 902 (2014). This combined amount is that parent's gross income for purposes of the child support calculation. However, in cases where parents share or split parenting time according to Section II. D. 2. and the retired or disabled parent is also the child support recipient, only the dependency benefit sent directly to the retired or disabled parent by the Social Security Administration should be added the income of that parent. The guidelines worksheet automatically recognizes this situation and makes the appropriate adjustment.

If the retired or disabled parent is the payor and the amount of the dependency benefit that the Social Security Administration sends to the recipient exceeds the child support obligation calculated under the guidelines, then the payor shall not have responsibility for payment of current child support in excess of the dependency benefit. However, if the guidelines are higher than the dependency benefit that derives from the payor's benefit, the payor must pay the difference between the dependency benefit and the weekly child support amount under the guidelines. See Rosenberg v. Merida, 428 Mass. 182 (1998).

19. spousal support received from a person not a party to this order;

20. contractual agreements;

21. perquisites or in-kind compensation to the extent that they represent a regular source of income;

22. unearned income of children, in the Court's discretion;

23. income from life insurance or endowment contracts;

24. income from interest in an estate, either directly or through a trust;

25. lottery or gambling winnings received either in a lump sum or in the form of an annuity;

26. prizes or awards;

27. net rental income;

28. funds received from earned income credit;

29. income derived from stock options and similar incentives, excluding any income from the coverture portion allocated at the time of the divorce of the parties subject to this child support order; and

30. any other form of income or compensation not specifically itemized above, including, but not limited to, alimony consistent with Calvin C. v. Amelia A., 99 Mass. App. Ct. 714 (2021).

B. Overtime and Secondary Jobs

1. The Court may consider none, some, or all overtime income or income from a secondary job. In determining whether to disregard none, some or all income from overtime or a secondary job, due consideration must be given to the history of the income, the expectation that the income will continue to be available, the economic needs of the parties and the children, the impact of the overtime or secondary job on the parenting plan, and whether the overtime work is a requirement of the job.

2. If after a child support order is entered, a payor or recipient begins to work overtime or obtains a secondary job, neither of which was worked prior to the entry of the order, there shall be a presumption that the overtime or secondary job income should not be considered in a future child support order.

C. Self-Employment and Other Business Income

Income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely-held corporation is defined as gross receipts minus ordinary and

necessary expenses required to produce income. In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine the appropriate level of gross income available to the parent to satisfy a child support obligation. In many cases, this amount will differ from a determination of business income for tax purposes.

D. Imputation of Income

1. When the Court finds that a parent has, in whole or in part, undocumented or unreported income, the Court may reasonably impute income to the parent based on all the evidence submitted, including, but not limited to, evidence of the parent's ownership and maintenance of assets, and the parent's lifestyle, expenses and spending patterns.

2. Expense reimbursements, in-kind payments or benefits received by a parent, personal use of business property, and payment of personal expenses by a business in the course of employment, self-employment, or operation of a business may be included as income if such payments are significant and reduce personal living expenses.

3. In circumstances where the Court finds that a parent has unreported income, the Court may adjust the amount of income upward by a reasonable percentage to take into account the absence of income taxes that normally would be due and payable on the unreported income.

E. Attribution of Income

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.

F. Non-Parent Guardian

The income of a non-parent guardian shall not be considered for purposes of calculating a child support obligation.

Commentary 2021 – Section I. – Income Definition

A. Sources of Income

For clarification purposes, the Task Force recommended eliminating the phrase "means-tested" in Section I and instead inserting phrases that define and explain what is meant by "means-tested", i.e., based on a person's financial circumstances. The agency or organization managing the program or benefit sets the financial criteria/circumstances for eligibility. Only those people who are determined to be eligible receive the benefits based on the person's financial circumstances.

In Section I. A. 9., the Task Force recommended clarifying the types of social security payments that are considered income for child support purposes, as there is much confusion regarding the differences between SSI, SSDI, and social security retirement. The guidelines worksheet requires the input of information regarding social security dependency benefits received in Line 2b and Line 2c and, if applicable, the guidelines worksheet adjusts that amount in Line 7c when calculating the child support amount, consistent with Rosenberg v. Merida, 428 Mass. 182 (1998) and Schmidt v. McCulloch-Schmidt, 86 Mass. App. Ct. 902 (2014).

However, the Task Force identified that in some cases – those where parents share or split parenting time according to Section II. D. 2. (box 1 or box 3 on the guidelines worksheet), and the retired or disabled parent is also the child support recipient, and the Social Security Administration is directly sending a dependency benefit to the payor – including the dependency benefit as income to the retired or disabled parent was inconsistent with the legal underpinnings of Rosenberg v. Merida, 428 Mass. 182 (1998). Accordingly, the Task Force recommended that in these situations only a dependency benefit sent directly to the retired or disabled parent by the Social Security Administration should be added to the income of the retired or disabled parent.

In Section I. A. 11., the Task Force clarified that military allotments are debits from income, rather than income itself. Military base pay, other forms of military pay, and military allowances, such as the Basic Housing Allowance, are sources of income.

The Task Force recommended adding Section I. A. 29. to highlight a type of income that is becoming a more common method of compensating employees. This recommendation does not change substantive law, but emphasizes that, under existing law, a person cannot avoid a child support obligation by choosing to be compensated with stock options or by otherwise reclassifying his or her income. See Ludwig v. Lamee-Ludwig, 91 Mass. App. Ct. 36 (2017); Wooters v. Wooters, 74 Mass. App. Ct. 839 (2009).

On June 10, 2021, the Appeals Court issued a decision that addressed whether certain alimony amounts should be included as income by the recipient and deducted by the payor when calculating child support. The Appeals Court noted that where one spouse is the sole payor of both alimony and child support, and alimony is calculated first, it is usually necessary to "us[e] the parties' adjusted, postalimony incomes when calculating child support to avoid running afoul of G. L. c. 208, § 53 (c) (2) . . . ." Calvin C. v. Amelia A., 99 Mass. App. Ct. 714, 721 (2021). This approach would not be utilized where the parties are "subject to reciprocal orders, i.e., each party is both a payor and a recipient of support" or where alimony is not calculated first. Id. Reference to this income is included in Section I. A. 30.

B. Overtime and Secondary Jobs

The Task Force recommended striking the word "first" as it appeared in prior guidelines to clarify that all of the factors must be considered.

The Task Force considered and discussed Section I. C., D., E., and F, and did not recommend any changes.

Commentary 2017 – Section I. – Income Definition

A. Sources of Income

Although the Task Force did not recommend any substantive changes to Section I. A., Sources of Income, it considered whether to do so in light of emerging areas of income-producing activities such as transportation networking companies, crowd funding, domain site flipping, and inconsistent, short-term home rentals. The Task Force determined that these income-producing activities were encompassed by the existing list of sources of income.

The Task Force received public comment regarding means-tested and non means-tested veterans' benefits and, in response, clarified that means-tested veterans' benefits are a type of income that is not included as income for child support calculation purposes. Due to the complexity of determining whether a veteran's benefit is means-tested, the Task Force strongly recommended that the Court should inquire regarding the benefit.

If the Court determines that there has been misrepresentation of income to a taxing authority or on a court-filed financial statement and/or guidelines worksheet, the Court may be required to report the information to the appropriate authority. See Rule 2.15(B) of SJC Rule 3:09: Code of Judicial Conduct.

B. Overtime and Secondary Jobs

The Task Force recommended continuation of the presumptive exclusion of certain overtime and secondary job income from the calculation of gross income for child support purposes. The Task Force rewrote and moved for clarification the sentence that previously read, "The Court may consider none, some, or all overtime income even if overtime was earned prior to the entry of the order." The Task Force also determined that the language in this section applies to payors and recipients since the income of both parents is considered in setting a child support order.

C. Self-Employment and Other Business Income

The Task Force renamed, reorganized and refined this section to focus on issues related to self-employment and the operation of a business. The Task Force moved the language regarding imputing income to the newly created Section I. D. entitled, "Imputation of Income". Because the Task Force felt it was redundant, it deleted from the guidelines the sentence, "The calculation of income for purposes of this section may increase gross income by certain deductions or other adjustments taken for income tax purposes.". The Appeals Court noted in Whelan v. Whelan, 74 Mass. App. Ct. 616, 626-27 (2009), "in 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." As further direction, the Appeals Court noted in an unpublished decision, Zoffreo v. Zoffreo, 76 Mass. App. Ct. 1105 (2010), "[t]he fact that [a parent] is permitted under the tax laws to deduct an amount for depreciation does not mean that those funds, which are not out of pocket expenses, are not available to pay child support."

For additional decisional guidance regarding calculating gross income, the Supreme Judicial Court held "that a determination whether and to what extent the undistributed earnings of an S corporation should be deemed available income to meet a child support obligation must be made based on the particular circumstances presented in each case." J.S. v. C.C., 454 Mass. 652, 662-63 (2009). The Supreme Judicial Court included a non-exhaustive list of relevant factors to consider when making this determination, such as "a shareholder's level of control over corporate distributions", "the legitimate business interests justifying corporate earnings", the "affirmative evidence of an attempt to shield income by means of retained earnings", and "the allocation of burden of proof in relation to the treatment of an S corporation's undistributed earnings for purposes of determining income available for child support[.]" J.S. v. C.C., 454 Mass. 652, 662-65 (2009).

In Fehrm-Cappuccino v. Cappuccino, 90 Mass. App. Ct. 525 (2016), the Appeals Court addressed the appropriateness of including rental income when determining income for child support purposes. The decision notes that "there is no risk of double counting, where 'neither the value of [the father's interest in [the asset]] nor the [father's] ability to earn income is diminished by treating the [father's interest in [the asset]] as a marital asset as well as a source of income by which [the father] can meet his support obligations.'" Fehrm-Cappuccino v. Cappuccino, 90 Mass. App. Ct. 525, 528 (2016) (quoting Champion v. Champion, 54 Mass. App. Ct. 215, 221 (2002)).

D. Imputation of Income

The Task Force renamed, reorganized and refined the section previously entitled, "Unreported Income" to focus on issues related to the imputation of income. Income may be imputed when there are actual resources available to the parent that are not reported for tax purposes.

In general terms, undocumented income is income that does not result in the issuance of a tax reporting form. Unreported income is any income that is received and required to be reported that the taxpayer does not report on his or her taxes.

The Appeals Court decision in Crowe v. Fong, 45 Mass. App. Ct. 673 (1988) is instructional regarding Section I. D. 2. In Crowe, the payor earned $275 per week working at a business owned by his mother, lived rent-free in a home owned by his father, and had use of a vehicle. The Appeals Court upheld the trial judge's "characterization of [the payor's] free use of the home as 'perquisite or in-kind income' for purposes of calculating his support obligation under the guidelines[.]" Crowe v. Fong, 45 Mass. App. Ct. 673, 680-81 (1988).

E. Attribution of Income

The Task Force reorganized and refined this section for clarification and to distinguish attributed income from imputed income. Income is attributed to a parent when the Court determines a parent is capable of earning more than is currently being earned and assigns a hypothetical amount of income to the parent. The Task Force, in consideration of the January 2017 changes to 45 C.F.R. § 302.56 (c) (2017), revised the factors to be considered when attributing income to a parent.

In P.F. v. Department of Revenue, 90 Mass. App. Ct. 707 (2016), the Appeals Court addressed attribution of income where the payor is incarcerated. "'Income may be attributed where a finding has been made that [the payor] is capable of working and is unemployed or underemployed,' . . . or where the payor owns 'substantial assets.'" P.F. v. Department of Revenue, 90 Mass. App. Ct. 707, 710 (2016) (quoting Wasson v. Wasson, 81 Mass. App. Ct. 574, 581 (2012), quoting from Flaherty v. Flaherty, 40 Mass. App. Ct. 289, 291 (1996)). However, where there is "no income or assets from which to pay child support", the Court may not attribute income to the payor based on the payor's prior earning capacity, even if the payor is incarcerated due to committing a crime against the child for whom child support is being paid. P.F. v. Department of Revenue, 90 Mass. App. Ct. 707, 710-11 (2016).

F. Non-Parent Guardian

The Task Force did not recommend any changes to this section.

II. FACTORS TO BE CONSIDERED IN SETTING THE CHILD SUPPORT ORDER

A. Relationship to Alimony or Separate Maintenance Payments

1. These guidelines were developed with the understanding that alimony is for the support of a spouse, while child support is for the support of children.

2. These guidelines were developed with the understanding that child support is non-deductible by the payor and non-taxable to the recipient. These guidelines do not preclude the Court from deciding that any support order be designated in whole or in part as alimony or unallocated support without it being deemed a deviation, provided that the tax consequences are considered in determining the support order and the after-tax support received by the recipient is not diminished. The parties have the responsibility to present to the Court the tax consequences of proposed orders.

3. Chapter 124 of the Acts of 2011, entitled, "An Act Reforming Alimony in the Commonwealth", amended G. L. c. 208 and prohibits the use of gross income which the Court has already considered in making a child support order from being used again in determining an alimony order. See G. L. c. 208, § 53 (c) (2). At any combined income level, the Court and the parties may consider preparing alternate calculations of alimony and child support, as well as an unallocated support order, to determine the most equitable result for the children and the parties. Depending upon the circumstances, such as the total amount of support that would be available to each household, it may be appropriate to calculate alimony first, and in other circumstances it may be appropriate to calculate child support first. Judicial discretion is necessary and deviations shall be considered. An unallocated support order is not a deviation and, as such, does not require findings.

B. Claims of Personal Exemptions for Child Dependents

In setting a support order, the Court and the parties shall consider the allocation of personal exemptions for child dependents between the parties to the extent permitted by law.

C. Minimum and Maximum Levels

1. These guidelines are intended to balance the need to protect a minimum subsistence level for those parents obligated to pay child support and the obligation of all parents to contribute to the support of their children. 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. See Section IV.

2. These guidelines are calculated up to a maximum combined available annual gross income of the parties of $400,000. In cases where combined available income is over $400,000, the guidelines should be applied on the first $400,000 in the same proportion as the recipient's and payor's actual income as provided on Line 3c of the guidelines worksheet. In cases where income exceeds this limit, the Court should consider the award of support at the $400,000 level as the minimum presumptive order. The child support obligation for the portion of combined available income that exceeds $400,000 shall be at the discretion of the Court. However, any percentage applied to the payor's income above the maximum level, as listed in Line 8b of the guidelines worksheet, should be below the percentage applied to the maximum level in Table A (10%).

D. Parenting Time

1. These guidelines recognize that children should enjoy parenting time with both parents to the greatest extent possible consistent with the children's best interests. The basic calculations under these guidelines are based upon the children having a primary residence with one parent and spending approximately one-third of the time with the other parent.

2. These guidelines apply to all types of parenting plan schedules. Information regarding whether the parents share financial responsibility and parenting time for the children approximately equally (shared), whether the children reside primarily with one parent for approximately 2/3 of the time, and whether, in a family with more than one child covered by the order, each parent provides a primary residence for at least one child (split) is entered directly into the guidelines worksheet. The guidelines worksheet will calculate the presumptive child support order based on the information entered into the guidelines worksheet.

3. Where parenting time is substantially less than one-third for the parent who is not the residential parent, the Court may consider deviation by an upward adjustment to the amount calculated under the guidelines worksheet. See Section IV. B. 8.

E. Child Care Costs

1. Reasonable child care costs of up to $355 per week, per child for the children covered by the child support order and due to gainful employment of either parent are shared by the parents in proportion to their share of combined available income. To determine the amount of child care costs to be shared by the parents, the guidelines worksheet requires the input of information regarding the number of children for whom child care is being paid and the total cost of the child care paid per week.

2. In appropriate circumstances, child care costs may include those child care costs incurred due to training or education reasonably necessary to obtain gainful employment or enhance earning capacity. The Court may consider a deviation where the child care cost is extraordinary. See Section IV. B. 7.

F. Child Support for Children Between the Ages of 18 and 23

1. By statute, the Court has discretion either to order or to decline to order child support for children age 18 or older. If the Court exercises its discretion to order child support for children age 18 or older, the guidelines formula reduces the amount of child support in accordance with Table C of the guidelines worksheet. For the guidelines calculation to account for families with children both under age 18 and age 18 or older, the guidelines worksheet requires the input of information regarding the number of children age 18 or older and under age 18.

2. A child age 18 or older who is enrolled in and attending high school shall be deemed to be under age 18 for purposes of the guidelines and Table C, absent deviation.

3. In determining whether to order child support for a child age 18 or older, the Court shall consider the reason for the child's continued residence with and principal dependence on the recipient, the child's academic circumstances, the child's living situation, the available resources of each parent, and each parent's contribution to the costs of post-secondary education for the child and/or other children of the family. The Court may also consider any other relevant factors.

G. Contribution to Post-secondary Educational Expenses

1. By statute, the Court has discretion either to order or to decline to order a parent to contribute to post-secondary educational expenses. Contribution to post-secondary educational expenses is not presumptive.

2. In determining whether to order contribution to post-secondary educational expenses, the Court shall consider the cost of the post-secondary education, the child's aptitudes, the child's living situation, the available resources of each parent and child, and the availability of financial aid. The Court may also consider any other relevant factors.

3. No parent shall be ordered to pay an amount in excess of fifty percent of the undergraduate, in-state resident costs of the University of Massachusetts-Amherst, unless the Court enters written findings that a parent has the ability to pay a higher amount. Costs for this purpose are defined as mandatory fees, tuition, and room and board for the University of Massachusetts-Amherst, as set out in the "Published Annual College Costs Before Financial Aid" in the College Board's Annual Survey of Colleges. This section applies to all orders requiring parental contribution to post-secondary educational expenses, regardless of where the child resides or attends school.

4. If exercising its discretion to order both child support for a child over age 18 and contribution to the child's post-secondary educational expenses, the Court shall consider the combined amount of both orders.

H. Health Care Coverage

1. Each parent may deduct from gross income the reasonable cost of the individual or family health care premium/enrollment actually paid by that parent. If there is an additional cost to insure a person not covered by this order, and the Court determines that such additional cost would unreasonably impact the amount of child support, then some or all of such additional cost shall not be deducted.

2. When the Court makes an order for child support, the order shall include a provision for health care coverage for the child in accordance with the following:

a. The Court shall enter an order that requires either parent to provide health care coverage if such coverage is available at reasonable cost and accessible to the child. If the Court

determines that an order for health care coverage is not in the best interest of the child or creates an undue hardship for either parent, then the Court shall enter written findings.

b. If a parent has enrolled a child in MassHealth, or an equivalent program in another state that is substantially similar to the program established in G. L. c. 118E, the Court shall order that parent to maintain such coverage as long as the child remains eligible; provided, however, that the Court may also order the other parent to enroll the child in private health insurance if: (i) private health insurance is available to that parent at reasonable cost and accessible to the child; (ii) enrollment in the insurance is in the best interest of the child; and (iii) enrollment in the insurance will not create an undue hardship for either parent.

c. For the purposes of this section: (i) health care coverage shall be deemed reasonable in cost if the cost to the party ordered to provide health care coverage does not exceed 5 per cent of the gross income of the party; (ii) health care coverage shall be deemed accessible to the child if covered services are available within 15 miles of the child's primary residence; (iii) health care coverage includes private health insurance available through employment, union affiliation or otherwise, and public health coverage administered by the Title XIX agency; and (iv) private health insurance shall be deemed not available at reasonable cost to a parent whose gross income does not exceed 150 per cent of the federal poverty guidelines for the family size or who receives MassHealth on behalf of themselves or the child.

d. If health care coverage pursuant to this section is not available to either parent at the time the order is entered, the Court shall order the parties to notify the IV-D agency if such coverage becomes available.

I. Dental/Vision Insurance

1. Each parent may deduct from gross income the reasonable cost actually paid by that parent of dental/vision insurance insuring the children covered by this order.

2. If there is an additional cost to insure a person not covered by this child support order, and the Court determines such additional cost would unreasonably reduce the amount of child support, then some or all of such additional cost shall not be deducted from gross income.

3. The cost of dental/vision insurance insuring the children covered by this order is included on the guidelines worksheet in the combined child care and health care costs adjustment.

J. Routine Out-of-Pocket and Uninsured Medical and Dental/Vision Expenses and Extraordinary Out-of-Pocket and Uninsured Medical and Dental/Vision Expenses

1. The recipient shall be responsible for payment of the first $250 each year in combined routine out-of-pocket and uninsured medical and dental/vision expenses for all the children covered by this child support order. For amounts above that limit, at the time of entry of an

order establishing or modifying the child support order, the Court shall enter an order allocating expenses between the parties without adjustment to the child support order.

2. The payment of extraordinary out-of-pocket and uninsured medical and dental/vision expenses incurred for the children, absent agreement of the parties, shall be treated on a case-by-case basis (for example: orthodontia, psychological/psychiatric counseling, etc.). Where the Court makes a determination that such medical and dental/vision services are necessary and are in the best interests of the children, the Court shall allocate such expenses between the parties.

K. Existing Support Obligations and Responsibility for Children Not in the Case under Consideration

1. When an initial order or a modification of an existing order is sought for a child covered by the order in the case under consideration, the amount actually paid by a parent pursuant to a pre-existing support order for a child or spouse not in the case under consideration shall be deducted from the gross income of that parent where that parent provides sufficient proof of the order and payments made. Payments on arrearages shall not be deducted from gross income.

2. When an initial order or a modification of an existing order is sought for a child covered by the order in the case under consideration, the amount of voluntary payments actually paid to support a child not in the case under consideration and with whom the parent does not reside shall be deducted from the gross income of that parent, but only to the extent the Court determines the payments to be reasonable. The parent who seeks the deduction must provide sufficient proof of the legal obligation to support the child and of actual payments made to the other parent or guardian.

3. When an initial order or a modification of an existing order is sought for a child covered by the order in the case under consideration, a hypothetical amount of child support for a child with whom the parent resides but for whom no child support order exists shall be deducted from the gross income of the parent. The parent seeking the deduction must provide sufficient proof of the legal obligation to support the child and of the gross income of that child's other parent. The hypothetical child support amount shall be calculated according to the guidelines worksheet using the gross incomes of both parents of the child for whom the hypothetical child support amount is being calculated.

4. Obligations to a subsequent family may be used as a defense to a request to modify an order seeking an increase in the existing order, but such obligations should not be considered a reason to decrease an existing order.

L. Families with More than One Child

The guidelines formula applies to families with one to five children. For more than five children, the order should be at least the amount ordered for five children. Table B of the guidelines worksheet includes the child support adjustment for more than one child.

M. Contribution to Other Child-Related Expenses

In cases where the Court makes a determination that there are additional child-related expenses such as extra-curricular activities, private school, or summer camps, which are in the best interest of the child and which are affordable by the parties, the Court may allocate costs to the parties on a case-by-case basis.

Commentary 2021 – Section II. – Factors To Be Considered In Setting The Child Support Order

A. Relationship to Alimony or Separate Maintenance Payments

The Task Force extensively discussed the continuing challenges with G. L. c. 208, § 53 (c) (2). Many of the public comments that the Task Force received addressed this issue. The Task Force discussed the practical concerns with the language of G. L. c. 208, § 53 (c) (2) – in some circumstances, a spouse with no children could receive more support than a spouse with children. The Task Force affirmed, after much thought and consideration, that alimony may be run first or second, depending on the facts of the case. The Task Force strongly urges the Court and parties to proactively run different support scenarios to determine what support order is appropriate for the family – specifically whether determining alimony first and then child support provides the appropriate support. The Task Force emphasized that, although an unallocated order does not currently have the same tax benefit as it did before the Tax Cuts and Jobs Act of 2017, an unallocated order that blends alimony and child support may be appropriate.

B. Claims of Personal Exemptions for Child Dependents

The Task Force did not recommend any changes to this section.

C. Minimum and Maximum Levels

The Task Force examined the minimum and maximum levels. The Task Force recognized that the prior minimum order of $25 per week resulted in some payors not having sufficient funds to support themselves. To address this concern, the Task Force created two tranches at the minimum level in Table A of the guidelines worksheet for payors with income up to $249 per week, to include all payors with income below the 2021 U.S. Federal Poverty Guidelines. For payors with gross income up to $210 per week, the minimum weekly order is $12. For payors with gross income between $211 and $249 per week, the minimum weekly order is $12 plus 20% above $210 which calculates to between $12 and $20 per week.

The Task Force recommended increasing the maximum level to $400,000 of combined available income, as the maximum level has not been increased since 2009. The maximum level of $400,000 was recommended after considering the maximum income levels in other states' guidelines and the higher levels of income and costs in Massachusetts relative to other states. There are now six tranches between $250 and $7,692 in weekly combined available income. The eight tranches can be seen in Table A of the guidelines worksheet.

The guidelines worksheet calculates the amount by which each parent's available income exceeds the maximum level. The Task Force discussed wide ranging examples of how income exceeding the maximum level is then used in calculating the child support order amount. The economic consultant observed that, from an economic perspective, simply rerunning the guidelines worksheet on the amounts above the maximum level is objectively incorrect because that approach applies the higher percentages in Table A of the guidelines worksheet for lower income levels. Any percentage applied to the payor's income above the maximum level, as listed in Line 8b of the guidelines worksheet, should be below the 10% applied to the highest income level listed in Table A of the guidelines worksheet.

D. Parenting Time

The Task Force did not recommend any substantive changes to this section. However, the Task Force observed that in Luce v. Folino-Inadoli, an unpublished memorandum and decision pursuant to Rule 23 of the Appeals Court, a judge's decision to adopt a hybrid approach to calculating a child support order when the parties' parenting plan did not fall precisely into any of the three parenting plans provided for in the guidelines worksheet was upheld. See Luce v. Folino-Inadoli, 99 Mass. App. Ct. 1103 (December 17, 2020). The judge ran the guidelines under box 1 and under box 2 on the guidelines worksheet. The judge entered an order that did not adopt the child support amount from either calculation and instead "required the father to pay a reduced child support order of one hundred dollars per week to the mother. This hybrid approach reflects a deviation that is grounded in the circumstances of the parties and the best interests of the children. On this record, the judge did not abuse his discretion. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014)."

E. Child Care Costs

The Task Force extensively discussed child care costs and how these costs should be apportioned between parents, while also understanding that child care costs in Massachusetts are very expensive. The Task Force recommended eliminating both the deduction of child care costs paid from the parent's gross income and the 15% cap on the child care credit from the 2017/2018 guidelines. The Task Force felt that parents should be sharing the actual costs of child care paid in proportion to their income, up to the benchmark amount of $355 per child, per week. The benchmark represents the average cost of center-based infant care in Massachusetts as reported by the Massachusetts Department of Early Education's Market Rate Survey of Child Care Costs. Although the benchmark is set at the average cost for center-based infant care, parents with older children are only responsible for proportionally sharing the actual amount spent on child care up to this benchmark. The benchmark amount does not mandate that parents spend $355 on child care per child, per week; it simply establishes the limit on the amount of child care costs per child, per week that is eligible to be shared between parents in proportion to their respective incomes. To account for situations where more than one child receives child care, the guidelines worksheet multiplies the benchmark amount by the number of children receiving child care. In making its recommendations, the Task Force acknowledged that these changes may significantly increase child support orders. Judges should continue to consider deviation where appropriate, especially where the overall current child support order is more than 40% of the payor's available income as listed in Line 3a of the guidelines worksheet. See Section IV. C. Line 7e of the guidelines worksheet indicates whether the overall support order is more than 40% of the payor's available income.

F. Child Support for Children Between the Ages of 18 and 23

The Task Force recommended changing "the available resources of the parents" to "the available resources of each parent" to emphasize that each parent's resources, including, but not limed to, savings, should be considered separately. The Task Force noted that the increase in the adjustment factors for more than one child in Table B of the guidelines worksheet impacts the adjustment percentages for children between the ages of 18 and 23 in Table C. This is because the percentages in Table C are based on the combination of the 25% reduction for children between the ages of 18 and 23 and the adjustments for the number of children. As a result, the higher adjustment factors in Table B result in higher adjustment factors in Table C for families with children both under age 18 and age 18 and over.

G. Contribution to Post-secondary Educational Expenses

In Section II. G. 2., the Task Force recommended changing "the available resources of the parents" to "the available resources of each parent" to emphasize that each parent's resources, including, but not limited to, savings, should be considered separately. The Task Force felt that it was important to emphasize that the Court should consider whether one parent had saved for post-secondary education expenses, while the other parent did not save, but had had the ability to do so. There should not be a penalty for saving for post-secondary educational expenses.

The Task Force considered whether Section II. G. 2. needed revisions in light of the COVID-19 pandemic and determined that the language as written was sufficient to address any temporary changes in post-secondary education that might have occurred because of the pandemic.

In Section II. G. 3., the Task Force retained the University of Massachusetts - Amherst as the benchmark for determining the parental share of post-secondary educational expenses. Although not the most expensive Massachusetts state college when these guidelines became effective, the University of Massachusetts – Amherst remains the flagship state college in Massachusetts.

In Section II. G. 4., the Task Force recommended language to clarify that ordering both child support for a child over age 18 and post-secondary education expenses is discretionary, but, if both are ordered, then the combined amount of the orders must be considered.

H. Health Care Coverage

The Task Force discussed and recommended eliminating the 15% cap on the health care credit that was included in the 2017/2018 guidelines. Although parties will not receive a credit for health care costs paid, parties will still be allowed to deduct certain health care costs actually paid. However, as noted in the guidelines, "If there is an additional cost to insure a person not covered by this order, and the Court determines that such additional cost would unreasonably impact the amount of child support, then some or all of such additional cost shall not be deducted." The Task Force deleted the word "coverage" and replaced it with "premium/enrollment" to clarify what can be deducted on the guidelines worksheet.

This section was also amended to reflect the many statutory changes that occurred in July 2019. See G. L. c. 119, § 28; c. 119A, § 12; c. 208, § 28; c. 209, §§ 32, 37; c. 209C, § 9.

I. Dental/Vision Insurance

The Task Force considered and discussed this section and did not recommend any changes.

J. Routine Out-of-Pocket and Uninsured Medical and Dental/Vision Expenses and Extraordinary Out-of-Pocket and Uninsured Medical and Dental/Vision Expenses

This section was amended to clarify what these costs entail. Routine out-of-pocket expenses refer to expenses paid when there is medical/dental/vision coverage, but the coverage does not cover all expenses, such as co-payments and deductibles. Uninsured medical/dental/vision expenses refer to expenses paid where there is no medical/dental/vision coverage.

K. Existing Support Obligations and Responsibility for Children Not in the Case under Consideration

The Task Force considered and discussed this section and did not recommend any changes.

L. Families with More Than One Child

The Task Force renamed the section previously entitled, "Families with More Than Five Children". Table B of the guidelines worksheet sets the adjustment factors used to calculate child support when the child support order is for more than one child. The Task Force discussed whether the adjustment factors should be increased and recommended that they should be. Based on a combination of economic data and policy considerations, the incremental cost for each additional child was increased to 40% for two children, 20% for three children, 10% for four children, and 5% for five children. As a result of the increases to the incremental cost for each additional child, the adjustment factors in Table B of the guidelines worksheet were changed to: 1.4 for two children, 1.68 for three children, 1.85 for four children, and 1.94 for five children. The previous adjustment factors were: 1.25 for two children, 1.38 for three children, 1.45 for four children, and 1.48 for five children.

M. Contribution to Other Child-Related Expenses

The Task Force did not recommend any changes to this section.

Commentary 2018 – Section II. – Factors To Be Considered In Setting The Child Support Order

D. Parenting Time

This section was amended to eliminate the directions on how the guidelines should be calculated based on the type of parenting plan. The directions are no longer necessary because of the newly-designed worksheet effective on June 15, 2018. This section now reflects that one worksheet is used to calculate the presumptive child support order for shared, split and approximately 2/3 and 1/3 parenting plans.

F. Child Support for Children Between the Ages of 18 and 23

This section was amended to reflect the changes in Table B and Table C in the June 2018 amendments. In the June 2018 amendments, the September 2017 Table B was split into two separate tables. Table B now lists the adjustment factors for the number of children, and Table C lists the adjustment percentages for children's ages.

The application of the adjustment percentages in this section was revised by the Trial Court to eliminate counterintuitive outcomes in support orders for four or five children, at least one being 18 years of age or older. The age adjustments in the September 2017 Table B were based on applying the 25 percent discount listed in the guidelines in equal proportion to the number of children 18 years of age or older. The age adjustment percentages in the June 2018 Table C are based on applying the 25 percent discount to the oldest children last. That is, the 25 percent discount is applied only to the increases in child support for additional children, rather than to the overall amount of support. The children 18 years of age or older are accounted for last in this calculation to fully preserve the increases in child support for additional younger children.

Commentary 2017 – Section II. – Factors To Be Considered In Setting The Child Support Order

A. Relationship to Alimony or Separate Maintenance Payments

The Task Force discussed the challenges related to the tax consequences of unallocated support. The Task Force recommended that the Court, especially in cases involving parties with disparate levels of income, consider an unallocated support order. By designating some, or all, of a payor's support obligation as tax-deductible to the payor and a taxable payment to the recipient, a significant tax benefit may be achieved.

Under Fechtor v. Fechtor, 26 Mass. App. Ct. 859 (1989), it is the responsibility of the parties to bring the tax implications of a support order to the attention of the Court. Parties and attorneys should familiarize themselves with the applicable provisions of I.R.C. § 71, which provides specific rules that must be followed in order to fashion support orders that will be deemed tax-deductible under the Internal Revenue Code.

The relationship between alimony and child support remained an issue during this review as it was during the 2012 review. When issuing an alimony order, "the court shall exclude from its income calculation gross income which the court has already considered for setting a child support order." G. L. c. 208, § 53 (c) (2). However, the converse is not stated in the statute.

Since the 2012 review and report, the Massachusetts appellate courts have not issued any decisions on point, nor has there been a statutory change. The Task Force discussed this conundrum and determined that, despite the desire to provide more instruction, no changes to this section were recommended at this time. The Task Force recommended that this issue be reviewed again during the next quadrennial review.

B. Claims of Personal Exemptions for Child Dependents

The Task Force refined this section to emphasize the importance of considering the allocation of the dependency exemptions.

C. Minimum and Maximum Levels

The Task Force considered whether the minimum support order required adjustment. The minimum support order has not changed since 2002 when it was established at $18.46 per week. After discussion, the Task Force recommended that the minimum support order be increased to $25 per week. This increase is consistent with economic data on the increase in the overall cost of living in Massachusetts since 2002. The guidelines chart has been adjusted to reflect that the minimum support order applies to combined available income up to $115 per week.

For informational assistance with regard to child support when the parents' combined gross income is over $250,000, section 6 of the guidelines worksheet calculates the amount by which each parent's available income exceeds $250,000. Child support based on income above $250,000 is discretionary. The excess income information in section 6 of the guidelines worksheet may be considered on a case-by-case basis.

D. Parenting Time

The Task Force discussed at length the consequences of the changes that were incorporated by the 2012 Task Force with regard to when parenting time is more than one-third but less than fifty percent. The Task Force agreed that the provision relating to these circumstances needed to be eliminated. The Task Force considered public comment, attorney and judicial experience, the 2008 Report of the Child Support Guidelines Task Force, and the Final Report of the 2012 Task Force when making this determination. The 2012 change increased litigation and acrimony between parents, shifted the focus from a parenting plan that is in the best interests of the children to a contest about a parenting plan that attempts to reduce a child support order, and failed to create the consistency in child support orders that it sought to create.

The Task Force suggested that the first step in determining a child support order is actually creating a parenting plan that is best for the children, recognizing that children should enjoy parenting time with both parents to the greatest extent possible consistent with the children's best interests. Child support should not be driving the parenting plan. Once the parenting plan is established, then calculations may occur. It is important to note again here that the Task Force specifically created a principle regarding the appropriate use of a deviation where the circumstances of a family require one. See Principles, Principle 5.

The Task Force recommended deleting the provisions inserted in the 2009 guidelines that limited the deduction of other support orders from gross income when making certain calculations related to parenting time. This Task Force was unable to determine why the provisions were included, and thus determined that equity required their deletion.

E. Child Care Costs

The Task Force discussed at length how to address the concerns raised by many people regarding the significant costs of child care. The Task Force recommended a proportional adjustment to the child support order based on child care and health care costs. The proportional adjustment for the costs is not dollar-for-dollar because the significant costs of child care and health care coverage could unfairly skew a child support order. Instead, the adjustment is capped, either up or down, at fifteen percent of the child support order.

F. Child Support for Children Between the Ages of 18 and 23

The Task Force renamed and restructured the section previously entitled, "Age of the Children". The Task Force clarified that these guidelines apply in all cases where a child support order is established or modified and not just in cases involving children under age 18. See 45 C.F.R. § 302.56 (a) (2017). That Massachusetts by statute allows for, but does not require, child support until age 23 does not negate the federal requirement that the guidelines must apply in all cases. However, the C.F.R. does not mandate that the guidelines be identical for children of all ages. For dependent children between 18 and 21, child support may be ordered if the dependent child is domiciled with a parent and is principally dependent on that parent. See G. L. c. 208, § 28, G. L. c. 209C, § 9 and G. L. c. 209, § 37.

For dependent children between 21 and 23, child support may be ordered if the dependent child is domiciled with a parent and is principally dependent on that parent due to enrollment in an educational program, as long as the program is not beyond an undergraduate degree. See id. Although the Task Force received public comment suggesting that child support end at age 18, the Task Force did not amend the provision retaining discretion in entering child support orders for children between the ages of 18 and 23 because this discretion is statutory. The Task Force strongly recommended that, until or unless the Massachusetts Legislature amends the child support statutes to clarify that child support is mandatory through graduation of high school, the Court consider child support orders for those children who have turned 18 but are still in high school as mandatory rather than permissive.

Because these guidelines apply to all child support orders, including those for children up to age 23, the Task Force discussed whether the application of the guidelines through the guidelines worksheet should result in a reduction in the base amount of child support for children who are age 18 or older and not attending high school, but nevertheless eligible for child support pursuant to Massachusetts law. The Task Force agreed that a twenty-five percent reduction is appropriate as it takes into consideration factors typical of this age group. For example, the child may be living away at school thereby reducing some of the household expenses for the recipient or the child may be living at home and is not enrolled in a post-secondary educational program and should be working and contributing to the household expenses. The reduction balances the requirement imposed by federal regulation that all child support orders are the product of a formula established by guidelines, while also considering important factors unique to children between the ages of 18 and 23. See M.C. v. T.K., 463 Mass. 226, 231 (2012) ("The Chief Justice of the Trial Court is authorized to promulgate guidelines establishing presumptive child support awards, based on articulated principles and calculated according to specified mathematical formulas.") Nothing in this section limits the ability of the Court to deviate from the presumptive order where appropriate. For example, the child may be living at home and commuting to a post-secondary educational program.

This section shall not be construed to change the rule set forth in Feinberg v. Diamant, 378 Mass. 131 (1979) allowing the Court to require a financially able parent to "contribute to the support of an adult child who by reason of mental or physical infirmity incurs expenses that he or she is unable to meet." Feinberg v. Diamant, 378 Mass. 131, 134 (1979). These matters are addressed in equity actions.

G. Contribution to Post-secondary Educational Expenses

The Task Force created a new section to address the complexity of contributions to post-secondary educational expenses. Post-secondary educational expenses have increased exponentially since 1976 when the Massachusetts Legislature amended statutes to permit the Court to order parents to pay for educational expenses. Overall, both public and private four-year college expenses for fees, tuition, room and board, have increased approximately 250%, as adjusted for inflation. See College Board, Annual Survey of Colleges, 2017. The Task Force shared the pervasive concern that many parents cannot pay post-secondary educational expenses from their income, while meeting other expense obligations. The Task Force intended to discourage orders requiring parents to incur liability for loans in excess of state university costs unless the parents agree to accept such liabilities. The Task Force also intended an expense limitation to provide general uniformity in court-ordered, post-secondary educational expenses contributions.

The limitation on post-secondary educational expenses orders is recommended for most cases, but it is not mandatory. The Task Force does not intend the limitation to apply to children already enrolled in post-secondary education before the effective date of these guidelines or to parents who are financially able to pay educational expenses using assets or other resources.

The University of Massachusetts-Amherst was designated as the benchmark for maximum orders because it was the flagship, and most expensive, Massachusetts state college when these guidelines became effective.

H. Health Care Coverage

The Task Force renamed, reorganized, and revised this section. The phrase "health care coverage" was changed from "health insurance" to reflect recent changes in federal law, which now references both private and public health care coverage. Under federal regulations, child support guidelines must "[a]ddress how the parents will provide for the child's health care needs through private *or public health care* coverage and/or through cash medical support." 45 C.F.R. § 302.56 (c) (2) (2017) (emphasis added). Under 45 C.F.R. § 303.31 (a) (3), "[c]ash medical support or the cost of health insurance is considered reasonable in cost if the cost to the parent responsible for providing medical support does not exceed five percent of his or her gross income or, at State option, a reasonable alternative income-based numeric standard defined in State law, regulations or court rule having the force of law or State child support guidelines adopted in accordance with § 302.56(c) of [Chapter 45]." The Massachusetts Legislature has not amended G. L. c. 119A to reflect the federal definition of reasonableness or to grant the authority to order cash medical support. Nor does G. L. c. 119A allow the Court to order either parent to provide health care

coverage. See G. L. c. 119A, § 12 (b) (5). The Task Force strongly recommended that the Massachusetts Legislature amend G. L. c. 119A to be consistent with the federal regulations.

The Task Force also made revisions that more clearly reflect the statutory requirements relating to orders for health care coverage. Before requiring a payor to obtain health care coverage, the Court must determine that such coverage is available at reasonable cost, "provided that the cost of such coverage does not create an undue hardship upon the [payor]." G. L. c. 119A, § 12 (b) (5). Because "undue hardship" is not defined by statute or case law, factors relating to determining whether an order of health care coverage creates an undue hardship on the payor are included in these guidelines. There are circumstances where the combined child support order and the cost to the payor for obtaining and maintaining health care coverage exceed the amount allowed under law to be ordered withheld from a payor's income. If health care coverage is ordered in these circumstances, and the costs for the health care coverage are deducted from the payor's income before the child support order is paid, the child support order is not paid in full and the payor accrues child support arrears. For purposes of this section, an undue hardship may occur if the combined health care coverage and child support order exceeds statutory garnishment limits. The Task Force determined that it was appropriate to adopt the percentage of poverty level that MassHealth's Children's Health Insurance Program (CHIP) uses for eligibility screening. See http://children.massbudget.org/masshealth. The Court retains the discretion to consider other relevant factors in making the determination regarding undue hardship.

If health care coverage is not currently available at a reasonable cost or the payment of health care coverage causes an undue hardship, the Task Force removed the requirement that the Court enter an order requiring the payor to obtain and maintain health care coverage for the child if and when the parent has access to such coverage. Instead, the Task Force added a provision that requires the payor to notify the IV-D agency or the recipient if health care coverage becomes available. If health care coverage becomes available, a modification of the child support order may be appropriate to reflect the cost of such coverage, as well as to determine whether there is any undue hardship.

In addition to child care costs, the Task Force also discussed at length how to address the concerns raised by many people regarding the significant costs of health care coverage. The Task Force recommended a proportional adjustment to the child support order based on child care and health care costs. The proportional adjustment for the costs is not dollar-for-dollar because the significant costs of child care and health care coverage could unfairly skew a child support order. Instead, the adjustment is capped, either up or down, at fifteen percent of the child support order.

The Task Force recommended that, where appropriate, the Court should examine whether the parent who seeks to deduct the total amount of health care coverage is including in that total amount the cost for covering persons not covered by the order under consideration. In that circumstance, the Court may determine that some or all of the additional cost should not be deducted from gross income on the guidelines worksheet.

I. Dental/Vision Insurance

The Task Force reorganized this section. The Task Force determined that the costs of the dental and vision insurance covering children under this order shall be included as a component of the child care and health care adjustment.

J. Routine Uninsured Medical and Dental/Vision Expenses and Extraordinary Uninsured Medical and Dental/Vision Expenses

The Task Force reorganized the sections previously entitled, "Routine Uninsured Medical and Dental Expenses" and "Uninsured Extraordinary Medical and Dental Expenses" into one section without any substantive changes.

K. Existing Support Obligations and Responsibility for Children Not in the Case under Consideration

The Task Force recommended changes to this section to clarify the different circumstances that may result in a deduction from gross income when a parent has a legal responsibility to support a child not part of the case currently being considered. The Task Force clarified that where applicable either parent may seek the deductions from gross

income and that sufficient proof must be provided. The Task Force reviewed language from the New Jersey, North Carolina, Ohio, and Tennessee child support guidelines to assist in drafting the clarifications.

In Department of Revenue v. Mason M., the Supreme Judicial Court endorsed the use of deducting a hypothetical support order from a parent's gross income where that parent had multiple children to support. Department of Revenue v. Mason M., 439 Mass. 665, 671-72 (2003). However, to calculate a hypothetical amount of child support, the gross incomes of both parents of that child must be used. This calculation can be difficult to compute because the Court does not have the non-party parent's gross income. The burden is on the parent who seeks to deduct a hypothetical amount to provide to the Court the information necessary for calculating the hypothetical amount, including the non-party parent's gross income.

L. Families with More than Five Children

The Task Force did not recommend any substantive changes to this section.

M. Contribution to Other Child-Related Expenses

The Task Force renamed this section for consistency. "Post-secondary education" was deleted from this section only because the Task Force created a new section that addresses contribution to post-secondary educational expenses. See Section II. G.

III. MODIFICATION

A. A child support order may be modified if any of the circumstances listed below exist.

1. There is an inconsistency between the amount of the existing order and the amount that would result from the application of the guidelines.

2. Previously ordered health care coverage is no longer available.

3. Previously ordered health care coverage is still available but no longer at a reasonable cost or without an undue hardship.

4. Access to health care coverage not previously available to a parent has become available.

5. Any other material and substantial change in circumstances has occurred.

B. Upon a request for modification of an order that deviated from the guidelines at the time it was entered, the Court shall apply the existing deviation to the modification action if:

1. the facts that gave rise to deviation still exist; and

2. deviation continues to be in the child's best interest; and

3. the guidelines amount would be unjust or inappropriate under the circumstances.

C. Section III. B. does not preclude deviations based on other grounds set forth in Section IV. or grounds for modification as set forth in Section III. A.

Commentary 2021 – Section III. – Modification

The Task Force considered and discussed this section and did not recommend any changes.

Commentary 2017 – Section III. – Modification

The Task Force deleted Paragraph B of the 2013 guidelines because it was premised on the assumption that Massachusetts law provides for a separate standard to be used by the Court when the Department of Revenue is providing IV-D services in a case where the order is less than three years old. While the Department of Revenue is not required to use the inconsistency standard when determining whether to provide IV-D services to seek a modification of an order that is less than three years old, the Court must apply the inconsistency standard once any complaint for modification is filed and is before the Court. See 57 Fed. Reg. 61559, 61577 (1992). See also G. L. c. 208, § 28, G. L. c. 209C, § 20 and G. L. c. 209, § 37.

The Department of Revenue's review process does not prohibit an individual from filing a complaint for modification on his or her own, regardless of whether the case is receiving IV-D services.

The Task Force refined the language to clarify that if circumstances that resulted in a deviation are still in existence during a modification action, those circumstances shall be considered to remain even though it may be appropriate to modify the existing order. For example, a child may have a medical condition that results in ongoing, extraordinary medical expenses and the existing child support order deviates from the guidelines amount. The recipient is now unemployed and files a complaint for modification. The underlying circumstances for the existing deviation remains; however, the Court also considers the additional circumstances.

IV. DEVIATION

A. The Court, or the parties by agreement approved by the Court, may deviate from these guidelines and overcome the presumptive application of these guidelines, provided the Court enters specific written findings stating:

1. the amount of the order that would result from application of the guidelines;

2. that the guidelines amount would be unjust or inappropriate under the circumstances;

3. the specific facts of the case which justify departure from the guidelines; and

4. that such departure is consistent with the best interests of the child.

B. Circumstances which may support deviating, above or below the presumptive guidelines amount, including setting a child support order at $0, are as follows:

1. the parties agree and the Court determines the agreement to be fair and reasonable and approves their agreement;

2. a child has ongoing special needs or aptitudes with financial consequences;

3. a child has ongoing extraordinary mental, physical, or developmental needs with financial consequences;

4. a parent has ongoing extraordinary mental, physical, or developmental needs with financial consequences;

5. a parent has extraordinary expenses for health care coverage;

6. a parent has extraordinary travel or other expenses related to parenting time;

7. a parent has extraordinary child care costs for the children covered by this order;

8. a parent provides substantially less than one-third of the parenting time for a child or children;

9. the payor is incarcerated and has insufficient financial resources to pay support;

10. application of the guidelines, particularly in low income cases, leaves a parent without the ability to self support;

11. application of the guidelines would result in a gross disparity in the standard of living between the two households such that one household is left with an unreasonably low percentage of the combined available income;

12. application of the guidelines may adversely impact reunification of a parent and child where the child has been temporarily removed from the household in accordance with G. L. c. 119; and

13. absent deviation, application of the guidelines would lead to an order that is unjust, inappropriate or not in the best interests of the child, considering the Principles of these guidelines.

C. Whenever application of the guidelines requires a payor to pay a recipient more than 40% of the payor's available income in Line 3a of the guidelines worksheet for a current child support order, there shall be a rebuttable presumption of a substantial hardship, justifying a deviation from the guidelines.

Commentary 2021 – Section IV. – Deviation

The Task Force again emphasized here that in certain circumstances setting a child support order at $0 may be appropriate. The Task Force recommended inserting "time" at the end of Section IV. B. 6. to clarify that the expenses listed were related to parenting time with minor children. The Task Force also recommended amending Section IV. B. 7. to clarify that a deviation may be appropriate where child care costs for the children covered by the child support order are extraordinary.

The Task Force recommended adding Section IV. C. to include a rebuttable presumption of a substantial hardship justifying a deviation where the overall current child support order is more than 40% of the payor's available income in Line 3a of the guidelines worksheet. In setting this percentage, the Task Force considered the range of marginal percentages in Table A of the guidelines, the amounts resulting from the application of the guidelines across the full range of income combinations, and economic estimates of child costs relative to income levels. A threshold of 40% falls between economic estimates of child costs for one child and two children reported by the Betson-Rothbarth,

USDA, and MIT Living Wage studies. The Task Force's recommendation recognized the need for additional protection in certain limited cases where the child support order would exceed this percentage. The guidelines worksheet in Line 7e indicates whether the current child support order is more than 40% of the payor's available income.

Commentary 2017 – Section IV. – Deviation

The Task Force refined and clarified the circumstances where deviation may be appropriate. The Task Force reordered this section for clarification purposes only and not to prioritize any one factor over another. The Task Force emphasized that a deviation may be appropriate for a family and encourages the Court to deviate where circumstances require it.

The Task Force clarified in the first phrase of Section IV. B. that it is permissible to deviate to an amount below the presumptive guidelines amount. Because the deviation circumstances affect an ongoing child support award, rather than a one-time or occasional allocation, the Task Force emphasized that certain circumstances must be ongoing and with financial consequences for them to be considered appropriate for a deviation. In Section IV. B. 8., the Task Force added "substantially" to emphasize as it did it Section II. D. that a parenting plan that is in the best interest of the child is the first step in determining a child support order. The inclusion of "substantially" provides a parameter with the goal of reducing acrimony and litigation between parents regarding the interaction of the parenting plan and the amount of the child support order.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title III DOMESTIC RELATIONS

Chapter 208 DIVORCE

Section 48 DEFINITIONS APPLICABLE TO SECS. 49 TO 55

Section 48. As used in sections 49 to 55, inclusive, the following words shall, unless the context requires otherwise, have the following meanings:—

“Alimony”, the payment of support from a spouse, who has the ability to pay, to a spouse in need of support for a reasonable length of time, under a court order.

“Full retirement age”, the payor’s normal retirement age to be eligible to receive full retirement benefits under the United States Old Age, Survivors, and Disability Insurance program; but shall not mean “early retirement age,” as defined under 42 U.S.C. 416, if early retirement is available to the payor or maximum benefit age if additional benefits are available as a result of delayed retirement.

“General term alimony”, the periodic payment of support to a recipient spouse who is economically dependent.

“Length of the marriage”, the number of months from the date of legal marriage to the date of service of a complaint or petition for divorce or separate support duly filed in a court of the commonwealth or another court with jurisdiction to terminate the marriage; provided, however, that the court may increase the length of the marriage if there is evidence that the parties’ economic marital partnership began during their cohabitation period prior to the marriage.

“Rehabilitative alimony”, the periodic payment of support to a recipient spouse who is expected to become economically self-sufficient by a predicted time, such as, without limitation, reemployment; completion of job training; or receipt of a sum due from the payor spouse under a judgment.

“Reimbursement alimony”, the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse, such as enabling the payor spouse to complete an education or job training.

“Transitional alimony”, the periodic or one-time payment of support to a recipient spouse after a marriage of not more than 5 years to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title III DOMESTIC RELATIONS

Chapter 208 DIVORCE

Section 49 TERMINATION, SUSPENSION OR MODIFICATION OF GENERAL TERM ALIMONY

Section 49. (a) General term alimony shall terminate upon the remarriage of the recipient or the death of either spouse; provided, however, that the court may require the payor spouse to provide life insurance or another form of reasonable security for payment of sums due to the recipient in the event of the payor's death during the alimony term.

(b) Except upon a written finding by the court that deviation beyond the time limits of this section are required in the interests of justice, if the length of the marriage is 20 years or less, general term alimony shall terminate no later than a date certain under the following durational limits:

(1) If the length of the marriage is 5 years or less, general term alimony shall continue for not longer than one-half the number of months of the marriage.

(2) If the length of the marriage is 10 years or less, but more than 5 years, general term alimony shall continue for not longer than 60 per cent of the number of months of the marriage.

(3) If the length of the marriage is 15 years or less, but more than 10 years, general term alimony shall continue for not longer than 70 per cent of the number of months of the marriage.

(4) If the length of the marriage is 20 years or less, but more than 15 years, general term alimony shall continue for not longer than 80 per cent of the number of months of the marriage.

(c) The court may order alimony for an indefinite length of time for marriages for which the length of the marriage was longer than 20 years.

(d) General term alimony shall be suspended, reduced or terminated upon the cohabitation of the recipient spouse when the payor shows that the recipient spouse has maintained a common household, as defined in this subsection, with another person for a continuous period of at least 3 months.

(1) Persons are deemed to maintain a common household when they share a primary residence together with or without others. In determining whether the recipient is maintaining a common household, the court may consider any of the following factors:

(i) oral or written statements or representations made to third parties regarding the relationship of the persons;

(ii) the economic interdependence of the couple or economic dependence of 1 person on the other;

(iii) the persons engaging in conduct and collaborative roles in furtherance of their life together;

(iv) the benefit in the life of either or both of the persons from their relationship;

(v) the community reputation of the persons as a couple; or

(vi) other relevant and material factors.

(2) An alimony obligation suspended, reduced or terminated under this subsection may be reinstated upon termination of the recipient's common household relationship; but, if reinstated, it shall not extend beyond the termination date of the original order.

(e) Unless the payor and recipient agree otherwise, general term alimony may be modified in duration or amount upon a material change of circumstances warranting modification. Modification may be permanent, indefinite or for a finite duration, as may be appropriate. Nothing in this section shall be construed to permit alimony reinstatement after the recipient's remarriage, except by the parties' express written agreement.

(f) Once issued, general term alimony orders shall terminate upon the payor attaining the full retirement age. The payor's ability to work beyond the full retirement age shall not be a reason to extend alimony, provided that:

(1) When the court enters an initial alimony judgment, the court may set a different alimony termination date for good cause shown; provided, however, that in granting deviation, the court shall enter written findings of the reasons for deviation.

(2) The court may grant a recipient an extension of an existing alimony order for good cause shown; provided, however, that in granting an extension, the court shall enter written findings of:

(i) a material change of circumstance that occurred after entry of the alimony judgment; and

(ii) reasons for the extension that are supported by clear and convincing evidence.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title III DOMESTIC RELATIONS

Chapter 208 DIVORCE

Section 50 TERMINATION, EXTENSION OR MODIFICATION OF REHABILITATIVE ALIMONY

Section 50. (a) Rehabilitative alimony shall terminate upon the remarriage of the recipient, the occurrence of a specific event in the future or the death of either spouse; provided, however, that the court may require the payor to provide reasonable security for payment of sums due to the recipient in the event of the payor's death during the alimony term.

(b) The alimony term for rehabilitative alimony shall be not more than 5 years. Unless the recipient has remarried, the rehabilitative alimony may be extended on a complaint for modification upon a showing of compelling circumstances in the event that:

(1) unforeseen events prevent the recipient spouse from being self-supporting at the end of the term with due consideration to the length of the marriage;

(2) the court finds that the recipient tried to become self-supporting; and

(3) the payor is able to pay without undue burden.

(c) The court may modify the amount of periodic rehabilitative alimony based upon material change of circumstance within the rehabilitative period.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title III DOMESTIC RELATIONS

Chapter 208 DIVORCE

Section 51 TERMINATION OF REIMBURSEMENT ALIMONY; MODIFICATION; APPLICABILITY OF INCOME GUIDELINES

Section 51. (a) Reimbursement alimony shall terminate upon the death of the recipient or a date certain.

(b) Once ordered, the parties shall not seek and the court shall not order a modification of reimbursement alimony.

(c) Income guidelines in subsection (b) of section 53 shall not apply to reimbursement alimony.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title III DOMESTIC RELATIONS

Chapter 208 DIVORCE

Section 52 TERMINATION OF TRANSITIONAL ALIMONY; MODIFICATION OR EXTENSION

Section 52. (a) Transitional alimony shall terminate upon the death of the recipient or a date certain that is not longer than 3 years from the date of the parties' divorce; provided, however, that the court may require the payor to provide reasonable security for payment of sums due to the recipient in the event of the payor's death during the alimony term.

(b) No court shall modify or extend transitional alimony or replace transitional alimony with another form of alimony.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title III DOMESTIC RELATIONS

Chapter 208 DIVORCE

Section 53 DETERMINATION OF FORM, AMOUNT AND DURATION OF ALIMONY; MAXIMUM AMOUNT; INCOME CALCULATION; DEVIATIONS; CONCURRENT CHILD SUPPORT ORDERS

Section 53. (a) In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider: the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material.

(b) Except for reimbursement alimony or circumstances warranting deviation for other forms of alimony, the amount of alimony should generally not exceed the recipient's need or 30 to 35 per cent of the difference between the parties' gross incomes established at the time of the order being issued. Subject to subsection (c), income shall be defined as set forth in the Massachusetts child support guidelines.

(c) When issuing an order for alimony, the court shall exclude from its income calculation:

(1) capital gains income and dividend and interest income which derive from assets equitably divided between the parties under section 34; and

(2) gross income which the court has already considered for setting a child support order.

(d) Nothing in this section shall limit the court's discretion to cast a presumptive child support order under the child support guidelines in terms of unallocated or undifferentiated alimony and child support.

(e) In setting an initial alimony order, or in modifying an existing order, the court may deviate from duration and amount limits for general term alimony and rehabilitative alimony upon written findings that deviation is necessary. Grounds for deviation may include:

(1) advanced age; chronic illness; or unusual health circumstances of either party;

(2) tax considerations applicable to the parties;

(3) whether the payor spouse is providing health insurance and the cost of health insurance for the recipient spouse;

(4) whether the payor spouse has been ordered to secure life insurance for the benefit of the recipient spouse and the cost of such insurance;

(5) sources and amounts of unearned income, including capital gains, interest and dividends, annuity and investment income from assets that were not allocated in the parties divorce;

(6) significant premarital cohabitation that included economic partnership or marital separation of significant duration, each of which the court may consider in determining the length of the marriage;

(7) a party's inability to provide for that party's own support by reason of physical or mental abuse by the payor;

(8) a party's inability to provide for that party's own support by reason of that party's deficiency of property, maintenance or employment opportunity; and

(9) upon written findings, any other factor that the court deems relevant and material.

(f) In determining the incomes of parties with respect to the issue of alimony, the court may attribute income to a party who is unemployed or underemployed.

(g) If a court orders alimony concurrent with or subsequent to a child support order, the combined duration of alimony and child support shall not exceed the longer of: (i) the alimony or child support duration available at the time of divorce; or (ii) rehabilitative alimony beginning upon the termination of child support.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title III DOMESTIC RELATIONS

Chapter 208 DIVORCE

Section 54 REMARRIAGE OF PAYOR; INCOME FROM SECOND JOB OR OVERTIME WORK

Section 54. (a) In the event of the payor's remarriage, income and assets of the payor's spouse shall not be considered in a redetermination of alimony in a modification action.

(b) Income from a second job or overtime work shall be presumed immaterial to alimony modification if:

(1) a party works more than a single full-time equivalent position; and

(2) the second job or overtime began after entry of the initial order.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title III DOMESTIC RELATIONS

Chapter 208 DIVORCE

Section 55 REASONABLE SECURITY FOR ALIMONY IN EVENT OF PAYOR'S DEATH; ORDERS TO MAINTAIN LIFE INSURANCE; MODIFICATION OF ORDERS

Section 55. (a) The court may require reasonable security for alimony in the event of the payor's death during the alimony period. Security may include, but shall not be limited to, maintenance of life insurance.

(b) Orders to maintain life insurance shall be based upon due consideration of the following factors: age and insurability of the payor; cost of insurance; amount of the judgment; policies carried during the marriage; duration of the alimony order; prevailing interest rates at the time of the order; and other obligations of the payor.

(c) A court may modify orders to maintain security upon a material change of circumstance.

SCHULER v. SCHULER
382 Mass. 366

September 12, 1980–January 27, 1981

Middlesex County

Present: HENNESSEY, C.J., QUIRICO, BRAUCHER, WILKINS, & LIACOS, JJ.

In a proceeding on a husband's complaint for modification of alimony and support obligations, there was sufficient evidence to warrant a finding that the husband retained the ability to continue to make the payments required by the judgment of divorce even though he had suffered a substantial reduction in income as the result of the termination of his prior employment.

In a proceeding on a husband's complaint for modification of alimony and support obligations, the judge was not restricted in the circumstances to a consideration of the husband's actual income at the time of the hearing but could properly consider his potential earning capacity.

In a proceeding on a husband's complaint for modification of alimony and support obligations on the ground that he had suffered a substantial reduction in his income, the judge was entitled to take into consideration the husband's assets in determining his ability to make the required payments.

In a proceeding on a husband's complaint for modification of alimony and support obligations, the judge's refusal to consider the husband's expenses related to his second wife and child was not error where there was sufficient evidence to warrant a finding that the husband had the ability to make the alimony and support payments and to support himself and his second family.

COMPLAINT for divorce filed in the Probate Court for the county of Middlesex on May 5, 1976.

A complaint for modification, filed on January 24, 1979, was heard by Ginsburg, J.

After review was sought in the Appeals Court, the Supreme Judicial Court, on its own initiative, ordered direct appellate review.

Michael H. Riley for the plaintiff.

Charles A. Goglia, Jr., for the defendant.

QUIRICO, J. The parties in this case were divorced by a judgment nisi entered on May 5, 1976, which became absolute on November 5, 1976. See G.L. c. 208, Section 21. A prior written separation agreement was incorporated and merged in the judgment. The agreement required the husband, Chester L. Schuler, to pay the wife, Beverly, $700 a month as alimony and $700 a month as child support.[Note 1] The agreement contained other provisions not relevant here.

On January 24, 1979, Chester, acting pursuant to G.L. c. 208, Section 37,[Note 2] filed a complaint for modification of the payments required by the judgment. After a hearing at which both parties testified, the probate judge on June 26, 1979, filed his findings and entered an order dismissing the complaint. Chester appealed, and we ordered the case transferred to this court on our own motion. *See* G.L. c. 211A, Section 10(A). We hold that the judge did not abuse his discretion or otherwise commit error in denying the modification.

At the hearing on the cross complaints,[Note 3] Chester argued that, because of substantial changes in his circumstances since the date of the agreement and judgment, the agreement should be modified by eliminating all alimony payable to Beverly, and by decreasing child support payments. He now argues that certain of the judge's findings of fact were clearly erroneous.

To be successful in an action to modify a judgment for alimony or child support, the petitioner must demonstrate a material change of circumstances since the entry of the earlier judgment. *Robbins v. Robbins*, 343 Mass. 247, 249 (1961). *Hinds v. Hinds*, 329 Mass. 190, 191–192 (1952). In this case, the judge held that Chester did not prove the requisite change of circumstances. The judge reported his findings and we have a transcript of all the evidence. Accordingly, "the appeal brings before us all questions of law, fact, and discretion." *Krokyn v. Krokyn*, 378 Mass. 206,

208 (1979), quoting from *Cohen v. Murphy*, 368 Mass. 144, 147 (1975). However, we will not reverse findings made by the judge on the basis of oral testimony unless we are convinced they are plainly wrong. *Consent to Adoption of a Minor*, 363 Mass. 537, 539 (1973). *Whitney v. Whitney*, 325 Mass. 28, 28–29 (1949).

We summarize the relevant facts. Chester and Beverly were married in 1953; they have two children by this marriage. Fifteen days after their divorce decree became final in 1976, Chester remarried. He has a son by his second marriage.

At the time of the divorce, Chester was president of and a ten per cent shareholder in Powercube Corporation, a closely held corporation which he had founded in 1967 on the basis of his own inventions relating to specialized power. In 1976, Chester's income as president of Powercube was approximately $46,500. By 1978, his income including bonuses had increased to approximately $55,000. In late 1978, Unitrode Corporation, which owned eighty per cent of Powercube, bought out Chester's stock for $250,000.[Note 4] Unitrode terminated Chester's employment as president of Powercube as of December 31, 1978. As part of his agreement with Unitrode, Chester executed a two-year noncompetition agreement. In return he received, in addition to the purchase price, three months' severance pay ($11,250), a bonus ($10,000), and a distribution from a profit sharing trust ($9,000). Chester's tax liability for the sale of the stock was approximately $70,000. He currently receives income from investments made after the sale of his Powercube stock in the amount of $185 a week ($9,620 a year).

At the time of the modification hearing, Chester had not accepted other employment. Although positions in design engineering, his line of work before he founded Powercube, paid approximately $24,000 a year and were reasonably available, he had decided not to pursue that career alternative.

Chester's apparent career objective is to become the president of another small corporation. In attempting to reestablish himself in such a position, Chester had one job interview during the eight months prior to the modification hearing. He testified that he read want-ads and sought contacts within his industry, but did not consult an executive search organization. Instead Chester organized a consulting business on May 5, 1979. He and his present wife each contributed $5,000 investment capital to that corporation. Each owns fifty per cent of the stock. At the time of the hearing, the corporation had clients with work in progress estimated to be worth approximately $4,000 to $5,000.

At the time of the divorce, Beverly gave music lessons in her home, earning approximately $125 a week. Subsequently she enrolled in nursing school, financing her tuition through education loans, and received a nursing degree. At the time of the modification hearing she was employed as a part-time music specialist registered nurse in a children's ward of a hospital, earning approximately $125 a week.

In summary, at the time of the hearing, Chester's only employment was in the consulting business he established. His income between his termination by Powercube on December 31, 1978, and the hearing in June, 1979, from his bonus, severance pay, and consulting business totaled $21,000.[Note 5] He was also receiving $185 a week in investment income. Chester's net worth at the time of the hearing was $167,000. Although Beverly had trained as a nurse and worked as a music specialist rather than as a music instructor, her income was approximately the same at the time of the hearing as it had been at the time of the divorce. Beverly's net worth, including the marital home, was $61,000.

On these facts Chester argues that the judge abused his discretion or otherwise erred in three respects: (1) in finding that Chester had not sought new employment and did not intend to do so; (2) in relying on Chester's potential income as a design engineer rather than his actual income as a consultant; and (3) in relying on Chester's substantial assets to conclude that Chester had the current ability to pay under the original agreement. Chester also argues that the court erred in refusing to consider his second family expenses. Chester's arguments are cumulative. He argues that given his decreased income and increased expenses, he should not have to deplete all of his assets in making the support and alimony payments. He further argues that even considering his potential income as a design engineer, the decline in his salary from the amount he earned as president of Powercube warrants a modification.

In determining whether to modify a support or alimony order, a probate judge must weigh all relevant circumstances. Resolution of the issue rests in the judge's sound discretion. *Buchanan v. Buchanan*, 353 Mass. 351, 352 (1967).

An order for child support may be modified "as the circumstances of the parents and the benefit of the children may require." G.L. c. 208, Section 28, *as amended through* St. 1976, c. 279, Section 1. *Whitney v. Whitney*, 325 Mass. 28, 31 (1949). The needs of the children, the financial status of the support provider, and the station in life of the respective parties must all be considered. *Buchanan v. Buchanan*, *supra*. A substantial and permanent decrease in the income of the support provider is one of the material circumstances to be considered in a request for reduction of a support reward. *See Annot.*, 89 A.L.R.2d 7, 39 (1963), and cases cited. However, while a substantial decrease in income or financial status may warrant a modification, such a decrease does not alone compel a modification. *See Trippe v. Trippe*, 237 Ga. 159, 160 (1976).

Bearing in mind the weight to be accorded the exercise of the probate judge's sound discretion, we review the record in its entirety.

1. Chester argues that the evidence taken as a whole does not warrant the judge's finding that Chester retained the ability to pay the alimony and support obligations as set forth in the original separation agreement. He specifically challenges the finding that, with the exception of one job interview, he had not sought a new position prior to the modification hearing and did not intend to do so.[Note 6] We will not overturn the judge's determination unless we find that it was clearly erroneous. We are not, however, limited to the findings made by him, and we may make such additional findings as are supported by the evidence. *Whitney v. Whitney*, *supra* at 28–29.

At the hearing Chester presented evidence that he was interested in obtaining a position equivalent to that which he had held at Powercube—president of a small corporation. Indeed, he stated that he established his consulting business in part as a means of seeking out business contacts which might enable him to locate such a position. His own testimony that he assumed he could readily get a position as a design engineer, but has chosen not to do so, is inconsistent with his claim that no evidence supports the judge's conclusion that Chester is not actively pursuing a new position. The judge's finding, acknowledging Chester's current status in his consulting business, was not clearly erroneous. Chester argues that the judge erred by disregarding his testimony. The record suggests, however, that the judge not only did not disregard Chester's testimony, he based his findings directly upon it.

Based on our review of the record, however, we make the additional finding that Chester has in fact sought professional employment as the president of a small corporation and intends to keep seeking such employment.[Note 7] We acknowledge that Chester has persuasive reasons—salary, personal fulfillment, even ambition—for attempting to reestablish himself on the professional level he had previously reached. However, those reasons must be balanced against his obligations to support his former and present families. It was within the judge's discretion to conclude that it was unreasonable for Chester to wait indefinitely upon the limited prospect of becoming president of a corporation, or the equivalent, when by his own testimony a position with a $24,000 salary was reasonably available.

Furthermore, even were we to disregard the judge's finding number 17 as clearly wrong, *see Ober v. Ober*, 1 Mass. App. Ct. 32, 33 (1973), we would not reach a different result in this case. It is not clear that the judge relied only on Chester's current employment status in concluding that he had the present ability to meet his support and alimony obligations. Chester possesses substantial assets, he has not lowered his own standard of living, and his first wife's expenses and income have not changed. *Cf. Carter v. Carter*, 563 P.2d 177 (Utah 1977) (no error in judge's refusal to find change in circumstances sufficient to justify modification, where facts showed that husband's income had been reduced from $21,000 at the time of original petition to $10,000 at time of petition for modification, that he had remarried and had added financial obligations, but that wife's needs had not decreased). Additionally, Chester himself testified that he expected his business to become profitable within two or three years. Where reduced income is temporary, a modification is not necessarily mandated. *See Reed v. Reed*, 260 Iowa 1166, 1168 (1967).

Thus, regardless of Chester's current employment status, we conclude that the evidence as a whole warranted the finding that he retained the ability to continue to make the payments required by the judgment. *See Schnell v. Schnell*, 252 N.W.2d 14 (N.D. 1977), holding that after a trial court has refused to reduce alimony and support awards, an appellate court will do so only in "exceptional cases, where compliance with lower court judgments verged on the impossible." *Id*. at 21. In Schnell, the totality of the circumstances, including the extent of the husband's assets, his substantial earning ability as demonstrated by past income over many years, and the needs of his

wife and children as well as his own needs, supported the trial judge's refusal to modify support and alimony payments. *Id*. at 20.

2. Chester also argues that the judge abused his discretion by improperly considering some factors and refusing to consider others in reaching his conclusion that the alimony and support orders should not be modified. We find no abuse of discretion.

Chester challenges the judge's purported use of Chester's potential rather than actual income in determining his ability to pay. Where a support provider makes an involuntary, or a good faith voluntary, career change, courts asked to reduce the rate of alimony or support payments frequently consider the moving party's actual income rather than his potential income in evaluating his ability to pay. Thus a good faith career change resulting in lowered income may warrant a reduction of alimony and child support payments. *See, e.g.*, *Fogel v. Fogel*, 184 Neb. 425 (1969). *Cf. Thomas v. Thomas*, 281 Ala. 397 (1967).

Chester asserts that his career change was in fact involuntary, and that he has sought, in good faith, employment commensurate with that which he held at Powercube.[Note 8] However, the issue at the time of the modification hearing was not simply Chester's sale of stock and concomitant loss of his position as president of Powercube, but also his continuing unemployment over the six months following the sale.

In deciding whether a support provider has the ability to meet his support obligations, the judge must consider all attendant circumstances. Accordingly, he should not be restricted to a consideration of actual earnings but may also consider earning power. We hold that it would not have been an abuse of the judge's discretion to consider Chester's potential rather than actual income as one factor in his decision not to modify the original separation agreement. This holding is consistent with the general rule that where the support provider is earning less than he could with reasonable effort, the trial judge may consider potential earning capacity rather than actual earnings. *See Stiltz v. Stiltz*, 236 Ga. 308, 310–311 (1976); *Ellis v. Ellis*, 262 N.W.2d 265, 267–268 (Iowa 1978). *Cf. Hickland v. Hickland*, 39 N.Y.2d 1 (1976).

3. Chester also argues that his mere possession of substantial assets should not justify the denial of a reduction in support payments. He contends that the judge abused his discretion by improperly weighing those assets against other factors. We disagree.

We have not addressed the specific point whether assets should be considered in determining ability to pay for the purposes of modification. However, on the closely related issue of contempt upon failure to make support payments, we have stated: "[W]e think it clear that capital assets may be considered in addition to income in evaluating the ability of a contemnor to purge his contempt. . . . Common sense and basic concepts of fairness support the notion that ownership of a valuable asset demonstrates ability to pay. . . ." *Krokyn v. Krokyn*, 378 Mass. 206, 213–214 (1979). We believe the same principles apply here.

Chester further argues that a different and stricter standard should apply in a contempt proceeding than applies in a modification hearing. We find no merit in the argument. Had Chester fallen into contempt, his possession of $167,000 would be clear evidence of his ability to pay and thereby purge himself of contempt.[Note 9] It makes no sense to find that a support provider has the ability to pay amounts owed when he has fallen into arrearage, yet not find that the same economic circumstances constitute ability to make current or prospective monthly payments as they become due.

We do not attempt to detail how substantial the assets possessed by a support provider must be to justify the dismissal of a modification complaint where the provider's income has decreased since the date of the original decree. That question is left to the sound discretion of the judge in his consideration of all the circumstances. Moreover, we do not hold that a support provider would have to deplete his total liquid or other assets in an effort to meet his support obligations. We hold simply that at the time of the hearing on the complaint for modification in this case the balance of equities supported the judge's conclusion that Chester had the present ability to pay the amounts required by the agreement and judgment.

Case law from other jurisdictions supports this result. For example, in *Sieber v. Sieber*, 258 N.W.2d 754 (Minn. 1977), the husband was employed only sporadically after he sold his insurance business for $111,800. The court noted that (1) the proceeds from the sale of his business would represent a considerable source of income if properly invested; (2) the husband failed to show that he could not engage in gainful employment if he chose to do so; and (3) he had introduced almost no evidence that his own standard of living had so substantially changed since the time of the divorce as to justify termination of the stipulated obligation. As to whether in those circumstances the husband should be required to utilize his assets, if necessary, to meet the alimony obligation, the court stated: "[W]hen an ex-husband voluntarily liquidates his business, a capital asset, and thereby diminishes his future earning capacity, we believe that it would be unjust to hold that he is automatically relieved of future alimony payments, even if it ultimately becomes necessary to pay the ex-wife a portion of the proceeds from the sale." *Id.* at 757 n.2. *See, e.g.*, *Chastain v. Chastain*, 73 So.2d 66, 68 (Fla. 1954).

Like the *Sieber* court, we believe that it would have been unjust, in the totality of the circumstances, to allow Chester to indulge himself in a new and speculative business venture and refuse simultaneously to expend his substantial assets on his familial obligations.

4. Chester argues the further point that the judge erred in refusing to consider as part of his expenses any expenses related to his second wife and their child. This court has never decided the question whether, in an action to modify an alimony or support decree, the judge must consider the second family expenses as a factor in determining changed circumstances. *But see O'Brien v. O'Brien*, 325 Mass. 573 (1950). In *O'Brien*, upon finding a change in the circumstances of the former wife, we modified a previous decree eliminating alimony and granted her petition for the renewal of alimony, stating: "We do not believe that the respondent ought to be permitted to shift to the public the obligation he assumed when he married her. It may be that because of his second marriage he will suffer some financial hardship, but the short answer to that is that he must have entered into the second marriage conscious of his obligations to his former wife so that the second marriage with its attendant obligations affords him no relief." *Id.* at 578. In contrast to *O'Brien*, we find no material change of circumstances here to mandate a modification. Hence we express no opinion on the continuing validity of these dicta.[Note 10]

In this case the evidence as a whole, including evidence as to Chester's income, his income potential and earning history, his assets, his former wife's earnings, and both their expenses and their needs, warranted an implied finding by the judge that at the time of the modification hearing Chester had the ability to make the payments for alimony and support mandated by the original judgment, and also to support himself and his second family. Moreover, we here expressly make that finding based upon our own review of the evidence. For that reason we need not reach the question of what consideration, if any, a probate judge should give to second family expenses in an action to modify an alimony or support order. Therefore, the judge's refusal in this case to consider Chester's second family expenses was not error.

Judgment affirmed.

FOOTNOTES

[Note 1] The Schulers had two children, the older of whom was emancipated. Beverly received custody of the younger son, Timothy, then age nine. The agreement requires Chester to pay child support until Timothy's emancipation.

[Note 2] General Laws c. 208, Section 37, as appearing in St. 1977, c. 495, states: "After a judgment for alimony or an annual allowance for the spouse or children, the court may, from time to time, upon the action for modification of either party, revise and alter its judgment relative to the amount of such alimony or annual allowance and the payment thereof, and may make any judgment relative thereto which it might have made in the original action."

[Note 3] Beverly had filed a cross complaint for modification of the agreement, seeking an increase in the alimony and support payments. The two complaints were heard together, and her claim was also dismissed on June 26, 1979.

[Note 4] The separation agreement required that, in the event of the sale of his Powercube stock, Chester would pay Beverly ten per cent of his after-tax net of the sale price in excess of $100,000. Pursuant to this provision of the agreement, Chester paid Beverly $7,452.

[Note 5] Chester had a net loss of $250 from his consulting business at the time of the hearing.

[Note 6] Finding number 17 reads as follows: "With the exception of one (1) job interview, after the termination of his employment with Powercube Corporation, the Husband has not sought a new position and does not intend to do so. He admits that he could readily obtain employment as

an engineer earning in the vicinity of twenty four thousand ($24,000.00) dollars per year. He intends to work to establish his own consulting business. He has already earned one thousand ($1,000.00) dollars as a consultant."

[Note 7] Chester's intentions regarding his search for employment are not directly relevant to the issue of changed circumstances at the time of the modification hearing. The question of intent is, however, relevant to the issue of good faith, discussed at note 8, infra.

[Note 8] Although Chester voluntarily negotiated the sale of his business and entered into a noncompetition agreement with Unitrode Corporation, we acknowledge that the voluntariness of these actions was more technical than real; as majority stockholder, Unitrode in effect forced the sale. However, because we find that Chester's employment status was not necessarily critical to the judge's conclusion that Chester had the ability to pay under the original order, we need not reach the question whether, in determining a support provider's ability to pay, a sale by a minority stockholder at the initiative of the majority stockholder should be considered a good faith voluntary action. Nor need we decide what standard of good faith should be required. *Compare Nelson v. Nelson*, 225 Or. 257, 260–261 (1960) (In order to refuse modification on basis that husband, acting in bad faith, voluntarily worsened his financial condition, it is necessary to find that he acted with a purpose of jeopardizing the interests of his children), *with Lambert v. Lambert*, 66 Wash.2d 503, 510 (1965) (In order to prove a change in circumstances sufficient to warrant a modification where husband voluntarily reduces his income or curtails his earning capacity, he must make a substantial showing of good faith).

[Note 9] We note that during the spring of 1979, Chester fell $5,000 into arrears in his alimony and support payments and that, upon a finding of contempt, he expended $5,000 to purge his contempt.

[Note 10] We note that many jurisdictions have held that the combination of second family expenses with other changed circumstances warrants reduction of alimony or child support. *See, e.g.*, *Fought v. Fought*, 94 Ariz. 187 (1963); *Barnes v. Barnes*, 246 Ark. 624 (1969); *Mark v. Mark*, 248 Minn. 446 (1957); *Walsh v. Walsh*, 460 P.2d 122 (Okla. 1969). Other jurisdictions treat the modification and second family issues as distinct. In those jurisdictions, once the support provider demonstrates a change in circumstances sufficient to justify a downward modification of the support award, he may then introduce the needs of the second family as a factor in determining the extent of that modification. *See, e.g.*, *Lawrence R. v. Muriel R.*, 89 Misc.2d 666, 669–670 (N.Y. Fam. Ct. 1976). We need not decide today whether and to what extent the probate judge must allow evidence of second family expenses at a modification hearing. We note, however, our statement made in the analogous context of a petition for alimony brought by a wife after her former husband's remarriage: "When the respondent married his present wife, no application for alimony had been made by the petitioner. . . . [W]hile such marriage would not be a bar to the petitioner's claim for alimony, still it is a circumstance to be considered with other pertinent facts by the court in determining whether alimony should be granted, and if so, for what amount." *Brown v. Brown*, 222 Mass. 415, 418 (1916). *See Allen v. Allen*, 326 Mass. 214, 217 (1950). *Cf. Silvia v. Silvia*, 9 Mass. App. Ct. 339, 342 (1980) (the income and assets of second spouses are part of the circumstances relevant to the ability of parents to use their own resources to contribute to the support of their children).

DAVIDSON v. DAVIDSON
19 Mass. App. Ct. 364

Appeals Court of Massachusetts, Barnstable.

Argued Nov. 15, 1983.

Decided Feb. 20, 1985.

Roberta Kettlewell, Boston, for Henry L. Davidson.

J. Richard Ratcliffe, Boston (Richard L. Zisson, Boston, with him), for Ann Davidson.

Before BROWN, ROSE and WARNER, JJ.

WARNER, Justice.

Ann and Henry Davidson were divorced by a judgment which was entered as absolute on the docket of the Barnstable County Probate Court on September 7, 1976. By the terms of that judgment, Henry was ordered to pay $40 per week for the support of the parties' two minor children, custody of whom was given to Ann, and $10 per week as alimony for a period of two years. In addition, Henry was ordered to convey to Ann his interest in the marital home.[1] On November 29, 1978, Ann filed a complaint for modification, which was twice amended. On March 5, 1981, she filed a complaint, later amended, seeking assignment of marital property under G.L. c. 208, § 34. The actions were tried together. The judge filed comprehensive findings of fact and conclusions of law. A judgment of modification was entered ordering, among other things, Henry to pay $125 per week for the support of the minor children[2] and lump sum alimony of $15,000. A second judgment was entered ordering Henry to pay Ann $45,000, "as a division of marital property," and $13,500 as counsel fees. Henry has appealed from the latter judgment, from so much of the former which awards Ann lump sum alimony, and from the denial of his motion for a mistrial.

1. *The Judgment of Modification*. Henry says that the judge's findings show clear error in three respects. First, he argues that the judge placed undue emphasis on the fact that Henry was a life income beneficiary (in the discretion of the trustees) of an unfunded trust under the will of his mother. The judge's findings clearly indicate that she considered that the trust was unfunded and might never be. Moreover, Henry's current circumstances, as found by the judge and not disputed, apart from any future income which he might receive from the trust, fully support the amount of the award made. Henry next contends that the judge failed to take into account income which Ann earned as a private duty nurse in the finding as to her average weekly earnings. That finding involved an assessment of the credibility of Ann's testimony, which was for the judge to make. Henry's final claim—that there was clear error in the judge's finding that Ann had no opportunity for the future acquisition of income other than through her earnings as a registered nurse—is patently without merit.

The detailed findings of the judge are more than sufficient to establish the material change in circumstances necessary to support a judgment of modification under G.L. c. 208, § 37. *See Robbins v. Robbins*, 343 Mass. 247, 249 (1961); *Schuler v. Schuler*, 382 Mass. 366, 368 (1981); *Pagar v. Pagar*, 9 Mass. App. 1, 2 (1980). The award of $15,000 as lump sum alimony was well within the judge's broad discretion. *See Surabian v. Surabian*, 362 Mass. 342, 348 (1972); *Schuler v. Schuler*, *supra* at 370.

2. *The Judgment Under G.L. c. 208, § 34*. (a) Res judicata. Henry argues that Ann was precluded from seeking an assignment of property by the judgment of divorce. We have no record of the divorce proceedings other than the judgment of divorce nisi, entered March 4, 1976, in which Henry was ordered to pay child support and alimony, and to convey his interest in the marital home to Ann. The judge who heard the divorce action made no findings of fact, undoubtedly because the judgment was entered before the Supreme Judicial Court suggested, and then required, findings on the statutory factors set forth in G.L. c. 208, § 34. *See Bianco v. Bianco*, 371 Mass. 420, 423 (1976);

Rice v. Rice, 372 Mass. 398, 402–403 (1977); *King v. King*, 373 Mass. 37, 40 (1977). *See also Putnam v. Putnam*, 5 Mass. App. 10, 15 (1977); Mass. R. Dom. Rel. P. 52(a), (c) (1975).

"[W]here the property rights of the parties have not been previously adjudicated, the Probate Court, upon consideration and findings relative to the statutory criteria, . . . may assign property pursuant to G.L. c. 208, § 34 . . . after a judgment of divorce has become absolute" (citations omitted). *Maze v. Mihalovich*, 7 Mass. App. 323, 324 (1979). *See Hay v. Cloutier*, 389 Mass. 248, 252 (1983). "[A] judgment of divorce only settles those 'matters which were necessarily involved and all issues which were actually tried and determined.'" *Maze v. Mihalovich*, *supra* at 326, quoting from *Whitney v. Whitney*, 325 Mass. 28, 31 (1949). As the *Maze* and *Hay* cases make clear, G.L. c. 208, § 34, issues are not "necessarily involved" in a judgment of divorce. From the record we are unable to determine whether any question of the assignment or division of the property of the parties was litigated in the divorce proceeding. We know that the judge could have ordered the conveyance of Henry's interest in the marital residence on traditional alimony principles. *See Crossman v. Crossman*, 14 Mass. App. 966, 968 (1982). As will be seen in the discussion which follows, the judgment did not deal expressly with all of the property interests of the parties. *Ibid*.

We conclude, as did the probate judge, that the judgment of divorce did not preclude litigation of the issues raised in the subsequent complaint for the assignment of property under G.L. c. 208, § 34.[3]

(b) Property subject to division.[4] Ann's amended complaint alleged that at the time of the divorce Henry had (1) an irrevocable remainder interest under a testamentary trust of his deceased father which had, at the time of the complaint, vested in possession, and (2) an expectancy, under the will of his mother, which had ripened into an inheritance at the time of the complaint. There is no dispute as to the judge's findings that at the time of trial Henry had received distributions from his father's trust of about $141,000 and tangible personal property from his mother's estate with a value of about $44,000.[5] It is also not in question that the judge considered at least these assets to be subject to division under G.L. c. 208, § 34.

