COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
SJC No: 12228

MIDDLESEX, ss

APPEALS COURT
NO. 2016-P-479

ROBERT L, POPP,
Plaintiff-Appellee

vs.

JOANNE M. POPP,
Defendant-Appellant.

On Appeal from a Judgment of the Middlesex Probate & Family Court

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BRIEF OF APPELLANT, JOANNE POPP

Respectfully submitted,
JOANNE POPP
By her counsel

May 16, 2016

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STATEMENT OF THE ISSUES

1. Whether the Probate & Family Court's retroactive application of G.L. c. 208, § 49(b) -- the durational limitation provisions of the Alimony Reform Act -- unconstitutionally infringed Joanne's substantive rights and violated the due process guarantees of the state and federal Constitutions.

2. Whether application of G.L. c. 208, § 49(b) to this case so fundamentally changed the burden of proof as to unconstitutionally impair Joanne's substantive rights.

3. Even if the retroactive application of G.L. c. 208, § 49(b) is constitutional, should the Judgment below be vacated where the trial court failed to consider all relevant statutory factors under G.L. c. 208, § 53(a).

4. Even if the retroactive application of G.L. c. 208, § 49(b) is constitutional, did the trial court err in placing a term limit on Joanne's alimony award given the combined length of both marriages, in the absence of any predictable, future event that would cause her to become economically self-sufficient by August, 2020.

5. Even if the retroactive application of G.L. c. 208, § 49(b) is constitutional, did the trial court abuse its discretion by not ordering a deviation from the durational limitations of G.L. c. 208, § 49(b), where the parties' two marriages spanned 23 years, Joanne had undisputed chronic health issues, had not held any meaningful job in more than 20 years, and had no assets from which to support herself. G.L. c. 208, §53(e).

STATEMENT OF THE CASE[1]

This is an appeal from a Judgment of the Middlesex Probate & Family Court (Gorman, J.), which

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[1] References are made to the Record Appendix as "RA at __."

has its origins in Robert Popp's (Robert) Complaint for Modification. The primary issues raised in this appeal center around the propriety of the trial court's decision to apply the durational limit provisions of the Alimony Reform Act, see G.L. c. 208, § 49(b). In short, after a three (3) day trial, the Probate & Family Court reduced Robert's alimony and ordered that his payments to his former spouse, Joanne Popp (Joanne) automatically terminate in August, 2020.

STATEMENT OF THE FACTS

Joanne summarizes the pertinent details of the trial court's decision, supplemented by un-contradicted parts of the record that may bear on this Court's evaluation of the issues. A few additional facts are then discussed in the argument section, as relevant, to avoid repetition.[2]

Background Facts.

Marriage & Divorce #1: The parties married *for the first time* on December 11, 1988; they divorced just over five (5) years later on February 28, 1994. RA at 010 and 587-589. During their first marriage,

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[2] See Whitney v. Whitney, 325 Mass. 28, 28-29 (1949)(this Court is not limited to the findings made by the trial judge and may "make such additional findings as are supported by the evidence").

they had three (3) children, George, born April 21, 1989, Robert, born on May 11, 1990 and Sarah, born on September 13, 1991. RA at 010.[3] At the time of their first divorce, the parties were residing, and then divorced, in Connecticut. RA at 589.

Not long thereafter, Joanne returned to Massachusetts with their three (3) children. Robert followed them, and the couple resumed their relationship. RA at 590-591.

Marriage & Divorce #2: The parties remarried in Massachusetts on June 4, 1996, and divorced almost fifteen (15) years later on January 18, 2011. RA at 008--009 (Judgment of Divorce Nisi). The Judgment of Divorce incorporated the terms of an agreement dated the same day, which provided, in relevant part, that Robert would pay Joanne $12,000 per month[4] in alimony plus 36.75% of additional earned income up to $875,000; the total annual alimony payments were not to exceed $321,562.50. RA at 013 (¶1.c). Alimony was to "continue until further order of this Court, the death of either party or the remarriage of the Wife,

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[3] As of the time of trial on this modification, all three children were emancipated. RA at 825 (¶3).

[4] This figure represented 42.35% of Robert's reported base pay of $340,000. See infra.

whichever event occurs first." RA at 014 (Agreement at ¶1.c). With one exception, the provisions of alimony merged with the Judgment. RA at 025-026 (¶3).[5]

Traditional Marriages. Both marriages were traditional. Joanne was primarily focused on raising the parties' children, see RA at 614-617 (Joanne's testimony), while Robert was the primary wage earner. RA at 832; RA at 683-684 (at ¶s 40-47).

Then: At the time of their second divorce Joanne was 43 years old, had weekly self-employment income of **$54.42**, RA at 693 at ¶114, and suffered from various medical conditions that had required hospitalization, including: a kidney disorder, which causes extreme pain and requires constant monitoring and treatment; high blood pressure and Tachycardia; breast cancer; gastro esophageal reflux disease, causing nausea;

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[5] The following provision survived the Judgment: "In any modification proceeding brought by either party, the parties agree that Ms. Popp may exclude from consideration the first $100,000 of yearly income she may earn. In addition, any income, other than alimony support, made by Ms. Popp up to $100,000 each year and savings therefrom, any decision by Ms. Popp to move to a smaller home, proceeds from the sale of Ms. Popp's home and savings therefrom, any reduction in Ms. Popp's expenses, and/or the emancipation of the children, or reduction of costs by Ms. Popp shall not be grounds for modification. The provisions of this paragraph shall survive as an independent contract and shall not be merged in the parties' judgment of divorce..."

asthma; depression and anxiety; and vertigo and tinnitus. RA at 585; RA at 618; RA at 685-686. The parties took Joanne's chronic health issues into consideration at the time of they negotiated the terms of the agreement. RA at 583-584.