Henry contends that since these assets did not come into his possession until after the judgment of divorce absolute, they constituted "after acquired" property and were thus not part of his "estate" and subject to division under § 34. Ann counters that the Supreme Judicial Court in *Rice v. Rice*, 372 Mass. 398 (1977), foreclosed the issue by declaring that § 34 "gives the trial judge discretion to assign to one spouse property of the other spouse *whenever and however acquired*" (emphasis supplied). *Id*. at 400. Thus, the argument goes, since the § 34 case was heard subsequent to the divorce under the holding in *Maze v. Mihalovich*, *supra*, the interests in question were subject to division.

Our consideration of the issue thus framed, one not heretofore considered by our appellate courts, begins with an examination of the nature of the rights afforded spouses under § 34. Without rehearsing in detail what has been said in our appellate cases which have treated the differences between traditional alimony and new division of property concepts (*see e.g.*, *Bianco v. Bianco*, 371 Mass. 420 [1976], and *Putnam v. Putnam*, 5 Mass. App. 10 [1977]), there is no question that the purpose and effect of § 34 has been, since it revision by St.1974, c. 565,[6] to provide for the equitable division of the property interests of partners in a marriage. *See Rice v. Rice*, *supra* at 401[7]; *Putnam v. Putnam*, *supra* at 13. In making such a division "the court may award to the wife a portion of the husband's separate estate in recognition of the vital and substantial, although nonmonetary, contribution which she has made to the marital partnership. . . . The value of the property to be assigned is dependent on those circumstances which warrant division of property in recognition of the marital partnership concept. . . ." Inker, Walsh & Perocchi, Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts, 10 *Suffolk U. L. Rev.* 1, 8 (1975).[8] "[T]he right to equitable division of property is fundamentally based on a partnership model." Inker & Clower, Towards a New Justice in Marital Dissolution: The Massachusetts Statutory Scheme and Due Process Analysis, 16 *Suffolk U. L. Rev.* 907, 931 (1982). *See* Clark, *Law of Domestic Relations* § 14.8, at 449 (1968); Ginsburg, M.G.L. c. 208, § 34—Some Observations about the Division of Property Leading to Predictability and Consistency, 25 *Boston Bar J.*, 10 (Jan. 1981).

None of the cases construing § 34 involved property interests acquired after the dissolution of the marital partnership. The language in *Rice v. Rice*, *supra* at 400, "whenever and however acquired," in context referred to separate property acquired by the husband before the marriage and as gifts during the marriage. *Id*. at 399–400. To hold that

property interests acquired after the dissolution of the marriage are subject to division under § 34 would be contrary to the marital partnership concept on which § 34 is founded. *See* Inker et al., 10 *Suffolk U. L. Rev.* 4, n.10. We conclude, therefore, that the property interests of Ann and Henry which were subject to division under § 34 were to be identified as of the time of their divorce.[9]

We turn then to the interests (as they existed at the time of the divorce) which Ann identified in her amended complaint under § 34, and on which the parties seem to have focused at trial: (1) Henry's remainder interest under his deceased father's testamentary trust; and (2) Henry's expectancy under the terms of his living mother's will.

At the time of the divorce in 1976, the following were the operative facts. Under the terms of the testamentary trust of Henry's father, Henry's remainder interest would be distributed free of trust when his mother died and when he reached age 35. Henry was about 33 years old and his mother was alive. The trustees were empowered "in their uncontrolled discretion" to invade principal for the benefit of Henry's mother. The value of the remainder interest was, therefore, uncertain and actuarial calculations would be to no avail. In addition, the remainder was subject to a valid spendthrift clause and could not have then been reached by Ann in satisfaction of any judgment or claim. *See Bucknam v. Bucknam*, 294 Mass. 214 (1936); *Burrage v. Bucknam*, 301 Mass. 235 (1938); *Pemberton v. Pemberton*, 9 Mass. App. 9, 18–22 (1980). Under Henry's mother's will, executed on December 20, 1975, Henry would receive certain tangible personal property and he would have a life estate under a trust.[10]

While "[p]roperty concepts have not become immaterial," *Putnam v. Putnam*, 5 Mass. App. at 15, implicit in our appellate decisions is the rejection of the notion that the content of the estates of divorcing parties ought to be determined by the wooden application of technical rules of the law of property. We think an expansive approach, within the limits of the marital partnership concept, is appropriate. The purpose of § 34 is to "empower[ ] the courts to deal broadly with property and its equitable division incident to a divorce proceeding. Such broad discretion is necessary in order that the courts can handle the myriad of different fact situations which surround divorces and arrive at a fair financial settlement in each case." (Citations omitted.) *Rice v. Rice*, 372 Mass. at 401.

We conclude that Henry's remainder interest under his father's testamentary trust, while it may have been at the outer limits, constituted a sufficient property interest to make it a part of his estate for consideration in connection with a property division under § 34. Henry's right to the remainder was fixed at the time of the divorce in 1976 (Henry's father died about 1968. The record does not show when his will was admitted to probate.), subject only to the conditions of survivorship. We do not think that either the uncertainty of value or the inalienability of the interest, in themselves, are sufficient to preclude consideration of the interest as subject to division.[11] We do not, of course, suggest that a judge must divide such an interest or assign it to the ledger of the holder in making a division of property. The determination whether to include a particular interest in the property to be divided lies within the sound discretion of the judge after consideration of all of the § 34 factors.[12]

Henry's expectancy at the time of the divorce under the will of his mother stands on a different footing. The mother was alive (she died on January 30, 1979) and could have changed her will. There are practical reasons for a rule that generally excludes such expectancies from the definition of property subject to division under § 34. An attempt at some determination of the usual speculative quantum of an expectancy might well involve the lengthy trial of issues collateral to the § 34 action: the validity of a will, current and future testamentary capacity, valuation of the estates of others, familial relationships, and so forth. *See Krause v. Krause*, 174 Conn. 361, 365 (1978). The record in this case shows no extraordinary circumstances which would support treating Henry's expectancy as a part of his estate for consideration in connection with a property division under § 34.[13] In any event, the expectancy might be considered by the judge, having been mindful of the evidentiary constraints which should deflect secondary considerations, under the § 34 criterion of "opportunity of each for future acquisition of capital assets and income" in determining what disposition to make of the property which is subject to division. *See Rice v. Rice*, *supra* at 402; *Belsky v. Belsky*, 9 Mass. App. 852, 853 (1980). *See also In re Marriage of Smith*, 100 Ill. App.3d 1126 (1981) (Even where governing statute excluded inheritances from definition of marital property, it was proper to consider wife's inheritance as a factor bearing on division of property). *Compare Lord v. Lord*, 443 N.E.2d 847 (Ind. App. 1982).

The judge's findings indicate that she may have considered after-acquired property in determining Henry's estate. She listed, for example, the home which Henry owned with his wife and tangible personal property which he inher-

ited from his mother, and assigned values to them. It would have been helpful if the judge had separated her findings in the modification action from those in the § 34 action. (We urge judges to do so in the future.) To the extent that she considered after-acquired property in the § 34 action, there was error. *See Hay v. Cloutier*, 389 Mass. at 250 and n.3. Since we cannot determine whether there were improper considerations, the judgment must be reversed. *Davidson v. Davidson*, 19 Mass. App. Ct. 364 (1985)

(c) The G.L. c. 208, § 34 factors.[14] As of what date are the § 34 factors to be applied? For the reasons discussed in part 2(b) above, we think that the marital partnership concept embodied in § 34 dictates that in this case the factors be examined as of the date of the divorce.[15] The focus of the commentators and, to some degree, our appellate cases, has been on the recognition by § 34 of a wife's service contributions to the marital partnership. The underpinning of any order for division of property under § 34 is, however, the judge's consideration of the contributions, in the statutory terms, of each spouse, as well as other factors in existence at the dissolution of the partnership which have been traditionally applied in determining alimony.[16] *See Bianco v. Bianco*, 371 Mass. at 422–423; *Putnam v. Putnam*, 5 Mass. App. at 14–15; Inker & Clower, 16 *Suffolk U. L. Rev.* at 913–918.

The judge made findings on many of the § 34 factors, for example, age, health, station, occupation, amount and sources of income, estate, liabilities, needs, and opportunity for future acquisition of capital assets and income, on the basis of the situation of the parties at the time of trial. The conclusion is inescapable that the judge in substantial part based § 34 relief on those findings. To the extent that she did so, there was error; and the judgment must be reversed.[17]

(d) Valuation of property subject to division. Where the division of property under § 34 takes place, as here, after the divorce, the property subject to division is to be valued as of the date of the order for division. Henry does not argue to the contrary. Thus, the parties equitably share in any appreciation or depreciation in the value of the property. The results are no different from those which follow from a division at the time of a divorce, except that in the latter case each spouse may have some control over the economic vicissitudes of the property which is assigned to him or her. Of course, the principles which apply to after-acquired property may come into play with respect, for example, to improvements to real estate to which an increase in value may fairly be attributed, or additions to stock holdings, as opposed to stock splits or dividends. No such considerations have been shown to exist here. The judge was correct in valuing Henry's remainder interest under his father's testamentary trust on the basis of the distributions from the trust which Henry had received at the time of trial.

3. *The Motion for Mistrial*. Henry's wife, Donna, was called as a witness by Ann; Donna had not been subpoenaed. She testified on direct examination on May 19 and June 9, 1981. On June 25, 1981, Ann filed a motion to join Donna as a defendant, pursuant to Mass. R. Dom. Rel. P. 19(a) (1975). Thereafter, Donna's attorney advised her not to return to Massachusetts from Maryland, where she lived with Henry, and she did not do so. On July 14, 1981, Henry's motion for a mistrial, on the ground of his inability to cross-examine Donna, was denied. The trial ended on July 15, 1981. On September 17, 1981, Ann's motion to join Donna as a party was denied.

Since there must be a new trial on the complaint under G.L. c. 208, § 34, we consider the denial of the motion for mistrial only as it related to the action for modification. In this respect, Henry's argument on appeal that Donna's testimony formed the basis for the judge's findings as to his "financial situation" ignores the ample evidence from other sources, including Henry's own testimony, on which the judge could have based her findings on material change of circumstances.[18] Henry did not seek relief less drastic than mistrial, as, for example, the striking of Donna's direct testimony. In the almost ten months which elapsed from the denial of the motion to join Donna as a party and the entry of judgment, Henry did not move to reopen the trial for the purpose of cross-examining Donna. Moreover, Henry points to no particular prejudice from Donna's direct testimony. The word "mistrial" is used to denote "such fundamental errors in a trial as to vitiate the result." *C.W. Hunt Co. v. Boston Elev. Ry.*, 217 Mass. 319, 321 (1914). "The declaration of a mistrial is within the sound judicial discretion of the trial judge." *Riley v. Davison Constr. Co.*, 381 Mass. 432, 444 (1980). There was no abuse of discretion in the denial of the motion.

4. *Counsel Fees*. Henry's only argument on this point is that the judge abused her discretion in ordering him to pay $13,500, as counsel fees for Ann, because he "lacks the financial status" to pay that amount. He does not argue that the record was inadequate reasonably to evaluate the services of Ann's counsel, or that the award was not commen-

surate with the value of the services rendered. *See Ross v. Ross*, 385 Mass. 30, 38–39 (1982). *Contrast Robbins v. Robbins*, 16 Mass. App. 576, 582 (1983). The judge's well supported findings clearly show that Henry has the "financial status" to satisfy the award of counsel fees. In her conclusions of law the judge expressly recognized the guidelines for determining such awards. *See Hayden v. Hayden*, 326 Mass. 587, 596–597 (1950); *Kane v. Kane*, 13 Mass. App. 557, 560 (1982). "[T]he award [of counsel fees] may be presumed to be right and ordinarily ought not to be disturbed." *Ross v. Ross*, *supra* at 39, quoting from *Smith v. Smith*, 361 Mass. 733, 738 (1972). *See Caldwell v. Caldwell*, 17 Mass. App. 1032, 1035 (1984). There was no abuse of discretion in the award of counsel fees.

However, since the award was made as a part of the judgment under G.L. c. 208, § 34, and since we may assume it was based, at least in part, on the result which Ann's counsel obtained in that action, we also reverse the judgment in this respect, so that the matter may be reconsidered in light of this opinion, and after a new trial on the § 34 complaint.

The judgment of modification is affirmed.

The judgment pursuant to G.L. c. 208, § 34, is reversed.

So ordered.

FOOTNOTES

1 Henry did not do so. Mortgage payments were substantially in arrears, and the mortgagee bank foreclosed a few days after the entry of the judgment of divorce nisi. Subsequently, Ann was allowed to repurchase the home with funds borrowed from her father.

2 A temporary order had been entered on January 11, 1979, increasing child support to $90 per week. The judgment also ordered Henry to pay an arrearage of $3,815 under that order at the rate of $25 per week.

3 Res judicata is an affirmative defense which must be pleaded. Mass. R. Dom. Rel. P. 8(c) (1975). The docket entries do not indicate that an answer to or motion to dismiss the original or amended complaint for assignment of property was filed. No such pleading appears in the appendix. An answer was, of course, required. Mass. R. Dom. Rel. P. 7(a), 8(b) (1975). (There is no provision in the Rules of Domestic Relations Procedure for summary judgment.) *See Dowd v. Morin*, 18 Mass. App. 786, 789 n.9 (1984). The record does not show that the question of issue preclusion was argued to the judge, but we assume that such was the case, since the judge addressed the issue in her conclusions of law. In any event, the judge did not rest her decision on the affirmative defense of res judicata, and so it is unnecessary to apply the principles discussed in *National Medical Care, Inc. v. Zigelbaum*, 18 Mass. App. 570, 578–579 (1984).

4 "In addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other." G.L. c. 208, § 34, as appearing in St.1977, c. 467.

5 As to Henry's interest under his mother's testamentary trust and the judge's findings with respect thereto, see part 1 of this opinion.

6 General Laws c. 208, § 34, as appearing in St.1977, c. 467, applied to the trial of this case. *See Zildjian v. Zildjian*, 8 Mass. App. 1, 12–13 (1979). Further amendments have been made by St.1982, c. 642, § 1, and St.1983, c. 233, § 77.

7 Chief Justice Hennessey, the author of *Rice*, later commented: "In practical effect, the court [in *Rice*] in a liberal interpretation of [§ 34], treated the marriage as an implied partnership for the purposes of distribution of property. As in the case law dealing with family operated small businesses, the Rices' marriage could be viewed as a pooling of resources, a co-ownership of the property brought to the marriage and acquired later." Hennessey, Explosion in Family Law Litigation, Challenges and Opportunities for the Bar, 14 *Family L.Q.* 187, 189 (1980).

8 This article has been cited with approval in many cases construing § 34. *See Bianco v. Bianco*, 371 Mass. 420, 422 (1976); *DuMont v. Godbey*, 382 Mass. 234, 237 (1981); *Putnam v. Putnam*, 5 Mass. App. 10, 13 n.4 (1977); *Lynch v. Lynch*, 5 Mass. App. 167, 170 (1977); *Maze v. Mihalovich*, 7 Mass. App. 323, 325 (1979); *Zildjian v. Zildjian*, 8 Mass. App. 1, 14 (1979); *Singer v. Singer*, 8 Mass. App. 113, 121 n.14 (1979); *Tanner v. Tanner*, 14 Mass. App. 922, 923 (1982).

9 In this case it makes no difference whether that property is identified as of the time of the divorce trial, the judgment nisi or the judgment absolute, as the situation was the same at all of those times. We intend no suggestion of a rule fixing any of those dates, or excluding some earlier time in appropriate circumstances, e.g., the date of the separation of the parties, as determinative in identifying divisible property. We think the development of the law in this respect is best left to a case-by-case analysis.

10 See part 1 of this opinion.

11 Other jurisdictions vary in their determinations as to what interests constitute property subject to division at divorce. (The starting point for analysis of any of the cases is the statute under which equitable division is allowed. See note 13, *infra*.) For instance, some States include nonpossessory remainders which are not subject to divestment. *See e.g.*, *McCain v. McCain*, 219 Kan. 780 (1976) (vested remainder, in land, which could be transferred, alienated or mortgaged subject to division); *In re Marriage of Hill*, 197 Mont. 451 (1982) (although right to possession postponed, vested remainder divisible at divorce). This approach is not uniform. *See, e.g.*, *Frank G.W. v. Carol M.W.*, 457 A.2d 715 (Del.1983) (vested trust interests not acquired for purposes of equitable distribution until beneficiary obtains possession).

Similarly, jurisdictions differ as to whether interests subject to contingencies may be equitably distributed. Some States exclude this species of interest as speculative and remote. *See, e.g.*, *Kroha v. Kroha*, 265 Ark. 170 (1979) (trust corpus, which could not be mortgaged, assigned or sold, distributed in monthly payments to beneficiary during life until depletion, not divisible property); *Loeb v. Loeb*, 261 Ind. 193 (1973) (vested remainder subject to condition subsequent not divisible asset); *Storm v. Storm*, 470 P.2d 367 (Wyo. 1970) (beneficiary's right to trust corpus conditioned on survivorship is "mere expectancy" not subject to division). Other courts have not hesitated to define such interests as divisible property. *See, e.g.*, *In re Marriage of Bentson*, 61 Or. App. 282 (1983) (whether vested or contingent, husband's interest in trust divisible at divorce); *Trowbridge v. Trowbridge*, 16 Wis.2d 176 (1962) (dictum: under Wisconsin law, remainder interest in trust subject to conditions of survivorship, depletion of corpus, and spendthrift clause, part of marital estate subject to division at divorce).

There have also been cases dealing with the question whether a chose in action accruing during marriage constitutes property divisible at divorce. *See and compare Postill v. Postill*, 116 Mich. App. 578 (1982) (right of action constitutes property suitable for division in divorce), *with Fries v. Fries*, 288 N.W.2d 77 (N.D. 1980) (personal injury claim too speculative for inclusion).

For other cases which have considered interests with uncertain or speculative value, *see and compare Richardson v. Richardson*, 280 Ark. 498 (1983) (value of stock options included), *with In re Marriage of Moody*, 119 Ill. App.3d 1043 (1983) (unexercised stock options found not to constitute marital property); and *see and compare In re Marriage of Stewart*, 59 Or. App. 713 (1982) (accounts receivable of husband's veterinary practice included in property division), *with Dogu v. Dogu*, 652 P.2d 1308 (Utah 1982) (husband's accounts receivable excluded in property division).

This court has recognized that nonvested pension rights constitute property subject to division at divorce. *Dewan v. Dewan*, 17 Mass. App. 97 (1983). Such has been the trend in both common law and community property jurisdictions. *See, e.g.*, *Van Loan v. Van Loan*, 116 Ariz. 272 (1977); *In re Marriage of Brown*, 15 Cal.3d 838 (1976); *Robert C.S. v. Barbara J.S.*, 434 A.2d 383 (Del. 1981); *In re Marriage of Fairchild*, 110 Ill. App.3d 470 (1982); *Damiano v. Damiano*, 94 A.D.2d 132 (N.Y. 1983); *Carpenter v. Carpenter*, 657 P.2d 646 (Okl. 1983); *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976); *Leighton v. Leighton*, 81 Wis.2d 620 (1978). *Contrast In re Marriage of Delgado*, 429 N.E.2d 1124 (Ind. App. 1982); *Ratcliff v. Ratcliff*, 586 S.W.2d 292 (Ky. Ct. App. 1979); *Miller v. Miller*, 83 Mich. App. 672 (1978). As to vested but unmatured pension rights, *see* L. Golden, *Equitable Distribution of Property* §§ 6.13-6.14 (1983); J. Freedman Meyer, Vested but Unmatured Pensions as Marital Property: Inherent Valuation, Allocation and Distribution Problems in Equitable Distributions, 14 *Rutgers, L.J.* 175 (1982).

12 As will be seen later in this opinion, the question of valuation presents no problem in this case, since the division was made at a time when the remainder interest had vested in possession. In the case of such an interest which has not vested in possession at the time of trial of the § 34 issues, and where there is no spendthrift or other limitation and actuarial evidence as to valuation is available, guidance in crafting creative judgments may be found in cases dealing with pension interests. *See Dewan v. Dewan*, 17 Mass. App. 97 (1983), and cases cited. In situations where it is not feasible to fashion an equitable judgment because of legal or practical impediments, the judge may, in the careful exercise of discretion, balancing the competing considerations of finality and fairness, decide to reserve, in whole or in part, the question of division of property, and retain jurisdiction. *Cf. In re Marriage of Fairchild*, 110 Ill. App. 3d 470, 476 (1982). In all instances, the judge's exercise of discretion in these respects will be influenced by consideration of the criteria enumerated in § 34. We leave the development of thoughtful solutions to "the myriad of different fact situations which surround divorces," *Rice v. Rice*, 372 Mass. at 401, to the case by case resolution by trial judges, for the most part probate judges, who will bring to bear their experience, insight and knowledge.

13 Massachusetts permits the equitable distribution of "all or any part of the estate of the other," G.L. c. 208, § 34, which has been held to include gifts, *Rice v. Rice*, *supra* at 399–401, and inheritances, *Earle v. Earle*, 13 Mass. App. 1062, 1063 (1982). *Cf. Belsky v. Belsky*, 9 Mass. App. 852, 853 (1980). Some statutes, including those of Kentucky, Ken. Rev. Stat. § 403.190 (1984); Maine, Me. Rev. Stat. Ann. tit. 19 § 722A (1981); Missouri, Mo. Rev. Stat. § 452.330 (Supp.1984); New Jersey, N.J. Stat. Ann. § 2A:34-23 (West Supp.1984); Pennsylvania, 23 P.S. § 401 (Purdon Supp.1984); and Wisconsin, Wis. Stat. § 767.255 (1981), exclude property acquired by a spouse through gift, bequest, devise or descent from division at divorce. The eight community property States, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington, exclude property acquired by a spouse through gift, bequest, devise or descent. *See* 15A Am. Jur.2d, *Community Property* § 26 (1976). *See also*, The Uniform Marriage and Divorce Act § 307, Alternative B, Comment, 9A *U. L. A.* 144 (1979) (Alternative B is intended to provide a definition of marital property consistent with the existing definition in community property States).

14 "In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit." G.L. c. 208, § 34, as appearing in St.1977, c. 467.

15 As the situation of the parties was substantially the same at the times of the entry of the judgments nisi and absolute, we do not reach questions which may arise where property is acquired or circumstances, in the § 34 sense, change between the entry of the judgments nisi and absolute. *See Zildjian v. Zildjian*, 8 Mass. App. 1, 13 (1979). Nor do we comment on factual settings, e.g., those involving couples separated for many years before divorce, which might indicate the use of an earlier date for the application of some or all of the § 34 factors.

16 We recognize, of course, that some or all of the contributions of spouses may have ceased well before the divorce.

17 In those situations where a judge after a divorce trial exercises discretion to reserve property division and retain jurisdiction, see note 12, *supra*, the judge should, nevertheless, make written findings on the § 34 criteria at the time of trial, so that they may be used by the judge who subsequently hears the § 34 case.

18 In addition, according to the docket entries, the judge had financial statements of both parties. Those statements are not reproduced in the appendix.

GOTTSEGEN v. GOTTSEGEN
397 Mass. 617

Supreme Judicial Court of Massachusetts, Worcester.

Argued Dec. 2, 1985.

Decided May 22, 1986.

Monroe L. Inker, Boston (Robert J. O'Regan, Boston, with him), for plaintiff.

Robert J. Kates, Boston (Douglas S. Segal, Boston, with him), for defendant.

Before HENNESSEY, C.J., and WILKINS, LIACOS, ABRAMS and NOLAN, JJ.

ABRAMS, Justice.

We hold that in a judgment for divorce, a judge of the Probate Court may not order the termination of alimony on the occurrence of an event unrelated to the recipient spouse's need for alimony or the supporting spouse's ability to pay.

On December 11, 1980, the plaintiff, Sandra L. Gottsegen, filed a complaint for divorce in the Probate and Family Court on the ground of irretrievable breakdown of her marriage to the defendant, Robert S. Gottsegen. G.L. c. 208, § 1A. A judge of the Probate Court entered a judgment of divorce nisi on August 3, 1981. On October 12, 1983, the plaintiff filed a complaint for civil contempt against the defendant for violation of the August 3, 1981, order. The judge dismissed the complaint,[1] but awarded counsel fees to the plaintiff. Both parties appealed. The plaintiff then retained new counsel and, on April 24, 1984, moved for relief from the judgment of divorce under Mass. R. Dom. Rel. P. 60(b) (1975), and concurrently moved for leave to take discovery, for an evidentiary hearing, and for reference to a master. The judge allowed the defendant's motion to strike the various motions, and denied the plaintiff's subsequent motion for reconsideration. The plaintiff appealed the allowance of the motion to strike. The appeals were consolidated. We transferred the case here on our own motion. We now affirm the rulings on the motion for relief under rule 60(b) and on counsel fees. We vacate and remand the ruling on contempt.

Before the plaintiff filed for divorce, she and the defendant executed a separation agreement. Under art. V.3 of the separation agreement, the parties agreed to request the Probate Court to incorporate the terms of the agreement into a final judgment of divorce. They further agreed that if the court did so, the provisions of art. III of the agreement ("Financial Arrangements Relating to Wife") would be merged in the judgment, but that the remaining provisions would survive as an independent contract. In the judgment of divorce nisi, the court ordered that the agreement be made a part of the judgment. The clauses here in controversy derive from art. III of the agreement which, by the terms of the agreement, merged into the judgment and did not survive.[2] They therefore have no legal significance independent of the divorce judgment. *See Knox v. Remick*, 371 Mass. 433, 435 (1976). *Cf. Bell v. Bell*, 16 Mass. App. Ct. 188, 190 (1983) (agreement survives judgment and has independent significance), *rev'd on other grounds*, 393 Mass. 20 (1984).

Paragraph A.1 of art. III of the judgment requires the defendant to pay the plaintiff $812.50 per month for her support and maintenance. Paragraph A.5 of art. III provides that, "[i]n the event of the wife's remarriage (as hereinafter defined) at any time prior to the fifth (5th) anniversary of the date of execution hereof, the husband's support obligation . . . shall thereupon terminate and be substituted by an obligation to pay to the wife, or for her benefit, for her support and maintenance" $30,000, at the rate of $833.33 per month for three years. Paragraph A.9 provides, "The remarriage of the wife shall, for purposes of this Agreement, be deemed to include her cohabitation with the same unrelated man with whom the wife has a romantic relationship for more than two (2) consecutive months."

1. *The civil contempt complaint*. In early 1983, the defendant began to suspect that the plaintiff was cohabiting with one L.W. After confirming his suspicions through personal observation and the report of a private investigator, the defendant concluded that the plaintiff had been cohabiting with L.W. for more than two consecutive months. On July 15, 1983, he commenced making monthly payments of $833.33, pursuant to the remarriage and cohabitation clauses of the agreement.

The plaintiff responded to the changed alimony payments by filing a complaint for civil contempt. The defendant denied that he was in contempt of the divorce judgment. He counterclaimed to request a judgment declaring that the plaintiff had remarried pursuant to paragraph A.9 of art. III of the agreement and determining the date of the remarriage and his further alimony obligations. The parties stipulated that the plaintiff had a romantic relationship with L.W. The judge found that, during the seven-week period from April 17 through June 5, 1983, the plaintiff and L.W. spent the night together on an average of at least 5.5 nights per week, including one period of seventeen consecutive nights. The judge made detailed findings about the plaintiff's and L.W.'s living, social, and financial arrangements, including the following: "40. [L.W.] and Mrs. Gottsegen have never represented to be man and wife, even on over night trips. 41. Mrs. Gottsegen receives no financial support from Mr. [L.W.] except [that] he pays for about 85% of the cost of eating out. Mrs. Gottsegen provided no financial support to [L.W.]. 42. Mrs. Gottsegen and [L.W.] have no joint assets of any kind. 43. Mrs. Gottsegen and [L.W.] maintain separate residences. 44. There is a continuing need for alimony for Mrs. Gottsegen." The judge concluded that the plaintiff and L.W. were cohabiting for more than two consecutive months within the terms of the cohabitation clause,[3] and that the remarriage provisions should take effect as of June 1, 1983. He concluded by finding the defendant not in contempt.

We begin our analysis by considering briefly the history of judicial jurisdiction over alimony. In England, questions of divorce and alimony were not within the jurisdiction of the common law courts, but instead were decided by the ecclesiastical courts, applying canon law. 1 *Legal Papers of John Adams* 281 (L. Wroth & H. Zobel 1965).[4] Because there was no alimony jurisdiction at common law, this court early held that the power to grant alimony was wholly statutory. *Davol v. Davol*, 13 Mass. 264, 264–265 (1816). *See Orlandella v. Orlandella*, 370 Mass. 225, 227 (1976); *Parker v. Parker*, 211 Mass. 139, 141 (1912). In 1692, the provincial Legislature vested jurisdiction over all questions of marriage and divorce in the Governor and Council. Province Laws 1692–1693, c. 25, § 4. In 1695, the justices of the Superior Court of Judicature were empowered to assign to a wife whose marriage had been nullified by reason of consanguinity "such reasonable part of the estate of her late [i.e., former] husband as in their discretion the circumstances of the estate may admit." Province Laws 1695-1696, c. 2, § 3.[5] By St. 1785, c. 69, § 7, the Legislature enacted comprehensive legislation regulating marriage and divorce, and directed that all questions of divorce and alimony be heard by the Supreme Judicial Court. The act set out several grounds for divorce—more limited than are available today—and provided for property settlement and alimony that varied according to the grounds for divorce.[6] The property settlement and alimony scheme reflected the necessity of providing support for women who, by social convention and traditional property law, were usually dependent on their husbands.

In *Holbrook v. Comstock*, 16 Gray 109, 110 (1860), this court defined alimony as "that portion of the husband's estate which is allowed [the wife] for her present subsistence and livelihood."[7] In subsequent years, as the Legislature gradually expanded the conditions in which alimony could be granted, *see Parker v. Parker*, 211 Mass. 139, 141–143 (1912), the support purposes behind alimony remained constant. Thus, in *Topor v. Topor*, 287 Mass. 473 (1934), we stated, "The word 'alimony' as used in our statutes carries the meaning of money or property which under order of court a husband provides for the support and maintenance of his wife and such minor children as are committed to her custody. . . . From the nature of the word 'alimony' support or maintenance of the recipient is an essential element." (Citations omitted.) *Id*. at 475.

Throughout this period, the amount of alimony to be granted lay in the "just and reasonable" discretion of the court. While mere subsistence may have been the minimum to which the wife was entitled, the court could grant greater sums depending on the property and capacity of the husband. *Graves v. Graves*, 108 Mass. 314, 321 (1871). By 1916, it was clear that support and maintenance comprehended "the condition in life of the parties and their mode of living," *Brown v. Brown*, 222 Mass. 415, 417 (1916), which, the court later explained, meant "maintain[ing] her and the family according to the property and condition in life of her husband." *Coe v. Coe*, 313 Mass. 232, 236 (1943), quoting *Jordan Marsh Co. v. Cohen*, 242 Mass. 245, 249 (1922).

In 1974, the Legislature substantially revised the statutory treatment of alimony. G.L. c. 208, § 34, as appearing in St. 1974, c. 565. *See generally Bianco v. Bianco*, 371 Mass. 420 (1976). The amendment made alimony available to either party, depending on the needs and circumstances of the case. The statute now requires the court, in determining the amount of alimony, to consider "the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income." G.L. c. 208, § 34 (1984 ed.). The statute affords the judge considerable discretion, but also defines the scope of that discretion by requiring the judge to consider all the factors set forth by the statute. *Bianco v. Bianco*, *supra* at 423.

Despite these changes, § 34 does not alter the fundamental purpose of alimony: to provide economic support to the dependent spouse. As the Appeals Court recently noted, "[t]he focus of any financial award must include 'the crucial issue in an alimony dispute, namely, the [spouse's] need for support and maintenance in relationship to the respective financial circumstances of the parties.'" *Grubert v. Grubert*, 20 Mass. App. Ct. 811, 819 (1985), quoting *Partridge v. Partridge*, 14 Mass. App. Ct. 918, 919 (1982). Thus, the statutory authority of a court to award alimony continues to be grounded in the recipient spouse's need for support and the supporting spouse's ability to pay. A court may not limit alimony for reasons unrelated to its statutory base. *See Levine v. Levine*, 394 Mass. 749, 752 n.4 (1985). *Accord*, *Mitchell v. Mitchell*, 418 A.2d 1140, 1143 (Me. 1980); *Marriage of Grove*, 280 Or. 341, 354 (1977); *Overson v. Overson*, 125 Wis.2d 13, 17–18 (Ct. App. 1985). Any event that triggers a change in alimony must bear some relation to the financial circumstances of the parties.

We turn now to the precise issue here presented: whether the judge properly ordered in the original judgment that alimony be terminated on the wife's "cohabitation with the same unrelated man with whom the wife has a romantic relationship for more than two (2) consecutive months." A divorced spouse has no right to exercise control over a former spouse's life, and a court may not attempt to create such a right through the alimony provisions of a divorce judgment.[8] *See Mitchell v. Mitchell*, 418 A.2d 1140, 1143 (Me. 1980) ("Modification of alimony on the basis of moral judgments of the recipient's living arrangements would be beyond the scope of the divorce court's discretion"). Nor may a judge, in formulating the divorce judgment, assume that cohabitation of the type described here would have any effect on the recipient spouse's economic circumstances and the need for alimony. "The extent of actual economic dependency, not one's conduct as a cohabitant, must determine the duration of support as well as its amount." *Gayet v. Gayet*, 92 N.J. 149, 154 (1983). Thus, the Probate Court may not in the original divorce judgment order alimony to be terminated on mere cohabitation.[9]

Nevertheless, the court may later modify the original judgment if the petitioner demonstrates a material change of circumstances. *Schuler v. Schuler*, 382 Mass. 366, 368 (1981), and cases cited. The court "may make any judgment relative [to the modification of the original judgment] which it might have made in the original action." G.L. c. 208, § 37 (1984 ed.). Thus, if the supporting spouse shows that, as a result of cohabitation, the recipient spouse's economic circumstances have materially changed, then the court may alter or eliminate alimony. However, a judge may not modify a judgment solely on the basis of a finding of cohabitation. Such an order is not within the court's discretion under G.L. c. 208, § 34.[10] Most State courts that have considered the issue are in accord with our conclusion. *See Marriage of Schober*, 379 N.W.2d 46 (Iowa Ct. App. 1985); *Fleming v. Fleming*, 221 Kan. 290 (1977); *Mitchell v. Mitchell*, 418 A.2d 1140 (Me. 1980); *Petish v. Petish*, 144 Mich. App. 319 (1985); *Sieber v. Sieber*, 258 N.W.2d 754 (Minn. 1977); *Bisig v. Bisig*, 124 N.H. 372 (1983); *Gayet v. Gayet*, *supra*; *Hazelwood v. Hazelwood*, 89 N.M. 659 (1976); *Myhre v. Myhre*, 296 N.W.2d 905, 908 (S.D. 1980); *Stahl v. Stahl*, 136 Vt. 90 (1978); *Wight v. Wight*, 284 S.E.2d 625 (W. Va. 1981); *Van Gorder v. Van Gorder*, 110 Wis.2d 188 (1983). *See also Marriage of Lieb*, 80 Cal. App.3d 629 (1978), and *Kaplan v. Kaplan*, 186 Conn. 387 (1982), construing statutes.

In this case, there are no grounds for modification of the original alimony award. The judge made detailed findings on the financial arrangements between the plaintiff and L.W. He found that neither the plaintiff nor L.W. supported the other, with the exception of L.W.'s payment of about 85% of the cost of dining out; that they have no joint assets of any kind; that they maintain separate residences; and that there is a continuing need for alimony by the plaintiff. These findings could not support a conclusion of material change of circumstances sufficient to justify modification of the original judgment.

We conclude that the judge's dismissal of the complaint for contempt on factors unrelated to the financial circumstances of the parties is error and that the judge's findings do not otherwise warrant a modification of the judgment. We therefore vacate the dismissal of the complaint for contempt and remand that portion of the case for proceedings consistent with this opinion.[11] To prevent any confusion, we order the judgment to be modified by striking paragraph A.9 of art. III, pursuant to our equitable power under G.L. c. 211, § 3 (1984 ed.). *See Moore v. Moore*, 389 Mass. 21, 26 (1983).

2. *The motion for relief from judgment*. After her complaint for contempt was dismissed, the plaintiff filed a motion for relief from judgment under Mass. R. Dom. Rel. P. 60(b), along with motions for reference to a master, for evidentiary hearing, and for leave to take discovery. The defendant moved to strike all those motions, and for an award of the defendant's attorney's fees and costs. The judge allowed the defendant's motion to strike and denied the request for attorney's fees and costs. The judge subsequently denied the plaintiff's motion for reconsideration. The plaintiff appeals. Looking beyond the form to the substance, we treat the defendant's motion to strike as a motion in opposition to the plaintiff's motion under rule 60(b), and the judge's allowance of the motion to strike as a dismissal of the plaintiff's motion.

In her motion for relief from the divorce judgment, the plaintiff alleges that the original agreement was unfair and unreasonable because it awarded her no property and only minimal alimony, and because the cohabitation clause is contrary to public policy. The plaintiff also alleges that, in approving the agreement, the judge failed to consider all the factors under G.L. c. 208, § 34, and in particular ignored the plaintiff's needs and contribution to the marital enterprise. Finally, she alleges that the defendant committed fraud and made misrepresentations both to her and to the court, and that her assent to the agreement was obtained through duress.

There was no error. Under rule 60(b),[12] a motion for relief from judgment because of fraud, misrepresentation, or other misconduct of an adverse party must be brought within one year after the judgment was entered. The judgment of divorce nisi was entered on August 3, 1981, and the judgment of divorce absolute took effect six months later.[13] Because the record does not support a determination that the plaintiff did not know or could not have known of the alleged fraud and misrepresentation between then and April 23, 1984, when she filed her rule 60(b) motion, we conclude that the judge did not err in dismissing the fraud and misrepresentation claims.

We assume, without deciding, that the plaintiff's remaining allegations of unfairness and unreasonableness amount to "any other reason justifying relief from the operation of the judgment" under rule 60(b)(6). Such claims must be filed "within a reasonable time" from the date of entry of the judgment. We may further assume that the plaintiff's remaining allegations, if true, would be sufficient grounds for the court to vacate the judgment. Even so, the plaintiff has suggested no reason why she could not have brought her motion earlier. The grounds on which she attacks the judgment were available to her from the day the judgment was entered.[14] The only new ground that appears on the record is the plaintiff's hiring of new counsel. In these circumstances, the judge could properly conclude that the plaintiff's motion was not brought within a reasonable time.

3. *Conclusion*. The award of counsel fees to the plaintiff and the dismissal of the plaintiff's motion under rule 60(b) and of the accompanying motions are affirmed. The inclusion of the cohabitation clause in the original judgment is beyond the scope of the Probate Court's discretion and should be struck from the judgment. Because the provisions of art. III in the Gottsegen agreement did not survive, the judgment of dismissal of the plaintiff's complaint for contempt on factors unrelated to the financial circumstances of the parties is error. That judgment is therefore vacated and the case is remanded to the Probate Court for further proceedings consistent with this opinion.

So ordered.

HENNESSEY, Chief Justice (concurring).

I concur, but I wish to emphasize that this case does not overrule the principles of *Bell v. Bell*, 393 Mass. 20 (1984). In *Bell*, we held that the parties were bound by the clear language of their separation agreement, which provided that alimony would cease if the wife cohabited with another man. *Id.* at 23. I have no doubt that, even in the absence of an agreement, the fact of such arrangement is an appropriate circumstance to be considered by the court in setting or

modifying a support order. In this case, however, (1) under the terms of the agreement between the parties, the provision as to cohabitation did not survive the judgment of divorce, and (2) the judge found in substance that the wife's arrangement with another man did not affect her need for support. The judge thus relied on a condition which is irrelevant to the need for support under G.L. c. 208, § 34. The principles of *Bell* are not affected.

NOLAN, Justice (dissenting).

In part one of its opinion, the court has, in my view, completely ignored the intent of the parties--as expressed in their separation agreement, and elevated form over substance to sustain its holding. In doing so, the court has irredeemably overruled *Bell* without forthrightly admitting it. I dissent.

I agree with the premise that a court is to follow G.L. c. 208, § 34 (1984 ed.), in awarding alimony. I also agree that a judge may not order alimony terminated because of the cohabitation of a former spouse with a member of the opposite sex, without more. *Ante* at 1139. However, neither issue controls this case. Here, two adults freely agreed that the husband's support obligations would be altered if his former wife cohabited with the same unrelated man with whom she was having a romantic relationship for more than two consecutive months. This condition occurred and the judge so found. Now, merely because a provision of the separation agreement was, at the request of the parties, merged into the judgment of divorce, the court erroneously holds that the provision is an unenforceable order of the court.

I am unpersuaded by the court's attempt to distinguish *Bell*. The attempt fails. The concurring opinion makes no improvement. The similarities between this case and *Bell* are too striking to be ignored. In *Bell v. Bell*, 393 Mass. 20 (1984), the disputed cohabitation clause provided for the termination of alimony upon the wife's living together with a member of the opposite sex "so as to give the outward appearance of marriage." *Id.* at 21. The clause at issue in *Bell* was not conditioned on the wife's financial independence. Like *Bell*, the cohabitation clause in this case became effective upon the wife's living in concubinage with a member of the opposite sex; nor was the clause in this case conditioned on the wife's financial independence.

In *Bell*, the probate judge made specific findings and reported that the wife was in fact cohabiting with "J.R." The judge dismissed the complaint for contempt, thereby allowing enforcement of the agreement. As in *Bell*, the judge in this case made specific findings and reported that the wife was cohabiting with L.W. for a sufficient period of time to warrant enforcement of the agreement. In *Bell*, the parties incorporated the separation agreement into their divorce decree, thereby altering it from an ordinary contract to "a judicially sanctioned contract setting forth the allocation between former spouses of rights, responsibilities, and resources." *Bell v. Bell*, *supra* at 26 (Abrams, J., dissenting). Under the court's reasoning today, a probate judge would be permitted to enforce a cohabitation provision in a separation agreement that survived a judgment of divorce, as in *Bell*, but would be precluded from enforcing the same agreement made by the same two parties merely because the agreement merged into the judgment at the request of the parties. This result is plainly wrong. To the extent that a separation agreement was incorporated in the judgment of divorce in both cases, there is not a scintilla of material difference between this case and *Bell*.

Finally, the court *ante* at 1138 n.8, suggests that in *Bell* the court affirmed the dismissal of a complaint for contempt brought by the former wife "on the ground that under *the terms of an independent, surviving separation agreement*, *Bell v. Bell*, 16 Mass. App. Ct. 188, 190 (1983), she had 'liv[ed] together with a member of the opposite sex, so as to give the outward appearance of marriage.'" (emphasis supplied). It is worthy of note that the court in the instant case had to cite the opinion of the Appeals Court, which we reversed, in order to supply the phrase "under the terms of an independent, surviving separation agreement." The clear implication from the juxtaposition of the phrase "under the terms of an independent, surviving separation agreement" is that of cause and effect—that the complaint was dismissed because the agreement was independent and surviving. There is not the slightest suggestion in this court's opinion in *Bell* that the complaint was dismissed for this reason. In fact, the reader will search this court's opinion in *Bell* in vain for any discussion or even mention of an "independent, surviving agreement." These terms ("independent" and "surviving") don't come into play until one spouse seeks to enforce the separation agreement outside the Probate Court, as for example, in a separate contract action. The court recently addressed this problem in *Ratchford v. Ratchford*, 397 Mass. 114, 116 (1986). In short, reliance on *Bell* for the discussion in note 8 of a surviving and independent contract is wholly unfounded.

A word in response to the concurring opinion is in order because it contains language which attempts to distinguish *Bell* but fails. This concurring opinion says that "under the terms of the agreement between the parties, the provision as to cohabitation did not survive the judgment of divorce." Is the opinion suggesting that the "merging" of the agreement in the judgment which the agreement calls for in art. V.3 means that it ceases to be operative as a judgment? If so, it clearly is wrong. The cohabitation provision in the judgment in this case is as much entitled to enforcement as the cohabitation provision in the *Bell* judgment. It may be argued that, in *Bell*, the parties agreed that their agreement, incorporated into the judgment, remained alive, independent of the judgment. However, this argument is specious because the holding in *Bell* did not depend on the survival of the agreement. *Bell* was decided exclusively on the judgment, not on the agreement. The judgment controlled in *Bell* precisely as it controls in this case. In a word, there simply is no material difference between *Bell* and this case. Therefore, I dissent.

FOOTNOTES

1 On the reverse side of the contempt complaint appears a notation signed by the judge that the complaint was dismissed on January 30, 1984. The docket bears no entry of judgment. Rule 58(a) of the Massachusetts Rules of Domestic Relations Procedure (1975) requires that "[u]pon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, . . . the court shall forthwith prepare, sign and enter judgment. . . . Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)" (requiring the clerk to enter all judgments in the docket). "Although the better practice calls for the preparation of a separate document of judgment," *Lewis v. Emerson*, 391 Mass. 517, 520 (1984), and the judgment should have been entered on the docket, there is no confusion or dispute in this case that the judgment was entered January 30, 1984. The purposes of rule 58(a) have therefore been served, and there is no reason "to prevent the parties' exercise of their posttrial and appellate rights on the basis of clerical niceties." *Id.*

2 At oral argument, the defendant noted that the merger clause applies to "the provisions of art. III above with respect to the financial arrangements between the parties," and argued that the disputed clause, although contained in art. III, is not a provision concerning "financial arrangements." Because the clause triggers a termination of support payments, it is an integral part of the "financial arrangements."

3 We need not decide whether "cohabitation," as used in this divorce judgment, encompasses an arrangement in which the parties are together on an almost daily basis and frequently eat meals together, even though they maintain separate residences and neither mingle financial assets nor support each other financially.

4 The ecclesiastical courts granted two types of divorce decree: absolute divorce (a vinculo matrimonii, "from the bonds of matrimony") when the marriage was a nullity because of defects such as consanguinity or impotence; and divorce from bed and board (a mensa et thoro) when the grounds were adultery, cruelty, and the like. 1 *Legal Papers of John Adams*, *supra* at 281, 282. In the latter case, the marriage itself was considered valid and unbreakable. The legal effect was that of a decree for separation and maintenance, and the husband was required to pay alimony under the theory that "since the marriage still existed, he was merely continuing to perform the duty of support which he would have had in normal course." *Id*. at 282, 283.

5 The act also provided for criminal penalties in the case of incestuous marriage: "such man and woman so convicted shall be set upon the gallows by the space of an hour, with a rope about their neck and the other end cast over the gallows, and in the way from thence to the common [gaol] shall be severely whipped, not exceeding forty stripes each; also every person so offending shall forever after wear a capital I of two inches long and proportionable bigness, cut out in cloth of a contrary colour to their cloaths, and sewed upon their upper garments on the outside of their arm or on their back in open view." Province Laws 1695–1696, c. 2, § 2. Thus did the provincial authorities ensure punishment for incestuous marriage consistent with punishment for adultery. *See* Province Laws 1694–1695, c. 5, § 2; N. Hawthorne, *The Scarlet Letter* (1850).

6 For example, in cases of absolute divorce, the statute required that the wife be restored to all her lands, tenements and hereditaments, and all or part of her personal estate held by the husband, but made no provision for alimony. *See Davol v. Davol*, *supra*.

7 Compare the ecclesiastical definition of alimony: "that proportion of the Husband's Estate, which the Wife sues in the Ecclesiastical Court, to have allowed her for her present subsistence and livelyhood, according to Law, upon any such separation from her Husband, as is not caused by her own *elopement or Adultery*" (emphasis in original). 1 *Legal Papers of John Adams*, *supra* at 284 n. 19, quoting J. Godolphin, *Repertorium Canonicum* 508 (3d ed. 1687). *See also Cole v. Cole*, 142 Ill. 19, 25–27 (1892). Ecclesiastical principles formerly were an important source of law for interpreting and applying the alimony statutes in this Commonwealth. *See, e.g.*, *Graves v. Graves*, 108 Mass. 314, 321 (1871); *Davol v. Davol*, 13 Mass. 264, 265 (1816); 1 *Legal Papers of John Adams*, *supra* at 283.

8 The judge's lack of discretion to order alimony terminated on mere cohabitation does not prevent a divorcing couple from including such a provision in a separation agreement that survives the entry of the divorce judgment. In *Bell v. Bell*, 393 Mass. 20 (1984), *cert. denied*, 470 U.S. 1027 (1985), this court affirmed the dismissal of a contempt complaint brought by the recipient spouse, on the ground that, under the terms of an independent, surviving separation agreement, *Bell v. Bell*, 16 Mass. App. Ct. 188, 190 (1983), she had "liv[ed] together with a member of the opposite sex, so as to give the outward appearance of marriage." *Bell v. Bell*, 393 Mass. at 21. The court thereby allowed the defendant husband to raise the surviving agreement as a bar to the contempt proceeding. *See Knox v. Remick*, 371 Mass. 433, 438 (1976).

As we discussed *supra*, the cohabitation provisions of the separation agreement in this case did not survive as an independent contract. There is no agreement to be enforced in a contract action, only a court order enforceable in an action for contempt. The original court order for which enforcement is sought must have been within the court's discretion when made. As our discussion of the history of alimony jurisdiction, supra, makes clear, the court's discretion in ordering alimony is limited to the economic—not the social—circumstances of the parties. The parties cannot by their own agreement confer discretion on a court to issue an order not otherwise within its statutory authority. Where, as here, the sole issue raised is one of authority under the statute, the intent of the parties is irrelevant.

9 If the parties submit such a clause to the court for incorporation in the judgment, as was done in this case, the court should inform the parties that such an order is beyond the scope of its discretion. The court may then allow the parties an opportunity to renegotiate a proposed order to present to the court, or may incorporate in the judgment some or all of the allowable portion of the agreement. Nothing in today's decision, however, disturbs our holding in *Moore v. Moore*, 389 Mass. 21, 23–24 (1983), that the Probate Court may not order that a separation agreement shall not survive when the parties clearly intended that it should.

10 Under § 34, the court may consider the parties' conduct during the marriage as one factor in determining an alimony award, but may not base the award only on a spouse's blameworthy conduct. *See Rice v. Rice*, 372 Mass. 398, 401 (1977). After a divorce is final, a court may not condition alimony on either party's subsequent conduct. *See Zildjian v. Zildjian*, 8 Mass. App. Ct. 1, 17 (1979). Nor may a judge penalize either spouse for companionship with another person after the divorce is final.

11 The plaintiff also argues that enforcement of the cohabitation clause violates her rights under the Federal Constitution and the Massachusetts Declaration of Rights. Because that argument was not raised below, we do not reach or decide any of the constitutional issues.

On cross-appeal, the defendant argues that the judge erred in determining the plaintiff's date of remarriage under the terms of the judgment. In light of our disposition of the plaintiff's appeal, we need not consider this aspect of the cross-appeal. The defendant also argues on cross-appeal that the probate judge erred in awarding $4,000.00 in fees to the plaintiff's trial counsel in the contempt proceeding. Under Mass. R. Dom. Rel. P. 46 (1975), the defendant was obliged to "make [ ] known to the court . . . his objection to the action of the court and his grounds therefor." Although the defendant filed a motion for reconsideration after the judge's decision, there is no indication on the record that the defendant objected to the plaintiff's motion for counsel fees at the time the award was made. Therefore, the issue was not preserved for appeal. *Cassamasse v. J.G. Lamotte & Son, Inc.*, 391 Mass. 315, 320 (1984). Even if it had been, there is no showing—particularly in light of our disposition of the contempt complaint—that the award is incommensurate with an objective evaluation of the services performed or that the judge otherwise abused his discretion. *Ross v. Ross*, 385 Mass. 30, 38–39 (1982). *See Grubert v. Grubert*, 20 Mass. App. Ct. 811, 819–820 & n.15 (1985).

12 Rule 60(b) of the Massachusetts Rules of Domestic Relations Procedure provides: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken."

13 We need not decide whether, for purposes of rule 60(b), the time period during which a motion for relief from judgment can be filed should be measured from the date of entry of the judgment nisi or the judgment absolute.

14 Of course, either party is entitled to seek a modification of the judgment under G.L. c. 208, § 37, at any time that a material change of circumstances can be demonstrated.

SAVIDES v. SAVIDES
400 Mass. 250

Supreme Judicial Court of Massachusetts, Hampden.

Argued April 7, 1987.

Decided June 11, 1987.

John F. Wagner, Chicopee, for defendant.

Thomas A. Kenefick, III, Springfield, for plaintiff.

Before HENNESSEY, C.J., and WILKINS, LIACOS, LYNCH and O'CONNOR, JJ.

LYNCH, Justice. Joan L. Savides appeals from that part of the judgment of divorce of November 25, 1985, which determined the amount of the marital assets and divided them under G.L. c. 208, § 34. The Probate Court judge ordered that the wife receive the former marital home (valued at approximately $130,000 as of the date of the divorce), plus $245,000. He also ordered that she receive $250 per week in support payments. We transferred the case to this court on our own motion. We affirm.

The Probate Court judge found the following facts: Edward K. Savides and Joan L. Savides were married in 1956 and thereafter lived together through 1974. In early 1974, both parties began extramarital relationships. In October, 1974, Edward left the marital residence and moved in with his paramour. At the same time Joan's paramour moved in with her. With the exception of a few months when Edward lived with Joan while recuperating from an illness, Joan's paramour lived with her through the date of the hearing in 1985. For all intents and purposes the parties' marriage terminated in October, 1974, at which time both ceased to hold themselves out to the community as a married couple, and there was no further marital relationship after that time.

Between 1974 and 1983, Edward paid all Joan's living expenses and until 1982 provided her with $100 per week for food. He also left a $62,000 savings account with her, and Joan has had exclusive use of the marital home. In addition, Edward gave her money for travel, furnished her with a new motor vehicle, paid her medical expenses, and in general provided for her in a generous manner.

During the course of the marriage, Edward was engaged in automobile sales. He contributed all the finances to the marriage and through his investment skills and diligent work increased the parties' net worth. Joan was a homemaker and mother. Although she did not contribute financially to the estate of the parties, her contributions to the marriage were found equal to Edward's efforts up to October, 1974. After October, 1974, Joan contributed nothing to the acquisition of the assets. However, Edward's business grew substantially after October, 1974; at the time of the divorce his estate was valued at close to $5 million.

1. *Findings*. Joan argues that the Probate Court judge erred in finding the marriage to have effectively terminated in October, 1974. The uncontested facts demonstrate that both parties established separate relationships as described by the judge and ceased to hold themselves out to the community as husband and wife after October, 1974. None of the facts alluded to by the wife, most of which center around the husband's continuing generosity toward her after October, 1974, compels a finding that the marriage continued beyond that date. *See* Mass. R. Dom. Rel. P. 52(a). *Savides v. Savides*, 400 Mass. 250 (1987)

2. *Abuse of discretion*. The wife also contends that the evidence establishes her right to an equitable division of the marital property as it existed at the time Edward filed his complaint for divorce (1983) rather than as of 1974. Our review of a judgment pursuant to G.L. c. 208, § 34, proceeds under a two-step analysis. "First, we examine the judge's findings to determine whether all relevant factors in § 34 were considered." The second part of our review requires us to determine "whether the reasons for the judge's conclusions are apparent in his findings and rulings."

Bowring v. Reid, 399 Mass. 265, 267 (1987). *Redding v. Redding*, 398 Mass. 102, 107 (1986). Here the judge made findings on each of the factors enumerated in the statute as required. *Rice v. Rice*, 372 Mass. 398, 402–403 (1977). In addition, a review of the judge's findings makes clear the rationale for the property division. The judge did not, as the wife suggests, assign the marital property solely by reference to the date of the parties' separation. The findings make clear that the judge did consider events after the parties' separation, including their relationship and the husband's greatly increased estate, but concluded that the wife's contribution to marital property ceased in October, 1974.

The equitable factors which are to be considered under § 34 reflect a view of marriage as an implied partnership for the purposes of distribution of property. *See* Hennessey, Explosion in Family Law Litigation, Challenges and Opportunities for the Bar, 14 *Family L.Q.* 187, 189 (1980); Inker & Clower, Towards a New Justice in Marital Dissolution: The Massachusetts Statutory Scheme and Due Process Analysis, 16 *Suffolk U. L. Rev.* 907, 913 (1982); Inker, Walsh & Perocchi, Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts, 10 *Suffolk U. L. Rev.* 1, 9 (1975) (commenting that in assigning property under G.L. c. 208, § 34, "[i]f contribution is to be considered, failure to contribute must also be acknowledged"). In considering the increase in value of property after separation, it was not error for the judge to exclude the wife's participation in that increase where she made no contribution to the marriage after that time and the increase in value was solely attributable to the husband's efforts. *See Davidson v. Davidson*, 19 Mass. App. Ct. 364 (1985). Given the broad discretion conferred by § 34, we cannot conclude that the Probate Court judge's determination as to the property division was "plainly wrong and excessive" as would be required for reversal. *Bowring v. Reid*, *supra*, 399 Mass. at 267. *Redding v. Redding*, *supra*, 398 Mass. at 107.

Judgment affirmed.

ZEH v. ZEH
35 Mass. App. Ct. 260

No. 91-1097.

Appeals Court of Massachusetts, Norfolk.

Argued Dec. 15, 1992.

Decided Sept. 3, 1993.

Ruth E. Soybel, Waltham, for Lillian M. Zeh.

Ira D. Feinberg, Boston, for Stephen W. Zeh, Jr.

Before DREBEN, JACOBS and GREENBERG, JJ.

JACOBS, Justice. In this appeal from a divorce judgment entered in the Probate and Family Court, Lillian M. Zeh (wife), essentially claims that the judge was manifestly unfair in that he did not properly consider an inheritance of Stephen W. Zeh, Jr. (husband), and her contributions to the marriage in dividing their assets and awarding alimony pursuant to G.L. c. 208, § 34. She also argues that the judge erred in not making provision for health insurance coverage for her. We agree with her contentions, and accordingly vacate the financial components of the judgment and remand the case for further proceedings.

We recite the relevant facts from the judge's findings. The parties were married in 1964. They have two children, both adults at the time of the divorce hearing. After the birth of their second child in 1968, marital intimacy between the parties ended. "[T]he parties argued and on occasion were physically abusive to each other." The wife left the marital home and brought this action in August, 1988. The husband, a high school graduate, was self-employed during the marriage, managing residential property owned by him and his father. The wife, a college graduate, was employed throughout the marriage, first as a service representative for a telephone company and later in three part-time positions: meter maid, school crossing guard, and clerical worker. At the time of the divorce hearing in 1990, the wife was fifty-two years old and the husband fifty-six years old, and while each was experiencing physical ailments, both could continue their employment.

At the time of the divorce hearing, the husband's gross weekly income was $746.53, comprised of $394.77 in net rental income and $351.76 in dividends and interest, and the wife's gross weekly income was $410. The wife's net weekly earnings of $264.77 were insufficient to meet her weekly expenses of $406.41. The judge made no findings concerning the husband's needs other than that he was able to meet them and provide support for the wife. He also found that the husband had a gross estate of $603,820[1] and liabilities of $73,341, while the wife had an estate of $24,000, consisting almost entirely of future pension rights presently valued at $23,287, and liabilities of $32,417. In addition, approximately $11,000 of the husband's assets were being held in escrow by order of the court pending the outcome of the divorce action. The judge found that the wife was the primary caretaker of the children and the home during the marriage and utilized her earnings to purchase clothing for the children. She also did "some minor clean up work" and snow shovelling at the rental property managed by the husband. He found that the husband "took care of the children when the wife worked and took them camping and to baseball games." He characterized their station in life as "middle class."

From 1970 until the time of his death in 1984,[2] the husband's father supplemented the parties' income. In 1975, he made a gift of several apartment buildings in Brookline to the husband. The husband later sold two of these buildings, remitted half of the proceeds to his father and used the other half to purchase property in New York in his and his father's name. The remainder of the Brookline property was valued at $236,000 at the time of the divorce hearing. The parties utilized one of the apartments as their home, and the husband continued to live there after the wife left. Upon his father's death, in 1984, the husband became the sole owner of property in New York valued at

$178,000 at the time of the divorce. The husband's interest in other property in New York State jointly owned with his mother was valued at $165,000.

In the judgment of divorce, the judge awarded the wife a lump sum of $120,000 and weekly alimony of $100. The judgment also provided that the amount held in escrow be released to the husband and that he pay the wife's attorneys' fees in the amount of $10,000. The judgment contained no provision for health insurance for the wife.

The uncontradicted materials and evidence in the record indicate that the husband and his mother were nominated and appointed executors of his father's will, which was admitted to probate, without contest, in the State of New York on March 6, 1985; that the father's gross estate was valued at over one and one-half million dollars; and that the husband's legacy of a one-quarter interest in the residual estate was valued at $421,918.82. Notwithstanding the issuance of Federal and State estate tax closing letters in 1987, no explanation is contained in the record for the husband's legacy not having been distributed as of the time of the divorce hearing in October, 1990, nor for the nonpayment of accrued executor's fees owed to him in the amount of $40,389. Although the weekly dividend and interest income of $351.76 attributed to the husband by the judge in his findings emanated almost entirely from the father's estate, that fact is not mentioned in the findings, and the husband's share of the probate assets which generated that income is not included in the judge's listing of assets constituting the "estate" of the husband.

Aside from referring to the father's death in his findings and noting that the husband acquired certain real property in New York State as surviving joint owner, the judge does not make mention of any specific expectancies relating to inheritance beyond acknowledging that the husband "has a substantial opportunity to acquire further assets from the estate of his father, his fees as co-executor of that estate and an inheritance from his mother[3] . . ." and finding that "[t]he husband's estate is directly due to the generosity of his parents and the inheritance from the estate of his father."

In his statement of the theory for his conclusions the judge stated that "[t]he assets of this marriage were acquired as a result of gifts and/or inheritances from the husband's parents," and "[t]he wife contributed nothing to the acquisition of these assets." He further stated that the wife "will have sufficient money to meet her reasonable needs" from her earnings, alimony, and income from the lump sum of $120,000.

The applicable legal principles are well established. "Under G.L. c. 208 § 34, a judge has broad discretion to divide marital property equitably. *See Drapek v. Drapek*, 399 Mass. 240, 243 (1987). Of course, that discretion is not unlimited. *See Handrahan v. Handrahan*, 28 Mass. App. Ct. 167, 168 (1989), and cases cited. We require that judges dividing marital property make express findings indicating that all relevant factors under § 34 have been considered. *See Rice v. Rice*, 372 Mass. 398, 402–403 (1977). We also require that the reasons for the judge's conclusions must be apparent in his decision. *See Bowring v. Reid*, 399 Mass. 265, 267 (1987). A judgment dividing property that is 'plainly wrong and excessive' cannot stand. *See Redding v. Redding*, 398 Mass. 102, 107 (1986)." *Pare v. Pare*, 409 Mass. 292, 296 (1991). *See Early v. Early*, 413 Mass. 720, 727 (1992). "Contribution to the marital enterprise is a factor to be taken into account in what is a fair division of assets. . . . It is the duty of a reviewing court to consider whether the apportionment of assets flows rationally from the judge's findings under § 34." *Denninger v. Denninger*, 34 Mass. App. Ct. 429, 430–431 (1993), and cases there cited.

1. *The Inheritance*. While an expectancy of an inheritance does not qualify as property subject to division under G.L. c. 208, § 34, it may be considered by the judge under the "criterion of 'opportunity of each for future acquisition of capital assets and income' in determining what disposition to make of the property which is subject to division." *Davidson v. Davidson*, 19 Mass. App. Ct. 364, 374–375 (1985). *See* 2 Kindregan & Inker, *Family Law & Practice* § 883 at 481 (1990). An inheritance in possession clearly stands on different footing and constitutes part of the estate of the recipient subject to division under § 34. *Earle v. Earle*, 13 Mass. App. Ct. 1062, 1063 (1982). *Davidson v. Davidson*, *supra* at 374 & n.13. *Comins v. Comins*, 33 Mass. App. Ct. 28, 30 (1992).

In the circumstances of this case, the husband's inheritance from his father falls well within the category of assets subject to division. As a noncontingent legacy, it vested as of the date of the father's death. *See DiSanto v. Wellcraft Marine Corp.*, 149 A.D.2d 560, 562–563 (N.Y.1989); 6 Bowe & Parker, *Page on Wills* § 59.2 at 378–380 & supp. 1993 nn.10 & 11 (rev. ed. 1962). *See also Union Trust Co. v. Nelen*, 283 Mass. 144, 149 (1933); 2 Newhall, *Settle-*

*ment of Estate*s § 356 at 447 & n.6 (4th ed. 1958). A fair estimation of the size of the legacy appears to have been available at the time of the divorce hearing, which was conducted five and one-half years after the father's will had been admitted to probate. In the absence of evidence of claims against the estate or other unusual circumstances, there is no reason to treat the legacy other than as part of the "estate" of the husband and subject to equitable division under § 34. It falls more closely within the definition of "estate" as "includ[ing] all property to which [a spouse] holds title, . . . whenever and however acquired," *Rice v. Rice*, 372 Mass. at 400, than "a number of intangible interests (even those not within the complete possession or control of their holders)" which have been held to be part of a spouse's estate for purposes of § 34, such as "nonvested pension rights . . . rights in pending lawsuits . . . and rights under a contingent fee agreement. . . ." *Lauricella v. Lauricella*, 409 Mass. 211, 214 (1991). Our courts' expansive view of the marital estate of a party to a divorce includes a beneficial interest in a trust, notwithstanding that distribution of that interest has not occurred and may be conditioned on factors outside of the spouse's control. *Id.* at 216. *Davidson v. Davidson*, 19 Mass. App. Ct. at 371–372. *Comins v. Comins*, *supra* at 30. Moreover, the fact that the value of a vested, but not yet distributed, interest may not be susceptible of precise calculation "does not alter its character as a divisible asset." *Lauricella v. Lauricella*, *supra* at 217. *See Davidson v. Davidson*, 19 Mass. App. Ct. at 373 n.12.

The substance and tenor of the judge's findings lead us to conclude that he treated the husband's inheritance from his father's estate as nothing more than a mere expectancy and did not include it as part of the divisible estate of the husband. In context, his allusion to "inheritances" reasonably may be read as limited to interests acquired by the husband as surviving joint owner of real estate held by him and his father. If, as the husband contends, the judge included the inheritance as part of the husband's estate, the judgment would result in his having allotted to the wife less than nine percent of the divisible assets, a result which we might not allow to stand in the absence of valid reasons apparent in the judge's findings and rulings. *Bowring v. Reid*, 399 Mass. at 267.

2. *Contributions of the Parties*. In any event, we must consider the fairness of the judgment within the confines of the broad discretion permitted the judge. *Pare v. Pare*, 409 Mass. at 296. While appropriately taking into account the original source of the assets to be divided and the parties' contributions to their acquisition, *see Tanner v. Tanner*, 14 Mass. App. Ct. 922, 923 (1982), the judge appears to have attached inordinate importance—especially in light of the length of the marriage—to allowing the husband to retain wealth which was derived from his parents, *see Bacon v. Bacon*, 26 Mass. App. Ct. 117, 123 (1988) (Kaplan, J., concurring). Moreover, the judge's focus on the genesis of the assets, and the absence of any findings or rationale which reasonably could be read as factoring the correlative value of the wife's long term contributions as a homemaker into the decisional calculus are indicative of an unexplained turning away from the principle that "[t]he concept of property assignment or equitable division under G.L. c. 208, § 34, must be read to apply in a broad sense to the value of all contributions of the respective spouses towards the marital enterprise. . . ." *Putnam v. Putnam*, 5 Mass. App. Ct. 10, 17 (1977). "The underpinning of any order for division of property under § 34 is . . . the judge's consideration of the contributions, in the statutory terms, *of each spouse* . . ." (emphasis supplied). *Davidson v. Davidson*, 19 Mass. App. Ct. at 376. Once a judge gives weight to the discretionary statutory factor of spousal contributions, he is obliged to consider homemaking as well as financial efforts and to make apparent in his findings and rulings their effect, if any, upon his decision. The absence of significant advantage to either of the parties deriving from the findings relating to the other § 34 factors, coupled with the judge's unexplained uneven consideration of the contributions of each spouse, render the disparate apportionment of assets plainly unfair and outside the realm of acceptable discretion. The fact that the judgment provisions may meet the wife's basic needs does not preclude assessment of the fairness of the division of the assets of this long-term marriage, given both the apparent failure to weigh the effect of the wife's contribution as a homemaker and the size of the marital estate, as enhanced by the husband's inheritance from his father. *See Rosenberg v. Rosenberg*, 33 Mass. App. Ct. 903, 904 (1992).

3. *Health Coverage*. The health coverage provisions of § 34 are applicable to this case.[4] Once the judge ordered alimony on behalf of the wife,[5] he was obliged under those provisions to determine whether the husband had health insurance or other health coverage available to him through an employer or organization or whether such insurance or coverage was available to the husband at reasonable cost and, in any event, whether the benefits of that insurance or coverage could be extended to the wife. Upon determination of the availability of such insurance or coverage, the judge was further obliged to include in the alimony order a requirement that the husband either exercise an available option of additional coverage in favor of the wife or obtain coverage for her or reimburse her for the cost of health

insurance. Given these statutory requirements and the critical importance and expense of health insurance, a judge's findings and orders under § 34 expressly should reflect compliance with the statute and make provision for the requisite coverage or reimbursement.[6] The failure to make such findings and provisions in this case was error.

4. *Remand Order*. We vacate the financial components of the divorce judgment and remand the case to the Probate Court for further proceedings consistent with this opinion, including, in the discretion of the judge, presentation of additional evidence. Upon remand, the judge shall consider the estate of the parties as including the husband's inheritance under his father's will. He shall also make additional findings of fact explaining the effect, if any, of the wife's contribution as a homemaker to the family unit upon any conclusions reached by him. He shall also make a determination and findings with respect to health insurance or other health coverage for the wife pursuant to the last three sentences of § 34. The wife is to have the costs of this appeal.

So ordered.

Notes

1 This amount is independent of any assets in the probate estate of the husband's father. See infra.

2 The judge's findings list the death as occurring in 1984. The record indicates that the date of death was February 9, 1985.

3 While the record is silent as to the total financial worth of the husband's eighty-one year old mother, there is uncontradicted evidence that she inherited one-half of the residual estate of the father and that the value of her share of real estate jointly held with the husband was $165,000.

4 The last three sentences of § 34, inserted by St. 1988, c. 23, § 67, are as follows:

> "When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse."

The amendment inserting these sentences went into effect on April 21, 1988. The complaint for divorce was dated August 25, 1988, and the judgment was entered on November 19, 1990.

5 General Laws c. 208, § 17 (1990 ed.), provides in part that when a "court makes an order for alimony on behalf of a party, and such party is not a member of a private group health insurance plan, the court shall include in such order for alimony a provision relating to health insurance, which provision shall be in accordance with section thirty-four." We assume from the placement of this provision that it is applicable to temporary alimony orders entered during the pendency of a divorce action. *See* 2 Kindregan & Inker, *Family Law & Practice* § 907 (1990).

6 We note that the husband in his financial statement filed with the Probate Court listed a weekly expense of $50 for "Blue Cross/Blue Shield" for himself, his wife and their son. If this reference was to a group plan, the provisions of G.L. c. 175, § 110I, G.L. c. 176A, § 8F, and G.L. c. 176B, § 6B, may continue the wife's eligibility for benefits without additional premium payments until the remarriage of either party unless the divorce judgment otherwise provides. *See* 2 Kindregan & Inker, *Family Law & Practice* § 907 (1990).

O'BRIEN v. O'BRIEN (and a companion case[Note 1])
416 Mass. 477

October 6, 1993–December 6, 1993

Norfolk County

Present: LIACOS, C.J., WILKINS, ABRAMS, NOLAN, & O'CONNOR, JJ.

In an action by a former wife seeking modification of a support order entered against a former husband in which she had agreed to receive alimony payments that would expire approximately five and one-half years from the date of the judgment nisi, and to surrender any further claim against him, the judge, on the basis of findings that the wife was receiving public assistance and that the husband was capable of contributing to her support, correctly concluded that he should award support to the wife against the husband only to the extent necessary to remove her from public assistance; moreover, the judge's order concerning the husband's payment of uninsured medical expenses of the wife was reasonable, and the amount of attorney's fees awarded after a hearing was properly within the judge's discretion.

On appeal from dismissal of a claim for support made by a former wife against the second of her three former husbands, this court expressed the view that the probate judge's conclusion that the second husband's obligation to support his former wife ended when she married her third husband was a correct application of the general principle governing this case that, when a successor spouse is financially able to support the former recipient spouse, the former payor spouse is not obliged to contribute support payments (in the absence of an agreement to the contrary).

LIBEL for divorce filed in the Probate Court for the county of Norfolk on May 4, 1973.

COMPLAINT for divorce filed in the Norfolk Division of the Probate and Family Court Department on June 25, 1982.

COMPLAINTS for modification of support orders filed on August 23, 1989, November 21, 1989, and November 27, 1989, respectively, were heard by Charles J. Bowser, Jr., J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Christine A. Faro for Audrey A. O'Brien.

Jeffrey N. Moxon for Francis X. O'Brien.

Stephen D. Fried for John J. Casey.

WILKINS, J. In 1989, the plaintiff, Audrey A. O'Brien (Audrey), who was receiving public assistance, filed complaints against two of her three former husbands seeking modification of support orders entered against them in actions of divorce. In an order dated January 31, 1991, a judge in the Probate and Family Court Department granted relief to Audrey against her most recent and third husband, Francis X. O'Brien (Francis), and denied her relief against her next prior husband, John J. Casey (John).[Note 2]

Audrey has appealed because she disagrees with the extent of the relief she obtained against Francis and with the denial of any relief against John. Francis appeals claiming that the judge should not have granted any relief to Audrey and that, if he is to be obliged to contribute to Audrey's support, John should share the burden. We transferred the case to this court on our own motion. We affirm the judge's order. We shall first consider the judge's determinations of issues disputed between Audrey and her most recent husband, Francis. Then we shall consider the dismissal of the complaint against John.

Audrey and Francis were married in September, 1976. They had no children and were divorced in April, 1984, with the entry of a judgment entered pursuant to a settlement agreement that survived the judgment. The agreement required Francis to pay weekly alimony until early October, 1989. By the terms of the agreement Audrey surrendered all rights not set forth in the agreement. Francis is now retired and receives an annual civil service pension of $51,000. Before and since her divorce from Francis, Audrey has been employed in various jobs, but she has not worked since September, 1989. She has had health problems, but, as the judge was warranted in finding, she is capable of working at least part time. Finding that Audrey has become a public charge and that Francis is capable of

contributing to her support, the judge ordered Francis to pay alimony of $200 each week and up to $1,000 annually toward Audrey's uninsured medical bills. He also allowed attorney's fees to Audrey, but in an amount less than claimed.

1. The judge correctly concluded that he should award support to Audrey against Francis only to the extent necessary to remove her from public assistance. He structured an order which assumed that Audrey would work part time and under which, with the ordered alimony, she would not be dependent on public assistance for her basic needs. This order conformed to principles announced by this court. A separation agreement, fair and reasonable at the time of a judgment nisi, and constituting a final resolution of spousal support obligations, should be specifically enforced, absent countervailing equities. *See Stansel v. Stansel*, 385 Mass. 510, 514–516 (1982); *Knox v. Remick*, 371 Mass. 433, 436–437 (1976). If, however, a spouse who makes such an agreement becomes a public charge, a judge may order support pursuant to his statutory authority (G.L. c. 208, Sections 34, 37 [1992 ed.]), thereby not enforcing the separation agreement where to do so would impose support obligations on the taxpayers. *Knox v. Remick*, *supra*. *See Talbot v. Talbot*, 13 Mass. App. Ct. 456, 458–459 (1982). The result is that one spouse may not cast off by agreement a duty to support the other spouse when the other spouse is or becomes a public charge.

What we have said substantially disposes of both Audrey's and Francis's challenges to the support order. Audrey agreed to alimony payments that would expire approximately five and one-half years from the date of the judgment nisi, and at the same time she surrendered any further claim against Francis. In circumstances such as this, a court should override provisions of this type only to the extent necessary to prevent a former spouse from becoming a public charge.

The order concerning the payment of uninsured medical expenses was reasonable. The order for support and for the payment of medical expenses may be modified as needed to conform to the standard that governs Francis's support obligations. The amount of attorney's fees awarded after a hearing was properly within the judge's discretion. *Brash v. Brash*, 407 Mass. 101, 106 (1990).

2. The judge properly dismissed the claim for support made against John, the next prior husband. We are not concerned here with the question of Audrey's rights against John if Francis were deceased or unable to provide adequate support for Audrey. We are, however, concerned with the question whether John at least should share the burden with Francis.

Audrey and John were married from 1968 to 1973. They had no children. In June, 1973, a decree nisi of divorce incorporated an agreement which provided for a weekly alimony payment of $225 to Audrey. It does not appear that the agreement survived the entry of the decree or that it stated the limits of Audrey's rights to future support. In September, 1975, Audrey and John agreed to modify the weekly support obligation to $125. In October, 1976, the two agreed that John would pay Audrey a lump sum of $5,000 as "payment in full for all past, present, and future claims by Audrey against John for support and property settlement." Audrey had already married Francis in the previous month. It does not appear that this agreement was reflected in any modification of the 1973 decree of divorce. At the time of trial in 1990, John had substantial assets and an annual income much greater than that of Francis.

The judge's conclusion that John's obligation to support Audrey ended when she married Francis was a correct application of a general principle that governs this case. Our cases have not announced a hard and fast rule, however, that, absent an agreement to continue support, remarriage always terminates the support obligations of a prior spouse. In *Southworth v. Treadwell*, 168 Mass. 511, 512–513 (1897), the court held that remarriage was a material change of circumstances giving one a right to look for support from the new spouse and that "[i]n the absence of proof that this right was not adequate to all her needs" (*id*. at 513), a decree effectively eliminating the former wife's alimony by reducing it to a nominal sum was warranted. *Cf. Surabian v. Surabian*, 362 Mass. 342, 346–347 (1972) (decree incorporating separation agreement that automatically terminated alimony as of date of remarriage properly may be entered even if remarriage is later annulled; question left open whether support order properly could be modified after purported remarriage was annulled); *Glazer v. Silverman*, 354 Mass. 177, 180–181 (1968) (statutory right in annulment proceeding to obtain award of alimony against bigamous spouse bars enforcement of agreement for support by former payor spouse which by its terms ends when former recipient spouse goes through marriage ceremony).[Note 3]

This court has not recently visited the general question of the automatic termination of alimony upon the remarriage of a spouse who has been receiving alimony. It does so in this case only to say that, when a successor spouse is financially able to support the former recipient spouse, the former payor spouse is not obliged to contribute support payments (in the absence of an agreement to the contrary).

The various challenged orders and judgments in this case are affirmed.

So ordered.

FOOTNOTES

[Note 1] *Audrey A. O'Brien vs. John J. Casey*.

[Note 2] Audrey was married to Raymond Jordan from 1951 until their divorce in 1953.

[Note 3] The majority rule in this country is that remarriage automatically terminates all alimony obligations to the remarried spouse. *See* Annot., Alimony as Affected by Wife's Remarriage, in Absence of Controlling Specific Statute, 48 *A.L.R.2d* 270 (1956 and later case service [1992]); Frumkes, The Impact of Remarriage on Alimony, in *Alimony: New Strategies for Pursuit and Defense*, 1988 *ABA Sec. Fam. L.* 108–109. The result would be otherwise if there were a clear agreement that alimony would not terminate on remarriage. Frumkes, *supra* at 110. Almost all States that do not make termination of alimony automatic on remarriage treat a remarriage as a strong presumption or prima facie case in favor of termination. *Id*. at 109–110.

FLAHERTY v. FLAHERTY
40 Mass. App. Ct. 289

February 8, 1996–April 12, 1996

Middlesex County

Present: WARNER, C.J., KASS, & PORADA, JJ.

In a divorce action, the judge's attribution of income to the husband underlying the order of child support was not supported by findings of fact: the matter was remanded for specific and detailed findings.

COMPLAINT for divorce filed in the Middlesex Division of the Probate and Family Court Department on July 5, 1993.

The case. was heard by Judith Nelson Dilday, J., and a proceeding for contempt, commenced on October13, 1994, was heard by Fernande R.V. Duffly, J.

John M. Flaherty, pro se.

Rudolf A. Jaworski, Jr., for Nancy M. Flaherty.

WARNER, C.J. In August, 1994, the parties were divorced by a judgment nisi that required the husband to pay child support of $400 per week. The husband appeals, claiming the support order was based on an attribution of earnings unsupported by the judge's findings. He also challenges a finding of civil contempt based on his payment of less than $400 per week in child support. As the judge's findings were inadequate to support the child support and remand for further findings. We therefore also vacate the judgment of contempt *see Dominick v. Dominick*, 18 Mass. App. Ct. 85, 93–95 (1984); and reinstate the husband's prior support obligation under the temporary order ($115).[Note 1]

The husband, forty-six years old at the time of trial, is a well-educated professional with a Ph.D. in physics. Some two months prior to the divorce trial, the husband was laid off from his job where he earned approximately $1,200 per week. At the time of trial, he was receiving $375 per week in unemployment benefits. He had prepared a resume and was readying himself to seek new employment.

Before final judgement entered, the husband was paying child his obligation under the Child Support Guidelines (1989) based on his actual unemployment income of $375 per week. In her proposed judgment, the wife requested child support in the amount of $400 per week. This amount was based on a computation attributing to the husband full-time employment income of $1,211.54 a week.

In the judgment of divorce nisi, the judge ordered the husband to pay $400 per week in child support. In her findings of fact, the judge concluded that "[t]he husband has the ability, based on his skills and experience, to acquire future capital and income." She made no specific findings in support of this general conclusion. In an amendment to the judgment of divorce nisi, the judge ordered that "[t]he obligation [to pay $400] begins on the date of this judgment because income greater than unemployment compensation is attributed to the husband."

Despite the judge's order, the husband continued to pay $115 per week in child support. On November 7 1994, the husband was found in contempt by another judge for failure to pay $400 per week in child support. He was ordered to pay $7,098 to the wife for past due and future child support.[Note 2]

The earning capacity rather than the actual income of a parent may be considered in determining child support orders. *Canning v. Juskalian*, 33 Mass. App. Ct. 202, 206 (1992). Guideline II-H of the Child Support Guidelines provides, however, the court first must make "a determination that either or both parties is earning substantially less than he or she could through reasonable effort. . . .

In keeping with the guidelines, a judge should determine by specific and detailed findings of fact whether an individual will be able to earn additional income with reasonable effort before attributing income.[Note 3] Attribution of income may be appropriate when a judge determines a career change is voluntary, *see Schuler v. Schuler*, 382 Mass. 366, 371–372 (1981); *Canning v. Juskalian*, 33 Mass. App. Ct. at 204; *Bassette v. Bartolucci*, 38 Mass. App. Ct. 732, 735–736 (1995), or where a party fails to take another job despite its easy availability. *See Schuler v. Schuler*, *supra* at 371 (husband testified that he could readily obtain position as engineer, but wanted to be president of small corporation). A party's ownership of substantial assets also may be weighed in determining whether attribution is proper. *Id*. at 372. Where, however, as here, there is no evidence that a change in job status was voluntary, the party is making a reasonable effort to secure additional income, and he or she has no additional assets with which to pay the increased support order, child support orders must be based upon present income. *Cf. Goldman v. Goldman*, 28 Mass. App. Ct. 603, 613 (1990) ("Where future events cannot be predicted with any measure of certainty, an alimony award should be based on present conditions").

The order of child support in the judgment of divorce nisi is vacated; in all other respects, the judgement is affirmed. The judgement of contempt is vacated. The judge shall file in this court further findings in accordance with this opinion within thirty days of the rescript in this appeal. The parties shall have twenty days after such filing to submit, in letter form not to exceed fifteen pages, memoranda addressing the further findings. We retain jurisdiction of this case, and upon receipt of the memoranda, we will make such further orders as seem desirable. *See In the Matter of R.H.*, 35 Mass. App. Ct. 478, 493–494 (1993).

So ordered.

FOOTNOTES

[Note 1] In addition to challenging the award of child support, the husband challenges the award of physical custody to the wife and the division of marital assets. We conclude that the judge's findings in these respects have not been shown to be clearly erroneous and that there was no abuse of discretion. *Caldwell v. Caldwell*, 17 Mass. App. Ct. 1032 (1984); *Matteson v. Matteson*, 23 Mass. App. Ct. 945, 945–946 (1986). Mass. R. Dom. Rel. P. 52(a), as amended (1987). *Cf. New England Canteen Serv., Inc. v. Ashley*, 372 Mass. 671, 675 (1977); *Gallagher v. Taylor*, 26 Mass. App. Ct. 876. 880–881 (1989).

The husband further challenges the visitation order to which he agreed in the stipulation. To change visitation he must file a complaint for modification and demonstrate that a material and substantial change has occurred and that a change would be in the best of the children. G.L. c.208, s. 28.

[Note 2] The husband had been holding $7,000 for payment of the wife's attorney's fees in accordance with the divorce judgment. Although we are vacating the contempt judgment, the $7,000 will remain with the wife but should be applied by the wife to the payment of her attorney's fees.

[Note 3] The guidelines state that they "are intended to be applied where a finding has been made that the party is capable of working and is unemployed, working part-time or is working a job, trade, or profession other than that for which he/she has been trained." Guideline II-H.

DEMATTEO v. DEMATTEO
436 Mass. 18

October 2, 2001–February 8, 2002

Plymouth County

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

Divorce and Separation, Separation agreement, Attorney's fees. Contract,

Antenuptial agreement. Husband and Wife, Antenuptial agreement.

Evidence in a divorce proceeding did not warrant a Probate and Family Court judge's conclusion that an antenuptial agreement was not valid at the time of its execution, where the wife was fully informed of the financial worth of her prospective husband before she executed the agreement; where the wife recognized that marriage conferred certain rights, and that she waived those rights by signing the agreement; and where the judge's findings did not support a conclusion that the agreement was not fair and reasonable when it was executed, even though a judge might have awarded the wife a significantly larger share of the marital estate under G.L. c. 208, s. 34.

Evidence in a divorce proceeding did not warrant a Probate and Family Court judge's conclusion that an antenuptial agreement was not enforceable at the time of the divorce trial, where, applying a "conscionability" standard to the agreement, there were no circumstances that had occurred during the marriage that would have left the wife without sufficient property, maintenance, or appropriate employment to support herself if the agreement was enforced.

In a divorce proceeding, the judge was well within her discretion in ordering the husband to pay the wife's attorney's fees during the pendency of litigation to enable her to defend the action and to contest the validity and enforceability of an antenuptial agreement, and the case was remanded for a determination of the fees for the wife's attorney not incommensurate with an objective evaluation of the services performed.

COMPLAINT for divorce filed in the Plymouth Division of the Probate and Family Court Department on March 13, 1998.

The case was heard by Catherine P. Sabaitis, J.

The Supreme Judicial Court granted an application for direct appellate review.

Jacob M. Atwood (Mark T. Smith & David E. Cherny with him) for the plaintiff.

Peter F. Zupcofska (Fiona S. Trevelyan with him) for the defendant.

MARSHALL, C.J. At issue in this appeal is the validity of a judgment in the Probate and Family Court that an antenuptial agreement is not enforceable. The judge concluded that the agreement was not fair and reasonable either at the time it was executed or when the husband sought its enforcement on commencing a divorce action nearly eight years after the parties were married. The husband appealed and we granted his application for direct appellate review. On appeal he challenges the judge's order as to the enforceability of the antenuptial agreement and her order that he pay the wife's attorney's fees.[Note 1] We hold that the evidence did not warrant a conclusion that the antenuptial agreement is unenforceable, and reverse so much of the judgment to that effect. We affirm so much of the judgment as orders the husband to pay the wife's attorney's fees, but remand the case to the Probate and Family Court for a determination of the amount to be paid.

1. *Factual background.* The circumstances in which the parties' antenuptial agreement was negotiated and executed were as follows.[Note 2] M. Joseph DeMatteo (husband) and Susan J. DeMatteo (wife) were married on March 23, 1990. At the time the husband was forty-seven years old, and the wife was forty-one years old. They had known each other as adolescents and had dated occasionally in the 1970's. In 1987, they renewed their earlier acquaintance. In 1989, the husband proposed marriage. He did so on condition that the wife sign an antenuptial agreement. She agreed to do so. This was to be the husband's first marriage, and the wife's second. The wife had a daughter, born in 1983, from her first marriage. Until shortly before her second marriage in 1990, the wife lived with her daughter in a rented two-bedroom house in Dedham. She worked as a secretary earning approximately $25,000 a year, owned no real property, and had few assets. In contrast, the husband was a wealthy individual. He had a substantial ownership interest in his family's construction business; this and other real estate holdings and investments established him as a

man of significant net worth, described more fully below. It is undisputed that the wife knew that her future husband was a man of considerable wealth, and that the husband knew that his future wife had few financial assets.

During the fall and winter of 1989-1990, the wife and the husband discussed the terms and necessity of an antenuptial agreement. The judge found that, although he was not "overbearing," the husband was "very clear that such an agreement was necessary." At the husband's urging, the wife retained independent legal counsel—Ann C. Palmer—to represent her in negotiating the agreement. Palmer was recommended to the wife by a friend. The husband was represented by his business counsel, Joel Lewin.

In February and March, 1990, Lewin and Palmer spoke several times and Lewin sent Palmer a draft antenuptial agreement. The draft provided, among other things, that if the marriage terminated by legal proceedings, including separation or divorce, the wife would receive the marital home free of encumbrance, the automobile that she was then driving, and an annual payment from the husband of $25,000 until her death or remarriage. On Palmer's advice, the wife did not accept these terms. Palmer sent a letter to Lewin rejecting the draft; she also requested full disclosure of the husband's assets. In response, Lewin delivered to Palmer the husband's tax returns for 1984 through 1988 and a current financial statement showing the husband's net worth to be between $83 million and $108 million. The husband's interests in his family's construction business comprised a majority of his assets. The wife made no further inquiries regarding the husband's assets and has not claimed that the husband's financial disclosures made before she signed the antenuptial agreement were incomplete, inaccurate, or misleading.[Note 3]

On receipt of the husband's financial disclosures, Palmer consulted further with her client. She then informed Lewin that her client required that the husband increase the annual payments to the wife to $35,000, adjusted annually for increases in the cost of living. She also requested medical insurance, life insurance, and the lesser of twenty per cent of the husband's estate or $5 million. The husband rejected these requests. Further negotiations followed, the details of which are not necessary to describe, except to note that the wife dropped her demand for the lesser of twenty per cent of the husband's estate or $5 million in the event that the marriage was terminated by divorce.

The parties executed the agreement on March 21, 1990. The agreement, fifteen pages long, to which the parties' respective statements of assets were attached and incorporated,[Note 4] contains provisions concerning the disposition of their separate assets on death[Note 5] or if the marriage was "terminated or interrupted by divorce or other legal proceedings" during their lifetimes, disposition of liabilities, and numerous other provisions concerning such issues as breach, modifications, and choice of law. The agreement also contains provisions concerning waiver,[Note 6] "fairness,"[Note 7] warranties about legal advice,[Note 8] and child support "if any children shall be born of their marriage."[Note 9]

Concerning termination of the marriage on divorce, the agreement provided that the wife would receive the marital home free of encumbrance,[Note 10] yearly support of $35,000 until her death or remarriage with an annual cost-of-living increase,[Note 11] an automobile, and medical insurance until her death or remarriage. All property jointly acquired during the marriage would be divided between the parties in equal shares.

Both attorneys were present when the parties executed the agreement and the signing was recorded on videotape. The recording shows the husband's attorney reciting the terms of the agreement and the parties communicating their understanding of and consent to those terms. The parties acknowledge they have received advice from counsel of their choice, that they understand their rights in the absence of the agreement, and that they each have read the other's financial disclosures.

2. *Procedural background.* On March 13, 1998, the husband filed a complaint for divorce under G.L. c. 208, § 1B, alleging that the marriage was irretrievably broken down and seeking enforcement of the antenuptial agreement. The wife denied that the marriage was irretrievably broken down and challenged the enforceability of the agreement. The judge allowed the husband's motion to bifurcate the trial to consider first the validity and enforceability of the agreement. There followed three days of testimony solely on that issue. On February 12, 2001, the judge issued comprehensive findings of fact, conclusions of law, and a judgment that the antenuptial agreement was "not fair and reasonable at the time of its execution and is not fair and reasonable at the present time, and therefore may not be

enforced." Because it elucidates our discussion of the issues, we describe in some detail the judge's rulings of law and her supporting analysis; her findings are summarized above.

The judge considered whether the agreement was fair and reasonable. *See Osborne v. Osborne*, 384 Mass. 591, 599 (1981). Without differentiating between fairness at the time of execution and fairness at the time of the trial, the judge concluded that the agreement was neither fair nor reasonable at either point in time. She based her determination on "the entirety of the financial settlement" to the wife, on what she termed "the lack of substantial negotiations involved before the agreement was executed," the "sophistication of the issues involved," and "the lifestyle of the parties during the marriage and the vast disparity between the parties' ability to acquire future assets and income."

Addressing the claims of the wife, the judge placed no reliance on her assertion that she was incapacitated at the time she executed the agreement. She found that the wife did not suffer from any incapacity due to any health reasons at the time, nor did she lack "education or business acumen to appreciate the significance of what she was doing," as the wife had also claimed. The judge did not credit the wife's contention that she signed the agreement under duress: "If she was under as much duress as she claimed to be, it was not at all apparent" on the video taped recording."[Note 12]

Concerning the negotiations preceding the agreement's execution, the judge found that there was "complete financial disclosure by both parties." She nevertheless pointed to what she characterized as "minimal" negotiations prior to the agreement's execution, noting that "the financial and legal issues involved in this case were quite complex." The judge concluded that the wife "did not fully explore all the options available to her, nor was there any real discussion with her about either the consequences of this agreement or the possible results after a [G.L. c. 208,] § 34 hearing." She gave no weight to the fact that the wife was represented by independent counsel, noting only that the wife did not "discuss with her counsel what she might anticipate in terms of an appropriate financial settlement in the even[t] of a divorce." The judge found that the wife was "aware of the criteria considered by the Court under [§] 34,"but that "there was [no] real explanation of its application to her case."[Note 13]

Turning to other factors, the judge also noted that "in view of the fact that this is a ten year marriage which produced two children," the settlement for the wife was "less than modest." She pointed to the "financial holdings" of the husband, the parties' "lifestyle during the marriage," and the husband's "ability to acquire . . . significant assets" as compared to the wife, whose ability to acquire assets she termed "vastly inferior" to that of the husband.

In reaching her conclusion the judge explicitly relied on the "fair and reasonable" test as elaborated by the Appeals Court in *Dominick v. Dominick*, 18 Mass. App. Ct. 85 (1984), a decision concerning the enforceability of a separation agreement. She reviewed the factors listed in that case[Note 14] to conclude that the antenuptial agreement at issue here was unenforceable. The *Dominick* case, she noted, permitted her to consider the mandatory and discretionary factors in G.L. c. 208, § 34, governing the assignment of assets by a judge in divorce proceedings.[Note 15] Thus, the judge pointed to the length of the marriage, station, amount and source of income, employability, estate, and the needs of each party and the opportunity of each for future acquisition of assets and income. The judge also noted that "[a] divorcing party's needs are to be measured by the standard of living enjoyed during the marriage, not by whether a proposed allocation would enable the party to merely survive or even to live comfortably," citing *Rosenblatt v. Kazlow-Rosenblatt*, 39 Mass. App. Ct. 297, 301 (1995). In that connection, the judge stated that, "[a]lthough they lived in a manner more frugally than their income required," the parties "lacked no comfort or convenience, and their lifestyle was by choice rather than necessity." She noted that the couple had spent money "on trips, jewelry, home and yard maintenance, outside help and other things that made life easier and actually, more luxurious," and that "[t]here were no limits placed on their personal spending." Finally, the judge concluded that an agreement will be "struck down" if there are countervailing equities to its enforcement or if it contains representations not supported in the record, even if the agreement recites that it was entered into knowingly by the parties, who were advised of their rights by independent counsel, citing *Stansel v. Stansel*, 385 Mass. 510, 514–515 (1982), and *Randall v. Randall*, 17 Mass. App. Ct. 24, 31 (1983).

3. *Enforceability of the antenuptial agreement*. In *Osborne v. Osborne*, 384 Mass. 591, 598 (1981), we held that it is permissible for parties contemplating marriage to enter into an antenuptial contract settling their alimony or property rights in the event their marriage should prove unsuccessful. Noting that the freedom to limit or waive those rights in

the event of divorce is not unrestricted, we set forth "some guidelines to be used in determining the extent to which such agreements should be enforced."[Note 16] *Id*. at 599. First, a judge must determine whether an antenuptial agreement is valid. Second, "the agreement must be fair and reasonable at the time of entry of the judgment nisi." *Id*.

As to whether an agreement is valid, we adopted the "fair disclosure" rules announced in *Rosenberg v. Lipnick*, 377 Mass. 666 (1979), where we considered the validity of an antenuptial agreement settling property rights on the death of a party. Under those rules, a judge must determine whether the agreement:

"(1) . . . contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth" (footnote omitted). *Id*. at 672.[Note 17]

A

We first examine the judge's conclusion that the antenuptial agreement in this case was not valid at the time of execution. The application of the second and third *Rosenberg* rules to the evidence will be disposed of first.[Note 18] It is clear that the wife was "fully informed" of the worth of her prospective husband before she executed the agreement. The judge found that there was "complete financial disclosure" by both parties, and it is undisputed that the wife was apprised that her prospective husband had a net worth between $108 million and $133 million; the husband gave the wife a detailed statement of his net worth, which he later supplemented. See note 4, *supra*. He also acceded to her request and provided her with copies of his income tax returns for the most recent five years.

Full and fair disclosure of each party's financial circumstances is a significant aspect of the parties' obligation to deal with each other "fairly and understandingly" because they stand in a confidential relationship with each other. *Rosenberg v. Lipnick*, *supra* at 673. While we have not elaborated on the point, it seems clear that it is sufficient that the disclosure be such that a decision by the opposing party may reasonably be made as to whether the agreement should go forward.[Note 19] *See, e.g.*, *In re Estate of Lopata*, 641 P.2d 952, 955 (Colo. 1982) (fair disclosure "is not synonymous with detailed disclosure," but "contemplates that each spouse should be given information, of a general and approximate nature, concerning the net worth of the other"); *Button v. Button*, 131 Wis. 2d 84, 95 (1986) (requiring "fair and reasonable disclosure [of] financial status").

The wife claims that the negotiations were compressed in time and that she did not receive disclosure of the husband's assets until two weeks before the parties executed the agreement. There is no evidence that time precluded the wife from exploring her options. The judge found the husband was not "overbearing"; he issued no ultimatum at the last moment.[Note 20] The wife plainly had sufficient knowledge of her future husband's worth to make an informed decision as to whether she wished to consent to the agreement. What the judge characterized as "minimal negotiations" are circumstances insufficient to invalidate the agreement. The parties reached agreement after full disclosure of their respective financial positions and after negotiations during which they exchanged offers and counteroffers. The second *Rosenberg* rule is satisfied.

As to the third rule, that the agreement set forth a waiver by the contesting party of his or her rights, this agreement did just that, providing a waiver by the wife of all spousal rights, except those specifically provided in the agreement. See note 6, *supra*. The wife did challenge the agreement's validity, raising defenses of lack of capacity and duress, but the judge did not credit her evidence on those issues. See note 12, *supra*. The findings on this point are fully supported by the evidence.

Moreover, the parties were each represented by independent counsel. The judge found that the wife's attorney had informed her client that, by signing an antenuptial agreement, "she gave up her right to have the Court make an assignment of property to her."[Note 21] The judge found that the wife "initiated little discussion" with her attorney concerning the agreement, did not "assert herself regarding any changes" to the draft agreements, and "did not discuss" what she "might receive by way of property division from the Court in the event of a divorce." However, the wife selected her own counsel, and she cannot now attack the agreement on the ground that her counsel was not sufficiently sophisticated in matters of antenuptial agreements.[Note 22] Nor can the wife take advantage of her own failure

to question her counsel more fully about the legal consequences of signing the antenuptial agreement and thereby avoid the agreement.[Note 23]

Waiver is important because it underscores that each party is exercising a meaningful choice when he or she agrees to give up certain rights in anticipation of marriage. It was therefore correct for the judge to consider such factors as whether each party was represented by independent counsel, the adequacy of the time to review the agreement, the parties' understanding of the terms of the agreement and their effect, and a party's understanding of his or her rights in the absence of an agreement. *See Button v. Button*, *supra* at 95–96. *See also Rinvelt v. Rinvelt*, 190 Mich. App. 372, 376–379 (1991) (agreement must be "entered into voluntarily, with full disclosure, and with the rights of each party and the extent of the waiver of such rights understood"). But the evidence does not support a conclusion that the wife's waiver of her rights was not meaningful. However minimal her inquiries to her counsel, the failure to explore more fully with her lawyer the effect of signing the agreement is chargeable to her (or her lawyer), not the husband.[Note 24] The wife recognized that marriage conferred certain rights, and that she waived those rights by signing the agreement. The third *Rosenberg* rule is satisfied.

We turn finally to the first *Rosenberg* rule, the requirement that an antenuptial agreement contain a "fair and reasonable provision" for the contesting party, measured at the time of execution. The application of this legal standard to the parties' agreement was vigorously contested at trial, as it is on appeal.

In *Rosenberg v. Lipnick*, *supra* at 672, we said that it is permissible to consider "the parties' respective worth, the parties' respective ages, the parties' respective intelligence, literacy, and business acumen, and prior family ties or commitments." We noted, however, that "the reasonableness of any monetary provision in an antenuptial contract cannot ultimately be judged in isolation." *Id.* On the one hand, any examination of the validity of an antenuptial agreement must respect the parties' freedom to contract. The Legislature has recognized that antenuptial agreements settling property rights on marriage serve the useful function of permitting the parties to arrange their financial affairs as they best see fit. *See* G.L. c. 209, § 25.[Note 25] We recognize those same interests. *See Osborne v. Osborne*, 384 Mass. 591, 598 (1981) ("There is no reason not to allow persons about to enter into a marriage the freedom to settle their rights in the event their marriage should prove unsuccessful, and thus remove a potential obstacle to their divorce"); *Rosenberg v. Lipnick*, *supra* at 673 ("The right to make antenuptial agreements settling property rights in advance of marriage is a valuable personal right which courts should not regulate destructively"). On the other hand, the State has an interest in protecting the financial interests of spouses when they divorce. Marriage is not a mere contract between two parties, but a legal status from which certain rights and obligations arise. *See French v. McAnarney*, 290 Mass. 544, 546 (1935). *See also Button v. Button*, *supra* at 94. It was for this reason that we determined that the freedom to limit or waive legal rights in the event of divorce "is not appropriately left unrestricted." *Osborne v. Osborne*, *supra* at 599.

To meet the requirement of "fair and reasonable," at the time of execution an antenuptial agreement need not approximate an alimony award and property division ruling a judge would be required to make under G.L. c. 208, § 34. Judged by those statutory requirements, the parties' right to settle their assets as they wish would be meaningless. The relinquishment of claims to the existing assets of a future spouse, even if those assets are substantial, also does not necessarily render an antenuptial agreement invalid. An antenuptial agreement may be most desired when a wealthy individual contemplating marriage seeks to ensure that, if the marriage is not successful, his or her own assets will not accrue to the spouse. Many valid agreements may be one sided, and a contesting party may have considerably fewer assets and enjoy a far different lifestyle after divorce than he or she may enjoy during the marriage. It is only where the contesting party is essentially stripped of substantially all marital interests that a judge may determine that an antenuptial agreement is not "fair and reasonable" and therefore not valid. *Cf. French v. McAnarney*, *supra* at 546–548.[Note 26] Where there is no evidence that either party engaged in fraud, failed to disclose assets fully and fairly, or in some other way took unfair advantage of the confidential and emotional relationship of the other when the agreement was executed, an agreement will be valid unless its terms essentially vitiate the very status of marriage. Our test of "fair and reasonable" is not the same as the test of "unconscionability" that has been adopted in other jurisdictions. *Upham v. Upham*, 36 Mass. App. Ct. 295, 301 (1994). We agree with the reasoning of the Appeals Court in *Upham* that while there may be substantial overlap between the standards, a standard of unconscionability generally "requires a greater showing of inappropriateness." *Id.*, citing 3 Lindey, *Separation Agreements and Antenuptial Contracts* § 90.07 (1993). *See Brash v. Brash*, 407 Mass. 101, 106 (1990) (separation agreement

deemed "not . . . fair and reasonable and, in fact, . . . unconscionable"). A number of States have adopted a test of unconscionability. *See, e.g.*, *Scherer v. Scherer*, 249 Ga. 635, 641 (1982); *Gentry v. Gentry*, 798 S.W.2d 928, 936 (Ky. 1990); *Ferry v. Ferry*, 586 S.W.2d 782, 786 (Mo. Ct. App. 1979); *MacFarlane v. Rich*, 132 N.H. 608, 614, 616–617 (1989).[Note 27] The standard of unconscionability measured at the time of an antenuptial agreement's making was also adopted in the Uniform Premarital Agreement Act.[Note 28] 9C *U.L.A.* 35 (Master ed. 2001). On the other hand, our "fair and reasonable" test is consonant with the standard recognized in a number of other States. *See, e.g.*, *Ex parte Walters*, 580 So. 2d 1352, 1354 (Ala. 1991); *Harbom v. Harbom*, 134 Md. App. 430, 443 (2000), quoting *Hartz v. Hartz*, 248 Md. 47, 63 (1967) (antenuptial agreement upheld if agreement was "fair and equitable under the circumstances"); *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 267–268 (Minn. 1989) (agreement must be substantively fair at the time of execution and at the time of enforcement); *Matter of the Estate of Crawford*, 107 Wash. 2d 493, 496 (1986) ("if the agreement makes a fair and reasonable provision for the party not seeking its enforcement, the agreement may be upheld").

We see no reason to replace our standard of "fair and reasonable" when we test the validity of the agreement at the time of execution with a standard of "unconscionability." As noted by the commissioners, the unconscionability standard was adopted in the Uniform Act in part because it "is used in commercial law, where its meaning includes protection against one-sidedness, oppression, or unfair surprises . . . and in contract law." 9C *U.L.A.* 49–50 at comment, quoting Commissioner's Note, Uniform Marriage and Divorce Act § 306, 9A (Part I) *U.L.A.* 249 (Master ed. 1988). Antenuptial agreements by their nature concern confidential relationships, and a standard for testing the validity of a business agreement seems to us inappropriate in this context.

We turn to examine the judge's analysis in this case of the fairness and reasonableness of the agreement at the time it was executed. In making her determination, the judge considered the factors enumerated in *Dominick v. Dominick*, 18 Mass. App. Ct. 85, 92 (1984),[Note 29] as well as some of the factors listed in G.L. c. 208, § 34. The judge also emphasized the parties' lifestyle and standard of living during their marriage, relying on *Rosenblatt v. Kazlow-Rosenblatt*, 39 Mass. App. Ct. 297, 301 (1995). We agree with the husband that the judge applied the incorrect legal standard. The considerations that permit a judge to conclude that a separation agreement is "fair and reasonable" are different from those that permit a judge to conclude that an antenuptial agreement is "fair and reasonable." Parties to a separation agreement are joined in marriage. On termination of their marriage, it is entirely appropriate that the statutory factors that govern the award of property and support should inform, in part, the fairness and reasonableness of a separation agreement. The separation agreement is, after all, a substitute for the independent application by a judge of those same statutory factors. An antenuptial agreement, in contrast, permits the parties to define the material aspects of their relationship before they enter into the status of marriage. If the terms of a proposed antenuptial agreement are unsatisfactory, a party is free not to marry. *See* C.P. Kindregan, Jr., & M.L. Inker, *Family Law and Practice* § 20.10, at 661 (2d ed. 1996) ("If antenuptial agreements are to have any standing under which the parties can rely on them as an effective settlement of their financial interests, then it is clear that a trial judge cannot simply base the judgment nisi on the same factors set out in [G.L. c. 208, § 34]").

Applying the correct legal standard, we conclude that the judge's findings do not support a conclusion that the agreement was not fair and reasonable when it was executed. Substantively, the agreement provided that in the event of divorce the husband would continue to provide for the wife's support and her health insurance until her death or remarriage; she would also have housing (the marital home) and transportation. These provisions do not strip the wife of her marital rights. In fact, they leave her in a better economic position than she had before the marriage. The first *Rosenberg* rule is therefore satisfied. That a judge might have awarded her a significantly larger share of the marital estate under G.L. c. 208, § 34, does not render the agreement unfair and unreasonable at the time of its execution. We recognize that the standard of living the wife will be able to enjoy after any divorce will be significantly lower than the one she enjoyed during her marriage. However, she was free to refuse to sign the antenuptial agreement; she was free to refuse marriage on those terms.

For all of these reasons, we conclude that the antenuptial agreement was valid when it was executed by the parties before their marriage in 1990.

B

By concluding that the antenuptial agreement "was not fair and reasonable at the time of execution," the judge held, in essence, that the agreement was not valid. *See Osborne v. Osborne*, 384 Mass. 591, 599 (1981) (validity of antenuptial agreements "should be judged by the same 'fair disclosure' rules" as in *Rosenberg v. Lipnick*, *supra*). She nevertheless proceeded to consider whether the agreement was "fair and reasonable" at the time of the divorce trial, although a "second look" at the agreement is required only when a judge concludes that an antenuptial agreement is valid. *Id*. Because we have concluded that the agreement is indeed valid, we are required to consider whether there is any reason not to enforce it.

In *Osborne*, we suggested that this "second look" at an antenuptial agreement gave the judge the authority to deviate from the terms of an antenuptial agreement "in certain situations, for example, where it is determined that one spouse is or will become a public charge, or where a provision affecting the right of custody of a minor child is not in the best interests of the child." *Id*.[Note 30] We pointed to *Knox v. Remick*, 371 Mass. 433, 436–437 (1976), in which we explained:

"If a judge rules, either at the time of the entry of a judgment nisi of divorce or at any subsequent time, that the agreement was not the product of fraud or coercion, that it was fair and reasonable at the time of the entry of the judgment nisi, and that the parties clearly agreed on the finality of the agreement on the subject of interspousal support, the agreement concerning interspousal support should be specifically enforced, absent countervailing equities." We are not persuaded that the parties' agreement is not enforceable now.

Before we explain our conclusion, we pause to comment on the standard applicable to the "second look" a judge must undertake when a party challenges the enforceability of a valid agreement. In *Osborne*, we described the standard as "fair and reasonable." *Osborne v. Osborne*, *supra*. In the twenty years since *Osborne* was decided, no Massachusetts appellate court has elaborated on that test, and at least one commentator has suggested that the *Osborne* second-look test is one of "conscionability." *See* C.P. Kindregan, Jr., & M.L. Inker, *supra* at § 20.10, at 661–662.

The nomenclature attached to the standard of review—whether it be "fair and reasonable" or "conscionability"—is but a shorthand descriptor of what is of real moment: the content and meaning behind the label, and the careful analysis required of judges, case by case, of each antenuptial agreement and the circumstances surrounding its enforcement. Indeed, whether termed "unconscionable," "fair and reasonable," "inequitable," or something else, in jurisdictions that employ a "second-look" analysis, the vast majority direct trial judges to undertake an analysis that is remarkably similar in substance. *Compare* 1 H.H. Clark, Jr., *Domestic Relations in the United States* § 1.9, at 52 n.51 (2d ed. 1987) ("Unconscionability seems to be defined as occurring when enforcement of the agreement would leave the spouse without sufficient property, maintenance, or appropriate employment to support himself"), *and MacFarlane v. Rich*, 132 N.H. 608, 616–617 (1989) (defining "unconscionable" when "provisions in an antenuptial agreement may lose their vitality by reason of changed circumstances so far beyond the contemplation of the parties at the time they entered the contract that its enforcement would work an unconscionable hardship"), *and Miles v. Werle*, 977 S.W.2d 297, 303 (Mo. Ct. App. 1998), and cases cited (agreement unenforceable that attempts to "totally take from one of the spouses his or her presumed right to marital property. . . . By contrast, where an antenuptial agreement permits each spouse to retain a share of the marital property, albeit a disproportionately small one, courts are more likely to uphold and enforce the agreement"), *with Cladis v. Cladis*, 512 So. 2d 271, 273 (Fla. Dist. Ct. App. 1987) ("a trial court may determine that the agreement . . . does not adequately provide for the challenging spouse and, consequently, is unreasonable"), *and Button v. Button*, 131 Wis. 2d 84, 98–99 (1986) ("If . . . there are significantly changed circumstances after the execution of an agreement and the agreement as applied at divorce no longer comports with the reasonable expectations of the parties, an agreement which is fair at execution may be unfair to the parties at divorce").

In Massachusetts, a valid antenuptial agreement is not unenforceable at the time of divorce merely because its enforcement results in property division or an award of support that a judge might not order under G.L. c. 208, § 34, or because it is one sided. Moreover, it is not appropriate for a judge to use the same test of enforceability of an antenuptial agreement as she would for the enforceability of a separation agreement, for the reasons explained earlier.[Note 31] Rather, we follow the majority of courts and require that a judge may not relieve the parties from the provi-

sions of a valid agreement unless, due to circumstances occurring during the course of the marriage, enforcement of the agreement would leave the contesting spouse "without sufficient property, maintenance, or appropriate employment to support" herself. *See* 1 H.H. Clark, Jr., *Domestic Relations in the United States*, *supra* at § 1.9. Such circumstances might include, for example, the unanticipated mental or physical deterioration of the contesting party (here the antenuptial agreement provided for full health insurance for the wife), or the erosion by inflation of agreed-on support payments to such a degree as to nullify the obvious intention of the parties at the time of the agreement's execution (here the support payments agreed to by the parties contained an adjustment for cost of living, which the wife does not claim is inadequate). The "second look" at an agreement is to ensure that the agreement has the same vitality at the time of the divorce that the parties intended at the time of its execution. *See MacFarlane v. Rich*, *supra* at 616–617.

As we noted above, we will not recognize the validity of an antenuptial agreement that essentially strips the contesting spouse of substantially all of her marital interests. For the same reason—that marriage is a special status from which certain obligations arise—we will not enforce an antenuptial agreement that prevents a spouse from retaining her marital rights, of which maintenance and support, however disproportionately small, are the most critical. *See Knox v. Remick*, 371 Mass. 433, 436–437 (1976). *See also Gentry v. Gentry*, 798 S.W.2d 928, 936 (Ky. 1990) (agreement enforceable where "the terms of the agreement were not "manifestly unfair"; agreement "did not attempt to limit or deny maintenance or support").

We have described the inquiry a judge must undertake when a party contests the enforceability of a valid antenuptial agreement. Our description gives content to, but does not depart from, the standard that has been in effect since *Osborne v. Osborne*, 384 Mass. 591 (1981). There we described the standard as "fair and reasonable." We now hold that the term "conscionability" is a more appropriate term to describe the standard at the time of enforceability. We trust that this change of nomenclature will be of assistance to judges and members of the bar, and will facilitate the recognition of the distinction between the enforceability of separation agreements and the enforceability of antenuptial agreements.

Applying the standard to the antenuptial agreement at issue here, the judge made no findings, and the wife points to no evidence, that circumstances during the marriage led to any changes of any significance: the wife suffered no debilitating illness, and she is not unable to work should she choose to supplement her income. The judge grounded her decision on three postmarriage factors: "the lifestyle of the parties during the marriage," "the vast disparity between the parties' ability to acquire future assets and income,"[Note 32] and "the fact that this is a ten year marriage which produced two children." None is sufficient to render the agreement unenforceable. The settlement is, as the judge characterized it, "less than modest, given the financial holdings of the plaintiff." But the wife was fully apprised of the husband's holdings before she agreed to these "less than modest" arrangements.

4. *Attorney's fees*. The judge ordered the husband to pay the wife's attorney's fees. The husband challenges that aspect of the order on three grounds: (1) that the judge "lack[ed] jurisdiction" to make the order, (2) that the antenuptial agreement provides that the party in breach is liable for the parties' attorney's fees, and (3) that the judge failed to address the reasonableness of the fees. We agree with the husband as to his last claim only.

General Laws c. 208, §§ 17 and 38,[Note 33] permit the judge to make an award of attorney's fees. Such an award is within the sound discretion of the judge and will not ordinarily be disturbed. *See, e.g.*, *Kennedy v. Kennedy*, 400 Mass. 272, 274 (1987) ("This matter rests in the discretion of the judge"); *Ross v. Ross*, 385 Mass. 30, 39 (1982), quoting *Smith v. Smith*, 361 Mass. 733, 738 (1972) ("[T]he award . . . may be presumed to be right and ordinarily ought not to be disturbed"). *See also Kane v. Kane*, 13 Mass. App. Ct. 557, 560 (1982) ("any award made [is] entitled to considerable respect on review"). The factors a judge may consider include the amount of time required to prepare the case and pleadings, the complexity of the issues involved, the value of the marital property, and the spouse's ability to pay. *See Kane v. Kane*, *supra* at 560–561. *See also Kennedy v. Kennedy*, *supra* at 274 (consideration of award should appropriately take into account important interests at stake and amount of opposition interposed by opposing party); *Goldman v. Roderiques*, 370 Mass. 435, 437 (1976) (in making award of attorney's fees, "the basic factors of need and relative economic positions of the spouses" must be considered). The judge was well within her discretion in ordering the husband to pay the wife's attorney's fees during the pendency of the litigation to enable her to defend the action and to contest the validity and enforceability of the antenuptial agreement.

While the order is proper, the judgment provides only that the husband "shall pay the parties' counsel fees." We remand the case to the Probate Court for a determination of the fees for the wife's attorney "not incommensurate with an objective evaluation of the services performed." *Ross v. Ross*, *supra* at 38–39.

5. *Conclusion*. The judgment that the antenuptial agreement is unenforceable is reversed. The judgment that the husband pay the wife's attorney's fees is affirmed. The case is remanded to the Probate and Family Court for a determination of the amount of such fees.

So ordered.

FOOTNOTES

[Note 1] The judge denied the husband's motion to stay the divorce hearing and payment of attorney's fees pending the disposition of this appeal. The husband raises no claim in connection with that order.

[Note 2] The relevant facts are drawn from the judge's written findings of fact. The husband does not dispute the findings; rather, he argues that the judge's subsidiary and ultimate findings do not support her rulings of law.

[Note 3] The wife does complain that the husband divulged the financial information to her only two weeks before the agreement was executed.

[Note 4] The husband's revised statement of assets showed his net worth to be between $108 million and $133 million. The wife's financial statement showed assets of less than $5,000 in several bank accounts and ownership of a 1977 Chevrolet Nova automobile. At the time of trial in 2000 on the enforceability of the agreement, the husband's financial statement showed assets of $112 million and liabilities of $2 million.

[Note 5] The parties negotiated and made provisions in the final agreement for property division and support should their marriage be terminated by the death of either one of them. Those negotiations and the terms of the final agreement on this point—substantially more favorable to the wife than the provisions concerning termination of the marriage by divorce—are not relevant to this action.

[Note 6] The parties acknowledged that they were informed of their rights, had considered the effect of the agreement on their estates, and freely and willingly waived rights that "may well have great value" in exchange for the provisions of the agreement.

[Note 7] A section entitled "Fairness Considerations" provided that the husband and the wife "acknowledge that they have considered the fairness of this Agreement in light of the present size and character of his and her estate as disclosed in [the Agreement and that] . . . [a]fter consideration of their respective disclosures as to their respective financial circumstances . . . each party deems it to be in his or her best interest to execute this Agreement."

[Note 8] The husband and the wife acknowledged that they had legal advice of their own choosing, and that with the advice of counsel each had considered carefully the financial disclosures appended to the agreement.

[Note 9] The wife and the husband had two children during their marriage. The agreement provided for a judicial resolution of all matters concerning any children of the marriage, including child support, custody, and visitation. The agreement made no provision for the wife's only child of her first marriage. At the time of entry of judgment, the husband continued to support the wife's daughter, as he had done since the parties began living together.

[Note 10] At the time of the execution of the agreement, the parties lived with the wife's child in the husband's Hyannis condominium. The agreement provides that the wife would receive the Hyannis property, or a residential property "of substantially equal value" if the Hyannis property were sold.

The judge found that, after they were married, the parties continued to live in Hyannis, but that, in 1992, they purchased the "marital" home in Norwell, and spent their summers at the Hyannis property. After the parties separated the husband purchased a second home in Norwell where he now resides.

[Note 11] The cost of living increase covered the period between the date of the parties' marriage and the time of the initiation of any divorce action only. There would be no further cost of living increases from the commencement of a divorce action to the time of the wife's death or remarriage.

[Note 12] The wife testified that she did not want to sign the agreement and felt ill and nauseous on the day of execution. The judge found that the wife did not so inform the husband and showed no reluctance in signing it. The judge also found that the videotape recording showed no indication that the wife appeared "distressed, distracted, resistant, uncooperative, or otherwise unwilling" to sign the agreement.

[Note 13] In her findings of fact, the judge noted that the wife's counsel had been a member of the bar since 1979, and that sixty to seventy-five per cent of her practice was devoted to family law. The judge found that this was the attorney's "first case involving a premarital agreement, and her first case involving assets over one million dollars." The judge did not find that the attorney was not qualified to represent the wife or that she had failed to represent her adequately.

[Note 14] *Dominick v. Dominick*, 18 Mass. App. Ct. 85 (1984), lists eight factors for assessing whether a separation agreement is fair and reasonable. These factors are "(1) the nature and substance of the objecting party's complaint; (2) the financial and property division provisions of the agreement as a whole; (3) the context in which the negotiations took place; (4) the complexity of the issues involved; (5) the background and knowledge of the parties; (6) the experience and ability of counsel; (7) the need for and availability of experts to assist the parties and counsel;

and (8) the mandatory and, if the judge deems it appropriate, the discretionary factors set forth in G.L. c. 208, § 34" (footnotes omitted). *Id*. at 92. That the *Dominick* case involved a separation agreement, rather than an antenuptial agreement—as is at issue in this case—is discussed *infra*.

[Note 15] General Laws c. 208, § 34, provides that: "In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each party, shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit."

[Note 16] An antenuptial agreement must also, of course, comport with the rules governing the formation of all contracts, for example, the necessity of consideration and the absence of fraud, misrepresentation, and duress. *See Rosenberg v. Lipnick*, 377 Mass. 666, 673 (1979).

[Note 17] We also noted in *Rosenberg v. Lipnick*, *supra* at 673, that "antenuptial agreements must be so construed as to give full effect to the parties' intentions, but we are concerned that such agreements be executed fairly and understandingly and be free from fraud, imposition, deception, or over-reaching."

[Note 18] The judge correctly noted that she was to test the enforceability of the agreement under the disclosure rules of *Rosenberg v. Lipnick*, *supra* at 672–673, although she did not examine each rule separately.

[Note 19] A leading treatise has described the test this way: "The issue is whether an intelligent, competent person did have or should have had a general, adequate and sufficient knowledge of the other's worth to make an informed decision as to whether they wished to consent to the terms of the proposed premarital agreement." C.P. Kindregan, Jr., & M.L. Inker, *Family Law and Practice* § 20.8, at 654 (2d ed. 1996).

[Note 20] Other courts have held that the lack of negotiations or insufficient notice, standing alone, is seldom enough to invalidate an antenuptial agreement. *See, e.g.*, *Liebelt v. Liebelt*, 118 Idaho 845, 848 (Ct. App. 1990); *Howell v. Landry*, 96 N.C. App. 516, 528 (1989). Courts generally have treated such a claim as one of duress, and have found such a defense inapplicable where, as here, the party contesting the agreement had notice of the agreement. *See, e.g.*, *Rose v. Rose*, 526 N.E.2d 231, 235–236 (Ind. Ct. App. 1988) (parties discussed necessity of agreement several times before wedding, and husband told wife he would not marry her if she did not sign agreement); *Matter of the Marriage of Adams*, 240 Kan. 315, 319–320 (1986) (husband approached wife morning of wedding and asked her to sign agreement; agreement was identical to one wife reviewed with her attorney); *Taylor v. Taylor*, 832 P.2d 429, 431 (Okla. Ct. App. 1991) (wife in possession of the agreement for three months prior to its execution); *Shepherd v. Shepherd*, 876 P.2d 429, 432 (Utah Ct. App. 1994) (parties discussed agreement for months prior to marriage and each had opportunity to review and make changes to it).

[Note 21] Counsel's letter states in part: "When you sign a pre-marital contract, you give up the opportunity of having the Court make an independent assignment of marital property, and accept the terms of the contract instead."

[Note 22] To the extent there was any inadequacy of representation by the wife's attorney, that is a claim of the wife against her lawyer, not a basis for voiding the antenuptial agreement.

[Note 23] The evidence is undisputed that the wife's attorney wrote to her before the execution of the agreement, enclosed a copy of G.L. c. 208, § 34, and instructed the wife to read it carefully, "so that you can evaluate properly the terms of the Pre-Marital Agreement that we are negotiating." Her attorney further told her that they would go over the statute when they met at the attorney's office the following Monday, March 19. The judge found that the wife's attorney had advised her client that the agreement in its final form was fair and reasonable.

[Note 24] The wife did not claim or prove that her counsel was incompetent. *Cf. Cladis v. Cladis*, 512 So. 2d 271, 274 (Fla. Dist. Ct. App. 1987) (trial judge's finding that wife did not have competent assistance of counsel no basis for setting aside valid property settlement agreement).

[Note 25] General Laws c. 209, § 25, provides that: "At any time before marriage, the parties may make a written contract providing that, after the marriage is solemnized, the whole or any designated part of the real or personal property or any right of action, of which either party maybe seized or possessed at the time of the marriage, shall remain or become the property of the husband or wife, according to the terms of the contract. Such contract may limit to the husband or wife an estate in fee or for life in the whole or any part of the property, and may designate any other lawful limitations. All such limitations shall take effect at the time of the marriage in like manner as if they had been contained in a deed conveying the property limited."

[Note 26] *See also* C.P. Kindregan, Jr., & M.L. Inker, *supra* at § 20.8, at 652.

[Note 27] *See also* 2A. Lindey & L.I. Parley, *Separation Agreements and Antenuptial Contracts* § 110.66[2], at 110–59 (2d ed. 1999).

[Note 28] *See* Uniform Premarital Agreement Act § 6 (a)(2). 9C *U.L.A.* 48–49 (Master ed. 2001). The Act, first approved in 1983, has been substantially adopted in at least twenty-eight States and the District of Columbia: Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Mississippi, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin. Legislation to adopt the Act has been introduced in the South Carolina General Assembly, but has not passed. *See Hardee v. Hardee*, 348 S.C. 84, 94 n.6 (Ct. App. 2001).

[Note 29] See note 14, *supra*.

[Note 30] Custody and the support of the parties' minor children are not at issue in this case.

[Note 31] In this aspect of her ruling, the judge also incorrectly relied on the factors identified in *Dominick v. Dominick*, *supra*, including those enumerated in G.L. c. 208, § 34.

[Note 32] The judge noted that, during their ten years of marriage, the wife was "completely dependent on [the husband] for her financial security."

[Note 33] General Laws c. 208, § 17, provides: "The court may require either party to pay into court for the use of the other party during the pendency of the action an amount to enable him to maintain or defend the action. . . ."

General Laws c. 208, § 38, provides: "In any proceeding under this chapter, whether original or subsidiary, the court may, in its discretion, award costs and expenses, or either, to either party, whether or not the marital relation has terminated. In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his or her counsel, or may be apportioned between them."

DOWNEY v. DOWNEY
55 Mass. App. Ct. 812

March 19, 2002–September 12, 2002

Middlesex County

Present: BROWN, RAPOZA, & DOERFER, JJ.

Divorce and Separation, Modification of judgment, Alimony, Attorney's fees.

In an action for modification of a judgment of divorce nisi, the judge did not abuse her discretion in awarding alimony to the former wife, where the judge took into account the fact that the loss of child support income upon the emancipation of the divorced couple's youngest child constituted a material change of circumstances, but also considered the history of the proceedings and other relevant circumstances of the parties, and concluded that the wife's resources were not sufficient for her support.

The judge in an action for modification of a judgment of divorce nisi did not abuse her discretion in ordering the former husband to pay the former wife's attorney's fees, where the judge considered all relevant factors, including the ability of the wife's counsel, the hourly rates, the existence of contemporaneous time records, the financial position of the parties, and the husband's obstructionist conduct which prolonged the proceedings and caused the wife's counsel to engage in extraordinary discovery efforts.

COMPLAINT for divorce filed in the Middlesex Division of the Probate and Family Court Department on January 25, 1982.

A complaint for modification, filed November 5, 1996, was heard by Fernande R.V. Duffly, J., and a motion for attorney's fees was also heard by her.

Janet H. Pumphrey (Russell R. Kadl with her) for Gerald F. Downey.

Richard D. Packenham for Carol A. Downey.

DOERFER, J. The former husband appeals from a modification judgment of the Probate and Family Court which, among other things, orders him to pay to the former wife alimony in the amount of $275 a week. The husband also appeals from an order of the court directing him to pay to the wife attorney's fees in the amount of $25,000. We affirm the judgment and order.

1. *Background*. By a judgment of divorce nisi that was entered on September 23, 1982, the parties were ordered to comply with the terms of an agreement that was incorporated and merged in the judgment. The agreement provided, among other things, that the wife would have physical custody of the three minor children of the marriage and that the husband would "pay to the [w]ife the sum of $225 per week for alimony and support." The agreement made no specific provision for the termination of the alimony and child support obligation.[Note 1]

The wife filed a first complaint for modification on June 25, 1990, alleging that the husband was making substantially more money than he had been earning at the time of the entry of the divorce judgment, and that the parties' youngest minor child was a full time student. The parties entered into a written agreement, which was incorporated in a temporary order of the court on February 26, 1991, providing that "[c]hild support shall be payable to the plaintiff in the amount of $275 per week," and that the wife "clearly does not waive any claim to alimony and retains the right to raise the issue upon the emancipation of the remaining child. . . ." No judgment was entered on the first complaint for modification.

The present complaint for modification was filed by the wife in November, 1996, and was amended in December, 1997. The amended complaint alleged that the wife "retained the right to raise the issue of alimony upon the emancipation of the remaining child," which would occur in May, 1998, and that the wife "is in need of support for herself." By a temporary order that was issued on August 28, 1998, the husband's child and college support obligations were terminated, but the husband was ordered to pay $300 a week "to meet the present financial needs of the wife." After a trial on the wife's amended complaint for modification, the judge made extensive findings, which we summarize below.

The husband, a college professor, is sixty-two years of age. The wife, a legal secretary, is fifty-eight. In 1982, the husband earned $34,000 and listed his interest in the former marital home as his only major asset. (Although the husband also had a Commonwealth of Massachusetts pension/retirement plan, the parties' agreement made no provision for the division of that asset.) The wife, who returned to work shortly before the divorce, earned $5,340 in 1982. It appears that the wife's primary asset at that time was her interest in the former marital home.

As of February 26, 1991, the husband's gross weekly income from employment was $1,187.50 ($61,750 a year). The husband's financial statement reflected assets worth $164,200, including his one-half interest in the former marital residence (which the husband valued at $87,350) and his contributions to an IRA and the Commonwealth of Massachusetts retirement plan. In February, 1991, the wife's gross weekly income from earnings was $586.54 ($30,500 a year). The value of the wife's assets was $124,000, including her one-half interest in the former marital home (which she valued at $100,000).

At the time of the modification trial, the husband earned $1,584 a week ($82,368 a year) in addition to weekly interest income of $22. His net weekly income amounted to $1,045. The husband's expenses, exclusive of mortgage and property tax payments[Note 2] and alimony, amounted to $752 a week. The husband's expenses included those of his current wife. The husband valued his assets, including his contributions to the Commonwealth of Massachusetts retirement system,[Note 3] at $267,506. At the time of trial, the wife earned $644.24 a week ($33,500 a year), plus $70.92 in weekly interest and dividend income. Her net income, exclusive of alimony, was $764.78 a week. Her weekly expenses, exclusive of attorney's fees and income taxes, amounted to $950. The wife's assets consisted of the balance of the proceeds from the sale of the marital home ($89,006), an IRA ($12,000), and an automobile.

In issuing the modification judgment, the judge set forth a rationale which, in summary form, indicated (a) that she had given due consideration to the parties' agreements (and the wife's retention of the right to seek alimony upon emancipation of the youngest child); (b) that even in the absence of the 1991 agreement, the loss of child support income to the wife in the amount of $14,300 a year constituted a change in circumstances sufficient to warrant consideration of her claim[Note 4]; (c) that although the wife's income had increased since the divorce, it had never been sufficient to allow her to provide adequately for her own needs; (d) that the wife should not be required to deplete her own assets in order to maintain herself; and (e) that the wife required alimony in the amount of $275 a week to meet her needs and the husband had the ability to make that payment.

On the wife's motion for attorney's fees, costs, and expenses, the judge, after a hearing, ordered the husband to pay the wife $25,000.

2. *Modification of alimony*. "To be successful in an action to modify a judgment for alimony . . ., the [plaintiff] must demonstrate a material change of circumstances since the entry of the earlier judgment." *Schuler v. Schuler*, 382 Mass. 366, 368 (1981). *See Bush v. Bush*, 402 Mass. 406, 411 (1988).[Note 5] "The change may be in the needs or the resources of the parties . . . or in their respective incomes." *Fugere v. Fugere*, 24 Mass. App. Ct. 758, 760 (1987). "The determination of the extent and palpability of such change, however, lies in large measure within the discretion of the trial judge." *Heistand v. Heistand*, 384 Mass. 20, 26 (1981). *Fugere v. Fugere*, 24 Mass. App. Ct. at 760. *Champion v. Champion*, 54 Mass. App. Ct. 215, 223 (2002). In acting on a request for modification, the judge, of course, must weigh all relevant circumstances. *See Parrish v. Parrish*, 30 Mass. App. Ct. 78, 89 (1991). "Unless there is no basis in the record for the judge's decision, we defer to the judge's evaluation of the evidence presented at trial." *Bush v. Bush*, 402 Mass. at 411.

The husband argues that the judge erred in awarding alimony to the wife "where the only material change of circumstances was [the loss of child support income upon the] emancipation of the youngest child and where the wife's resources were sufficient for her support." We think the husband reads too narrowly the judge's findings and conclusions. While the judge makes specific reference in her findings to the emancipation of the youngest child and the wife's loss of child support, it is apparent that the judge, in reaching her decision, also had in mind the history of the proceedings and other relevant circumstances of the parties. Indeed, the judge considered the wife's request for alimony against the backdrop of the original judgment and the 1991 stipulation and temporary order. *See Huddleston v. Huddleston*, 51 Mass. App. Ct. 563, 568 (2001) ("We review the findings to determine whether the judge gave appropriate consideration to the parties' intentions as expressed in their [merged] written agreement . . . and to any

changes in their circumstances since the last modification"); *Dwight v. Dwight*, 52 Mass. App. Ct. 739, 744 n.6 (2001).[Note 6] The judge also compared carefully the parties' past and present financial positions, which showed that the husband's income (and the value of his assets) had increased since 1982 and 1991 and that the wife was unable to meet her needs despite the increase in her own income.

To the extent the husband argues that the youngest child's emancipation was not unexpected and that a modification cannot be based on an anticipated event, it is enough to say that the parties agreed expressly in 1991 that the wife retained the right to raise the issue of alimony upon the emancipation of the youngest child. *See Bercume v. Bercume*, 428 Mass. 635, 643–644 (1999) ("A judge who modifies a divorce judgment does not write on a tabula rasa. To the extent possible, and consistent with common sense and justice, the modified judgment should take into account the earlier, expressed desires of the parties"); *Huddleston v. Huddleston*, 51 Mass. App. Ct. at 567–568. Moreover, we think it is apparent that the parties' reservation of the wife's right to revisit the question of alimony constitutes a tacit acknowledgment that the real financial circumstances of the wife could well change upon the child's emancipation.[Note 7]

Finally, notwithstanding the husband's assertion in his brief that the emancipation of a child "by its very nature implies a *decrease* of household expenses" (emphasis supplied), the husband, through counsel, acknowledged at oral argument that the emancipation of a child would not automatically compel a reduction in support. In all events, we perceive no sound reason why a child's emancipation, and the resulting loss of child support to a party, may not, in circumstances such as those presented here, be considered by a judge in determining whether there has been a material change in circumstances that would warrant the imposition of (or increase in) an order for alimony.[Note 8] The point is suggested by our decision in *Buckley v. Buckley*, 42 Mass. App. Ct. 716, 719 n.2 (1997) (dictum),[Note 9] and is consistent with the fundamental purpose of alimony, i.e., to provide economic support to the dependent spouse. *See Fugere v. Fugere*, 24 Mass. App. Ct. at 760–761, citing *Gottsegen v. Gottsegen*, 397 Mass. 617, 623 (1986). There is nothing in *Fugere v. Fugere*, *supra*, that would require a different result in the present case.

As for the husband's claim that the wife's resources are sufficient for her support, the judge found specifically that the wife's weekly expenses exceed substantially her weekly income and that the wife is unable to provide adequately for her needs.[Note 10] Although the wife possesses assets worth in excess of $100,000 (a portion of which, the judge found, the wife intends to use to purchase a replacement residence), the judge properly could conclude that the wife "should not be required to deplete her assets in order to maintain herself." Similarly, we perceive no error in the judge's failure to attribute income to the wife because one of the emancipated children of the marriage continues to reside with her. Indeed, there was undisputed evidence at trial that the child residing with the wife had committed herself to work for one year in a public interest job at an extremely modest salary.[Note 11]

In view of the foregoing discussion, we cannot say that the judge abused her discretion or otherwise erred as matter of law in ordering the husband to pay to the former wife alimony in the amount of $275 a week.

3. *Attorney's fees*. The husband argues that the judge abused her discretion by ordering him to pay $25,000 of the wife's attorney's fees "where the fees were not strictly conservative" and the court failed to consider all of the factors set out in cases such as *Robbins v. Robbins*, 19 Mass. App. Ct. 538, 543 (1985), *S.C.*, 22 Mass. App. Ct. 982 (1986), and *Edinburg v. Edinburg*, 22 Mass. App. Ct. 192, 198 (1986).

The judicial setting of counsel fees involves a consideration of "numerous, complex variables." *See Robbins v. Robbins*, 19 Mass. App. Ct. at 543. *See generally* 1 Kindregan & Inker, *Family Law and Practice* § 6.4 (2d ed. 1996). It follows that much discretion must be accorded a judge in determining the necessity and amount of attorney's fees. *See Robbins v. Robbins*, 19 Mass. App. Ct. at 543; *Moriarty v. Stone*, 41 Mass. App. Ct. 151, 159 (1996). An award of counsel fees is "presumed to be right and ordinarily ought not to be disturbed." *Ross v. Ross*, 385 Mass. 30, 39 (1982), quoting from *Smith v. Smith*, 361 Mass. 733, 738 (1972).

On review of the judge's seven-page memorandum of decision on the wife's motion for counsel fees, we are satisfied that the judge considered all relevant factors, including the ability of the wife's counsel, the work performed, the results secured, the time spent, the hourly rates, the existence of contemporaneous time records, the financial positions of the parties, and the husband's obstructionist conduct which prolonged the proceedings and caused the

wife's counsel to engage in extraordinary discovery efforts. It is also clear that the court's award was grounded on "strictly conservative principles." *See Pemberton v. Pemberton*, 9 Mass. App. Ct. 9, 16 (1980). In the circumstances, the judge did not abuse her discretion in fashioning the order for counsel fees.

4. *Conclusion*. The modification judgment dated April 13, 1999, is affirmed. The order on motion for attorney's fees dated July 9, 1999, is affirmed. The wife's request for double costs and attorney's fees on appeal is denied.

So ordered.

FOOTNOTES

[Note 1] The agreement also contained provisions concerning the sale of the former marital home in which the wife resided. The house was eventually sold at some time subsequent to July, 1998.

[Note 2] The husband remarried in 1986. As the home the husband shares with his current wife is owned by her, he did not list real estate as an asset on his current financial statement.

[Note 3] Although the husband listed the current value of his contributions to the retirement plan at $98,600, the judge found that that was not the present value of his interest. *See Dewan v. Dewan*, 17 Mass. App. Ct. 97, 99–100 (1983), *S.C.*, 399 Mass. 754 (1987), and 30 Mass. App. Ct. 133 (1991).

[Note 4] At trial, the husband took the position that the court was required to "consider whether there has been a change in the parties' circumstances since the February 26, 1991 order." The court concluded that "in the absence of a judgment of modification filed in connection with the complaint filed by [the wife] on June 25, 1990, the court must consider changes in circumstances which have occurred since the [d]ivorce [j]udgment of September 22, 1982, but the conclusion would in either event be the same."

[Note 5] Both parties have proceeded on the theory that the wife was required to demonstrate a material change in circumstances in the present case. As we have stated, the judge did, in fact, find that there had been a material change in the parties' circumstances.

[Note 6] As we have indicated, the 1982 agreement and judgment provided for unallocated alimony and child support in the amount of $225 a week (which comprised approximately 34%of the husband's gross income at the time) that was not subject to a specific termination date or event. The judge explained that pursuant to the terms of the original agreement, and absent any modification thereof, the wife could have continued to receive alimony after her retirement. Continuing, the court stated that the support provision of the 1982 agreement was fair and equitable in view of the length of the parties' marriage and the fact that the husband earned substantially more than the wife, who had been a homemaker throughout most of the marriage. The judge also stated that it was reasonable to assume that the parties' failure to divide the husband's pension was based on the possibility that the husband would be paying support to the wife from his retirement benefits.

As for the parties' modification of support in 1991, the judge noted that the child support payment of $275 a week was equal to only 23% of the husband's gross income, but that it would no longer be tax deductible by the husband nor would it be included as income on the wife's tax returns.

[Note 7] Contrary to the husband's claim, the judge did not construe the reservation of rights in 1991 as a directive that the wife must be awarded alimony.

[Note 8] The husband, through counsel, stated at oral argument that the emancipation of a child is a relevant factor in determining whether there has been a material change in the parties' circumstances. He urged, however, that it cannot be the sole factor upon which a judge relies. As we have discussed, the husband reads too narrowly the judge's findings and conclusions.

[Note 9] In *Buckley*, the parties entered into an agreement whereby the wife was to have physical custody of the parties' daughter and the husband was to have physical custody of the parties' son. The parties waived past and present alimony but expressly reserved the right to claim future alimony. After the minor daughter left the home of her mother and moved in with her father, the court modified the husband's support obligation by no longer requiring him to pay to the wife child support for the daughter. On the wife's complaint for modification seeking alimony, the court ordered the husband to pay ongoing alimony in the amount of $60 a week. We stated: "What matters in a modification proceeding is the current financial situation of the parties, obligations of support, and whether there has been a material change in circumstances from the time of the divorce . . . These, the trial judge considered here, noting, among other things, the loss of child support income to the wife, the husband's ability to contribute toward the wife's support, and the wife's inability to sustain herself reasonably on her current income." *Buckley v. Buckley*, 42 Mass. App. Ct. at 719 n.2. The husband in *Buckley* did not challenge on appeal the judge's determination that a material change in circumstances had occurred. *Id*. at 722 n.6.

[Note 10] As the husband has failed to include in the record appendix the wife's financial statement filed at the time of the modification hearing, he is not in a position to challenge the judge's factual findings on the point. *See Connolly v. Connolly*, 400 Mass. 1002, 1003 (1987).We note also that there is nothing in the judge's findings to indicate that the wife's needs were excessive or unreasonable. *See Fugere v. Fugere*, 24 Mass. App. Ct. at 761 n.7.

[Note 11] Although the child does not make a financial contribution to the wife, the wife testified that the child "pays her own bills as far as clothing and that sort of thing."

KORFF v. KORFF (and a companion case[Note 1])
64 Mass. App. Ct. 94

April 15, 2005–July 22, 2005

Middlesex County

Present: KANTROWITZ, DOERFER, & COHEN, JJ.

Divorce and Separation, Alimony. Contract, Antenuptial agreement.

This court concluded that once a Probate and Family Court judge determined that an antenuptial agreement was valid, it was improper for the judge to alter its alimony provisions.

COMPLAINTS for divorce filed in the Middlesex Division of the Probate and Family Court Department on February 28 and December 26, 2002.

The cases were heard by Spencer M. Kagan, J.

Elizabeth A. Zeldin (Suzanne T. Mancuso with her) for Jay S. Korff.

Nancy A. Freed (Peter A. Kuperstein with her) for Jill R. Korff.

KANTROWITZ, J. Once it was determined that an antenuptial agreement was valid, it was improper for the Probate and Family Court judge to alter its alimony provisions.[Note 2]

Facts. The parties were married on March 29, 1992, two days after signing an antenuptial agreement (agreement) that provided, in part, that in case of divorce, alimony was to be determined annually, based upon the husband's gross income multiplied by a percentage that was determined by the length of the marriage. If, for example, the marriage lasted from sixty-one through 120 months, the wife would be entitled to sixteen percent of the husband's gross income; if it lasted from 121 through 180 months, the percentage would rise to twenty-one percent. The agreement provided that the end of the marriage would be "[u]pon the filing of a Complaint for Divorce."

On February 28, 2002, the husband filed, but did not serve, a complaint for divorce in the Probate and Family Court. The husband did not tell the wife that he had filed for divorce, and, in fact, the couple continued to live together as husband and wife until December 26 of that year, when the wife filed and served her own complaint for divorce.[Note 3]

The first issue thus litigated was the true date of the divorce filing: February 28, 2002, as the husband claimed (thus setting the marriage length at 119 months, entitling the wife to sixteen percent of the husband's gross annual income) or December 26, 2002, as the wife claimed (which resulted in a marriage length of 129 months, entitling the wife to a twenty-one-percent share). The judge found that the controlling date was December 26, 2002, thus establishing the alimony provision at twenty-one percent.[Note 4]

Despite some mild protestations by the wife, the validity of the agreement was never really at issue, and the judge, after hearing some evidence on the subject, quickly turned to the question of alimony.[Note 5] The husband was a financial advisor at Morgan Stanley and his income, based primarily on commission and deferred production bonuses, varied substantially from year to year.[Note 6] His college-educated wife worked part-time in magazine advertising sales, earning, on a commission basis, $97,959 in 2003 and $38,252 in 2002.

As explained above, the agreement provided that alimony was to be based upon a yearly percentage of the husband's gross income.[Note 7] Rather than adhere to this provision in the contract, however, the judge proceeded to modify it based upon his finding that the husband "has no financial credibility."[Note 8] For that reason, the judge ordered a fixed annual amount of alimony, based on the "average over the last five years of the Husband's gross income," arriving at an average gross income figure of $926,725.50.[Note 9] The wife was, therefore, to be paid a monthly sum of

$14,625.24 until the agreement terminated.[Note 10] The judge also ordered attorney's fees and costs in the amount of $25,000 to the wife.[Note 11]

On appeal, the husband argues that as the agreement was valid and enforceable, the judge was obligated to enforce its terms as written. Therefore, the creation of a fixed alimony payment based on an average of the husband's gross income was effectively a modification of the alimony provision, and in error. We agree.

Discussion. As the validity of the agreement is not an issue before us, we need not discuss it at length. Suffice it to say that in determining the validity of an antenuptial agreement, the judge must undertake a dual-pronged inquiry. First, he must establish whether the agreement was "'fair and reasonable,' at the time of execution." *DeMatteo v. DeMatteo*, 436 Mass. 18, 30 (2002), quoting from *Rosenberg v. Lipnick*, 377 Mass. 666, 672 (1979). Next, taking a "second look," the judge must inquire whether the agreement, at the time of the divorce, is "conscionable." *DeMatteo v. DeMatteo*, *supra* at 34, 38. Under the conscionability standard, "a judge may not relieve the parties from the provisions of a valid [antenuptial] agreement unless, due to circumstances occurring during the course of the marriage, enforcement of the agreement would leave the contesting spouse 'without sufficient property, maintenance, or appropriate employment to support herself.'" *Id*. at 37, quoting from 1 Clark, Jr., *Domestic Relations in the United States* § 1.9 (2d ed. 1987).

In the instant matter, the judge found the agreement to be valid and enforceable not only at the time of execution, but also at the time of the divorce. Neither party contests this holding, nor do we find it to be in error.[Note 12] Notwithstanding this conclusion, however, the judge modified the alimony provision based on his finding that the husband lacked financial credibility. Thus, anticipating ongoing, future, annual breaches by the husband, the judge instituted preventive measures by fixing a set amount of alimony to be paid over the life of the agreement, in direct conflict with its clear language that alimony was to be determined annually. Although, based on the record, the judge's displeasure with the husband's conduct is understandable (e.g., his treatment of Jill, including subjecting her to vile name-calling and physical force, his failure to disclose assets in his financial statements, and his covert filing and failure to serve his complaint for divorce), the solution was, nonetheless, legally impermissible.

The agreement called for alimony to be adjusted on an annual basis, the wife receiving twenty-one percent of the husband's gross income, as defined in the agreement. While the agreement does not provide a formal mechanism for the parties to agree upon the calculation of gross annual income[Note 13] and alimony readjustment, the parties would be wise, in the future, to arrange one. While we are remanding this matter for a determination of the husband's alimony obligation for the year in question, in the future that figure will have to be determined anew on an annual basis. If the parties cannot agree as to how that figure is to be calculated, or if the wife is dissatisfied with the method employed by the husband, she is free to return to court for an accounting, a legal determination of the amount owed, or a complaint for contempt or breach of contract, including a breach of the duty of good faith and fair dealing. *See, e.g.*, *DeCristofaro v. DeCristofaro*, 24 Mass. App. Ct. 231, 234–237 (1987); *Larson v. Larson*, 37 Mass. App. Ct. 106, 109–110 (1994). A judge would be free, among other options, to appoint a master under Mass. R. Dom. Rel. P. 53 (1997), or to assess attorney's fees and costs if deemed appropriate, as allowed by article IV(B)(4) of the agreement.

Conclusion. So much of the judgment of divorce as pertains to alimony is vacated. The matter is remanded for a determination, consistent with this opinion, of the appropriate alimony for the period in question.[Note 14] Whether to reopen the evidence is within the judge's discretion.[Note 15] The wife's request for appellate counsel fees is denied. Although we vacate the order for support, the present terms are to remain in effect temporarily pending new orders by the Probate and Family Court judge.

So ordered.

FOOTNOTES

[Note 1] *Jill R. Korff vs. Jay S. Korff.*

[Note 2] The husband also claims that the award of attorney's fees to the wife was error. We disagree and affirm that aspect of the judgment. *See* G.L. c. 208, §§ 17, 38; *DeMatteo v.DeMatteo*, 436 Mass. 18, 38-39 (2002).

[Note 3] The husband served the wife with his divorce complaint on June 19, 2003, two days after the wife served the husband with a motion to dismiss his divorce complaint.

[Note 4] The judge found that the "Husband did not present sufficient or credible evidence of any nature as to why he did not serve the Wife a Domestic Relations Summons, within 90 days of February 28, 2002, as required under Massachusetts law." The husband also admitted that he filed the complaint in February, 2002, to "preserve the percentage of assets that would be awarded to the Wife under the Agreement." The husband is not appealing this finding. Indeed, in his prayer for relief he asks us to "order Jay to pay to Jill a sum equal to 21% of Jay's gross income."

[Note 5] In spite of his appropriate observation that "the existence of a valid Antenuptial Agreement obviates the need for the Court to consider the statutory factors under G.L. c. 208,§ 34," the judge, nevertheless, undertook a detailed analysis of those factors for the purported purposes of "interpreting the parties[']s Agreement and determining an appropriate level of child support." The factors of G.L. c. 208, § 34, are inapplicable considerations either in determining the validity of an antenuptial contract or in the interpretation of a valid antenuptial contract. *See, e.g.*, *DeMatteo v. DeMatteo*, 436 Mass. at 31 ("[A]n antenuptial agreement need not approximate an alimony award . . . a judge would be required to make under G.L. c. 208, § 34. Judged by those statutory requirements, the parties' right to settle their assets as they wish would be meaningless"). Furthermore, child support is controlled by G.L. c. 208, § 28, and the Massachusetts Child Support Guidelines.

[Note 6] He earned, in 1998, $903,652.91; in 1999, $1,346,909.51; in 2000, $1,590,450.19; in 2001, $1,426,528.23; in 2002, $547,618.10; and in 2003, through October 31, $430,028.98.

[Note 7] Gross income was defined as "all income earned in a given year whether from declared or deferred compensation, excluding deferred compensation earned in a prior year but elected to be taken in the current year, minus any child support paid by [the husband]."

[Note 8] This finding was based on the husband's failure to list residual income and other assets, including a one-quarter share of his mother's house, which she deeded to her sons in 1998, leaving a life estate for herself. As for the drop in income the last two years, the judge found that the husband "intentionally, either voluntarily directly or indirectly reduced his income to reduce his exposure to the proper amount of alimony and child support." There is scant direct evidence on this point. Indeed, the only evidence appears to be to the contrary, i.e., that he lost a major account and the stock market declined.

[Note 9] That figure excluded the husband's production bonus, which the judge considered "deferred compensation" under the agreement. This was not raised as an issue on appeal.

[Note 10] Under the agreement, the alimony obligation would terminate upon (1) the husband's death; (2) the wife's death; (3) the wife's remarriage; or (4) after a period of time equal to the length of the marriage—in this case, 129 months (10 years, 9 months).

[Note 11] The judge also ordered, in accordance with the agreement, arbitration on the division of assets, as well as child support. Neither issue is contested here.

[Note 12] Even considering the husband's lowest year of income, $430,028.98 for part of 2003, the wife would have been entitled to at least $90,306.09, leaving her with sufficient support under the parameters of *DeMatteo*.

[Note 13] This is not a case of self-employment with a possibility of hiding assets. The husband here is employed by Morgan Stanley, and his income and benefits can be, it appears, readily ascertainable. The more troublesome area is when a husband has the ability to generate income but does not. *See generally Schuler v. Schuler*, 382 Mass. 366, 373–374 (1981); *Bassette v. Bartolucci*, 38 Mass. App. Ct. 732, 735–736 (1995); *Flaherty v. Flaherty*, 40 Mass. App. Ct. 289, 291 (1996). Whatever remedies that might be fashioned in such a case do not include the rewriting of a valid antenuptial agreement.

[Note 14] In light of our holding, we do not reach the husband's claims of error as to the judge's factual findings. Virtually all of the factual findings at issue relate to the improper modification of the agreement.

[Note 15] The husband was not allowed to call his supervisor as a witness, apparently due to late notice to the wife that he would be testifying. It appears that if the evidence were reopened, the supervisor would be able to shed light in the area of the husband's earnings. See note 8, *supra*.

AUSTIN v. AUSTIN
445 Mass. 601

October 5, 2005–December 21, 2005

Barnstable County

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, SOSMAN, & CORDY, JJ.

Related Cases: 62 Mass. App. Ct. 719

Divorce and Separation, Alimony. Contract, Antenuptial agreement. Husband and Wife, Antenuptial agreement.

A probate judge erred in holding that an antenuptial agreement was unenforceable insofar as it precluded the wife from receiving alimony, in circumstances where the agreement was valid at the time it was executed and fair and reasonable at the time of the divorce. GREANEY, J., dissenting, with whom SPINA, J., joined.

COMPLAINT for divorce filed in the Barnstable Division of the Probate and Family Court Department on May 31, 2001.

The case was heard by Robert E. Terry, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Jacob M. Atwood (Mark T. Smith & Erin Moran Shapiro with him) for Craig B. Austin.

Dana Alan Curhan (Brad P. Bennion with him) for Donna M. Austin.

IRELAND, J. As part of the parties' judgment of divorce nisi, a Probate and Family Court judge held an antenuptial agreement (agreement) was invalid only insofar as it precluded the wife from receiving alimony. The husband appealed from the judgments, including the judge's award of alimony to the wife, and the Appeals Court affirmed. *Austin v. Austin*, 62 Mass. App. Ct. 719 (2004). We granted the husband's application for further appellate review, limited to the enforceability of the agreement. Because we conclude that the agreement was valid at the time it was executed and fair and reasonable at the time of divorce, we vacate so much of the judgment that awards alimony payments to the wife.

Facts and procedural background. The parties met in 1984 and lived together from 1986 until 1988. They were married in May, 1989. Two days prior to the marriage, on May 11, 1989, the couple executed the agreement. The judge found that the husband made the marriage conditional on the signing of the agreement and that the wife "was not thrilled" about signing. Both parties sought the advice of legal counsel, but it was the draft prepared by the wife's counsel that the parties executed. Separate lists of each of the parties' assets were attached to the agreement as exhibits. The husband's assets were worth approximately $1 million, including interests in various family businesses. The wife's assets totaled approximately $35,000, most of which consisted of furs and jewelry. *See Austin v. Austin*, *supra* at 720 (listing the parties' assets).

The agreement allowed the separate property listed on the parties' exhibits to the agreement to be retained separately. In addition, "[t]he separate property of each party . . ., including [the] increase in value of property acquired in exchange therefor, shall remain the sole and separate property of the party in whose name it is titled."

All other property was to be deemed marital property and subject to "division under the laws of the jurisdiction which ultimately terminates . . . the marriage." The agreement provided, in relevant part, that any appreciation on the last marital home at the time of separation would be deemed a marital asset, subject to division. A key provision was that, if the marital residence was owned solely by the husband at the time of separation, although the wife would have to vacate the home,[Note 1] the husband was required to assist the wife in relocating and to give the wife "support based upon such considerations as the length of the marriage, their present employment, whether any

children were born to the marriage and such other factors as are cognizable under domestic relations and property laws of the jurisdiction in which the parties last resided."[Note 2] Both parties waived alimony from the other.[Note 3]

Over the course of their twelve-year marriage, the couple had one child, born in 1991. By agreement, the wife stayed home as a full-time mother, helping out occasionally at the family's restaurant, which opened in 1999, and other businesses. In addition, in 1995, the couple bought a house in East Sandwich, which was the marital home at the time the wife filed for divorce in 2001. During the marriage, the family enjoyed "an upper class lifestyle."

In a bifurcated trial, the judge first considered evidence whether the agreement was valid. The judge found that the parties made informed, voluntary decisions to sign the agreement, that they represented their net worth to the best of their abilities, and that the wife was "under neither duress [n]or coercion when she signed the agreement."[Note 4] He also found that the wife was fully advised of her rights when she executed the agreement and that the wife, having been divorced previously, was fully aware of her rights to alimony, support, property division, and child support. The judge found that, as it related to the division of property, the agreement was fair and reasonable at the time of execution. However, although he further found that the wife's "waiver of alimony at that time was a knowing, voluntary and intelligent waiver," the judge concluded that the waiver of alimony was unfair and unreasonable at the time the agreement was executed.

After a trial on the merits of the divorce, the judge divided the marital assets. Relevant to our discussion is the fact that the wife was awarded, among other things, the marital home, valued at $1,275,000,[Note 5] $525,000 in cash, and her Lexus automobile (subject to a loan balance of $24,575). The judge also awarded the wife $500 per week in child support and $1,000 per week in alimony. The husband's appeal from the alimony provision is the sole issue before this court.[Note 6]

Discussion. Antenuptial agreements that waive alimony are not "per se against public policy and may be specifically enforced." *Osborne v. Osborne*, 384 Mass. 591, 598 (1981). However, to be enforceable, the agreement must be valid at the time of execution and must also be fair and reasonable at the time of divorce. *DeMatteo v. DeMatteo*, 436 Mass. 18, 26 (2002). In order to be valid at the time of execution, the judge must determine whether "(1) [the agreement] contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement; (2) the contesting party was fully informed of the other party's worth prior to the agreement's execution, or had, or should have had, independent knowledge of the other party's worth; and (3) a waiver by the contesting party is set forth." *Id*., quoting *Rosenberg v. Lipnick*, 377 Mass. 666, 672 (1979). In determining whether an agreement was fair and reasonable at the time of execution, "reference may appropriately be made to such factors as the parties' respective worth, . . . ages, . . . intelligence, literacy, business acumen, and prior family ties or commitments." *Rosenberg v. Lipnick*, *supra* at 672. An agreement, even a one-sided agreement that leaves the contesting party with "considerably fewer assets" and imposes a "far different lifestyle after divorce" than she had during the marriage, is fair and reasonable unless "the contesting party is essentially stripped of substantially all marital interests." *DeMatteo v. DeMatteo*, *supra* at 31.

Where an agreement is valid at the time of execution, a judge must take a second look at its provisions at the time of divorce. *Id*. at 34-35. At that time, the agreement will be enforced "unless, due to circumstances occurring during the course of the marriage, enforcement . . . would leave the contesting spouse 'without sufficient property, maintenance, or appropriate employment to support' herself." *Id*. at 37, quoting 1 H.H. Clark, Jr., *Domestic Relations in the United States* § 1.9 (2d ed. 1987). We turn first to the validity of the agreement at the time it was executed.

In concluding that the agreement was not fair and reasonable as to alimony for the wife at the time of its execution, the judge stated: "Although at the time it may have been reasonable to for[ ]go alimony because she was employed and was young and healthy, . . . it was not fair and reasonable at the time of execution for [the wife] to for[ ]go all possible alimony and support given the great disparity of earning potential of the parties." The wife was employed at a department store in Boston, and the husband had various business interests. The judge noted that the wife entered the marriage intending to build a life with the husband and "rightfully believed that what they built together would belong to both of them," but that the husband made "it his mission . . . to prevent the creation of joint marital assets."[Note 7] Although it is important to our analysis, the judge did not address the provision of the agreement that

created support for the wife based on, among other things, length of marriage and employment, in the event a jointly owned marital home did not exist at the time a divorce complaint was filed.

The judge's findings do not permit the conclusion that the wife was "essentially stripped of substantially all marital interests," which is the standard required to declare an agreement invalid at its execution.[Note 8] *DeMatteo v. DeMatteo*, *supra* at 31. Disparity of income that has the potential to leave one spouse in an essentially different lifestyle is not a valid basis for determining that the agreement was invalid at its execution. *Id*. Moreover, "[w]here there is no evidence that either party engaged in fraud, failed to disclose assets fully and fairly, or in some other way took unfair advantage of the confidential and emotional relationship of the other when the agreement was executed, an agreement will be valid unless its terms essentially vitiate the very status of marriage." *Id*.

Here there is no evidence of the husband's taking unfair advantage of the wife at the time the agreement was executed. The wife's attorney drafted the agreement, after he had advised her not to sign an agreement prepared by the husband's attorney. Furthermore, as discussed, the judge found that the wife was fully aware of her rights and knowledgeable about alimony, property division, and child support. The agreement provided that the wife's separate premarital property would remain hers and not be incorporated into marital assets. *Cf. Rice v. Rice*, 372 Mass. 398, 400 (1977) (judge has "discretion to assign to one spouse property of the other spouse whenever and however acquired"). The agreement permitted the wife a joint interest in marital assets and provided that "any appreciation on the marital home or such home as the parties reside as their last marital home at the time of separation, whether due to market forces or capital investment," be divided as a marital asset, even if the husband held sole title to the property. Most important, the agreement entitled the wife to relocation and "support" from the husband if there were no jointly owned marital home at the time of a divorce, "based upon such considerations . . . as are cognizable under domestic relations and property laws" of the relevant jurisdiction. In short, the agreement provided for either funds from a capital asset or access to support, utilizing standard factors such as those now codified in Massachusetts in G.L. c. 208, § 34. When they were married, the couple resided in the husband's condominium unit. Therefore, it was reasonably foreseeable that a home owned by the husband would exist in the event of a divorce. There is nothing in this record that would allow us to conclude that the agreement vitiated the status of marriage by stripping the wife of "substantially all marital interests." *DeMatteo v. DeMatteo*, *supra* at 31. Accordingly, the agreement was valid at the time it was executed. Had the wife been dissatisfied with the terms of the agreement, she could have refused marriage. *See id*. at 34.

Our conclusion that the agreement is valid requires us "to consider whether there is any reason not to enforce it." *Id*. We begin by noting that, although he was not required to do so after he found the agreement to be invalid at the time of execution, the judge also found that the agreement concerning alimony was invalid at the time of divorce. He stated that the wife had spent ten of the twelve years of marriage as a homemaker, completely dependent on the husband, and given her lack of education,[Note 9] was "not in a position to secure income which would maintain the lifestyle that she achieved [for her and her daughter] during the marriage."

In the *DeMatteo* case, the court held that the so-called "second look" at the agreement "is to ensure that the agreement has the same vitality at the time of the divorce that the parties intended at the time of its execution." *Id*. at 37. The agreement must be enforced unless circumstances such as the mental or physical deterioration of the contesting party, or erosion of promised support by inflation, would lead the court to conclude that the agreement was not conscionable and that its "enforcement . . . would leave the contesting spouse "without sufficient property, maintenance, or appropriate employment to support herself.'" *Id*., quoting 1 H.H. Clark, Jr., *Domestic Relations in the United States* § 1.9 (2d ed.1987). In the *DeMatteo* case, the court rejected as insufficient the factors the judge had relied on to determine that an antenuptial agreement with "less than modest" financial provisions for the wife was invalid: lifestyle during the marriage, vast disparity in the parties' ability to acquire assets, and the fact that it was a ten-year marriage that produced two children. *Id*. at 38. The court stated that "the wife was fully apprised of the husband's holdings before she agreed to these 'less than modest' arrangements." *Id*. In fact, the court recognized that one spouse's share of the marital assets might be "disproportionately small."[Note 10] *Id*. at 37.

Here, there has been no physical or mental deterioration of the wife. She was self-supporting during a period of separation prior to their marriage. The wife has the marital home worth $1,275,000 and was awarded $525,000 in cash. She was allowed to keep many of the contents of the marital home, including jewelry acquired since the

marriage worth $74,000. Given the assets she has been awarded, we cannot say that the agreement leaves the wife without sufficient property and maintenance.

Conclusion. For the reasons set forth above, we conclude that the agreement is enforceable and vacate the judge's order to award the wife alimony.

So ordered.

GREANEY, J. (dissenting, with whom Spina, J., joins). The court today denies a woman, in her fifties, with a high school education, low potential earning capacity, and a child to raise, her right to receive alimony. The linchpin of the court's decision, which pertains to the first standard stated in *Rosenberg v. Lipnick*, 377 Mass. 666, 672 (1979), for determining the validity of an antenuptial agreement, is the following statement:

"The judge's findings do not permit the conclusion that the wife was "essentially stripped of substantially all marital interests,'[Note Dissent-1] which is the standard required to declare an agreement invalid at its execution. *DeMatteo v. DeMatteo*, [436 Mass. 18, 31 (2002)]." *Ante* at 605. The court erroneously applies this standard.

As noted, the critical time frame is the time of execution of the agreement. *DeMatteo v. DeMatteo*, *supra* at 30. Significantly, at that time, the wife did not simply agree to take less than what she might have received under G.L. c. 208, § 34. Instead, she relinquished her right to both alimony and any claim on the husband's assets, essentially giving up substantially all marital interests. *Contrast DeMatteo v. DeMatteo*, *supra* at 22, 34 (explaining that, although it gave wife less than she would have received under G.L. c. 208, § 34, antenuptial agreement did not strip wife of her marital rights because it provided her, at the time of its execution, with a mortgage-free house, an automobile, medical insurance, and lifetime alimony). While the agreement did not impair the wife's right to seek her share of the marital assets in the event of divorce, there were no marital assets at the time she executed the agreement. The wife, in substance, was given nothing under the agreement. The agreement contemplated only potential marital assets that might be acquired after marriage. Further, although the agreement contemplated the possibility of a future marital residence, it had a provision relating to circumstances where the parties lived together "in a residence owned by only one of them," and as noted by the Appeals Court, "there is . . . nothing in the agreement *requiring* [the husband] to provide a home for [the wife]" (emphasis added). *Austin v. Austin*, 62 Mass. App. Ct. 719, 720 n.2 (2004). Contrary to the court's statement, if no jointly owned marital home existed at the time of the divorce, the agreement required the husband only to "assist" the wife "in her relocation and support," with absolutely no monetary obligation specified or required. Thus, at the relevant time, namely, when the agreement was executed, the wife essentially gave up all her marital rights.

The parties did subsequently acquire assets during the marriage, and the wife ultimately received a share of the assets. Consideration of that fact, however, is appropriate if it becomes necessary to take a "second look" at the agreement, a step required only after it has been determined (at the time of the first look) that an agreement is valid. *DeMatteo v. DeMatteo*, *supra* at 34. There is no need to reach that consideration in these circumstances. The Appeals Court, in a well-crafted opinion, saw the flaw in the husband's arguments and voided the agreement in first-stage examination for the reasons I have described. *See Austin v. Austin*, *supra* at 727 ("In so doing [namely, concluding that this agreement should not be enforced], we do not consider the circumstances at the time of the divorce, including whether either party has accumulated additional assets since the agreement was made. That inquiry occurs during the 'second look' stage, when a court deciding whether and to what extent to enforce a valid term of the agreement must assess if it is 'conscionable' to do so. *DeMatteo v. DeMatteo*, 436 Mass. at 38"). Thus, the court has analytically transposed the proper order that governs examination of the validity of antenuptial agreements. In so doing, it has implicitly overruled portions of the *DeMatteo* decision that hew closely to the traditional two-stage analysis, holding, without expressly saying so, that an agreement, perhaps proper at the second look, is valid for all purposes, even if it is nugatory at the time of execution.

For these reasons, I respectfully dissent.

FOOTNOTES

[Note 1] After the parties were married, they lived in a condominium unit owned by the husband.

[Note 2] The agreement preserved the parties' rights concerning support and custody of their child.

[Note 3] The paragraph waiving alimony states that both parties "understand that any waiver or modification of their right [to alimony] may be voidable under certain circumstances and may be subject to reconsideration by a court of competent jurisdiction."

[Note 4] For purposes of this appeal, the wife does not contest the judge's findings that she was fully informed of the husband's net worth prior to marriage and that the agreement contains a waiver.

[Note 5] The marital home is subject to a $154,000 mortgage.

[Note 6] The husband also appealed from the judge's decision concerning visitation with his child. That issue was decided by the Appeals Court and was not raised in the husband's application for further appellate review. *Austin v. Austin*, 62 Mass. App. Ct. 719, 722 (2004).

[Note 7] The judge did not find that the husband breached the prenuptial agreement or fraudulently diverted or concealed marital assets. In such circumstances, the judge would have the equitable power to design a remedy, such as adjusting the distribution of assets, regardless of whether the agreement itself was valid either at its execution or at the time of divorce. *See Anderson v. Anderson*, 354 Mass. 565, 567 (1968) (discussing Probate Court's equity jurisdiction); *Bak v. Bak*, 24 Mass. App. Ct. 608, 624 (1987) (affirming court's judgment that real estate that husband fraudulently transferred to his mother be held against husband's alimony payments); C.P. Kindregan, Jr., & M.L. Inker, *Family Law and Practice* § 71:2 (3d ed. 2002 & Supp. 2005) (same).

[Note 8] The judge's decision concerning the agreement's validity was issued approximately one month before our decision in *DeMatteo v. DeMatteo*, 436 Mass. 18 (2002). The *DeMatteo* case was called to the court's attention by the husband in motions he filed in August, 2002. Neither party contests the fact that the *DeMatteo* decision, which clarified the standards to be applied to antenuptial agreements, applies to this case. *Id*. at 30-31, 35. *See generally Schrottman v. Barnicle*, 386 Mass. 627, 630-631 (1982).

[Note 9] The wife was born in 1952 and has a high school education.

[Note 10] Contrary to the suggestion of the dissent, *post* at 610, today's decision reaffirms our holding in *DeMatteo v. DeMatteo*, *supra*, that as a first stage inquiry, a prenuptial agreement must be found to be valid, a determination that includes, inter alia, a finding that the agreement "contains a fair and reasonable provision as measured at the time of its execution for the party contesting the agreement." *Id*. at 26, quoting *Rosenberg v. Lipnick*, 377 Mass. 666, 672 (1979).

[Note Dissent-1] This language appeared for the first time in *DeMatteo v. DeMatteo*, 436 Mass. 18 (2002), which was decided after the judge had entered his decision concerning the validity of the agreement.

PIERCE v. PIERCE
455 Mass. 286

SJC-10381.

Supreme Judicial Court of Massachusetts, Middlesex.

Argued September 8, 2009.

Decided November 9, 2009.

Anthony M. Doniger, Boston (Susan A. Hartnett with him) for Rudolph F. Pierce.

David E. Cherny, Boston (Mark T. Smith with him) for Carneice G. Pierce.

The following submitted briefs for amicus curiae:

Rachel B. Biscardi for Women's Bar Association of Massachusetts & another.

Edward M. Ginsburg, Christina L. Paradiso, & Katie M. Perry for Legal Assistance Corporation of Central Massachusetts.

John Foskett, Thomas J. Barbar, Boston, & Fern L. Frolin, Wellesley, for American Academy of Matrimonial Lawyers, Massachusetts Chapter.

Present: SPINA, COWIN, CORDY, BOTSFORD, & GANTS, JJ.

GANTS, J. The plaintiff, Rudolph F. Pierce, was married to the defendant, Carneice G. Pierce, for thirty-two years until their divorce on August 26, 1999. As part of their separation agreement, which was merged in relevant part with the judgment of divorce nisi (divorce judgment), Rudolph was required to pay Carneice $110,000 per year as alimony for her support and maintenance.[1] In March, 2008, at the age of sixty-five, Rudolph voluntarily retired as a partner at the law firm where he had practiced and became "of counsel" to the firm. In April, 2008, he filed a motion in the Probate and Family Court to amend his earlier complaint for modification of the divorce judgment, asking the court to eliminate his alimony obligation to Carneice because of his retirement. After an evidentiary hearing, the judge allowed Rudolph's complaint for modification to the extent that the judge reduced the amount of the alimony to $42,000 per year. Rudolph now appeals from the modification of the divorce judgment, contending that the judge abused her discretion by failing to terminate Rudolph's alimony obligation. Rudolph also appeals from the judge's failure to grant a retroactive reduction in alimony for calendar year 2007, in view of the significant decline in his earned income that year resulting from his gradual withdrawal from active employment.

We granted Rudolph's application for direct appellate review to consider whether a former spouse's voluntary retirement from employment at or beyond the customary age of sixty-five should create a rebuttable presumption under the statutes governing the award of alimony (G.L. c. 208, §§ 34, 37) that any alimony obligation owed by the retiring spouse should be terminated. We conclude that the statutes and interpretative case law governing the determination of the amount of alimony do not reasonably permit such a presumption. Instead, we hold that voluntary retirement at a customary age is simply one factor, albeit an important one, to be considered by the judge in deciding whether to modify the alimony obligation set forth in a divorce judgment. We conclude that the judge did not abuse her discretion in finding that a reduction in the amount of alimony, but not a termination of alimony, was warranted in view of the totality of the circumstances, which in this case included not only Rudolph's age and wish to retire but also Carneice's recent loss of employment and desire to postpone her application for Social Security benefits until she became eligible for full retirement benefits.