For his part, Robert was then 48 years old, and had a salary of $340,000; RA at 537. The bonus portion of his income as of January, 2011 was "undetermined," RA at 537, and would not be ascertained until the "end of the year." RA at 532-533.

Alimony Reform Act. Just over one (1) year after the parties' second divorce, on March 1, 2012, the Alimony Reform Act, codified in G.L. c. 208, §§ 48-55, went into effect. Of particular import here, G.L. c. 208, § 49(b) provided, *inter alia*, that:

> **(b)** Except on 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:
>
> . . .
>
> **(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 percent of the number of months of the marriage.

Course of Proceedings & Trial. On February 7, 2014, Robert filed the underlying Complaint for Modification seeking a downward adjustment to his alimony due to an alleged decrease in his income. RA at 004 (docket entry no. 32), RA at 034 (complaint). He did not seek a termination date. See RA at 034-035. Joanne filed an Answer on March 3, 2014. RA at 004 (docket entry no. 36).[6]

This case was then tried over three (3) days on April 21, 2015, April 22, 2015 and June 2, 2015, RA at 036, 246 and 447, following which each party filed written proposals with the Court. See RA at 655 (Robert's), 674 (Joanne's). Robert did not propose the automatic termination date, under G.L. c. 208, § 49(b), for his support. See RA at 839-843.

On September 1, 2015, the trial court issued its Findings, Conclusions, Rationale and Judgment. RA at 835, 837 [These were docketed on September 8, 2015. RA at 006 (docket entry nos. 96-97)].

Undisputed Evidence as to Joanne's Chronic Health Issues. By the time of trial on Robert's modification

[6] On March 27, 2015, Joanne filed a Complaint for Contempt, which was subsequently consolidated with Robert's Complaint for Modification. The propriety of the trial court's decision on Joanne's complaint is not at issue in this appeal.

Complaint, Joanne was 47 years old, and, as the trial judge found, continued to suffer from many of the same, chronic medical conditions she did at the time of divorce "which limit her employment options." RA at 831 (finding no. 47). *In addition*, Joanne had begun to suffer from chronic and severe migraines -- "about 20 headaches per month" -- for which she was scheduled to receive injections in her head and neck. RA at 618, 686. She gets sick and needs to take many medicines every day, RA at 617, and feels nauseous like she may pass out. RA at 618.

Undisputed Evidence of Joanne's Limited Income and Employment. Though Joanne had a law degree, other than working part-time while waiting for the Bar results and reviewing purchase and sale agreements for not more than 20 clients, she never practiced law. RA at 614-617. At the time of trial, Joanne lived alone, RA at 058 & 619, and, as the trial judge properly found, had "no income other than [weekly] alimony" of $2,769.24 and "weekly expenses of $4,663.11." RA at 831 (finding no. 42), RA at 833-834. Indeed, over the course of the 23 years from the date of their first

marriage until the second divorce,[7] Joanne had no income for 16 of those years, and the most she ever had earned in one year was $9,080. RA at 687-688. See also RA at 614-618. While not discounting any of her expenses, nor finding any of them extravagant or excessive, the trial court found Joanne simply "needs to reduce her living expenses." RA at 834. Joanne had gross assets of $107,474 - virtually the entirety ($106,581) was home equity -- and liabilities of $279,587. RA at 831 (finding nos. 43-45). See also RA at 619.

At the time of trial, Robert was 53 years old and in good health. RA at 831. He resided with his girlfriend and her two (2) children in a home Robert purchased, and which he alone financially maintained. RA at 828 (finding no. 23); RA at 830 (finding no. 35); RA at 251, 253-255, 394 and 603. The trial court found that Robert's base weekly income was $5,384.62

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[7] While the Act permits a court to consider the length of pre-marital cohabitation, G.L. c. 208, § 48, the court did not do so here in applying the durational limit, ignoring the prior five year marriage, which produced three children, and the intervening two and one-half years between the marriages, during which Joanne cared for the children and the parties resumed their relationship. If these marriages, together, render this a long-term marriage, the durational limits do not apply. This issue also is on appeal in Kareores v. Kareores, No. SJC-11975.

($280,000 annually).[8] RA at 830 (finding no. 34); RA 528-529. He had assets of $422,127 and liabilities of $267,805. RA at 830-831 (finding nos. 35-40). By the time of trial, Robert had resumed contributing toward his retirement account. RA at 522 ($933.33 per month).

Based on the evidence before it, the trial court concluded that Robert had demonstrated that his income had dropped since the divorce, RA at 833, and that he had met his burden of proving a material change in circumstances. RA at 833. Reducing Robert's alimony payments to Joanne from $12,000 to $8,575 per month, the trial court reasoned:

> Even with the current alimony order of $12,000 per month, Ms. Popp is unable to meet her weekly expenses. Considering both Mr. Popp's reduced income and Ms. Popp's ongoing health problems, the Court finds it most equitable to award Ms. Popp alimony equal to 36.75% of Mr. Popp's income as the parties intended in their Separation Agreement.

RA at 834.[9] The Court then fixed August, 2020 as the termination date for alimony payments, finding:

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[8] 42.35% of the husband's base is $9,881.66 per month. See footnote 4, supra.