We further hold that the judge erred in failing to make specific findings of fact to support her decision not to modify the divorce judgment retroactively with respect to alimony that she found was due in 2007 but had not yet been paid at the time Rudolph served his complaint for modification. We therefore remand this case to the judge for further proceedings consistent with our ruling.[2]

Background. We summarize the relevant facts as found by the judge and as stipulated by the parties, supplemented where necessary by undisputed evidence in the record. Rudolph and Carneice were married in 1967 and divorced on August 26, 1999. At the time of the divorce, Rudolph was fifty-seven years of age and Carneice was age fifty-five. At the time of the judge's ruling on the complaint seeking to terminate alimony, Rudolph was sixty-six years of age and Carneice, sixty-four. They have two children from their marriage, both of whom are emancipated. Both parties are in good health for their respective ages and physically able to work in their respective fields of employment.

Rudolph began practicing law in 1970. He became a United States Magistrate Judge in 1976 and an Associate Justice of the Massachusetts Superior Court in 1979. He returned to the private practice of law in 1985 and, in 1987, became a partner in a Boston-based law firm, where he remained until his voluntary retirement on March 31, 2008. During his years in private practice, Rudolph enjoyed a successful career as a trial lawyer, specializing in civil litigation and "white collar" criminal defense. Following the 1999 divorce, he remarried and moved with his wife in 2004 to the Washington, D.C., area, where he became the lone litigation attorney in his firm's Washington, D.C., office.

At the time of the divorce judgment, Rudolph earned approximately $450,000 as a partner at his law firm. After receiving between $500,000 and $570,000 in total compensation from the law firm for each of its fiscal years between 1999 and 2006, his compensation dropped to $300,000 in 2007.[3] When he voluntarily retired from the law firm in 2008 at the age of sixty-five, he had been earning a salary of $225,000 per year. By converting to retired "of counsel" status, Rudolph relinquished any regular, fixed annual compensation, but continued to receive medical insurance and long-term care insurance. He would also receive $250 per hour for any case work he performed. In July, 2008, he began receiving full Social Security benefits totaling approximately $24,000 per year. At the time of the judge's ruling, Rudolph reported annual income of approximately $34,000, consisting of Social Security income, dividends, interest, and "one-time" income; he had assets of approximately $1.3 million and no significant debt. The judge found that among Rudolph's assets was a retirement account valued at approximately $843,000, which, she concluded, would provide him with unearned income of at least $40,000 when he chose to access these funds. Rudolph's current wife is employed and earns $125,000 annually.

During her marriage to Rudolph, Carneice was the primary caretaker for the parties' two children and the marital home. For twenty-seven years of her marriage, Carneice was employed by an international computer corporation, but at the time of the divorce, she had left her position there and was working as a development officer for an international charitable organization. In August, 2007, when the complaint for modification was filed, she was employed as a fundraiser for a national nonprofit organization, where she earned $95,000 annually. In June, 2008, Carneice's employer informed her that her position had been restructured and that she would be required to cover a larger territory, increase her travel, and assume more duties without any increase in salary. After explaining that she could not take on the increased travel and other responsibilities because of her age and physical condition, Carneice resigned her position. She received no severance payment. At the time of the judge's ruling, she was looking for, but had not yet found, new employment. She also had applied for unemployment benefits but had yet to learn whether she was eligible for such benefits. Because she was unemployed and received neither Social Security nor unemployment benefits, at the time of the judge's ruling, Carneice reported current total annual income of under $1,000, all from interest and dividends. She had nearly $600,000 in bank and money market accounts, plus an IRA retirement account valued at approximately $292,000. Including these accounts and the real estate she owned, her total assets were approximately $1,248,000; offsetting this, she had mortgages and other debts of approximately $325,000. Carneice intended to find employment and postpone retirement for two years, at which time she would become eligible for full Social Security benefits.

At the time of the 1999 divorce, the parties entered into a separation agreement, negotiated by experienced divorce counsel, which, with respect to all terms governing the payment of alimony, merged into the divorce judgment. The separation agreement made an equal division of marital property between the parties.[4] Under the terms of the agreement, Rudolph was obligated to pay Carneice alimony for her support and maintenance in the amount of $110,000

annually for an indefinite period; the agreement provided for termination of the payments only on the death of Rudolph, or on the death or remarriage of Carneice, whichever came earlier. Payment was to be made in two parts: (1) regular payments in the amount of $2,000 on the first and the fifteenth of each month, totaling $48,000 annually; and (2) the balance of $62,000 "in approximately four yearly installments to be paid at a time and in an amount to coincide with cash payments [Rudolph] receives from his employer. . . . In any event, the entire sum of [$62,000] is to be paid in full no later than December 31st of each year."

Neither party sought modification to the terms of the divorce judgment until Rudolph filed a complaint for modification in August, 2007, seeking to reduce the amount of his alimony obligation in connection with his gradual withdrawal from active employment with his law firm. In February, 2008, Carneice filed a complaint for contempt after Rudolph failed to pay the $62,000 balance due under the divorce judgment for the calendar year 2007.

On March 17, 2008, the judge found that, under the terms of the separation agreement, Rudolph owed and was required to pay Carneice $41,107, which represented, in the judge's calculation, the prorated portion of the annual $62,000 payment attributable to the period from January 1, 2007, to the date Rudolph served the complaint for modification on Carneice—August 31, 2007. The judge ruled that, even if a modification of Rudolph's alimony obligation were allowed, the modification would not apply to amounts due prior to the service of the complaint for modification.[5]

In April, 2008, Rudolph moved to amend his complaint for modification, asserting that, because he had retired completely from the practice of law and therefore was without earned income, his alimony obligation should be terminated and his alimony obligation for 2007 retroactively should be reduced. On May 2, 2008, Carneice moved to amend her complaint for contempt, claiming that Rudolph had stopped making bimonthly alimony payments of $2,000 as required by the divorce judgment.

At the August 13, 2008, hearing on the consolidated complaints for modification and contempt, the judge heard the testimony of both Rudolph and Carneice. On September 16, 2008, in her twenty-four page decision, the judge considered, among other factors, the current income, assets, and liabilities of the parties, their financial needs, Rudolph's financial support of his mother and his wife's financial support of their household, and the opportunities available to each of the parties to acquire future income and assets. The judge concluded that it was appropriate to reduce Rudolph's obligation to pay alimony under the divorce judgment from $110,000 per year to $42,000 per year, retroactive to April 1, 2008, but not appropriate to terminate that obligation altogether. That same date, the judge entered judgment on Carneice's complaint for contempt by finding Rudolph not guilty of contempt. The judge did not modify her earlier judgment obliging Rudolph to pay Carneice the prorated amount of $41,107 for the first eight months of 2007.

The judge recognized that "there may be insufficient income" for each party to enjoy the standard of living they had enjoyed during their marriage, "particularly as they now approach their retirement years." However, the judge found that Rudolph had not reduced his standard of living after his retirement and, "based on his significant assets, it appears he will continue to have a similar lifestyle to that when he was employed." In contrast, the judge found that Carneice had insufficient income to meet her financial needs and could not do so without continued financial support from Rudolph. In summary, the judge acknowledged that "retirement is something due every individual at some point in life," but found that "the facts and circumstances presented in this matter demonstrate an ongoing need for support on behalf of Carneice in addition to what she can continue to earn until her own retirement."

The judge found that Rudolph had the present financial ability to pay the reduced amount of alimony, despite his diminished income. The judge noted that Rudolph was receiving Social Security benefits of approximately $24,000 per year, that his retirement assets, assuming a rate of return of five per cent, should provide him with an unearned income of approximately $40,000 per year, and that Rudolph's wife was paying many of the couple's bills from her annual salary of $125,000. The judge also found that, despite his retirement, Rudolph continued to have "significant earning power." As "of counsel" to his law firm, Rudolph had a continuing ability to earn income through part time, hourly legal work that would pay him $250 per hour. She also found that his extensive judicial and legal experience allowed him to obtain employment at one of the Washington, D.C., law schools.[6]

The judge noted that, even though Rudolph was fifty-seven years of age when he entered into the separation agreement with Carneice and "must certainly have been aware that his retirement was on the horizon," the agreement provided that alimony would continue until Carneice's remarriage or the death of either party. The judge declared that the terms of the agreement must bear on any resolution of the issues before her: "This provision is clear and unambiguous as to the parties' desire for when support should cease, and retirement is not among the list. Therefore, even if the parties' agreement of August 26, 1999 is to be modified, the parties' original desires and purposes should not be disregarded."

Discussion. "To be successful in an action to modify a judgment for alimony or child support, the petitioner must demonstrate a material change of circumstances since the entry of the earlier judgment." *Schuler v. Schuler*, 382 Mass. 366, 368 (1981). Here, Rudolph was successful in modifying the divorce judgment with respect to his alimony obligation, but he did not succeed in terminating that obligation. In considering Rudolph's appeal from the modification judgment, we recognize that a judge enjoys considerable discretion in fashioning an appropriate modification judgment, and that the judgment may not be reversed in the absence of an abuse of discretion. *See Ross v. Ross*, 385 Mass. 30, 37 (1982); *Greenberg v. Greenberg*, 68 Mass. App. Ct. 344, 347–348 (2007). Because every modification judgment requires findings of fact, conclusions of law, and the exercise of discretion, our inquiry on review requires careful consideration of the facts and circumstances of an individual case. We examine (1) whether the factual findings are "clearly erroneous," giving "due regard ... to the opportunity of the trial court to judge of the credibility of the witnesses," Mass. R. Dom. Rel. P. 52(a) (2008); (2) whether there were errors of law; and (3) whether the judge appears to have based her decision not on sound discretion, but "on whimsy, caprice, or arbitrary or idiosyncratic notions." *Bucchiere v. New England Tel. & Tel. Co.*, 396 Mass. 639, 642 (1986). The standard of review reflects substantial, but not unlimited, deference to the judge who saw the witnesses and heard the evidence. *See Boulter-Hedley v. Boulter*, 429 Mass. 808, 811 (1999).

1. Before considering whether the judge abused her discretion by failing to terminate Rudolph's alimony obligation, we first briefly review the law of divorce and alimony as it has evolved in the Commonwealth. There is no common-law authority in Massachusetts for a court to grant a divorce or award alimony. "The court's power to award alimony and make an equitable division of property is wholly statutory."[7] *Heins v. Ledis*, 422 Mass. 477, 480 (1996). *See Gottsegen v. Gottsegen*, 397 Mass. 617, 621–622 (1986). *See also Davol v. Davol*, 13 Mass. 264, 264–265 (1816) (judicial authority to award alimony originates only in statute, not under common law). In the Eighteenth Century, under the Colonial government of Massachusetts, divorce could be granted only by the Governor or the Governor's Council or through a special legislative Court of Assistants, to which the Colonial Legislature delegated authority to hear divorces. *See* C.P. Kindregan, Jr., & M.L. Inker, *Family Law and Practice* §§ 1:2, 1:5 (3d ed. 2002). *See also Gottsegen v. Gottsegen*, *supra* at 621. The Massachusetts Constitution, adopted in 1780, provided that all causes of marriage, divorce, and alimony were to "be heard and determined by the governor and council, until the legislature shall, by law, make other provision." Part II, c. 3, art. 5, of the Constitution of the Commonwealth. In 1785, the Legislature made other provision, enacting comprehensive legislation regulating marriage and divorce and granting jurisdiction over these matters to the courts of the Commonwealth. St. 1785, c. 69, § 7. *See Gottsegen v. Gottsegen*, *supra* at 621–622. Consequently, in matters of divorce and alimony, the role of the judiciary is to interpret the governing statutes, not to fashion its own solutions under the common law. *See School Comm. of Lowell v. Mayor of Lowell*, 265 Mass. 353, 356–357 (1928). *See also* 3 N.J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 57.17 (3d ed. 2008).

The contemporary statutory provisions governing property division and alimony on divorce in Massachusetts date from 1974, when the Legislature dramatically revised the law by granting courts the ability to award alimony to either a husband or a wife, according to need, and to make a division of property by awarding either spouse's property to the other. *See* St.1974, c. 565; *Heins v. Ledis*, *supra* (explaining legislative purpose behind revision of statutory scheme for awarding alimony). *See also* Inker, Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts, 10 *Suffolk U.L. Rev.* 1, 4 (1975). Also new to the statutory scheme, and of immediate relevance to our inquiry, was the introduction by St.1974, c. 565, of a detailed inventory of factors that a court must consider in making any division of property or award of alimony.[8] These factors have remained unchanged since their introduction. General Laws c. 208, § 34, provides:

> "In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court . . . shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income."

A court must consider these same factors in determining whether the amount of alimony should be modified based on a change of circumstances following entry of an earlier judgment for alimony. *See* G.L. c. 208, § 37 (allowing court to modify alimony judgment and "make any judgment relative thereto which it might have made in the original action").[9] *See also Gottsegen v. Gottsegen*, *supra* at 625.

In conducting this multifactor analysis, whether in fashioning the original alimony judgment or in modifying that judgment, the judge must weigh all the statutory factors in light of the facts of the particular case; no single factor is determinative. *See Gottsegen v. Gottsegen*, *supra* at 623; *Ross v. Ross*, 385 Mass. 30, 35 (1982). "The weight to be accorded each of the § 34 factors in a particular case is committed to the judge." *Id.* at 37, quoting *Langerman v. Langerman*, 9 Mass. App. Ct. 869, 870 (1980). While the judge must consider and weigh all the factors, she must keep in mind that "the statutory authority of a court to award alimony continues to be grounded in the recipient spouse's need for support and the supporting spouse's ability to pay." *Gottsegen v. Gottsegen*, *supra* at 624.

If a supporting spouse has the ability to pay, the recipient spouse's need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage. "The standard of need is measured by the 'station' of the parties—by what is required to maintain a standard of living comparable to the one enjoyed during the marriage." *Grubert v. Grubert*, 20 Mass. App. Ct. 811, 819 (1985), citing *Rice v. Rice*, 372 Mass. 398, 402 (1977). *See also Kittredge v. Kittredge*, 441 Mass. 28, 44 (2004); *Greenberg v. Greenberg*, 68 Mass. App. Ct. 344, 346–347 (2007). When, however, the supporting spouse does not have the ability to pay, the recipient spouse "does not have an absolute right to live a lifestyle to which he or she has been accustomed in a marriage to the detriment of the provider spouse." *Heins v. Ledis*, 422 Mass. 477, 484 (1996). The judge must consider all the statutory factors and reach a fair balance of sacrifice between the former spouses when financial resources are inadequate to maintain the marital standard of living. *See id.*; *Greenberg v. Greenberg*, *supra*.

The judge's task in arriving at a fair balance, a complex calculus in any circumstance, becomes more complicated when a party's actual earnings are substantially less than the party's potential earning capacity. This can occur when a party who can work full time works part time or chooses employment that is more satisfying, but less lucrative, than the party's skills and education may permit. The provider spouse's payment obligation depends on both parties' incomes, so the cost of either party's choice of less lucrative work—or no work at all—is always, in part, shifted to the other. *See* American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 5.03(c) (2002). Because the statutory factors include age, health, vocational skills, employability, and opportunity for future income, *see* G.L. c. 208, § 34, in addressing this situation "[a] judge is not limited to a party's actual earnings but may in the proper circumstances consider potential earning capacity." *Heins v. Ledis*, *supra* at 485. *See Schuler v. Schuler*, 382 Mass. 366, 374 (1981) ("where the support provider is earning less than he could with reasonable effort, the trial judge may consider potential earning capacity rather than actual earnings"). A judge, however, is not obligated to use a party's potential earning capacity as the measure of the party's ability to pay. "Where a support provider makes . . . a good faith voluntary . . . career change, courts asked to reduce the rate of alimony or support payments frequently consider the moving party's actual income rather than his potential income in evaluating his ability to pay." *Id.* at 373. Much remains committed to the judge's discretion, as in other considerations of alimony.

In determining a fair balance of sacrifice between the parties, the judge may credit that the support provider has good faith, persuasive reasons for selecting employment paying less than his or her potential earning capacity. People often prefer careers that may not maximize their lifetime income, and divorce should not entirely deprive an individual of this freedom. But these considerations must be balanced against a provider's obligation to support the former spouse. *Id.* at 372. Thus, in *Schuler v. Schuler*, *supra* at 371-372 & n.6, we found that it was within the probate judge's discretion to conclude that it was unreasonable for a former spouse charged with the financial support of his former wife and children to continue indefinitely to earn a negligible income through consulting work in the

hope of becoming president of a small corporation when a substantially higher-paying salaried position was reasonably available to him. At the same time, we also recognized in that opinion that, in appropriate circumstances, "a good faith career change resulting in lowered income may warrant a reduction of alimony." *Id*. at 373.

A support provider's retirement from employment is a career change that, depending on the support provider's age, health, and occupation, may constitute a voluntary, good faith career change that will justify a probate judge's decision to rely on the support provider's actual, rather than potential, income in deciding whether (and by how much) to modify an alimony judgment. Yet, even in the context of a good faith retirement, a judge must reach a fair balance of sacrifice between the parties, based on all the factors set forth in G.L. c. 208, § 34. This may mean that overriding or counterbalancing needs of the recipient spouse require the judge to consider the retiring party's continued earning capacity (assuming the party remains in good health) in deciding the motion for modification, even if the practical consequence of considering continued earning capacity is to delay the support provider's retirement or to require the provider to find part-time employment. *See Huddleston v. Huddleston*, 51 Mass. App. Ct. 563, 570–571 (2001) (former husband's retirement at age sixty-five not by itself sufficient basis for terminating alimony). Just as a support provider will naturally ask himself whether *he* or *she* can afford now to retire or to reduce his or her workload to part-time employment, a judge deciding a complaint to modify an alimony judgment must ask whether the supporting spouse *and* the recipient spouse can afford the supporting spouse's retirement at that time.[10] If the answer is, "No," the judge in her discretion must determine a fair balance of sacrifice between the wants and needs of the two parties.[11] This may include ensuring that the supporting spouse is willing to assume an appropriate portion of the shared financial burden that will result from his or her decision to retire.

2. Here, the judge was required to grapple with this dilemma in arriving at her judgment. At age sixty-five, Rudolph had retired after a long and successful career in the law. In doing so, he forswore the $225,000 in compensation he was scheduled to earn in 2008 as a partner at his law firm and substituted for it only Social Security income in the amount of approximately $24,000 per year. In large part because his wife continued to work and contribute to the household expenses, Rudolph could afford to maintain his marital life style, provide ongoing financial support for his mother, and postpone any withdrawals from his retirement funds, at least until his wife's anticipated retirement. The timing of Rudolph's decline in income, however, could not have come at a worse time for Carneice. The judge was permitted to credit Carneice's testimony that, at age sixty-four, she could not physically handle the expanded territory her employer wished to assign her, with its additional travel requirements, and continue to manage her other work responsibilities.[12] In short, at the time of the hearing, Carneice was unemployed, without either severance or unemployment benefits, and not yet eligible for full Social Security benefits. The judge was warranted in finding that she could not meet her financial needs without alimony.[13]

The judge was also warranted in finding that Rudolph maintained an "of counsel" relationship to his law firm, was physically able to work part time as an attorney, and would be paid $250 per hour for such work. While the record does not identify any clients who would continue to retain him or any significant cases that required his involvement, the judge, in view of Rudolph's education and extensive experience as a civil trial lawyer, United States Magistrate Judge, and Massachusetts Superior Court judge, was not plainly wrong in finding that he could continue to perform part-time legal work for his law firm.[14]

The judge did not abuse her discretion in ruling that the fair balance of sacrifice in this case meant that Carneice, in view of Rudolph's wish to retire at the age of sixty-five, must adapt her life style to cope with a sixty-two per cent reduction in alimony (from $110,000 per year to $42,000 per year), and that Rudolph must continue to pay this reduced amount, even if that requires him to find part-time legal work at his law firm, withdraw retirement income earlier than he had hoped, or modify his life style. We note that, if Rudolph billed only 200 hours per year on case work at his law firm, he could earn $50,000, more than enough to pay all his alimony.[15]

Rudolph asks this court to tilt the balance of sacrifice in his favor by declaring a rebuttable presumption that all alimony should be terminated when (1) the supporting spouse retires from employment at a customary retirement age and has no actual earned income, (2) the parties' marital assets, including their retirement assets, had been equally divided at the divorce, and (3) the parties have the same amount of liquid assets at the time of the provider spouse's retirement. Rudolph contends that this presumption should be rebuttable only on a showing of extraordinary circumstances compelling continued payment of alimony.

We agree that, generally, a supporting spouse's wish to retire at a customary retirement age will justify a reduction of the alimony award, even if the consequence is that the recipient spouse may be unable to sustain a lifestyle equal to that enjoyed during the marriage. *See Schuler v. Schuler*, 382 Mass. 366, 370–371 (1981) ("A substantial and permanent decrease in the income of the support provider is one of the material circumstances to be considered in a request for reduction of a support [award]"). We also agree that, generally, if the parties' marital assets, including their retirement assets, have been equally divided at the divorce, and the parties have approximately the same amount of liquid assets at the time of the provider spouse's retirement, a judge should be reluctant to include the continued earning capacity of a supporting spouse who retires at a customary age in calculating a modified alimony award, unless the failure to do so would cause substantial financial hardship to the recipient spouse. In short, we agree that an alimony award that, for all practical purposes, requires a supporting spouse who wants to retire to continue to work beyond the customary retirement age imposes a considerable burden on that spouse that must be carefully weighed in reaching a fair balance of sacrifice. We also recognize that, even when a fair balance requires a supporting spouse to postpone retirement or to work part time, that balance (and the alimony award that emerges from such balancing) will and should change over time consistent with changes in the support provider's age, health, and employability (and perhaps the recipient spouse's eligibility for full Social Security and retirement benefits).

We decline, however, to create the rebuttable presumption proposed by Rudolph, which would discard the multifactor analysis required under G.L. c. 208, § 34, and embodied in our case law and replace it with a rule that, in the absence of extraordinary circumstances, would prohibit a judge from considering the continued earning capacity of a supporting spouse who retires at a customary retirement age. The multiple factors set forth in G.L. c. 208, § 34, and the obligation of a judge deciding an alimony judgment to consider all the factors, including "the opportunity of each [party] for future acquisition of . . . income," reflect the complexity of the alimony decision, the unique set of circumstances posed by every case, and the need to fashion an alimony judgment that imposes a fair balance of sacrifice in each case. Section 34 does not place any one of its mandatory considerations above any other; constrained by its directives, we have declined to do so on our own. G.L. c. 208, § 34. *See Gottsegen v. Gottsegen*, 397 Mass. 617, 623–624 (1986).[16]

We also do not agree that the age of the supporting spouse, taken in isolation, should always be the most significant factor in a judge's evaluation of alimony. Under the proposed standard, a support provider's terminal illness or involuntary job loss would be granted substantially less weight in a judge's ruling on a modification complaint than the support provider's voluntary decision to retire from active employment at the customary age, even though the former two circumstances lie outside his or her control and pose a more severe and potentially irreversible threat to the support provider's long-term ability to pay.

By seeking this rebuttable presumption, Rudolph essentially aims to ensure through a rule of law that his alimony obligation will terminate when he retires, even though no such provision was included within the separation agreement, which declares that alimony terminates only on Rudolph's death, or the death or remarriage of Carneice. Even where, as here, the separation agreement's provisions regarding alimony are merged into and do not survive the divorce judgment, "it is nevertheless appropriate for a judge to take heed of the parties' own attempts to negotiate terms mutually acceptable to them." *Bercume v. Bercume*, 428 Mass. 635, 644 (1999). *See Greenberg v. Greenberg*, 68 Mass. App. Ct. 344, 353 (2007) (declining to terminate alimony obligation on husband's retirement where separation agreement had provided for continuation until husband's death); *Huddleston v. Huddleston*, 51 Mass. App. Ct. 563, 567–568 (2001) (reversing termination of alimony obligations on supporting spouse's attainment of age of sixty-five when merged separation agreement between parties expressed contrary intent). If Rudolph had wanted his alimony obligation to end on his retirement, he could have negotiated such a provision in the separation agreement, which might have affected the division of marital property and the amount of alimony to be paid between divorce and retirement.

We are confirmed in our unwillingness to adopt the rebuttable presumption proposed by Rudolph by the absence of case authority for such a rule in other jurisdictions. Even the cases relied on by Rudolph and the amicus brief filed by the Massachusetts Chapter of the American Academy of Matrimonial Lawyers do not declare any such presumption. *See In re Marriage of Reynolds*, 63 Cal. App.4th 1373 (1998); *In re Marriage of Swing*, 194 P.3d 498 (Colo. Ct. App. 2008); *Pimm v. Pimm*, 601 So.2d 534 (Fla. 1992). In *In re Marriage of Reynolds*, *supra* at 1379, the California court declared, "Just as a married couple may expect a reduction in income due to retirement, a divorced

spouse cannot expect to receive the same high level of support after the supporting spouse retires." Consequently, the court held that "no one may be compelled to work after the usual retirement age of [sixty-five] in order to pay the same level of spousal support as when he was employed." *Id.* at 1378.[17] In *In re Marriage of Swing*, *supra*, the Colorado court adopted what it characterized as the "majority rule" that "reduced income due to a spouse's objectively reasonable decision to retire, made in good faith and not with the intention of depriving the other spouse of support, should be recognized as a basis for modifying maintenance." *Id.* at 501. In *Pimm v. Pimm*, *supra* at 535, the Florida court simply held that the postjudgment retirement of the provider spouse may be considered, together with other relevant factors and relevant law, in determining a petition to modify the alimony. The court added that the needs of the recipient spouse and the financial impact on that spouse of a modification or termination of alimony are among the relevant circumstances a court may consider in deciding a modification petition, along with any relevant provision contained in an earlier agreement between the parties. *Id.* at 537.[18] None of these assertions is inconsistent with this opinion.

Finally, Rudolph argues that, unless we create a rebuttable presumption to benefit the supporting spouse, the recipient spouse will hold effective veto power over the provider spouse's retirement decision, potentially denying the provider spouse the opportunity ever to retire. Our decision grants the recipient spouse no such veto. Every supporting spouse is permitted to retire, and an alimony judgment based on the supporting spouse's earned income eventually will need to be reduced or terminated to reflect the supporting spouse's diminished actual income after retirement. The supporting spouse, however, is not entitled unilaterally to retire regardless of the financial hardship such retirement may cause the recipient spouse. In appropriate circumstances, as here, the supporting spouse, even after reaching a customary retirement age, in the sound discretion of the probate judge, may be expected temporarily to postpone retirement or to find part-time work to help the recipient spouse weather difficult financial circumstances.

3. Beyond his challenge to the judge's award of continuing alimony in her ruling on his complaint for modification, Rudolph appeals from the judge's March 17, 2008, order directing him to make payment of $41,107 to Carneice. This sum represents the judge's calculation of the pro rata share of the $62,000 component of his 2007 alimony obligation for the period from January 1, 2007, to August 31, 2007, the date Rudolph served on Carneice his initial complaint for modification.[19]

The judge's order rests on two conclusions, one express and the other implicit. The express conclusion followed from the judge's interpretation of a term of the parties' 1999 separation agreement, which was merged with the divorce judgment, that required Rudolph, in addition to making bi-monthly alimony payments of $2,000, to pay Carneice each year:

> "The sum of Sixty-Two Thousand ($62,000.00) Dollars in approximately four yearly installments to be paid at a time and in an amount to coincide with cash payments the Husband receives from his employer, [the law firm]. In any event, the entire sum of Sixty-Two Thousand ($62,000.00) Dollars is to be paid in full no later than December 31st of each year."

The judge found that this language clearly means that the $62,000 component of alimony became progressively due over the course of the year, and therefore was properly allocable on a pro rata basis to a period of less than twelve months. The judge then found that the sum of $41,107 had been due and payable as of August 31, 2007.[20] The implicit conclusion underlying the judge's order is that any retroactive modification to Rudolph's 2007 alimony obligation that may arise from Rudolph's complaint for modification could not apply to unpaid sums that were "due and payable" as of August 31, 2007.

In reaching her express conclusion, the judge relied solely on what she found was the "clear and unequivocal" language of the agreement to reject Rudolph's argument that, because the anticipated quarterly payments from his employer ceased when his employment status changed in 2006 from an equity partner to a salaried employee, no part of the $62,000 annual obligation could be due and payable under the agreement until December 31, 2007. We conclude that the language of the separation agreement is not so clear and unequivocal as to permit the judge to reach this conclusion without considering parol evidence as to the purpose and intent of the parties in adopting this provision. *See Robert Indus., Inc. v. Spence*, 362 Mass. 751, 753-754 (1973).

We also conclude that the judge erred in her implicit conclusion that a judge may not reduce or eliminate an alimony obligation that is due and payable, but in arrears, in a judgment of modification. Probate judges "have full power and authority under [G.L. c. 208, § 37,] to modify [judgments] for alimony entered in divorce proceedings not only as to the future, but also as to arrears." *Watts v. Watts*, 314 Mass. 129, 133 (1943). *See Binder v. Binder*, 7 Mass. App. Ct. 751, 760 (1979) ("A Probate Court has the power to reduce the alimony provisions of its divorce judgment retroactively, as well as prospectively . . ."). [21, 22] Because a judge has authority to modify alimony payments due in arrears, a decision not to make a modification, such as the judge reached in her order, constitutes an exercise of discretion under G.L. c. 208, § 37. While such a decision clearly rests within the scope of a judge's discretion, it cannot be reached without findings reflecting her consideration of all the factors mandated by G.L. c. 208, § 34. The same is true with any decision regarding the amount of alimony. *See Gottsegen v. Gottsegen*, 397 Mass. 617, 623–624 (1986). The judge here made no such findings, and the record does not otherwise reflect that she considered all the § 34 factors in denying retrospective relief.

For these reasons, we vacate that part of the judge's March 17, 2008, order directing Rudolph to make payment of $41,107 to Carneice and remand this case so that the judge (1) may consider parol evidence and make findings as to the interpretation of the payment provisions in the separation agreement, and (2) may exercise her sound discretion, supported by findings of fact and a statement of reasons, as to whether Rudolph is entitled to retrospective relief regarding his alimony obligation for the period from January 1, 2007, to August 31, 2007.

Conclusion. We affirm the judgment on Rudolph's complaint for modification, dated September 16, 2008. We vacate that part of the order dated March 17, 2008, that directed Rudolph to pay Carneice the amount of $41,107, which the judge found was due and payable for the period from January 1, 2007, through August 31, 2007, and remand the case to the Probate and Family Court for further proceedings consistent with this opinion.

So ordered.

Notes:

1. In the interest of clarity, we use the first names of the parties. *See Bercume v. Bercume*, 428 Mass. 635, 636 n.1 (1999).

2. We acknowledge the amicus briefs filed by the American Academy of Matrimonial Lawyers, Massachusetts Chapter; the Legal Assistance Corporation of Central Massachusetts; and the Women's Bar Association of Massachusetts and the Women's Bar Foundation of Massachusetts.

3. In 2006, Rudolph changed his employment status with the law firm, converting from an equity partner who received a share of the firm's net profits to a salaried contract employee.

4. Under the division of marital assets reached in the separation agreement, Carneice received ownership of the marital home, certain small retirement accounts held in her own name, and a portion of the substantial retirement assets held in Rudolph's name. The retirement assets transferred from Rudolph to Carneice totaled approximately $409,000 at the time of transfer. At the time of the August 13, 2008, modification hearing, the total value of Carneice's retirement assets had declined to $296,600. Carneice testified that this decline was attributable to poor investment decisions by a professional advisor.

5. Rudolph moved for reconsideration of this order on April 10, 2008; the motion was denied on April 22, 2008.

6. Rudolph testified that he was unsuccessful in his application to teach at one Washington, D.C., law school.

7. In England, judicial authority over matrimonial matters was vested exclusively in the ecclesiastical courts, applying canon law. While these courts would, in certain circumstances, recognize legal separation and award alimony as a form of economic support, they refused as a rule to recognize the formal dissolution of a marriage. Beginning in the late Seventeenth Century, a narrow, alternative route to divorce developed for well-situated litigants able to secure formal divorce by way of a special act of Parliament. This remained the governing scheme under English law until 1857, when jurisdiction for divorce was transferred to the civil court system and divorce was formally authorized in circumstances of adultery. *See* H.H. Clark, Jr., *Domestic Relations in the United States* § 13.1, at 696 (2d ed. 1987). *See also Gottsegen v. Gottsegen*, 397 Mass. 617, 621 (1986).

8. Prior to the 1974 legislative revision, G.L. (Ter. Ed.) c. 208, § 34, had provided simply: "Upon a divorce, or upon petition at any time after a divorce, the court may decree alimony to the wife, or a part of her estate, in the nature of alimony, to the husband."

9. A complaint for modification must be based on a change of circumstances occurring after the earlier alimony judgment, because "the issue ought not be *relitigated* unless there has been a change of circumstances" (emphasis in original). *Cherrington v. Cherrington*, 404 Mass. 267, 270 (1989). *See Schuler v. Schuler*, 382 Mass. 366, 368 (1981).

10. In the clear-eyed observation of one court, a former spouse's ongoing need for financial support is a continuing limitation on a supporting spouse's freedom to retire, write poetry, or take a vow of poverty: "The reason for this is that the duty of self-fulfillment must give way to the

preexisting duty which runs between spouses who have been in a marriage which has failed." *Deegan v. Deegan*, 254 N.J. Super. 350, 358–359 (App. Div. 1992). *See Bassette v. Bartolucci*, 38 Mass. App. Ct. 732, 735–736 (1995).

11. When balancing a support provider's wish to retire against a recipient spouse's continuing financial need, the judge must consider all the statutory criteria in G.L. c. 208, § 34, as they relate to both parties, not simply the party seeking a reduction in the alimony judgment. *See Heins v. Ledis*, 422 Mass. 477, 485 (1996) (judge must consider recipient spouse's potential earning power when determining appropriateness of alimony); *Talbot v. Talbot*, 13 Mass. App. Ct. 456, 456–458 (1982) (reversing dismissal of complaint for alimony brought by former spouse in part for failure to consider effect of chronic mental illness on that spouse's employability and opportunity for acquisition of assets in future).

12. The judge found that Carneice's territory had spanned from Maine to Delaware but that her employer wanted her to add the Plains and Mountain States. She testified that she was already traveling two weeks of every month; the additional territory would have necessitated even more travel, at greater distances.

13. We acknowledge that the record did not support the judge's finding that Rudolph's retirement assets conservatively would yield a rate of return of five per cent, and note that the judge did not impute income to Carneice based on a comparable rate of return from either her retirement assets ($292,000) or her liquid savings ($597,000). We conclude, however, that even if the judge had assumed a more modest rate of return and imputed income from Carneice's retirement and liquid savings based on that same rate of return, Carneice would still not be able to meet her financial needs without alimony. Because the judge did not articulate any formula that she used to determine the modified amount of alimony, and because we conclude that the modified amount was within the range that was reasonable under the circumstances, we do not conclude that the judge abused her discretion despite these unsupported factual findings.

14. The judge also found that Rudolph "should be a highly desirable candidate to teach full or parttime at any of the greater Washington, D.C. law schools." While the record supports her finding that he "should be a desirable candidate," it does not support the conclusion that he had any reasonable prospect of obtaining full or part-time employment as a law professor, or that he would earn a substantial salary if he worked part time as an adjunct professor.

15. The amount in alimony paid by a provider spouse is deducted from gross income under Federal and Massachusetts tax law, so income taxes on such income are paid by the recipient spouse, not the provider spouse. *See* I.R.C. §§ 71, 215 (2006); C.P. Kindregan, Jr., & M.L. Inker, *Family Law and Practice* § 38:13 (3d ed. 2002) (G.L. c. 62, § 2, adopts Federal definition of gross income, so alimony may also be deducted from gross income on Massachusetts tax return).

16. We have created only one presumption as to alimony: unless otherwise provided in the divorce judgment or the parties' agreement, the remarriage of the recipient spouse is presumed to terminate the supporting spouse's obligation to pay alimony, absent "some extraordinary circumstances, established by the recipient spouse, warranting its continuation." *Keller v. O'Brien*, 420 Mass. 820, 826–827 (1995). In creating this presumption, we reasoned that, on the recipient spouse's remarriage, the new spouse assumes a duty to support the recipient spouse, so that, except in extraordinary circumstances, it is neither logical nor reasonable for the spouse to receive support from a current spouse and a former spouse at the same time. *Id*. at 828. Otherwise stated, by remarrying, the recipient spouse makes "an election between the support provided by the alimony award and the legal obligation of support embodied in the new marital relationship." *Id*., quoting *Voyles v. Voyles*, 644 P.2d 847, 849 (Alaska 1982). The recipient spouse makes no such election when the supporting spouse decides to retire, and therefore equitably should not be expected to bear the entire brunt of that decision.

17. The California court also held that the trial court could not properly attribute to the retired husband a monthly income based on his earning capacity rather than his actual earnings, thereby requiring him to work well past the age of sixty-five. *In re Marriage of Reynolds*, 63 Cal. App.4th 1373, 1377 (1998). The significance of this holding, however, is limited by the fact that the court found that there was no evidence in the record that the husband had any actual ability to work or that he had refused any actual jobs. *Id*. at 1378.

18. Rudolph focuses on the Florida court's acknowledgment that age sixty-five is the conventionally accepted age for retirement, but the court acknowledged this convention only for the purpose of concluding that a party wishing to retire before the age of sixty-five would have a heavy burden to show his or her retirement is reasonable. *See Pimm v. Pimm*, 601 So.2d 534, 537 (Fla.1992).

19. The September 16, 2008, judgments on Rudolph's complaint for modification and Carneice's complaint for contempt did not modify this order.

20. The judge calculated the amount due as follows: $62,000 divided by 365 days multiplied by 242 days (period from January 1, 2007, to August 31, 2007) equals $41,107.

21. A judgment for alimony differs in this regard from a judgment for child support. Under G.L. c. 119A, § 13 (a), an order for child support is not subject to modification for any period prior to the date that notice of a complaint for modification has been served. *Smith-Clarke v. Clarke*, 44 Mass. App. Ct. 404, 405–406 (1998).

22. Because the judge may issue retrospective relief as to alimony payments, she has the authority to provide such relief even if, on remand, she were again to find that $41,107 had been due and payable as of August 31, 2007.

ANSIN v. CRAVEN-ANSIN
457 Mass. 283

April 5, 2010–July 16, 2010

Court Below: Probate and Family Court Department, Worcester Division

Present: MARSHALL, C.J., IRELAND, SPINA, COWIN, CORDY, BOTSFORD, & GANTS, JJ.

Husband and Wife, Marital agreement. Contract, Marital agreement. Divorce and Separation, Division of property.

This court concluded that a so-called postnuptial or marital agreement does not violate public policy and may be enforced [288-289], but must be scrutinized by a judge to determine whether each party had an opportunity to obtain separate legal counsel of that party's own choosing, whether there was fraud or coercion in obtaining the agreement, whether all assets were fully disclosed by both parties before the agreement was executed, whether each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce, and whether the terms of the agreement were fair and reasonable at the time of execution and remained so at the time of divorce.

In a divorce action, a judge in the Probate and Family Court properly entered judgment enforcing a marital agreement against the wife, where the agreement was not the product of fraud, the husband met the rigorous standard for disclosure of his assets, the wife's waiver in the agreement of her rights in the event of divorce was meaningful, and the terms of the agreement were fair and reasonable both at the time of execution and at the time of divorce.

COMPLAINT for divorce filed in the Worcester Division of the Probate and Family Court Department on November 29, 2006.

The case was heard by Lucille A. DiLeo, J.

The Supreme Judicial Court granted an application for direct appellate review.

Susan E. Stenger (Nancy R. Van Tine & Robin M. Lynch Nardone with her) for the defendant.

David H. Lee (Kevin M. Corr with him) for the plaintiff.

MARSHALL, C.J. We granted direct appellate review in this divorce proceeding to determine whether so-called "postnuptial" or "marital" agreements are contrary to public policy and, if not, whether the marital agreement at issue is enforceable.[Note 1] The dispute is between Kenneth S. Ansin (husband) and Cheryl A. Craven-Ansin (wife) concerning the validity of their 2004 written agreement "settling all rights and obligations arising from their marital relationship" in the event of a divorce. Two years after the agreement was executed, in November, 2006, the husband filed a complaint for divorce and sought to enforce the terms of the agreement. At the time of the complaint, the parties had been married for twenty-one years and had two sons.

A judge in the Probate and Family Court upheld the agreement, finding that it was negotiated by independent counsel for each party, was not the product of fraud or duress, and was based on full financial disclosures by the husband, and that the terms of the agreement were fair and reasonable at the time of execution and at the time of divorce. Judgment entered enforcing the marital agreement. The wife appealed, and we granted both parties' applications for direct appellate review.[Note 2] We now affirm.

1. *Facts*. We recite the facts as found by the judge, all of which are supported by the record.

a. The marital assets. At the time of the execution of the marital agreement in 2004, the value of the combined assets of the husband and wife was approximately $19 million. One of the assets, now at issue, is the husband's interest in certain trusts and business entities established by his grandfather, currently managed by his uncle. The assets of these various entities are substantial real estate holdings in Florida.[Note 3] The husband's interest in the Florida real estate is passive; he was not involved in the management of the properties, and did not have or exercise control over the sale or other disposition of the properties. During the course of the marriage, the husband received, and the wife

was aware of, distributions from his interest in the Florida real estate. The timing and amount of the distributions was unpredictable, and varied widely, as the wife knew.

During the course of their marriage the couple retained RINET Company LLC (RINET) to provide financial advice to them and to prepare their joint tax returns. The parties' primary financial planner from RINET met with the couple on a quarterly basis, and RINET prepared "periodic summary reports" to permit the couple to monitor their financial affairs. Because the husband's interest in the Florida real estate was "fractional" and "non-controlling," and because "speculation" is "inherent in any attempt to assign any values to such interests," there was no attempt by RINET to assign concrete values to these assets. Rather, on the reports prepared by RINET, the husband's interest in the Florida real estate was given a "placeholder" value of $4 million to $5 million (the amount varied from time to time), of which the wife was well aware. The wife understood that the husband's principal objective in executing a marital agreement was to protect his interest in the Florida real estate in the event of a divorce.

b. The marital agreement. The parties were married in July, 1985. The execution of their marital agreement nineteen years later was precipitated by marital problems that began toward the end of 2003. At the time the couple sought the assistance of a marriage counsellor. In early 2004, the husband informed his wife that he "needed" her to sign an agreement if their marriage was to continue. He testified that his "uncertainty" about the wife's commitment to their relationship was the reason for this request. It caused the wife a "great deal of stress"; she told her husband that she would not sign any such agreement, and that discussion of the issue made her "physically ill." The parties separated, as it turned out for some six weeks. While the parties were separated, the husband promised his wife that he would recommit to the marriage if she would sign a marital agreement. She agreed to do so, she said, in an attempt to preserve the marriage and the family. The parties resumed living together, and went on a "second honeymoon."

In April, 2004, they began negotiating the terms of the agreement, which we describe below. Each retained counsel. The judge's detailed description of the negotiations depicts back-and-forth discussions between counsel for the wife and counsel for the husband, during which the wife negotiated terms more favorable to her. Several draft agreements were exchanged. The judge found that in the course of the negotiations the wife was "fully informed" of the marital assets, and that she was "satisfied" with the disclosures made by the husband with respect to the Florida real estate, which included the financial summaries prepared by RINET that used the "placeholder" values. Finally, with the assistance of their respective counsel, the parties reached an agreement; it was signed in July, 2004.

We briefly summarize key provisions of the marital agreement. The agreement sets forth the parties' intent that, in the event of a divorce, the terms of the agreement are to be "valid and enforceable" against them, and "limit the rights" that "otherwise arise by reason of their marriage."[Note 4] The agreement recites that the parties are aware of the rights to which they may be entitled under Massachusetts law, that each has retained independent legal counsel, and that each executed the agreement "freely and voluntarily." The agreement states that the parties are "aware of the other's income," warrants that each has been provided with "all information requested by the other," and affirms that each "waives his or her rights to further inquiry, discovery and investigation." The agreement further recites that each is "fully satisfied" that the agreement "will promote marital harmony" and "will ensure the treatment of Husband's property to which the parties agreed before their marriage and since their separation."

As for the distribution of property in the event of a divorce, the agreement states that the wife "disclaims any and all interest she now has or ever may have" in the husband's interest in the Florida real estate and other marital assets. The husband agreed to pay the wife $5 million, and thirty per cent of the appreciation of all marital property held by the couple from the time of the agreement to the time of the divorce.[Note 5] The agreement provides that the wife could remain in the marital home for one year after any divorce, with the husband paying all reasonable expenses of that household. The husband agreed to pay for the wife's medical insurance until her death or remarriage, and he agreed to maintain a life insurance policy to the exclusive benefit of the wife in the amount of $2.5 million while the parties remained married.

c. Events following execution of marital agreement. On execution of the marital agreement, the relationship between the husband and wife took on, in the judge's words, a "light and optimistic tone" and both were "looking forward to strengthening their marriage." The two engaged in numerous activities together, including training for a marathon and traveling. However, in August, 2004, the parties had a discussion that "led the [w]ife to believe that their mar-

riage was over." The husband had not decided to divorce his wife, and the judge credited his testimony that he was "unwilling" to abandon the marriage at that time.

In response to their marital difficulties, the parties again considered separating, but decided not to do so at least until their younger son graduated from high school. They remained living together from August, 2004, until June, 2005, engaged in an intimate relationship, and "attempted to preserve the appearance of their marriage." During this time, they purchased a new home for $790,000, and paid $500,000 for its renovations.

Meanwhile, the husband applied for and was accepted to Harvard University's Kennedy School of Government; his decision to enroll as a student there was not supported by his wife. The wife began to increase her consumption of alcohol, leading to more arguments with her husband. In June, 2005, at the wife's request, the husband moved out of the house. He did not file for divorce at that time, believing that while things looked "grim," filing for divorce would have been the "ultimate declaration" that his marriage was over. After separating from her husband, the wife maintained contact with their RINET financial advisor, inquiring on multiple occasions what the value of any payment to her would be under the terms of the marital agreement. In 2006 the wife became involved in a serious relationship with another man. In February of that year, the wife informed the husband that "one of us has to be strong enough to take the steps to bring closure to our relationship." She did not commence divorce proceedings. In November, 2006, the husband filed a petition for divorce.

2. *Validity of marital agreement*. Whether a marital agreement should be recognized in Massachusetts is a long-deferred question of first impression. *See Fogg v. Fogg*, 409 Mass.531, 532 n.2 (1991).[Note 6] Consistent with the majority of States to address the issue, *see Bratton v. Bratton*, 136 S.W.3d 595, 599-600 (Tenn. 2004), we conclude that such agreements may be enforced. *See e.g.*, *Matter of Estate of Harber*, 104 Ariz. 79, 86 (1969); *Casto v. Casto*, 508 So. 2d 330, 333 (Fla. 1987); *Lipic v. Lipic*, 103 S.W.3d 144, 149 (Mo. Ct. App. 2003); *Matter of Estate of Gab*, 364 N.W.2d 924, 925 (S.D. 1985).[Note 7] Our decision is consistent with our established recognition that a marital relationship need not vitiate contractual rights between the parties. We have, for example, recognized the validity of premarital agreements, *Osborne v. Osborne*, 384 Mass. 591, 598 (1981), and separation agreements, *Knox v. Remick*, 371 Mass. 433, 436 (1976), reasoning that it was important to respect the parties' "freedom to contract" and that such agreements may serve a "useful function" in permitting the parties to arrange their financial affairs "as they best see fit." *DeMatteo v. DeMatteo*, 436 Mass. 18, 30 (2002) (concerning premarital agreements). *See Osborne v. Osborne*, *supra* ("no reason not to allow persons about to enter into a marriage the freedom to settle their rights in the event their marriage should prove unsuccessful"); *Knox v. Remick*, *supra* ("no reason why parties to a separation agreement which anticipates that the marriage will be terminated by divorce may not agree to a permanent resolution of their mutual rights and obligations, including support obligations between them," provided that judge rules agreement is "not the product of fraud or coercion," that it is "fair and reasonable," and that parties agreed to its "finality").

The wife argues that marital agreements are different in kind and should be declared void against public policy because they are "innately coercive," "usually" arise when the marriage is already failing, and may "encourage" divorce. The wife provides no support for, and we reject, any assumption that marital agreements are typically executed amid threats of divorce or induced by illusory promises of remaining in a failing marriage. Marital contracts are not the product of classic arm's-length bargaining, but that does not make them necessarily coercive. Such contracts may inhibit the dissolution of a marriage, or may protect the interests of third parties such as children from a prior relationship. In any event, a marital agreement will always be reviewed by a judge to ensure that coercion or fraud played no part in its execution.

3. *Judicial review of a marital agreement*. A marital agreement stands on a different footing from both a premarital and a separation agreement.[Note 8] Before marriage, the parties have greater freedom to reject an unsatisfactory premarital contract. *See* C.P. Kindregan, Jr.,& M.L. Inker, *Family Law and Practice* § 50:15 (3d ed. 2002) (hereinafter Kindregan & Inker) (agreement made in expectation of marriage "radically" different situation from "that which faces a spouse attempting to save a long existing family relationship to which she has committed her best years"); *Pacelli v. Pacelli*, 319 N.J. Super. 185, 190 (App. Div.1999) (wife faced more difficult choice "than the bride who is presented with a demand for a pre-nuptial agreement" because cost "would have been the destruction of a family and the stigma of a failed marriage"). *See also* American Law Institute, *Principles of Family Dissolution: Analysis*

and Recommendations § 7.01 comment e (2002) (ALI Principles of Family Dissolution) ("opportunities for hard dealing may be greater" with marital contracts than with premarital contracts).

A separation agreement, in turn, is negotiated when a marriage has failed and the spouses "intend a permanent separation or marital dissolution." *Id*. at § 7.01(1)(c). *See Knox v. Remick*, *supra* at 436 (separation agreement is "a permanent resolution of [a married couple's] mutual rights and obligations, including support obligations between them"). The family unit will no longer be kept intact, and the parties may look to their own future economic interests. *See* Kindregan & Inker, *supra* (separation agreements, unlike marital agreements, are not executed "when the parties are still hopeful of saving a troubled marriage"). The circumstances surrounding marital agreements in contrast are "pregnant with the opportunity for one party to use the threat of dissolution 'to bargain themselves into positions of advantage.'" *Pacelli v. Pacelli*, *supra* at 195, quoting *Mathie v. Mathie*, 12 Utah 2d 116, 121 (1961).

For these reasons, we join many other States in concluding that marital agreements must be carefully scrutinized. *See, e.g.*, *Casto v. Casto*, 508 So. 2d 330, 334 (Fla. 1987) (court "must recognize that parties to a marriage are not dealing at arm's length, and, consequently, trial judges must carefully examine the circumstances to determine the validity of [marital] agreements"); *Matter of Estate of Gab*, 364 N.W.2d 924, 925-926 (S.D. 1985), citing *Matter of Estate of Harber*, 104 Ariz. 79 (1969) (because of "confidential relationship" existing between husband and wife, marital agreements "are subjected to close scrutiny by the courts to insure that they are fair and equitable"); *Bratton v. Bratton*, 136 S.W.3d 595, 601 (Tenn. 2004) (same). *See also* ALI Principles of Family Dissolution, supra at § 7.01 Reporter's Notes to comment e ("the problems presented by the two kinds of agreements [premarital and marital] are different, which has led some states to adopt different rules" for each).

Before a marital agreement is sanctioned by a court, careful scrutiny by the judge should determine at a minimum whether (1) each party has had an opportunity to obtain separate legal counsel of each party's own choosing;[Note 9] (2) there was fraud or coercion in obtaining the agreement; (3) all assets were fully disclosed by both parties before the agreement was executed; (4) each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce; and (5) the terms of the agreement are fair and reasonable at the time of execution and at the time of divorce.[Note 10] Where one spouse challenges the enforceability of the agreement, the spouse seeking to enforce the agreement shall bear the burden of satisfying these criteria. *See* ALI *Principles of Family Dissolution*, *supra* at § 7.04(2) ("A party seeking to enforce an agreement must show that the other party's consent to it was informed and not obtained under duress").

We now elaborate on those points as they apply to the marital agreement here.

a. Fraud and coercion. As with contracts generally, marital agreements are not enforceable if tainted by fraud or coercion. *Fogg v. Fogg*, 409 Mass. 531, 535 (1991). We agree with those States that have held that the spouse seeking to enforce a marital agreement, in contrast to the enforcement of contracts generally, must establish that the other spouse's consent was not obtained through coercion or fraud. *See, e.g.*, *Matter of Estate of Harber*, *supra* at 88 (where marital agreement challenged on grounds of fraud or coercion, it is other party's "burden to prove by clear and convincing evidence that the agreement was not fraudulent or coerced").[Note 11] *See also* ALI *Principles of Family Dissolution*, *supra* at § 7.04 comment b (burden shifting reflects appropriate "heightened scrutiny" of bargaining process leading to marital agreements as compared with bargaining process leading to commercial contracts). *Cf. Matter of Estate of Gab*, *supra* at 926, quoting *Keith v. Keith*, 37 S.D. 132, 133 (1916) ("less evidence is required in such cases to establish the fraud, oppression, or deception than if the parties had been dealing at arm's length as strangers").

Even though the judge in this case did not utilize a burden-shifting analysis, we see no reason to question her ultimate finding that the marital agreement was not the product of coercion or fraud. The agreement was the product of lengthy negotiations between the parties, each represented by separate, experienced counsel. The wife's attorney testified that, consistent with the instructions of her client, she intended to negotiate an enforceable marital agreement. A vigorous exchange ensued with the husband's counsel in which she was able to negotiate significant gains for the wife.[Note 12] The evidence is clear that the wife made an informed, voluntary choice to sign the agreement.[Note 13]

As to fraud, the wife argues that the husband misrepresented his intention to stay in the marriage in order to induce her to sign the agreement. The judge found to the contrary, and her findings are fully supported by the evidence. For example, after the agreement had been signed, the husband worked "hard" in the areas the wife "felt needed improvement." The couple traveled together extensively. They purchased and substantially renovated a new house together. It was not until over two years later, after the wife had asked the husband to leave the marital home and after she had become involved with another man, that the husband filed for divorce.[Note 14] A judge should be careful to ensure that the contesting spouse has not been misled in any way by a spouse that at the time seems committed. We are confident that the judge did so in this case.

b. Disclosure of assets. We have explained with respect to premarital agreements that "[f]ull and fair" disclosure of each party's financial circumstances is a "significant aspect" of the parties' obligation to deal with each other fairly "because they stand in a confidential relationship with each other" and must have such information in order to make an informed decision about the terms of the agreement. *DeMatteo v. DeMatteo*, 436 Mass. 18, 27 (2002). The obligation is greater with respect to marital agreements because each spouse owes a duty of absolute fidelity to the other. *See Krapf v. Krapf*, 439 Mass. 97, 103 (2003) (spouses "stand as fiduciaries to each other, and will be held to the highest standards of good faith and fair dealing in the performance of their contractual obligations"). Because a marital agreement is consummated without the safeguards attendant to divorce proceedings, such as court-ordered disclosures, *see* Rule 401(a) of the Supplemental Rules of the Probate Court, Mass. Ann. Laws Court Rules, at 1133 (LexisNexis 2008-2009), and discovery, enforcement of a marital agreement can occur only when a judge finds that there was a full disclosure of all assets of both spouses, whether jointly or separately held. The requirement of full disclosure may be satisfied if "prior to signing the agreement the party seeking to enforce it provided the other party with a written statement accurately listing (i) his or her significant assets, and their total approximate market value; (ii) his or her approximate annual income . . . and (iii) any significant future acquisitions, or changes in income, to which the party has a current legal entitlement, or which the party reasonably expects to realize" in the near future. ALI *Principles of Family Dissolution*, *supra* at § 7.04(5).[Note 15] The disclosure need not be exact, but must approximate the value of the assets.

We agree with the judge that the disclosures here were sufficient to meet this rigorous standard. The wife argues that the husband undervalued his interest in the Florida real estate, and that he committed a breach of the warranty in the agreement that such disclosures were "accurate and truthful." The facts as found by the judge belie this claim.[Note 16] During the marriage the wife was aware of her husband's interest in a "significant amount" of real estate in Florida, that the precise value of that interest was uncertain and speculative, that there was limited information available concerning the real estate, and that the $4 million to $5 million value assigned to those interests by RINET was a "placeholder."[Note 17] During the negotiation of the agreement, the wife provided her attorney with a December 31, 2003, summary of the parties' net worth prepared by RINET, and the husband provided a similar June 30, 2004, report. Each summary contained the "placeholder" value, stating that the Florida properties had an "[a]nticipated" value of $5 million. While she was negotiating the marital agreement, the wife had access to the couple's financial advisor, with whom she previously had regularly met, and her own independent counsel to assist her in making any inquiries about the "placeholder" value that she felt was required. The judge found that the wife was "satisfied" with the disclosures, accepting that the available information about the properties was necessarily limited. Information about the Florida real estate was not, in the judge's words, "a strong point of contention between the parties."

The wife acknowledged when she executed the marital agreement that she had "been provided with all information requested," that she was "afforded sufficient opportunity to inquire and investigate further financial circumstances" of her husband, and that she waived her "rights to further inquiry." There is nothing in the record to suggest that those representations were inaccurate.[Note 18]

c. Waiver. By the terms of their agreement, the husband and wife agreed that they intended the marital agreement to limit their rights in the event of divorce, and that the agreement should govern "in lieu of and in full discharge and satisfaction of the rights which otherwise arise by reason of their marriage." As we explained in the context of premarital agreements, waiver is "important because it underscores that each party is exercising a meaningful choice when he or she agrees to give up certain rights." *DeMatteo v. DeMatteo*, 436 Mass. 18, 29 (2002). In determining whether there was a meaningful waiver of rights, a judge should consider "whether each party was represented by independent counsel, the adequacy of the time to review the agreement, the parties' understanding of the terms of

the agreement and their effect, and a party's understanding of his or her rights in the absence of an agreement." *Id*. Here, the wife was represented by independent counsel, who represented her over the course of several weeks as the terms of the agreement were negotiated. The wife affirmed in writing that she understood the rights she was waiving, and she does not claim that she did not understand any terms of the agreement. The evidence supports the conclusion that the wife's waiver was meaningful.

d. Fair and reasonable terms. We turn finally to the requirement that a marital agreement contain terms that are "fair and reasonable" at the time of execution and at the time of divorce. We do not accept the husband's suggestion that the standard applicable to marital agreements should be the same as the one applicable to premarital agreements. *See* note 8, *supra*.[Note 19] As the wife points out, a marital agreement more closely resembles a separation agreement. The statutory rights and obligations conferred by marriage are not potential benefits for a divorcing spouse but an integral aspect of the marriage itself. The Legislature has required that the relinquishment of marital rights be assessed in light of the factors set forth in G.L. c. 208, § 34. In *DeMatteo v. DeMatteo*, *supra* at 33, we noted that "it is entirely appropriate" that the judge consider the factors set forth in G.L. c. 208, § 34, in evaluating a separation agreement; the "separation agreement is, after all, a substitute for the independent application by a judge" of the equitable division of parties' property as mandated by the Legislature. Similar considerations inform our view of the enforceability of marital agreements, with this additional observation: parties to a marital agreement do not bargain as freely as separating spouses may do. *See* part 3, *supra*. Because a marital agreement is executed when the parties do not contemplate divorce and when they owe absolute fidelity to each other, the heightened scrutiny to which we made reference earlier applies in this context as well.

In evaluating whether a marital agreement is fair and reasonable at the time of execution, a judge should accordingly consider the entire context in which the agreement was reached, allowing greater latitude for agreements reached where each party is represented by separate counsel of their own choosing. *See* note 9, *supra*. A judge may consider "the magnitude of the disparity between the outcome under the agreement and the outcome under otherwise prevailing legal principles," whether "the purpose of the agreement was to benefit or protect the interests of third parties (such as the children from a prior relationship)," and "the impact of the agreement's enforcement upon the children of the parties." ALI *Principles of Family Dissolution*, *supra* at § 7.05(3)(a), (c), (d). Other factors may include the length of the marriage, the motives of the contracting spouses, their respective bargaining positions, the circumstances giving rise to the marital agreement, the degree of the pressure, if any, experienced by the contesting spouse, and other circumstances the judge finds relevant.

Viewed at the time of execution, we agree with the judge that the marital agreement at issue here was fair and reasonable. As noted earlier, the wife was represented by experienced, independent counsel throughout the negotiations. In the event of a divorce, the wife was to receive a substantial fixed sum payment from her husband. If the marital estate appreciated in value after execution of the agreement, she would receive, in addition, a percentage of the increase in value; she did not forgo the fixed payment if the marital assets, including the husband's interest in the Florida real estate, declined substantially. There is no basis to the wife's claim that the judge "ignore[d]" the husband's "legal obligation of disclosure of value" of the Florida real estate. As we discussed in detail earlier, the basis of the valuation was known to and accepted by the wife and her lawyer. We see no reason to disturb the judge's ruling on this point.

In determining whether a marital agreement is fair and reasonable at the time of divorce, a judge will be able to satisfy the searching inquiry we require by examining the same factors employed for evaluating a separation agreement. *See Dominick v. Dominick*, 18 Mass. App. Ct. 85, 92 (1984). *See also Barry v. Barry*, 409 Mass. 727, 730 (1991) (judge considering separation agreement pursuant to divorce under G.L. c. 208, § 1A, or G.L. c. 208, § 1B, "should make a ruling at the time of the divorce that the agreement is fair and reasonable").

Thus, a judge may consider, among other factors, "(1) the nature and substance of the objecting party's complaint; (2) the financial and property division provisions of the agreement as a whole; (3) the context in which the negotiations took place; (4) the complexity of the issues involved; (5) the background and knowledge of the parties; (6) the experience and ability of counsel; (7) the need for and availability of experts to assist the parties and counsel; and (8) the mandatory and, if the judge deems it appropriate, the discretionary factors set forth in G.L. c. 208, § 34"[Note 20] (footnotes omitted). *Dominick v. Dominick*, *supra*. As with a judge's evaluation of separation agreements, the § 34

factors are not determinative; the judge is not required to "divine" what judgment she would likely enter had the case been litigated in the absence of an agreement. *Id.*[Note 21] Rather, she considers only whether the agreement is "fair and reasonable" when considered in light of the factors we have identified and any other relevant circumstances. *Id.*

The gravamen of the wife's complaint is that she will be left with a disproportionately small percentage of the couple's marital assets. A marital agreement need not provide for an equal distribution of assets, as long as a judge has concluded that the agreement is fair and reasonable. In her careful and detailed findings, the judge considered the factors set forth in G.L. c. 208, § 34, as well as many of the other factors we have just detailed. The wife points to no material change between the time she, on the advice of counsel, executed the marital agreement and the husband's petition for divorce in 2006. We again see no reason to conclude that the judge was erroneous in her conclusion.

4. *Conclusion.* Enforcement of a marital agreement is not contrary to public policy. We agree with the judge in the Probate and Family Court that the marital agreement in this case should be specifically enforced.

Judgment affirmed.

FOOTNOTES

[Note 1] A "postnuptial" or "marital" agreement is an "agreement between spouses who plan to continue their marriage that alters or confirms the legal rights and obligations that would otherwise arise under . . . [the] law governing marital dissolution." American Law Institute, *Principles of the Law of Family Dissolution: Analysis and Recommendations* § 7.01(1)(b) (2002) (ALI *Principles of Family Dissolution*). *See Fogg v. Fogg*, 409 Mass. 531, 531-532 (1991) (same). Consistent with the ALI, we adopt the term "premarital" agreement for what is often termed a prenuptial or antenuptial agreement, and the term "marital" agreement for what is often termed a postnuptial agreement. *See* ALI *Principles of Family Dissolution*, supra at § 7.01(1)(a), (b).

[Note 2] In September, 2008, the proceedings having been bifurcated, a judgment of divorce nisi was entered on the grounds that the parties' marriage was irretrievably broken down. The judgment became absolute in December, 2008. The wife neither sought to stay, nor appealed from, that judgment.

[Note 3] We shall refer to the husband's interests in the trusts and business entities owned by his family as the husband's interest in Florida real estate.

[Note 4] More specifically, the agreement states that the parties "desire by this Agreement to fix and limit the rights of each of them in and to any property that the other has any right, title or interest, or in the future, may obtain any right, title or interest in the event of dissolution of the parties' marriage, in lieu of and in full discharge and satisfaction of the rights which otherwise arise by reason of their marriage."

[Note 5] The agreement defined marital property with specificity and provided a mechanism for determining the wife's thirty per cent interest.

[Note 6] In *Fogg v. Fogg*, 409 Mass. 531 (1991), this court left "to another day" the question whether marital agreements were valid, *id.* at 532 n.2, noting that even if "this type of agreement is valid, it must be free from fraud and coercion," *id.* at 532, and affirming the judge's finding that the agreement in that case was fraudulently induced, *id.* at 535. *See Rubin v. Rubin*, 29 Mass. App. Ct. 689, 697 (1991) (marital agreement invalid because it was product of coercion).

[Note 7] Several States have enacted statutes that permit the enforcement of marital agreements. *See, e.g.*, *Tibbs v. Anderson*, 580 So. 2d 1337, 1339 (Ala. 1991); *Boudreaux v. Boudreaux*, 745 So. 2d 61, 63 (La. Ct. App. 1999); *Button v. Button*, 131 Wis. 2d 84, 87-88 (1986). *But see* Ohio Rev. Code Ann. § 3103.06 (West 2005) ("A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation"). Many States have not addressed the issue. We are aware of no jurisdiction that has declined to enforce such agreements unless required to do so by statute.

[Note 8] The ALI takes the position that "the principles applicable to marital and premarital agreements are the same" and suggests, as some States have done, applying substantially the same standards for enforcing both types of agreements. ALI *Principles of Family Dissolution*, *supra* at § 7.01 Reporter's Notes to comment e, citing *Reese v. Reese*, 984 P.2d 987 (Utah 1999). While we draw on some aspects of the ALI's suggestions on how to evaluate marital agreements, we conclude that the principles applicable to premarital and marital agreements are not the same in all respects.

[Note 9] We do not require, as do some other States, that a marital agreement will be enforceable only if each spouse is represented by separate counsel. *See, e.g.*, Minn. Stat. Ann. § 519.11(1a)(c) (West 2006) ("A postnuptial contract or settlement is valid and enforceable only if at the time of its execution each spouse is represented by separate legal counsel"). Reliance on the advice of experienced, independent legal counsel, however, will go a long way toward ensuring the enforceability of an agreement. *Cf.* ALI *Principles of Family Dissolution*, *supra* at § 7.04 (marital agreement "rebuttably presumed" to satisfy showing that contesting party's consent was "informed and not obtained under duress" if parties were "advised to obtain independent legal counsel, and had reasonable opportunity to do so before the agreement's execution"). Here it is undisputed that both parties to this agreement not only had the opportunity to, but did, obtain separate legal counsel.

[Note 10] The wife argues that she did not receive "sufficient" consideration because the financial components of the agreements were "far less" than she was "already entitled to receive" on divorce. In this case, and likely would be in any case, this is in essence an argument that the marital

agreement was not fair and reasonable. *See* part 3.d, *infra*. Because the marital agreement was supported by consideration, we need not consider whether a marital agreement needs to be supported by consideration. *See* ALI *Principles of Dissolution*, *supra* at § 7.01(4) (consideration not required to create enforceable marital agreement).

[Note 11] We do not agree with the Arizona court, *see Matter of Estate of Harber*, 104 Ariz. 79, 88 (1969), that the burden must be satisfied by "clear and convincing" evidence. *See* ALI *Principles of Family Dissolution*, *supra* at § 7.04 comment b (shift burden of proof to spouse seeking to enforce agreement, but not suggesting proof by clear and convincing evidence).

[Note 12] We need not recite the factual findings of the judge that identify with specificity the negotiations and the gains secured by the wife.

[Note 13] The wife suggests that because the parties' younger son suffers from an illness, she was pressured into signing the agreement to preserve her son's "happiness and stability." The judge made no findings concerning the son's illness or its effect on the wife's decision to sign the marital agreement. The wife made no request for additional findings on those points, and we do not consider them. It may be that in some circumstances evidence that a spouse agrees to a marital agreement because of concern for the illness of a child and evidence that the child will be harmed by a divorce will be sufficient to establish coercion or duress.

[Note 14] The wife testified at trial that in or around August, 2004, several weeks after the agreement was signed, the parties had a discussion that led the wife to believe that their marriage was over, and the parties then sought the advice of their marriage counsellor, as well as their son's physician, to consider a separation that would be the least disruptive for him. The wife argues that the judge erred in not allowing her to testify concerning the contents of this conversation, which she claims would have shown that the husband did not intend to stay in the marriage when he asked her to sign the agreement. The judge excluded her testimony on the grounds of "spousal disqualification." That evidentiary rule provides that "a witness shall not testify as to private conversations with a spouse occurring during their marriage," *see* Mass. G. Evid. § 504(b) (2010), but recognizes an exception for proceedings "arising out of or involving a contract between spouses," *id*. at § 504(b)(2)(A). We question whether the evidence should have been excluded, given the exception to the spousal disqualification rule. Even if the ruling was erroneous, however, it was harmless. There was ample other evidence to support the judge's finding that the husband did not fraudulently induce the wife to sign the agreement.

[Note 15] The ALI *Principles of Family Dissolution*, *supra* at § 7.04(5), specifies that the spouse seeking to enforce the agreement must have disclosed his income for "each of the preceding three years" and any significant future acquisitions or changes in income that the party "reasonably expects to realize within three years of the agreement's execution." We need not determine whether a three-year period is appropriate in this case because the wife was aware of the couple's marital assets and income, and participated regularly in meetings with the couple's financial advisor throughout the marriage. *See* ALI *Principles of Family Dissolution*, *supra* at § 7.04(5) comment g (evidence that contesting spouse has knowledge of all other spouse's assets independent of any written disclosures will satisfy requirement of disclosure).

[Note 16] The judge held a separate hearing to receive evidence as to the husband's and the wife's finances, in connection with which each spouse was required to submit financial statements, and each was able to cross-examine the other as to the information in these statements. The judge found that the husband's financial statement was a "true, accurate and complete" representation of his financial affairs. In contrast, the judge found that the wife's statements were not an "accurate" picture of her financial affairs because, among other things, she failed to list interest income on over $1 million in brokerage account investments.

[Note 17] In connection with the divorce, the husband contacted his uncle who manages the Florida properties to obtain a rough estimate of their value. The judge credited the husband's testimony that this was the "best method to obtain a value" for the husband's interest in the Florida real estate.

[Note 18] In light of these representations, and where the evidence shows that the wife had full knowledge of the limitations on the information concerning the value of the Florida real estate, the judge did not err in denying the wife further discovery in February, 2008, on the value of the Florida properties and excluding the testimony of the wife's expert as to his opinion of the value of the Florida real estate. It appears from the transcript that the tax assessor was an expert in valuing land, and not in valuing marginal, noncontrolling interests in entities that own land.

[Note 19] We adopted a more deferential standard of review for premarital agreements in part because when "terms of a proposed antenuptial agreement are unsatisfactory, a party is free not to marry." *DeMatteo v. DeMatteo*, 436 Mass. 18, 33 (2002). One party, perhaps having significant family wealth, may decline to enter the marriage unless he or she can protect these assets in the event of a divorce. Consequently, a premarital agreement may provide that on divorce there will be great inequality accorded to each party. For a spouse to relinquish statutorily proscribed marital rights to significant assets necessarily requires a more searching inquiry as to whether an agreement is "fair and reasonable."

[Note 20] In relevant part, G.L. c. 208, § 34, provides that a judge "shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. . . . [T]he court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit."

[Note 21] In evaluating the agreement, the judge is not required to hold an evidentiary hearing, although she may do so in her discretion, as the judge did in this case. *See Dominick v. Dominick*, 18 Mass. App. Ct. 85, 92 (1984).

ZEGHIBE v. ZEGHIBE
82 Mass. App. Ct. 614

May 4, 2012–October 11, 2012

Court Below: Probate and Family Court Department, Barnstable Division

Present: GRAHAM, KATZMANN, & CARHART, JJ.

Divorce and Separation, Modification of judgment, Alimony, Child support. Parent and Child, Child support.

This court remanded to the Probate and Family a modification of a judgment of divorce that ordered the husband to pay alimony to the wife, where the judge's findings failed adequately to address and explain the wife's need for support; further, the judge erred in attributing income to the husband in ordering the wife to pay child support to the husband, in that the husband's receipt of funds from individual retirement accounts at the time of the divorce, as part of the division of assets and not as a stream of income for purposes of computing support, could not be characterized as a resulting in a "reward" to him.

COMPLAINT for divorce filed in the Barnstable Division of the Probate and Family Court Department on April 17, 2007.

Complaints for modification, filed on August 14, 2008, August 31, 2009, and January 25, 2010, respectively, were heard by Robert A. Scandurra, J., and postjudgment motions to alter and amend judgment were considered by him.

Wendy H. Sibbison for Kenneth F. Zeghibe.

George P. Lordan, Jr. (Dennis P. Derrick with him) for Margaret L. Zeghibe.

CARHART, J. Kenneth Zeghibe (husband), the former husband of Margaret Zeghibe (wife), appeals from an amended consolidated judgment (on certain complaints for modification) of the Probate and Family Court which, among other things, awards him physical custody of the parties' younger child, orders him to pay alimony in the amount of $405 a week, and orders the wife to pay him child support in the amount of $170 a week. The husband has also appealed from the order denying his motion to amend the amended consolidated judgment.[Note 1] We vacate those portions of the amended consolidated judgment concerning child support and alimony (as well as any calculations dependent upon those orders) and remand the matter for further proceedings consistent with this opinion. In all other respects, the amended consolidated judgment is affirmed.

1. *Background.* The parties were divorced by a judgment of divorce nisi (later amended) in December, 2007. At the time of the divorce, the parties' older child was eighteen years old and their younger child was twelve years old. The husband, a master mariner, was on paid leave from his employer due to a disability and his yearly income, exclusive of benefits, was a minimum of $155,000. The wife was a nursing student and was unemployed. By the terms of the amended divorce judgment, the parties were awarded shared physical custody and joint legal custody of the younger child, and the husband was ordered to pay child support for the unemancipated children in the sum of $600 a week and alimony in the amount of $400 a week. Each party received assets of substantial value through the property division.

In August, 2008, the husband filed a complaint for modification seeking a reduction in his alimony and child support obligations based upon a change in his income and employment status. In light of the husband's disability and corresponding decrease in income,[Note 2] a probate judge, by temporary orders, suspended the husband's alimony obligation and reduced his child support payments to $500 a week. In August, 2009, the husband filed an additional complaint for modification seeking primary physical custody of the younger child and a modification of child support. In response, the wife sought increased alimony.

On March 9, 2010, after a trial, the judge issued a consolidated judgment granting physical custody of the younger child to the husband, ordering the wife to pay weekly child support for the younger child in the amount of $200,[Note 3] and ordering the husband to pay weekly alimony in the amount of $200. In his rationale accompanying the judgment, the judge stated that there had been a material change in circumstances that warranted a child support and ali-

mony modification "as the [husband's] income has reduced substantially since he no longer receives a full salary plus multiple benefits and a bonus, and the [wife] now has salary income, which she did not have at the time of the divorce."[Note 4]

The judge also explained how he arrived at the child support and alimony amounts. With respect to child support, the judge stated that this was a case that called for an application of the Massachusetts Child Support Guidelines (guidelines) and that in applying the guidelines he had utilized income figures of $78,200 per year ($1,504 per week) for the husband and $46,800 per year ($900 per week) for the wife. With respect to alimony, the judge applied "the recommendations of the joint 'MBA-BBA Alimony Task Force'" (task force). More specifically, the judge took the husband's income of $1,504 a week and subtracted from it the wife's income of $900 a week, and then divided the difference ($604) by three. As the wife's child support obligation and the husband's alimony obligation each amounted to approximately $200 a week, the judge stated that there was a "wash" of one payment to the other. In effect, the judge noted, neither party was ordered to pay any support to the other. The support orders were made retroactive to August 29, 2009.[Note 5]

Following the filing of postjudgment motions, an amended consolidated judgment was issued on April 20, 2010 (nunc pro tunc as of March 9, 2010), ordering the wife to pay weekly child support of $170, and the husband to pay weekly alimony in the amount of $405. The orders were again made retroactive to August 29, 2009, and resulted, in effect, in the husband paying alimony to the wife in the amount of $235 a week. The judge explained his rationale as follows:

> "[W]hat was overlooked by the Court in its original judgment and rationale was that the Husband purposely reduced his available income stream by withdrawing $476,487 in [individual retirement] accounts which could have been withdrawn by him at the rate of between $15,000 and $36,000 annually (without penalty or tax obligation in light of his disabled status). Thus, the Husband should not be rewarded for cashing in an income producing asset by ignoring what would have been the income stream from that asset."[Note 6]

The judge added approximately $31,000 to the husband's yearly income, bringing his annual income to $110,000. The amended income figure was then used to calculate the amount of the alimony and child support payments due under the guidelines and the recommendations of the task force.

2. *Discussion*. (a) The alimony order. The husband argues that "after finding that the wife now earned enough [$900 a week] to replace the support ordered in the divorce judgment [a combined total of $1,000 a week], the [judge] erroneously awarded her alimony based on a mechanical formula rather than actual need."

To modify successfully a judgment for alimony, "the petitioner must demonstrate a material change in circumstances since the entry of the earlier judgment." *Pierce v. Pierce*, 455 Mass. 286, 293 (2009), quoting from *Schuler v. Schuler*, 382 Mass. 366, 368 (1981). In determining whether the amount of alimony should be modified based upon a change in circumstances, a judge must consider and weigh all of the factors set out in G.L. c. 208, § 34, in light of the facts of the particular case. *Pierce v. Pierce*, *supra* at 295–296. In acting on a complaint for modification, a judge "must keep in mind that 'the statutory authority of a court to award alimony continues to be grounded in the recipient spouse's need for support and the supporting spouse's ability to pay.'" *Id*. at 296, quoting from *Gottsegen v. Gottsegen*, 397 Mass. 617, 624 (1986). *See Heins v. Ledis*, 422 Mass. 477, 484 (1996) ("An award of alimony is improper absent a finding of financial need on the part of the recipient spouse").

Here, the husband states that at the time of the divorce, when the wife was unemployed and living in the marital home with two children, and her financial statement showed weekly expenses of $1,326.41, she was awarded $1,000 in weekly support to meet her and the children's financial needs (i.e., $600 in child support and $400 in alimony). Continuing, the husband asserts that some two years later, at the time of the modification, the judge found that the wife was earning $900 a week and that her "expenses and needs" will or have decreased.[Note 7] Yet, the husband argues, despite these findings, and using a mechanical formula, the judge ordered him to pay weekly alimony in the amount of $405.

We agree with the husband that the judge's findings fail adequately to address and explain the wife's need for support. *See Heins v. Ledis*, 422 Mass. at 485 (judge's conclusion that recipient spouse is in need of alimony must be apparent from record). *See also Bowring v. Reid*, 399 Mass. 265, 268 (1987). Moreover, the judge's use of the "formula" purportedly recommended by the task force is, in the circumstances (and notwithstanding the husband's failure to object to the original alimony modification order, see note 5, *supra*), problematic. In arriving at the amount of alimony to be paid by the husband, the judge appears to have relied on that part of section V of the task force guidelines that provides: "An alimony or spousal support order should be entered in consideration of traditional concepts of alimony in a specific dollar amount which dollar amount should not exceed 33% of the difference between the gross ordinary incomes of the parties." However, both the title of the task force report and the report's preamble indicate that the task force's recommendations "do not apply to circumstances where [as here] the parties have dependent children." Furthermore, the provision upon which the judge apparently relied makes clear that an order for alimony should be entered based upon "traditional concepts of alimony." Indeed, section V of the task force guidelines contains the following caveat: "The Alimony Task Force suggests that the foregoing [provision relied upon by the judge] is not to be utilized as a 'formula' for alimony but to recognize that a 'cap' of alimony orders should be available."

The order for alimony must be vacated and the matter remanded to the Probate and Family Court for further proceedings.[Note 8], [Note 9]

(b) The child support order. The husband argues that the judge erred in attributing income to him in the amount of $31,000 a year ($596 a week) as the guidelines only permit income attribution when "either or both of the parties is either purposely unemployed or underemployed," and the judge found specifically that the husband is not "presently able to engage in any meaningful employment" based on his medical diagnoses and medications. He also claims that the judge, in calculating child support (and alimony, see note 8, *supra*), unfairly punished him for using a personal asset that had been assigned to him, and improperly double counted putative income from his IRA, in the annual amount of $31,000, which was awarded to him as property at the time of the divorce. *See Croak v. Bergeron*, 67 Mass. App. Ct. 750, 758–759 (2006), and *Wasson v. Wasson*, 81 Mass. App. Ct. 574, 579–580 (2012), summarizing the basic law applicable to double counting.[Note 10] In essence, the husband claims that the judge's orders redistribute to the wife, in the form of reduced child support and increased alimony, property awarded to him at the time of the divorce. Even were we to assume that attribution of income under the guidelines is not limited to situations where a party is purposely unemployed or underemployed,[Note 11] we agree with the husband that the income attribution in this case must be set aside.

As noted, the judge's attribution of income in the amount of $31,000 is based on the premise that the husband had purposely reduced his "available income stream" by withdrawing $476,487 from his IRA and that he should not be "rewarded" for cashing in an "income producing asset" and ignoring the fact that he could have received tax and penalty free annual distributions of principal from the IRA.[Note 12] A difficulty with the judge's analysis is that the husband received the IRA funds at the time of the divorce as part of the division of assets and not as a stream of income for purposes of computing support.[Note 13] Upon divorce, it is not uncommon, and often reasonable or necessary, for a party to use (or to change the form of) assets assigned to him or her for various purposes in starting anew.[Note 14] *But cf. Pagar v. Pagar*, 9 Mass. App. Ct. 1, 4 (1980) (party has no right to waste asset deliberately or ignore feasible source of income and then request increase in support). In this case, we think it is strained to characterize the husband's actions as resulting in a "reward" to him.

Even were we to assume, however, that there may be circumstances in which equitable considerations would allow a judge, in an appropriate case, to treat such putative distributions as income for support purposes, on all of the facts presented here, including the relative comparability of the parties' financial situations, we perceive no such equities in this case.

3. *Summary*. So much of the amended consolidated judgment as pertains to alimony and child support, as well as any calculations dependent on those orders, is vacated and the matter is remanded to the Probate and Family Court for further proceedings consistent with this opinion. The judge may hold such further hearings as he deems necessary. Unless the judge for good written reason decides otherwise, pending further proceedings and the entry of new

orders, the existing orders with respect to alimony and child support shall remain in place as temporary orders.[Note 15] In all other respects, the amended consolidated judgment is affirmed.

So ordered.

FOOTNOTES

[Note 1] Various complaints for contempt were also before the judge. They are not implicated in the present appeal, except to the extent that certain payments ordered by the judge take into consideration support and alimony payments made by the parties.

[Note 2] The husband had begun to receive long term (tax-free) disability benefits of $78,176.76 a year ($6,514.73 a month).

[Note 3] The parties' older child was, by that time, a full-time college student whose college expenses were paid by both parties. The judge also found that the older child spends approximately equal amounts of time with both parties. In the circumstances, the judge determined that neither party should be ordered to pay child support for her.

[Note 4] The judge found that since the divorce the wife had obtained a degree in nursing and was earning approximately $900 a week as a registered nurse at a hospital.

[Note 5] The husband did not object to the orders under which he would owe $200 in weekly alimony and the wife would owe $200 in weekly child support.

[Note 6] To understand the judge's amended rationale, further explanation is required. By the terms of the divorce judgment the parties were to share equally in an individual retirement account (IRA) standing in the husband's name. As of February, 2008, the value of the IRA was $952,975.40 and each party received one-half of that amount, i.e., $476,487.70. There was evidence at the modification trial that in 2008 the husband withdrew $315,000 from his share of the IRA to pay certain debts and to assist in the purchase of (1) a fifty percent interest in a thirty-three-foot power boat, and (2) a sixty-foot used sailboat. The husband testified that he had spent the majority of his life on the water and was less stressed and more happy there than on land. He hoped to restore the sailboat (which he stated he had purchased at a "good" price) by the time of his retirement so that he could leave and go where he wanted on it. There was also evidence that the husband later withdrew an additional $120,000 from his IRA that appears to have been used to pay the income taxes on the IRA distributions. By the time of the modification trial, the balance in the husband's IRA account was $1,124.02.

The wife's tax expert testified that based upon the husband's receipt of $78,300 worth of tax-free disability income and an assumed alimony obligation of $20,800 a year, the husband could have taken $36,450 out of his IRA each year without incurring any tax liability. If the husband paid no alimony, he could have withdrawn $15,650 yearly from his IRA with no tax liability. The wife's expert also indicated that had the husband invested his $476,487.70 share of the IRA, it would be appropriate to use a three percent rate of return. The husband acknowledged at trial that he was aware that he could have received annual distributions from the IRA without penalty, but stated that the funds in the IRA were his assets from the divorce.

[Note 7] The judge found: "The [wife's] income has substantially changed and increased in an amount close to the combined amount of alimony and child support originally ordered under the Judgment of Divorce. The [wife's] expenses and needs will and have decreased. She is no longer in school, the children do not live with her, and she has not paid child-related daily expenses since June 11, 2009 other than [the younger child's] football fee and some limited clothing. Her home related expenses will further decrease as on February 10, 2010 the marital home was sold and she no longer pays utilities and real estate tax by herself."

[Note 8] The husband also challenges the alimony award for the reason that the judge "improperly double-counted putative income from [his] IRA, which was awarded to him as property at the time of divorce." To the extent this issue retains any vitality, we address the question of attribution of income to the husband in our discussion of the child support order, infra.

[Note 9] While the appeal was pending in this court, the Alimony Reform Act (the amendments to G.L. c. 208, effectuated by St. 2011, c. 124, *see* G.L. c. 208, § 34 & §§ 48–55) became effective on March 1, 2012. While the husband cites in his brief to certain provisions of the Act, no meaningful argument has been made concerning possible application of the Act should the matter be remanded. That issue should be addressed in the first instance in the Probate and Family Court.

[Note 10] Neither party raises any question as to the applicability of the concept of double counting in a modification proceeding; both address the question on the merits.

[Note 11] We note in passing that both case law and the Guidelines, effective January 1, 2009, would seem to undercut the husband's assertion. *See, e.g.*, Massachusetts Child Support Guidelines I-D (2009); *M.C. v. T.K.*, 463 Mass. 226, 240 (2012); *Crowe v. Fong*, 45 Mass. App. Ct. 673, 679–682 (1998) (decided under earlier version of guidelines).

[Note 12] This is not a case where the judge considered available assets in deciding to deviate from the guidelines. *See Croak v. Bergeron*, 67 Mass. App. Ct. at 757 & n.13; Massachusetts Child Support Guidelines IV (2009).

[Note 13] The amended judgment of divorce nisi recites that the parties shall share equally the IRA account standing in the name of the husband, and such transfer shall be made forthwith, pursuant to an approved Qualified Domestic Relations Order or other such order, to be prepared by counsel for the husband. There is nothing in the divorce judgment that requires the husband to withdraw the principal of the IRA in any specific amounts or over a period of time. It is to be noted that the judge did not impute any income to the wife from her share of the IRA. *Cf. Pierce v. Pierce*, 455 Mass. at 299 n.13.

[Note 14] The husband posits, for example, a scenario where he had used his IRA funds to purchase a house, rather than the boats. He suggests that the judge surely would have approved such a "conventional decision" and not used it as the basis for attributing $31,000 in annual income to him.

[Note 15] Any proceedings necessary to enforce the temporary orders are to be brought in the Probate and Family Court. *See Kennedy v. Kennedy*, 400 Mass. 272, 276 (1987); *Casey v. Casey*, 79 Mass. App. Ct. 623, 636 n.19 (2011).

ZALESKI v. ZALESKI
469 Mass. 230

SJC–11391.

Supreme Judicial Court of Massachusetts, Essex.

Argued Dec. 3, 2013.

Decided Aug. 1, 2014.

Paul P. Perocchi (Cynthia Grover Hastings with him), North Andover, for the wife.

David E. Cherny (Catharine V. Blake with him), Boston, for the husband.

Present: IRELAND, C.J., SPINA, CORDY, BOTSFORD, GANTS, DUFFLY, & LENK, JJ.[1]

Opinion

DUFFLY, J. The Alimony Reform Act of 2011, St. 2011, c. 124 (alimony reform act or act), changed the legal framework under which courts may award alimony when a marriage ends in divorce. The act created four categories of alimony: "[g]eneral term alimony," "[r]ehabilitative alimony," "[r]eimbursement alimony," and "[t]ransitional alimony," and placed durational limits on the length of time alimony may be paid absent specific extenuating circumstances as found by a judge before the statutory period expires. *See* G.L. c. 208, §§ 48–52. We are asked to decide in this case of first impression whether a Probate and Family Court judge abused her discretion in determining that rehabilitative alimony, with its presumptive five-year payment period, was the appropriate form of alimony to be ordered, rather than general term alimony, which, based on the length of the parties' marriage, would have permitted alimony payments to continue for thirteen years.

In December, 2010, Carolyn Zaleski (wife) filed a complaint for divorce from Stephen Zaleski (husband) on the ground of an irretrievable breakdown of the marriage. Following trial, judgment entered granting a divorce nisi on the basis of irretrievable breakdown of the marriage, *see* G.L. c. 208, § 1B, awarding rehabilitative alimony to the wife, dividing the marital assets, and incorporating a stipulation of the parties regarding the custody and education of their two children. The wife appealed, and we transferred the case to this court on our own motion.

The wife challenges that portion of the judgment ordering the husband to pay rehabilitative alimony rather than general term alimony. She also challenges the judge's exclusion of the husband's bonus income from the calculation of the amount of the alimony award; the requirement that she maintain policies of term and whole life insurance as security for her obligations under the divorce judgment; and the division of marital assets, including the allocation of marital debt. We conclude that it was not an abuse of discretion to award rehabilitative alimony, and that the allocation of debt and division of property between the parties was warranted by the evidence. Nonetheless, we remand for further proceedings based on our determination that it was error not to include all of the husband's income in the calculation of the amount of alimony, and that there was no basis in the judge's findings to require the wife to maintain life insurance policies as security.

Background. We draw our summary of the facts from the judge's written findings of fact. The parties were married on October 15, 1994, in Massachusetts. At the time of trial, the wife was forty-five years old and the husband was forty-eight years old.[2] They have two children, both of whom attend private schools; at the time of trial, their daughter was a sophomore in high school and their son was in the eighth grade. The parties are in agreement that their son should also attend a private high school. In June, 2011, the parties agreed to a temporary parenting arrangement under which the children resided in the marital home continuously and the parties moved in and out of the marital residence to accommodate each party's scheduled time with the children.[3] The complaint for divorce was served on the husband in February, 2011.[4]

The judgment of divorce ordered the husband to pay the wife rehabilitative alimony in the amount of $11,667 per month for five years; this amount is thirty-five per cent of the husband's annual base salary of $400,000.[5] A stipulation of the parties that provided for shared legal and physical custody of the children was incorporated in the judgment; the judge ordered that neither was to pay child support "at this time." The judgment further provided that the husband shall be solely responsible for the children's private school tuition and expenses, and that the parties shall share equally the cost of the children's extracurricular and enrichment activities and their uninsured medical and dental costs.[6] In addition, the judgment required both parties to maintain life insurance coverage as it existed at the time of trial as security for their obligations; allocated responsibility for certain joint indebtedness; ordered that each party will have responsibility for liabilities standing in his or her own name; and provided for a division of assets, including a payment from the husband to the wife in the amount of $27,466, "[i]n order to equalize the division."[7]

Discussion. 1. *Statutory framework*. Because there was no alimony jurisdiction at common law, "the power to grant alimony was wholly statutory." *Gottsegen v. Gottsegen*, 397 Mass. 617, 621–624 (1986).[8] The courts' authority to grant alimony has been set forth in G.L. c. 208, § 34. As noted, the alimony reform act of 2011 added new provisions to c. 208, creating four categories of alimony; only rehabilitative and general term alimony are at issue here.[9] Both require that a judge consider the factors set forth in G.L. c. 208, § 53, in deciding the appropriate form of alimony:

> "the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material."

G.L. c. 208, § 53(a). These factors also are to be considered in determining the amount of alimony to be awarded. *Id*. In sum, the primary differences between rehabilitative and general alimony relate to the initial term limits set forth in the act and the standard by which the term of alimony may be extended.

Rehabilitative alimony is defined as "the periodic payment of support to a recipient spouse who is expected to become economically self-sufficient by a predicted time, such as, without limitation, reemployment; completion of job training; or receipt of a sum due from the payor spouse under a judgment." G.L. c. 208, § 48. The alimony reform act provides, among other things, that "[r]ehabilitative alimony shall terminate upon . . . the occurrence of a specific event in the future," G.L. c. 208, § 50(a),[10] but also that the alimony term shall not exceed five years. G.L. c. 208, § 50(b). Extension of the term is authorized, however, on a showing of compelling circumstances that "unforeseen events prevent the recipient spouse from being self-supporting at the end of the term with due consideration to the length of the marriage, [and] the court finds that the recipient tried to become self-supporting." G.L. c. 208, § 50(b).[11] The amount of alimony may be modified during the term "upon material change of circumstance." G.L. c. 208, § 50(c). By contrast, general term alimony is defined as "the periodic payment of support to a recipient spouse who is economically dependent." G.L. c. 208, § 48. Payments continue, subject to durational time limits established by the act that depend upon the length of the marriage; here, general alimony would have entitled the wife to support payments of up to approximately thirteen years.[12] *See* G.L. c. 208, § 49. General term alimony can be extended for "good cause" if there has been a material change in circumstances and the reasons are supported by "clear and convincing evidence." G.L. c. 208, § 49(f)(2).

We turn to a consideration whether the judge's findings in this case reflect that she considered the mandatory factors when determining the appropriate form of alimony, and whether those findings support her conclusion that the wife should receive rehabilitative alimony. We then consider whether the findings support the judge's determination regarding the amount of the alimony award.

2. *Standard of review*. A judge has broad discretion when awarding alimony under the statute. *Heins v. Ledis*, 422 Mass. 477, 480–481 (1996).[13] In reviewing both the form and the amount of an award of alimony, we examine a judge's findings to determine whether the judge considered all of the relevant factors under G.L. c. 208, § 53(a), and whether the judge relied on any irrelevant factors. *Cf. Baccanti v. Morton*, 434 Mass. 787, 790 (2001) (reviewing factors under G.L. c. 208, § 34, regarding division of marital property). "[I]t is important that the record indicate

clearly that the judge considered all the mandatory statutory factors," *Rice v. Rice*, 372 Mass. 398, 401 (1977), and that the reason for her conclusion is apparent in her findings. *Heins v. Ledis*, *supra* at 481. "A judgment will not be disturbed on appeal unless 'plainly wrong and excessive.'" *Id*., quoting *Pare v. Pare*, 409 Mass. 292, 296 (1991).

3. *Rehabilitative alimony*. a. Mandatory factors. A judge has discretion in deciding whether to award rehabilitative alimony rather than general term alimony, so long as she has given appropriate consideration to the factors identified in G.L. c. 208, § 53(a).[14] Where the determination is made that rehabilitative alimony, with its shorter durational limits, is the most appropriate form, findings based on those factors must support the conclusion that a recipient spouse's economic dependence is temporary, and that, at a predictable date, the dependent spouse can become self-sufficient by undertaking reasonable efforts. *See* G.L. c. 208, §§ 48, 53.

Here, the judge made comprehensive findings of fact in conjunction with her conclusion that the appropriate form of alimony in this case was rehabilitative. "[W]e will not reverse findings made by the judge on the basis of oral testimony unless we are convinced they are plainly wrong." *Felton v. Felton*, 383 Mass. 232, 239 (1981). *See* Mass. R. Dom. Rel. P. 52(a). According to those findings, this was a marriage of approximately sixteen years and four months; at the time of trial the wife was forty-five years old and the husband was forty-eight years old; both parties enjoyed good health, as did their children. During most of the marriage, both parties were employed full time outside the home and contributed their earnings to the marital enterprise. The marriage was a "true partnership in every aspect," from the financial contributions that each made "to child rearing [, and] to homemaking."

The husband, who holds a bachelor of arts degree in political science, initially worked as a real estate appraiser and then as an analyst and executive in real estate investment firms. The husband's income, as reported on his Internal Revenue Service W–2 forms, was $302,442 in 2004. It increased annually until it reached $1,024,555 in 2008, and was in excess of $900,000 in 2009 and 2010. In 2011, the husband's income as reported on his W–2 forms was $741,958.[15] Since 2008, the husband's income has consisted of base salary in the amount of approximately $400,000, and bonuses that are paid annually in the year after they are earned. In 2011, the husband also received $286,625 in nonrecurring deferred compensation from a prior employer. The husband's income during the marriage was always greater than that of the wife. The husband was found to be self-supporting and fully employed commensurate with his training, skills, and experience.

The wife holds a bachelor of science degree in business; beginning early in the marriage, she was employed as a sales representative and, starting in 1990, as a pharmaceutical sales representative for several companies. In 2003, the wife was promoted to the position of sales district manager, a job from which she was terminated in 2007. See note 16, *infra*. At that time, her base salary was in the range of $127,000 to $130,000 annually, with a bonus of up to $40,000; she also had use of the company car.

The judge found that the wife, who has not been employed outside the home since 2008, is not presently self-supporting, but has the ability and the desire to work. The judge found credible the wife's testimony that she wants to work and plans to work outside the home, but found also that her job search efforts have been sporadic and superficial, and that she had not used her best efforts to secure employment.[16] At the time of trial, the wife had received no interview or job offers as a result of her job search. The judge was not required to credit, or to give significant weight to, the wife's assertions as to those steps she had taken in her job search, which do not, even if credited, negate the finding that the wife had not used her best efforts. *Cf. Flaherty v. Flaherty*, 40 Mass. App. Ct. 289, 291 (1996). The judge did not credit the opinion of the husband's expert that the wife was highly employable as a sales manager or marketing manager and in those jobs could earn an annual salary of $160,000 to $170,000, but did find that the wife had skills that were transferrable across many fields beyond pharmaceutical and medical device sales.

Also according to the findings, "[t]he parties lived an upper middle class lifestyle during the marriage. They dined out, vacationed, joined a yacht club," and owned boats, luxury vehicles, and a second home, which the parties sold by agreement during the litigation. The children attended private schools. The husband held membership in a fish and game club, while the wife was a member of a tennis club. The judge also found that the husband and wife "spent beyond their means" and that, despite the husband's significant income and the wife's "meaningful salary," their only assets at the time of trial consisted of the equity in their home and their retirement accounts.

The judge determined that the wife was in need of rehabilitative alimony and that it was "anticipated that [the w]ife will return to the workforce on a full time basis" within a predictable period of time, and that until such time she "is in need of alimony." The judge further found that, with reasonable effort, the wife "can be employed within five years. At such time, the parties will need to review each of their respective financial circumstances and the need for continued alimony and/or child support."

These factors reflect that the judge gave consideration to all the factors identified in G.L. c. 208, § 53(a). We turn now to the wife's claim that the findings do not support the judge's determination that the wife will become self-sufficient by a predictable date in the future.

b. Self-sufficiency by predicted date. The wife argues that the judge abused her discretion in awarding rehabilitative rather then general term alimony, because there is no specific event upon which termination was based. The wife relies on the language in G.L. c. 208, § 50(a), which provides, in relevant part, that "[r]ehabilitative alimony shall terminate upon ... the occurrence of a specific event in the future," to support her claim that rehabilitative alimony is appropriate only where a judge has identified a "specific event in the future," such as completion of job training or a medical residency, passing a licensing examination, or graduation from a specific educational program. We agree that the examples provided by the wife can support the award of rehabilitative alimony. However, we conclude that, in some circumstances, the potential of future reemployment may provide a basis for deciding that rehabilitative, rather than general term, alimony should be awarded.

We interpret a statute according to "all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated." *Board of Educ. v. Assessor of Worcester*, 368 Mass. 511, 513 (1975), quoting *Industrial Fin. Corp. v. State Tax Comm'n*, 367 Mass. 360, 364 (1975). The reference to a "specific event" is found only in G.L. c. 208, § 50(a), which establishes the durational limits for rehabilitative alimony. The meaning of "specific event" must be considered in light of other provisions in the alimony reform act that define rehabilitative alimony and list the factors a judge must consider when determining the form of the alimony award.

General Laws c. 208, § 48, defines rehabilitative alimony as support paid to "a recipient spouse who is expected to become economically self-sufficient by a predicted time, such as, without limitation, reemployment; completion of job training; or receipt of a sum due from the payor spouse under a judgment." Although the wife makes no direct reference to this provision, it is implicit in her argument that she views the term "reemployment" to mean a specific, identifiable job that is expected to materialize on a date certain. But future employment is also among the factors a judge must consider in determining the form of alimony to be awarded.

As set forth in G.L. c. 208, § 53(a), a judge must consider the "employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary." "Employable" has been defined as "capable of being employed," *Webster's Ninth New Collegiate Dictionary* 408 (1991), and "able to be employed," *Webster's New Universal Unabridged Dictionary* 638 (2003). "Employability" in this context means that a party has the capability of being employed. As the act suggests, to become employable may require that a party undertake "reasonable diligence and additional training." Thus, although a party may not be employed or employable at the time of entry of the alimony award, that party still could have predictable prospects of future employment in a specific type of work or position. In such circumstances, if a party's employability in the near future is a realistic prospect, rehabilitative alimony might, with other considerations, be appropriate.

The act itself sheds no further light on the specific circumstances in which a spouse might be deemed capable of economic independence at some predictable date that is five years or less in the future. Our decisional law, however, through which the concept of rehabilitative alimony has developed, provides some guidance. The purpose of an award of rehabilitative alimony is "to protect, for a limited time, a spouse whose earning capacity has suffered (or become nonexistent) while that spouse prepares to reenter the work force." *Moriarty v. Stone*, 41 Mass. App. Ct. 151, 158 (1996), quoting *Bak v. Bak*, 24 Mass. App. Ct. 608, 621–622 (1987). *See Fechtor v. Fechtor*, 26 Mass. App. Ct. 859, 867–868 (1989) (affirming award rehabilitative alimony to "knowledgeable, experienced businesswoman" who "may take some time" to reach level of earnings she previously had achieved while employed at hus-

band's business). The award of rehabilitative alimony is appropriate when a spouse's anticipated self-sufficiency is based on the predictable occurrence of a future event, such as reemployment. *Adlakha v. Adlakha*, 65 Mass. App. Ct. 860, 870 (2006).[17] In accordance with these cases, the prospect of future employment, when based on a past history of commensurate employment followed by a brief hiatus, may be sufficiently predictable, even in the absence of an available, specifically identifiable job.

Rehabilitative alimony is the appropriate form of alimony if "a recipient spouse . . . is expected to become economically self-sufficient by a predicted time." G.L. c. 208, § 48. Thus, the alimony reform act permits a judge to determine that rehabilitative alimony based on expected employment is appropriate where there is sufficient evidence for a judge to find, with a reasonable degree of certainty, that the recipient spouse can obtain employment through reasonable efforts, and thereby can gain economic self-sufficiency, in the near future. *See* G.L. c. 208, § 50(b).

Here, the judge found that both parties are educated professionals, experienced in their respective fields. The wife had been employed outside the home until 2008, fewer than four years before the end of the marriage; at that time, her income was approximately $170,000. After losing her job, the wife pursued her interest in interior design, attending classes in 2009 and 2010, and started a business that failed through no fault of her own. The judge found also that the wife wished to work, that she was highly employable in the area of sales, that her skills were transferrable, and that she could with reasonable diligence find employment at a level permitting self-sufficiency. These findings support the judge's determination that the wife can be "expected to become economically self-sufficient by a predicted time." G.L. c. 208, § 48. Thus, the judge did not abuse her discretion in deciding that the wife was not entitled to general term alimony under the specific facts of this case.[18] *See Heins v. Ledis*, 422 Mass. 477, 480–481 (1996).

4. *Amount of alimony award*. The wife also challenges the amount of the alimony award, arguing that it should not have been calculated solely from the husband's base salary, but rather should have encompassed his income from all sources, including any bonuses. The husband argues that alimony based on thirty-five per cent of his base income is sufficient to meet the wife's needs; that any future bonuses are the result of his own hard work alone; that the amount of his future bonuses is speculative; and that by ordering him to pay all of the cost of the children's private school education, the judge was in essence excluding from his income an amount that the judge had already considered for setting a child support order, as provided by G.L. c. 208, § 53(c)(2).

Included among the factors that the judge was required to consider in determining the amount of the alimony award are "marital lifestyle" and "ability of each party to maintain the marital lifestyle." G.L. c. 208, § 53(a). In addition, an award of rehabilitative alimony is governed by the general guidelines for awards of alimony, other than reimbursement alimony, that the amount "should generally not exceed the recipient's need or [thirty] to [thirty-five] per cent of the difference between the parties' gross incomes established at the time of the order being issued." G.L. c. 208, § 53(b). Subject to certain exclusions,[19] "income shall be defined as set forth in the Massachusetts child support guidelines." G.L. c. 208, § 53(b).

As the provisions of G.L. c. 208, § 53(b), make clear, where an award of alimony is necessary to assure the "self-sufficiency" of a spouse who is determined to be dependent—whether for the short or long term—the award must reflect the parties' marital lifestyle. One method of measuring the amount necessary to support a spouse in a manner consistent with the marital lifestyle (particularly where, as here, the parties were found to be spending beyond their means) may be found in the provision that authorizes an alimony award based on "need," or on a percentage of "the difference between the parties' gross incomes established at the time of the order being issued." G.L. c. 208, § 53(b). Because "need" is a relative term for purposes of the act, it must be measured in light of mandatory considerations that include the parties' marital lifestyle. The judge found that the parties enjoyed "an upper middle class lifestyle" that included dining out, vacations, memberships in clubs, luxury automobiles, boats, and private schools for their children. Although the husband's income at times prior to the divorce approached or exceeded $1 million annually, the husband and wife "spent beyond their means" and acquired few assets. On these facts, the judge did not abuse her discretion in arriving at an award based on thirty-five per cent of the husband's income, rather than on a calculation of need based on historic marital spending. *Cf. M.C. v. T.K.*, 463 Mass. 226, 234 n.11 (2012) (noting distinction between net worth and standard of living, and that household spending is but one mode of establishing standard of living).

The question remains whether the judge was required to include the husband's bonus income in this calculation. The language of the act is clear that all of the payor spouse's income, as defined by the Massachusetts Child Support Guidelines (guidelines), must be included in any calculation of alimony, and bonus income is specifically included in this definition.[20]

Caring for dependent children is a factor to be considered in awarding child support, but is not among the factors to be considered in determining alimony. *See* G.L. c. 208, § 53(a). *See also Saia v. Saia*, 58 Mass. App. Ct. 135, 137–138 (2003).

It is certainly possible, as the husband suggests, that the judge factored in as child support an amount the wife might otherwise have been ordered to contribute to the costs of the children's private schools, but the findings on this point are not clear. The judge found that "the parties agreed that neither would pay child support to the other," and, on this basis, ordered that neither party was to pay child support "at this time." However, the record supports the wife's claim that there was no agreement that the husband need not pay child support. Rather, at trial the wife sought child support calculated in accordance with applicable provisions in the guidelines, and proposed that the amount so calculated would be "designated . . . as alimony," so that the husband could enjoy the tax advantages that such a designation would provide.[21] She thereafter sought to amend the judgment, seeking, among other things, an increase in the alimony award by a percentage of the husband's income in excess of his base salary.[22]

Because the alimony amount was not calculated on the basis of all of the husband's income, as required by the statute, and because the finding that the wife agreed that the husband need not pay child support was erroneous, we are unable to conclude that the amount of alimony was determined after due consideration of all of the statutory factors. We therefore remand to the Probate and Family Court for recalculation of the amount of alimony, and for any additional action that the judge may deem to be warranted.

5. *Life insurance as security*. The judgment ordered both parties to maintain the life insurance policies in effect at the time of trial for the benefit of the other. The act authorizes a court to "require reasonable security for alimony in the event of the payor's death during the alimony period. Security may include, but shall not be limited to, maintenance of life insurance." G.L. c. 208, § 55(a). In addition, when support for children has been ordered, "the court may require sufficient security for its payment according to the judgment." G.L. c. 208, § 36.

The wife's insurance policies would provide a death benefit to the husband in the amount of $1.6 million; at the same time, the husband would be relieved of his obligation to pay alimony.[23] See G.L. c. 208, § 50(a). Although the wife is responsible for one-half of the cost of the children's extracurricular and enrichment activities and one-half of their uninsured medical and dental costs, nothing in the judge's findings suggests that these costs were the basis for her order. The findings do not otherwise support an order requiring security under G.L. c. 208, § 55(a), or under G.L. c. 208, § 36. Assuming that some security could be found to be appropriate, the amount of the death benefit the wife was ordered to maintain exceeds any financial obligation she has under the judgment, and on this basis, the order requiring that the wife maintain life insurance policies with a death benefit of $1.6 million for the benefit of the husband was an abuse of discretion.

6. *Division of assets*. The wife contends that the judge's assignment of marital property and allocation of responsibility for the parties' liabilities was plainly wrong and not supported by the judge's findings. She argues that, because the judge found the marriage to be a "true partnership" and ordered a payment to "equalize the division of assets," the judge intended to effect an approximately equal division of assets. The wife contends that the division was not equal, because the judge allocated to her a greater amount of debt than was allocated to the husband, failed to value certain of the husband's bank accounts, and incorrectly divided one asset based on its present value rather than ordering that she receive one-half of any future proceeds.

We review the judge's findings to determine whether she considered all the relevant factors under G.L. c. 208, § 34, and whether she relied on any irrelevant factors. *See Baccanti v. Morton*, 434 Mass. 787, 790 (2001). "We will not reverse a judgment with respect to property division unless it is 'plainly wrong and excessive.'" *Id*. at 793, quoting *Mahoney v. Mahoney*, 425 Mass. 441, 447 (1997).

The judgment allocates debts totaling $75,519.04 to the wife and $26,200.71 to the husband. The findings reflect that over $16,000 of the wife's listed debts were to repay loans from members of her family, and over $57,000 consisted of credit card debt incurred by the wife alone. The judge found that the wife's credit card charges reflect a lifestyle beyond that which the wife could afford; because the debts were incurred at a time when the husband "was paying all of the family's living expenses" and the wife was receiving weekly cash payments from the husband, who had taken over management of the family finances, the judge found that the debts were solely those of the wife. The judge's findings are supported by the evidence, and the allocation of liabilities was not plainly wrong or excessive.

Apart from this allocation of the parties' liabilities, the judge awarded each party assets of roughly equal value. The judge was not required to follow a precise mathematical formula in dividing the marital estate. *See Williams v. Massa*, 431 Mass. 619, 631 (2000); *Denninger v. Denninger*, 34 Mass. App. Ct. 429, 430 (1993). The wife claims that the judge erred in concluding that the value of the husband's bank accounts was "nominal." The husband testified at trial that the balances in these accounts had changed; he was using them to pay bills, and had recently made a mortgage payment on the former marital residence.[24] The judge was entitled to, and implicitly did, credit this testimony when she allocated these accounts to the husband without an attribution of specific value.

The wife also takes issue with the manner in which the judge divided the interests in a particular investment vehicle. The judge found that the present value of the husband's interest in that investment vehicle was $24,625. One-half of the value of the investment vehicle was assigned to the wife. The wife makes no claim that the finding as to the present value of this asset is erroneous.[25] Rather, she argues that the asset should have been divided on an "if, as, and when basis," meaning that she should receive one-half of the value at some future date if, and when, investors receive a return on their investment.

Because the wife does not challenge the judge's finding as to the present value of this investment, and the parties have sufficient assets to permit a present payment, it was not an abuse of the judge's discretion to order present assignment of the wife's interest. *See, e.g.*, *Dewan v. Dewan*, 399 Mass. 754, 757 (1987), citing *Holbrook v. Holbrook*, 103 Wis.2d 327, 340 (Ct. App. 1981) (present assignment of percentage of future pension benefits is "the preferable approach" where sufficient assets are available at time of divorce to divide present value without causing undue hardship to either spouse).

Conclusion. For the foregoing reasons, the order in the judgment of divorce nisi requiring the plaintiff to maintain her current policies of life insurance for the benefit of the defendant is vacated. The matter is remanded to the Probate and Family Court for recalculation of the amount of the monthly alimony payment to be made to the plaintiff in light of this opinion. In all other respects, the judgment is affirmed.

So ordered.

Notes:

1 Chief Justice Ireland participated in the deliberation on this case prior to his retirement.

2 The trial took place over three nonconsecutive days from January 31, 2012, to March 6, 2012.

3 Pursuant to this "nesting arrangement," as described by the parties, when a party was not residing in the marital home with the children, that party lived in a shared apartment that was maintained by the parties for this purpose.

4 This was a marriage of approximately sixteen years and four months under the definition of "[l]ength of marriage" in G.L. c. 208, § 48 (defining "length of marriage" as "the number of months from the date of legal marriage to the date of service of a complaint . . . for divorce").

5 Alimony was to be paid by the husband in monthly installments commencing on July 1, 2012, and terminating on the earliest of July 1, 2017, the remarriage of the wife, or the death of either party. For State and Federal income tax purposes, the alimony payments were deductible by the husband, and included as taxable income to the wife. *See Holmes v. Holmes*, 467 Mass. 653, 655 n.2 (2014). The husband was ordered to maintain his then-current medical, dental, and vision insurance for the benefit of the children until their emancipation, and for the wife so long as she was eligible for coverage under the terms of his employer-sponsored insurance coverage. In the event of an additional cost to the husband to insure the wife, the wife was to be responsible for such cost. Each party was responsible for his or her own uninsured medical and dental expenses.

6 No provision was made for payment of the children's future college tuition and expenses. *See Passemato v. Passemato*, 427 Mass. 52, 54 (1998) ("as a general rule, support orders regarding the future payment of post-high school educational costs are premature and should not be made").

7 The judgment ordered that the wife transfer her interest in the marital home to the husband, and required that the husband refinance the existing mortgage and pay to the wife the sum of $161,432, an amount equal to one-half of the equity in the home. The judgment also ordered that certain bank accounts, investment accounts, and retirement accounts standing in the individual name of a party would remain that party's property. The husband's Merrill Lynch 401(k) account and Fidelity Investments individual retirement account were to be divided equally.

8 The courts' statutory authority to award alimony has existed in the Commonwealth since 1786. *See* St. 1785, c. 69.

9 The other two forms of alimony are reimbursement and transitional alimony. Reimbursement alimony is defined as

> "the periodic or one-time payment of support to a recipient spouse after a marriage of not more than [five] years to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse, such as enabling the payor spouse to complete an education or job training."

G.L. c. 208, § 48. Reimbursement alimony terminates on the death of the recipient or on a date certain; once ordered, modification of reimbursement alimony is prohibited and income guidelines, applicable to all other forms of alimony, do not apply. G.L. c. 208, § 51(a)–(c).

Transitional alimony is defined as:

> "the periodic or one-time payment of support to a recipient spouse after a marriage of not more than [five] years to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce."

G.L. c. 208, § 48. Transitional alimony terminates on the death of the recipient or a date certain "that is not longer than [three] years from the date of the parties' divorce." G.L. c. 208, § 52. The statute prohibits modification or extension of transitional alimony, which, once ordered, may not be replaced with another form of alimony. *Id*.

10 General Laws c. 208, § 50(a), provides in full:

> "Rehabilitative alimony shall terminate upon the remarriage of the recipient, the occurrence of a specific event in the future or the death of either spouse; provided, however, that the court may require the payor to provide reasonable security for payment of sums due to the recipient in the event of the payor's death during the alimony term."

11 General Laws c. 208, 50(b), provides:

> "The alimony term for rehabilitative alimony shall be not more than [five] years. Unless the recipient has remarried, the rehabilitative alimony may be extended on a complaint for modification upon a showing of compelling circumstances in the event that: (1) unforeseen events prevent the recipient spouse from being self-supporting at the end of the term with due consideration to the length of the marriage; (2) the court finds that the recipient tried to become self-supporting; and (3) the payor is able to pay without undue burden."

12 Because this was a marriage of approximately sixteen years and four months, see note 4, *supra*, the durational period of general term alimony is governed by G.L. c. 208, § 49(b)(4), which provides:

> "If the length of the marriage is [twenty] years or less, but more than [fifteen] years, general term alimony shall continue for not longer than [eighty] per cent of the number of months of the marriage."

13 The legislative history clearly shows that the broad discretion judges historically have had in making awards of alimony was not affected by the Alimony Reform Act of 2011, St. 2011, c. 124 (alimony reform act). Indeed, the Legislature appears to have viewed the creation of the four categories of alimony as providing greater discretion to judges. A senator speaking in support of the bill that would become the alimony reform act stated, "Under this bill, people are provided with the ability to plan for their future. They are provided with clear guidance. We still need discretion for judges." *See* State House News Service (Senate Sess.), July 28, 2011 (statement by Senator Cynthia S. Creem). And in floor debates prior to adoption of the alimony reform act, a representative stated, "We create[d] several forms of alimony. . . . [The bill] gives judges the ability to do things they can't do now." *See* State House News Service (House Sess.), July 20, 2011 (statement by Representative John V. Fernandes prior to vote to engross 2011 Senate Doc. No. 665). *See also* State House News Service, Sept. 25, 2011 ("The bill lays out for the first time in state law specific guidelines on the levels and duration, amount and form of payments to former spouses. Reform advocates say the bill will give judges more discretion on when and how much alimony to award").

14 There is nothing in the statutory scheme to suggest that, even where there is evidence of conditions supporting rehabilitative alimony, a judge must in every case award rehabilitative and not general term alimony; indeed, a fine line may distinguish the two in some circumstances.

15 According to the judge's findings, the husband "received" bonuses from his present employer in the amount of $200,000 in 2008, $200,000 in 2009, and $345,000 in 2010, but the uncontested trial evidence reflects that those amounts were "earned" in the years indicated and received a year later and that the husband's income for 2011 included a bonus in the amount of $345,000, and in each of 2010, 2009, and 2008 his income included a bonus of $200,000. This evidence is consistent with the judge's findings regarding the husband's 2011 income.

16 The judge found that, immediately after being terminated from her job in 2007, the wife applied for a job with another company, but received no response. Soon thereafter, the wife and her sister-in-law started a consulting firm for early-stage pharmaceutical companies, but the business closed after six months because of what the judge described as "issues" in the sister-in-law's life.

17 *See Sampson v. Sampson*, 62 Mass. App. Ct. 366, 371 (2004) (durational limit not warranted where "simply uncertain" that wife, sole proprietor of small business, could generate future income that would render alimony unnecessary); *D.L. v. G.L.*, 61 Mass. App. Ct. 488, 510 (2004) (durational limit not warranted where "simply uncertain" whether wife's future income from employment would render alimony unnecessary); *Goldman v. Goldman*, 28 Mass. App. Ct. 603, 613 (1990) ("Where future events cannot be predicted with any measure of certainty, an alimony award should be based on present conditions").

18 As to the circumstances of the wife's departure from her last position, the judge found that the wife's employer had determined after investigation that, as a sales district manager, she had approved an expense of a sales representative who had misappropriated the funds. The wife had no knowledge of this misappropriation, but was fired nonetheless. However, as the judge noted in her findings, the husband's expert was not asked what impact the involuntary departure from employment would have on the likelihood of the wife's ability to secure employment. The wife introduced no expert testimony on this issue.

19 General Laws c. 208, § 53(c), provides:

> "When issuing an order for alimony, the court shall exclude from its income calculation:
>
> "(1) capital gains income and dividend and interest income which derive from assets equitably divided between the parties under [§] 34; and
>
> "(2) gross income which the court has already considered for setting a child support order."

20 The definition of income in the Massachusetts Child Support Guidelines (effective Jan. 1, 2009) (guidelines) that were in effect at the time of the trial in this case is very broad and includes bonuses among twenty-seven specifically identified sources of income, as well as "any other form of income or compensation not specifically itemized above." The guidelines in effect as of August 1, 2013, do not alter this aspect of the definition of income.

21 Section II.A of the guidelines provides that the guidelines "do not preclude the Court from deciding that any order be designated in whole or in part as alimony." Further, § II.A of the 2013 guidelines provides that, consistent with the alimony reform act,

> "[c]onsideration may be given by the parties to preparing alternative calculations of alimony and child support to determine the most equitable result for the child and the parties. Depending upon the circumstance, alimony may be calculated first, and in other circumstances child support will be calculated first. Judicial discretion is necessary and deviations should be considered."

22 We do not suggest that the amounts calculated by the wife are correct.

23 The parties are in agreement that the wife's annual premiums for the policies she has been ordered to maintain total approximately $15,561.

24 The husband's financial statement sets forth weekly living expenses of $7,250.61, including payments to the wife in the amount of $500.

25 The husband listed this as the value on his financial statement submitted to the court in conjunction with the divorce filing. The value reflects the cost of two subscription units of the investment vehicle made available through a private offering to employees of a certain investment firm, less an outstanding payment of $375.

DOKTOR v. DOKTOR
470 Mass. 547

October 6, 2014–January 30, 2015

Court Below: Probate and Family Court, Berkshire Division

Present: Gants, C.J., Spina, Cordy, Botsford, Duffly, Lenk, & Hines, JJ.

Records And Briefs:

(1) SJC-11727 01 Appellant Doktor Brief

(2) SJC-11727 03 Appellee Doktor Brief

Oral Arguments

Divorce and Separation, Alimony, Modification of judgment, Separation agreement. Statute, Retroactive application.

In an action seeking modification of a judgment of divorce (entered in 1992) to terminate an obligation to pay alimony that was contained in a provision of a separation agreement that merged with the judgment, the Probate and Family Court judge properly concluded that G.L. c. 208, § 49(f), which provides that general term alimony may be terminated upon a payor's reaching full retirement age, did not apply to a judgment entered more than twenty years prior to the date established in the Alimony Reform Act of 2011, St. 2011, c. 124; further, the judge properly could conclude that the wife was not able to meet her current reasonable expenses from income without alimony, unless she were to invade her assets.

COMPLAINT for divorce filed in the Berkshire Division of the Probate and Family Court Department on March 15, 1991.

A complaint for modification, filed on June 21, 2013, was heard by Beth A. Crawford, J.

The Supreme Judicial Court granted an application for direct appellate review.

Peter C. Alessio for the husband.

Janet H. Pumphrey for the wife.

DUFFLY, J. Joseph W. Doktor and Dorothy A. Doktor were divorced by a judgment nisi that entered in January, 1992, after a marriage of over twenty years.[Note 1] The judgment incorporated a separation agreement that, among other things, obligated Joseph to pay alimony to Dorothy in the weekly amount of $200 until "the death or remarriage of the Wife." That provision merged with the judgment. In June, 2013, Joseph filed a complaint for modification in the Probate and Family Court, seeking termination of the alimony obligation under G.L. c. 208, § 49(f), inserted by St. 2011, c. 124 (alimony reform act), which provides that "general term alimony orders shall terminate upon the payor attaining the full retirement age." He asserted that he had retired, and was past the normal age of full retirement as defined by the alimony reform act. *See* G.L. c. 208, § 48. Thereafter, he filed an amended complaint for modification, asserting as a further change in circumstances that his former wife was no longer in need of alimony. Following a trial, a Probate and Family Court judge dismissed the complaint for modification, concluding that G.L. c. 208, § 49(f) (retirement provision), applies prospectively, and therefore that Joseph was required to, but had not, established that there had been a material change in circumstances warranting modification. Joseph appealed, and we granted his petition for direct appellate review.

This case again raises a question relative to retroactive application of the retirement provision of the alimony reform act to alimony agreements that merged with judgments of divorce entered prior to March 1, 2012, the effective date of the act. *See Chin v. Merriot*, *ante* 527, 528–529 (2015); *Rodman v. Rodman*, *ante* 539, 540 (2015). Joseph argues that the judge erred in concluding that only those general term alimony orders that exceed the durational limits set forth in G.L. c. 208, § 49(b),[Note 2] can be terminated pursuant to provisions of the alimony reform act. We have con-

cluded that the Legislature intended the retirement provision to have prospective application; consequently, it is not applicable to modification of the alimony judgment in this case. *Chin v. Merriot*, *supra* at 529. As to Joseph's claim that the evidence he presented supports modification of his obligation to pay alimony based on a material change in circumstances, we conclude that the judge did not abuse her discretion in finding that the evidence failed to establish a change in the parties' circumstances warranting termination of the alimony obligation.

Background. We draw our summary of the facts from the judge's findings and the stipulations of the parties. The parties were married on September 20, 1968. Joseph was trained as an electrical engineer and worked for the majority of his career at a major electronics firm, until his retirement in 2001 at the age of fifty-seven. Dorothy earned a degree in medical technology and last worked in that field in 1973. During the marriage, Dorothy focused on raising the parties' two children, who are now adults, and managing the household. Joseph was the primary wage earner. The parties had been married for more than twenty years when they were divorced by a judgment of divorce nisi entered on January 10, 1992, which incorporated the parties' separation agreement. A merged provision of that agreement provides that "the Husband shall . . . pay to the Wife the sum of $200 per week as alimony . . . Payments . . . shall cease upon the death or remarriage of the Wife."

Following a trial on Joseph's complaint for modification, the judge concluded that the retirement provision does not operate retroactively, and thus that it does not apply in circumstances such as these, where the parties' divorce judgment predates the alimony reform act. The judge also determined that Dorothy could not meet her expenses without alimony payments, and that Joseph had the ability to meet his alimony obligation.

Discussion. 1. *Prospective application of the retirement provision*. Joseph challenges the judge's conclusion that § 4 of the uncodified provisions of the alimony reform act, St. 2011, c. 124, § 4 (uncodified section), sets forth the standard of review for modification for alimony awards in judgments existing prior to March 1, 2012.[Note 3] As we explained in *Chin v. Merriot*, *supra* at 532, citing *Murphy v. Department of Correction*, 429 Mass. 736, 737–738 (1999), we "construe the language of the uncodified sections of the alimony reform act together with the codified sections, according to their plain meaning, unless the reliance on the literal words would produce an absurd result, or a result contrary to the Legislature's manifest intent."

The judge was correct in concluding that the Legislature distinguished between modifications of newly-enacted durational limits on alimony, defined in G.L. c. 208, § 49, and other modifications to the amount of alimony awarded. The alimony reform act provides that "existing alimony judgments that exceed the durational limits under [G.L. c. 208, § 49,] shall be modified upon a complaint for modification without additional material change of circumstance, unless the court finds that deviation from the durational limits is warranted." Uncodified § 4(b). In all other respects, however, G.L. c. 208, §§ 48–55, "shall not be deemed a material change of circumstance that warrants modification of the amount of existing alimony judgments." Uncodified § 4(b).

Under common understanding of the phrase, the term "durational limits" refers to "the length of time something lasts." *Black's Law Dictionary* 613 (10th ed. 2014). The codified sections of the alimony reform act, discussing durational limits, clearly refer to the length of time that alimony is to be paid, and distinguish this period from the amount of alimony to be paid.[Note 4] Under the alimony reform act, the term "durational limits" does not include an event, such as death, remarriage, cohabitation, or reaching the age of retirement, that might trigger termination or reduction of alimony. The language of uncodified § 4(b) is consistent with the language of uncodified § 4(a), which provides that G.L. c. 208, § 49,

> "shall apply prospectively, such that alimony judgments entered before March 1, 2012 shall terminate only under such judgments, under a subsequent modification or as otherwise provided for in this act."

As we explained in *Rodman v. Rodman*, *supra* at 543, modification based on the newly-enacted durational limits in G.L. c. 208, § 49, affords the sole exception to prospective application, and it is apparent that this is what the Legislature was referencing in uncodified § 4(a) when it allowed prospective application "as otherwise provided for in this act." Uncodified § 5 staggers the filing dates for complaints for modification asserting that an existing alimony judgment exceeds the durational limits of G.L. c. 208, § 49.[Note 5] There is a three and one-half year phase-in period

for filing of such requests.[Note 6] However, uncodified § 6 provides an exception to that phase-in period. Read together, uncodified §§ 5 and 6 establish that, where a payor who had been married to a recipient for fewer than twenty years seeks to modify an alimony obligation based on the durational limits of G.L. c. 208, § 49, and the payor also will "reach full retirement age on or before March 1, 2015," the payor may file a complaint for modification on or after March 1,2013, "[n]otwithstanding clauses (1) to (4) of [§] 5"; accordingly, such a payor is not restricted to the phased filing dates provided in uncodified § 5.

Based on the foregoing, the judge did not err in dismissing the complaint for modification on the ground that G.L. c. 208, § 49(f), is prospective, and therefore provides no basis for modifying the alimony judgment that entered more than twenty years prior to March 1,2012.

2. *Material change in circumstances*. Joseph also challenges the judge's conclusion that the parties' circumstances do not warrant modification of the alimony judgment. The judge properly "looked to the statute governing modification of divorce judgments that was in effect prior to the enactment of the alimony reform act, to inform her determination whether there had been a material change in the parties' circumstances." *Chin v. Merriot*, *supra* at 530–531, citing *Pierce v. Pierce*, 455 Mass. 286, 293 (2009).

Because the parties stipulated "that the Husband has the ability to pay the current alimony award," the judge made no findings concerning Joseph's income, expenses, or assets. Indeed, nothing in the record reflects the amount of his income and expenses, or the net value of his assets. Instead, in light of the stipulation, the judge's findings focus on whether Dorothy's circumstances since the divorce have changed so materially that she is no longer in need of alimony. In determining whether Dorothy is no longer in need of alimony, the judge considered the parties' marital standard of living, as she was required to do. "If a supporting spouse has the ability to pay, the recipient spouse's need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage. 'The standard of need is measured by the "station" of the parties—by what is required to maintain a standard of living comparable to the one enjoyed during the marriage.'" *Pierce v. Pierce*, *supra* at 296, quoting *Grubert v. Grubert*, 20 Mass. App. Ct. 811, 819 (1985).

Joseph does not challenge the following findings of fact. During the marriage, Joseph was the primary wage earner; his gross weekly income was $1,428,66. Dorothy earned no significant income after the children were born. At the time of the divorce, her only income, other than child support, was one hundred dollars per week from dividends and interest. The marital home, which the parties built together using their own labor, was sold at the time of the divorce. The house, a four-bedroom, two and one-half bathroom colonial, is located on four and one-half acres of land. Joseph used the proceeds to pay off the mortgage on the house, in which he continues to live with his current wife; title to the house is now in her name.[Note 7] Dorothy purchased "a modest house," which at the time of trial had equity in the amount of $109,000. During their marriage, Joseph and Dorothy traveled regularly; every year, they took an extensive vacation with their children, and Dorothy often accompanied Joseph on business trips. They drove expensive automobiles, went to concerts and dined out frequently, and Joseph often purchased jewelry for Dorothy.

Following the divorce, Dorothy worked as a limousine driver earning seventy-nine dollars per week. By the time of trial on the complaint for modification, she no longer drove for a company, but continued to drive for friends, earning between forty dollars and $46.15 per week. As additional sources of weekly income, she received $197 in Social Security benefits, $232.42 in dividends, and $144.26 from her share of Joseph's pension. The judge found Dorothy's adjusted weekly expenses of $634.49 to be "reasonable." The judge found also that Dorothy traveled occasionally, but that her travel was not as "lavish" as it had been during the marriage, and that she used discounts and coupons to meet her other expenses. Dorothy had received two assets as part of an equal division of marital assets when the parties divorced. They had a combined value of $690,231 at the time of trial on the complaint for modification.[Note 8] The judge found that Dorothy "is not able to meet her current reasonable expenses from income without alimony, unless she invades her assets."

Joseph argues that the judge erred in not considering Dorothy's ability to use the principal of her assets to meet her reasonable expenses. "In determining whether to modify a support or alimony order, a . . . judge must weigh all relevant circumstances"; "[r]esolution of the issue rests in the judge's sound discretion." *Schuler v. Schuler*, 382 Mass. 366, 370 (1981). On this record, the judge appears to have "weigh[ed] all relevant circumstances," *id*., and to have

reached her determination based on the evidence presented. She properly considered the parties' station in life during the marriage; the nature, source, and value of Dorothy's assets; her current income and reasonable expenses; and Joseph's stipulated ability to continue to pay alimony in the amount of $200 per week. On these facts, the "judge properly could conclude that the wife should not be required to deplete her assets in order to maintain herself." *Downey v. Downey*, 55 Mass. App. Ct. 812, 818 (2002).

Judgment affirmed.

FOOTNOTES

[Note 1] Because they share a last name, we refer to Joseph W. Doktor and Dorothy A. Doktor by their first names.

[Note 2] The alimony reform act, St. 2011, c. 124, sets limits on the period of time that alimony awards may continue, based on the length of the parties' marriage as defined by the act. *See* G.L. c. 208, § 49(b)(1)–(4). Following a marriage of more than ten but less than fifteen years, for example, "general term alimony shall continue for not longer than [seventy] per cent of the number of months of the marriage." G.L. c. 208, § 49(b)(3). Uncodified § 4(b) of the alimony reform act states in part: "Existing alimony awards which exceed the durational limits established in [G.L. c. 208, § 49,] shall be modified upon a complaint for modification." St. 2011, c. 124, § 4(b) (uncodified section).

[Note 3] Uncodified § 4(b) of the alimony reform act provides:

> "[General Laws c. 208, §§ 48-55,] shall not be deemed a material change of circumstance that warrants modification of the amount of existing alimony judgments; provided, however, that existing alimony judgments that exceed the durational limits under [G.L. c. 208, § 49,] shall be deemed a material change of circumstance that warrant modification.
>
> "Existing alimony awards shall be deemed general term alimony. Existing alimony awards which exceed the durational limits established in [G.L. c. 208, § 49,] shall be modified upon a complaint for modification without additional material change of circumstance, unless the court finds that deviation from the durational limits is warranted."

[Note 4] Thus, G.L. c. 208, § 49(b), sets forth limitations on the duration of alimony obligations based on the length of the parties' marriage. General Laws c. 208, § 49(b), by its terms, does not apply to a marriage of more than twenty years. *See id.* ("if the length of the marriage is [twenty] years or less, general term alimony shall terminate no later than a date certain under the following durational limits").

[Note 5] Uncodified §§ 5 and 6 of the alimony reform act provide:

> "SECTION 5. Any complaint for modification filed by a payor under [§] 4 of this act solely because the existing alimony judgment exceeds the durational limits of [G.L. c. 208, § 49,] may only be filed under the following time limits:
>
> "(1) Payors who were married to the alimony recipient [five] years or less, may file a modification action on or after March 1, 2013.
>
> "(2) Payors who were married to the alimony recipient [ten] years or less, but more than [five] years, may file a modification action on or after March 1, 2014.
>
> "(3) Payors who were married to the alimony recipient [fifteen] years or less, but more than [ten] years, may file a modification action on or after March 1, 2015.
>
> "(4) Payors who were married to the alimony recipient [twenty] years or less, but more than [fifteen] years, may file a modification action on or after September 1, 2015.
>
> "SECTION 6. Notwithstanding clauses (1) to (4) of [§] 5 of this act, any payor who has reached full retirement age, as defined in section [G.L. c. 208, § 48,] or who will reach full retirement age on or before March 1, 2015 may file a complaint for modification on or after March 1, 2013."

[Note 6] According to the chairs of the alimony task force that drafted the proposed legislation act that eventually was adopted as the alimony reform act, this "phase in period" was intended to ease the additional burden on courts resulting from the sudden influx of cases. *See* letter of December 28, 2010, from Chairs of the Alimony Task Force to Chairs of the Joint Committee on the Judiciary.

[Note 7] The record does not reflect the value of the house, its sale price, or the amount of equity each party received.

[Note 8] One of these assets was an investment account valued at $375,839 that generated dividend income in the amount of $232.42 per week, and the other was an individual retirement account valued at $314,392. The judge found that Dorothy also had, at some point, acquired an additional individual retirement account valued at $30,361; the evidence does not reflect the date on which this asset was acquired.

PFANNENSTIEHL v. PFANNENSTIEHL
475 Mass. 105

SJC–12031.

Supreme Judicial Court of Massachusetts, Norfolk.

Submitted April 5, 2016.

Decided Aug. 4, 2016.

Robert J. O'Regan, Boston, for the husband.

Jillian B. Hirsch, Boston, for the wife.

Martha R. Bagley, Marblehead, pro se, amicus curiae, submitted a brief.

William H. Schmidt, Boston, pro se, amicus curiae, submitted a brief.

Present: GANTS, C.J., SPINA, CORDY, BOTSFORD, DUFFLY, & HINES, JJ.[1]

DUFFLY, J. In this appeal from a judgment of divorce, we are asked to determine whether the present value of the husband's beneficial interest in a discretionary spendthrift trust (2004 trust) may be included in the parties' divisible marital estate. *See* G.L. c. 208, § 34, as amended by St. 2011, c. 124, §§ 1, 2. As part of the judgment of divorce in 2012, a judge in the Probate and Family Court awarded Diane L. Pfannenstiehl[2] sixty per cent of her husband Curt F. Pfannenstiehl's interest in the present value of the 2004 trust. At that time, the trust was valued at $2,265,474.31. Curt appealed, arguing that the judge abused her discretion by including the 2004 trust in the marital estate. In a divided opinion, the Appeals Court affirmed. *See Pfannenstiehl v. Pfannenstiehl*, 88 Mass. App. Ct. 121, 124 (2015). We granted Curt's application for further appellate review, limited to issues concerning the 2004 trust.

We conclude that Curt's interest in the 2004 trust is "so speculative as to constitute nothing more than [an] expectanc[y]," and thus that it is "not assignable to the marital estate." *See Adams v. Adams*, 459 Mass. 361, 374 (2011), *S.C.*, 466 Mass. 1015 (2013). Although Curt's expectancy of future acquisition of income from the 2004 trust is not part of the marital estate, on remand, the judge, pursuant to G.L. c. 208, § 34, may consider that expectancy as part of the "opportunity of each [spouse] for future acquisition of capital assets and income," in the judge's determination of a revised equitable division of the marital property.[3] *See Williams v. Massa*, 431 Mass. 619, 629 (2000); *Drapek v. Drapek*, 399 Mass. 240, 245 (1987).

1. *Facts*. "We recite the facts from the judge's findings and the uncontradicted evidence" in the record. *Baccanti v. Morton*, 434 Mass. 787, 788 (2001). Curt and Diane were married on February 5, 2000. They have two children, a son and a daughter. Curt filed his complaint for divorce on September 13, 2010. The parties were married for twelve years, but had been separated for nearly two years at the time of trial. Pursuant to G.L. c. 208, § 48, the length of the marriage thus was ten years and seven months. An amended divorce judgment was entered on August 27, 2012. At that time, Curt was forty-two years old and Diane was forty-eight years old; each was in generally good health. Their son was then eleven years old and their daughter was eight years old.[4]

During the marriage, Curt was employed primarily as an assistant bookstore manager for a subsidiary of his father's corporation, Educor, Inc.,[5] earning approximately $170,000 per year Curt's total annual income was approximately $190,000 at the time of trial, including his earnings at other part-time jobs.[6] Prior to and during the first few years of the marriage, Diane served in the United States Army Reserves, which obligated her to participate in two weeks of training twice per year. In 2004, Diane retired from the Army Reserves, two years short of the twenty years of service that would have entitled her to a pension. The judge found that she made the decision to retire after pressure from Curt and his family following the birth of their daughter, who has Down syndrome. From 2004 through the

time of trial, Diane worked one day per week as an ultrasound technician. At the time, Diane was earning a gross annual income of $22,672. She also received $7,428 per year in rental income.[7]

During the marriage, the parties lived an upper middle class lifestyle. They owned a home valued at in excess of $700,000, as well as other real estate,[8] took several vacations each year, and belonged to a country club. The income to support this lifestyle was derived largely from Curt's earnings, augmented by support from Curt's father, as well as by distributions to Curt from the 2004 trust. The judge found that Diane made significant contributions as a homemaker and caretaker of the children, while also contributing her earnings and rental income to the marital estate.

2. *Discussion*. a. The 2004 trust. The irrevocable trust at issue was established by Curt's father in 2004, a few years after Curt and Diane married.[9] The trust benefits an open class of beneficiaries,[10] composed of any one or more of the then living issue of Curt's father. "Issue" is defined in the trust as the "lawful blood descendants in the first, second, or any other degree of" Curt's father. The 2004 trust is funded through shares of two for-profit education corporations, several life insurance policies, and a cash account. The trustees are Curt's brother, who is also a trust beneficiary, and a family attorney who is not a beneficiary.

The 2004 trust provides that distributions to beneficiaries may be made only with the approval of both trustees, who

> "shall pay to, or apply for the benefit of, a class composed of any one or more of the Donor's then living issue such amounts of income and principal as the Trustee, in its sole discretion, may deem advisable from time to time, whether in equal or unequal shares, to provide for the comfortable support, health, maintenance, welfare and education of each or all members of such class."

The 2004 trust also contains a spendthrift provision, pursuant to which "[n]either the principal nor income of any trust created hereunder shall be subject to alienation, pledge, assignment or other anticipation by the person for whom the same is intended, nor to attachment, execution, garnishment or other seizure under any legal, equitable or other process."[11]

The judge found that, at the time of trial, there were eleven living beneficiaries—children and grandchildren of Curt's father—and no great-grandchildren. The judge determined the total present value of the 2004 trust to be $24,920,217.37 at that time. Based on her finding that Curt had a one-eleventh interest in the trust, she determined the value of Curt's interest in the trust to be $2,265,474.31.

At that point, only Curt and his two siblings had received any distributions from the 2004 trust; no distributions had been made to any of the grandchildren. Between 2004 and 2007, there were no distributions from the trust. From April, 2008, until August, 2010, Curt and his siblings received regular, tax-free distributions from the trust.[12] During that period, Curt received regular monthly distributions for a total of $800,000 in distributions. Since the complaint for divorce was filed in September, 2010, Curt has not received any distributions from the 2004 trust. The judge found that the distributions to Curt ceased when he filed the complaint for divorce because the trustees deemed it too risky to distribute funds to Curt at a time when he might be required to share the funds with Diane, a nonbeneficiary. The trustees continued to make distributions to Curt's two siblings.

The judge determined that distributions from the 2004 trust "augmented" Curt and Diane's income and lifestyle during the marriage. The judge concluded that Curt's interest in the 2004 trust should be included as part of the marital estate, and awarded sixty per cent of that estate to Diane.[13] The judge based the award on her findings concerning Diane's "past, present and future contributions and her lessened ability to acquire capital assets and work full-time," which she contrasted with Curt's "high salary, flexible work hours and beneficiary status in his father's estate planning." To effectuate the division of the 2004 trust, the judge ordered Curt to pay Diane the sixty per cent of Curt's interest that she had been awarded in twenty-four monthly instalments of $48,699.77, for a total payment of $1,168,794.41, which included a three per cent interest rate.[14]

b. Equitable division of the marital estate. General Laws c. 208, § 34, vests broad authority in judges of the Probate and Family Court to make equitable division of the property included in the marital estate of divorcing parties, taking into account

> "the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. . . . The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."

See Rice v. Rice, 372 Mass. 398, 401 (1977); *Bianco v. Bianco*, 371 Mass. 420, 422 (1976).

Although a judge "has considerable discretion in determining how to divide [marital] assets equitably," *Baccanti v. Morton*, 434 Mass. 787, 792 (2001), the question we address here, whether an interest in a trust is sufficiently similar to a property interest that may be included in a marital estate and thus subject to equitable division under G.L. c. 208, § 34, is a question of law. *See Lauricella v. Lauricella*, 409 Mass. 211, 213 (1991).

General Laws c. 208, § 34, further provides that

> "the court may assign to either husband or wife all or any part of the estate of the other, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, . . . pension, profit-sharing, annuity, deferred compensation and insurance."

A party's estate for purposes of equitable division under G.L. c. 208, § 34, "includes all property to which a party holds title, however acquired." *Williams v. Massa*, 431 Mass. 619, 625 (2000). In light of the plain language of G.L. c. 208, § 34, and the Legislature's explicit intent to grant judges broad discretion to effectuate an equitable distribution incident to divorce, we have interpreted this provision to permit inclusion in the marital estate of a broad range of property interests. *See Lauricella v. Lauricella*, *supra* at 213–214. A divorcing spouse's enforceable right to an asset generally permits that asset to be included in the marital estate. *See Mahoney v. Mahoney*, 425 Mass. 441, 444 (1997) (dividing pension plan but not Social Security benefits because employee has "enforceable contractual right" to pension but not to "governmental safety net" of Social Security [citation omitted]); *Hanify v. Hanify*, 403 Mass. 184, 186–188 (1988) (enforceable right to proceeds from successful lawsuit); *Baccanti v. Morton*, *supra* (enforceable right to delayed compensation from stock options).

Because we are not "bound by traditional concepts of title or property" in considering whether a particular interest is to be included in the marital estate, we "have held a number of intangible interests (even those not within the complete possession or control of their holders) to be part of a spouse's estate for purposes of [G.L. c. 208,] § 34." *Baccanti v. Morton*, *supra*, quoting *Lauricella v. Lauricella*, *supra* at 214. *See, e.g.*, *Adams v. Adams*, 459 Mass. 361, 372–373 (2011); *Davidson v. Davidson*, 19 Mass. App. Ct. 364, 374–375 (1985); *Putnam v. Putnam*, 5 Mass. App. Ct. 10, 17 (1977). When interests are properly characterized as mere expectancies, however, they may not be included in the divisible estate of the divorcing parties. We have "drawn a line around certain interests that are so speculative as to constitute nothing more than expectancies, and thus, are not assignable to the marital estate." *Adams v. Adams*, *supra* at 374. Because "[e]xpectancies . . . embody no enforceable rights accruing during marriage," *Hanify v. Hanify*, *supra* at 188, they more properly are characterized as "anticipated" but "indefinite" opportunities for the future acquisition of assets or income. *Mahoney v. Mahoney*, 425 Mass. 441, 444, 446 (1997). This is because expectancies have "only theoretical value," and do not create a fixed entitlement to income. *Adams v. Adams*, *supra* at 376. *See, e.g.*, *Drapek v. Drapek*, 399 Mass. 240, 244 (1987) (future earned income from professional degree); *Yannas v. Frondistou–Yannas*, 395 Mass. 704, 714 (1985) (anticipated future income from patents); *Davidson v. Davidson*, 19 Mass. App. Ct. at 374 (husband's interest in inheritance from living testator who could have altered will).

Whether a trust may be included in the divisible marital estate requires close examination of the particular trust instrument to determine whether the interest is a "fixed and enforceable" property right, *D.L. v. G.L.*, 61 Mass. App. Ct. 488, 499 (2004) (citation omitted), or "whether the party's interest is too remote or speculative" to be included.

Id. at 496–497. The question turns "on the attributes" of the specific trust at issue, rather "than on principles of general application," *Lauricella v. Lauricella*, *supra* at 216, and therefore requires evaluation of the facts and circumstances of each case. *See id*. *See also Williams v. Massa*, *supra* at 628–629; *S.L. v. R.L.*, 55 Mass. App. Ct. 880, 883–884 (2002); *Ruml v. Ruml*, 50 Mass. App. Ct. 500, 511–512 (2000). If an interest in a trust is determined after such examination to be speculative or remote rather than fixed and enforceable, and thus more properly characterized as an expectancy, the interest is to be considered under the G.L. c. 208, § 34, criterion of "'opportunity of each [spouse] for future acquisition of capital assets and income,' in determining what disposition to make of the property that [i]s subject to division" [citation omitted]. *Williams v. Massa*, *supra* at 629.

c. Curt's interest in the 2004 trust. Curt contends that because the 2004 trust permits the trustees to distribute funds to beneficiaries in their "sole discretion," as they "may deem advisable from time to time," he has no control over when and whether he receives distributions, and, therefore, the 2004 trust is a "discretionary" trust which creates "nothing more than an eligibility for distributions."[15] Curt contends further that because the class of beneficiaries is open, it was error for the judge to conclude that he had a one-eleventh interest in the 2004 trust on the basis of the then-living beneficiaries. In addition, he maintains that, considering the trust instrument as a whole, *see Dana v. Gring*, 374 Mass. 109, 117 (1977), and in light of his father's intent, the 2004 trust may not be used to benefit Diane. *See Morse v. Kraft*, 466 Mass. 92, 98 (2013) (when interpreting trust, intent of settlor is paramount).

Interests in discretionary trusts generally are treated as expectancies and as too remote for inclusion in a marital estate, because the interest is not "present [and] enforceable"; the beneficiary must rely on the trustee's exercise of discretion, does not have a present right to use the trust principal, and cannot compel distributions. *See Lauricella v. Lauricella*, 409 Mass. 211, 216 (1991); *Randolph v. Roberts*, 346 Mass. 578, 579 (1964). Diane attempts to distinguish the 2004 trust from a "pure" discretionary trust,[16] however, by noting that distributions from the 2004 trust are subject to an "ascertainable standard" which governs the trustee's discretion. *See Dana v. Gring*, 374 Mass. 109, 116–117 (1977).

Under § 103 of the Uniform Trust Code, an "ascertainable standard" refers to a trust provision that requires a trustee to distribute funds to support a beneficiary's needs "relating to an individual's health, education, support or maintenance."[17] *See* G.L. c. 203E, § 103. This standard limits the discretion of the trustee, who is obligated to make distributions with an eye toward maintaining the beneficiary's standard of living in existence at the time the trust was created.[18] *See Dana v. Gring*, *supra*, discussing *Woodberry v. Bunker*, 359 Mass. 239, 241–243 (1971).

The trustee of a trust that contains an ascertainable standard must engage in a detailed inquiry into each beneficiary's needs and finances, and must "give serious and responsible consideration both as to the propriety of the amounts and as to their consistency with the terms and purposes of the trust." *See Old Colony Trust Co. v. Rodd*, 356 Mass. 584, 588–589 (1970). Such consideration must be "viewed in light of [the beneficiaries'] assets and needs, when measured against the assets of the trust" (citation omitted). *Marsman v. Nasca*, 30 Mass. App. Ct. 789, 796 (1991). *See* G.L. c. 203E, § 803 (if trust has more than one beneficiary, trustee must give "due regard to the beneficiaries' respective interests").

Diane argues that, because the trustees of the 2004 trust must take Curt's standard of living into account when determining whether to make distributions, Curt has a present enforceable property right to compel distributions when he needs them. Her argument relies in large part on the Appeals Court's decision in *Comins v. Comins*, 33 Mass. App. Ct. 28, 30–31 (1992), in which an interest in a discretionary trust with an ascertainable standard was deemed sufficiently certain to include the trust in the marital estate. In that case, the wife was the sole beneficiary of the trust. *Id*. at 30 n. 4. She received all of the trust income and held power of appointment over the trust upon her death. *Id*.

Unlike the spouse in *Comins*, however, Curt is one of eleven living beneficiaries among an open class of beneficiaries. The trustees of the 2004 trust are required to take into account the trust's long-term needs and assets, unpredictability in the stocks that fund it (which the judge found at times in the past have provided no income or have incurred a loss), the changing needs of the eleven current beneficiaries, and the possibility of additional beneficiaries. Curt's present right to distributions from the 2004 trust is speculative, because the terms of the trust permit unequal distributions among an open class that already includes numerous beneficiaries, and because his right "to receive

anything is subject to the condition precedent of the trustee having first exercised his discretion" in determining the needs of an unknown number of beneficiaries (citation omitted). *See Pemberton v. Pemberton*, 9 Mass. App. Ct. 9, 20 (1980).

"[P]ower lodged in the trustee to invade principal 'in its uncontrolled discretion' for the maintenance, support and education of [beneficiaries] does not give to the petitioners an enforceable claim against the trust for their support." *Spalding v. Spalding*, 356 Mass. 729, 729 (1969). Curt's share of the trust is subject to reduction in order to benefit the needs of the remaining ten current beneficiaries, as well as any future beneficiaries. *Contrast S.L. v. R.L.*, 55 Mass. App. Ct. at 884 & n.10 (dividing wife's one-fifth interest in trust with closed class of five beneficiaries because death of beneficiary could increase wife's interest, but her interest was not subject to reduction).[19] The judge found that distributions from the 2004 trust have not been equal from year to year and from beneficiary to beneficiary, with Curt receiving no distributions in some years.[20] In addition, although the existence of a spendthrift provision alone does not bar equitable division of a trust, *see Lauricella v. Lauricella*, *supra* at 211–212, 216–217, in light of the provisions in the 2004 trust, discussed *supra*, an order dividing it to benefit Diane cannot create a right in Curt to compel distributions in her favor, when he does not otherwise have a right to compel distributions. *See Burrage v. Bucknam*, 301 Mass. 235, 236 (1938); *Pemberton v. Pemberton*, 9 Mass. App. Ct. at 19–20.

Curt's remainder interest in the 2004 trust is equally speculative. The 2004 trust benefits future generations, and, consistent with their fiduciary obligations, the trustees are unlikely to terminate the trust and distribute the remainder of its principal in Curt's lifetime. *See Dana v. Gring*, 374 Mass. 109, 117–118 (1977) (trustees must comply with "evident intent to preserve trust principal for lineal descendants" and, unless trust expressly states otherwise, must administer trust with eye to future generations); *D.L. v. G.L.*, 61 Mass. App. Ct. 488, 497 (2004) (considering generational nature of trust in concluding interest in trust remainder was too remote for inclusion in marital estate). The judge found that termination of the 2004 trust, and distribution of its remaining principal, would be contingent on the trust no longer holding any stock in one of the for-profit higher education corporations that fund it. The judge found also that the trustees do not intend to sell those shares, and that Curt does not have the ability to compel them to do so. Therefore, the possibility that the 2004 trust will be terminated and the principal distributed to the remainder beneficiaries is remote.[21] *Cf. Lauricella v. Lauricella*, *supra* at 212, 216 n.6; *S.L. v. R.L.*, 55 Mass. App. Ct. 880, 884 & n.10 (2002).

Considering the language of the 2004 trust, and the particular circumstances here, the ascertainable standard does not render Curt's future acquisition of assets from the trust sufficiently certain such that it may be included in the marital estate under G.L. c. 208, § 34. *Cf. Lauricella v. Lauricella*, *supra* at 216; *Williams v. Massa*, 431 Mass. at 628–629. As noted, however, the trust may be considered as an expectancy of future "'acquisition of capital assets and income' in determining what disposition to make of the property that [i]s subject to division."[22] *See Williams v. Massa*, *supra* at 629, quoting G.L. c. 208, § 34; *Drapek v. Drapek*, 399 Mass. 240, 245 (1987).

Conclusion. The order dividing Curt's interest in the 2004 trust is vacated and set aside. The matter is remanded to the Probate and Family Court for further proceedings consistent with this opinion.

So ordered.

Notes:

1 Justice Duffly participated in the deliberation on this case and authored this opinion prior to her retirement.

2 Because the parties share the same last name, we refer to Curt F. Pfannenstiehl and Diane L. Pfannenstiehl by their first names.

3 We acknowledge the amicus briefs submitted by Martha R. Bagley and William H. Schmidt.

4 The judge awarded shared legal custody of the children to both parents, and primary physical custody to Diane. The judge incorporated in the judgment of divorce the parties' stipulation as to the amount of child support Curt was to pay Diane.

5 The corporation manages a number of for-profit institutions of higher education in Massachusetts and Indiana. The parties suggest that Curt has continued to be employed in the same capacity in his father's corporation since the divorce.

6 Curt also worked part time as an on-call fire fighter, and occasionally as a snow plow driver for the town of Dover and for private clients.

7 The rental income was from a two-family house held in Diane's name alone.

8 The judge found that the total value of the parties' marital estate, which included real estate, bank accounts, retirement accounts, insurance proceeds, deferred compensation, and personal property, was $4,305,379.28. The parties stipulated to the value of the real estate, and, by the time of trial, had divided the majority of the assets other than the 2004 trust, the valuation and division of which were the key issues at trial.

9 The 2004 trust provides that it is governed in accordance with the laws of the Commonwealth.

10 An open class of beneficiaries is one in which the interests of currently living beneficiaries are subject to partial reduction in favor of persons born after the creation of the trust who, under its terms, are entitled to share as members. *See* H.S. Shapo, G.G. Bogert, & G.T. Bogert, *Trusts and Trustees* § 182, at 404 (3rd ed. 2012).

11 A spendthrift provision has the effect of prohibiting a creditor or assignee from reaching a beneficiary's interest in a trust, unless the beneficiary receives such distribution and the creditor then pursues a claim against the beneficiary individually. G.L. c. 203E, § 502(c). *See Pemberton v. Pemberton*, 9 Mass. App. Ct. 9, 19–20 (1980); Newman, Spendthrift and Discretionary Trusts: Alive and Well Under the Uniform Trust Code, 40 *Real Prop. Prob. & Tr. J.* 567, 569 (2005). In the absence of a spendthrift provision, a "court may authorize a creditor or assignee of the beneficiary to reach the beneficiary's interest by attachment of present or future distributions . . . or other means." G.L. c. 203E, § 501.

12 Under the terms of the 2004 trust, distributions are not taxable to the beneficiaries, because Curt's father is responsible for taxes on any income earned by the trust.

13 The judge decided that, because Curt's "share of the 2004 Trust is being divided," the judge would "not use any future stream of income from distributions in assessing alimony," and ordered that "[n]either party is awarded alimony at this time." Because we conclude that the 2004 trust should not have been included in the divisible marital estate, it may be appropriate on remand for the judge and the parties to revisit whether alimony is now appropriate, and, if so, in what amount, on the basis of the factors the judge may deem relevant pursuant to G.L. c. 208, § 53(a).

14 Although Curt initially complied with the order obligating him to make these payments, in January, 2013, Diane filed a complaint for contempt, asserting that Curt had that month stopped making the required payments. *See Pfannenstiehl v. Pfannenstiehl*, 88 Mass. App. Ct. 121, 135 (2015). After a hearing, Curt was adjudicated in contempt. Id. at 136, 37 N.E.3d 15. Concluding that Curt "at least ostensibly tried" to obtain funds from the trust to make the payments to Diane, but that the trustees refused to distribute the funds, the Appeals Court set aside the judgment of contempt, *see id*., commenting that Curt had not "wilfully and intentionally violated a clear and unequivocal order." Although the judgment of contempt is not before us in this limited grant of further appellate review, based on our conclusion that the 2004 trust should not have been included in the marital estate, we would agree that the judgment of contempt must be set aside.

15 "A discretionary trust is one in which the settlor gives the trustee authority over the trust . . . [including the authority] to use discretion in the timing and amount of income payments to the beneficiary." H.S. Shapo, G.G. Bogert, & G.T. Bogert, *Trusts and Trustees* § 228. *See* Restatement (Second) of Trusts § 155 (1959).

16 "Pure" discretionary trusts permit a trustee's "sole," "uncontrolled," or otherwise unlimited exercise of discretion, and do not provide a governing standard for trust distributions. H.S. Shapo, G.G. Bogert, & G.T. Bogert, *Trusts and Trustees* § 228. *See* Restatement (Second) of Trusts § 155(1) (1959); Amann, 6 *Est. Plan. & Community Prop. L.J.* 181, 184–185 (2014).

17 General Laws c. 203E, § 814(b)(1), provides that, unless otherwise indicated, the "ascertainable standard" is incorporated into the distribution provisions of every trust governed by Massachusetts law.

18 The Internal Revenue Service (IRS) also uses the term "ascertainable standard" in the context of trusts and estates. Under IRS regulations, a beneficiary's interest in a trust is included in that beneficiary's taxable estate if the beneficiary has a general power of appointment through which he or she controls the distribution of the trust principal, but is excluded from the taxable estate if the discretion to distribute trust principal is limited by an "ascertainable standard relating to health, education, support, or maintenance." 26 U.S.C. § 2041(a)(2), (b)(1)(A). *See Dana v. Gring*, 374 Mass. 109, 110–111 (1977); *Woodberry v. Bunker*, 359 Mass. 239, 240 (1971).

19 "Unlike alimony, a property settlement is not subject to modification." *Drapek v. Drapek*, 399 Mass. 240, 244 (1987). Thus, Curt would be unable to modify a property division that included the value of his interest in the 2004 trust even if future beneficiaries or events reduce that interest. *See id*.

20 As noted, Curt received distributions from the trust, which was established in 2004, only during the period from April, 2008, through August, 2010.

21 Under its terms, if the 2004 trust were to be terminated, the principal would be distributed to Curt and any of his siblings over the age of thirty, or, if any sibling were deceased at the time of termination, held in trust until the children of that sibling reach the age of thirty.

22 See notes 8 and 13, *supra*.

SCHULMAN v. SCHULMAN
89 Mass. App. Ct. 1126

No. 15–P–418.

Appeals Court of Massachusetts.

June 3, 2016.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this appeal from a so-called "further judgment of divorce"[1] entered in the Probate and Family Court, Robert A. Schulman (husband), the former husband of Elizabeth W. Schulman (wife), challenges aspects of the alimony award and the provision regarding the payment of college expenses for the parties' child. We affirm.

1. *Alimony*. In the further judgment of divorce, the husband was ordered to pay general term alimony to the wife of $952 per week, along with rehabilitative alimony of $361 per week for a period of three years while the wife transitioned back into the workforce.[2] The combined general term and rehabilitative alimony amount of $1,313 represented approximately thirty-five percent of the husband's weekly gross salary of $3,750. The husband was also ordered to pay additional alimony to the wife equivalent to a percentage (thirty-five percent for the first three years, and thirty percent thereafter) of his "gross income from all other forms of compensation, including but not limited to bonuses, stock options, awards or grants, including incentive awards such as long-term incentive awards comprised of restricted stock units and cash components (except for capital gains income and dividend and interest income which derive from assets equitably divided by the parties under their Partial Agreement for Judgment) if, as, and when received."

On appeal, the husband principally challenges the provision requiring him to pay a percentage of his "other" nonsalary income, on the grounds that (1) it constitutes an impermissible self-modifying alimony award in violation of *Hassey v. Hassey*, 85 Mass. App. Ct. 518, 526–529 (2014), and (2) it exceeds both the wife's need for alimony and the husband's ability to pay the same. As a threshold matter, we note that the husband did not raise his first argument (that the percentage-based alimony award is barred by *Hassey*) during the proceedings below. In fact, the husband specifically requested a percentage-based alimony award, rather than a fixed alimony amount, in connection with his discretionary bonus income.[3] Accordingly, we deem this argument waived and decline to consider it. *See Carey v. New England Organ Bank*, 446 Mass. 270, 285 (2006). We therefore turn to the husband's remaining argument that the alimony award exceeds both the wife's need and the husband's ability to pay.

"A judge has broad discretion when awarding alimony under the statute." *Zaleski v. Zaleski*, 469 Mass. 230, 235 (2014). "In reviewing both the form and the amount of an award of alimony, we examine a judge's findings to determine whether the judge considered all the relevant factors under G.L. c. 208, § 53(a), and whether the judge relied on any irrelevant factors." *Id*. at 235–236.[4] "[T]he amount of alimony should generally not exceed the recipient's need or 30 to 35 percent of the difference between the parties' gross incomes established at the time of the order being issued." G.L. c. 208, § 53(b), *inserted by* St. 2011, c. 124, § 3. "Although the [Alimony Reform] Act [act] creates express guidelines to aid judges in fashioning alimony orders, it does not alter the principle that the central issue relevant to a financial award is the dependent spouse's 'need for support and maintenance in relationship to the respective financial circumstances of the parties.'" *Hassey*, 85 Mass. App. Ct. at 524–525, quoting from *Partridge v. Partridge*, 14 Mass. App. Ct. 918, 919 (1982). "If a supporting spouse has the ability to pay, the recipient spouse's need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage." *Pierce v. Pierce*, 455 Mass. 286, 296 (2009).

a. <u>The wife's need for alimony</u>. In the present case, the judge found that the parties enjoyed an upper-income lifestyle during their long-term marriage. The husband was the primary wage earner throughout the marriage, and at the time of the divorce, he was earning an annual base salary of $195,000, along with a compensation package that included discretionary bonuses,[5] restricted stock shares, and long-term incentive awards. As a result of the property

division, the parties each received approximately $1,704,791 in marital assets, some of which the wife used to purchase a condominium in South Carolina where she intended to move after the divorce. The judge found that, following the move to South Carolina, the wife would have weekly expenses of $2,118.70, and, "given her significant assets," she would "be able to meet her living expenses and maintain the marital lifestyle with a contribution from Husband of $1,313.00 per week until she has the opportunity to obtain additional [job] training . . . [while] also receiv[ing] varying portions of Husband's income from all other sources, including bonus income and stocks."

The husband contends that the provision requiring him to pay additional alimony to the wife from his "other" nonsalary compensation is excessive, as the judge found that the wife's needs could be met with the $1,313 alimony award alone. We disagree. The $1,313 alimony award does not cover all of the wife's expenses, as it leaves a shortfall of $805.70 per week. It is apparent from the findings that the judge expected the wife to cover the shortfall through a combination of her own assets and any additional alimony received from the husband. While the husband claims that the wife's expenses are inflated, we note that the wife's expenses had actually been reduced by approximately $838 per week due to the South Carolina move.[6] Moreover, the wife's expenses amounted to less than one-half of the husband's expenses ($4,468 per week). "Absent good reason, in a long term marriage, there is no justification for the lifestyle of one spouse to go down while the other remains high." *Goldman v. Goldman*, 28 Mass. App. Ct. 603, 611 (1990).[7] Accordingly, we conclude that the alimony award is not excessive with respect to the wife's needs.

b. The husband's ability to pay. The judge found that the husband has weekly expenses of $4,468, and "given [his] significant assets, bonus income, and regular weekly income of $3,750.00, he has the ability to pay weekly alimony of $1,313.00 to Wife and still maintain the marital lifestyle." The husband argues that the judge abused his discretion by making an alimony award that renders the husband unable to meet his own expenses without invading his assets, and by improperly including the husband's income derived from assets received in the divorce when determining his ability to pay alimony. Section 53(c) of c. 208, *inserted by* St. 2011, c. 124, § 4, provides that "[w]hen issuing an order for alimony, the court shall exclude from its income calculation . . . capital gains income and dividend and interest income which derive from assets equitably divided between the parties under section 34." Contrary to the husband's claim, the judge specifically excluded such income when calculating the husband's alimony obligation.[8] Moreover, to the extent that the judge considered both parties' assets when assessing the over-all fairness of the alimony award, he was well within his discretion to do so. *Contrast Katz v. Katz*, 55 Mass. App. Ct. 472, 478 (2002).

The husband further argues that the provision requiring him to pay additional alimony from "all other sources" of compensation is overly broad, as it could encompass future earnings that are presumptively excluded under the act. Section 54(b) of the act provides that "[i]ncome from a second job or overtime work shall be presumed immaterial to alimony modification if: (1) a party works more than a single full-time equivalent position; and (2) the second job or overtime began after entry of the initial order." G.L. c. 208, § 54(b), *inserted by* St. 2011, c. 124, § 4. *See Vedensky v. Vedensky*, 86 Mass. App. Ct. 768, 778 (2014). However, this appeal does not involve a modification proceeding, nor is there any indication in the judge's findings that the husband was planning to obtain a second job after entry of the divorce judgment.[9] The judge was obligated to consider all of the husband's current income when calculating the alimony award. *See Zaleski*, 469 Mass. at 243 ("The language of the act is clear that all of the payor spouse's income, as defined by the Massachusetts Child Support Guidelines . . ., must be included in any calculation of alimony"). A fair reading of the provision in question demonstrates that the judge intended to include all nonsalary aspects of the husband's current compensation package.[10] As there is no express requirement for the husband to pay alimony out of income derived from a part-time job commenced after the divorce, we discern no error.

2. *College expenses*. At trial, the parties agreed to share in the cost of the child's college expenses, but disagreed as to the apportionment of those expenses. The judge found it equitable for the husband to pay two-thirds of the child's college expenses, in part because the wife would be "seeking the training necessary for her to reenter the workforce" during the time period in question. The husband argues that the disparate division of the child's college expenses was an abuse of discretion, as the husband will have to invade his assets to satisfy the judgment. However, as the husband does not cite to any legal authority in support of this claim, it does not rise to the level of reasoned appellate argument contemplated by Mass. R.A.P. 16(a)(4), *as amended*, 367 Mass. 921 (1975), and we decline to consider it. *See K.A. v. T.R.*, 86 Mass. App. Ct. 554, 567 (2014).[11, 12]

Further judgment of divorce entered August 29, 2014, affirmed.

Notes:

1 On July 11, 2014, a so-called "bifurcated judgment of divorce nisi" entered, incorporating a partial agreement of the parties resolving certain issues, including property division. Following a two-day trial on the remaining issues, including alimony and payment of college expenses, the further judgment of divorce entered on August 29, 2014.

2 The judge found that the three-year rehabilitative alimony period would enable the wife to obtain necessary job training, after which she would be capable of earning $30,000 annually as an administrative assistant.

3 The husband acknowledges in his brief that "[i]t was [his] position at the time of trial that he should pay [the wife] the amount of $745.00 per week ($38,740.00 annually) in alimony and twenty (20%) percent of his bonus, if, as and when received, as additional income." Moreover, the husband's proposed judgment, submitted after *Hassey*, specifically included a provision requiring the husband to pay twenty percent of his bonus income as additional alimony to the wife.

4 "In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider: the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital life style; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material." G.L. c. 208, § 53(a), *inserted by* St. 2011, c. 124, § 3.

5 In March of 2014, the husband received bonus income of $30,000.

6 The judge found that the wife's weekly expenses would be reduced from $2,956.65 to $2,118.70 as a result of the move to South Carolina.

7 The husband further claims that there was no evidence that the wife would require three years of training before reentering the workforce. However, we find no merit in this argument, as the husband's own witness, Christopher Reece, testified, and the judge found, that the wife would "need to take courses on Microsoft Office Products before she will be employable in administrative positions."

8 The judgment expressly excludes from the husband's alimony obligation "capital gains income and dividend and interest income which derive from assets equitably divided by the parties." Moreover, the judge specifically noted that he did not consider "future dividend and interest income in calculating alimony, as this income will be derived from assets previously divided in the divorce."

9 Indeed, if the husband does obtain a second job in the future, he would be free to raise this argument in connection with a modification or contempt proceeding.

10 This is demonstrated by the express inclusion of the various forms of compensation being earned by the husband.

11 Even if we considered the merits of this argument, we would be unpersuaded. "In establishing support orders for children over age 18 . . . the Court shall exercise its discretion in ordering support and/or college contribution." Massachusetts Child Support Guidelines § II–F (2013) (guidelines). The guidelines are intended "to promote joint parental responsibility for child support in proportion to, or as a percentage of, income." *Id.* at principles par. 2. In this case, after taking into account the alimony award, the husband retains approximately two-thirds of the parties' combined gross income. We therefore discern no abuse of discretion in requiring the husband to pay a share of the child's college expenses that is proportional to his income. *See J.S. v. C.C.*, 454 Mass. 652, 660 (2009) (Child support orders are reviewed for an abuse of discretion).

12 The wife's request for an award of her appellate fees is denied.

EMERY v. STURTEVANT
91 Mass. App. Ct. 502

December 2, 2016–May 12, 2017

Court Below: Probate and Family Court, Franklin Division

Present: Vuono, Wolohojian, & Shin, JJ.

Divorce and Separation, Modification of judgment, Child support, Alimony, Findings. Parent and Child, Child support. Evidence, Earning capacity. Contempt.

A probate judge erred in dismissing complaints for modification of alimony and child support, filed by the husband following his resignation from a high-paying position and acceptance of a substantially lower-paying position, where the criteria had not been met for attribution of income to the husband consistent with his prior salary, in that not only did the judge fail to make a specific finding that the husband could earn more with reasonable effort, but such a finding could not be made on the record (i.e., it was neither reasonable nor fair to expect the husband, after he had engaged in an extensive job search in his field of expertise and secured employment commensurate with his training and experience, to continue his job search efforts indefinitely to avoid the risk of income attribution); further, in light of that conclusion, this court concluded that it need not reach the issue whether a second judge, in considering the wife's complaint for contempt against the husband, had abused her discretion in failing to modify the husband's alimony arrearages and ongoing alimony payments once she determined that the husband lacked the ability to pay.

COMPLAINT for divorce filed in the Franklin Division of the Probate and Family Court Department on November 12, 2010.

Following review by this court, 88 Mass. App. Ct. 1118 (2015), complaints for modification, filed on July 24, 2012, were considered by Stephen M. Rainaud, J., and a complaint for contempt, filed on January 24, 2014, was considered by Beth A. Crawford, J.

David H. Lee (Jessica M. Dubin also present) for the husband.

Edward F. Dombroski, Jr. (Laura S. Davis also present) for the wife.

VUONO, J. This case, which comes before us a second time, arises from the complaints filed by the former husband (husband) for modification of alimony and child support payments and from a series of complaints for contempt filed by the former wife (wife). The question we must answer is whether it is appropriate to attribute income to the husband, for purposes of determining his alimony and child support obligations, where he resigned from a high-paying position as head of school at a private institution and accepted a substantially lower-paying position in the same field following an extensive job search. We conclude that, under such circumstances, the criteria for attribution of income have not been met. We therefore remand this case for a determination of the husband's support obligations based on his "present income." *Flaherty v. Flaherty*, 40 Mass. App. Ct. 289, 291 (1996).

Background. A full recitation of the facts is necessary for our discussion.[Note 1] The parties were divorced on June 18, 2012, following twenty years of marriage. During the marriage, the wife was the primary caregiver for the parties' three children, while the husband worked in the private education sector, making "considerable professional advancements over the years." On July 1, 2003, the husband began working as associate head of school at Northfield Mount Hermon School (NMH), located in Gill, earning a starting annual salary of $128,500. He was promoted to head of school in less than one year, and by all accounts, he was extremely successful and effective in the performance of his job duties. By 2010, the husband's base salary had increased to $350,000. In addition to his base salary, the husband received numerous benefits from NMH, including, but not limited to, annual bonuses, deferred compensation, "free housing in an eight-bedroom, five-bathroom, three-story mansion, with all maintenance, cleaning and upkeep provided by the school," free meals through the school's dining service, use of a vehicle, and generous private school tuition waivers for the parties' children. In 2010, the value of the husband's total compensation package from NMH exceeded $450,000.

The husband's position as head of school was governed by a series of three-year employment contracts; each contract was subject to extension at the discretion of NMH's board of trustees. The husband's initial contract guaranteed

his employment through June 30, 2007. His contract was thereafter extended twice, ultimately guaranteeing his employment through June 30, 2012.

In 2010, the husband was involved in discussions with Mark Chardack, the chairman of NMH's board of trustees, to extend his employment contract once again. To that end, in December, 2010, Chardack sent a letter to the husband memorializing their "mutual intention . . . to enter into a formal employment agreement before the end of the current School year" extending the husband's "employment as Head of School through June 30, 2015." As it turned out, however, the husband was never presented with a new contract.

In April, 2011, the husband informed Chardack that he had engaged in an extramarital affair with a subordinate, which had ended in November, 2010. In the following weeks, the husband and Chardack spoke several times. The content of those discussions was not disclosed at trial. On May 3, 2011, the husband sent a letter to Chardack announcing that he was resigning from NMH due to "personal reasons." Chardack responded with a letter, dated the same day, indicating that he accepted the husband's resignation "with deep sadness." The husband stopped working at NMH immediately, although the school year had not yet ended and his employment did not officially terminate until June 30, 2011.[Note 2] In connection with his departure from NMH, the husband received a severance package which continued his base salary of $350,000 for one year (through June 30, 2012), along with some additional benefits. The husband began looking for a new full-time position in June,2011, supplementing his severance package with proceeds from temporary consulting work.