[9] While the trial court can "take heed of the parties' own attempts to negotiate terms mutually acceptable to them" when modifying a support award, Pierce v. Pierce, 455 Mass. 286, 302 (2009)(citation omitted), the percentage of Robert's base awarded by

> The parties were married on June 4, 1996 and Mr. Popp was served with the Complaint for Divorce on February 16, 2010. For purposes of alimony, they were married for 13.67 years. Therefore, pursuant to G.L. c. 208, § 49, the maximum alimony duration is 114 months, which is seventy percent of the number of months of the marriage. Therefore, Mr. Popp's alimony obligation shall continue until August of 2020.

RA at 834 (findings), RA at 836 (Judgment at ¶1).

On September 22, 2015, Joanne filed a timely Notice of Appeal. RA at 006 (docket entry no. 98) and 838 (Notice).

STANDARD OF REVIEW

Review of issues of statutory interpretation, and questions regarding a statute's constitutionality, is plenary. See Delaware Cty. Pa. v. Fed. Hous. Fin. Agency, 747 F.3d 215, 220-221 (3d Cir. 2014). Because a statute is presumed to be constitutional, "the burden of proving the unconstitutionality of its retroactive application rests with" Joanne. Moe v. Sex Offender Registry Bd., 467 Mass. 598, 611 (2014). It is her burden to prove that "retroactive application of the statute would be unreasonable and therefore

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the trial judge was less than what the parties had previously negotiated. See footnote 4, supra. Had the trial court followed that approach, Robert's monthly alimony obligations should have been **$9,881.66** ($280,000 [base] x 42.35%/12).

inequitable." Id.

A judgment modifying alimony will be reversed if it is found to be plainly wrong, Hassey v. Hassey, 85 Mass. App. Ct. 518, 524 (2014), or an abuse of discretion. Pierce v. Pierce, 455 Mass. 286, 293 (2009).[10]

Here, while it is apparent on the record why the trial judge found it necessary to reduce Robert's alimony obligations, it is not apparent why alimony should cease altogether in August, 2020. So much of the Judgment that applied the durational limitation provisions of G.L. c. 208, §49(b), was plainly wrong and an abuse of discretion.

SUMMARY OF THE ARGUMENT

While Joanne does not challenge the reduction in her alimony, the application of the durational limit

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[10] An appellate court shall "examine a judge's findings to determine whether the judge considered all of the relevant factors under G.L. c. 208, § 53(a)." Zaleski v. Zaleski, 469 Mass. 230, 235-236 (2014). "It is important that the record indicate clearly that the judge considered all the mandatory statutory factors." Id. at 236. The appellate court must then consider whether the trial court's "rationale underlying the judge's conclusions is apparent and flows rationally from the findings and rulings." Hassey v. Hassey, 85 Mass. App. Ct. 518, 524 (2014). This standard is deferential, "but that deference is not without limit." Greenberg v. Greenberg, 68 Mass. App. Ct. 344, 348 (2007).

provisions of the Act to this case impermissibly and unconstitutionally infringe her vested, bargained-for and judicially approved substantive rights and should be vacated. Alternatively, Joanne maintains that the trial court abused its discretion in establishing August, 2020 as a termination date given the facts of this case. For these reasons, the alimony termination date is plainly wrong and should be vacated or stricken from the Judgment.

ARGUMENT

I. THE PROBATE & FAMILY COURT'S RETROACTIVE APPLICATION OF THE DURATIONAL LIMITATION PROVISIONS OF THE ALIMONY REFORM ACT, CODIFIED IN G.L. c. 208, § 49(b), INFRINGED JOANNE'S SUBSTANTIVE RIGHTS, VIOLATED HER RIGHT TO DUE PROCESS AND WAS CONSTITUTIONALLY IMPERMISSIBLE.

The Act. Courts, legal scholars and commentators alike referred to the Act as fundamentally "changing the legal framework under which courts may award alimony,[11] as ushering in "the most comprehensive" legislative alimony reform,[12] and embarking on a "new era of domestic relations practice in Massachusetts

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[11] Zaleski v. Zaleski, 469 Mass. at 232.

[12] C. Kindregan, *Reforming Alimony: Massachhusetts Reconsiders Postdivorce Spousal Support*, 46 Suffolk U.L.Rev. 13 (2013),

with regard to spousal support."[13] Legislators considered it "a major reform in family law." See floor remarks of Cynthia Creem on HB3617, July 28, 2011. "The media hailed [the Act] as the biggest domestic relations policy change in twenty-five years," Id. (citation omitted), the "most dramatic reform" of which "centers on the court's new ability to issue alimony orders with durational limits." Id.[14]

Fundamentally, the Act is an attempt by the legislature to readjust the rights and the burdens of divorced and divorcing parties in the area of alimony; however, to be enforceable, "[r]etroactive legislation has to meet a burden not faced by legislation that has only future effects. It does not follow that what ... the Legislature can legislate prospectively it can legislate retrospectively." Moe v. Sex Offender Registry Bd., 467 Mass. at 611.

The Supreme Judicial Court has explained that where, as here, a party argues:

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[13] R. Biscardi, *Dispelling Alimony Myths: the Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 Western New England Law Rev., 1, 17 (2014).

[14] See also Floor Debate on SB 665 (John V. Fernandes explaining the bill allows a modification to the duration of an existing alimony award "which may go on forever").

> that a statute is impermissibly retroactive, we must resolve three distinct but related questions. Preliminarily, we must determine **[1]** whether the law, as amended, has a retroactive effect. If not, and assuming the law is otherwise constitutional, no further inquiry is necessary. If the statute is retroactive, we look to see **[2]** whether the Legislature clearly intended it to be retroactive. Where it so intended, we determine **[3]** whether retroactive application is constitutional.

Id.at 606. There is no doubt -- especially as applied to this case -- that G.L. c. 208, § 49(b), has retroactive effect, and that the Legislature intended it to be so. The critical question is whether retroactive application is constitutional.

1. The Durational Limitation Provisions of the Act Operate Retroactively.

As Moe teaches, "a statute is retroactive in effect where the new provision attaches a new legal consequence to events completed before its enactment." 467 Mass. at 606, quoting Landgraf v. USI Film Prods., 511 U.S. 244, 270 (1994). "[I]mpairment of a vested, substantive right certainly qualifies as a new legal consequence that would render a statute retroactive... [but] it is not the only new legal consequence that [will] do so." Id. at 608. "Determining whether a particular rule operates retroactively comes at the end of a process of judgment concerning the nature and

extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." Id. As the U.S. Supreme Court recognized, and as Moe advances, this "test is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity, but... familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance." Id. at 607 (citation omitted).

At the time the Court incorporated the parties' agreement into the divorce judgment, Joanne had no notice, let alone fair notice, that in a few years hence her support could automatically terminate based on a legislatively devised mathematical formula. Nor can it be denied that it was reasonable for Joanne to rely on the terms of the Judgment, which incorporated, as fair and reasonable, their bargained-for and court-sanctioned exchange, when planning her post-divorce financial affairs. Given the terms of the judgment, Joanne's "settled expectations" were that while the *amount* of her alimony might fluctuate, the duration would principally be guided by "death or remarriage."

The Act altered those expectations. Under the new legal consequence test, the Act's durational

limitation provisions are considered retroactive in operation not simply because its uncodified provisions direct it, but because § 49(b) mandates a substantial new legal consequence (the presumptive termination of Joanne's alimony) to events completed on or before the date of its enactment (length of the parties' marriage as later defined in G.L. c. 208, § 48). As applied to this case and doubtless others as well, G.L. c. 208, § 49(b) attaches a new liability and burden to Joanne's *right* to receive alimony and effectively imposes a new term into the parties' previously bargained-for, and court approved agreement and divorce Judgment.

In the words of Justice Gants in Pierce v. Pierce, if Robert "had wanted his alimony obligation to end [on a date certain], 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 [the date of termination]." Pierce v. Pierce, 455 Mass. at 302. Here, Robert did not do so, and it would be fundamentally unfair to permit him to resurrect waived negotiation points and demands, while constraining Joanne from renegotiating the division of marital assets. See infra.

2. The Legislature Intended Retroactive Operation of the Durational Limitation Provisions of the Act.

The Supreme Judicial Court answered this question in the affirmative in Chin v. Merriot, 470 Mass. 527, 536 (2015)("By emphasizing the limitations on prospective application of the alimony reform act in three separate provisions in the uncodified sections of the act, the Legislature could not have expressed its intent more clearly; only a claim for modification based on durational limits may, but will not always apply retroactively to existing alimony judgments"). Cf. Waddey v. Waddey, 49 N.E.2d 8 (NY 1943)(noting "Legislature... indicated by express declaration its intent that the [subsequent] act should have retroactive application) (act found to violate due protections).

3. The retroactive operation of the Act does not comport with due process.

In Moe v. Sex Offender Registry Bd., supra at 610, the SJC explained:

> Retroactive statutes raise particular constitutional concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of

> retribution against unpopular groups or individuals.

(citations and internal quotation marks omitted). "The constitutional entitlement to due process 'protects the interests in fair notice and repose that may be compromised by retroactive legislation." Id. at 611 (citations omitted). Under Massachusetts case law, "retroactive laws must meet the test of reasonableness to comport with State constitutional due process requirements. Ultimately, the principle inquiry -- as to reasonableness -- is essentially a review of whether it is equitable to apply the retroactive statute against" Joanne [and similarly situated alimony recipients]. Id. at 611 citing St. Germaine v. Pendergast, 416 Mass. 698, 704 (1993)("fairness is the touchstone of due process" and retroactive application of statute "would offend fundamental fairness").

In determining whether the application of the durational limitation provisions of the Act is inequitable and thus unreasonable, Moe teaches that this court must "examine the [Act] from three perspectives: **[1]** the nature of the public interest which motivated the Legislature to enact the retroactive statute; **[2]** the nature of the rights

affected retroactively; and **[3]** the extent or scope of the statutory effect or impact." Id. at 611-612. Thereafter, **[4]** the Court should "balance these various perspectives." Id.

(a) The Nature of the Public Interest that Motivated the Legislature to Enact the Act:

Based on comments made by those who drafted the Act, as well as those involved in its passage, what appears to have motivated the Legislature was the perceived need:

- for more equitable alimony orders, See Candaras and Fernandes File Alimony Reform Measure, January 18, 2011;
- to clarify what some considered to be "confusing and obsolete laws," and to "give judges the ability to set a term limit on alimony orders," see MBA Hails Landmark Alimony Reform Bill, May 18, 2011;[15] and
- to ultimately replace what some believed was the existing "blunt object" of alimony law with a new, sharper alimony scalpel. C, O'Neil, Alimony for the Real World, November, 2011.[16]

In this process, some legislators noted the difficulty in "maintain[ing] the delicate balance between *fair play and equity.*" See comments of Gale

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[15] https://massbar.org/media/1006904/05.18.11%20mba%20supports%20alimony%20legislation.pdf.