The divorce proceedings. By the time of the husband's departure from NMH, the parties had already separated and the wife had initiated divorce proceedings in the Probate and Family Court. A two-day trial was held before a judge (divorce judge) in May, 2012, at which the wife was represented by counsel and the husband represented himself. The divorce judge issued a judgment of divorce nisi dated June 18, 2012, as amended on July 17, 2012, ordering the husband to pay weekly child support of $780 and weekly general term alimony of $2,481 to the wife. The judge calculated the support payments using the husband's reported gross weekly income of $10,436.58.[Note 3]

The husband's complaints for modification. On May 30, 2012, after the conclusion of the divorce trial but before the entry of judgment, the husband was offered a position as head of school at the SEED School of Cincinnati, Ohio (SEED), at a starting annual salary of $135,000. On July 24, 2012, the husband filed two separate complaints for modification seeking a reduction in his child support and alimony obligations on the basis that his new income was substantially lower than his income at the time of the divorce. Following a trial, which was held before the divorce judge, the complaints were dismissed. In his memorandum and order dated October 24, 2013, the divorce judge concluded, without making subsidiary findings, that no material change in circumstances had occurred because the husband's "actual earnings [from SEED] are less than his potential and demonstrated earning capacity," and the reduction in the husband's income was caused by "his voluntary decision to resign from NMH." The husband appealed from the dismissal of his complaints for modification.

The wife's complaints for contempt. In addition to the modification proceedings initiated by the husband, the parties were involved in numerous contempt proceedings brought by the wife. Between September, 2012, and January, 2014, the wife filed three separate complaints for contempt alleging that the husband had fallen behind in his child support and alimony payments.[Note 4] The first two complaints were adjudicated by the divorce judge, who found the husband to be in contempt and established the husband's total arrearage at $90,710.91 as of October 11, 2013. The wife's third complaint for contempt, filed on January 24, 2014, was adjudicated by a different judge of the Probate and Family Court (contempt judge). On April 18, 2014, the contempt judge issued a judgment establishing the husband's alimony arrearage at $113,924.13 as of March 20, 2014 (the husband was current with his child support payments at that point), while declining to find the husband in contempt due to his inability to pay. Specifically, the contempt judge found that the husband's expenses exceeded his net income by $102 per week and that he did not have any liquid assets available to satisfy his alimony arrearage. The husband also appealed from the April 18, 2014, judgment.

The first appeal and remand. The husband's appeals were consolidated and came before a different panel of this court. In an unpublished memorandum and order issued pursuant to our rule 1:28, the panel remanded the case, holding that the divorce judge's failure to make adequate findings to support his conclusion that the husband's re-

duction in salary was voluntary and the absence of findings with regard to the reasonableness of the husband's job search prevented an assessment of the validity of the judge's ruling regarding the attribution of income.[Note 5] Given the lack of subsidiary findings to support the divorce judge's attribution of income, the panel was also unable to determine whether "it was within the [contempt] judge's discretion to allow arrears to continue accruing after the complaints for modification were filed." Accordingly, the panel vacated all three judgments and, as we have noted, remanded the case for further proceedings consistent with its decision.

Shortly thereafter, on January 18, 2016, without taking additional evidence,[Note 6] the divorce judge issued a "Judgment After Remand" setting forth findings of fact in support of his decision to dismiss the husband's complaints for modification. One month later, on February 16, 2016, also without further hearing, the contempt judge issued a "Judgment on Complaint for Contempt (After Remand)," again declining to find the husband in contempt in light of his inability to pay, while omitting a specific arrearage amount in the judgment. The present appeal followed.

Discussion. The husband challenges (1) the dismissal of his complaints for modification on the ground that the attribution of income based on his prior earning capacity was improper, and (2) the contempt judge's failure to eliminate the husband's alimony arrearages and ongoing alimony payments in light of her finding regarding the husband's inability to pay. We address each claim in turn.

1. *Modification*. We review a judge's denial of a party's request for modification of alimony and child support for an abuse of discretion. *See Pierce v. Pierce*, 455 Mass. 286, 293 (2009); *Wasson v. Wasson*, 81 Mass. App. Ct. 574, 576 (2012). A party seeking to modify an existing alimony award "must demonstrate a material change of circumstances since the entry of the earlier judgment." *Vedensky v. Vedensky*, 86 Mass. App. Ct. 768, 772 (2014), quoting from *Schuler v. Schuler*, 382 Mass. 366, 368 (1981). *See* G.L. c. 208, § 49(e).[Note 7] "Because alimony is a creature of statute," *Vedensky v. Vedensky*, *supra* at 776 n.11, actions to establish or modify alimony are governed by the Alimony Reform Act (Act), G.L. c. 208, §§ 48–55. The Act requires a judge to consider several factors when setting or modifying an alimony award, including, but not limited to, the "income, employment and employability of both parties," and the "ability of each party to maintain the marital lifestyle." G.L. c. 208, § 53(a), inserted by St. 2011, c. 124, § 3.[Note 8] Moreover, the Act generally limits the amount of an alimony award to "the recipient's need or 30 to 35 per cent of the difference between the parties' gross incomes." G.L. c. 208, § 53(b).

In contrast to alimony, "[t]he method for calculating and modifying child support" is governed both by statute, *see* G.L. c. 208, § 28, and by the Massachusetts Child Support Guidelines (2013) (guidelines). *Morales v. Morales*, 464 Mass. 507, 509–510 (2013). "Although the guidelines have been subject to periodic revision since their enactment, an essential premise has remained constant: that child support should be calculated as a percentage of parental income." *P.F. v. Department of Rev.*, 90 Mass. App. Ct. 707, 709 (2016), quoting from *M.C. v. T.K.*, 463 Mass. 226, 232 (2012). The guidelines permit a judge to modify a child support order if "there is an inconsistency between the amount of the existing order and the amount that would result from the application of the child support guidelines" (inconsistency standard), or if "any other material and substantial change in circumstances has occurred" (material change in circumstances standard). Guidelines § III-A.

While the precise methods for calculating and modifying child support and alimony differ somewhat, both depend in large part on the parties' financial circumstances. Accordingly, the central inquiry in a case involving modification of both child support and alimony is whether, and to what extent, the parties' financial circumstances have changed since the entry of the prior judgment. "The change may be in the needs or the resources of the parties . . . or in their respective incomes." *Kernan v. Morse*, 69 Mass. App. Ct. 378, 383 (2007), quoting from *Fugere v. Fugere*, 24 Mass. App. Ct. 758, 760 (1987).[Note 9]

Here, the husband sought a downward modification of his alimony and child support payments on the basis that his income from SEED was substantially lower than his income at the time of the divorce. However, the divorce judge concluded that the husband was not entitled to modification because his decision to resign from NMH, and the resulting reduction in his income, was "voluntary." The judge found that because the husband "was earning less at the time of the [modification] trial . . . than prior to the divorce by his own choosing," it was appropriate to attribute income to the husband consistent with his prior NMH salary. The husband claims that the judge's attribution of income to him was error. We agree.

At the outset, we note that "attribution of income in the alimony context is not different in rationale from that in the child support context." *C.D.L. v. M.M.L.*, 72 Mass. App. Ct. 146, 153 n.5 (2008). Accordingly, the discussion that follows applies to both alimony and child support.[Note 10]

"In the proper circumstances, '[a] judge is not limited to a party's actual earnings but may . . . consider potential earning capacity' when attributing income." *Id*. at 152, quoting from *Heins v. Ledis*, 422 Mass. 477, 485 (1996). However, before doing so, the judge must make a determination that a party is capable of earning more with reasonable effort. *See Flaherty v. Flaherty*, 40 Mass. App. Ct. at 291. Indeed, "the Child Support Guidelines and the case law specifically provide that an attribution tied to earning capacity is to be based on whether a party has exercised reasonable efforts in seeking employment." *Ulin v. Polansky*, 83 Mass. App. Ct. 303, 307 (2013). *See* Guidelines § I-E ("If the Court makes a determination that either party is earning less than he or she could through reasonable effort, the Court should consider potential earning capacity rather than actual earnings in making its order").

When determining the earning capacity of a party who has recently undergone a career change, we have said that "[a]ttribution of income may be appropriate when a judge determines a career change is voluntary." *Flaherty v. Flaherty*, *supra*. In such voluntary career change cases, attribution based on a party's prior earning capacity has been permitted when that party has voluntarily left his or her job and has thereafter failed to make reasonable efforts to secure comparable employment. This may occur when a party has taken an early retirement, or has chosen to pursue work in a totally unrelated field at a substantially reduced salary, despite the availability of higher-paying jobs commensurate with that party's education, training, and experience. *See, e.g.*, *Schuler v. Schuler*, 382 Mass. at 372 (affirming attribution of income to husband who, after being terminated from job, chose "to wait indefinitely upon the limited prospect of becoming president of a corporation" instead of taking readily available position as engineer); *Canning v. Juskalian*, 33 Mass. App. Ct. 202, 209–211 (1992) (affirming attribution of income to wife who resigned from job to stay at home with child from subsequent marriage); *Bassette v. Bartolucci*, 38 Mass. App. Ct. 732, 735–736 (1995) (affirming attribution where husband voluntarily retired from his job as letter carrier earning $735 per week to work as missionary with pension income of $235 per week); *C.D.L. v. M.M.L.*, 72 Mass. App. Ct. at 152, 158 (affirming attribution of income to husband who, after resigning as partner in large law firm, "made minimal attempts to obtain employment" and "only applied for jobs in areas for which he had little or no experience").[Note 11]

Here, it is apparent that the judge viewed this as a voluntary career change case. As we have noted, the judge "[found] it appropriate to attribute to [the husband] his NMH salary in light of his voluntary resignation from his position as Head of School at NMH."[Note 12] This was error. The facts of this case are distinguishable from the voluntary career change line of cases. The husband did not take an early retirement, nor did he resign from NMH to pursue a less lucrative career in a completely unrelated field. Moreover, while the judge found that "[t]he [h]usband's position at NMH remained available to him, but for his resignation," there was no evidence demonstrating that the husband's employment with NMH would continue indefinitely.[Note 13]

Regardless of the circumstances surrounding the husband's resignation from NMH, the judge was still required to consider whether, at the time of the modification trial, the husband could earn more with reasonable effort. *See P.F. v. Department of Rev.*, 90 Mass. App. Ct. at 711 ("[I]n Massachusetts, the relevant inquiry for attribution of income is not whether the payor's unemployment was 'foreseeable'; it is whether the payor is presently able to obtain employment through 'reasonable efforts'"). 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. *See, e.g.*, *C.D.L. v. M.M.L.*, 72 Mass. App. Ct. at 157 (in affirming attribution of income to husband, court gave "special weight to the judge's finding that the husband was 'earning less than he could with reasonable efforts'"). 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." *Ulin v. Polansky*, 83 Mass. App. Ct. at 307.[Note 14]

In making such a finding, the judge must "consider all relevant factors including without limitation the education, training, . . . past employment history of the party, and the availability of employment at the attributed income level." Guidelines § I-E. *See Flaherty v. Flaherty*, 40 Mass. App. Ct. at 291 ("judge should determine by specific and detailed findings of fact whether an individual will be able to earn additional income with reasonable effort before

attributing income"). Here, the judge found that the husband is "highly employable," having "advanced steadily in his career in academia throughout the parties' marriage." However, the judge did not make a specific finding regarding the reasonableness of the husband's efforts to secure employment. Instead, the judge simply "credit[ed] the [h]usband's testimony about his job search efforts after his resignation from NMH." The testimony credited by the judge details the husband's extensive job search spanning eleven months (from June, 2011, to May, 2012) during which the husband (1) applied for dozens of positions in the private education sector, the majority of which were head of school or similar positions; (2) traveled frequently, often several times per month (including to Boston, New York, Connecticut, California, and China), to attend numerous interviews, meetings, and job fairs; (3) worked with several recruiters and job search agencies; (4) reached out continuously to his contacts in the education field regarding potential job openings; and (5) worked on developing skills in educational technology to further enhance his marketability. These efforts to secure a permanent position resulted in a single job offer, the head of school position at SEED, which the husband accepted.

Rather than assessing the reasonableness of the husband's job search leading up to his acceptance of the SEED position, the judge instead found that "once the [h]usband obtained his position with the SEED Foundation in May, 2012, he ceased making any efforts to find employment that paid a salary commensurate with that he had made at NMH." It is neither reasonable nor fair to expect the husband, after he has engaged in an extensive job search in his field of expertise and has secured employment commensurate with his training and experience, to continue his job search efforts indefinitely to avoid the risk of income attribution. *Compare Schuler v. Schuler*, 382 Mass. at 371–372; *C.D.L. v. M.M.L.*, 72 Mass. App. Ct. at 150, 158. Accordingly, not only did the judge fail to make a specific finding that the husband could earn more with reasonable effort, it is apparent that such a finding cannot be made on this record.[Note 15]

In light of the foregoing, we conclude that "[t]he criteria for attribution of income were not met in this case." *P.F. v. Department of Rev.*, 90 Mass. App. Ct. 707, 710 (2016). *See Ulin v. Polansky*, 83 Mass. App. Ct. at 307 ("without a specific finding" that party has failed to exercise reasonable efforts to obtain employment, "attribution tied to an earning capacity. . . . rests on insufficient factual findings"). As such, the husband's support obligations must be based on his present income. *Flaherty v. Flaherty*, 40 Mass. App. Ct. at 291. We therefore vacate the dismissal of the husband's complaints for modification and remand for a redetermination of the husband's support obligations consistent with his actual, rather than attributed, income.

2. *Contempt*. The husband argues that the contempt judge abused her discretion by failing to modify the husband's alimony arrearages and ongoing alimony payments once she determined that the husband lacked the ability to pay. "A Probate Court has power to modify a support order in the context of either a complaint for contempt or a complaint for modification. . . . This power may be exercised not only as to future obligations, but also as to arrearages." *Kennedy v. Kennedy*, 17 Mass. App. Ct. 308, 312 (1983), and cases cited. *But see* G.L. c. 119A, § 13(a) (child support arrearages are only subject to retroactive modification during period in which complaint for modification is pending). Here, we need not reach the issue of whether the contempt judge properly exercised her discretion in declining to modify (both retroactively and prospectively) the husband's alimony payments, because we have already concluded that the divorce judge abused his discretion in declining to grant the husband's request for a downward modification of his support obligations.

Conclusion. The judgment after remand dated January 18, 2016, is vacated, and the matter is remanded for the limited purpose of recalculating the husband's child support and alimony obligations based on the husband's actual income at the time of the modification trial.[Note 16] The modification of the husband's alimony and child support obligations shall be effective as of the date of the original judgments of dismissal entered on October 24, 2013.

The judgment on complaint for contempt (after remand) dated February 16, 2016, is vacated, and the matter is remanded for recalculation of the husband's alimony arrearages, if any, following the modification of his support obligations on remand.[Note 17]

So ordered.

FOOTNOTES

[Note 1] We summarize the uncontested findings of fact entered in support of the judgments challenged on appeal, and "[w]here necessary to provide context or meaning, we have supplemented our summary" with competent evidence in the record appendix and excerpts from this court's decision in the related case of *Emery v. Sturtevant*, 88 Mass. App. Ct. 1118 (2015). *M.C. v. T.K.*, 463 Mass. 226, 229 n.2 (2012).

[Note 2] The school year ended in late May.

[Note 3] The judge relied on the gross weekly income figure reported on the husband's financial statement filed at the start of the divorce trial. That figure included $3,705.81 derived from the husband's temporary consulting work, and $6,730.77 from the husband's severance pay from NMH.

[Note 4] On September 11, 2012, the wife filed a complaint for contempt alleging that the husband was behind on his child support and alimony payments. On November 14, 2012, the divorce judge issued an amended judgment of civil contempt, finding the husband in contempt and establishing his combined child support and alimony arrearages at $10,248 as of September 27, 2012. The wife filed a second complaint for contempt in November, 2012. On February 14, 2013, the divorce judge issued a judgment of civil contempt and established the husband's total arrearages at $51,085 as of January 18, 2013. On March 27, 2013, the divorce judge issued a further judgment of civil contempt, establishing the husband's total arrearage at $54,346. Finally, on October 24, 2013, the divorce judge issued a further judgment of civil contempt establishing the husband's total arrearage at $90,710.91 as of October 11, 2013.

[Note 5] The panel further noted that it was unable to "discern whether the judge credited any of the ample evidence presented by the husband at trial of the extent of his job search following his resignation from NMH," or whether "the amount of the attribution was appropriate."

[Note 6] The panel acknowledged that "[w]hether there should be additional evidence taken in this case is a matter within the judge's discretion."

[Note 7] "[G]eneral term alimony may be modified in duration or amount upon a material change of circumstances warranting modification." G.L. c. 208, § 49(e), inserted by St. 2011, c.124, § 3. "General term alimony" is defined as "the periodic payment of support to a recipient spouse who is economically dependent." G.L. c. 208, § 48, inserted by St. 2011, c. 124, § 3.

[Note 8] When determining the appropriate duration and amount of alimony:

> "[A] court shall consider: the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material."

G.L. c. 208, § 53(a). "A court must consider these same factors in determining whether the amount of alimony should be modified based on a change of circumstances following entry of an earlier judgment for alimony." *Pierce v. Pierce*, 455 Mass. at 295 (discussing alimony factors set forth in G.L. c. 208, § 34, prior to enactment of Act).

[Note 9] We note that the criteria for determining a party's income is the same for purposes of both alimony and child support. *See* G.L. c. 208, § 53(b) (for purposes of calculating alimony "income shall be defined as set forth in the Massachusetts child support guidelines").

[Note 10] Both the Act and the guidelines permit a judge to attribute income to a party who "is unemployed or underemployed." *See* G.L. c. 208, § 53(f); Guidelines § I-E.

[Note 11] *Compare Ulin v. Polansky*, *supra* (reversing attribution of income where there was evidence that wife was "sincere in her job search" after resigning from previous job, yet judge failed to make specific finding whether wife had exercised reasonable efforts to obtain employment); *Flaherty v. Flaherty*, *supra* (reversing attribution of income to husband who was recently "laid off from his job" and "was readying himself to seek new employment").

[Note 12] The husband contends that the judge's finding regarding the voluntariness of his resignation from NMH was clearly erroneous. However, the judge's finding was based largely on his assessment of the husband's credibility at trial—a finding that "[w]e will not reverse . . . unless we are convinced [it is] plainly wrong." *Zaleski v. Zaleski*, 469 Mass. 230, 237 (2014), quoting from *Felton v. Felton*, 383 Mass. 232, 239 (1981). The judge found that "[a]lthough the [h]usband testified that he resigned to 'smooth the waters' at NMH after revelation of an extramarital affair, there was absolutely no evidence presented at trial that the [h]usband was forced or requested to resign as Head of School at NMH." The judge declined to "credit the [h]usband's testimony that he had no expectation that his contract would be extended after June, 2012." While "[i]t is settled that mere disbelief of testimony does not constitute evidence to the contrary," *Kunkel v. Alger*, 10 Mass. App. Ct. 76, 86 (1980), we cannot say that the judge was plainly wrong in concluding that the husband failed to present credible evidence that he was forced to resign. This is especially true where, as here, the husband's own testimony regarding the circumstances of his resignation was somewhat vague and contradictory. The husband testified that he was unable to discuss the terms of his resignation due to a confidentiality agreement, and that he did not initially believe that disclosing the affair to Chardack would cost him his job. While we decline to disturb the judge's finding as to the voluntariness of the husband's resignation from NMH, we note that it is not dispositive of the attribution issue.

[Note 13] While there was some evidence (namely, Chardack's December, 2010, letter of intent) indicating the potential for a contract extension through June, 2015, there is nothing in the record indicating that the husband's employment would be extended beyond that date. Indeed, the husband's predecessor served as head of school for six years, and the head of school prior to that served for eight years. By the time of his resignation in May, 2011, the husband had already served as head of school for seven years.

[Note 14] In *Ulin v. Polansky*, a case with facts similar to those of the present case, the wife voluntarily resigned from her job because she "believ[ed] that she could not reasonably meet" sales goals imposed by her new supervisor. 83 Mass. App. Ct. at 304. The trial judge found that while the wife's resignation was voluntary, "she had no other decision but to do so given the proposal with which she was faced." *Id.* at 305. The wife maintained that she was actively looking for work but had not been able to secure a new job. *Id.* at 304. However, the judge found that the wife was "presently able to obtain employment," and attributed an annual income to her of $120,000. *Id.* at 305. This court ultimately reversed

and remanded, concluding that the "attribution rest[ed] on insufficient factual findings" because, notwithstanding the wife's voluntary resignation, the judge failed to make a specific finding as to "whether [the wife] had exercised reasonable efforts in her job search." *Id.* at 306–307.

[Note 15] It is worth noting that while the judge failed to give appropriate attention to the required "reasonable efforts" inquiry, he appeared to consider an impermissible factor—the husband's conduct—when deciding to attribute income to him. The judge specifically found that "[t]he [h]usband's resignation from his position as Head of School was voluntary and was the result of his affair with a subordinate. The [h]usband's willful and deceptive behavior resulted in the resignation. . . . As a result of the [h]usband's resignation, the [w]ife lost her housing, access to unlimited meals at no charge, use of a vehicle, subsidized vacations and numerous other benefits." "[W]e caution against the view that . . . alimony . . . may be justified purely on the basis of the blameworthy conduct of one of the spouses." *Putnam v. Putnam*, 5 Mass. App. Ct. 10, 15 (1977).

[Note 16] On remand, the judge may consider, in addition to the husband's salary, any "perquisites or in-kind compensation to the extent that they represent a regular source of income" to the husband. Guidelines § I-A-20.

[Note 17] The wife's request for appellate attorney's fees and costs is denied.

YOUNG v. YOUNG (and a consolidated case[Note 1])
478 Mass. 1

March 6, 2017–September 25, 2017

Court Below: Probate and Family Court, Norfolk Division

Present: Gants, C.J., Lenk, Hines, Gaziano, Lowy, & Budd, JJ.[Note 2]

Records And Briefs:

(1) SJC-12240 03 Appellee Joy Young Redacted Brief

(2) SJC-12240 14 Appellant Derek Young Redacted Brief

(3) SJC-12240 15 Appellant Derek Young Redacted Reply Brief

(4) SJC-12240 18 Amicus Durland Brief

(5) SJC-12240 20 Amicus Women S Bar Association Brief

Divorce and Separation, Alimony, Findings.

In a divorce action, although the judge appropriately recognized that the parties' needs expanded in accordance with the increasingly available income during the marriage, the judge erred in determining that the wife's need for support should continue to expand after the divorce commensurate with the anticipated "upward trajectory" of the husband's income; further, the fluctuations in the husband's annual income did not present a "special case" warranting the judge's award of alimony based on a percentage of the husband's various sources of income, where, given the substantial financial assets available to the husband, the fluctuations did not materially affect his ability to pay a fixed alimony award that would meet the wife's needs; and where the percentage-based formula was intended to allow the wife's lifestyle to become more lavish than the marital lifestyle as the husband's income increased over time, rather than to approximate over time the amount needed to meet the wife's need to maintain her marital lifestyle.

COMPLAINTS for divorce filed in the Norfolk Division of the Probate and Family Court Department on January 29 and February 5, 2013.

After consolidation, the case was heard by Jennifer M.R. Ulwick, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

David H. Lee (Jessica M. Dubin also present) for the husband.

David E. Cherny (Erin M. Shapiro also present) for the wife.

W. Sanford Durland, III, & Glenn M. Schley, amici curiae, submitted a brief.

Jennifer C. Roman & Johnathan P. Diggin, for Women's Bar Association, amicus curiae, submitted a brief.

GANTS, C.J. The Probate and Family Court judge in this divorce action made two rulings that are the primary subjects of this appeal. First, the judge found that, where the husband's income from his employment was "on an upward trajectory," the wife may only maintain a standard of living "consistent with the marital lifestyle (which was one where the parties[']) needs expanded in accordance with the increasingly available income)" by an award of general term alimony that increases commensurate with the increase in the husband's income. Second, the judge found that, because of "the complex nature of [the husband's] compensation over and above his base salary and bonus," and because of "the constantly shifting nature of [the husband's] compensation," "it is reasonable and fair in the circumstances" to award alimony to the wife in the amount of thirty-three per cent of the husband's gross income, rather than a fixed amount.

We conclude that, where the supporting spouse (here, the husband) has the ability to pay, the need for support of the recipient spouse (here, the wife) under general term alimony is the amount required to enable her to maintain the standard of living she had at the time of the separation leading to the divorce, not the amount required to enable her to maintain the standard of living she would have had in the future if the couple had not divorced. We also conclude that, although there might be circumstances where it is reasonable and fair to award a percentage of the supporting spouse's income as general term alimony to the recipient spouse, those circumstances are not present in this case. We therefore remand the case to the Probate and Family Court with instructions to reevaluate the alimony judgment in light of our opinion and enter a new judgment accordingly.[Note 3]

Background. Derek L. Young (husband) and Joy G. Young (wife) had been married for nearly twenty-four years when the husband filed a complaint for divorce in the Probate and Family Court in January, 2013. The wife filed a complaint for divorce one week later, and the two actions were effectively treated as one. In October, 2013, the judge ordered the husband to pay temporary alimony in the amount of $48,950 per month. After a four-day trial, the judge made voluminous findings of fact and issued an amended judgment of divorce on September 25, 2015. We summarize only those findings relevant to the issues on appeal.

The judge found that the husband works as a "high level executive" with a financial institution who receives substantial compensation in various forms. Apart from his annual base salary (which was $350,000 in 2014) and an annual bonus (which was $1.6 million in 2013), he receives compensation through at least seven different compensation programs or share plans, including several types of stock options, a special bonus program, investor entity units, and opportunities to purchase shares of common stock at a discount. The compensation programs vary in how consistently they produce income and in the amount of income they produce. Some investment assets that are earned are liquid and immediately transferrable, and some may not be transferred or converted to cash until sometime in the future. The amount earned, above and beyond the base salary and annual bonus, through these compensation programs is both considerable and variable. The husband's gross income from 2008 through 2012 was approximately $1.53 million in 2008, $2.07 million in 2009, $3.81 million in 2010, $7.96 million in 2011, and $7.76 million in 2012.

The judge found that the parties agreed early in their marriage that the husband would work and the wife would "be a stay-at-home parent and not be employed outside the home." As a result, the wife has not worked outside the home since 1992, and the judge found that she "has no ability to be employed at a level to allow her to maintain a lifestyle post divorce similar to that maintained during the marriage without alimony."

The husband's substantial compensation package allowed the parties to enjoy "an affluent, upper-class station in life and marital lifestyle during their marriage." The couple's expenses increased as the husband's income increased during the course of his employment. Before the separation, the parties were living in a lavish, eight-bedroom home, driving luxury vehicles, and regularly dining out three to four times a week at expensive restaurants. They had purchased a summer home in Nantucket, were spending "tens of thousands of dollars on articles of clothing and handbags" from designer stores, and regularly enjoyed expensive vacations.

The judge found that, after the parties separated, the wife maintained a level of spending similar to what she spent during the marriage. According to the wife's October 8, 2013, financial statement, the wife's weekly expenses totaled $8,728 (or $453,856 per year) after subtracting expenses related to the children's college tuition and room and board. However, according to the wife's September 10, 2014, financial statement, the wife's weekly expenses had increased to $12,575.77 (or $653,940 per year). The judge found that "many of [the] wife's expenses" were supported by the evidence at trial, but she lacked "personal knowledge regarding her own expenses," certain expenses were "overstated," and her "representations of expenses on her financial statements [were] not an accurate reflection of her needs." The judge did not make a finding regarding her actual weekly or annual expenses or needs.

The wife sought alimony in the amount of $713,781.49 per year. After considering the husband's ability to pay, the wife's needs, and the other factors required by G.L. c. 208, § 34, the judge did not set a fixed amount of general term alimony but instead ordered the husband to pay the wife each year alimony in the amount of thirty-three per cent of his annual gross income.[Note 4] The judge included within the husband's gross income the husband's base salary and annual bonus, as well as several of the additional components of the husband's compensation package, including but

not limited to the husband's deferred bonus, special bonus, special retention bonus, special dividends, and distributions for payment of taxes.[Note 5] The judge reasoned, "Because the parties lived with the expectation and reality that [the husband's] bonus level is on an upward trajectory, and given the fact that their needs historically followed this upward trajectory, and due to the complex nature of [the husband's] compensation over and above his base salary and bonus, it is reasonable and fair in the circumstances to use a percentage for the future alimony particularly given the constantly shifting nature of [the husband's] compensation." The judge appointed a special master to oversee compliance with the judgment and to assist in resolving disputes that might arise.

The husband appealed, and we transferred the case to this court on our own motion.

Discussion. 1. *Determination of need for support*. "Alimony" is defined in the Alimony Reform Act of 2011, St. 2011, c. 124 (act), as "the payment of support from a spouse, who has the ability to pay, to a spouse in need of support for a reasonable length of time, under a court order." G.L. c. 208, § 48. Neither "ability to pay" nor "need of support" is a defined term under the act. Rather, the act identifies a number of factors that a judge must consider in "determining the appropriate form of alimony and in setting the amount and duration of support," and gives the judge the discretion to consider other factors that the judge deems "relevant and material." G.L. c. 208, § 53(a).[Note 6] "A judge has broad discretion when awarding alimony under the statute," *Zaleski v. Zaleski*, 469 Mass. 230, 235 (2014), citing Heins v. Ledis, 422 Mass. 477, 480–481 (1996), but the act establishes presumptive parameters: the amount of general term alimony "should generally not exceed the recipient's need or [thirty] to [thirty-five] per cent of the difference between the parties' gross incomes established at the time of the order being issued." G.L. c. 208, § 53(b).

A judge must consider and weigh all the relevant factors, but where the supporting spouse has the ability to pay, "the recipient spouse's need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage." *Pierce v. Pierce*, 455 Mass. 286, 296 (2009). *See Heins*, 422 Mass. at 480, quoting Inker, Alimony and Assignment of Property: The New Statutory Scheme in Massachusetts, 10 *Suffolk U. L. Rev.* 1, 8 (1975) (noting "the inherent limitation of alimony that it be only for 'the amount necessary to support the wife in the manner of living to which she has been accustomed'"); *Grubert v. Grubert*, 20 Mass. App. Ct. 811, 819 (1985) ("The standard of need is measured by the 'station' of the parties—by what is required to maintain a standard of living comparable to the one enjoyed during the marriage"). Two of the statutory factors in § 53(a) are "marital lifestyle" and the "ability of each party to maintain the marital lifestyle." Both focus on the spouses' lifestyle during the marriage. *See Zaleski*, 469 Mass. at 243 ("Because 'need' is a relative term for purposes of the act, it must be measured in light of mandatory considerations that include the parties' marital lifestyle"). *See also* 1 *Lindey and Parley on Separation Agreements and Antenuptial Contracts* § 22.63[2][e] (2d ed. 2017) ("standard of living experienced during the several years before the divorce" relevant for alimony determination is preseparation standard of living); L.D. Wardle & L.C. Nolan, *Fundamental Principles of Family Law* 715 (2d ed. 2006) ("the historic baseline for measuring 'need' has been the standard of living the parties enjoyed during the marriage"). Thus, both the act and the case law interpret "need" in terms of the marital lifestyle the parties enjoyed during the marriage, as established by the judge at the time of the order being issued, in this case, the judgment of divorce.[Note 7]

Where, as so often happens, the couple's collective income is inadequate to allow both spouses to maintain the lifestyle they enjoyed during the marriage after their household is divided in two through divorce, "the recipient spouse 'does not have an absolute right to live a lifestyle to which he or she has been accustomed in a marriage to the detriment of the provider spouse.'" *Pierce*, 455 Mass. at 296, quoting *Heins*, 422 Mass. at 484. Instead, "[t]he judge must consider all the statutory factors and reach a fair balance of sacrifice between the former spouses when financial resources are inadequate to maintain the marital standard of living." *Pierce*, *supra*. The act presumptively provides that the "fair balance of sacrifice" means that the supporting spouse generally should not be required to pay more than thirty-five per cent of the difference between the parties' gross incomes. G.L. c. 208, § 53(b).

Here, given the husband's substantial ability to pay, the determination of alimony rested solely on the wife's needs, that is, the amount necessary to allow her to maintain the lifestyle she enjoyed prior to the termination of the marriage. Where, as here, the husband's income grew considerably over the years and the marital lifestyle grew with it, the wife's need for alimony reflects the need to enjoy the more expensive lifestyle she had grown accustomed to before the marriage ended. *See Zaleski*, 469 Mass. at 243; Wardle & Nolan, *Fundamental Principles of Family Law*,

supra at 715. The judge here appropriately recognized that "the parties' needs expanded in accordance with the increasingly available income" during the marriage, but the judge erred in determining that the wife's need for support is to continue to expand after the divorce commensurate with the anticipated "upward trajectory" of the husband's income. "[T]he award must reflect the parties' marital lifestyle," not the marital lifestyle the parties might have enjoyed had they stayed together. *See Zaleski*, *supra* at 242. Even if the parties enjoyed an upwardly mobile lifestyle for the duration of their marriage, nothing in the language of the statute or our case law suggests that the recipient spouse is entitled, by way of alimony, to enjoy a lifestyle beyond what he or she experienced during the marriage.[Note 8], [Note 9]

2. *Percentage-based alimony award*. The judge ordered that the husband pay the wife alimony in the amount of thirty-three per cent of his various sources of income. The husband contends that the percentage-based award is "self-modifying" because the amount of alimony he must pay under its terms varies with his income from year to year. He contends that a "self-modifying" order is prohibited by G.L. c. 208, § 49(e), which permits modifications in the amount of alimony only upon a showing of "a material change of circumstances warranting modification."

We reject the argument, as we have before in a different context, that a judge lacks statutory authority to order a supporting spouse to pay alimony in an amount that may vary according to variables or contingencies set forth in the order, such as the income of the supporting spouse, the rate of inflation, or, where the spouses reside in different countries, changes in the currency exchange rate. *See Stanton-Abbott v. Stanton-Abbott*, 372 Mass. 814, 815–816 (1977) (affirming judgment requiring semiannual increases in alimony by one-half of any percentage increase in British retail price index). We do not consider every change in the amount of payment under such an alimony order to be a modification of the judgment, which we recognize would require a showing "by the party favorably affected that conditions [have] changed justifying the modification, and . . . procedural due process for the party adversely affected." *Id*. at 816. "When time brings about the change of situation of the parties, or trips the contingency, or alters the basis of the calculation, as provided in the judgment, we should not regard the corresponding shift in the rate of payment as a modification of the judgment which requires new justification in another court proceeding. The judgment has remained the same although its variable terms, which were presumably argued and deliberated before they were approved, have produced results which in some sense are new." *Id*.

As we have also recognized, the fact that the statute does not bar alimony orders with variable or contingent provisions does not mean that such orders are "advisable on the merits, or compatible with the fundamental purposes of alimony." *Id*. at 817. Here, the percentage-based award ran afoul of the act and therefore was an abuse of discretion not because of its variable nature, but because it was intended to award the wife an amount of alimony that exceeds her need to maintain the lifestyle she enjoyed during the marriage.

There may be cases in which a variable or contingent award is warranted, but such cases are the exception rather than the rule, and must be justified by the special circumstances of the case. See id. (parties' circumstances "presented a special case"). In most cases, setting the amount of alimony at a fixed amount, subject to modification upon a material change in circumstances, is preferable in order to provide "a clean break between the parties" and avoid "continued strife and uncertainty" (citation omitted). *Cf. Dewan v. Dewan*, 399 Mass.754, 757 (1987) (involving division of property). A variable or contingent award may make alimony judgments more difficult to enforce, especially where the variable or contingency is inadequately defined or where it may not be clear whether the contingency has been triggered. *See, e.g.*, *Wing v. Wing*, 549 So.2d 944, 947–948 (Miss. 1989) (finding of contempt improper where separation agreement did not specify precisely which consumer price index governed progressive increases in child support). *See also Breiner v. Breiner*, 195 Neb. 143, 145–146 (1975); *Provenzano v. Provenzano*, 71 A.D.2d 618, 618 (N.Y. 1979). Awarding alimony as a percentage of income may encourage income manipulation in order to reduce the alimony obligation. *See Baccanti v. Morton*, 434 Mass. 787, 800 (2001) (potential for fraud where spouse may collude with employer to manipulate compensation in view of divorce proceedings). Relatedly, where alimony is a percentage of income, proving contempt becomes more difficult because, instead of simply proving that payments have fallen short of a specified amount and that the supporting spouse had the ability to pay, the parties may be forced to litigate what is and is not "income." *See, e.g.*, *In re Marriage of Winne*, 239 Ill. App.3d 273, 284–285 (1992); *Mabee v. Mabee*, 159 Vt. 282, 285–286 (1992) (considering whether capital gains are income). We note that the judge thought it necessary to appoint a special master, paid for by the parties, to ensure compliance "[d]ue to the

complicated nature of . . . the ongoing obligations between the parties regarding the payment of alimony." Not everyone can afford to pay a special master.

We do not suggest that variable or contingent awards are warranted only in extraordinary circumstances. We recognize that returning to court to modify a judgment may be an unnecessary and costly burden where it is based on a foreseeable change of circumstances that can be anticipated in the alimony judgment. For instance, where the inflation rate is significant, a cost-of-living adjustment based on a specific consumer price index will result in changes to the actual amount of alimony paid, but is intended to keep the original award of alimony constant in terms of real purchasing power. Several Massachusetts cases have affirmed alimony judgments that included cost-of-living adjustments. *See, e.g.*, *DeMatteo v. DeMatteo*, 436 Mass. 18, 22, 39 (2002); *Mailer v. Mailer*, 390 Mass. 371, 375 (1983); *Moore v. Moore*, 389 Mass. 21, 22, 26 (1983); *Stanton-Abbott*, 372 Mass. at 815–818.

There may also be special circumstances where an alimony award based on a percentage of the supporting spouse's income might not be an abuse of discretion, such as where the supporting spouse's income is highly variable from year to year, sometimes severely limiting his or her ability to pay, and where a percentage formula, averaged over time, is likely not to exceed the needs of the recipient spouse. In *Wooters v. Wooters*, 42 Mass. App. Ct. 929,929–931 (1997), the Appeals Court affirmed a judgment that ordered the husband, who was a partner in a large law firm, to pay alimony in the amount of one-third of his gross employment income because he "was about to undergo a serious operation, and it was uncertain how much he would be able to work," and because his compensation from his law firm "had considerable fluctuations." The court found that these circumstances "presented a special case" that suggested the use of a "self-executing formula." *Id*. at 931, quoting *Stanton-Abbott*, 372 Mass. at 817.

The fluctuations in the husband's income in this case do not present a comparable "special case" warranting the judge's percentage-based formula for two reasons. First, given the substantial financial assets available to the husband, the fluctuations in his annual income do not materially affect his ability to pay a fixed alimony award that would meet the wife's needs. Second, as earlier noted, the percentage-based formula was intended to allow the wife's lifestyle to become more lavish than the marital lifestyle as the husband's income increases over time, not to approximate over time the amount needed to meet the wife's need to maintain her marital lifestyle.[Note 10]

Conclusion. The case is remanded to the Probate and Family Court with instructions to reevaluate the alimony judgment in light of our opinion and enter a new judgment accordingly.

So ordered.

FOOTNOTES

[Note 1] *Joy G. Young vs. Derek L. Young*.

[Note 2] Justice Hines participated in the deliberation on this case prior to her retirement.

[Note 3] We acknowledge the amicus briefs submitted by the Women's Bar Association, and by attorneys W. Sanford Durland, III, and Glenn M. Schley.

[Note 4] The judge determined that the husband's alimony obligation would extend until September 18, 2031, the death of one of the parties, or the wife's remarriage, whichever came first.

[Note 5] Under G.L. c. 208, § 53(b), for purposes of determining the amount of alimony, with exceptions not relevant here, "income shall be defined as set forth in the Massachusetts child support guidelines." *See Zaleski v. Zaleski*, 469 Mass. 230, 242–244 (2014). Under the guidelines, "income is defined as gross income from whatever source," and specifically includes "salaries," "bonuses," "interest and dividends," and "perquisites of in-kind compensation to the extent that they represent a regular source of income." Child Support Guidelines § I(A) (Aug. 1, 2013). *See Snow v. Snow*, 476 Mass. 425, 431 (2017).

[Note 6] General Laws c. 208, § 53(a), provides: "In determining the appropriate form of alimony and in setting the amount and duration of support, a court shall consider: the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material."

[Note 7] The other factors the judge must consider in making an alimony determination under G.L. c. 208, § 53(a), may also bear on the analysis of need, such as the health and age of the parties. *See, e.g.*, 1 *Lindey and Parley on Separation Agreements and Antenuptial Contracts* § 22.63[2][l] (2d ed. 2017) (must evaluate need in light of other criteria, such as party's health).

[Note 8] In light of this conclusion, we need not address the husband's argument that the judge was clearly erroneous in finding that the husband's income would continue to grow on an "upward trajectory." Even if it did, the wife's alimony would still be limited to the amount needed to allow her to continue to live the lifestyle she enjoyed at the end of the marriage.

[Note 9] We do not address what alimony would be appropriate in the quite different circumstances of a divorce where one spouse was on the cusp of being able to afford a more expansive lifestyle after separating from the spouse who had financially supported him or her while he or she completed medical school or business school. The alimony sought in this case was general term alimony. In the circumstances we describe in this footnote, G.L. c. 208, § 48, provides for "reimbursement alimony," defined as "the periodic or one-time payment of support to a recipient spouse after a marriage of not more than [five] years to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse, such as enabling the payor spouse to complete an education or job training." *See Drapek v. Drapek*, 399 Mass. 240, 248 (1987) (where wife "postponed her educational and professional plans in order to put her husband through [medical] school," judge did not abuse discretion in awarding wife 9.35 per cent of gross income or at least $60,000 with time limit of five years).

We also note that different factors and principles govern the equitable division of property in a divorce. *See* G.L. c. 208, § 34 (identifying factors judge "shall consider" in division of property in divorce); *Heins v. Ledis*, 422 Mass. 477, 482 (1996) ("The concepts of alimony and property division have been historically viewed as separate and distinct"). We address only the issue of general term alimony.

[Note 10] Because we reverse the percentage-based judgment in this case, we need not address the husband's argument that the provision in paragraph 6(c) of the amended judgment, which awards the wife a thirty-three per cent interest in any shares the husband subsequently acquires with his bonus compensation and imposes a constructive trust for the wife's benefit regarding these shares, represents an impermissible award of property acquired after the marriage.

COURNOYER v. COURNOYER
91 Mass. App. Ct. 1125

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. Cournoyer[2] 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 alimony[3] 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.

FRASCA v. FRASCA
93 Mass. App. Ct. 1101

17–P–650

Appeals Court of Massachusetts.

Entered: March 8, 2018

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The appellant, Richard Frasca (husband), appeals from the second corrected judgment of divorce nisi, which incorporates the original judgment and the first corrected judgment of divorce nisi, issued in the Probate and Family Court (judgment). On appeal, he maintains that the judge erred in: (1) assigning his ex-wife, Hemalatha Frasca (wife), thirty-five percent of any future inheritances he may receive; (2) failing to consider the wife's interest in a property located in India; and (3) awarding his personal property to the wife. We vacate in part and remand.

Background. The parties were married for roughly thirty-four years. After both spouses filed for divorce, the consolidated complaints came before a judge of the Probate and Family Court, and the judge found the following facts.

The parties lived an upper middle class life-style, funded in large part by the husband's mother. Among other things, the husband's mother provided a home in Boston for them to live in, bought them an investment property in California, and paid for their children's private schooling from preschool through college. The husband holds a Ph.D. and has taught at many prestigious universities, while the wife earned a general education diploma (GED) and has not been employed outside the home. At the time of their divorce proceedings, the husband's mother was paying for him to live in a retirement community, and the wife was living in the marital home rent free. The judge found that the wife was completely financially dependent on the husband and his family's wealth.

Discussion. 1. *Future inheritance*. The husband contends that because he had no vested interest in an inheritance at the time of the divorce, the judge's assignment of any future inheritance constituted an abuse of discretion, requiring reversal. We agree.

General Laws c. 208, § 34, provides "for the equitable division of the property interests of partners in a marriage." *Davidson v. Davidson*, 19 Mass. App. Ct. 364, 369 (1985). When reviewing a divorce judgment, we examine (1) whether the judge considered all the factors outlined in § 34 when dividing the marital assets; and (2) whether the judge's reasoning is apparent from the findings and rulings. *See Adams v. Adams*, 459 Mass. 361, 371 (2011). "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude 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." *Hoegen v. Hoegen*, 89 Mass. App. Ct. 6, 9 (2016), quoting from *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014).

An expectancy of future inheritance is not considered part of the marital estate, but a judge may take the expectancy into consideration when determining how to equitably divide the marital assets pursuant to G.L. c. 208, § 34. *See Pfannenstiehl v. Pfannenstiehl*, 475 Mass. 105, 111 (2016) ("When interests are properly characterized as mere expectancies . . . they may not be included in the divisible estate of the divorcing parties"); *Davidson*, *supra* at 374–375; *Zeh v. Zeh*, 35 Mass. App. Ct. 260, 264 (1993). Here, when allocating the marital property, it was well within the judge's discretion to consider the high probability that the husband would inherit from his still-living mother at some point in the future. It was error, however, to assign the wife thirty-five percent of any future inheritances that the husband may receive. *See Davidson*, *supra* (husband's expectancy under still-living mother's will was not part of marital estate). *Cf. Zeh*, *supra* ("An inheritance in possession clearly stands on different footing [from an expectancy of an inheritance] and constitutes part of the estate of the recipient subject to division under § 34").[2] For this reason, that portion of the judgment must be vacated.[3, 4]

2. *India property*. The husband also contends that the trial judge erred in failing to find that the wife owned property in India. Alternatively, he maintains that the judge should have considered the wife's ability to generate rental income from this property.

"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 of the credibility of the witnesses." Mass. R. Dom. Rel. P. 52(a). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Barboza v. McLeod*, 447 Mass. 468, 469 (2006), quoting from *Marlow v. New Bedford*, 369 Mass. 501, 508 (1976). The appellant bears the burden of showing that a finding of fact is clearly erroneous. *See Pointer v. Castellani*, 455 Mass. 537, 539 (2009).

At trial, the husband claimed that the wife owned and rented out a property in India, while the wife maintained that a Hindu temple owned the land, but that she paid taxes and had the right to live on the property. The resolution of conflicting testimony was for the judge, who explicitly credited the wife's testimony that she did not own the land. *See Baccanti v. Morton*, 434 Mass. 787, 790–791 (2001). The judge's factual findings were not clearly erroneous.

3. *Personal property*. Lastly, the husband takes issue with the portion of the judgment that provides for each party to "retain . . . all personal property . . . presently in their possession." He maintains that the judge erroneously granted the wife his academic work and papers, because she has no interest in them. At the time of the divorce, his possessions were in the marital home with the wife.[5] The husband testified about these personal possessions, but the judge made no explicit findings, nor provided any rationale for her decision to grant "all" personal property to the wife. The record is devoid of evidence or rationale to support the award with respect to the academic papers. On remand, the judge should once again consider the disposition of the husband's academic papers and provide written findings. *See Redding v. Redding*, 398 Mass. 102, 108 (1986) (reasons for judge's conclusions "must be apparent in [her] findings and rulings").

So much of the second corrected judgment that divides the marital assets, as well as the portion of the second corrected judgment awarding personal property, are vacated, and the matter is remanded for further proceedings consistent with this memorandum and order. In all other respects the second corrected judgment is affirmed.

So ordered.

Vacated in part and remanded; affirmed in part.

Notes:

2 Although there was testimony on both sides regarding the possibility of a trust benefiting the husband, and the judge credited the wife's testimony that she had seen a family trust, there was no evidence that the husband had a present and enforceable interest in any trust. *Contrast Lauricella v. Lauricella*, 409 Mass. 211, 216–217 (1991); *Ruml v. Ruml*, 50 Mass. App. Ct. 500, 510–512 (2000).

3 Although the judgment provides that neither party will presently pay alimony to the other, the judge also concluded that the grant of thirty-five percent of any of the husband's future inheritances will "mirror the alimony statutory guidelines . . . to meet [w]ife's needs." We note that the concepts of alimony and property division are "separate and distinct." *Heins v. Ledis*, 422 Mass. 477, 482 (1993). However, as noted above, the judge may consider the husband's expectancy in a future inheritance when dividing the marital assets. *See Pfannenstiehl*, *supra*.

4 The judgment provides that the wife will not receive alimony "at this time." We express no opinion as to any future complaint for modification of alimony should the husband receive the inheritance.

5 The husband brought a motion to reconsider which was denied without explanation.

MILES v. BEUSCH
94 Mass. App. Ct. 1118

17-P-1511

January 24, 2019

Alton L. MILES, Third v. Laura K. BEUSCH.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The former husband (husband) appeals from a Probate and Family Court further amended judgment of divorce nisi (further amended judgment) dated August 30, 2017, and judgment of contempt dated July 5, 2017. He challenges the further amended judgment's attribution of income to him in connection with child support, property division, award of sole legal and physical custody of the parties' three children to the former wife (wife), and award of $100,000 in attorney's fees to the wife. We vacate the further amended judgment in part and remand for further proceedings consistent with this memorandum and order.

1. *Attribution of income*. The judge made the following findings pertaining to the husband's work history. From May of 2006 to March of 2009, the husband worked as a portfolio manager and equity analyst for Fidelity Investments (Fidelity), earning approximately $600,000 per year (comprised of a $220,000 base salary and bonuses). In December of 2010, after being unemployed since March of 2009, the husband accepted a director of equity research position with Knight Capital (Knight), earning approximately $500,000 per year (comprised of a $200,000 base salary and bonuses). In August of 2013, after being laid off by Knight two months earlier, the husband accepted a senior equity analyst position with Baird Kailash (Baird), earning a $125,000 base salary with potential bonuses up to 125 percent. His total income in 2014 was $179,560. In June of 2016, shortly before the end of trial, the husband was laid off from Baird.

In concluding that attribution of income was warranted, the judge found that the husband had "not made reasonable efforts to earn an income commensurate with his education, skills, employment history and prior earning level" since serving the complaint for divorce on the wife in May of 2013. Specifically, the judge found the husband capable of earning $400,000 per year based on his "compensation history," "outstanding credentials," and "promising employability." Given the husband's recent layoff from Baird, however, and his "period of prolonged unemployment during the marriage," the judge attributed to him an annual income of $250,000 "while [he] is unemployed" and ordered him to pay weekly child support of $1,029.

The husband claims that it was an abuse of discretion to attribute income to him because he had recently been laid off and there was insufficient evidence of readily available positions at the attributed income level. We agree.[1] When determining a party's income for purposes of setting a child support order, "[i]n the proper circumstances, '[a] judge is not limited to a party's actual earnings but may . . . consider potential earning capacity.'" *C.D.L. v. M.M.L.*, 72 Mass. App. Ct. 146, 152 (2008), quoting *Heins v. Ledis*, 422 Mass. 477, 485 (1996). "The child support guidelines allow a judge to attribute income to a party when a finding is made that the party is earning less than he or she could through reasonable efforts." *Ulin v. Polansky*, 83 Mass. App. Ct. 303, 306 (2013). Before attributing income, however, the judge must "consider all relevant factors including without limitation the education, training, . . . past employment history of the party, and the availability of employment at the attributed income level." Massachusetts Child Support Guidelines § I.E (2013) (Guidelines).

Here, in finding the husband capable of earning $400,000 per year and then attributing an annual income of $250,000 to him "while [he] is unemployed," the judge credited the testimony of the wife's vocational expert that the husband was a "stellar candidate" for a director-level equity analyst position in Boston, with the yearly salary range for such a position typically falling between $400,000 and $750,000. The judge also credited the expert's opinion that the husband's Baird compensation was too low in light of his qualifications and was more in line with a salary offered to a recent Harvard graduate. Conspicuously absent from the expert's testimony, however, is any indi-

cation that the husband was overqualified for his position at Baird.[2] *See Emery v. Sturtevant*, 91 Mass. App. Ct. 502, 512 (2017) (reversing income attribution to husband who accepted substantially lower-paying position "commensurate with his training and experience" after extensive job search). Moreover, the expert testified that the type of upper-level equity analyst position appropriate for the husband is somewhat rare, admitting that there were no open positions at the time of trial and that in such a "competitive field" he "can't predict when" one might "come up."[3] The relative scarcity of these positions is underscored by what the judge characterized as the husband's "period of prolonged unemployment during the marriage."

Thus, though we see no error in the judge's determination that the husband is "eminently" qualified for a director-level equity analyst position earning upwards of $400,000 per year, it is unclear from this record if and when such a position will become available. The timing of the husband's layoff by Baird, shortly before trial ended, further muddies the waters. *See Flaherty v. Flaherty*, 40 Mass. App. Ct. 289, 290 (1996) (reversing attribution of income to husband who was recently laid off and "was readying himself to seek new employment"). Though the judge reduced the husband's attributed income to $250,000 in light of his sudden unemployment, the attribution was ultimately based on the judge's subsidiary findings regarding the husband's ability to secure a salary of at least $400,000. Furthermore, there was no evidence that there were available positions even at the $250,000 level when the husband was laid off from Baird, or that he had a meaningful opportunity to conduct a job search prior to the close of evidence. In these circumstances, while the judge "was not required to point to a specific position or job opening" when attributing income, *C.D.L.*, 72 Mass. App. Ct. at 157, we do not think that the evidence adequately demonstrates the "availability of employment at the attributed income level." Guidelines § I.E. *See P.F. v. Department of Revenue*, 90 Mass. App. Ct. 707, 711 (2016) ("relevant inquiry for attribution of income is . . . whether the payor is *presently* able to obtain employment through 'reasonable efforts'" [emphasis added]). We therefore must remand for further findings as to whether the husband exercised reasonable efforts, since his layoff from Baird, to secure employment commensurate with his education, training, and work history. *See Emery*, 91 Mass. App. Ct. at 511 ("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").

2. *Property division*. The husband argues that the judge improperly excluded from the asset division the wife's interests in her parents' estate and a life insurance policy insuring her father, and failed to properly account for a portion of the marital funds advances to the wife during the pendency of the divorce proceedings. "In making an equitable division of the parties' property, the judge had available for distribution 'all or any part of the estate of the other.'" *Heins*, 422 Mass. at 483–484, quoting G.L. c. 208, § 34. "We review the judge's findings to determine whether she considered all the relevant factors under G.L. c. 208, § 34, and whether she relied on any irrelevant factors." *Zaleski v. Zaleski*, 469 Mass. 230, 245 (2014). "We will not reverse a judgment with respect to property division unless it is 'plainly wrong and excessive.'" *Id*., quoting *Baccanti v. Morton*, 434 Mass. 787, 793 (2001).

The judge excluded the wife's potential inheritance from her parents on the ground that it was "too speculative to constitute anything more than an expectancy," as the wife "has no right to demand a present distribution and her parents could change their estate plan at any time." The judge instead considered the wife's potential inheritance "in determining [her] future ability to acquire additional assets" under G.L. c. 208, § 34. This was proper. Though a judge has broad discretion to divide assets "whenever and however acquired," *Rice v. Rice*, 372 Mass. 398, 400 (1977), an expectancy (such as a future inheritance) is generally deemed too speculative to be included in the marital estate and is thus appropriately considered under the § 34 criterion of "opportunity . . . for future acquisition of capital assets and income." *Pfannenstiehl v. Pfannenstiehl*, 475 Mass. 105, 106 (2016), quoting G.L. c. 208, § 34. *See Williams v. Massa*, 431 Mass. 619, 628–629 (2000); *Davidson v. Davidson*, 19 Mass. App. Ct. 364, 374–375 (1985).

The husband argues in the alternative that the judge did not assign enough weight to the wife's expected inheritance when granting the husband only a slightly larger share of the marital assets. We disagree. The weight to be given to a particular § 34 factor is committed to the judge's sound discretion. *See Denninger v. Denninger*, 34 Mass. App. Ct. 429, 430 (1993). The judge properly weighed the wife's expected inheritance against the husband's superior earning potential.[4] In addition, the judge declined to award alimony to the wife, despite the husband's superior earning potential, and noted that the expected inheritance would likely reduce any future alimony award. *See Casey v. Casey*, 79 Mass. App. Ct. 623, 630 (2011), quoting *Andrews v. Andrews*, 27 Mass. App. Ct. 759, 761 (1989) ("Alimony and equitable division are interrelated remedies"). We see no abuse of discretion in the judge's ruling.

In contrast, the judge's stated basis for excluding the wife's interest in her father's life insurance policy was erroneous in part. The judge found it appropriate to exclude the policy "particularly" given the "[w]life's lack of title." The wife concedes that this was clear error, as the evidence showed that she coowns the policy with her sister. It also appears that the wife used marital funds to pay the policy premiums. The judge thus erred to the extent that she excluded the wife's interest in the policy based on her purported lack of title. *See Heins*, 422 Mass. at 484 ("A party's 'estate' includes all property to which a party holds title, however acquired"). As we are unable to discern whether the judge would have reached the same result if not for the error, remand is required on this issue.

Turning to whether the judge incorrectly accounted for the advances received by the wife during the pendency of the divorce proceedings, we conclude that remand is also required on this issue. In the further amended judgment, the judge accounted for one $75,000 advance received by the wife. The husband asserts that the wife received two $75,000 advances, as reflected by two separate orders (issued in June and August of 2014), each authorizing the wife to withdraw $75,000 from the parties' joint accounts for counsel fees. The wife asserts on the other hand that the second order merely released the funds previously authorized by the first order and did not actually result in a second advance. The record before us is unclear, and the judge's findings do not resolve the ambiguity. We therefore remand for clarification.

3. *Custody*. The husband contends that the judge made erroneous and insufficient findings in awarding sole legal and physical custody of the three children to the wife and ignored evidence of her alleged domestic violence against the husband and the children. We review custody determinations for abuse of discretion. *See Schechter v. Schechter*, 88 Mass. App. Ct. 239, 245 (2015). "In custody matters, the touchstone inquiry [is] . . . what is 'best for the child.'" *Hunter v. Rose*, 463 Mass. 488, 494 (2012), quoting *Custody of Kali*, 439 Mass. 834, 840 (2003). "The determination of which parent will promote a child's best interests rests within the discretion of the judge . . . [whose] findings . . . 'must stand unless they are plainly wrong.'" *Hunter*, 463 Mass. at 494, quoting *Custody of Kali*, 439 Mass. at 845. "Determining what parenting and living arrangements will be in a child's best interests 'presents the trial judge "with a classic example of a discretionary decision."'" *Smith v. McDonald*, 458 Mass. 540, 547 (2010), quoting *Youmans v. Ramos*, 429 Mass. 774, 787 (1999).

Here, the judge found that "joint custody is not feasible . . . due to an enduring failure of the parties to communicate effectively and work cooperatively regarding the children. . . . [T]he parties have been unable to come to a consensus on nearly every contested decision affecting the children, ranging from medical care to afterschool activities." *See Carr v. Carr*, 44 Mass. App. Ct. 924, 925 (1998) ("Where the judge . . . [finds] that the relationship of the parties has been dysfunctional, virtually nonexistent, and one of continuous conflict, . . . custody should be awarded to only one parent"). The judge also found that, "[b]ased on the inability of the parties to communicate effectively, joint legal and joint physical custody is not in the children's best interests"; rather, their best interests would be served by the wife's "continu[ing in her] role as the primary caretaker." *See Custody of Kali*, 439 Mass. at 843 ("it is ordinarily in the child's best interests to maintain" existing parenting arrangement if it "is satisfactory and is reasonably capable of preservation"). In addition, the judge found that the wife "has demonstrated a willingness to be respectful and supportive of [the h]usband's active involvement in the children's lives, which has not been reciprocated by [him]." *See Hunter*, 463 Mass. at 495–496 (affirming award of sole custody to only parent willing to foster child's relationship with other parent).

The husband challenges these findings, claiming they are not supported by the evidence. But the findings were based largely on the judge's assessment of the credibility of several witnesses, including the parties, the guardian ad litem (GAL), and the parenting coordinator.[5] As there is nothing in the record to show that the judge's credibility determinations were "plainly wrong," we decline to disturb them. *Zaleski*, 469 Mass. at 237, quoting *Felton v. Felton*, 383 Mass. 232, 239 (1981). Indeed, "[i]n this situation, '[t]he opportunity which the judge had to observe and appraise both parents is particularly important.'" *Bak v. Bak*, 24 Mass. App. Ct. 608, 616 (1987), quoting *Stevens v. Stevens*, 337 Mass. 625, 627 (1958).

The husband further argues that the judge improperly rejected the GAL's recommendation for joint legal custody without providing an adequate basis for doing so.[6] But the judge was not required to adopt the GAL's recommendation. *See Pizzino v. Miller*, 67 Mass. App. Ct. 865, 876 (2006). The judge's findings regarding the parties' inability to agree on even the smallest of issues provide more than a sufficient basis for declining to award shared legal cus-

tody. *See Rolde v. Rolde*, 12 Mass. App. Ct. 398, 404 (1981) ("in order for joint custody or shared responsibility to work, both parents must be able mutually 'to agree on the basic issues in child rearing and want to cooperate in making decisions for [their] children'").

We are likewise unpersuaded by the husband's contention that the judge failed to properly consider evidence of the wife's alleged domestic abuse, in violation of G.L. c. 208, § 31A. Though the husband asserts that the judge "block[ed the] testimony of rebuttal witnesses" prepared to testify regarding the abuse allegations, the record does not support the husband's claim.[7] Furthermore, the judge did consider the abuse allegations raised by the husband, but did not find them credible. The judge credited the GAL's testimony that she investigated certain abuse allegations raised by the husband but ultimately determined that there were no concerns regarding the children's safety while they are in the wife's care.[8] We discern no abuse of discretion with regard to the award of sole legal and physical custody to the wife.

4. *Attorney's fees*. A judge has considerable discretion to award attorney's fees in a divorce case. *See Moriarty v. Stone*, 41 Mass. App. Ct. 151, 159 (1996); G.L. c. 208, § 38. "The factors relevant to an exercise of judicial discretion in determining an award of attorney's fees in a case such as this include 'the ability of the wife's counsel, the work performed, the results secured, the time spent, the hourly rates, the existence of contemporaneous time records, the financial positions of the parties, and the husband's obstructionist conduct which prolonged the proceedings.'" *Schechter*, 88 Mass. App. Ct. at 260, quoting *Cooper v. Cooper*, 62 Mass. App. Ct. 130, 141 (2004). "As long as the amount awarded is not incommensurate with an objective evaluation of the services performed, . . . '[t]he award of such costs generally rests in sound judicial discretion . . . and ordinarily ought not to be disturbed.'" *Ross v. Ross*, 385 Mass. 30, 38–39 (1982), quoting *Smith v. Smith*, 361 Mass. 733, 738 (1972).

The judge presided over several years of litigation in this case, including a nine-day trial, and was "intimately familiar" with the issues, the ability of the wife's counsel, the parties' conduct during the proceedings, and their respective financial positions. *Moriarty*, 41 Mass. App. Ct. at 159. The judge's decision to award the wife $100,000 in fees was "due primarily to [the h]usband's overzealous posture during the discovery phase and his tendency to perseverate over minor issues throughout these proceedings and at trial, which combined to unnecessarily prolong this litigation." The judge found that the nine-day trial (originally scheduled as a two-day trial) was "excessive . . . [given] the issues in dispute" and that "the length of the time for the case to be tried was exacerbated by [the h]usband's actions."

Furthermore, the judge found the fee award to be warranted given the contempt adjudication (on "[c]omplaint for [c]ontempt filed April 7, 2014") against the husband. In particular, the judge found the husband in contempt for utilizing $900,000 in marital funds to purchase a home, without obtaining the wife's permission or leave of court. Though the husband contends that the judge's findings relative to the contempt and his protraction of the litigation were clearly erroneous, we see nothing in the record that would compel us to disturb those findings, especially since they were rooted largely in the judge's own observation of the husband's conduct during the litigation. *See Salten v. Ackerman*, 64 Mass. App. Ct. 868, 875 (2005) ("trial judge [is] in the best position to determine whether the husband prolonged the case").[9] The judge's basis for awarding fees to the wife was sound. *See Hunter*, 463 Mass. at 502 ("Fee awards are proper given a party's discovery abuses, obstructionist conduct, and delay tactics").

We also reject the husband's argument that the judge's findings fail to reflect appropriate consideration of the reasonableness of the award of $100,000 in attorney's fees. The judge considered, among other things, the $250,000 in fees paid by the husband to his various attorneys, the "scope and quality" of the representation provided by the wife's counsel, the $300 hourly rate charged by the wife's counsel (which the judge found to be "consistent with the market rate for family law practitioners of comparable skill and experience in eastern Massachusetts"), and the husband's clear ability to pay the fee award "given his current cash assets." Moreover, the judge declined to award the entire $160,000 in fees sought by the wife, concluding that "$100,000 represents a fair assessment . . . considering the expense necessary to litigate this matter in a reasonable manner." These findings were well within the judge's discretion. *See Schechter*, 88 Mass. App. Ct. at 260 (affirming fee award to mother where "judge was intimately familiar with the parties, the father's superior financial position, the nature of the case, and the submissions of the parties" and "made specific findings that the father needlessly complicated the mother's efforts to discover the facts and severely and unnecessarily increased the amount of work performed by the mother's attorney").

Conclusion. So much of the further amended judgment as pertains to property division and to attribution of income is vacated, and the case is remanded for further proceedings consistent with this memorandum and order. In all other respects, the further amended judgment is affirmed. The judgment of contempt dated July 5, 2017, is affirmed.[10]

So ordered.

FOOTNOTES

1 We reject the husband's argument that, as a matter of law, income cannot be attributed to a party whose career change was "not voluntary." "Regardless of the circumstances surrounding the husband's [departure from his employment], the judge was still required to consider whether . . . the husband could earn more with reasonable effort." *Emery v. Sturtevant*, 91 Mass. App. Ct. 502, 511 (2017).

2 To the contrary, the expert's testimony suggests that the husband's role at Baird was appropriate in light of his education, training, and work history.

3 The expert testified that only one director-level position typically exists in a given company and that, in the past two years, he had received only "six requests to produce candidates to fill automotive equity analyst positions matching [the h]usband's hypothetical candidate profile."

4 Notwithstanding our ruling on the judge's attribution of income to the husband, we discern no error in the judge's finding that the husband's future earning potential is superior to that of the wife, given his education, work experience, and earning history throughout the marriage.

5 For example, the judge credited the parenting coordinator's testimony that "the parties consistently relied on him to arbitrate nearly every contested decision" and "[s]imply enrolling the children in swim lessons required a court order."

6 It is not wholly apparent from the record before us whether the GAL did in fact recommend joint legal custody. The husband failed to include a copy of the GAL's report in the record appendix, and the only record citation he provides in his brief does not clearly establish that the GAL recommended joint legal custody.

7 The judge placed two former nannies on standby as rebuttal witnesses. On the last day of trial, the husband never renewed his request to call rebuttal witnesses. Thus, as conceded by the husband at oral argument, there is no clear indication in the record that the judge prevented the nannies from testifying.

8 Because the husband did not include the GAL report in the record appendix, we are unable to assess his claim that the GAL did not conduct a thorough investigation. *See Chokel v. Genzyme Corp.*, 449 Mass. 272, 279 (2007). We therefore accept the judge's finding that "[t]he GAL investigation was thoroughly conducted," as the GAL "properly assessed when certain issues needed further investigation and when they did not."

9 We see no merit to the husband's claim that the judge abused her discretion by not conducting an evidentiary hearing. *See Robbins v. Robbins*, 19 Mass. App. Ct. 538, 543 n.10 (1985) ("where the judge evinces firsthand knowledge of the work performed and of going rates, an evidentiary hearing may not be necessary").

10 The wife's request for "additional appellate fees" is denied.

MACRI v. MACRI
96 Mass. App. Ct. 362

February 4, 2019–November 1, 2019

Court Below: Probate and Family Court, Middlesex Division

Present: Green, C.J., Agnes, & Desmond, JJ.

Divorce and Separation, Alimony, Child support, Child custody, Modification of judgment. Parent and Child, Child support, Custody. Evidence, Earning capacity.

In the circumstances of an unallocated support award in a divorce proceeding, the income attributed to the husband was reasonable and supported by the findings and the trial record, where the husband was voluntarily unemployed and not making reasonable efforts to obtain employment, and where there was uncontroverted expert testimony that the husband was highly employable at a salary range matching that of the attributed income; further, the unallocated support award was necessary to maintain the lifestyle enjoyed by the recipient spouse and child prior to termination of the marriage.

In a divorce proceeding, a Probate and Family Court judge did not abuse her discretion in modifying a child custody order to grant sole legal custody to the mother, where the father's failure to effectively communicate with the wife regarding the child's education and otherwise act in the child's best interests in the time since joint custody was ordered constituted a material change in circumstances and was sufficient to support the change in custody.

COMPLAINT for divorce filed in the Middlesex Division of the Probate and Family Court Department on July 25, 2011.

Following review by this court, 89 Mass. App. Ct. 1115 (2016), the case was heard by Patricia A. Gorman, J.

Susan E. Stenger for the husband.

Rachael M. Soun (David E. Cherny also present) for the wife.

DESMOND, J. Theodore W. Macri, Jr. (husband), the former spouse of Sheila Mary Macri (wife), appeals from a Probate and Family Court judgment, dated January 12, 2018, entered after remand (remand judgment), challenging (1) the amount of income attributed to him, (2) the amount of unallocated support (combined alimony and child support) awarded to the wife, and (3) the transfer of sole legal custody of the parties' child to the wife. We affirm.

Background. The parties, who married in May of 1998, lived in New York City until the husband's employer, Deutsche Bank, promoted him to a position in Singapore in April of 2000. In 2005, the husband was transferred to Hong Kong, where he remained until his resignation from Deutsche Bank in 2011. Between 2008 and 2011, the husband's annual earnings at Deutsche Bank ranged from $751,680 to $1,034,028. The wife initiated divorce proceedings in Hong Kong in 2008 and was permitted to relocate to Massachusetts with the parties' child in August of 2010. The husband moved to Massachusetts in 2011 and filed complaints regarding child support and custody in the Probate and Family Court. A four-day trial was held before a judge of the Probate and Family Court, concluding in September of 2012.

A judgment, dated December 31, 2013 (as amended on May 28, 2014), issued in which the judge (1) granted the parties joint legal custody of their child, (2) attributed an annual income of $400,000 to the husband, who was unemployed at the time of the trial, and (3) ordered the husband to pay unallocated support of $10,000 per month. The husband appealed from the amended judgment, principally challenging the amount of income attributed to him. This court vacated so much of the amended judgment as set forth the unallocated support order and remanded the matter for a redetermination of the husband's earning capacity, stating that the attributed annual income of $400,000 was "inappropriate" insofar as it was "base[d] [on] the husband's . . . earnings he made from another country" without "any expert testimony on the husband's earning potential in the United States" or on any "comparable salaries." *Macri v. Macri*, 89 Mass. App. Ct. 1115 (2016). The wife thereafter filed a counterclaim seeking to modify legal custody, which was consolidated with the remanded support matter and tried over the course of two days before the same judge in December of 2017. Dr. Peter Cohen, a "vocational consultant" retained by the wife to assess the hus-

band's earning capacity, was permitted to testify as an expert witness and his report was entered into evidence at the trial.

The judge issued the remand judgment, dated January 12, 2018, granting sole legal custody to the wife and ordering the husband to pay unallocated support of $10,000 per month (retroactive to January 1, 2014). The judge found that the husband had not exercised reasonable efforts to obtain appropriate employment and attributed to him an annual income of $440,400 for 2014 to 2016, and $475,000 for 2017. The present appeal by the husband followed.

Discussion. The husband challenges the amount of attributed income, the amount of unallocated support, and the modification of legal custody. We address his arguments in turn.

1. *Attribution of income*. The husband contends that the amount of income attributed to him, in excess of $400,000 per year, rests on insufficient evidence. We disagree.

"Both the [Alimony Reform Act (act), G.L. c. 208, §§ 48-55,] and the [Massachusetts Child Support Guidelines (Guidelines)] permit a judge to attribute income to a party who 'is unemployed or underemployed.'" *Emery v. Sturtevant*, 91 Mass. App. Ct. 502, 509 n.10 (2017), quoting G.L. c. 208, § 53(f); Guidelines § I(E) (2013).[Note 1] Before considering a supporting spouse's potential earning capacity, rather than the spouse's actual income, the judge must determine that the spouse is capable of earning more with "reasonable effort." *Emery*, *supra* at 509. *See* Guidelines § I(E) (2013); Guidelines § I(E)(2) (2017).[Note 2] In making such a determination, the judge is required to consider several factors, including the supporting spouse's "assets, residence, education, training, job skills, literacy, criminal record and other employment barriers, age, health, past employment and earnings history, as well as the [spouse's] record of seeking work, and the availability of employment at the attributed income level, the availability of employers willing to hire the [spouse], and the relevant prevailing earnings level in the local community." Guidelines § I(E)(3) (2017).[Note 3]

Here, the judge's findings reflect consideration of all factors required by the Guidelines. The husband was fifty-one years old and in good health at the time of the remand trial. The husband had worked in the financial sector for over twenty-five years, holding a variety of titles, including vice president, director, managing director, general manager, and senior consultant. After leaving Deutsche Bank and returning to the United States in 2011, the husband remained unemployed until February of 2013, when he began working as a consultant for SC Lowy. The husband's position at SC Lowy required him to divide his time evenly between Boston and New York, and paid an annual salary of $125,000. The husband voluntarily terminated his employment with SC Lowy on April 13, 2016, and although he claimed to have been searching for a job since that time, the judge did not find the husband's "stated desire to find employment . . . sincere." The judge found the husband had not exercised reasonable efforts to secure appropriate employment, noting that he "could not remember the names of executive search firms he had worked with, did not join job clubs or respond to advertisements in professional journals; and more often than not, forwarded his resume by e-mail rather than contacting individuals at companies directly."[Note 4] *Cf. Emery*, 91 Mass. App. Ct. at 503 (reversing income attribution where husband accepted substantially lower-paying position in his field of expertise after extensive job search).

The judge credited Dr. Cohen's assessment that, based on the husband's education, training, and transferable skills, the husband fell within the category of a "long-range planning executive," and was "highly employable" in a wide range of positions in the financial sector. The judge credited Dr. Cohen's determination that, as of November, 2017, there were a total of 5,014 available positions in the Boston area involving fixed income, corporate finance, and alternative investments (positions which the husband specifically claimed to be searching for).[Note 5] The judge further credited Dr. Cohen's opinion that the husband's annual earning capacity was $440,400 from 2014 through 2016, and $475,000 in 2017, based on average reported earnings for "long-range planning executive[s]" in the Boston area.[Note 6] The judge therefore concluded that the husband had been "underemployed" while working for SC Lowy, and had remained "unreasonably unemployed" since leaving that position.

The husband challenges the judge's reliance on Dr. Cohen's analysis, contending that there was no evidence of any available positions listing an annual compensation of over $400,000. The judge, however, "was not required to point to a specific position or job opening" when attributing income to the husband. *C.D.L. v. M.M.L.*, 72 Mass. App. Ct.

146, 157 (2008). As Dr. Cohen explained at the trial, the current job postings he reviewed generally did not disclose compensation, thus he researched wage data for long-range planning executives in the Boston area for 2014 and 2017 when forming his opinion of the husband's earning capacity. The husband did not present his own expert witness to rebut Dr. Cohen's testimony. On this record, we discern no abuse of discretion in the judge's decision to credit Dr. Cohen's analysis and ultimate opinion of the husband's earning capacity. *See Ulin v. Polansky*, 83 Mass. App. Ct. 303, 307–308 (2013) ("Trial judges have 'extensive discretion' with respect to the admission of expert testimony, . . . and are free as fact finders to accept or reject that testimony once admitted, as did the judge in this case"). We are therefore satisfied that the judge's findings demonstrate appropriate consideration of "the availability of employment at the attributed income level, the availability of employers willing to hire the [husband], and the relevant prevailing earnings level" in the Boston area. Guidelines § I(E)(3) (2017).

We also discern no merit in the husband's contention that the judge, in relying on Dr. Cohen's analysis, failed to take into account certain factors impeding the husband's ability to obtain employment. The judge found there were no "barriers to [the husband] finding full-time employment," declining to credit the husband's assertion that his job prospects were limited by his age, background in Asian debt, and lack of an established Boston network. As there is nothing in the record convincing us that this credibility determination was "plainly wrong," we will not disturb it (citation omitted). *Zaleski v. Zaleski*, 469 Mass. 230, 237 (2014).

To be sure, this case is "distinguishable from the voluntary career change line of cases," *Emery*, 91 Mass. App. Ct. at 510, involving a party who has "taken an early retirement, or has chosen to pursue work in a totally unrelated field at a substantially reduced salary, despite the availability of higher-paying jobs commensurate with that party's education, training, and experience." *Id*. at 509. We have previously said that the voluntariness of a career change is not dispositive for purposes of income attribution, *see id*. at 510 n.12, 511, and we do not suggest here that a party is foreclosed from making a good faith, voluntary career change simply because the change results in less income.[Note 7] The relevant inquiry in all income attribution cases, i.e., whether the party "could earn more with reasonable effort," *id*. at 511, requires consideration of the party's "specific circumstances," including a broad list of factors specified in the Guidelines. Guidelines § I(E)(3) (2017). The weight afforded to each factor is a matter within the trial judge's discretion, and depending on the circumstances of a particular case, certain factors may be weighed more heavily than others. *See, e.g.*, *Schuler v. Schuler*, 382 Mass. 366, 374–375 (1981). Here, the judge carefully considered the husband's "specific circumstances," Guidelines §I(E)(3) (2017), and concluded that he could earn more with "reasonable effort." *See* Guidelines § I(E) (2013); Guidelines § I(E)(2) (2017). In light of the record before us, we discern no abuse of discretion in that conclusion. *Cf. P.F. v. Department of Revenue*, 90 Mass. App. Ct. 707, 711 (2016).

2. *Unallocated support*. The husband contends that the unallocated support award of $10,000 per month, encompassing both alimony and child support, substantially exceeds the needs of the wife and the child. We disagree.

An alimony award is generally limited to the recipient's need for support. *See* G.L. c. 208, §53(b).[Note 8] If the supporting spouse has the ability to pay,[Note 9] the recipient's "need" is typically the amount required "to maintain the lifestyle he or she enjoyed prior to termination of the marriage." *Young v. Young*, 478 Mass. 1, 6 (2017), quoting *Pierce v. Pierce*, 455 Mass. 286, 296 (2009). Child support, although "calculated as a percentage of parental income," *M.C. v. T.K.*, 463 Mass. 226, 232 (2012), is also rooted in a determination of need, which is "defined, at least in part, by the [ ] parents' standard of living." *Brooks v. Piela*, 61 Mass. App. Ct. 731, 737 (2004). *See* Guidelines, Principles (2017) (child support should "meet [ ] the child's survival needs in the first instance, but, to the extent either parent enjoys a higher standard of living, allow [ ] the child to enjoy that higher standard").

Here, the judge found the parties enjoyed an "upper-class" standard of living for most of the marriage, although neither party had been able to maintain that elevated lifestyle upon returning to the United States.[Note 10] The judge found that both the wife and the child required support to maintain their "current" lifestyle (as reflected in the wife's weekly living expenses of $3,751.85), and that the "minimum presumptive order" under the Guidelines was not "appropriate in this case."[Note 11] Although the husband claims the unallocated support order is excessive, the wife's financial statement reveals a net deficit of approximately $2,240 per week.[Note 12] Accordingly, we cannot reasonably say the unallocated support award of approximately $2,308 per week ($10,000 per month) is "excessive" or "not rationally related to the reasonable needs" of the wife and the child. *Cooper v. Cooper*, 62 Mass. App. Ct. 130, 136

(2004). We therefore discern no abuse of discretion in the amount of unallocated support ordered by the judge. *See J.S. v. C.C.*, 454 Mass. 652, 660 (2009) (support awards reviewed for abuse of discretion).[Note 13]

3. *Legal custody*. The husband contends that the modification of legal custody was improper as the judge's findings fail to demonstrate the existence of a material change in circumstances. *See* G.L. c. 208, § 28.[Note 14]

We review custody determinations for an abuse of discretion. *Schechter v. Schechter*, 88 Mass. App. Ct. 239, 245 (2015).[Note 15] "In custody matters, the touchstone inquiry [is] . . . what is 'best for the child.'" *Hunter v. Rose*, 463 Mass. 488, 494 (2012), quoting *Custody of Kali*, 439 Mass. 834, 840 (2003). *See* G.L. c. 208, § 28. "The determination of which parent will promote a child's best interests rests within the discretion of the judge . . . [whose] findings . . . 'must stand unless they are plainly wrong.'" *Hunter*, *supra*, quoting *Custody of Kali*, *supra* at 845. "[F]or joint custody or shared responsibility to work, both parents must be able mutually to agree on the basic issues in child rearing and want to cooperate in making decisions for [their] children" (quotation omitted). *Rolde v. Rolde*, 12 Mass. App. Ct. 398, 404 (1981).[Note 16]

Here, the judge found that the parties' "significant difficulty" communicating with each other "ha[d] not improved" since the first trial in 2012. The judge described several instances of recent conflict between the parties, two of which concerned the child's unsuccessful application to ten private high schools for the 2017-2018 academic year. The judge found that the husband refused to consent to the child working with an educational consultant retained by the wife and unilaterally chose to include sensitive information regarding the child in the applications, over the wife's objection. The judge found that both decisions by the husband were contrary to the child's best interests and demonstrated that he was "unable to put [the child's] needs first in regard to his communication and decision-making with [the wife]." The judge found that "[t]he parties' continued inability to communicate," as illustrated by the aforementioned incidents, constituted a "material and substantial change in circumstances," and that it was in the child's best interests to grant the wife sole legal custody. The husband claims there was no material change in circumstances because the parties' communication issues already existed at the time of the 2013 judgment. The judge, however, permissibly found that the parties' ongoing conflict had become contrary to the child's best interests as of 2017, thus warranting a modification of legal custody. *See Rosenthal v. Maney*, 51 Mass. App. Ct. 257, 262 (2001) (inferring material change in circumstances from best interests determination). We therefore discern no abuse of discretion in the judge's decision to grant sole legal custody to the wife. *See Carr v. Carr*, 44 Mass. App. Ct. 924, 925 (1998), *cert. denied*, 525 U.S. 1073 (1999) (joint legal custody not appropriate where "the relationship of the parties has been dysfunctional, virtually nonexistent, and one of continuous conflict").[Note 17]

Conclusion. The remand judgment dated January 12, 2018, is affirmed.[Note 18]

So ordered.

FOOTNOTES

[Note 1] The "attribution of income in the alimony context is not different in rationale from that in the child support context." *C.D.L. v. M.M.L.*, 72 Mass. App. Ct. 146, 153 n.5 (2008). *See* G. L. c. 208, § 53(b) (for purposes of calculating alimony "income shall be defined as set forth in the [Guidelines]").

[Note 2] Here, the judge properly applied the 2013 Guidelines when determining the husband's earning capacity for 2014 to 2016, and the 2017 Guidelines when determining the husband's earning capacity for 2017.

[Note 3] Section I(E) of the 2017 Guidelines include certain additional factors not listed in § I(E) of the 2013 Guidelines. *See* Guidelines § I(E) (2013) ("The Court shall consider all relevant factors including without limitation the education, training, health, past employment history of the party, and the availability of employment at the attributed income level").

[Note 4] Indeed, when testifying at the trial on remand, the husband could not recall the name of a single recruiter with whom had he spoken in the past year.

[Note 5] Dr. Cohen also determined that there were 17,273 job listings for positions involving fixed income, corporate finance, alternative investments, and distressed debt in the New York City area as of November, 2017.

[Note 6] These figures were derived from wage data compiled by the Economic Research Institute (ERI), a "database for up-to-date market compensation information" used by most Fortune 500 companies and various United States government agencies, including the Internal Revenue Service. ERI's wage data revealed "mean annual earnings for the Boston Metropolitan area" of $440,400 in 2014 and $475,000 in 2017, for "job titles related to a 'long-range planning executive,'" including "Client Manager; Financial Consultant; Financial Services Representative; Finan-

cial Specialist; Investment Officer; Personal Banker; Registered Representative; Relationship Banker; Relationship Manager; Select Banker Planning/Development; Vice President Planning Executive; and Vice President Planning & Development."

[Note 7] As we noted in Emery, "[i]t is neither reasonable nor fair to expect [a party], after . . . ha[ving] engaged in an extensive job search in his [or her] field of expertise and ha[ving] secured employment commensurate with his [or her] training and experience, to continue his [or her] job search efforts indefinitely to avoid the risk of income attribution." *Emery*, 91 Mass. App. Ct. at 512.

[Note 8] "[T]he amount of alimony should generally not exceed the recipient's need or 30 to 35 per cent of the difference between the parties' gross incomes." G.L. c. 208, § 53(b).

[Note 9] The judge found that, based on the husband's attributed income, he has the ability to pay the unallocated support order of $10,000 per month while meeting his own living expenses. As this finding is not clearly erroneous, we decline to disturb it. *See Millennium Equity Holdings, LLC v. Mahlowitz*, 456 Mass. 627, 636–637 (2010) (finding "clearly erroneous" where it leaves reviewing court with "definite and firm conviction that a mistake has been committed" [citations omitted]).

[Note 10] While living in Asia, the parties were members of various private clubs, employed alive-in housekeeper, traveled internationally six to eight times per year staying at luxury resorts, dined out in "moderate to expensive" restaurants two to three times per week, enjoyed regular grooming and spa services, purchased bespoke and high-end clothing, and enrolled the child exclusively in private schools.

[Note 11] In cases where the parties' combined annual income exceeds $250,000, the judge "should consider the award of support at the $250,000 level as the minimum presumptive order" and additional child support may be awarded at the judge's discretion. Guidelines § II(C)(2) (2017). Here, the judge found the monthly "minimum presumptive order" was $3,012 for 2014 to 2016 (calculated under the 2013 Guidelines), and $2,604 for 2017 (calculated under the 2017 Guidelines).

[Note 12] The wife's financial statement reflects weekly gross income of $3,583.55 (salary and bonuses), deductions from pay of $2,071.35 (including health insurance, taxes, and retirement), and living expenses of $3,751.85.

[Note 13] "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude 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." *L.L. v. Commonwealth*, 470 Mass. 169, 185 n.27 (2014).

[Note 14] A judge may modify custody upon finding "a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the child [ ]." G.L. c. 208, § 28.

[Note 15] See note 13, supra.

[Note 16] "Shared legal custody" is defined as "continued mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development." G.L. c. 208, § 31.

[Note 17] To the extent we do not address the husband's other contentions, they "have not been overlooked. We find nothing in them that requires discussion" (citation omitted). *Commonwealth v. Brown*, 479 Mass. 163, 168 n.3 (2018).

[Note 18] The wife's request for appellate attorney's fees is denied.

CAVANAGH v. CAVANAGH
490 Mass. 398

August 8, 2022

SJC-13222

Court Below: Probate and Family Court, Hampden Division

Present: Budd, C.J., Gaziano, Lowy, Cypher, Wendlandt, & Georges, JJ.

Records And Briefs:

(1) SJC-13222 01 Appellant Lynn Cavanagh Redacted Brief

(2) SJC-13222 03 Appellant Lynn Cavanagh Redacted Reply Brief

Amended September 9, 2022.

Divorce and Separation, Child support, Modification of judgment, Alimony, Separation agreement, Findings. Statute, Construction. Evidence, Conversation between husband and wife.

Statement that in cases involving a separation agreement that has been merged into a judgment of divorce, the parties should include the judgment in the record transmitted to this court. [403-404]

In a divorce case in which the parties sought a modification of a child support order and one party sought alimony for the first time, the judge abused her discretion in choosing to calculate child support and then, without conducting the fact-specific analysis of the family's circumstances required by G.L. c. 208, § 53(a), denying alimony on the basis that G.L. c. 208, § 53(c)2, prevented the use of the payor's income to calculate alimony. [404-411]

In the circumstances of an action seeking a modification of a child support order in a judgment of divorce, the judge abused her discretion in interpreting the father's obligation regarding his youngest son's schooling in such as manner as to render it illusory [411-417]; however, the judge did not abuse her discretion in ruling that the parties' middle son was emancipated upon his agreement to enter the United States Military Academy, where that son was not principally dependent on either parent at that point [417-420].