[16] http://www.massbar.org/publications/lawyers-journal/2011/november/alimony-for-the-real-world.

Candaras in Floor Debate on SB 665. Others expressed reluctance about "going back" and asking parties to rewrite contracts. See comments of Paul K. Frost (R) in Floor Debate on SB 665, while others still considered the "bill is only prospective [and] cannot go back and change agreements." See comments of James M. Cantwell (D) in Floor Debate on SB 665.

Implicit in these comments was a reluctance to legislatively interfere with, and/or "protect people" from what they subsequently believed were "bad deals." See comments of Daniel Winslow (R), in Floor Debate on SB 665. Yet, arguably, that is precisely what the durational limit provision of the Act does here.

(b) The Extent or Scope of the Statutory Effect:

The impact of the durational limit provisions of § 49(b) is extensive. First, the number of affected parties is substantial. While it is not currently known how many preexisting alimony judgments are impaired by the sweeping changes ushered in by the Act, there can be little doubt that the Act impairs, and in some cases, extinguishes the rights and settled expectations of an entire class of litigants: alimony

recipients.[17] Indeed, the Legislature implicitly foresaw, then attempted to control, the widespread and immediate opening of payors' modification floodgates with the "phase-in" provisions of uncodified section 5 of the Act.

Second, and equally significant, is how the Act recalibrates the interplay between alimony and the equitable division of assets. At the time of Joanne's divorce, alimony was inextricably intertwined with the parties' substantive rights to an equitable division of the marital estate. See Hay v. Cloutier, 389 Mass.

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[17] As Biscardi's article notes, the Act produced "winners" and "losers." R. Biscardi, *Dispelling Alimony Myths: the Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 Western New England Law Rev. 1, 5 (2014). Among the later were "most likely those women who divorced after long-term marriages with alimony agreements that the courts can modify." Id. This is particularly true for those "with alimony orders that they thought were 'forever'." Id. at 30. Massachusetts women "like their counterparts across the country...suffer financially after a divorce" and without alimony "may fall into poverty." Id. at 7.

Awards of alimony made to compensate for "choices made during a marriage that primarily benefited the payor's spouse" have not alleviated the fact that "women still suffer more post-divorce, than their former spouses. Those who are lower-income fare even worse as there is less money and marital property to divide in a divorce through asset division. Courts, therefore, award alimony as a way of ensuring that the parties' financial situations post-divorce do not differ so dramatically that it is inequitable." Id. at 16-17.

248 (1983); Casey v. Casey, 79 Mass. App. Ct. 623, 630 (2011) ("Alimony and equitable division are interrelated remedies"). Both were to be considered under the same statutory authority. See G.L. c. 208, § 34. While alimony and property division play different, yet equally important, roles, decisional law dictated that alimony could not be viewed apart from an "order for division of property." Grubert v. Grubert, 20 Mass. App. Ct. 811, 818 (1985). The entire agreement, read as a whole, was required to "make sense." One implicit reason for this was that while alimony is modifiable on the showing of a material change in circumstances, see G.L. c. 208, § 37 (1994 ed.), property settlements are not. Heins v. Ledis, 422 Mass. 477, 482-83 (1996).

Though the interrelatedness ostensibly continues under the Act, see G.L. c. 208, § 34, as amended by St.2011, c. 124, § 2, Green v. Green, 84 Mass. App. Ct. 1109 (Memorandum and Order Pursuant to Rule 1:28)(Aug. 30, 2013)(Alimony Reform Act continued to "recognize the interrelationship between alimony and property division"),retroactive adjustment of alimony awards does not similarly expose equitable property divisions to retroactive attack. Authorizing payors to

reach back into Judgments to impose new, durational terms more restrictive to the payee while precluding payees from renegotiating property awards does little more than provide theoretical lip-service to the interconnectedness of alimony and equitable division. To be truly interrelated, if the scales of alimony are to be adjusted for payors based on a subsequent change in the law, it is only fair to give payees the opportunity to renegotiate the equitable division of assets. To hold otherwise, is fundamentally unfair and effectively alters the rules after the game started by benefitting only one side. Unquestionably, payees such as Joanne would have attempted to negotiate a different asset allocation if the law at the time of divorce imposed a presumptive termination date on their alimony payments. That the alimony provisions merged does not mitigate the deprivation of Joanne's substantive right to the full-benefit of her bargain.

Years after the divorce, after relying on what she viewed as an indefinite alimony award and after spending down the majority of those assets awarded to her, Joanne finds herself with yet more "chronic health issues," with only a modest home, in debt, no meaningful job prospects and a fixed cut-off date of

her support. In contrast, Robert is healthy, gainfully employed with a substantial income, and growing assets. The benefit of his bargain is not only guaranteed, it is improved by the trial court's retroactive application of § 49(b). This is simply not fair.

(c) The nature of the rights affected:

"As a general rule, the law existing at the time an agreement is made necessarily enters into and becomes part of an agreement." Feakes v. Bozyczko, 373 Mass. 633, 636 (1977). "In contrast, laws enacted after the execution of an agreement are not commonly considered to become part of the agreement unless its provisions clearly establish that the parties intended to incorporate subsequent enactments into their agreement." Id. (citations omitted; emphasis added). In this vein, Massachusetts has long held that new statutes, which affect *substantive rights,* should only be applied prospectively, while new statutes that affect *remedies and procedures* may be applied retroactively. See Hanscom v. Malden & Melrose Gas Light Co., 220 Mass. 1, 3-5 (1914), citing among others, Burt v. Burt, 168 Mass. 204, 207 (1897) ("Divorce statutes generally have been held not to be

retrospective.").

Implicitly, these rules of statutory interpretation are intended to preserve litigants' benefits of the bargain and settled expectations in judgments and statutes in effect at the time judgments enter. The question here, reduced to its nub, turns on whether Joanne's bargained-for, judicially-approved, and statutorily authorized right to receive alimony is a substantive right that should be preserved and not terminated by a subsequent legislative act.

Alimony is a substantive right that should be insulated from retroactive application of §49(b).

The question of whether alimony is a substantive right has not been previously addressed by any reported appellate decision in Massachusetts. Merriam Webster defines a "substantive right" as "a right arising from substantive law." http://www.merriam-webster.com/dictionary/substantive%20right#legalDictionary. A "substantive law" has been defined as one which "creates, defines, and regulates the rights and duties of the parties, which may give rise to a cause of action." Wilde v. Wilde, 969 P.2d 438, 442 (Utah Court of Appeals, 1998). "By contrast, a procedural law prescribes the practice and procedure or the legal

machinery by which the substantive law is determined or made effective...Procedural statutes do not enlarge, eliminate, or destroy vested or contractual rights." Id. Accord Sudwischer v. Estate of Hoffpauir, 705 So.2d 724, 729 (Sup. Ct. LA, 1997).

Without question, alimony is wholly a creature of statute. Pierce v. Pierce, 455 Mass. at 293-294 (discussing the statutory origins, initially embedded in the Massachusetts Constitution adopted in 1780). G.L. c. 208, § 34, as amended by St. 1990, c. 467, as it existed when the Court incorporated Joanne's and Robert's separation agreement into a divorce judgment -- must be considered a "substantive law" as it unquestionably "created, defined and regulated" a litigant's right to request alimony. This statute was, in effect, the legislative codification of the long-held view that a spouse has a "natural and legal duty...to support and maintain his wife." See e.g. Brown v. Brown, 222 Mass. 415, 418 (1916). The durational limitation provisions of the Act equally must be deemed "substantive" as they fundamentally change the parameters under which a party may continue to receive (and restrict the circumstances under which a spouse has a duty to pay) support as previously

authorized by c. 208, § 34, and as reflected in prior Judgments. See Wilde v. Wilde, supra (amendment to alimony law regulated party's right to receive alimony and was substantive change in law requiring law prior to amendment to be applied).

Using this reasoning, alimony must be considered a "substantive right." Numerous other states that have considered the issue agree. See White v. White, 24 S.E.2d 448 (Va. 1948)("Alimony is not merely an incident of divorce; it is a substantive right, which may be decreed to any wife under a given state of facts."); Farris v. Farris, 673 So.2d 1276 (La.App. 3 Cir. 1996)(referring to alimony as a "substantive right"); Brown v. Brown, 4 S.W.2d 345 (Sup.Ct.LA 1928) (discussing wife's "substantive right...to alimony").

A review of analogous Massachusetts decisional law also leads to the conclusion that alimony is a substantive right that should be insulted from amendments having retroactive application.

The case of Hay v. Cloutier, supra, is instructive. There, the Court was confronted with whether an amendment to G.L. c. 208, § 34 should be applied retroactively. The parties divorced in 1971 and three years later § 34 was amended to provide for

the equitable division of assets. In 1980, relying on the strength of the 1974 amendment, the wife filed a post-divorce complaint seeking a division of the marital estate. 389 Mass. at 249. After a trial, the lower court divided the marital estate as it existed in 1981. The husband appealed, claiming § 34 should not have applied retroactively. Id. at 250. The Supreme Judicial Court agreed and reversed, concluding that while the "Legislature enacted [the 1974 amendment] to correct and remedy the inequities caused by the earlier version of § 34 which did not recognize [the concept of equitable division]," it "established a new substantive right of division of property" which could not be retroactively applied. Id. at 254. Accord Stylianopoulos v. Stylianopoulos, 17 Mass. App. Ct. 64, 65 (1983)(court lacked power to act on ex-wife's complaint to divide assets where couple divorced prior to 1974 amendment).

In a similar and related vein, the case of Bohner v. Bohner, 18 Mass. App. Ct. 545 (1984), is also instructive. There, the Appeals Court was called on to determine whether a statutory amendment that authorized a judge to make or alter alimony orders in cases involving foreign divorces could be applied to

cases that predated the amendment. Contrasting Hay v. Cloutier, the Appeals Court concluded that since the statutory "amendments deal with the 'how' or 'where' of the alimony rights rather than the 'what' of those rights," and because the only thing that was at stake was "whether an additional forum can entertain the complaint as to alimony," the amendment did "not confer new substantive rights," and *could* be applied retroactively. 18 Mass. App. Ct. at 547-549.

Here, while there is no doubt that the Act was passed "to correct and remedy" perceived inequities caused by the earlier version of § 34, the landmark legislation fundamentally altered alimony law by creating new rights, and imposing new burdens on existing rights that never existed before. The Act, and § 49(b), in particular, most assuredly deal with more than just the "how" or "where." They address the very shape of "what" alimony rights look like.

Under the facts of this case, and under the reasoning of Hay v. Clouter and Bohner, Joanne submits it was inequitable, fundamentally unfair, unreasonable and constitutionally impermissible to apply the Act's durational limits retroactively to deprive her of the full benefit of her bargain.