In an action seeking a modification of a child support order in a judgment of divorce, the judge properly excluded from the calculation of the father's gross income in-kind income that did not constitute a regular source of income, but the judge abused her discretion in excluding interest, dividends, and capital gains on the father's savings and 401(k) plan; on the other hand, the judge did not abuse her discretion in including income that the father received from a second job; moreover, the judge did not abuse her discretion in including in the calculation of the father's income employer contributions to the father's retirement account and health savings account. [420-425]

In an action seeking a modification of a child support order in a judgment of divorce, the judge abused her discretion in giving retroactive effect to her modification order to a date for which there was no support in the record. [425-426]

This court vacated a finding made in an action seeking a modification of a child support order in a judgment of divorce, where the finding departed from the Probate and Family Court judge's pretrial order without good and sufficient reason, did not appear to be relevant to any issue decided in the case, and was clearly erroneous. [426-428] This court concluded that, where an action seeking a modification of a child support order in a judgment of divorce involved a contract made by the parties, the action fell within the contract exception to the spousal disqualification rule; further, this court ordered that, on remand, both parties should be permitted to testify about private marital communications concerning the relevant provision of a separation agreement that was incorporated and merged into the judgment of divorce. [428-430]

Complaint for divorce filed in the Hampden Division of the Probate and Family Court Department on September 16, 2015.

A complaint for modification, filed on March 31, 2020, was heard by Ellen M. Randle, J.

The Supreme Judicial Court granted an application for direct appellate review.

Jeff Goldman (Emma Diamond Hall also present) for the mother.

Ann E. Dargie for the father.

CYPHER, J. This case arises out of a postdivorce dispute concerning child support and alimony, in which both parties sought a modification of the child support order issued as part of the divorce judgment, and the mother sought alimony for the first time. We are asked to determine whether a provision of the Alimony Reform Act (act), G.L. c. 208, § 53(c)(2) (§ 53[c][2]), prohibits an award of alimony where child support has been ordered. The parties also seek review of several conclusions of the Probate and Family Court judge as to the meaning of certain provisions in the judgment of divorce, which incorporated and merged the parties' separation agreement. We are also asked to determine whether the judge impermissibly exceeded the scope of the pretrial order, which, pursuant to Mass. R. Dom. Rel. P. 16, enumerated the issues to be decided at trial. Finally, the parties dispute which of the father's sources of income and benefits properly constitute "gross income" for the purposes of calculating child support. We hold that § 53(c)(2) allows for the concurrent award of child support and alimony. We also conclude that several of the judge's rulings related to the divorce judgment and calculation of child support constituted error requiring us to vacate certain portions of the judgment and remand the case for further proceedings.

Background. We present the relevant facts and procedure as found by the Probate and Family Court judge, supplemented by undisputed facts in the record, and reserving certain facts for later discussion. *See Connor v. Benedict*, 481 Mass. 567, 568 (2019).

Michael Cavanagh (father) and Lynn Cavanagh (mother) were divorced on November 7, 2016, after an approximately twenty-one year marriage. During the marriage, the parties had three sons. The two older sons currently are over the age of majority. The oldest son graduated from college in May 2021. The middle son is a cadet at the United States Military Academy at West Point (West Point). The youngest son, who is still a minor, attends a private preparatory school previously attended by the two older sons.

Prior to and during the first year of the marriage, the father attended school to become a physician's assistant (PA). Before and during the marriage, the father incurred approximately $80,000 in educational debt. During the first year of the marriage, the parties lived with the mother's parents before moving into a house purchased by the mother with her father. The father was not able to be on the mortgage due to his debt. The entirety of the father's debt was paid off during the marriage.

The father has worked at an orthopedic surgical practice since in 1997. He took a second job at a medical center in approximately 2012 for the purpose of financing the children's private school education. Prior to and in the first years of the marriage, the mother worked as a teacher at a Catholic school. After the birth of the parties' oldest son in 1999, the mother left her job to remain home and care for him. The mother continuously was out of the work force to raise the parties' three sons. [Note 1]

During the marriage, the parties enjoyed a comfortable, middle-class lifestyle. They routinely bought used cars that were no older than two to three years at time of purchase, replacing them when they were no longer serviceable. The parties took camping vacations using a recreational vehicle owned by the mother's parents three to four times per year, including an annual vacation to Disney World. The parties had a pool built at the marital home, which home was kept in good repair. All three sons attended a private Catholic school beginning in kindergarten. The oldest son attended a private preparatory school from ninth through twelfth grades. The middle son attended the private preparatory school from seventh through twelfth grades. The youngest son was enrolled in third grade at the Catholic school at the time of the divorce.

The mother returned to work as a teacher at the Catholic school in September 2016, approximately two months before the entry of the divorce judgment, and she continues to work there. The Catholic school provides services to local public school students. The mother works at the Catholic school in two capacities: as a teacher on behalf of the Catholic school and as a Title I program instructor on behalf of the local public school system. The mother would like to work as a regular teacher for the public school system, where she believes she could earn more money, but she currently lacks the requisite credentials and lacks the financial resources necessary to obtain such credentials. The judge found the mother's gross weekly income to be $719.24. The father continues to work as the head PA at the orthopedic surgical practice and as a per diem PA at the medical center. The judge found the father's gross weekly income to be $4,388.

Pursuant to the divorce judgment, the mother received physical custody of the then-minor children, and the parties were to share legal custody. The divorce judgment also provided that the father "shall be responsible for payment up to $20,000 annually toward [the middle son's] tuition cost at [the private preparatory school] for his three years at the school . . . [and] shall contribute up to $20,000 per year toward an agreed upon prepatory [*sic*] school for [the youngest son]." The mother was to "be responsible for the payment of [the youngest son's] tuition at [the Catholic school]." The father was obligated to pay $800 per week in child support for the parties' three children. [Note 2] The parties agreed, and the divorce judgment provided, that the father's job with the medical center would not be used to calculate either child or spousal support obligations in the future, in consideration of the father's obligation to contribute toward the cost of the children's education.

Presently before this court are cross appeals from a judgment of modification on the father's complaint and the mother's counterclaim for modification of the child support order, and on the mother's counterclaim for alimony, legal fees, and a determination that the youngest son be permitted to continue attending the preparatory school at which he is enrolled. In the year before trial, each party filed complaints for contempt against the other, related to the enrollment of the parties' youngest son at the private preparatory school previously attended by the parties' two older sons. In July 2020, the judge found the mother in contempt for unilaterally removing the youngest son from the Catholic school and enrolling him at the preparatory school despite the father's expressed disagreement with that decision. The judge found that the father was not in contempt for failing to contribute to the costs of the youngest son's education at the preparatory school. The father brought a second complaint for contempt in September 2020, alleging that, despite the judge's prior judgment of contempt against the mother, the mother had not withdrawn the parties' youngest son from the preparatory school.

As relevant to these appeals, there was undisputed and uncontroverted testimony at trial that (1) in 2014, the father made public statements in front of the mother indicating that the parties' youngest son would be sent to the preparatory school for seventh grade; (2) at the time of the divorce, the mother thought the parties had agreed to send their youngest son to the preparatory school for seventh grade; (3) when it became apparent to the mother that the parties either no longer or never agreed to that course of action, she made significant efforts over a period of several months prior to the start of the youngest son's seventh grade year to engage the father in discussions to come to a mutual agreement as to the youngest son's schooling; (4) throughout that time, the father categorically refused to engage in any such discussions, stating that the only course of action he would accept would be to require the youngest son to continue attending the Catholic school and to make no contributions towards the youngest son's schooling for seventh and eighth grades. A provision of the divorce judgment requires that, in the event of a dispute concerning any provision of the divorce judgment, "the parties shall make a good faith effort to reach a mutual agreement."

After a trial in 2021 on the parties' modification claims and on the second complaint for contempt filed by the father, the judge made the following rulings: (1) the father is not obligated to contribute to the youngest son's education at the preparatory school; (2) the parties' two older sons are emancipated for child support purposes; (3) the father shall pay child support in the amount of $650 per week for the youngest son; (4) the father shall receive relief with respect to the child support reduction retroactive to the week of June 4, 2021, which was the week following the date the oldest son graduated from college; (5) the father shall not pay alimony to the mother; and (6) the parties are responsible for their own legal fees and costs. The judge dismissed the father's complaint for contempt as duplicative of his earlier complaint. The parties each appealed from the judgment of modification, and we granted the mother's application for direct appellate review.

Discussion. 1. *Separation agreement and judgment of divorce*. Before addressing the issues raised on appeal, we must address an inadequacy in the record before us.

While the parties and the judge below refer variously to the provisions of the judgment of divorce and the provisions of the parties' separation agreement, we observe that the separation agreement expressly provided that it "shall be incorporated and merged into said judgment [of divorce] and shall not survive as an independent contract." Thus, as of the entry of the divorce judgment, the separation agreement no longer has any independent legal effect. Its terms have been merged with and superseded by the provisions of the judgment of divorce, whether all, some, or none of the provisions of the separation agreement have been incorporated into that judgment. [Note 3] *See Halpern v. Rabb*, 75

Mass. App. Ct. 331, 338-339 (2009). *See also Clement v. Owens-Clement*, 98 Mass. App. Ct. 632, 635 n.3 (2020) (alimony provision in separation agreement did not survive but merged with divorce judgment).

Our review of these appeals could have been hampered by the parties' failure to provide us with a copy of the divorce judgment or to indicate whether all provisions of the separation agreement were incorporated into the judgment. Without the judgment of divorce, it was unclear to us whether all of the provisions of the separation agreement referenced by the judge and the parties were incorporated into the judgment of divorce, in which case they properly could be the subject of the action presently before us, or whether some may not have been incorporated, in which case those provisions would have no legal effect. [Note 4]

As an exercise of our discretion, we obtained the judgment of divorce from the Probate and Family Court and confirmed that all provisions of the separation agreement were incorporated and merged into the judgment of divorce. Mass. R.A.P. 18(a)(1)(D), as appearing in 481 Mass. 1637 (2019). We emphasize that this is not an action an appellate court is required to take. *See id*. ("The court may decline to permit the parties to refer to portions of the record omitted from the appendix, but the fact that parts of the record are not included in the appendix shall not prevent the court from relying on such parts"). It is the duty of the parties to provide "any parts of the record relied upon in the brief." Mass. R.A.P. 18(a)(1)(A)(v)(a). We therefore caution that, in future cases involving a separation agreement that has been merged into a judgment of divorce, the parties should include the judgment in the record transmitted to this court.

2. *Availability of concurrent child support and alimony under the act*. The parties both sought a modification of the child support order that issued as part of the divorce judgment, and the mother additionally sought alimony for the first time. The judge first calculated the appropriate amount of child support pursuant to the Child Support Guidelines (May 2018) (guidelines), and in light of her earlier determination that the oldest and middle sons were emancipated. The judge then determined that no alimony could be awarded to the mother for the sole reason that the judge had "considered all of [the father's] gross income in setting the child support order."

The parties disagree about the interpretation and application of § 53(c)(2) of the act. Specifically, the mother argues that § 53(c)(2) cannot be interpreted according to its plain language where such an interpretation would conflict with both other provisions of the statute and the expressed legislative purpose in enacting the act. The father argues that, pursuant to the plain language of § 53(c)(2), alimony is unavailable to the mother because child support has been ordered. The father also argues that an award of alimony is based on a recipient's need for support, and the mother has no need for alimony so long as she is receiving child support.

Determinations as to whether and in what form and amount to award alimony generally are reviewed for an abuse of discretion. *See Drapek v. Drapek*, 399 Mass. 240, 247 (1987). Questions of statutory interpretation, however, are considered de novo. *Boss v. Leverett*, 484 Mass. 553, 556 (2020).

"In interpreting the meaning of a statute, we look first to the plain statutory language." *Worcester v. College Hill Props., LLC*, 465 Mass. 134, 138 (2013). G.L. c. 4, § 6. "[W]e look not only to the specific words at issue but also to other sections [of the statute], and 'construe them together . . . so as to constitute an harmonious whole consistent with the legislative purpose.'" *Malloy v. Department of Correction*, 487 Mass. 482, 496 (2021), quoting *Pentucket Manor Chronic Hosp., Inc. v. Rate Setting Comm'n*, 394 Mass. 233, 240 (1985). "Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent. . . and the courts enforce the statute according to its plain wording . . . so long as its application would not lead to an absurd result" (quotations and citation omitted). *Worcester*, *supra*. Where there is doubt or ambiguity about the meaning of a statutory provision, the court may turn to extrinsic sources to determine legislative purpose and intent. *See Malloy*, *supra*. General Laws c. 4, § 6, provides that, as a general rule, "[w]ords and phrases shall be construed according to the common and approved usage of the language." However, the statute also provides that "[i]n construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute." *Id*. Thus, as § 6 makes clear, all rules of statutory construction serve the overarching principle that we "construe statutory language to effectuate legislative intent." *Commonwealth v. Rossetti*, 489 Mass. 589, 609 (2022). *See* G.L. c. 4, § 6; *Chin v. Merriot*, 470 Mass. 527, 532 (2015).

a. History of alimony and the act. "The Alimony Reform Act of 2011, St. 2011, c. 124, [codified at G.L. c. 208, §§ 34, 48-55,] changed the legal framework under which courts may award alimony when a marriage ends in divorce." *Zaleski v. Zaleski*, 469 Mass. 230, 231 (2014). In Massachusetts, a court's authority to award alimony is statutory. *Id*. at 233. This authority "has existed in the Commonwealth since 1786." *Id*. at 233 n.8, citing St. 1785, c. 69. Under the statute in effect prior to the act's enactment, the Legislature provided that "[u]pon a divorce or upon petition at any time after a divorce, the court may order either of the parties to pay alimony to the other." G.L. c. 208, § 34, as amended by St. 1974, c. 565. Although this statute provided that judges had to consider certain factors in setting an alimony order, it included no standard regarding types of alimony or permanency or modification of alimony orders. *See id*. *See also* Kindregan, Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support, 46 *Suffolk U. L. Rev.* 13, 22-23 (2013). As a result, judges had broad discretion to formulate alimony judgments, and alimony awards appeared to be somewhat unpredictable. *Id*. at 23.

The act was enacted after a task force of "legislators, lawyers and judges, along with representatives from the Massachusetts Bar Association, the Boston Bar Association, the Massachusetts Women's Bar Association and the American Academy of Matrimonial Lawyers, worked together monthly for more than a year, reviewing and redrafting [then] current alimony laws." Lawmakers See Support Broadening for Major Alimony System Changes, State House News Service, May 17, 2011. It was intended to make alimony awards fairer and more predictable, while providing for some judicial discretion to tailor awards in the specific circumstances of a given case. *See* Report of the Joint MBA/BBA Alimony Task Force, Alimony or Spousal Support Guidelines Where There Are No Dependent Children 1 (2010); McDonald, Alimony Reform Approved, Oct. 5, 2011, https://patch.com/massachusetts/milford-ma/alimony-reform-approved [https://perma.cc/9PMG-WGY9]; UPI, Reforms Make Mass. Alimony 'More Fair,' Sept. 26, 2011, https://www.upi.com/Top_News/US/2011/09/26/Reforms-make-Mass-alimony-more-fair/63301317074885/?st_rec=5571549864000&u3L=1 [https://perma.cc/4AH4-GDZ4]; State House News Service (Sen. Sess.), July 28, 2011; Amendment Would Give Judges More Power Over Settled Alimony Cases, State House News Service, July 18, 2011.

Passage of the act brought sweeping changes to Massachusetts alimony law. In many ways, it provided clear guidance surrounding the award of alimony. The act established four distinct types of alimony and set limits on the duration of all types. St. 2011, c. 124, § 3, inserting G.L. c. 208, §§ 48-55. General Laws c. 208, § 48, establishes the following four types of alimony:

(1) "'General term alimony,' the periodic payment of support to a recipient spouse who is economically dependent";

(2) "'Rehabilitative alimony,' the periodic payment of support to a recipient spouse who is expected to become economically self-sufficient by a predicted time, such as, without limitation, reemployment; completion of job training; or receipt of a sum due from the payor spouse under a judgment";

(3) "'Reimbursement alimony,' the periodic or one-time payment of support to a recipient spouse after a marriage of not more than [five] years to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse, such as enabling the payor spouse to complete an education or job training"; and

(4) "'Transitional alimony,' the periodic or one-time payment of support to a recipient spouse after a marriage of not more than [five] years to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce."

The act sets forth specific standards for when an award of alimony must terminate, based on the type of alimony awarded and the length of the marriage. G.L. c. 208, §§ 49-52. Under the current framework, a judge is permitted to order alimony for "an indefinite length of time" only where such order is for general term alimony and where "the length of the marriage was longer than [twenty] years." G.L. c. 208, § 49(c).

In fashioning an alimony award, "[a] judge *must* consider and weigh all the relevant factors [under G.L. c. 208, § 53(a)], [Note 5] but where the supporting spouse has the ability to pay, 'the recipient spouse's need for support is

generally *the* amount needed to allow that spouse to maintain the lifestyle he or *she enjoyed prior to termination of the marriage*'" [Note 6] (emphases added). *Young v. Young*, 478 Mass. 1, 6 (2017), quoting *Pierce v. Pierce*, 455 Mass. 286, 296 (2009). *See Zaleski*, 469 Mass. at 235-236. "Absent good reason, in a long[-]term marriage, there is no justification for the life-style of one spouse to go down while the other remains high." *Goldman v. Goldman*, 28 Mass. App. Ct. 603, 611 (1990). "'[I]t is important that the record indicate clearly that the judge considered all the mandatory statutory factors,' and that the reason for her conclusion is apparent in her findings" (citation omitted). *Zaleski*, *supra* at 236, quoting *Rice v. Rice*, 372 Mass. 398, 401 (1977).

b. Construction of § 53(c)(2). In one respect, the act has caused "serious problems of interpretation for the courts." Kindregan, *46 Suffolk U. L. Rev.* at 39. General Laws c. 208, § 53(c)(2), instructs: "When issuing an order for alimony, the court shall exclude from its income calculation: . . . gross income which the court has already considered for setting a child support order." We agree that a plain language interpretation of § 53(c)(2) whereby alimony is nearly absolutely prohibited where child support has already been awarded is untenable given that such an interpretation of § 53(c)(2) would conflict with other provisions of the act that indicate clear legislative intent to require a fact-specific consideration of the parties' circumstances when determining whether and how to award alimony, § 53(a), and to permit concurrent awards of alimony and child support, § 53(g). We must construe § 53(c)(2) in the context of these other provisions of the act, so that the act "constitute[s] a[] harmonious whole consistent with the legislative purpose." *Malloy*, 487 Mass. at 496.

In creating four distinct types of alimony and providing a list of factors a judge must consider in deciding whether and how to award alimony to a former spouse, the act as a whole provides that a judge should tailor a decision whether or in what form and amount to award alimony to the specific circumstances of a particular family. See G.L. c. 208, §§ 48-53. Section 53(g) expressly contemplates an order of "alimony *concurrent with or subsequent to* a child support order" (emphasis added). Section 53(a) sets forth the factors judges must consider when determining whether or in what form and amount to award alimony.

Section 53(a) does not permit judges to deny a request for alimony without making a fact-specific inquiry into the parties' circumstances, as evaluated through the application of these mandatory statutory factors. Even a plain language interpretation of § 53(c)(2) must take these additional relevant provisions into account.

Additionally, we note that it makes little sense to tie the availability of alimony to the provision of child support where child support and alimony serve distinct purposes: child support is intended to provide financial support for *children* of the parties, whereas alimony is intended to provide financial support to an economically dependent *former spouse*. [Note 7] *Compare* G.L. c. 208, § 28, and *White v. Laingor*, 434 Mass. 64, 66 (2001) (child support is for maintenance and benefit of children), *with* G.L. c. 208, § 48 (describing four types of alimony, all of which provide support for former spouse, making no mention of any child-care responsibilities of such former spouse). The two also "stand[] on a different footing" where parties may validly bargain away their own right for support in the form of alimony, but "[p]arents may not bargain away the rights of their children to support" (citation omitted). *White*, *supra*. The Legislature has stated that it is "the public policy that dependent children shall be maintained as completely as possible from the resources of their parents." G.L. c. 208, § 28. *See White*, *supra*. We have stated that such policy "'will take precedence over the freedom of the parties to enter a binding contract' that could potentially jeopardize the children's interests" (citation omitted). *Id.*

We understand that, pursuant to the plain language of § 53(c)(2), income that has been used to calculate a child support order may not be used to calculate alimony. However, we interpret this plain language in the context of the other provisions of the act, discussed *supra*. Where, as here, a judge chooses to calculate child support and then denies alimony on the basis that § 53(c)(2) prevents the use of the payor's income to calculate alimony, the judge has abused her discretion because she has failed to do the fact-specific analysis of the family's circumstances required by § 53(a). Therefore, in context, we read §§ 53(a), (c)(2), and (g) together to require that a judge consider, under the statutory factors set forth in § 53(a), the equities surrounding an award where alimony is calculated first and where child support is calculated first.

Thus, pursuant to the act, in cases where child support is contemplated, before a judge properly may exercise her discretion to decide whether and in what format and amount to award alimony, the judge must do the following:

(1) Calculate alimony first, in light of the statutory factors enumerated in § 53(a) and the principle that, with the exception of reimbursement alimony, the amount of alimony should be determined with reference to the recipient spouse's need for support to allow the spouse to maintain the lifestyle enjoyed prior to the termination of the parties' marriage. *Young*, 478 Mass. at 6. [Note 8] Then calculate child support using the parties' postalimony incomes.

(2) Calculate child support first. Then calculate alimony, considering, to the extent possible, the statutory factors enumerated in § 53(a). We acknowledge that in the overwhelming majority of cases, the calculation of child support first will preclude any alimony being calculated in this step.

(3) Compare the base award and tax consequences of the order that would result from the calculations in step (1) with those of the order that would result from the calculations in step (2), above. The judge should then fashion an order which would be the most equitable for the family before the court, considering the mandatory statutory factors set forth in G.L. c. 208, § 53(a), and the public policy that children be supported as completely as possible by their parents' resources, G.L. c. 208, § 28, and then fashion the order such that it reflects, or alternatively is responsive to, those considerations. Where the judge chooses to issue an order that does not include any award of alimony, the judge must articulate why such an order is warranted in light of the statutory factors set forth in § 53(a). [Note 9] *Zaleski*, 469 Mass. at 236, citing *Rice*, 372 Mass. at 401.

We acknowledge that the judge in this case did not have the benefit of this decision when ruling on the mother's counterclaim for alimony. However, where the judge did not consider an award where alimony was calculated before child support and denied alimony without considering the mandatory statutory factors set forth in § 53(a), the judge abused her discretion.

3. *The parties' obligations for the youngest son's schooling*. The mother contends that the judge erred in interpreting the language in the separation agreement providing that the father "shall contribute up to $20,000 per year toward an agreed upon preparatory school for [the youngest son]" to allow the father unilaterally to avoid any obligation to make such contribution by refusing to agree to any preparatory school, as such interpretation rendered the provision unenforceable. She further argues that the language of the provision is ambiguous such that extrinsic evidence of the parties' understanding of its meaning should not have been excluded. Specifically, the mother contends that she was prevented from testifying as to conversations she and the father had during the marriage concerning their agreement as to the youngest son's education plan, which informed their understanding of the meaning of the relevant provision of the separation agreement. She argues that the term "preparatory school" was understood to refer to the preparatory school attended by the parties' two older sons and to encompass the youngest son's attendance beginning in seventh grade and continuing through twelfth grade.

The mother presented undisputed and uncontroverted testimony that in 2014, which was around the time the marriage broke down, the father made statements both to the mother and to third parties while at a function at the preparatory school that he would "have children consecutively at [the preparatory school] for [thirteen] years in a row." The mother also presented undisputed and uncontroverted testimony that the youngest son finished sixth grade the same year the middle son graduated from the preparatory school. The mother understood that the only way the father's statement could have been true was if the youngest son began attending the preparatory school in seventh grade, and as a result, she understood the father's statement to mean that the youngest son would begin attending the preparatory school in seventh grade.

The father argues that where the separation agreement only obligates him to contribute to the youngest son's educational costs where the son is attending an "agreed upon preparatory school," the father properly may refuse to make such contributions where he disagrees with the school the youngest son is attending. The father also contends that he never had an obligation to pay for the youngest son's seventh and eighth grade years because the term "preparatory school" encompasses only grades nine through twelve and that he never agreed to send the youngest son to the preparatory school.

We observe that the mother's undisputed and uncontroverted testimony at trial was that, prior to enrolling the youngest son at the preparatory school where the parties had sent their two older children, she made repeated attempts over a series of several months to negotiate an "agreed upon preparatory school" with the father, including sending "probably hundreds of emails," offering alternative preparatory schools to which they might send the youngest son, and offering to split the cost of the preparatory school at which she wished to enroll the youngest son. The *only* option that the father was willing to agree to was keeping the youngest son enrolled at the Catholic school and contributing nothing to the youngest son's seventh or eighth grade schooling.

Thus, the mother's undisputed and uncontroverted testimony shows that, in offering multiple alternatives and concessions beyond what was required in the divorce judgment, the mother was "mak[ing] a good faith effort to reach a mutual agreement" with the father as to the youngest son's schooling. The father's actions, on the other hand, appeared to constitute a unilateral command where he categorically refused to discuss placing the youngest child in any preparatory school for seventh or eighth grade, in contravention of both the terms of the divorce judgment and the parties' status as joint legal custodians of the youngest son. [Note 10]

As noted *supra*, where the parties' separation agreement was merged into the judgment of divorce, "it retains no independent legal significance apart from the judgment." *Cournoyer v. Cournoyer*, 40 Mass. App. Ct. 302, 305 (1996), quoting *DeCristofaro v. DeCristofaro*, 24 Mass. App. Ct. 231, 235 (1987). However, because a separation agreement is a contract, to the extent that a judgment incorporates the terms of a separation agreement, we may apply contract principles to the interpretation of the judgment. *See Bercume v. Bercume*, 428 Mass. 635, 641 (1999); *Stansel v. Stansel*, 385 Mass. 510, 512-513 (1982), citing G.L. c. 208, § 1A.

The interpretation of the meaning of a term in a separation agreement or resulting divorce judgment is a question of law that we consider de novo. *See Lexington Ins. Co. v. All Regions Chem. Labs, Inc.*, 419 Mass. 712, 713 (1995). Where the language is clear, it determines the agreement's or judgment's meaning, but we may consider extrinsic evidence of the parties' and the court's intent where the language is ambiguous. *Balles v. Babcock Power Inc.*, 476 Mass. 565, 571 (2017), citing *EventMonitor, Inc. v. Leness*, 473 Mass. 540, 549 (2016). Language in a separation agreement or resulting divorce judgment "is ambiguous when it can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken" (quotation omitted). *Balles*, *supra*, quoting *Bank v. Thermo Elemental Inc.*, 451 Mass. 638, 648 (2008).

To determine whether the disputed language is ambiguous, we look to the disputed language itself as well as to the text of the agreement or judgment as a whole. *Balles*, 476 Mass. at 572. "Construction of an ambiguous judgment is much like interpreting other ambiguous written instruments, in that we are required to search the entire record for clues in attempting to divine the intentions of the parties and the court." *Jacobs v. Georgiou*, 922 S.W.2d 765, 769 (Mo. Ct. App. 1996). A separation agreement or resulting divorce judgment "should be construed in such a way that no word or phrase is made meaningless by interpreting another word or phrase." *Lexington Ins. Co.*, 419 Mass. at 713. Additionally, ambiguity in a written instrument should generally be construed against the party that drafted the ambiguous language. *Merrimack Valley Nat'l Bank v. Baird*, 372 Mass. 721, 724 (1977) ("As a general rule, a writing is construed against the author of the doubtful language if the circumstances surrounding its use and the ordinary meaning of the words do not indicate the intended meaning of the language" [citation omitted]).

Here, the judgment of divorce, incorporating the parties' separation agreement, provides that the father "shall be responsible for payment up to $20,000 annually toward [the middle son's] tuition cost at [a specific preparatory school] for his three years at the school . . . [and] shall contribute up to $20,000 per year toward an agreed upon prepatory [*sic*] school for [the youngest son]." The judgment provides that the mother would "be responsible for the payment of [the youngest son's] tuition at [the Catholic school he was attending at the time of the divorce]." It also provides that "[i]n the event of any dispute or disagreement concerning the performance, interpretation, meaning or application of the AGREEMENT, the parties shall make a good faith effort to reach a mutual agreement." We conclude that certain of these provisions are ambiguous.

The dispute turns on whether "preparatory school" encompasses seventh through twelfth grades or only ninth through twelfth grades, and further on whether it refers to the specific preparatory school previously attended by the parties' two older sons. The judge concluded that, where "there was and is no agreement between the parties that

[the youngest son] attend the [preparatory school at which the mother enrolled him] for the 2020/2021 and 2021/2022 academic years (7th and 8th grades), Father is not obligated to contribute up to $20,000 annually for the cost of [the youngest son's] attendance for those academic years pursuant to the terms of the parties' Separation Agreement."

In light of the undisputed and uncontroverted testimony that the father absolutely refused to engage in discussions about a preparatory school for the youngest son for seventh and eighth grade while the mother engaged in extensive efforts to come to a mutual understanding with the father about the youngest son's education, the judge's ruling effectively interpreted both the disputed provision of the divorce judgment and the provision surrounding the resolution of disputes to be inoperative by permitting the father to avoid any obligation to contribute to the youngest son's schooling through a unilateral refusal to engage in any efforts to come to an agreement about such school, despite the seemingly mandatory "shall contribute" language and the requirement that the parties engage in good faith efforts to reach a mutual agreement where a dispute arises. The effect of this interpretation is that any purported obligation of the father related to the youngest son's schooling under the judgment is merely illusory. *See Shayeb v. Holland*, 321 Mass. 429, 432 (1947). We will not interpret the judgment to render its language meaningless and unenforceable, and we conclude that the judge's interpretation was an abuse of discretion. The only interpretation whereby all words and phrases have operative effect is as follows: The father is obligated to contribute up to $20,000 annually for the cost of the youngest son's attendance at a preparatory school, presuming that both parties can and do agree on a choice of preparatory school, where both parties have an obligation to make a good faith effort to come to a mutual agreement. In the event that the parties cannot agree despite such good faith efforts, the issue should be presented to the court for resolution. As the parties' agreement is expressly contemplated by the judgment, and because the separation agreement did not survive the judgment of divorce, the parties' inability to come to an agreement about the youngest son's schooling may constitute a material change in circumstances warranting modification of the provision of the judgment relating to the youngest son's schooling. [Note 11] *See Chin*, 470 Mass. at 534-535 (when parties negotiate agreement that is "incorporated and merged" into divorce judgment, judgment is subject to modification based on material change in circumstances); *Stansel*, 385 Mass. at 515 (party seeking modification of divorce judgment where separation agreement did not survive must demonstrate material change of circumstances since entry of earlier judgment).

The record before us is insufficient to conclude that the term "preparatory school" as used in the divorce judgment referred to the specific preparatory school attended by the parties' two older sons, where other provisions of the judgment referred to the school expressly by name without reference to any agreement of the parties. The difference between the provisions indicates that the choice of school for the youngest son was not intended to be settled by the divorce judgment. However, the mother's testimony suggests that the parties may have, at some point after the time of the divorce, agreed that the youngest son would attend the same preparatory school as his older brothers. The testimony presented below regarding the father's *disagreement* appears to have been limited to a period of time beginning several years after the divorce. On remand, the judge should seek to ascertain whether, after the divorce judgment and prior to the father's recent expressed disagreement, he ever agreed to a choice of preparatory school for the youngest son. Applying contract principles to the provisions of the divorce judgment that incorporated the separation agreement, if an agreement was reached between the parties on this matter, then the father's later refusal may constitute a breach. *See Coviello v. Richardson*, 76 Mass. App. Ct. 603, 609 (2010) ("A repudiation of a contract is a material breach . . ."). These issues should be developed on rehearing. [Note 12]

The remaining ambiguity in the provision is in whether the definition of "preparatory school" encompasses seventh through twelfth grades or only ninth through twelfth grades. As discussed *supra*, the interpretation of the meaning of the provision is a question of law that we consider de novo. *See Lexington Ins. Co.*, 419 Mass. at 713. Additionally, it is undisputed that the father, through counsel, drafted the separation agreement. Therefore, such language will be construed in favor of the mother. *Merrimack Valley Nat'l Bank*, 372 Mass. at 724. The mother testified that, to her, the term "preparatory school" included seventh and eighth grade. This testimony was not disputed. The mother's undisputed testimony was also that the father previously stated that they would have children at the preparatory school attended by the two older sons "consecutively for [thirteen] years in a row." As the middle son graduated from the preparatory school in 2020, and the youngest son was going into seventh grade in 2020, the only way this statement could have been true was if the youngest son attended the preparatory school beginning in seventh grade. The parties had also unenrolled their middle son from the Catholic school after sixth grade and enrolled him in the

preparatory school for seventh through twelfth grades. Thus, the mother's understanding that the term "preparatory school" includes seventh and eighth grades was entirely reasonable. [Note 13] We therefore interpret "preparatory school" to mean a private school encompassing grades seven through twelve.

The judge's determination that the father has no obligation to contribute to the youngest son's schooling until at least ninth grade and that the father has the right unilaterally to withhold agreement ever to send the youngest son to any preparatory school and thus avoid ever being obligated to contribute to the youngest son's schooling was an abuse of discretion.

4. *Emancipation of the middle son*. The mother argues that the middle son's attendance at West Point does not constitute "entry into military service" such that the middle son is not emancipated for child support purposes. The father argues that the middle son is emancipated where his needs are fully met by the military and where 38 U.S.C. § 1965(1)(D) provides that the term "active duty" for the purposes of Servicemembers' Group Life Insurance includes "full-time duty as a cadet . . . at the United States Military Academy." "We review child support orders . . . to determine if there has been a judicial abuse of discretion" (citation omitted). *J.S. v. C.C.*, 454 Mass. 652, 660 (2009).

"[T]he Commonwealth has recognized that merely attaining the age of eighteen years does not by itself endow young people with the ability to be self-sufficient in the adult world." *Eccleston v. Bankosky*, 438 Mass. 428, 436 (2003). Therefore, the Legislature has enacted a statute permitting postminority support for a limited number of years where the child is both "domiciled in the home of a parent" and "principally dependent upon said parent for maintenance." [Note 14] G.L. c. 208, § 28. *See Eccleston*, *supra* at 435-436.

Consistent with the parties' separation agreement, the divorce judgment provides that, for all provisions thereunder, including those related to child support, emancipation of the minor children occurs "upon the happening of any of" a number of enumerated events, including "[e]ntry into the military service of the United States." As noted *supra*, it is well established that "[p]arents may not bargain away the rights of their children to support." *White*, 434 Mass. at 66. Additionally, G.L. c. 208, § 28, confers on the court the power to award support for a child who has attained the age of eighteen in certain circumstances. "The parties, by [their] agreement, cannot deprive the court of this power." *Madden v. Madden*, 359 Mass. 356, 363, *cert. denied*, 404 U.S. 854 (1971). Thus, the parties may not agree that a child is emancipated under conditions broader than those provided for by statute and thereby prevent the court from considering whether to award child support for a child who may otherwise receive support under the statute, as such agreement would amount to the bargaining away of the child's right to support. [Note 15] Therefore, whether the middle son is emancipated for child support purposes is governed not by the divorce judgment incorporating such agreement, but by G.L. c. 208, § 28, and depends on whether he is domiciled in the home of a parent and principally dependent on that parent for maintenance. There is no record evidence of the middle son's domicil. However, where we conclude that the middle son is not principally dependent on either parent, but instead is principally dependent on the United States military, the judge properly ruled that he was emancipated as of his entry at West Point. [Note 16]

The mother argues that attendance at West Point is akin to attendance at any four-year college or university with a full scholarship. We disagree. "[T]he obligations to the government that a cadet undertakes and the governmental control to which he subjects himself when he enters the [Military] Academy are fully consistent with emancipated status." *Dingley v. Dingley*, 121 N.H. 670, 673 (1981). *See Zuckerman v. Zuckerman*, 154 A.D.2d 666, 668 (N.Y. 1989) (parties' son became emancipated when he entered West Point). *But see Howard v. Howard*, 80 Ohio App. 3d 832, 835 (1992) (United States Coast Guard Academy cadet is "no different from any other college student on a full scholarship" and is not emancipated). While it is true that a cadet's obligation to serve as a commissioned officer begins after graduation, *see* 10 U.S.C. § 7448, other military service obligations are carried out while a cadet attends West Point. For example, cadets agree to "at all times obey . . . the Uniform Code of Military Justice." 10 U.S.C. § 7446(d). They "are trained in the duties of members of the [military]." *Porath v. McVey*, 884 S.W.2d 692, 696 (Mo. Ct. App. 1994). Further, they "shall perform duties at such places and of such type as the President may direct." 10 U.S.C. § 7449(b). *See Porath*, *supra*. "[M]any aspects of a cadet's daily life are subject to governmental regulation and supervision; and the government provides for practically all of the cadet's material needs." *Id*. [Note 17] A letter provided to the parties by West Point states that "West Point falls under the Department of Defense rather than the Department of Education." Where the benefits provided to a cadet are in exchange for military service, we cannot say that the support provided by West Point is equivalent to a college scholarship.

The judge found that the middle son "has year-round obligations to the military and receives short periods of leave for holidays such as Christmas and Thanksgiving. [He] additionally is granted four weeks of non-consecutive leave throughout the year." The middle son receives a base pay, travel pay, and military health benefits. The judge reasonably found that "all of [the middle son's] needs are met by his enrollment with the military." West Point provided a letter to the parties explaining that, in all likelihood, they may not continue claiming their cadet child as a dependent on their tax returns where "the taxpayer must be able to show that he/she provided more than half of the dependent's support for the tax year. After totaling Cadet pay, food, education, and room and board, the Army provides Cadets with more than $40,000 per year. In most circumstances, the financial support a Cadet received from parent(s) or guardian(s) does not exceed this amount." Thus, we conclude that the judge did not abuse her discretion in ruling that the middle son was emancipated on July 14, 2020, on his agreement to enter West Point. [Note 18]

5. *Computation of income*. The mother contends that the judge undercounted the father's gross income for the purposes of child support by excluding the father's receipt of interest, dividends, and capital gains on investments, and his in-kind income from his work as an instructor on wilderness medicine adventure trips. The father argues that the judge properly excluded these items from the computation of the father's gross income where they do not represent regular sources of income. The father further argues that the judge abused her discretion by including the following in her calculation of the father's gross income for purposes of child support: income from his second job at the medical center and employer contributions to his retirement accounts and health savings account. The father also argues that there is no support in the record for the judge's calculation of his income from the medical center. We review for an abuse of discretion. *J.S.*, 454 Mass. at 660.

"The method for calculating and modifying child support orders is governed by statute and by the guidelines." *Morales v. Morales*, 464 Mass. 507, 509-510 (2013). General Laws c. 208, § 28, provides in relevant part:

> "In determining the amount of child support obligation or in approving the agreement of the parties, the court *shall apply the child support guidelines* . . . , and 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" (emphasis added).

Thus, application of the guidelines is mandatory.

Both the 2018 guidelines and the current 2021 guidelines provide that, for the purposes of calculating child support, "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." [Note 19] Child Support Guidelines § I(A). Public assistance benefits based on financial need are excluded. *Id*. The guidelines provide a nonexclusive list of sources of income, including in relevant part "salaries, wages, overtime and tips"; "bonuses"; "interest and dividends"; "capital gains in real and personal property transactions to the extent that they represent a regular source of income"; and "perquisites or in-kind compensation to the extent that they represent a regular source of income." *Id*. The 2018 guidelines list also includes a catch-all provision of "any other form of income or compensation not specifically itemized above." Child Support Guidelines § I(A)(29). [Note 20]

a. Exclusions. The judge expressly excluded for purposes of calculating child support "income and capital gains on Father's savings and 401K plan or Father's classes and trips through [the wilderness medicine adventure trips], as they do not 'represent a regular source of income.'" Where the guidelines provide that in-kind compensation may be considered part of a party's gross income only to the extent it represents a regular source of income, and where the judge reasonably concluded that the in-kind income received from the wilderness medicine adventure trips did not constitute a regular source of income, [Note 21] it properly was excluded.

However, pursuant to the guidelines, "interests and dividends" are to be included without qualification in the calculation of gross income. In other words, unlike in-kind compensation or capital gains in real and personal property transactions, "interests and dividends" need not be a regular source of income to be included in the calculation of a party's gross income. In addition, capital gains need only be a "regular source of income" where they relate to "real and personal property transactions." Therefore, to the extent that the "income and capital gains on Father's savings and 401K plan" included interest, dividends, and capital gains on transactions other than those related to real and

personal property, the judge abused her discretion in excluding them from the calculation of the father's gross income for purposes of calculating child support.

b. Income from second job. The divorce judgment provided that income from the father's job at the medical center "shall not be utilized to calculate any future support obligations, whether child support or alimony." As noted *supra*, "[p]arents may not bargain away the rights of their children to support." *White*, 434 Mass. at 66. Thus, to the extent that this provision sought to preclude the use of the father's income from the medical center in future calculations of child support, it is void. As a result, not only was it within the judge's discretion to use such income in calculating child support, but it also likely would have been an abuse of discretion to exclude it where it falls squarely within the category of "salaries, wages, overtime and tips," and where the judge concluded that it was not being used to contribute to the educational costs of any of the children. [Note 22] Additionally, the father's argument that there is no record support for the judge's calculation of his medical center income is without merit, where the record reveals that the judge used the income he received from the medical center the previous year.

c. Employer contributions to retirement accounts. Whether employer contributions to a retirement account count as income for the purposes of calculating child support appears to be a question of first impression in the Commonwealth. Contrary to the father's argument, it is not dispositive that employer contributions to retirement accounts are not included in the nonexhaustive list of income sources provided in the guidelines, nor is the fact that such contributions may not constitute currently taxable income, where the guidelines expressly include in the definition of "income" that which may not be "recognized by the Internal Revenue Code or reported to the Internal Revenue Service or state Department of Revenue or other taxing authority." Child Support Guidelines § I(A). As noted *supra*, it is "the public policy of the Commonwealth . . . that children be supported as completely as possible from parental resources." *White*, 434 Mass. at 66. Accordingly, the Child Support Guidelines provide an "expansive definition of 'income.'" *Fehrm-Cappuccino v. Cappuccino*, 90 Mass. App. Ct. 525, 529 n.7 (2016).

Several other States previously have considered the issue. *Caskey v. Caskey*, 206 N.C. App. 710, 714-720 (2010) (collecting cases). The decisions are not uniform, with some States concluding that employer contributions to a retirement account constitute income for purposes of calculating child support and others concluding that they do not. *Id.* We find persuasive the conclusion of the Superior Court of Pennsylvania [Note 23] that "if we were to determine that an employer's matching contributions are not income, it would be possible for an employee to enter into an agreement with his employer to take less wages in exchange for a heightened matching contribution. This would effectively permit an employee to shield his income in an effort to reduce his child support obligation." *Portugal v. Portugal*, 798 A.2d 246, 253 (Pa. Super. Ct. 2002). Permitting such shielding of resources would violate the public policy of the Commonwealth. We therefore conclude that employer contributions to a retirement account constitute income for the purposes of calculating child support. The judge did not abuse her discretion in using such contributions to calculate the father's gross income. [Note 24]

d. Employer contributions to health savings account. Health savings accounts are governed by Federal law. *See* 26 U.S.C. § 223. A beneficiary may generally withdraw funds from a health savings account at any time for any purpose. *See* 26 U.S.C. § 223(d), (f). It is true that funds withdrawn and used to pay for "qualified medical expenses" are not taxed as part of an individual's gross income, whereas funds withdrawn and used for ineligible expenses are treated as taxable income of the beneficiary and are further subject to a twenty percent tax penalty. 26 U.S.C. § 223(f)(1), (4). However, although the tax implications may differ depending on the purpose of the withdrawal, funds generally may be withdrawn by the beneficiary at any time and for any purpose. Employer contributions to a health savings account, like employer contributions to a retirement account, properly are considered part of an employee's compensation package. *See Hoegen v. Hoegen*, 89 Mass. App. Ct. 6, 10 (2016). Thus, they properly constitute "income" for the purposes of calculating child support, and the judge did not abuse her discretion in counting them as such.

6. *Retroactive relief.* The father argues that relief with respect to the reduction in child support ordered by the judge should date back to the middle son's emancipation on July 14, 2020, and not to the date of the oldest son's graduation from college on May 22, 2021. He also argues that there is no support in the record for the date actually chosen for the retroactive reduction, which was June 4, 2021. The mother argues that the father was obligated to pay child support for two children at least through the oldest son's graduation from college.

"Whether to give retroactive effect to a modification order is a decision within the discretion of the judge." *Boulter-Hedley v. Boulter*, 429 Mass. 808, 809-810 (1999). The judge indicated that she was ordering "retroactive relief with respect to the child support reduction back to the week following the date the parties' oldest child graduated from college, namely, the week including June 4, 2021." It was the mother's undisputed testimony at trial that the oldest son graduated from college on May 22, 2021. Thus, although the judge stated that she would order a retroactive reduction in child support to the week following the oldest son's graduation, the date chosen appears to be two weeks after the graduation, and we can find no support in the record for that choice of date. We therefore conclude that it was an abuse of discretion. If the new child support order is to be given retroactive effect relative to the date of the oldest son's emancipation, it should be retroactive to the week immediately following Saturday, May 22, 2021, the date when the oldest son graduated from college and became emancipated. [Note 25]

7. *Findings beyond the scope of the pretrial order*. The judge's final pretrial order identified the following issues to be resolved at trial: (1) the party's responsibility for the costs of the youngest son's attendance at preparatory school, including the one in which he is currently enrolled; (2) whether the father's income from his second job should be used to calculate a child support order; (3) whether the parties' middle son is emancipated for child support purposes; (4) the amount of child support to be paid by the father for the support of any unemancipated marital children; (5) legal fees; and (6) alimony. Thus, all the issues to be decided at trial related to the finances of the parties; child custody and parenting time were not among the issues to be decided.

Rule 16 of the Massachusetts Rules of Domestic Relations Procedure, addressing pretrial procedure, provides in relevant part:

> "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

"[O]nce the issues are defined in a final pretrial order, 'they ought to be adhered to in the absence of some good and sufficient reason.'" *Slade v. Slade*, 43 Mass. App. Ct. 376, 378 (1997), quoting *Monod v. Futura, Inc.*, 415 F.2d 1170, 1173 (10th Cir. 1969). "The trial judge may alter the issues, modify the admissions or discharge [a] stipulation if satisfied that justice requires it." *Mitchell v. Walton Lunch Co.*, 305 Mass. 76, 80 (1939).

The mother argues that the judge abused her discretion by exceeding the scope of the pretrial order in finding that she disrupted the youngest son's relationship with the father by informing the son that the father refused to pay for preparatory school. She also contends that there is no record evidence to support the finding. The father argues that this finding was relevant to determining the mother's credibility and that, thus, the judge did not abuse her discretion. We agree with the mother. As the mother argues, the issue was neither enumerated in the final pretrial order nor naturally related to any of the issues that were enumerated, all of which concerned support and not custody or parenting time, nor do we see its relevance to a credibility determination. Therefore, there was no "good and sufficient reason" warranting a departure from the pretrial order, and the judge's finding as to this matter was an abuse of discretion.

Additionally, the only evidence introduced on this issue at trial directly on this point was that the mother did *not* tell the youngest son of the father's unwillingness to pay for preparatory school and that the father told the youngest son that he could not attend the preparatory school. It was the mother's undisputed testimony that, when the youngest son informed her that the father had told the youngest son he could not go to the preparatory school, the mother's only response was to say, "I'm communicating with your father." There also was evidence of several alternative means by which the youngest son could have learned of his father's unwillingness to pay, including several visits to the child's home by the sheriff related to the mother being held in contempt for enrolling the youngest son at the preparatory school and the fact that the youngest son had to do summer homework for both the Catholic school and the preparatory school because it was unclear to which school he would matriculate in the fall. Thus, the judge's finding also appears to be clearly erroneous. [Note 26] *See Adoption of Gregory*, 434 Mass. 117, 128 (2001).

Although the finding does not appear to be relevant to any of the issues decided in this case, it is foreseeable that it may have an impact on any future dispute over child custody or parenting time, and we thus conclude that the finding should be vacated.

8. *Spousal disqualification*. General Laws c. 233, § 20, First, provides in relevant part that "[e]xcept in a proceeding arising out of or involving a contract made by a married woman with her husband, . . . neither husband nor wife shall testify as to private conversations with the other." [Note 27] The mother argues that the spousal disqualification rule [Note 28] set forth in G.L. c. 233, § 20, does not apply where the dispute surrounds the parties' separation agreement, which is a contract. Alternatively, the mother argues that, if the spousal disqualification does apply as a general rule, it nevertheless does not attach to communications between the parties during the marriage that were not private. The father argues that the court properly excluded the mother's testimony as to private conversations between the parties during the marriage. [Note 29] In light of our conclusions *supra*, as to the import of the provision of the separation agreement addressing the youngest son's schooling and as to the middle son's emancipation, either that were resolved in the mother's favor or for which party statements would not be dispositive, we need not address whether the judge abused her discretion in excluding specific statements of the father on the basis of spousal disqualification. Because the issue will be relevant to the scope of evidence admissible on remand, however, we address whether the spousal disqualification applies here. The interpretation of G.L. c. 233, § 20, is a question of law that we review de novo. *Boss*, 484 Mass. at 556. See part 2, *supra*, for a discussion of the rules of statutory construction.

As a general matter, we note that the spousal disqualification is not triggered unless the proffered statements were made during a private conversation between two people who were married to each other at the time the conversation took place. G.L. c. 233, § 20, First. Thus, the following discussion is only relevant to the extent that either party, on remand, seeks to introduce evidence relating to such private conversations.

As discussed *supra*, the parties' separation agreement was merged into the judgment of divorce. "[T]he merger of [a separation] agreement in a [divorce] judgment is a substitution of the rights and duties under the agreement for those established by the judgment or decree." [Note 30] *Bercume*, 428 Mass. at 641. The provisions of the separation agreement do not survive, and the separation agreement loses all independent legal significance. *Id*. *Heistand v. Heistand*, 384 Mass. 20, 22 (1981). No action for breach of the separation agreement may be maintained. *Halpern*, 75 Mass. App. Ct. at 338-339. However, acknowledging that a separation agreement that has been incorporated and merged into a judgment of divorce provides the content of the judgment, we concluded *supra* that contract principles apply to the interpretation of the judgment. As noted in note 4, *supra*, we previously have stated that, even where a separation agreement merges with a judgment of divorce, a judge should "take heed of the parties'" negotiations when determining whether a modification of the judgment is warranted. *See Chin*, 470 Mass. at 535, quoting *Pierce*, 455 Mass. at 302. Thus, although no separate action may be maintained on a separation agreement that has merged with the judgment of divorce, it is not clear to us that an action, such as this, arising out of a divorce judgment that incorporated and merged the provisions of a separation agreement, does not in some capacity "involve" a contract made by spouses.

Additionally, as we have previously observed, G.L. c. 233, § 20, begins with the following statement: "Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows . . . ." *See Commonwealth v. Burnham*, 451 Mass. 517, 520-521 (2008), quoting G.L. c. 233, § 20. Thus, "[t]he general principle articulated at the beginning of § 20 is that any person may testify in any proceeding," and the spousal disqualification is itself an exception to this general principle. *Burnham*, *supra* at 521. We understand this language to evince a legislative intent to read broadly the exceptions to the spousal disqualification or, said differently, to interpret the spousal disqualification narrowly. *See Woods v. Executive Office of Communities & Dev.*, 411 Mass. 599, 605 (1992) ("where a provision, general in its language and objects, is followed by a proviso, . . . the proviso is to be strictly construed, as taking no case out of the provision that does not fairly fall within the terms of the proviso, the latter being understood as carving out of the provision only specified exception, within the words as well as within the reason of the former" [citation omitted]).

Therefore, where we understand the current action to involve a contract made by the parties, such action falls within the contract exception to the spousal disqualification such that, on remand, both parties shall be permitted to testify

about private marital communications concerning the relevant provision of the separation agreement, as incorporated and merged into the judgment of divorce.

Conclusion. We affirm so much of the judgment as concerns the emancipation of the oldest and middle sons and the payment of each party's legal fees and costs. The remainder of the judgment is vacated and remanded as follows:

> We vacate so much of the judgment as concerns (1) the denial of alimony; (2) the father's lack of obligation to contribute to the costs of the youngest son's attendance at the private preparatory school; (3) the exclusion from the calculation of the father's income any interest, dividends, and capital gains not related to real or personal property transactions, and any calculation of child support based on such erroneous exclusion; and (4) the calculation of the retroactivity of the child support reduction. We vacate so much of the judge's rationale finding that the mother informed the youngest son that the father was unwilling to pay for the youngest son's education at the preparatory school, that the mother's actions have disrupted the youngest son's relationship with the father, and that the mother violated a clear and unequivocal command when she enrolled the youngest son at the disputed preparatory school.

On remand, the judge shall determine whether an alimony award is appropriate and, if so, in what form and amount, pursuant to the interpretation and procedure set forth in this opinion. The judge shall also hold a new hearing to determine (1) whether the parties, at some point after the divorce but prior to the father's recent expressed disagreement, agreed that the youngest son would attend the same preparatory school as the two older sons; and (2) whether the father failed to engage in good faith efforts to agree to a preparatory school. If the answer to either (1) or (2) is "yes," consistent with the legal conclusions in part 3 of this opinion, *supra*, the judge shall order that the father contribute up to $20,000 per year to the cost of the youngest son's attendance for grades seven through twelve at the preparatory school previously attended by the two older sons.

A new child support order shall issue based on a recalculation of the amount pursuant to the 2021 Child Support Guidelines [Note 31] after any interest, dividends, and capital gains not related to real or personal property transactions have been added to the calculation of the father's gross income. To the extent the new calculation may result in an order for child support in an amount less than $800 per week, the judge shall reconsider the date of retroactive relief consistent with part 6 of this opinion, *supra*. Until a new child support order is issued, the existing child support provision in the judgment of modification dated July 14, 2021, shall remain in effect as a temporary order.

So ordered.

FOOTNOTES

[Note 1] The mother briefly returned to the work force as a substitute teacher from November 2014 to around February 2015. At that time, the father was "gone early in the morning until night." The mother was responsible for the children both in the morning before school and after they returned home from school; both parties participated in transporting their middle son to and from his various athletic obligations.

[Note 2] The parties acknowledged that this was an upward deviation above the child support guidelines to account for the substantial costs the mother paid related to the middle son's athletic training.

[Note 3] A judge may not approve and incorporate into a divorce judgment a separation agreement or provisions contained therein where the agreement as a whole or the relevant provisions are not "fair and reasonable" or are not "free from fraud and coercion." *Stansel v. Stansel*, 385 Mass. 510, 514 (1982), quoting *Reeves v. Reeves*, 318 Mass. 381, 384 (1945).

[Note 4] We note, however, that even where the provisions of a separation agreement "are merged and do not survive the divorce judgment, 'it is nevertheless appropriate for a judge to take heed of the parties' own attempts to negotiate terms mutually acceptable to them' when determining whether to modify" such judgment. *Chin v. Merriot*, 470 Mass. 527, 535 (2015), quoting *Pierce v. Pierce*, 455 Mass. 286, 302 (2009).

[Note 5] General Laws c. 208, § 53 (a), provides:

> "In determining the appropriate form of alimony and in setting the amount and duration of support, a court *shall consider*: [(1)] the length of the marriage; [(2)] age of the parties; [(3)] health of the parties; [(4)] income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; [(5)] economic and non-economic contribution of both parties to the marriage; [(6)] marital lifestyle; [(7)] ability of each party to maintain the marital lifestyle; [(8)] lost economic opportunity as a result of the marriage; and [(9)] such other factors as the court considers relevant and material" (emphasis added).

[Note 6] In light of this case law, contrary to the implication made by the father, a recipient spouse's need is *not* defined as an amount required to maintain a former spouse at a subsistence level based on current reported expenses.

[Note 7] For this reason, the father's argument that the mother can have no need for alimony so long as she receives child support is without merit.

[Note 8] General Laws c. 208, § 53 (b), provides:

> "Except for reimbursement alimony or circumstances warranting deviation for other forms of alimony, the amount of alimony should generally not exceed the recipient's need or [thirty to thirty-five percent] of the difference between the parties' gross incomes established at the time of the order being issued. Subject to subsection (c), income shall be defined as set forth in the Massachusetts child support guidelines."

[Note 9] Likely the only scenario where a judge may properly avoid articulating why alimony is not warranted where the judge denies alimony is where such denial is pursuant to a valid separation agreement, either independent from or as incorporated into a divorce judgment. However, where a separation agreement providing that no alimony shall issue has been both incorporated and merged into a divorce judgment, a judge should first evaluate a later request for new or modified alimony under the "material change in circumstances" standard. *Chin*, 470 Mass. at 534. If a material change in circumstances warranting a modification of the divorce judgment is found, the judge should then proceed according to the three-step framework outlined in this opinion. As discussed *supra*, the parties' separation agreement was incorporated and merged into the judgment of divorce. Under the relevant provision, the parties waived only "past and present" alimony and "expressly reserve[d] the right for future alimony." Thus, a new award of alimony after the entry of the divorce would not require modification of the judgment and, therefore, does not require a finding of a material change in circumstances. The judge in this case, therefore, should on remand proceed directly to the three-step framework outlined above.

[Note 10] We do not, however, conclude that this record requires a finding that the father failed to engage in the requisite good faith effort to come to a mutual agreement, where the issue was not litigated at trial and where a rehearing might yield greater development of the record on the same.

[Note 11] "A change in a custody judgment, however, should be made pursuant to a complaint for modification under G.L. c. 208, § 28." *Williams v. Massa*, 431 Mass. 619, 636 (2000).

[Note 12] Additionally, we note that the divorce judgment provides that, if the parties "are unable to agree, the matter in dispute may be submitted to the Probate Court for resolution." Here, the judge has already made a finding that it is in the youngest son's best interests to remain, at least through eighth grade, at the preparatory school where he is currently enrolled. There is ample support for such a finding in the record.

[Note 13] Were we to examine this provision under the more deferential abuse of discretion standard, the result would be the same, where the judge appeared to consider only the father's interpretation of the provision.

[Note 14] General Laws c. 208, § 28, provides in relevant part:

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

[Note 15] Parents may bargain to provide support to their children in more circumstances than provided for by statute. However, they cannot erode a child's statutory right to support by agreement. *White*, 434 Mass. at 66.

[Note 16] This determination would be unchanged were our analysis pursuant to the parties' separation agreement, as incorporated into the divorce judgment. As discussed *infra*, entry into West Point is undoubtedly "[e]ntry into the military service of the United States." The mother argues that the judgment is ambiguous where it contains provisions covering college and "entry into military service" but not attendance at a service academy. We disagree. First, as noted *infra*, service as a West Point cadet has always been considered "service in the army." *United States v. Morton*, 112 U.S. 1, 4 (1884). Second, the terms of the judgment provide that emancipation occurs "upon the happening of *any of the following*" enumerated events. Therefore, the happening of a single enumerated event, regardless of whether any others have or have not occurred, is sufficient under this language to trigger emancipation pursuant to the divorce judgment, provided that the child is not emancipated earlier than he would otherwise be under G.L. c. 208, § 28.

[Note 17] Federal law also provides that the "cadets of the United States Military Academy" are part of the "Regular Army," which "is the component of the Army that consists of persons whose continuous service on active duty in both peace and war is contemplated by law." 10 U.S.C. § 7075. The Comptroller General has concluded that "it is well established that service . . . as a cadet at the Military Academy is considered service in . . . the Army, since such academ[y is an] integral part[] of [that] service[]." Decision of the Comptroller General of the United States, B-195448, at 105-106 (Apr. 3, 1980) (Comptroller General), citing *Morton*, 112 U.S. 1, and others. The Comptroller General also noted, "[W]e have construed service at the academies as active Federal service." Comptroller General, *supra* at 106, citing 29 Com. Gen. 331 (1950), and others. The United States Supreme Court concluded in 1884 that "cadets at West Point were always a part of the army" and "service as a cadet was always actual service in the army." *Morton*, *supra* at 4.

[Note 18] We stop short of holding that, as a matter of law, all cadets are emancipated for the purposes of child support. As West Point acknowledges, "[i]n most circumstances," a cadet will receive more financial support from West Point than from parents or guardians. Where West Point acknowledges the possibility—however remote—that a cadet may receive the majority of his or her financial support from a parent or guardian, so too do we.

[Note 19] The 2018 guidelines in effect at the time of trial and the 2021 guidelines now in effect do not differ in the relevant portions of their definitions of "income." *See* Child Support Guidelines § I(A) (Aug. 2021).

[Note 20] The 2021 guidelines expand on this catch-all provision as follows: "any other form of income or compensation not specifically itemized above, including, but not limited to, alimony consistent with *Calvin C. v. Amelia A.*, 99 Mass. App. Ct. 714 (2021)." Child Support Guidelines § I(A)(30) (Aug. 2021).

[Note 21] The father testified that he tried to limit such trips to twice a year, that he went on a trip in March 2020, and that he was listed as an instructor for a trip scheduled for March 2022. Based on this testimony, the judge did not abuse her discretion in concluding that in-kind income from these trips was not a "regular source of income."

[Note 22] The judge applied the "material and substantial change in circumstances" standard to modify the child support order. Although the correct result was reached, we note that under G.L. c. 208, § 28, "when a complaint seeking modification of a child support order is filed, modification is presumptively required whenever there is an inconsistency between the amount of child support that is to be paid under the existing support order and the amount that would be paid under the guidelines." *Morales v. Morales*, 464 Mass. 507, 511 (2013). As the modification is only presumptive, the judge properly could have considered the father's other financial contributions (or lack thereof) to support the children. Where, as here, the child support order was inconsistent with the guidelines, the relevant provision of the divorce judgment was void, and the judge concluded that the father was not making contributions above and beyond the amount of court-ordered child support, the presumption that a modification is required likely would not have been overcome.

[Note 23] The Superior Court of Pennsylvania "is one of two statewide intermediate appellate courts." The Superior Court of Pennsylvania, https://www.pacourts.us/courts/superior-court [https://perma.cc/Z8T6-GULC].

[Note 24] The father's argument that the use of such contributions to calculate child support constitutes an impermissible divestment of assets accrued following the divorce is without merit. In the first instance, the case to which the father cites, *Kuban v. Kuban*, 48 Mass. App. Ct. 387, 387-388 (1999), concerned the division of property between divorcing spouses. As part of that division, the wife was awarded "fifty percent of the husband's pension fund as of October 1, 1989 . . . ., plus 'passive appreciation and investment experience' through June 1, 1996," which was after the date of divorce. *Id*. at 388. The court's conclusion was correct that, in the context of the division of marital assets, contributions made after the dissolution of the marriage and resulting appreciation in value of the fund "are most closely akin to 'property interest acquired after the dissolution of the marital partnership'" (citation omitted), id. at 389, but it has no bearing on this case. First, as noted *supra*, child support is a distinct concept, and is governed by distinct rules, from spousal support or spousal property division. An individual is generally not entitled to a portion of a former spouse's postdivorce assets. *Id*. However, because children have a right to an amount of support that is based on a parent's current income, G.L. c. 208, § 28, a child support order is subject to increase where a parent's income increases postdivorce. *Brooks v. Piela*, 61 Mass. App. Ct. 731, 734, 737-738 (2004). Second, to the extent *Kuban*, *supra* at 388, addressed "*passive* appreciation and investment experience," new contributions made either by a party or by a party's employer are active, rather than passive, and, at the time of contribution, constitute income rather than an asset, as wages and salary do.

[Note 25] We note that it would be an abuse of discretion to award relief retroactive to the date of the middle son's emancipation on July 14, 2020, where the current order provides for support of only one child, and the father was obligated to provide support for two children through the oldest son's graduation from college in May 2021. Where we conclude that the parties had three unemancipated children until July 14, 2020, and then two unemancipated children until May 22, 2021, presumably the judge may calculate child support for two children and retroactively impose that amount for the period between the weeks of July 14, 2020, and May 22, 2021. However, the judge is not required to do so. *Whelan v. Whelan*, 74 Mass. App. Ct. 616, 627 (2009).

[Note 26] We also note that, even had the mother informed the youngest son of the father's decision, it is unlikely that such act would rise to the level of alienation or disruption of the youngest son's relationship with his father, where the father conceded at trial that he has categorically refused to contribute to the youngest son's educational costs for seventh and eighth grades and where he does not think the youngest son should attend—at least for seventh and eighth grades, and possibly longer—the preparatory school attended by the two older sons. Although the father may be entitled not to have his relationship with his children negatively affected by the mother's actions, he is not entitled to avoid or be shielded by the mother from the negative consequences of his own actions.

[Note 27] The spousal disqualification also does not apply to paternity or child support proceedings under the Uniform Interstate Family Support Act, G.L. c. 209D, or in proceedings under G.L. c. 209C, which address the care and support of nonmarital children. G.L. c. 233, § 20, First. G.L. c. 209C, § 16 (c). There does not appear to be an analogous exception for child support proceedings relative to in-State married (or previously married) parties. Although it was not raised by the parties, we question whether this framework may implicate equal protection principles, and we invite future litigants to present the issue when the opportunity arises.

[Note 28] The mother's analysis tended to conflate spousal disqualification with spousal privilege. "The spousal privilege is different from the rule of spousal disqualification . . . ." *Commonwealth v. Szerlong*, 457 Mass. 858, 859 n.3 (2010), *cert. denied*, 562 U.S. 1230 (2011). *Compare* G.L. c. 233, § 20, First (spousal disqualification), *with* G.L. c. 233, § 20, Second (spousal privilege). Only the disqualification is implicated here.

[Note 29] The father also urges that the mother failed to preserve for appeal any objection to such exclusion. We disagree. "Ordinarily, an offer of proof is required to preserve the right to appellate review of the denial of an offer to introduce evidence through the direct examination of a witness." *Commonwealth v. Chase*, 26 Mass. App. Ct. 578, 581 (1988). Mass. R. Civ. P. 43 (c), 365 Mass. 806 (1974). However, an offer of proof is not necessary where "there [is] no doubt what testimony would be given." *Commonwealth v. Caldron*, 383 Mass. 86, 89 n.2 (1981). Having reviewed the entirety of the trial transcript, we conclude that, as to the mother's proffered testimony about marital communications between the parties, the mother made sufficient offers of proof or the expected testimony was sufficiently obvious to preserve her right to appeal from the exclusion of such testimony. The mother made multiple attempts to testify as to conversations with the father, including about the youngest son's schooling. The mother's counsel also sought clarification from the court on the application of the disqualification. Finally, the mother's counsel attempted to make an offer of proof as to conversations between the parties concerning a purported agreement about their respective responsibilities throughout the marriage whereby the father generated nearly all of the marital income.

[Note 30] "The general rule is that unless the parties intend otherwise, a separation agreement survives a judgment of divorce that incorporates the agreement by reference." *McManus v. McManus*, 87 Mass. App. Ct. 864, 865 (2015).

[Note 31] A calculation pursuant to the 2018 Child Support Guidelines would likely result in an award that is inconsistent with the current guidelines and itself would be grounds for modification of the order. G.L. c. 208, § 28 ("upon a complaint filed after a judgment of divorce, orders of maintenance and for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines").

SCHULZ v. SCHULZ
No. 21-P-143

Appeals Court of Massachusetts

September 1, 2022

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).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After approximately fifteen years of marriage, Colby L. Schulz (wife) filed a complaint for divorce from Kristopher W. Schulz (husband). Following a five-day trial that concluded in late 2019, a judge of the Probate and Family Court issued a judgment of divorce nisi (divorce judgment) and findings of fact on April 17, 2020. The husband appeals, challenging the portions of the divorce judgment pertaining to physical custody of the parties' two children and the division of the marital estate. The husband also appeals from a related "supplemental" judgment, dated June 1, 2020, that awarded the wife's attorney's fees of $900 in connection with her complaint for contempt. We affirm.

Discussion. 1. *Transcripts*. As an initial matter, we note that the husband has failed to provide complete transcripts of the trial below. The husband has provided transcripts of only the third and fourth days of the five-day trial, omitting, among other things, the entirety of the wife's direct testimony (and most of her cross-examination testimony) and all testimony from the contempt hearings. It is the husband's responsibility, as the appellant, to provide complete transcripts necessary to decide the issues raised in his brief. *See* Mass. R.A.P. 18(a), (b)(4), as appearing in 481 Mass. 1637 (2019); *Cameron v. Carelli*, 39 Mass. App. Ct. 81, 84 (1995). The husband's failure to provide complete transcripts has materially hampered our review of the custody award, property division, and fee award that he challenges on appeal and, as a result, the husband cannot sustain his appellate burden. Mass. R.A.P. 18(b)(4) (failure to provide transcripts necessary to decide issue on appeal "result[s] in waiver of the issue"); *Cameron*, *supra*. We nevertheless touch upon certain issues concerning the custody award, property division, and fee award, based on the incomplete record before us.

2. *Custody*. We review custody determinations for an abuse of discretion. *Schechter v. Schechter*, 88 Mass. App. Ct. 239, 245 (2015). "In custody matters, the touchstone inquiry [is] . . . what is 'best for the child.'" *Hunter v. Rose*, 463 Mass. 488, 494 (2012), quoting *Custody of Kali*, 439 Mass. 834, 840 (2003). *See* G.L. c. 208, § 28. "The determination of which parent will promote a child's best interests rests within the discretion of the judge . . . [whose] findings . . . 'must stand unless they are plainly wrong.'" *Hunter*, *supra*, quoting *Custody of Kali*, *supra* at 845.

The husband contends that the judge abused her discretion in awarding the wife primary physical custody of the parties' two children, asserting that the judge ignored evidence of his increased involvement with the children in the later years of the marriage and essentially penalized him for being the family's primary income earner. Based on the incomplete record before us, we discern no abuse of discretion. The judge's findings provide ample support for the custody determination. The judge found, among other things, that (1) the wife had been the children's primary caretaker throughout the marriage; (2) the wife acquired a job that accommodated the children's schedules, allowing her to manage their daily routines and be consistently available to them; (3) the husband was historically less involved in the children's day-to-day care; and (4) it was in the children's best interests for the wife to remain the children's primary caregiver. These findings form an appropriate basis for granting primary physical custody to the wife. *See Charara v. Yatim*, 78 Mass. App. Ct. 325, 334–335 (2010), quoting *Custody of Kali*, 439 Mass. at 842 ("it is in [the] best interests of [the] child to preserve [the] 'current placement with a parent, if it is a satisfactory one'; 'stability and continuity with the child's primary caregiver is itself an important factor in a child's successful upbringing'").

3. *Property division*. "Our review of a judgment pursuant to the equitable distribution statute, G.L. c. 208, § 34, proceeds under a two-step analysis. 'First, we examine the judge's findings to determine whether all relevant factors in § 34 were considered.'" *Adams v. Adams*, 459 Mass. 361, 371 (2011), quoting *Bowring v. Reid*, 399 Mass. 265, 267 (1987). "The second tier of our review requires us to determine whether the reasons for the judge's conclusions are 'apparent in [her] findings and rulings.'" *Adams*, *supra*, quoting *Redding v. Redding*, 398 Mass. 102, 108 (1986). "A division of marital property which is supported by findings as to the required factors will not be disturbed on appeal unless plainly wrong and excessive" (quotation and citation omitted). *Passemato v. Passemato*, 427 Mass. 52, 57 (1998).

Here, the judge made findings reflecting consideration of all required factors under § 34. The judge found the following property to be includable in the marital estate, the combined value of which was approximately $785,176: (1) the husband's inheritance from his late mother's estate, valued at approximately $301,818; (2) the husband's personal injury settlement proceeds received in March 2019, for an injury he sustained in 2015, valued at $78,000; (3) retirement assets dissipated by the husband during the pendency of the divorce proceedings, in the amount of $72,943; (4) the "vested shares" of the husband's restricted stock units (RSUs), valued at $5,934; and (5) the parties' remaining assets, consisting of the marital home equity and their retirement accounts, having an approximate combined value of $326,472.

With respect to the husband's inheritance, although the judge found it to be a vested property interest and thus includable in the marital estate, the judge assigned one hundred percent of it to the husband, given that he received it "at the very end of the marriage." As for the husband's personal injury settlement, the judge found that the husband sustained the injury during the marriage and that the wife was entitled to thirty-three percent ($25,740) of the net proceeds. The judge also ordered the husband to reimburse the wife for one-half of the dissipated retirement assets ($36,471), and one-half of the mortgage payments made by the wife during the pendency of the divorce proceedings ($4,398), which increased the marital home's equity. With respect to remaining property, the judge ordered the husband to pay the wife $5,934 (representing the July 2019 value of his vested RSUs) and assigned the wife sixty-five percent of the remaining assets (i.e., the parties' retirement accounts and the net proceeds from the future sale of the marital home). As a result of the foregoing property division, the husband was left with assets totaling approximately $500,000, and the wife was left with assets totaling approximately $285,000.

Despite that he received approximately sixty-three percent of the total marital estate, the husband contends that the property division was "grossly disparate" in favor of the wife because she received one hundred percent of the value of the RSUs and sixty-five percent of the marital home proceeds and retirement accounts. We disagree. In assigning the wife a larger share of those assets, the judge appropriately weighed the husband's superior earning capacity,[1] greater opportunity for the future acquisition of retirement assets, and retention of his entire inheritance. *See Ross v. Ross*, 385 Mass. 30, 37 (1982) ("The weight to be accorded to each of the § 34 factors in a particular case is committed to the judge" [citation omitted]). We cannot say that the wife's receipt of a greater share of some marital assets was "plainly wrong and excessive," *Passemato*, 427 Mass. at 57, where the overall property division favored the husband, the husband earns substantially more income than the wife (but was not ordered to pay alimony), and the judge found the parties to have made relatively equal contributions to the marital enterprise. *See Cabot v. Cabot*, 18 Mass. App. Ct. 903, 905 (1984) ("There is no requirement in G.L. c. 208, § 34, or cases under it, of precise parity in equitable division of marital assets").

The husband also claims error in the judge's decision to include his RSUs in the marital estate, asserting that they were unvested and that the judge failed to make findings justifying their inclusion. Here, the judge found there to be "scant" evidence regarding the RSUs, she declined to credit the husband's claim that the RSUs were unvested, and she ultimately relied on the value of the RSUs reported by the husband on his own financial statement. We see nothing in this incomplete record that would warrant disturbing the judge's credibility determination regarding the vested nature of the husband's RSUs. *See Johnston v. Johnston*, 38 Mass. App. Ct. 531, 536 (1995). Moreover, even assuming that the evidence established that the RSUs were unvested (which we do not suggest), the judge was not prohibited from including them in the marital estate. *See Baccanti v. Morton*, 434 Mass. 787, 796–797 (2001) ("unvested stock options are assets that may be included in a party's assignable estate"). "[T]he determinative factor is whether the options, or a portion of the options, are attributable to the marital partnership, not whether they will vest after dissolution of the marriage." *Id*. at 803. The husband had the burden of establishing that the RSUs were not

attributable to the marital partnership. *Id*. at 800–801. We see nothing in the incomplete record before us showing that the husband properly raised, let alone met his burden of proving, that the RSUs in question were not the product of the marital enterprise.[2] *Id*. at 803–804. Accordingly, we discern no error in the inclusion of the RSUs in the marital estate. *Id*. at 804.

We are likewise unpersuaded by the husband's contention that it was error to award the wife a portion of his personal injury settlement proceeds. "In making an equitable division of the parties' property, the judge had available for distribution 'all or any part of the estate of the other,'" *Heins v. Ledis*, 422 Mass. 477, 483–484 (1996), quoting G.L. c. 208, § 34, including personal injury settlement proceeds. *See Hanify v. Hanify*, 403 Mass. 184, 186–190 (1988). Insofar as the husband argues that the judge should have excluded the settlement because he received it after the parties separated (but before the divorce trial), "the marital estate is typically determined as of the date of the divorce trial," rather than at the time of separation. *Moriarty v. Stone*, 41 Mass. App. Ct. 151, 154 (1996). *Cf. Savides v. Savides*, 400 Mass. 250, 252–253 (1987) (affirming valuation at time of separation where parties were separated for nine years before husband filed complaint for divorce, and postseparation appreciation of husband's assets was not attributable to wife's efforts). Based on the incomplete record before us, we discern no error in the judge's decision to include the personal injury settlement proceeds in the marital estate.

4. *Fee award*. Finally, the husband argues that the judge improperly awarded attorney's fees to the wife in the supplemental judgment on her complaint for contempt, because that judgment did not actually adjudicate him guilty of contempt. Under G.L. c. 215, § 34A, there is "a presumption in favor of an award of reasonable fees and costs for a successful plaintiff in a contempt action," *Coppinger v. Coppinger*, 57 Mass. App. Ct. 709, 714 (2003); here, however, the supplemental judgment did not contain an express finding of contempt. That said, it is apparent from the judge's findings that the fee award related to the husband's failure to provide an accounting of the dissipated retirement funds as ordered by the judge prior to trial, thus causing the wife to unnecessarily incur additional attorney's fees. Accordingly, notwithstanding the lack of an express contempt finding, "[t]here was . . . ample basis for the judge to exercise her discretion under G.L. c. 208, § 38, to order an award of attorney's fees payable to the wife's counsel in order to mitigate expenses incurred as a result of the husband's obstructionist conduct" (quotation and citation omitted). *Cooper v. Cooper*, 62 Mass. App. Ct. 130, 143–144 (2004). We discern no abuse of discretion in the fee award. *See Moriarty*, 41 Mass. App. Ct. at 159 (judges have "considerable discretion" to award fees in domestic relations cases, and "[s]uch an award is 'presumed to be right and ordinarily ought not to be disturbed'" [citation omitted]).

5. *Appellate fees and costs*. The wife seeks an award of appellate fees and costs, citing the husband's failure to adhere to the rules of appellate procedure and the frivolousness of his appeal. In light of the husband's failure to provide us with complete transcripts necessary to decide the issues raised in his brief, we agree that his appeal is frivolous and allow the wife's request for appellate fees and costs. *See* Mass. R.A.P. 25, *as appearing in* 481 Mass. 1654 (2019); *Avery v. Steele*, 414 Mass. 450, 455 (1993) ("An appeal is frivolous [w]hen the law is well settled, when there can be no reasonable expectation of a reversal. . . . The determination whether an appeal is frivolous is left to the sound discretion of the appellate court" [quotations and citations omitted]). In accordance with the procedure specified in *Fabre v. Walton*, 441 Mass. 9, 10–11 (2004), the wife may, within fourteen days of the issuance of this memorandum and order, submit an application for attorney's fees with the appropriate supporting materials. The husband shall have fourteen days thereafter to file a response to that application.

Judgment of divorce nisi dated April 17, 2020, affirmed.

Supplemental judgment dated June 1, 2020, affirmed.

Wolohojian, Massing & Singh, JJ.[3]

Notes:

[1] At the time of trial, the husband was earning approximately $153,000 per year and the wife was earning approximately $30,000 per year.

[2] In addition to omitting three days of trial testimony, the husband failed to provide a transcript of the pretrial conference or a copy of his pretrial memorandum identifying the issues to be tried. Also omitted from the record appendix are copies of the parties' financial statements submitted during the divorce trial.

[3] The panelists are listed in order of seniority.

Section 2
UNEDITED PROGRAM TRANSCRIPT

>> Well, good afternoon, everyone. I'd like to welcome all of you to today's seminar, negotiating, substantiating and codifying alimony agreements. My name is Bruce Richard. I'm a program attorney here at MCLE. I'd like to thank our faculty panelists, all of whom are volunteers, for their time and commitment to this program. You'll be receiving an email with a link to an evaluation form for the program, we encourage you to take a few moments to complete it. I want to remind you about MCLE's subscription product, the online pass, which offers everything MCLE has online, hundreds of live and on demand webcasts, our entire book collection all for one low annual fee with unlimited 24/7 access on numerous electronic devices. Subscribe today in MCLE, we'll deduct the cost for today's program from your first year subscription. We encourage you to share what you learned here today's program via Twitter, tweet us at MCLE New England. You can also interact with us on Facebook, YouTube and LinkedIn. We encourage attendees to ask questions all throughout today's program. It's now my distinct pleasure to introduce the chair for today's program. Julie Murphy is a partner at Rico, Murphy, Diamond and Bean LLP. Her practice focuses on family law. Ms. Murphy is certified as a mediator and parent coordinator. She's also a trained art attorney and is often appointed for art cases in the Norfolk Probate Court. Ms. Murphy is a member of the Mass Bar Association, the Massachusetts Council on Family Mediation, Association of Family and Conciliation Court, and the Massachusetts Association of Guardian ad Litem. And with that, Julie, I'm going to turn the program over to you.

>> Thank you very much, Bruce. So I have the distinct honor of introducing my panel. I'm going to start with the honorable Mary Rudolph Black, who has been practicing law since 1986. She was appointed as an associate justice of the Probate and Family Court in April of 2017. She Has sat in Wistar, Middlesex, and is currently sitting in Essex County. Prior to that, she had served as a guardian ad litem and guardian ad litem next friend in the probate and family court, district court, juvenile court, and housing court, and a variety of areas, including investigations regarding custody, parenting schedules, modifications, termination of parental rights, adoption issues, residential relocations, de facto parenting, various medical issues, including end of life and advanced directive determinations, elder protective issues, suitability of fiduciary appointments, evaluation of privilege issues, and services educational surrogate parent for children in state custody. She had also been appointed as guardian and conservator for incapacitated individuals. Her practice included domestic relations litigation as well as probate litigation. She also served as a conciliator for the Essex County Bar Association. She received her BA in government from Colby College and her JD from New England School of Law. Judge Black is a member of the Gloucester Essex County and Massachusetts Bar Associations. Welcome Judge Black. I also have here Jennifer Roman, who is a partner at Tracy Roman and Ramos, P.C. and Wellesley Hills, where she specializes in all matters of domestic relations. Her practice includes all aspects of family law, including divorce, complex asset division, custody disputes, prenuptial and postnuptial agreements, restraining orders, litigation consulting, and domestic partnership agreements. Ms. Roman is a family law litigator as well as a certified family law mediator conciliator. Ms. Roman is a fellow of the American Academy of Matrimonial Lawyers and a member of the Massachusetts Council on Family Mediation. She frequently serves as a special master for the court, she's also an on camera legal analyst for WBZ CBS Boston, where she provides in depth legal commentary on cases of national and local interest. Welcome, Jennifer. And last but not least, I have here Robert Withrow III, who's a partner at Mulhall Withrow, PLLC. His practice is focused on family law and probate litigation. Mr. Withrow has worked on cases in all of the firm's practice areas focusing on litigation. His practice encompasses a broad range of family law matters, including alimony, child support, custody, modification, contempt actions, paternity, restraining orders, grandparent visitation, prenuptial agreement, postnuptial agreements, and adoptions. He's a graduate of Boston College in New England School of Law, and is also spoken as a panel member on Marital Trust Formulas and Portability at the Third Annual Probate Law Conference, Massachusetts Bar Association. Welcome Rob. Welcome, everybody. Thank you all very much for being here. And before we get started today, we wanted to get a sense, because we can't see any of you, so we can't ask for a show of hands, of what your level of experiences. So I want to ask everybody who has been practicing for zero to five years to put a one in the comment question so I can see how many people we have that have been practicing less than five years. We will just wait a second for it to come in.

>> You know, there's that delay.

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>> There is. And if you've been practicing, while we're waiting that, for five to 10 years, can you put a two in the comment section? And if it's been over 10 years, can you put a three? So far we have one response. All right. What I'm going to do while I'm waiting for these to come in, so we don't all just sit here, is actually get started. So we're going to get started today with Jennifer Roman.