Jurisprudence from Across the Country. Cases from other states that have considered post-divorce changes in alimony laws have held it is constitutionally impermissible to apply subsequent amendments to alimony statutes to pre-amendment cases. In McClain v. McClain, 246 S.E.2d 187 (Ga. 1978) the parties were divorced in 1975; their agreement, which required husband to pay wife alimony, merged in the judgment. Id. at 189. The law in effect at the time of divorce permitted the modification of alimony on the change in income and financial status of the husband. The law was then amended in 1977 to provide that alimony was "subject to revision" if there was a "change in income and financial status of either spouse." Id. at 189. The 1977 amendment did not state it would operate retroactively, but a 1978 Act did. Id. The husband subsequently sought to modify his support because the wife had become employed and her income had increased. The trial court dismissed husband's complaint and the Supreme Court of Georgia *affirmed*, reasoning:

> A party in an alimony action in which final judgment was entered prior to the 1977 Act had a **vested right in the judgment** not being subject to modification because of a change in the income of the wife, **since the law in effect at the time of the judgment did not permit a modification on such change**. The

> attempt by the legislature in the 1978 Act to make the 1977 Act retroactive is **unconstitutional**.

Id. at 190 (emphasis added).

Similarly, in Messenger v. Messenger, 827 P.2d 865 (Ok. 1992), the parties divorced in 1981, pursuant to which husband was ordered to pay alimony for ten years. In 1983, the law then changed to permit the division of the husband's military pension. In reliance on that statutory amendment, Wife filed a complaint seeking, *inter alia*, additional alimony. Rejecting the wife's claims, the Supreme Court observed:

> Property interests represented by a divorce decree's support alimony award are vested rights embodied in a judgment. They are constitutionally insulated...from legislative interference by after-enacted statutes. A decree's alimony decision constitutes a final judicial assessment of all those assets that are then legally available, and hence properly includable for consideration in making the spousal support award. The judicial decree that creates a monetary obligation in an interspousal suit is a judgment, which when final, stands on a constitutional footing absolutely equal to any money judgment at law...Judgments comprise obligations of the highest nature known to law. A judgment's effect and validity must be governed by the law in force at the time of its rendition. The legislature is **constitutionally powerless to burden a judgment with conditions not present in the law at the time of its rendition**.

Id. at 871. Denying wife relief, and holding the "alimony award[] [to be] impervious and invulnerable to tinkering by after-acquired legislation," the Court reasoned:

> to sanction modification of a decree-conferred alimony award rendered before [a statutory amendment] would operate to extinguish vested property rights protected by our fundamental law. While the legislature no doubt intended to adjust a perceived past inequity...all statutes -- especially those that operate retroactively upon vested rights -- must conform to the minimum standards of the state constitution and to the values it protects. Our fundamental law's due process clause was explicitly designed to shield citizens from the efforts of well-intentioned lawmakers no less than from those suspected of less supportable motives. The legislature stands powerless to abrogate rights whose existence cannot be questioned.

Id. at 873.

In Hayes v. Hayes, 709 S.W.2d 625 (TN Ct. of App. 1986), the parties were divorced in 1974, which judgment was later supplemented to require the payment of alimony "until death or remarriage of the wife." Id. at 626. The parties' agreement was "incorporated into the decree for divorce and" lost its "contractual nature." Id. at 627. In 1984, the operative alimony statute was then amended in a manner favorable to the payor-husband after which he applied to modify and

reduce his alimony obligations. Id. The Tennessee Court of Appeals framed the issue as follows:

> Does the [subsequent] statute apply to pre-1984 decrees so that a duty of rehabilitation is imposed on those alimony recipients claiming alimony pursuant to those decrees?

Id. at 627. *Affirming* the trial court's refusal to retroactively apply the amendment to the pre-1984 case, the Appeals Court held that the new law constituted a "substantive change in divorce law and that from both a legal and practical standpoint, it would be unwise to declare that the rights to alimony of all persons receiving an award...before 1983 are suddenly changed and must be reexamined." Id. at 627. Accord Dodd v. Dodd, 737 S.W.2d 286 (TN Ct. of App. 1987). See also Brannock v. Brannock, 523 S.E.2d 110 (N.C. App. 1999)(new statute worked "wholesale revision" to alimony law, invalidated prior vested rights to statutory defense, altered substantive rights of parties and could not be used to resurrect dismissed claim for alimony).

In Waddey v. Waddey, supra, the parties divorced in 1928, and a provision was made therein for alimony. In 1938, the Legislature amended the operative statute and, for the first time, authorized the trial courts

to annul alimony awards if the wife was found to be cohabitating with another man. 49 N.E.2d at 9. Relying on the 1938 amendment, the husband applied to annul his alimony obligations to his former spouse. The wife argued that the post-divorce amendment to the alimony statute was unconstitutional as it interfered with her vested rights and could not be given retroactive effect. The trial court terminated husband's alimony and wife appealed. The Appellate Division of the Supreme Court of New York *reversed*, concluding that the [amended] statute unconstitutionally deprived the wife of a substantial vested right, was not the result of due process and violated both the State and Federal Constitutions. Id. at 9. Accord Goodsell v. Goodsell, 81 N.Y.S. 806 (NY Sup.Ct. App. Div. 1903)(as the alimony allowed by a divorce decree becomes a vested property right, it cannot be affected by subsequent legislation authorizing the modification or annulment of alimony awards).