>> Thank you. So I'm going to start today's discussion on the Cavanagh case, which if you haven't read yet, you need to read and you need to read it a couple of times, because it's about 60 pages long and it covers a lot of different topics that are relevant in family law cases, not just what happens with an alimony modification. So, I can't stress enough the importance of reading this case. Certainly, it's been a hot topic among the bar. So, if you haven't read it, read it. If you have read it, but maybe once or twice, maybe you should think about reading it again. So the Cavanagh case is an SJC decision, it came out in August of this year. It started in the lower court's cross modifications by the former husband and the former wife on child support, and then mother's modification seeking a modification for alimony. She was actually seeking an award of alimony for the first time. At the time of the divorce agreement was a merged divorce agreement and the alimony provision the parties expressly agreed to waive past and present alimony, but then expressly reserved their rights to have future alimony looked at. The basic facts of this case, parties were married a long time, they were married just about 21 years at the time of their divorce. They had three children. At the time of the modification trial, one of the children was emancipated, one was a cadet at West Point, which is not relevant for our purposes, but it's something that the court talks about, which is sort of an interesting discussion about whether or not he's emancipated, and then they had one child who was under the age of 18 and was attending a private preparatory school. The father was working as a physician's assistants during the marriage as well as at the time of the modification trial. During the marriage, he took on a second job to help him pay for the children's private preparatory educational expenses. Throughout the majority of the marriage, the mother was a stay at home mom to their three children. And shortly before their divorce judgment entered, she returned to work, working as a teacher in a Catholic school. She was continuing to work as a teacher in the Catholic school at the time of the modification trial, and there was testimony that she would have liked to switch over to the public sector and work as a public school teacher where she thought she could make more money, but she didn't have the credentials to do so. At the time of their divorce, again, the parties had agreed that the father would pay child support in the amount of $800 a week, which was acknowledged to be an upward deviation at the time. And father also agreed to pay up to $20,000 for the two older children to attend a preparatory school, so $20,000 per each child. All three children attended a private Catholic school, and the older two children, as I noted, attended that private preparatory school. For the older child, that's grades 9 through 12, and for the middle child, that's grades 7 through 12. The court noted that the parties lived a comfortable middle class lifestyle during the marriage and they talk about some of the factors that helped them determine that, which I'm just going to skip over for purposes of our discussion here. Oh, in this case is in your materials to use if you want to look at it, you can do so. The parties agreed in their separation agreement that father's income from his second job, it was a per diem job that he was working, would not be used to calculate either future child support or future alimony because of his obligations at the time to contribute to the children's educational expenses. And as I noted earlier, this agreement merged with the judgment of divorce. At the time of the modification, the father was the head physician's assistants at an orthopedic surgical practice and was earning $4,388 a week, and then he also had income from his per diem position. And in addition, he had other sources of income, which were not regular, but did have them from working as a medic at an outdoor adventure program and some other sort of one off assignments he would do. And so while father was making $4,388 a week, mother was earning $719 per week from her position as a teacher. The trial judge ruled in relevant part that the father was not obligated to contribute to their youngest child's preparatory school costs, but the party's older two children were emancipated for purposes of child support, and that the father should pay child support in the amount of $650 per week, which again, was a decrease from the 800 a week he had been paying, and that would just be for one child. He was entitled to receive some retroactive relief to the time when their oldest son graduated college, that the father was not obligated to pay alimony to the mother, and each party was responsible for their own legal fees. Now, both parties appealed this judgment. And as I said, there's a lot of different factors and a lot of different issues raised in this case, but we're going to focus on the alimony and the impact of this case on modifications of alimony agreements going forward. The primary issue for the court to answer was whether or not you could have a concurrent child support order with an alimony order. And in this case, in Cavanagh, what the trial judge did was the charges first calculated the appropriate amount of child support pursuant to the child support guidelines, again, based upon one child. The judge then determined that no alimony could be awarded to the mother for the sole reason that the judge had

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considered all of the father's gross income in setting the child support order. So when setting the child support order, the trial court took that full 4,000 and change, and put that into the guidelines. On appeal, the father argued that the alimony was not available to mother, since he was already paying child support, and he also argued that alimony was based upon me, and the mother did not have a need so long as she was receiving child support. And you can imagine the mother argued something different. The mother argued that the Alimony Reform Act, specifically Section 53C as in cat could not be interpreted according to its plain language, when such an interpretation would conflict with other provisions of the Alimony Reform Act, specifically Sections 53A and 53G. Now, 53C, the provision that she says cannot be interpreted by plain language, states that you cannot use, you know, the same income that you're running for child support that you then use for alimony. And so she's hanging our hat on that saying, well, that's not consistent with the other provisions of the Alimony Reform Act, which make it, you know, which suggests that you can have a concurrent alimony and a child support order at the same time. So I'm going to talk to you a little bit more about that later, you know, about the nuances there and what these all means. But the determination as to whether, you know, what form an award of alimony is generally reviewed for an abuse of discretion standard, and questions of statutory interpretation, which were some of the questions mother were raising, they're reviewed de novo, which means they're reviewed as if it's the first time. In this discussion, the court briefly discussed the history of alimony, or more modern history of alimony, I should say, and also the Alimony Reform Act. And it identified how the Alimony Reform Act sort of defined alimony more specifically for us and it gave us four buckets of different types of alimony that can be awarded. And in this case, the bucket of alimony we were looking at was a general term alimony award. And you want to keep that in mind as you're approaching this, because this case it's not going to apply to a reimbursement alimony case, it may not even apply to a rehabilitative alimony case, it's really applying to these general term alimony orders that may issue. And when the court is looking to make an alimony award, whether it's the first time or it's on a modification, the court must consider and weigh all of the relevant factors under Chapter 208, Section 53A. And it notes that the statute says, where the supporting spouse has the ability to pay, the recipient spouses need for support is generally, right, generally, the amount needed to allow the spouse to maintain the lifestyle that he or she enjoyed prior to the termination of the marriage. So again, although we're in the present, we're looking retroactively to say, what was the lifestyle that the parties had, and does the resist the person who's seeking alimony, the recipient, have a need to be able to maintain that lifestyle? And the court noted in footnote six of this opinion that a recipients need is not defined as an amount required to maintain a former spouse at a subsistence level based upon current reported expenses. So this could go either way, you could have a client who now has less expenses than they did at the time of the divorce, they probably say, because they can't afford to do things that they used to be able to do, we don't have room for discretionary expenses, or you might have somebody who has more expenses now following the divorce, I can think of a really basic example of somebody now having a pet like a dog that's really sick. I know I have a client, his dog expenses are over $300 a week, between the dog walking the medications and the prescription food that they need for this animal. And so, that's sort of a basic one but, you know, you have to be looking to not what the present is, but what the lifestyle was at the time of the marriage. And we probably all know the adage, right, that ups and good reason and a long-term marriage, there's no justification for the lifestyle of one spouse to go up and the other spouse to go down. So, this is sort of all the backdrop here, right? We've got these parties that the court determined, we're sort of this upper middle class family, they had some children in Catholic school, they had some children attending preparatory school. So I know that the court made a comment about how they lived their lives, they didn't take fancy vacations, they often went camping, they drove their cars basically until they were not able to drive them anymore. So really, sort of focus their energies on investing in their children's education as opposed to doing other things. And so the court then starts to do this analysis, right, looking at the mother's claims first of, is there an inconsistency here? Does the Alimony Reform Act allow for concurrent alimony and child support orders? And if so, how do we reach those orders? So the court looked to the construction of Section 53C, and this section specifically says, when issuing an order for alimony, Section 53 instructs, the court shall exclude from its income calculation, gross income, which the court has already considered for setting a child support order. Now, that's what dad's hanging his hat on. And the court agreed with the mother here that a plain language interpretation of Section 53C whereby would make it that alimony is nearly prohibited when there's already been a child support awarded. And they agree that that's untenable reading of the statute, and that interpreting it in that way would conflict with the other provisions of the Alimony Reform Act, which indicate a clear legislative intent to require effect specific consideration of the party circumstances when determining whether and how to award alimony and to permit concurrent awards of alimony and child support, and that's under Section 53G where it says you can have those concurrent orders. Section 53G of the Alimony Reform Act expressly contemplates an

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order of alimony concurrent with or subsequent to the child support order. In Section 53A sets forth the specific factors that the judge must consider when determining whether or not alimony is awarded, and if so, in what form, again, which bucket is it falling into? The SJC noted in Cavanagh that it makes little sense to tie the availability of alimony to the provision of child support, because child support and alimony serve two distinct purposes. According to the court, the two stand on a different footing. And if you think of that, it makes sense, child support meant to meet the needs of the children, alimony is meant to meet the needs of the former spouse. And public policy says the parties cannot bargain away the rights of their child or their children, but you can bargain away your right to alimony, and that could be in something like an alimony buyout provision, or where you're waiving past, present and future alimony. So the SJC concluded that the trial judge had in fact abused her discretion when she denied the mother alimony on the sole basis that 53C prevents the use of the payer's income to calculate alimony because the trial judge did not do the specific fact analysis of the family circumstances, which is required under Section 53A of the Alimony Reform Act. So the court then, this is sort of like the key piece of this case for alimony modification purposes, and even setting initial alimony orders, the court outlines a three step process that the trial court needs to follow when presented with competing, you know, competing claims for alimony and child support. And so the court says that before a judge may properly exercise her discretion to decide whether and in what format an amount to award alimony, the judge must do the following three things and in this lawyer. First, the court needs to calculate alimony taking into consideration the statutory factors enumerated in Section53, and the principle that with the exception of reimbursement alimony, the amount of alimony should be determined with reference to the recipients need for support to allow the spouse to maintain the lifestyle and joy prior to the termination of the party's marriage, then calculate child support using the party's post alimony income, so that's step 1. Step 2 is to calculate the child support first, then you calculate alimony considering to the extent possible the statutory factors, once again, enumerated in Section 53A. And the court acknowledged that in the majority of cases, the calculation of child support first will preclude any alimony being calculated. And that's because our child support guidelines now look up to the first $400,000 of combined income of the party. So if you're using all of that income to determine child support and you come up with a child support for, let's say, $1,000 a week, well, that's probably not going to leave a whole lot left for the payor to be able to meet an alimony obligation. And that $1,000 a week, although it's for the benefit of the children, certainly benefits the spouse or the primary custody of the parent or the parent who has shared custody, because they're going to be able to use that income to help maintain their lifestyle as well as its derivative of the children. The third thing the court needs to do assuming that number two doesn't knock them out, that the calculation to child's support doesn't knock this out of being an alimony case. The third thing the court needs to do is compare the base award and tax consequences of the order that would result from the calculations in step 1, that's when you calculated alimony first and then calculate a child support post alimony and cons. The judge should then determine which order would be the most equitable for the family before the court, considering the mandatory statutory factors set forth in Chapter 208, Section 53A and the public policy that the children be supported as completely as possible by their parent's resources pursuant to Chapter 208, 28. When the judge chooses to issue an order pursuant to the calculations in step 2, when you calculate child support first, or otherwise, order wise issues an order that does not include an award of alimony, the judge must articulate why such an order is warranted in light of the statutory factors in Section 52A. So now you might be asking yourself, OK, we now have this protocol, we've got this three step process that will help the judge understand, but how does the judge do this? How does the judge get this information? What obligations do I have as a practitioner to be vetting these issues, or how do I present these issues to the court? And among people I've been talking to, and I welcome the panel to jump into, if you're really going to be either, well, I rely on a CPA to do these calculations, a lot of people have family law software that allows them to do these sort of tax consequences things, I just find it's just more cost effective for me to have a third party do it, quite honestly, because I don't want to screw it up. And really, you know, be presenting the judge with this information, this is what it would mean if you had an alimony and a child support order, this is how the numbers would break down, this is what the after tax dollars would look like for this family. And really, what the child support sort of wondering too, OK, is the recipient now going to end up with a higher after tax dollar than the payor because of the tax consequences, you know, child being completely tax neutral, alimony only being taxable in tax deductible in Massachusetts. So, that's the kind of thing, you know, those are the kind of things the judge is looking for now, is what does it mean to me if I do an alimony award? What does it mean if I do child support? How does this look different? Does it look different? Maybe it doesn't in your particular fifth case, but you, the practitioner, I think you need to be armed with that, because now the burden is on the judge to make those findings and to say that I'm doing child support because it means that the children need to come first and they need to be supported solely by their par-

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ents, and if there's also an alimony award, there's not going to be enough, you know, to be able to divert it to the children, or make a finding that there is enough income there to do [inaudible] award the child support and alimony. So, you really want to be thinking about how you present those numbers, and again, it's something that Judge Black mentioned yesterday, that she thought was really useful is if you give her a summary chart. So if we're presenting a judge with multiple child's for support guideline calculations, or child's per guideline calculation and an alimony child support calculation, it's not simply enough just to present her with the charts and be like, here judge, you can figure this out, you need to be able to walk them through it and show, preferably in a summary page, this is how the two lineup, right, this is what the guidelines say, this is what the after tax dollars would look like, this is what the alimony would be under the different percentages, this is what it would look like after tax dollars for each party. Because then you want to be able to give the court the information they need to make an appropriate decision on behalf of his family, because you really are talking about allocating family dollars even if you're, you know, you have your advocacy hat on, you're representing one party or the other, you really need to sort of be thinking, I think a little bit more holistically about what is the family need.

>> Jennifer, before you move on there, I know you had mentioned, when we were speaking with Judge Black yesterday, Judge Black, could you talk a little bit about what you were saying yesterday to us about when you want this information, at what stage is, what to consider for the temporary order hearing, the pretrial, et cetera. And you're on mute, so you should unmute.

>> Yes, that would be better if I unmuted. So, thank you for asking that. So for me, one of the things that we talked about was that I think that Cavanagh is going to make your temporary orders an extremely important part in the trajectory of your case. And so, you're going to need to be very prepared early on, and my suggestion would be that you come prepared at the temporary order level with the information, and the charts are very helpful. And I would just refer you to sometimes what I see in pre-trials when people are talking about an overall summary is the, you know, you just compare what mom is going to get and what dad is going to get. And if you have that similar type of chart, it's very helpful, because one of the things I mentioned yesterday is these analyses that we're required to do, I'm going to take time, and I think a lot of cases end up taking things under advisement. So the information that you give me, I'll look at in my lobby afterwards, in most cases, in conjunction with my notes, because it's going to be difficult, I think to give a quick answer to people, because we'll be digesting a lot of information. And the other thing I did want to mention, and Jennifer touched base on this, some of you have varying experiences in your practice relative to your knowledge of tax type issues. But I think that if you're dealing with a significant case, you're going to want to get that accountant on board sooner rather than later. And so I would suggest that you try and develop a relationship with a professional that you can rely upon and get that information quickly. Does that answer your question, Julie?

>> Yes, yes, thank you.

>> OK, great.

>> Yeah, and I would follow up on the remark about bringing in an accountant early, the stuff that your accountant will need to be able to do this analysis is all included in your roll for the mandatory discovery. So, you know, the want tax returns for at least the most recent year, if not two years. So I want to know, you know, pay stub, recent pay stubs, so in case incomes have change. And you know, they'll want to know how many children there are, and what their ages are. So, again, you're already going to have that information and you should have it before going in for temporary orders because it is obligated to be exchanged within 45 days at the surface of the complaint for divorce or the modification as well. If it's a financial modification, then you have to exchange the mandatory discovery as well. So you will have that information, either from your own client or coming to you from the other side in the case where the parties have been separated for a while, you know, you can still have that information at your fingertips. And so -- Before you go on, Jennifer, just to add to that, in what we were discussing yesterday is some practitioners tend to as soon as a complaint is filed, get a motion on the books and given how backed up the court is right now you sort of get almost one bite at the apple with a good motion hearing. And I just want to talk about that for a moment.

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>> I think that's very true. I mean, we're doing our best to accommodate people and there are a lot of issues that we weigh in the amount of time that we give a case. And so you want to make sure that you have all of your information, because once you come before me in a temporary order, unless it's really an emergency, and there's no specific definition for that, per se, it's unlikely you're going to get back in front of me again until the pretrial. So you may want to reevaluate your strategy as to whether getting in quickly is what you want to do or, you know, waiting a little while, and then a lot goes to your overall preparation when you first meet your client and even decide upon filing and things along that nature.

>> Thank you.

>> Definitely, definitely checking in to be strategic, especially when you have the client who's panicking, either that the payor or the recipient and they, you know, don't have what they need or they don't have the ability to meet it, the instinct is to, OK, I'm going to get in there as soon as I can. But to be just take a moment and be strategic about that, do I have what I need to make the most out of this temporary orders hearing and it get into a habit, I need to make this the most productive and useful hearing for the court so I get the most favorable order, the best order for this particular family is really dead. And I want to note too, that when drafting your agreements, particularly under Cavanagh, you want to be careful how you phrase the reservation of rights for future alimony. The Cavanagh case, in this particular case, as it started with earlier, the parties expressly reserved their rights to future alimony. And because they did that, the court said that the mother did not need to establish a material change in circumstance to seek an award of alimony, where as if the agreement had simply stated that no alimony shall, you know, shall take place at this time, or shall issue, or shall be awarded at this time and it was both incorporated and emerged into the judgment of divorce, that the moving party would then need to show a material and substantial change in circumstance. So think about, you know, that. I mean, sometimes when you're doing this, you're like, oh, no alimony past, present and future. Well, that's not actually what you're saying. If you want to leave future alimony open, and leave that bar lower for your client, if they're going to potentially be the recipient spouse, you want to make sure you're expressly reserving the rights to future alimony as opposed to saying, you know, no alimony past, present or future will be paid, but parties can seek a modification of that award. The other thing that I thought that was really interesting about Cavanagh is, it's not so sure how it might work itself out just yet, but it goes into a big discussion about sources of income for purposes of calculating child support. And it definitely clarified some areas of income that I think we as practitioners have often overlooked, but it also raises the question of how many of these enlarging [inaudible] income will come into play when looking at alimony, because the Alimony Reform Act adopts the same definition of income as the child support guidelines. But clearly, we have a different lens because in child support guidelines, for example, it's all income, it's interest income, dividend income, pension income. Now under Cavanagh, contributions to a party's 401k or retirement account by their employers considered, it needs to be looked at as income for purposes of child support. And so you need to be thinking about, when you are on the alimony side, with this very broad definition of alimony, you need to be thinking about, are there other sources of income that I may be overlooking? And if there are other sources of income, are they relevant to an alimony calculation? Because we certainly, you know, we had the rule on an asset division is you don't have the right to partake in or to share in your ex-spouse's future assets right? Once the assets are divided, they're divided, and anything thereafter acquired, stays with the party that acquired it. So it can become a little questionable than if an employer is contributing to a former spouse is 401k and that's very much a part of their regular income, you know, you may not be able to look to that for alimony purposes, but you are going to be looking to it for child support purposes, which can skew that step 1 and 2 under the Cavanagh case when you're running the guidelines first under alimony, and then doing post alimony incomes for child support purposes, or running the child support guidelines first, and then looking to alimony. So these are all sort of things just kind of want to be aware of. The other thing that the Cavanagh case talked about was in kind benefits or child's pro-guidelines, again, saying that in kind benefits can be deemed income. And in this case, the court determined that the father's in kind income received from his wilderness adventure trips, or he was served as a medic, they were not considered a regular source of income, and so therefore, they were excludable. Court noted that interest in dividends, regardless of regularity, are includable for child support purposes. And that capital gains income only needs to be a regular source of income if it's to be includable, if it's related to real and personal property transactions, and that income and capital gains on this case in the father savings account in 401k plan related to transactions other than real or personal property were includable for purposes of child support. And again, you're like, this is an alimony seminar, why are we talking about child support? Well, because you're going to have

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to be running simultaneous calculations, and the income that you're including for child support calculations may not be the same income you're going to be including for alimony calculations. And so, you just need to be aware of what the different factors are, what numbers you're putting into each calculation, and why. And you need to be aware of it so that you can make the court aware of it as well, because at first glance, it would be a little odd to see that child support, the calculation numbers 1,000 a week, but for alimony, it's only 800 a week, well, why is that? Well, because there's dividend income that's, you know, from an asset that was previously divided in their divorce, or because there's a contribution to a 401k plan that was previously divided and is an asset acquired by the payor post-divorce. So these are sort of things nuances that we're going to need to be paying attention to and thinking about. Similarly, with health savings accounts, it's another piece of the Cavanagh case talked about, and then including contributions to a health savings account can be deemed, income for purposes of child support, and any employer contributions to health savings account can be included for purposes of child support. So I think Cavanagh gives us a lot to be thinking about, it gives us a good roadmap, and definitely pushes that burden on us to get that work done early on, as Judge Black said, but I think it also makes, we need to just stand up a little bit straighter and be more mindful of what income and what sources of income we're using for child support and for alimony. I think I'm done, Julie.

>> Yeah, no, that's --

>> Thank you.

>> Yeah. There's just so much there. You know, like you said, it's 60 plus pages and there's so much there. There's so much there. All right, so thank you for that. So now, we're going to move on to, Jennifer and Rob, are going to give us a presentation on modifications of alimony.

[Inaudible]

>> Rob, I'm getting some feedback from you.

>> All right, I can turn my microphone down. I was having internet issues over here so I had to relocate.

[Inaudible]

Hold on. Is that any better? I adjusted the setting.

>> Talk for a moment.

>> Can I add one thing?

>> Please. I just want to add one thing to the end of Jennifer's presentation. It's really important when we talked about reading the case, and I want to tell you that you should read the case that's important to your particular case before me as well as the statute because I read them every single time because you're constantly reading it through a different lens. And especially in a case like Cavanagh, you really want to have read it multiple times. And the other thing that's important during these cases, our staff has done a fabulous job in giving you many cases, when you come to court, it's very helpful. If you have a case, it's important for you, come with three copies, one for yourself, one for me, and one for opposing counsel. I don't have a problem with having my session's clerk printed off, but that just takes valuable time. So if you come with a copy, and then you can give me a copy to markup, it makes things go quicker. But I read it each time and I would suggest you do that too, because sometimes you'll see something you didn't see before.

>> I'm going to throw in there too, that on the Cavanagh case, read the cases that it was cited to, you know. It came out of Pennsylvania, take the time to go to the Pennsylvania court, figure out how they came to it, I believe they came to their decisions out of North Dakota, so take the time to read all those cases. Some of those cases, you know, our decision came out in August, I believe Pennsylvania was 2002, North Dakota was earlier than that. I think, you

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know, this case is such a game changer, you need to look to the history of those other states and how they got to it, and then the issues that came after it so you can be prepared for that. So, OK.

>> All right. I will jump in here. We'll start off with, very briefly, just a little history lesson. So Massachusetts had the statutory authority to award alimony since 1786. So predating the Constitution, alimony primary comes from Massachusetts. The statute provided that judges had to consider certain factors in setting an alimony order. The alimony statute did not provide any standard for modifying alimony orders, however. And then along comes the Alimony Reform Act of 2011 which codified the standard for alimony modification. So one thing I probably should have started with is that if alimony or division of marital property is not addressed in the judgment at the time of the divorce, and one spouse need support to cease the division of the property or remedy then as a complaint for alimony is not a complaint for modification if it was never addressed at the time of divorce. You can look to the Cavanagh case for that. All right, so we'll get into modifying general term alimony and the alimony format. This is Chapter 208, Section 49e, unless the payor and recipient agree otherwise, general term alimony may be modified in duration or amount upon a material change of circumstances, warranting modification. Modification can be permanent, indefinite or for a finite duration, as may be appropriate. And nothing in this section is construed to permit alimony reinstatement after the recipient's remarriage, except by the party's express written agreement. And you'll find that in a few places that the agreement of the parties can trump some of the statutes of the ability of the courts to act. Same statute part f, once general term alimony -- or once it's issued general term alimony orders will terminate upon the payor attaining the full retirement age. The payor's ability to work beyond full retirement age is not a reason to extend alimony, provided that, one, when the court enters an initial alimony judgment, the court may set a different alimony termination date for good cause shown, provided that in granting deviation the court shall enter written findings of the reasons for deviation. Two, the court may grant a recipient an extension of an existing alimony order for good cause shown provided, however, that in granting an extension, the court shall enter written findings of, one, material change in circumstances that occurred after the entry of the alimony judgment, and two, reasons for the extension that are supported by clear and convincing evidence. For rehabilitative alimony, which is Chapter 208, Section 50. The alimony term for rehabilitative alimony shall not be more than five years, unless the recipient has been remarried, the rehabilitative alimony can be extended on a complaint for modification upon a showing of compelling circumstances. In the event that, one, unforeseen events prevent the recipient spouse from being self-supporting at the end of that term with due consideration for the length of marriage, two, that the court finds that recipient tried to become self-supporting, and three, that the payor is able to pay without undue burden. Then the court may modify the amount of periodically rehabilitative alimony based on a material change of circumstance within that rehabilitated period. For reimbursement alimony, Chapter 208, Section 51, this is Part B, once reimbursement alimony is ordered, the party shall not seek and the court shall not order a modification of reimbursement alimony. So that's probably the last one we could talk about that for the purposes of this. Similarly, transitional alimony, Chapter 208, Section 52, no court shall modify or extend transitional alimony or replace transitional alimony with any other form of alimony. So, for alimony orders that were entered before the Alimony Reform Act, March 1st, so predating March 1st, 2012, those that exceed the durational limits set forth in the act, you don't need to file a modification did to demonstrate a material change in circumstances. In the alimony recipient's cohabitation, or the payor reaching retirement age do not constitute grounds for a modification of alimony orders entered before the Alimony Reform Act, and you can look to the Chin case for that from 2015, Chin v. Merriott. Under no circumstances did the act provide a right to seek or receive a modification of an alimony judgment in which the provision survives the judgment and did not merge into the judgment. That's from the Lalchandani case Lalchandani v. Roddy another 2015 case prior to the Alimony Reform Act, the court could modify the alimony obligation if the plaintiff met a higher standard, which was something more than a material change in circumstances. But as the Alimony Reform Act, that cannot be modified that the provision survived the judgement and did not merge. So what are some changes in circumstances that could allow for a reduction of alimony? Those include increased assets or unanticipated employment or the recipient emancipation of a child living with the recipient spouse, to reduce income of the payor due to illness, involuntary financial hardship of the payor, such as unemployment, strike, decreased earnings, bankruptcy, et cetera. And for changes in circumstances that could allow for an increase in alimony, those include increased income, earnings or assets of the payor, an increase in recipients needs, decrease in the payor's needs, or a decrease in the payor's income. And so complaint for the modification versus a complaint for alimony, we've touched on this a little bit already. But a complaint for modification is appropriate when there's an existing alimony award or the court has considered factors in awarding alimony. So the court has to have considered both, I think, it's

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Section 53A factors in order for it to be a modification. The complaint for alimony is appropriate where the issue is before the court for the first time, and those mandatory action under Section 34 have not been considered. And we're going to circle back around to Cavanagh at some point because of that. The court in Cavanagh had something to say about that as well. All roads lead to Cavanagh here. Another case that I don't think is included in your materials, at least not in this section, I wanted to touch on, in entering an order for alimony, the judgment has to determine the respective parties needs and incomes at the time the order is issued. And so a court judgment imposing a self-modifying alimony provision will not be upheld, except in very limited circumstances. So you can look to the [inaudible] case for that, the [inaudible] case in 2014 when self-modifying alimony provision was overturned by the appeals court, additionally, in the young case as well. The SJC acknowledged that there could be circumstances where it would be fair and reasonable to award a percentage of alimony to a supporting spouse, for general term alimony but ultimately the court found that the circumstances of the case in that particular case did not warrant such an award but the court said that ultimately there may be cases in which a variable contingent award would be warranted, but that would be the exception rather than the rule in most cases. Next. Cavanagh case, Jennifer's already talked about the background of the case, so we won't delve into that in any great detail, but the mother and father have sought to modify various provisions of divorce judgment, mother's current claim for modification alimony for the first time and the lower court ruled that the father shall not pay alimony to the mother. Father argued that under the plain language of Chapter 2, Section 53, subsection c2, that alimony will be unavailable to the mother because child support was ordered. Mother argued that it can't be interpreted according to the plain language. It is such an interpretation with conflict with other provisions of the statute as well as long as the express legislative purpose of enacting the Alimony Reform Act. So Chapter 2, I'll read Section 53 part c2 states that when issuing an order for alimony, the court shall exclude from its income calculation the gross income which the court has already considered to setting the child support order. Ultimately, the court will put the mother holding that in cases where child support is contemplated before the judge properly to exercise their discretion to decide whether and in what form and amount to award alimony. The judge must perform the two step analysis that Jennifer went over. But more importantly for modification purposes is footnote 9, it speaks directly to alimony modification. Footnote 9 in Cavanagh states that, and this is on page 22 of the printout that I have, is likely the only scenario where a judge may properly avoid articulating why alimony is not warranted where the judge denies alimony is where the denial is pursuant to a valid separation of being independent from or incorporated into a divorce judgment. However, with a separation agreement providing that no alimony shall issue has been both incorporated and merged into a divorce settlement objection, first, evaluate a later request for new or modified alimony under the material change in circumstances standard, which we knew from the Chin case, and with the material change in circumstances warranting a modification is found when the judge should proceed according to a three step framework. The big change here is that the party separation agreement was incorporated and merged into the judgment of divorce. Under the relevant provision, the parties waved only past and present alimony and expressly reserves the right to future alimony. So the courts position in Cavanagh was that a new award of alimony after the entry of the divorce judgment would not require modification because [inaudible] running was reserved and therefore it does not require finding material change in circumstances. So I hope you were all able to watch the Cavanagh CLE that took place last month, there was a significant amount of discussion around this issue, and how Cavanagh impacts modifications essentially if you're waiving past and present alimony but you set the alimony amounts at zero rather than saying you reserved future alimony, set it at zero, then the standard of the material change and circumstances would apply. The problem with that, though, is it starts the clock on the durational limits. So, there's a bit of a window, it should be [inaudible] the lawyers, there are a lot of room for argument on that issue as to whether or not you want to set the amount at zero, start the clock on the durational limits or risk a complaint for alimony down the line, this doesn't have a more rigorous standard of material change and circumstances.

>> I'm wondering what you guys think about, so in Cavanagh, right, which is often the case, we had the primary parent being in need of the alimony, but what about a situation where it's not the primary parent who needs alimony? So non-primary parent needs alimony, but then you've also got non-primary parent having a child support obligation to the primary parent, any thoughts on sort of how you would tackle that situation? Because to me, Cavanagh is kind of like, yeah, you could do a post-income, post-alimony, pre-out, you know, calculation of the child support, but I'm not so sure that it would give you the same insight that it does when it's the same parent who needs the child support or is entitled to the child support of the same parent who has the need. You may have any thoughts about that?

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>> Lots of thoughts.

>> [Inaudible] would like to share.

>> No, so I mean, you know, when you think about the one thing that was prevalent in Cavanagh that, well, there was many things, but you kept seeing over and over again was the phrase which, you know, the child has a right to be supported, right, as fully as possible. And the case talks significantly about the deferment of income, you know, the reason that they were including, for example, employer contributions in income in child support was because deferring income to retirement age doesn't benefit children now. So I think, if you look at Cavanagh, and this is just off the top of my head, because you just pose this question. If you look at Cavanagh, and the answer to your question about the payor may also be the one in need, I would think the first question would be what are the needs of the children, and that would probably be a situation where perhaps you would run child support first, maybe you run alimony, and then you run child support on the recipient receiving the alimony, certainly I love to hear from Judge Black on this. My first thought is approach the case from the needs of the children.

>> So just to weigh in briefly, one of the things we talked about yesterday that I think might be appropriate to mention here is that these are the types of variables that even though we have the Alimony Reform Act, and we have the child support guidelines, and now we have Cavanagh, all of these tools give us benchmarks and guideposts in which to operate. And so at the end of the day, what I'm kind of left with is taking all of these various analysis that have been done. And then as we were talking yesterday, I kind of have to give it one last look to make sure that it's equitable, and so I think I can't give you a specific yes or no, but what I think this does is particularize each particular case. And so I'm going to have to take all of the calculations into math and then look at it to see, all right, so if one person is going to be the one paying the child support, then how does that work at the end of the day if they are also going to be the one receiving alimony, which, of course, is not, you know, is a variable, it's a possibility. So the best that I can tell you is right now, is that that's something I'm going to look at each analysis, and then I have to go back at the end and say, looking at the whole picture, what's going to work best for these parties? Because it is, it's an interesting concept that you bring up, because when we're talking about the same person receiving child support and alimony, but then we're talking about a different person paying the alimony in a different person receiving it, so you're weighing the needs of the children on one side, and then the needs in the ability to pay on the other, so it's going to be a big exercise, at least that's the way I look at it. And I'll, you know, depending upon how I decide, I have to justify that so that it's not one quick trip back up to the appeals court. So, I think that it's all I can tell you is it's going to require a lot of, you know, a lot more thought. And so again, the more information you can give me about your family and how you or family operates, those are the things that helped me, that you know, the real world is to how people are functioning, that's what helps me, because in the end, that's how I'll be making the decision, if that helps.

>> No, I think it does. And not to put anybody on my panel here on the spot, but I wonder if we could talk a little bit about the Young case, I think it is. Jennifer, I don't know if you want to sort of jump into that as we're talking about modification and sort of, to me, Young was one of those like aha moments we say to a lot, too.

>> Yeah. So I submitted in the amicus brief on the Young case files on the losing side, because I'm arguing on behalf of them, either.

>> I did not notice what I just asked you to discuss.

>> Yeah, yeah. I did submitted an amicus brief for the Women's Bar Association, so really, really, very, like thumbnail sketch, the facts for the parties were married long term, again, about 24 years, they -- the husband was a very high-level executive at a financial firm, he had multitude of areas of compensation varying forms, everywhere from a base salary, to a bonus, to stocks, to investments, to real estate, I mean, just many, many different components. And his income was north of $5 million dollars consistently at the time of the, actually, the modification trials income was north of $7 million. So the issue was never ability to pay, the issue was what was wife/mothers need for support, and what standard are you applying? And the Young case really just sort of laid it out there. In that case, there had been a variable alimony award where wife would receive x percentage of husband's income and as his

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income change, so did her alimony. And the court said, no, you can't do that. There are circumstances where that may be appropriate, but they're not here. And the reason why they found that was because they said that the touchstone of alimony is need first. And the need is based upon the lifestyle of the parties lived during the marriage, not the lifestyle that a spouse may have been afforded if they had stayed together and continued to be married. So in this case, although he ended up earning, you know, five, six, $7 million a year, it wasn't what he was making at the time of their marriage and the time of their divorce, and so the court basically said, she doesn't have a right to continue to partake in that elevated standard of living, her standard of living is based upon what her needs would have been to maintain a lifestyle that they had during the marriage. And so therefore, if she couldn't have a variable alimony award that was sort of self-adjust as the husband's income increased. And so it just kind of this constant reminder, right, and this is hard for clients, I think, to accept that circumstances change for the better for their former spouse, why can't they share in that? Well, because the partnership ended and the divorce cut off your ability to be entitled to any of that. Higher income can certainly impact an ability to pay, which can make it easier for you. Higher income could mean there's more available income to satisfy an alimony award to help you maintain that lifestyle during the marriage, but it doesn't entitle you to live the elevated lifestyle. And so that was sort of one of the components of Young that kind of, it really drilled that home that you really are looking to what was the lifestyle the time of the marriage.

>> And I think what I sort of took from Young is I think we've all been practicing long enough to remember that every time the ex got a significant increase in income or, you know, was seen driving a new, you know, the new modern car, or whatever, your client would come to you and say, I want a modification because they're making more, and I think Young put a stop to that.

>> Yeah. Yeah, I think you need some unique circumstances to be able to continue, to be able to benefit from that post-divorce.

>> So, OK. And then the other case, I think, would be good to discuss and the name of it completely slipped my mind, so if Judge Black can remind me or what have you. But, you know, Rob was talking about, you know, the difference between modification of an existing alimony award and addressing alimony for the first time, and I believe it was a case that came out a couple of years ago, I think it was a divorce in New York, and alimony hadn't been addressed at all in the divorce. And so that was a case where I believe the wife filed, you know, post-divorce for an alimony award in Massachusetts and the former husband said, no, there's no change in circumstances for modification. And the court said, well, actually the divorce agreement out of New York, I think it was out of New York, didn't address alimony at all, making that actually a case where alimony was requested for the first time. I just can't think of the name of the case, so I apologize.

>> John blinked too.

>> I know.

>> Is that the [inaudible] Clemens case? Is that one talks about a silent alimony mother and said that it should be treated as the same as a $0 alimony order, but I think Cavanagh comes along and says something different [inaudible]. Is that the one?

>> I cannot remember. I just remember that that, you know, in reading it, and maybe it was the case, Rob, because it talked about, you know, these people had gotten divorced, I think it was in New York. And, you know, the court there, you know, the parties were silent on alimony, the court was silent on alimony, there was nothing about alimony. And then, you know, they're living in Massachusetts and the wife, I believe she filed a complaint for modification, and the court said, well, you filed a complaint for modification, but we're really going to treat it like a complaint for the first time on alimony. So we're deciding it for the first time, there doesn't need to be a material change in circumstances. And I think that goes to what Jennifer was saying earlier about watch the language in your divorce agreements and your separation agreements. Oh, you're on mute, Jennifer.

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>> Oh, thank you. And read the divorce agreement carefully when somebody comes to you and says, now I want alimony or I want to modify my alimony. Because, you know, just make sure it's merged provision because it could be surviving, and so make sure it's merged, check the language and think about what standard do you need to meet? Is it, you know, you're setting alimony for the first time and you just have to look to the statutory factors? Or, is this a material and substantial change in circumstance? And if so, what do you have to allege for that? I'm sort of curious too, how do people, when somebody comes to us as well, now I need alimony because my child's emancipated, right, foreseeable change in circumstance, is that sufficient to support a material and substantial change for an alimony when it was never set the first time, you know, or if it was, if it sort of was set at zero the first time so technically was addressed, but it wasn't actually awarded, I think there's, you know, different people have different views on that, right? Like some people say, now, it's not a change in circumstance, because it's foreseeable change. And other people say, no, there's a change in circumstance, so.

>> Yeah. I mean, and that's a tough one, because if you're representing the, you know, the payee, in a child support case, you're going to, you know, you would love to get language in the divorce agreement that says, you know, upon child support, you know, terminating that is a material change in circumstances to seek alimony. And I think also, I think we were all at least pre-Cavanagh, we were sort of running the numbers, you know, in our minds, you know, the years, like, well, if you're dealing with, you know, a teenage children, you were thinking, OK, well, you know, it's child support, and then alimony, maybe we go right to alimony, alimony is no longer tax deductible, so it's not the same issue it was, you know, pre-2018 where you were looking, you know, should we call more of an alimony because there's more available dollars for the family when we have this, you know, tax deduction. You know, post-2018 we didn't have that anymore. So, you know, if you have a short-term marriage, and you know, young kids, you might be silent on whether that's even a change of circumstances, because it's going to be child support for, you know, 18 years. So, it just, you know, think about it, though, think about it when you're doing your drafting or, you know, when you're reading an agreement that somebody brings to you looking for a modifications, you know, read the whole agreement too, not just the section.

>> Yeah. Thank you, guys.

>> One thing from the young kids, I'm just because, the panel, I noticed the court says that there may be cases in which a variable or contingent award of alimony is warranted, but it will be the exception rather than the rule. I don't think it enumerates what kind of cases those would be, so any [inaudible] any thoughts on what the court is speaking to or --

>> If I had to guess, I would say, and I said Judge Black unmute, so I bet I want to hear from her before I assert my gas. But I was going to say that if you have somebody that perhaps their entire pay is commission based, and you know, you've got somebody who's maybe in sales, and I've definitely done a couple of those divorces where their base salary is nominal, and/or they're all commission, that might be an area to do a self, I don't know, judges.

>> You know, it's very interesting, because one of the things that we think about is sometimes the old saying everything old is new again is, you know, and it's a really interesting intellectual exercise, right, and I think they elected not to close the door 100%, because once you close the door, it's harder to open it. But if you just say, we're not closing this door, and because ultimately, we always come back, you know, all and I've been taking lots of notes here just on varying viewpoints, but you know, the issue of alimony, we always come back to, you know, that need, right? So that's kind of that, we're always coming back to that. And then, we still have that issue of discretion and we don't know where that's going to fall because we don't know the facts of the case. So, we've left a couple of windows open, we're always thinking about need, and then it's always fact specific, because I think there may be a possibility where certain times alimony is going to be awarded, just because of the particular facts of a case and it's not going to be as far reaching. But that's why facts keep coming in. And the more facts I have, you know, the better. But I think that just to, you know, address the issue of Young, I think they left it open, but that's, you know, just a thought.

>> Yeah. And I hear Judge Black saying, you know, the court has discretion, the court has discretion, and this is also one of the things we talked about in our planning call was, if you want to have control, if your client wants to know what's going to happen, then they need to settle the case.

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>> Right.

>> Right?

>> It's very true.

>> You never know what a third party is going to do, and by that, I mean a fact finder, right, whether it's a judge or an arbitrator, you never know what they're going to do, you don't know what facts were going to hone in on, and nobody knows your case better than you and your client, because it's your client's life, so they've been living it. And when you go through it with them, you learn so much, and there's things that may never come out in the courtroom, whether it's because of evidentiary rulings, or because it's hearsay, or because, you know what, you've only got a finite period of time and you can't possibly cover every single detail of their marriage in their life and why this is more. And so, you know, as a practitioner, when you go to trial, or you're already hearing, you pick what you think are the most salient facts for the court and, you know, it could, within those confines of the rules of evidence, and you hope that those are going to get the message or give a clear enough picture of what it's really like for your client that you just don't know, you just don't know.

>> And I think that it does an important lesson, I think, especially, you know, for young attorneys is that you want to advocate for your client as zealously as possible and give them all of the opportunities as that they can have. But they also need to understand that each opportunity that they elect to exercise comes with a cost, and that's the cost of the unknown of what I might do, and it's hard, it's a hard thing for clients to understand, but it's a risk. And I think it depends upon, you know, how much risk a particular client is willing to exercise because these are all new things, you know, for us as well. And I spend a lot of time, you know, rereading the section over again, looking at the financial statements, trying to figure out what works best and the clients could eliminate those variables by settling, no one's ever happy with a settlement, but you know, no one gets what they want, but you can prioritize, so it is. And the more we talk about it, I think that our participants here today will realize that there's a lot of options, a lot of options. Like, you know, I was thinking when you mentioned that, Rob, about Young, I could just envision myself in the courtroom hearing the information, taking notes, kind of formulating where I'm going, and then boom, you know, an attorney shoots that into my mind. I'm like, right, you know, so it's exciting, but it's challenging.

>> Sorry, Jennifer, just before you speak, one of our viewers put in the chat box, and it's starting to ring a little bit of bell here, is Barnes v. Gorman, May of 2022, allowed the loss of child support due to emancipation determined with sufficient material changes circumstances for considering implementing an alimony order for the wife. And I do remember, as we were talking like, I swear this, I just read something on this. And that's sort of another tip I would give too is, you know, we all get caught up in our day to day, and I certainly have not come across a single divorce practitioner right now saying, yeah, I sit around with nothing to do, I need more work, right, we're all sort of drowning. But if you can take that time to sort of jump on Lawyers Weekly, or just look and see, you know, what's come down, at least something that's, you read it once to kind of tickles your brain and you can go like, I remember a case, so that's the Barnes v. Gorman case.

>> Thank you.

>> So, it was tickling my brain, so thank you. So Jennifer, I cut you off, you're about to say something.

>> Oh, I was just going to say my little soundbite is that facts matter and the law matters, right? The judges implementing a court of law, and we as the practitioners need to take the facts that we have, not the ones that our client would like for us to have, but the ones we actually have, and make our best arguments to comport with the law, right? You got to be aware of both. It's not enough just to have the law, and it's not enough just to have the facts. So it's great when your facts align with the law, and that makes it a lot easier, you know, to argue and to advocate. But yeah, I mean, they matter, right, it matters and just need to be aware of both of those things, for sure.

>> Yeah. You know, I was wondering one thing, I'd like to know what you folks thing, is the scope of the type of information that I received during a temporary order is very different when the matter goes to trial, whether certain

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pieces of information like that come in. So I would be interested knowing how you folks elect to manage that in real time when someone is saying something for a temporary order that may influence me but, you know, we all know that if the matter ends up at trial, it's unlikely that that would come in as a piece of evidence. So, just mentioned briefly how you might handle that, because these facts are, you know, there's a lot of facts of the temporary orders and a lot of stuff is being, you know, given to me, so just spend just a second on that.

>> Rob, do you want to go first?

>> Sure. Yeah, well, I think one mistake that a lot of young practitioners make when they're first starting is you're nervous, you're going into court, and you get your script, and you want to get all of your bags out in front of the judge, because you think that that's, you know, what the court cares about, there might be something that you mentioned, if your head is down, you're looking at your script, you're not reading the judge and reading the judges reaction that you're going to miss, because a lot of times if there is something interesting that, you know, you can see it, pick the judges interest, and they might not always ask that follow up question to redirects you to it. So you have to be able to think on your feet and pivot there. And by the same token, when your brother or sister on the other side is presenting their case, presenting their motion, you need to be reading the judge as well. So, you know, you can't be off to the side talking to your client because you could miss something that the other side says that piques the judges interest, and unless you come back and say, oh, you know, judge, we have facts that actually, you know, counter what my sister is saying, what my brother is saying, that could really have an impact on how the judge rules on that motion without having any evidence presented because it's a motion for temporary orders.

>> Right.

>> And I would say that one of the most important things you can do before you even step into court is having a really good conversation with your client. You know, what is the worst thing that your spouse can say about you, you know, nobody wants to talk about that, you know, but if they know it, they're bringing it up. So, you know, in a perfect world, you do a motion, there's an opposition motion, you know what everybody's going to say, walking it, but you don't always.

>> Right.

>> So have a conversation with your client and say, you know, have a sense of, you know, so even if it's not true, if somebody says, you know, well, he or she, you know, complains that I drink too much, or you know, I'm an alcoholic or something, flesh that out, because your own client can be in denial so be prepared to address that. And one of the things, I know, we're sort of getting off topic, but one of the things that I talk about with clients when they're accused of having a substance abuse issue is they say, you know, a judge would much rather hear you say, I have an issue, and I'm working on it, than be in denial, but those are all the conversations you want to have sort of going in, you know, like if you need alimony because you can't keep a job, because you have an alcohol or a drug issue. You don't want to hear that for the first time from opposing counsel standing in front of the judge.

>> Yeah. I mean, I agree with what Rob and Julie said, I also want to sort of speak more to, a little bit more about what you were asking judge is, how do you pick and choose the evidence that you present at a motion hearing and representation when rules of evidence most likely wouldn't allow some of that to come in. And the way that I deal with that, as I really tried it, I'm kind of in the mindset that nobody should be prejudiced at a motion for temporary orders hearing. So if I've got the other side saying the child reports this, that, any other thing or, you know, this is what the evidence is going to show and I know that there's no backup for it, that kind of that gets me going, like I get upset by that, because I feel like it's just, it's not fair, so it's something that I try to avoid when I'm arguing, I try to keep it to what would reasonably be permissible. But that's a lot easier to do on financial matters, because going into a motion for temporary orders hearing on alimony, I'm going to know my client's financial picture and I would have reviewed bank records from both sides. You know, I've gone through documents and can sort of say, you know, I can back up what's on that financial statement. And remembering, you know, you're signing that financial statement on, you know, saying that you're not aware of anything that's inaccurate or false on there. So, I've taken the time to go through that. And so then to me, it's like the other side's throwing something out there that I feel like, wait a mi-

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nute, you know this just doesn't sound accurate, I've got my own little cheat sheet where I'm like, no, this is what it really, this is what the documents really show. But it does get tricky, though, I think with parenting issues, because people get a little fast and loose with that this is what the child's reporting and judge would never hear that absent a guardian ad litem report, you know, or maybe art counsel, the child is older, or the children are older, so it's hard to navigate, especially when your client wants you to, you know, to say all these things that are relevant but not necessarily admissible, right, it's hard.

>> Yeah. No, that's a really good point. And I mean, and they're talking about what the child's saying, you better be in there asking for a guardian ad litem or art counsel or, you know, probation to be interviewing somebody, as opposed to just sort of a free for all of, you know, this is what the kid is seen and observed, et cetera.

>> Right.

>> So, all right. Well, we're going to take a break here. So we'll take about a 15-minute break and then we will be back. And Rob is going to talk about alimony provisions in prenuptial and postnuptial agreements.

>> All right, so prenuptial agreements. Take a step back and start with some of the basics here. In order to be upheld as a valid prenup under Massachusetts law, it must be both fair and reasonable at the time of execution, and conscionable at the time of enforcement, also known as the second look. So the first case we're going to delve into here is Rosenberg v. Lipnick. Rosenberg v. Lipnick, 1979 case, this established the fair disclosure rule requiring that each party to a prenup fully and accurately disclosed their assets to the other party prior to executing the agreement. And that disclosure has to be something more than just a certain saying the parties acknowledge that each has fully disclosed their finances to the other. What it means, in order to contain a fair and reasonable, what it means is to be able to answer the question, does the agreement contain a fair and reasonable provision as measured at the time of the execution, or the party contesting the agreement? Ask yourself, were the contesting party fully informed of the other party's worth prior to the execution of the agreement? Did that party have or should they have had independent knowledge of the other party's worth? And does the agreement set forth a waiver by the contesting party? And the best way to deal with that is attaching exhibit pages that lists the assets and the value of those assets. You can attach a rule 401 financial statement, but that simple language of stating that the parties disclose their assets to each other wanted in this case. The monetary provisions in a prenup should be considered with reference to factors such as the parties respective birth, ages, intelligence, literacy level, business acumen, and prior family ties or commitments. So, further flush out that unfair disclosure is the Rostanzo case, which found that the full and fair financial disclosure is a significant aspect of fair dealings between parties entering into an antenuptial agreement and an essential prerequisite for a meaningful waiver of marital rights. There's also the Allen v. Allen case, which is an unpublished 2016 case, [inaudible] decision, in which the appeals court refused to enforce a prenuptial agreement that had been entered into by an English-speaking husband and a predominantly Portuguese-speaking wife. And although the wife had obtained the assistance of a Portuguese speaking attorney before signing the agreement, that attorney who did not practice divorce law, had merely read the agreement in Portuguese, and had not given her any independent legal advice concerning the terms of the agreement, and so the wife did not truly have the advice of independent counsel before signing that agreement. So, full and fair financial disclosure is the foundation for creating an enforceable prenuptial agreement. It can include exchanging federal and state tax returns, trust instruments, any other similar pertinent financial information you can exchange, paystubs you know, similar to the rule for time disclosure, in order to make the agreement enforceable. Next, we have the Osborne case. This is a 1981 case in which the SJC upheld the fair disclosure rule on the Rosenberg v. Lipnick case and added a second crime to the analysis, which was one of the agreement very reasonable at the time of the entry of judgment. The Osborne court also stated that an agreement might be modified by courts in certain circumstances, such as where it's determined that one spouse is or will become a public charge where a provision affecting the custody of a minor child is not in the child's best interest. And the second requirement was further modified as well after Osborne. There's Pisano case in 2014 stating that the husband's partial waiver of alimony provided alimony for husband funded from a wife's separate property only, without such alimony has become a public charge. After that, we had in 2002, there's the DeMatteo case. This was an appeal after the probate court found that the prenuptial agreement was invalid. The SJC reversed the probate court's decision, setting Rosenberg v. Lipnick and Osborne vote to determine whether the prenup is fair and reasonable, but distinguishing that the considerations that permitted judge to conclude that a separation agreement is fair and is dif-

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ferent than it is in a prenuptial agreement. The SJC held in DeMatteo that the standard in that second look test, edited by Osborne, is more appropriately described as a conscionability test, so it's distinguished from a fair and reasonable test, there has to be something more. In reviewing the prenup to determine its enforceability, maintenance of lifestyle and standard of living enjoyed during the marriage are not factors taken into consideration when you're talking about a prenup because there is no marital lifestyle yet the parties are aware. Next we have the Korff case. Korff is a 2005 case in which the probate court judge found that the agreement to be both valid at the time of execution and at the time of divorce under the DeMatteo viewpoint analysis. The judge fixed a set alimony amount to be paid over the life of the prenuptial agreement, and the court found that this was impermissible given the clear language of that agreement. It stands for the proposition that once a prenup is bound to be a valid agreement, the judge is obligated to enforce those terms as written. Next we have a 2005 case, this is the Austin case. In the Austin case, the husband appealed the probate court's finding that the intellectual agreement was invalid as to the alimony waiver and awarded alimony to the wife. The SJC decision, they cited to DeMatteo finding that it was fair and reasonable when that was entered into and it was also valid after that second look. In upholding the agreement, the court pointed to specific provisions in the agreement included in there that were beneficial to the wife, and some of those provisions included relocation support from the husband if there was no jointly owned marital home at the time of the divorce. Court also noted that the wife's attorney was the drafting attorney to the agreement that was executed. So after advising the wife not to sign a prenuptial agreement prepared by the husband's attorney, or its attorney prepared one and that ultimately was the agreement that was executed by the parties. The court announced and reiterated that the terms of a valid prenuptial agreement must be enforced unless circumstances exists, such as the mental or physical deterioration of the contesting party, or the erosion of the promised support due to inflation would lead the court to conclude that enforcing the agreement would leave the contesting spouse without sufficient property maintenance or appropriate employment to support themselves. And so the key there is a couple of factors, but the wife's attorney drafted the agreements of the wife to never say in this and also the specific provisions that were found to be beneficial to the wife for the Austin case enumerates what those provisions are and that's really what the court's decision is on there. Next, we have the Biliouris case, this was a 2006 case, another one with a similar outcome. The court concluded that the waiver of the alimony provision in the premarital agreement was fair and reasonable at the time of its execution. In that case, the contesting party was an educated professional, much like the wife in Austin. It demonstrated an earning capacity at the time she executed the agreement, which was also the case in Austin. Although the parties agreed that the wife would lose her job in order to be a stay at home mom upon marriage, there was nothing in the record, in Biliouris, to indicate to the court that the wife would be incapable of working and earning income to support herself in the event of a divorce. Also, the agreement provided that the wife's separate premarital property, which was valued at approximately $100,000 in appreciation there on would remain her property and not be incorporated into the marital estate or subject to division. We're getting to some prenup issues in a little bit, but for now, let's talk about postnuptial agreements. So in postnuptial agreements, the common misconception that each party is required to have separate counsel, and of course, it's not a requirement, but it is much more likely to be deemed enforceable if the parties do have independent counsel drafting the agreement. Some states do require that both parties have separate counsel, like Massachusetts. One of the reasons that it's so important for the parties to have separate counsel is that it affects the analysis on several factors considered in determining whether or not the postnuptial agreement is enforceable. So, specifically, it's relevant to the courts analysis when we're talking about collusion before disclosure of the financial or the assets of the parties, the waiver of the rights that the parties are giving up in the postnuptial agreement, the fairness and reasonableness of the agreement at the time that it's executed, and the fairness and reasonableness at the time of divorce. So in the Fogg case, which was a '91 case, this was the first look at a so called postnuptial agreement. In this case, the court declined to look at the validity of the agreement or the postnuptial agreements generally, but stated that if they were validated, at least have to meet the same threshold requirements as prenuptial agreements and separation agreements. The agreement the parties entered into in this case was not free from fraud as it was signed as a result of the wife's implied fraudulent promise that she would attempt to preserve the marriage, OK, so the court found that to be invalid. Next, we have the Ansin v. Craven-Ansin case, which is a 2010 case. In this, the SJC granted direct appellate review to determine if postnuptial agreements are contrary to public policy, and if not, whether or not the agreement at issue in this case was enforceable. Court found that while marital contracts are not the product of a classic arm's-length bargaining, it does not mean that they're inherently coercive. They do have more strict requirements than prenups and separation agreements, however, a differentiation from the Fogg case that we just talked about. In Ansin, the court found that marital agreements are different than prenups and separation agreements, and therefore have to be carefully scruti-

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nized. You must determine at a minimum if each party had an opportunity to obtain separate legal counsel of their own choosing. Two, if there was fraud or coercion in obtaining the agreement. Three, if all assets were fully disclosed by both parties before the agreement was executed. Four, whether each spouse knowingly and explicitly agreed in writing to waive the right to a judicial equitable division of assets and all marital rights in the event of a divorce. And five, that the terms of the agreement were fair and reasonable at the time of execution and at the time of divorce. So where one spouse challenges the enforceability of the agreement, the spouse seeking to enforce the agreement bears the burden of satisfying these five criteria. Additionally, just getting back to Ansin for one minute, the timing of the alleged question was also very important as illustrated by the facts in Ansin. In Ansin, the parties encountered marital difficulties, went to a marriage counseling at the end of 2003. Early 2004, the husband told the wife that if she wanted to continue with the marriage, he needed her to sign a marital agreement due to his uncertainty about her commitment to the relationship. This caused the wife a great deal of stress, he responded that the conversation made her physically ill, that she would not sign one, the parties then separated for six weeks. During that time, the husband told her that if she would sign the agreement, he would recommit to the marriage. In order to save the marriage and preserve the family, the wife agreed to do so. The husband moved back in and the parties went on a second honeymoon. So, these facts would have supported the fact that the wife was coerced into signing the agreement if she had signed it at that time, however, she signed it later in the events occurring. After that, a very important, April 2004, both parties retaining their own counsel began negotiating the agreement. The wife's counsel was able to negotiate some terms that were more favorable to the wife. Eventually, the parties reached an agreement and signed it. And on other things, the agreement stated that the parties intended for the agreement to be valid and enforceable, and to limit the rights they would otherwise have, or that they were aware of these rights were general counsel, they executed the agreement freely and voluntarily. It also states that they were fully satisfied that the agreement would promote marital harmony. So in analyzing that coercion issue, the court focused on those subsequent facts, acknowledge that the agreement was a product of lengthy negotiation between the parties that they were each represented by counsel. And according to testimony by the wife's counsel, wife and intended that the agreement be enforceable, counsel was able to negotiate favorably for her and obtain significant gains for her in the negotiation. Court decided that this was evidence that was clear that the wife had made an informed choice to sign the agreement as opposed to coercion. Next, we'll move on to the Conners case, this was a more recent one, this was 2018 case. This was another rule 128 decision. The court found that the postnuptial agreement was fair and reasonable at the signing, was not a product of duress or coercion, which was the wife's burden to prove, the parties had waivers, statements that they were aware of their marital rights under Massachusetts law. A court remanded only for the judge to determine whether the agreement was fair and reasonable at the divorce and to determine if the husband breached the agreement, resulting in an award of attorney's fees to the wife. The court also stated that among the factors the judge should consider are the financial and property division provisions of the agreement as a whole, and if the judge deems appropriate discretionary factors set forth in Chapter 208, Section 34. So, some issues in postnuptial, prenuptial agreements as they relate to alimony. Whether or not you want to have an alimony provision in a prenuptial agreement, that's an incremental payout. Excuse me. Incremental payout versus a lump-sum alimony payment. And part of this will just depend on who the parties are in the agreement. You have prenuptial agreements that are signed by people who are trying to protect family assets, and they're very young parties where their income down the line might not be as certain than the other parties. They're signing a prenuptial agreement in different rooms where maybe it's a, you know, a companionship marriage later in life, both parties are coming together, they already have children and they're just looking to protect those assets for the benefit of their children. So in a lot of instances, client may wish to avoid leaving any matters to chanced to the court, so it might best serve the clients to negotiate a lump sum in an appropriate amount in the event of a divorce, after one year of marriage, two years of marriage, you know, even had it adjust depending on the length of the marriage what that lump-sum will be, you can have it in five-year increments, and to pay out that way to see a fairly common arrangement. And then in this way, the obligation upon divorce can be established with some certainty. In other instances, it's appropriate to establish an alimony obligation. You know, if the parties are younger, it might make sense to do that five, 10, 15 kind of step up increments, if the parties are a bit older, it might make sense to have shorter increments to pay out those lump-sums. Additionally, while the proponent might rely on the material to provide those minimal amounts, counsel for the responding party has to be aggressive in asserting the need for their support commensurate with the party's lifestyle. Additionally, there are tax considerations that you have to make back in, I think it was 2017, there was a change to the tax code where alimony payments are no longer federally deductible. That's just the state of the law right now, there's no knowing if that is going to change in the future. So when you're drafting your prenuptial and postnuptial

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agreements, you want to make sure that you have that flexibility in there in case the pendulum swings the other way and it reverts back to the way things was, still account for those changes in the tax code. And additionally, we talked a lot about the Cavanagh footnote 9 in the language regarding future alimony. You know, there are still prenups out there being executed where it's the wave, you know, past and present alimony and they reserve future alimony still, so you want to make sure that you are accounting for those Cavanagh footnote 9 situations where you may want to set the alimony amount at zero in that instance that you can start that durational clock. That's all I have. I don't know if panel wants to discuss some of these issues [inaudible].

>> I'm sure we do. I'm sure we do. Jennifer and I do a lot of prenups together, actually. I always like to say we do things together, even though we're on opposing sides. I think that we do a better service to our clients with that mentality, that we have a case together as opposed to against each other. So we have quite a few that I know Rob you and I just had one.

>> [Inaudible] to understand sometimes too, because that's sort of benefit.

>> It is a benefit, yes. You know, what sort of comes to my mind right off the start of prenups and postnups, especially prenups, is I have yet to have somebody not start a conversation with, I just need a simple prenup. That, you know, there's no such thing, there's this complicated and significantly more complicated. You know, a lot of times people will talk about prenuptial agreements being unromantic, and I actually think they are a great opportunity to have a discussion about expectations in the marriage. And I know you touched on a case there, Rob, where, you know, the wife was self-supporting at the time they got married and then, you know, she agreed to stay home and with the kids, I like to explore that right off. What are the expectations for this relationship? You know, if it's a traditional husband, wife marriage, and I have the husband, I asked him, what are your expectations, you know. And if I hear, oh, well, you know, I assume she'll stay home with the kids. I always ask, what value does that have, in your mind? Because it's easier to discuss that in the love hate that I call it, then it is, you know, 10 or 15 years down the line when you're no longer perhaps in you know, happy with your partner, but I think those are things that need to be explored right from the beginning. And I think it's even more complicated if you have, so the first thing I would say is, a lot of times you have somebody say, well, you know, I'll be getting child support, so I'll just waive alimony. You don't know that you're, you know, if you guys have kids, you don't know that you're going to get custody, anything could happen down the road. So, have that conversation. Don't presume that it's easy to wait, you know, just going to waive alimony, because it's there's, you know, there'll probably be child support. You know, the second thing to consider is when you have people who own their own business and you're seeing provisions in the agreement, such as any income each party earns during the marriage belongs to them. Well, is that effectively an alimony waiver without saying it? I don't know, Jennifer, if you want to weigh in.

>> Yeah. I think, just generally, I don't like to do alimony waivers in prenups. I may do it in a postnup, depending on what the circumstances are. In terms of does that language actually constitute an unknowing alimony waiver, I think an argument could be made, but it does, and so you just have to be really careful about what you're excluding, right, because I know in a lot of prenups under the standard language is that they're each keeping their own property that they bring to the marriage, provided the language [inaudible] and any income generated from that asset, right, that separate asset. And if it's potentially going to be an alimony case, or you're not sure, but you're reserving the rights, you need to be mindful about that language without excluding any all income from that separate asset. Because if someone's a business owner, and you're getting married to them, and you're keeping future alimony open, but you have that language up at the top that says a separate asset shall be defined as any business interests, including, but not limited to any income derived therefrom, you've essentially waived the ability for alimony, because you're saying that anything derived from that business is going to be excluded. So, I think the trick with prenups, for me, is always that they're really dense. And no matter how much we strip them down and try to make them plain English, there's just a lot that needs to be put in there, and you need to define every little thing, what's the date of marriage, what's the date of termination of the marriage, what's separate property, what happens to joint property, what happens if somebody uses a piece of separate property to acquire joint property? And so there's just so much to cover that I think you as a practitioner does really need to be aware of your drafting and what you're potentially intentionally excluding and what you're potentially unintentionally excluding. That's sort of how I look at it anyway. I think that the thing about, you know, alimony and prenups, again, like Julie said, well, you know, we're going to

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have children, I'm going to waive alimony. You don't know. You hope to have children, but you don't know, and you don't know if in the event of a divorce, who is going to end up with custody, and how that might impact in child support/alimony. So I think that, yeah, I always counseled people not to waive alimony, unless they're both like, you know, coming into it with millions and millions of dollars and it's just kind of like, you know, there's ever going to be a need, right, I mean, that's a little bit different. But generally speaking, you have other second marriages where people want to protect what they have because they've gone through this before, or you have a young couple where maybe they themselves have acquired assets at a young age where their family is trying to protect future inheritances or trying to do some succession planning with business, family businesses, and real estate portfolios, and they want their child to protect, you know, and have a prenup. So, yeah, it's interesting. Postnups are totally different, though, right? I mean, at that point, it's a different standard, they have this fiduciary relationship to each other. They've been together a certain period of time, so then you're looking, let's just say it's a 10 to 15-year marriage, and they're questioning whether or not it's going to survive, which is most often the case of postnups, although I have seen cases where it's like a family member is willing to pay for something for their kids, but will only do it if they have a postnup, like what, OK, when I seen that kind of weird thing happen. You have to be really mindful of what your client may be giving up by doing alimony waiver or agreeing to a lump-sum alimony buyout. I thought it was interesting that, Rob, you had said, you know, maybe doing like, you know, reaching a milestone, so there's a little fly, reaching a milestone and then, you know, doing a lump-sum buyout based upon that, it makes me nervous, because you just don't know what the financial circumstances are going to be at the time. I mean, certainly, if they have a whole boatload of assets coming in, they're probably not going to lose those assets. But if you're talking about a younger couple or a second marriage where one person is the breadwinner and is not, there's a lot of considerations that you need to be thinking about to do that.

>> Would you be even less inclined to [inaudible] inclined to encourage an alimony waiver previously, but now, in light of Cavanagh and the interplay of the analysis that has to take place, would that make you even less inclined to have, especially like a young couple, with alimony?

>> Yeah. I mean, you know, obviously, if you take the lead from your client, but I'm always looking to try to protect it preserve a client's future rights because anything can happen, then I am to limit them. And that's usually the conversation I have with the potential payor as well that you want this to be enforceable, right? You want your prenup to be enforceable, you want your postnup to be enforceable. So, I'd rather you pay a little bit more now, right, or agreed to pay more now to ensure that enforceability down the road, than you try to say, I'm not going to do that, I'm going to pay less, you know, I'm going to only agree to pay less, and I think that's what's fair. Well, what's fair now may not be what's fair in 10 years from now. So, I think you've always got to kind of find that balance, which can be hard.

>> And one thing kind of piggybacking on what you had said, Julie, about one parent potentially staying at home. Another thing I asked all my clients is, do you intend to relocate at all? You know, is there a chance that one of you relocates out of state, and maybe one partner has to change jobs and their income takes a hit, you know, to their new location.

>> Or your prenups no longer, the terms that you negotiated won't be enforceable if they moved to Florida.

>> Right.

>> I mean, so that's a great question to ask, is there a possibility of relocation, and how likely is it? Because, you know, when you're drafting these things, what we consider to be fair and reasonable, another state may not, and/or those laws may be more favorable to one of the parties or the, you know, so you kind of like, yeah, we're moving in three months. Well, after, you know, or my future spouse is in negotiations or has an international company and we want to travel, and blah, blah, blah. Yeah, that's a good question to ask.

>> I'm always wary of the motive in a postnuptial agreement. Is there really a, you know, a good reason to do it? Sometimes you get people who say, we were going to do a prenup, but we ran out of time. And, you know, we want to try to construct something but we're, you know, nobody's thinking about divorce, we've only been married a few

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months. Are you dealing with somebody who's, you know, behind the scenes being promised that they won't file for divorce and they'll keep the family intact if they sign something, which of course is, you know, a form of duress, but I think, you know, and that's why it's at a, you know, a higher scrutiny the postnups, you know, what is the motivation? You know, are you dealing, you know, I sort of look at different aspects, so you're dealing with people that are just on the verge of divorce, and they're hitting maybe an alimony term, like they're at 19 years, and they do genuinely want to keep working on the marriage, but they don't want to go over 20 years. So they feel like they have to pull the trigger on a divorce or they want to stay and work it out but they want to enter into a postnup to sort of preserve their rights. I mean, you could have potentially a postnup that doesn't set an alimony amount, but says, listen, if this doesn't work out, we agree to set the alimony term at 19 years. Those are sort of all the considerations to me, it's motive too. Judge, do you see many contested prenups, postnups come before you?

>> Interesting, I've been sitting for a little over five years, and I would say, not as many as I expected, no. In fact, I'm trying to think, I don't think I've had a postnup, but I do agree with you, the motivation in a postnup knowing that you had all the other opportunities to do it, why didn't that occur? You know, that is an issue. But, there are prenuptial agreements, they're fascinating things from a trial standpoint.

>> Right.

>> They're very interesting. And did anyone mention the timing of them? Did either of you talk about the timing of them? Do either of you want to talk about that briefly?

>> Sure. The sooner, the better.

>> Yeah.

>> The sooner, the better, right, you don't want it, I mean, there's case law that, you know, obviously, that they'd signed literally on the courthouse steps and the court found to be enforceable because there had been extensive exchanging of drafts and negotiations beforehand so it was deemed to be sort of free of coercion and duress. But I like to have as much lead time as possible and have a prenup signed, if I can, 30 days prior, doesn't always happen that way, right? It's usually signed much closer in time, but you've been talking about it for a while. I think that the only time I started seeing postnups, and Julie is going to laugh when I say this, but when there's been a significant change in their asset base, you know, they had a prenup before, then something materially changes in their marital estate, and then the postnup is executed, right? Sort of like, looking back on that prenup, is it now still, you know, fair and reasonable at the time of potential enforcement? And if the answer is no, then I counsel people to do a postnup to bring it more current and protect, you know.

>> Yeah, that's an interesting approach, that kind of solves one of the motivation questions that we were talking about. Something big has happened and we now know that the prenup is not going to survive it, so we'll accommodate for it.

>> Yeah.

>> Right. So I guess we will move on then. Rob, can you stop sharing your screen? OK. And I am going to talk about alimony and asset division and attribution of income. So, OK. OK.

>> Great.

>> So, OK. So we've talked a lot, obviously, about alimony. We've talked about the general laws, so I'm not going to, you know, 34, 53, I'm not going to go through them again. But, you know, I will start off by saying, we all know that alimony is not automatic, you have to have a need, you have to have an ability to pay, and then you start to look at the statutory limits on time and percentages. So, asset division and alimony interchangeable. So one of the cases, 128 decisions, all of these are in your materials, the Schultz v. Schultz case. In this particular case, parties were married for 15 years, when the wife filed a complaint for divorce. In this case, the husband had had a personal injury

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claim, he was injured during the marriage, but the proceeds did not come in or get awarded till either right at the end of the marriage, certainly after the filing. And the judge had included in the marital estate has personal injury settlement. The judge has found that the husband sustained the injury during the marriage, the wife was entitled to 33% of the net proceeds and the husband challenged the judge's division of the marital estate. So one of the questions that comes up a lot in divorce is, when do we start dividing the assets? When is that clock sort of stop? For people who, you know, especially during COVID, some of us have had cases, you know, two or three years, five years ago their assets would have been significantly increasing in the stock market, today, things are taking a dive. So when are we dividing the assets? And so the court here had said, you know, we're dividing at the time of the trial. In that particular case, there have also been no alimony award. So the court upheld this and said that, in making an equitable division of the party's property the judge has available for distribution, all or any part of the estate of the other, and that's, you know, sort of piggybacking on Rob talking about prenuptial agreements. The court can take into account, especially absent of prenuptial agreement, assets you bring into the marriage, assets acquired during the marriage, and assets acquired sort of at the end of the marriage. And the court here had talked about the fact that in this particular case it was all up for grabs in the division. The other thing that was just noted about this case, if you read it, that the court had noted, is that they didn't have a complete record before them because the husband didn't obtain most of the transcripts from the trial. So, if you find yourself at the appeals court, make sure that you're providing a complete record. But contrast that decision with the Savides case, which if you don't know it, it's a really important case. It's a 1987 case, but the parties in this case, they were married in 1956. They live together until 1974. The court noted that they began extramarital relationships, but it was more than that, they had moved on with their lives. The husband in this case, for several years post-separation, even while the wife was living with her new significant other, he was with his significant other, he was paying all of the bills for the wife during these years of separation, and also was giving her $100 a week in support for a period of time. And in all the years while they were separated, so they separated in 1974, now, I think the divorce happened in 1985, the husband's business had grown substantially and he wanted it kept separate, and the wife wanted it divided at the time of the trial. And in that particular case, the SJC affirmed evaluation of the marital estate back at the separation, you know, it was a nine-year separation. So when you're dividing assets, consider the amount of time between the separation and the divorce trial and post-separation contributions of each spouse to the asset appreciation because the court had specifically found that the wife had not contributed anything in all of those years to the growth of the husband's business. So, we're presuming for the most part that asset division is at, you know, the time that the case is settled or goes to trial. But if you have one of those cases where somebody comes to you and says, yeah, we've been separated for 10 or 15 years, we finally want to get this done, that there are factors to consider. OK. Let's talk about inheritance, because I think we all get this question a lot in asset division. He or she either is expecting an inheritance, a parent dies right around the filing or, you know, perhaps an inheritance was received, you know, five or 10 years before and kept in a separate bank account. So let's look at Pfannenstiehl, which has been the subject of much litigation in many MCLE seminars. In this particular case, the parties were married in 2000. The husband filed a complaint for divorce in 2010, and he was the beneficiary of an irrevocable discretionary trusts that had been formed in 2004 and benefited in open class. At the time of the trial, there were 11 living beneficiaries, the husband had a 1/11 interest, totaling about $2 million. The court had found that the husband had a present right to distribution. The trust was speculative, because the terms of the trust permitted unequal distribution among an open class, meaning that it did not say each person was entitled to a specific amount, anybody could go to the trust and take all or some. So the court held that this future inheritance is deemed too speculative to be included in the divisible marital estate and that you couldn't order alimony on something that was that speculative, but you can take it into consideration in your 34 factors when you're talking about, we all know in our pretrial memos, we're answering that question, what is the, you know, what is the future, you know, acquisition of capital assets and income, because that can be used by the court in apportioning the marital assets. That speculative, you can't have it divided now. There was a Frasca decision 2018, rule 23 decision. In this case, the parties were married for 34 years, they lived a lifestyle that was funded in large part by the husband's mother. And the judge found that the wife was completely financially dependent on the husband and his family's wealth, and assigned the wife 35% of any future inheritance that the husband may receive. The court found that it is in the judge's discretion to consider the high probability that the husband would inherit from his still living mother at some point, but he didn't have a vested interest in that inheritance at the time of the divorce, and therefore the judge could not assign the future inheritance to the wife. When something is characterized as a mere expectancy, it cannot be divided. I'm not sure I'm pronouncing this correctly, the Zeh case from 1993, parties were married in 1964. From '70 to '84, the husband's father supplemented their income. And after the father's death in 1984, the husband was to receive $421,000.

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The wife left the marital home, brought an action for divorce in 1988. The time of the divorce hearing, the legacy had not yet been distributed. Holding, while an expectancy, my throat is getting a little dry, sorry, expectancy of an inheritance does not qualify as property subject to division under chewy 34, it can be considered by the judge for an opportunity for future acquisition of capital assets and income. However, an inheritance in possession, and possession clearly stands on different footing. So in this case, it had been inherited but not distributed yet, so it wasn't an expectancy. How does this relate to alimony? 208, 34, in addition to or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other. So alimony and equitable distribution are interrelated remedies. OK. Let's look back in 1986, statutory authority of a court to award alimony continues to be grounded in the recipient spouse's need and the payor's ability to pay were limited in that statutory base. The 2009 Pierce case, which of course, came up before the alimony statute, but it's still good law. In that case, as part of their separation agreement, the husband had been required to pay the wife $110,000 a year as alimony, he later retired and he filed a motion to ask the court to eliminate his alimony obligation. Court reduced his payments. Husband argued it should have been terminated. And the question there was, does a voluntary retirement of employment beyond the customary age of 65 create a rebuttable presumption that alimony should be terminated? And there they said, no, voluntary retirement is simply one factor to be considered by a judge, we're still dealing with ability to pay in need. Now, of course, we have the alimony statute and there's a presumption of the retirement age but, you know, as the judge was talking, there are still things within her discretion. So it's not automatic, but if you need to go beyond that, you have to make a case for it. One question I think a lot of us get is, if we're dividing assets, is there really even a need for alimony? If the other party is walking away with, you know, x amount of dollars in assets, don't they no longer have need? What the courts have said about that is the recipient spouse is not required to spend down their assets to meet their need. So in the Downey case, you have a divorce agreement provided the husband would pay the wife $225 a week for alimony and child support. When the husband was no longer required to pay child support, the husband was ordered to pay $300 a week to meet the financial needs of the wife. At the time of the modification trial back in 2002, the wife had about 101,000 and assets, the husband had 267,000. The judge found that the wife's weekly expenses substantially exceeded her weekly income and that she couldn't provide for her needs, so she had a need. And although she had assets in excess of $100,000, the judge properly could conclude that the wife should not be required to deplete her assets to maintain herself, so need ability to pay. The Doktor case, 2015, on an appeal, the husband alleged that the judge erred by not considering the wife's use of the principle of her assets to meet her reasonable expenses. And the judge considered the party station in life during the marriage, the nature source and value of the wife's assets, her current income and reasonable expenses, at that point, the husband had stipulated an ability to pay alimony and the court concluded that the wife's weekly expenses exceeded her need and she didn't have to deplete her assets to maintain herself. Cournoyer 2017 case, this is citing right back to Doktor and Downey, the parties have divorced after 18 years, the wife is paying the husband alimony, she lost her job and she sought to terminate the alimony. At trial, alimony terminated and the court has said, well, the husband can liquidate his assets to reduce his expenses. And the court remanded saying that this holding that the husband should use his assets was in conflict with Doktor. So again, what we're seeing is if there's an ability to pay, you do not have to deplete your assets to maintain yourself. Attribution of income in alimony cases. What is attribution of income? Income may be attributed to a payor where there's been a finding that the parent, or the person in this case, is capable of working is unemployed or underemployed. Considerations, age, need, and this is also applies to child support, specific circumstances of the parties, education, training, job skills, criminal record, barriers to getting employment, a lot of times you have modifications now where somebody is quite educated and has a extensive earning history but they're dealing with ageism, you know, they can't find a job. All of that gets taken into consideration and whether or not there's going to be an attribution of income. The Schuler case, 1981. Husband's income was approximately $46,000, and two years later, his employment was terminated. At the time of the modification hearing, the husband had not accepted other employment, because instead, he wanted to have his own business. So he formed a consulting business earning about $21,000. Although there were positions in his line of work that paid 24,000 and easily available, husband had decided, and this was based on testimony, not to pursue those opportunities because he had hoped to become a president of a small corporation. The judge found that the husband had not sought new employment, he didn't intend to do so, instead relying on his potential income and as a design engineer rather than his actual income and setting the alimony obligations. It was found it was unreasonable for the husband to wait indefinitely upon a limited prospect of becoming a president of a corporation. The general rule is where the support provider is earning less than he could with reasonable effort, the trial judge may consider potential earning capacity rather than actual earnings. It is not an abuse of discretion to consider those potential rather than actual income. The Macri case, 2019,

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parties divorced in 2008. And between 2008 and 2011, the husband earned an annual income between 700,000 and a million dollars. Case went on for a while because there was an appeal and a remand. So even though he had been making 700 to a million dollars, the judge attributed income of 400,000, husband was unemployed at the time of the trial, finding that he had not exercised reasonable efforts to obtain appropriate employment. The judge had found that the husband was 51, in good health, he'd worked in the financial sector for over 25 years and had voluntarily terminated his job. At trial, a vocational expert witness testified that the husband was highly employable, that over 5,000 positions were available in the Boston area, and that his annual earning capacity was 440,000. These factors led the judge to conclude the husband was unreasonably unemployed. Judge did not err and attributing an income of $400,000 to the husband, because the judges detailed findings demonstrated appropriate consideration of the availability of employment at the attributed income level, the availability of employers willing to hire him and the relevant prevailing earnings in the Boston area. The findings reflected consideration of all the factors required by the guidelines. The Flaherty case, husband, 46 year old professional with a PhD, two months prior to trial was laid off from his job. The time of the trial, he was receiving unemployment benefits and trying to find new employment. The judge ordered him to pay $400 a week in child support based on attributing full-time employment income to the husband instead of the unemployment income he was actually receiving. But the judge made no specific findings in support of attribution, the husband appealed. Holdings there was the trial judge's findings were inadequate to support the attribution of income. Court said it may be appropriate where the judge determines a career change is voluntary, or where a party fails to take a job, despite it's easy availability, but there has to be evidence that income should be attributed in all of the factors were taken into consideration. This case interested me when it came out, still does. This was an attribution case where the court said no attribution, this is the Emery versus Sturtevant case, 2017. This modification was filed at the end of a divorce trial. It's actually a really interesting case, so I encourage everybody to read it. In this case, the husband voluntarily resigned from his employment, he was probably asked to resign, he was having an affair with a subordinate, and he had been making significant income at this job when he resigned. And there was evidence taken that he spent significant time trying to find a job that would pay the same amount and he couldn't. He ended up taking a position, making 135,000, I'm not sure if I have it in the notes here, but that was considerably less than his previous compensation package had exceeded $450,000, and now, he's taking a job making 135,000. The judge's attributed income because of what they considered a voluntary career change, but the appeals court found this to be an error, and they said that the facts of this case are distinguishable from other voluntary career change lines of cases, because the judge was required to determine that the husband could earn more by reasonable effort. And that the reasonable effort inquiry here is critical, and generally the determining factor of whether to attribute income to the party. And the testimony in this case had been that he had spent a significant amount of time trying to find a job at the same level and just could not. The court should consider all relevant factors without limitation in this case, and that the judge had not made a specific finding regarding the reasonableness of his efforts that there had been, as I said, significant testimony about his attempts to find a job and therefore the criteria was not met and it was remanded for a support order based on his actual income and not his prior income. Another area in attribution that I sort of stumbled into when I was preparing this PowerPoint that I actually hadn't given much thought to as it being something that came before the court is attribution of income where somebody has a second job on top of their full-time job. So I direct this is less key case just because there's a couple other issues here. One that was interesting about this case, in addition to attribution of income, was the fact that, in this case, it was a 16-year marriage, and the judge found need, but instead of ordering alimony based on the term of 16 years, actually ordered rehab alimony. You know, which you usually see in a five year or less marriage, and in this particular case, the wife was educated, she'd been employed outside the home, she'd only been unemployed two years at the filing. And the judge found that, you know, reemployment that she was highly employable, and the judge ordered rehab alimony instead of the general term of alimony. So I thought that was a really interesting case to sort of highlight. But on the second job, attribution of income, I was looking at this Vedensky case, 2014. This was really interesting to me, because like I said, it never sort of occurred to me that somebody would be seeking attribution on a second job. So the facts in this case was the former wife was the payor, she had a full-time job, and she also had a part-time job on top of the full-time job. And the court had concluded that she could be earning even more at her part-time job and attributed income. So she had been earning 214,000 a year working full-time at the hospital. She was working part-time per diem at a rehab hospital. The judge not only took the second job into account in calculating the alimony, but considered her ability to work even more at a second job and attributed income to her. So I highlight this because I've never seen anything like this. So the court found, we conclude that a party who works at a full-time or full-time equivalent job may not be found to be unemployed or underemployed based on the level of compensation received from a

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second job obtained after entry of the initial order, unless the judge concludes based on findings supported by evidence that a basis exists for rebutting that presumption. So the court found that it was an error, citing that income from a second job or overtime shall be presumed to be immaterial to an alimony modification if a party works more than a single full-time equivalent job, or the second job, or overtime became after entry of the initial order. Of course, we now know that that's probably going to be in conflict with child support under Cavanagh, which specifically found that the second job needed to be included. But what I'm highlighting here was the court saying that they were going to attribute income because when you work at second job, you should be working -- given more hours. So, Jennifer, you're shaking your head, feel free to comment. You're on mute.

>> I just can't imagine. I mean, people work second jobs to generate, most cases, additional income to pay for extraordinary expenses, right? And so when you have somebody who's already a high income earner, 240,000 a year, is choosing to supplement her income by working the second job is that we could be working more hours, like she's already working full-time. I mean, and that's the rub, right, like, I mean, our case was like, look, if a person is working full-time, it's discretionary for child support purposes, whether or not you're including their secondary income, and the court looks to why they're working that job and how long they've been working that job. You know, is this something that preexisted the divorce? Is it something that they did like in the Cavanagh, it was the party doing that to pay for private school education, right, benefiting the child. Is it benefiting the person as an individual, such as just seems crazy to me that [inaudible]

>> The only thing I could think about, and I have no knowledge of this, whatsoever, is that she must have done something to really offend the court.

>> I thought the same thing.

>> Yes. [Inaudible]. Because it's such a shocking order. So, I can see Judge Black smiling, but yes. OK. So the takeaway from this is when you're talking about attribution of income is that the voluntariness of a career change is not dispositive of income attribution. So you need to be looking at why factors of how hard they're trying to replace that job, and certainly, whether they can find a job in that area, you know, just because somebody has earned, you know, we hear this all the time, you know, I can't find a job, and we bring in vocational experts and, you know, I'd love Judge Black to weigh in on that. You know, my question is always, OK, you've told me that my client qualifies for this job, but you haven't told me that they're actually going to be able to get it, you know. And when you've got the testimony, I've worked with x amount of headhunters. I've applied to, you know, 500 jobs. I've received no offers or I've received offers significantly less. I mean, it really comes down to the evidence, but attribution of income is not automatic but it's going to be closely looked at.

>> Judge, what do you need to see to attribute and --

>> You know, we've talked about evidence coming in, but one of the things that impacts me in this type of attribution issue is the credibility of the testimony of the person. And that's something that is, you know, unique to that particular case. And sometimes, you know, when you sit, you know, as a judge, you don't abandon your common sense. And so when we're presented with evidence that says that, you know, this person has these qualifications, and the industry shows that there is this availability out there. And then you have the person saying that they can't become employed, especially, for example, in today's market it's kind of an employee's market. I mean, you see many people are not able to have their businesses up and running because they can't find employees. So that comes down, for me, to the credibility of the testimony of the individual who's seeking or supposedly seeking the position. And so the cross examination of that person, so let's use, for example, to say that say it's the wife that is not taking advantage of what has been presented to me, her cross examination is going to be very significant for me, because I'm going to be looking to, you know, I'm going to be assessing her credibility, and that's one of the other factors that comes into play, and it's an important factor. I mean, we have the evidence, whether the evidence is in, the evidence isn't, what weight are you going to give it, but then you have the credibility, and that's significant to me. So once I hear the direct, you know, testimony of the person, and I'm very anxious to see what I'm going to receive on cross, so you need to be prepared to cross examine that person. That's what I would say. And in the, you know, the reality

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of what's going on is, you know, is significant, especially, for example, today, when is a tremendous, I think maybe it's fair to say perhaps more jobs than people who are wish to retain them.

>> And I think on that, you know, I think I sort of touched on ageism, so I think to Judge Black's point, there's going to be a presumption that everybody who wants a job can have one. So if your client is somebody that cannot be reemployed, or certainly not at the level they were at, you have to be prepared to explain that.

>> Right, especially absent, you know, certain types of things. Like if someone has, you know, suffered some type of injury or illness, it's, you know, those types of things. But absent that, the cross examination is going to be very significant to me. Because, you know, here we're talking about alimony, but a lot of times throughout the whole course of this seminar, we've talked about the, you know, how interrelated alimony and child support are. And so everyone, I think, as an obligation to support their children. And so those are, you know, factors that come into play, but I would say your cross examination is going to be key on that.

>> Great. All right. Jennifer, you're on mute.

>> Shucks, did it again. I have another question for the judge. So, what do you want to see, because when somebody's out of work and they say I'm looking for work, what evidence do you like to see to support their representations that they're seeking for work, they're being diligent in their work search, question number one. And then number two, do you entertain motions for jobs seek orders and put requirements around what somebody needs to do?

>> I like to see, and I will sometimes say to people, I have indicated to people that you will need to engage in a minimum of x applications and you'll need to document that for the court the next time you come, indicating how you did it, who you did it. And I say to them that it's significant to me to know that you're making a good faith effort, because looking for a job in and of itself is a job. I'm not expecting someone to retain a headhunter or something like that, but especially now where people don't have to, you know, hit the pavement, so to speak, and so much of the ability to secure employment can be advanced through the internet, an electronic means. I'm going to say to someone, you're going to need to tell me how many you did and, you know, how you followed up, who the people are. So I want details as to what they did, and it's interesting how people comply with that. Because I'll ask for the chart, you know, I always look at the last order that I entered before I, you know, start a hearing to see if I did anything that I need to be looking for. And that's one of the things I'll say, you know, did you bring it, let's look at it. And because it is, it's a commitment to get a job, especially for individuals in certain income brackets that wants to be able to, they're looking to at least find a lateral position, if not, you know, increase their employment options. So, that's how I usually do it. So, I'm trying to think, I'm trying to remember if anyone has said to me, oh, we want you to enter a seat, I think probably yes, but I think that I let people know that that's generally how I'm going to approach it, you're going to need to show me what, you know, what you've done. So, if that answers your question.

>> Right. Well, we don't have any questions coming in. So, does anybody have any last thoughts, and we'll wrap up?

>> So the question for the judge.

>> Sure.

>> [Inaudible] is a an employee's market out there, do you think it's more incumbent on us representing someone who is unemployed to show that they can't get a job, or is the onus on the person trying to attribute income to show that there are jobs available? Has that kind of burden of proof shifted so that's on the attorney representing the unemployed party?

>> I think, you know, that's an interesting question is, you know, does the burden shift, because that's a formal thing, right? For me, I'm looking to just to reiterate my position, I want to be able to give anyone who comes in front of me the benefit of the credibility of their representations, so I want them to tell me what they've done. So to specifically answer your point, if I was representing the party who was unable to get the job, I would want to be able to indicate

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all that they have done. And to that end, it's important that you as the attorney, and I'm speaking to our, you know, our attendees, that you as the attorney know all of that information, because one of the things that you'll want to master is the ability to answer the questions that might be very specific coming from the judge, because it's interesting and it sometimes happens, it's just, you know, no one can be 100% prepared. But it's always interesting when I have two attorneys that will be answering my questions, and then I'll be getting into, you know, more detailed facts, and it happens that the attorneys will start deferring to their clients to answer that specific question. And I get that, I get that, you know, but you're entering into, you know, dangerous territory when you start letting your client speak. As a general rule, I won't hear from parties if they're represented by counsel, unless it's something, you know, that it's going to save time, like what was the date that, you know, we had that, you know, big European vacation or something like that. But beyond that, it's tricky. So I would say, if I was the person to bring it back, if I was the attorney representing the person who could not get employed, I would come prepared to acknowledge the expert and then say, we're not disputing that that may not exist, but my client has done this, this, this, this and this. And it could be that's the reality of the circumstances is your client could have had a number of interviews, and that's important for me to know, but they may not have gotten call back, do you know what I mean? And to a certain extent, I then can't hold them responsible for the fact that those particular employer is looking perhaps for skills that they're not satisfying. So there's, you know, there's always a little balance. [Inaudible].

>> That's very helpful. All right, well, I want to thank everybody for taking the time, not just to be here today, but for putting your presentations together, because it takes a lot of work for us to summarize everything for everybody, so thank you.

>> Well, thank you. I always learn something, so I --

>> Me too.

>> -- I take notes on the slides. So, thank you.

>> Thank you.

>> Your preparation, your slides were great. I found them very helpful.

>> Thank you. All right, everybody, take it easy.

>> Great. Have a good evening everybody.

>> You too.

>> Thank you. Good bye now.