(d) Balancing of perspectives: In light of both Massachusetts jurisprudence and the cases cited above, Joanne maintains that the balancing of interests here requires that the durational limitation provisions of § 49(b), must not be applied to her case. The logic

and reasoning of Chief Justice Rugg in Hanscom v. Malden & Melrose Gas Light Co., are noteworthy here:

> In substance and effect the [Act], if held to apply to the case at bar, has taken away from the [alimony recipient, Joanne] valuable property rights without compensation and has handed them over to the [alimony obligor, Robert] without price. This would not be a mere change in practice or modification of remedy. It would transfer a vested property right from one person to another by the pure fiat of the Legislature. This is contrary to the guarantees of both the state and federal Constitutions. It would be a taking of property without due process of law. The law as to the enforcement and effect of a contract at the time it is made cannot be changed to the detriment of either party. Such law enters the contract and becomes part of its obligation.

220 Mass. at 6-7.[18]

Because the statutory authority at the time of divorce here did not impose a presumptive durational limit, and because a limit now in light of post-divorce amendments to the statutory scheme would substantially and unfairly burden Joanne's reasonable expectations, while simultaneously awarding Robert something for which he did not bargain, the trial

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[18] "A separation agreement incorporated in a judgment of divorce is not an ordinary contract, but a judicially sanctioned contract setting forth the allocation between former spouses of rights, responsibilities, and resources." Bell v. Bell, 393 Mass. 20, 25-26 (1984).

court's application of the Act's durational limits cannot stand. To hold otherwise would, as the many above cases suggest, run counter to due process guarantees.

II. THE DURATIONAL LIMITATION PROVISIONS OF THE ACT, AS APPLIED HERE, UNCONSTITUTIONALLY CHANGED THE BURDEN OF PROOF, BURDEN JOANNE'S FUNDAMENTAL RIGHTS AND MUST BE APPLIED PROSPECTIVELY ONLY.

The U.S. Supreme Court has held that the assignment of the burden of proof is a rule of substantive law affecting the substantive aspects of a claim. See, e.g., Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20-21 (2000)("Given its importance to the outcome of cases, we have long held the burden of proof [is] a 'substantive' aspect of a claim".); Dir., Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 271 (1994)(stating that "the assignment of the burden of proof is a rule of substantive law"); Garrett v. Moore-McCormack Co., 317 U.S. 239, 249 (1942)(stating in an admiralty case that the right of the party to be free from the burden of proof "inhered in his cause of action" and "was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure").

Joanne submits that this jurisprudence must be

interpreted to require that any changes in burdens of proof should be applied prospectively only, and not retroactively where it would impair substantive aspects of alimony recipients' claims. See, e.g. In re: Guardianship of Jeremiah T., 976 A.2d 955, 961 (Me. 2009)(*vacating* trial court judgment and holding statutory amendment that altered burden of proof in guardianship case affected substantive rights and should not have applied to a case that pre-dated the amendment).

The durational limitation provisions of the Act, as applied to this case, impermissibly shift the burden of proof to recipients, such as Joanne, to justify the continuation of something that already has been approved by the Court as fair and reasonable. In effect, the Act changes the rules in the middle of the game to benefit only one class of litigants. That result is simply unfair.

Under the *old* regime, the burden of proving a material and substantial change in circumstances sufficient to justify the modification of alimony obligations was on the party seeking the adjustment to the *status quo*. See, e.g. Greenberg v. Greenberg, 68 Mass. App. Ct. at 350. Under the *new* Act:

> "Existing alimony awards which exceed the durational limits established in section 49 of said chapter 208 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."

St.2011, c.124, section 4 (emphasis added). Robert's burden is met by the mandatory "shall" simply by filing. He cannot be expected, nor is he required, to proffer grounds for "deviation." As applied to all pre-Act cases in which durational limitation provisions have been called into play, and this case in particular, the burden has shifted to Joanne to justify why the continuation of something she already has bargained-for is "necessary," see G.L. c. 208, § 53(e), "in the interests of justice," see G.L. c. 208, § 49(a), or "warranted." See St.2011, c.124, at uncodified section 4. This fundamental shift in the burden of proof is a substantive change that alters the bargain, burdens Joanne's expectations, and should be applied only prospectively.

In the event the Court concludes that the retroactive application of § 49(b) *is* constitutional, so much of the Judgment below that imposes a durational limit must nevertheless be vacated for the following reasons.

III. THE PROBATE & FAMILY COURT'S JUDGMENT SHOULD BE VACATED BECAUSE IT FAILED TO CONSIDER ALL THE RELEVANT STATUTORY FACTORS UNDER G.L. C. 208, § 53(a).

Pursuant to the Act, a judge determining the duration of an alimony award must consider a non-exclusive list of factors. See G.L. c. 208, § 53(a)[19]; Hassey v. Hassey, 85 Mass. App. Ct. at 524. Here, however, the trial Court failed to consider, *inter alia*, Joanne's:

- ability to maintain marital lifestyle [independent of support from Robert], or her
- lost economic opportunity as a result of her marriages to Robert.

The Court did find that Joanne had limited employment options and was dependent upon Robert for

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[19] G.L. c. 208, § 53(a) provides that:

> 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;...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.

support.[20] Insofar as Joanne's lost economic opportunities are concerned, the trial Court would have been warranted in finding, see Whitney v. Whitney, 325 Mass. at 28-29, that Joanne had not just *lost* economic opportunities as a result of her marriage, but she *sacrificed* a career to advance Robert's career, and raise their three (3) children:

- she quit school "to take care of the kids, and it was one child after another," RA at 615;

- she followed Robert from Massachusetts and away from her family to Connecticut with their "three little children," RA at 615;

- thereafter, their son began to have "problems." He was expelled from school and was enrolled in a private school "for kids with severe needs." He had an IEP, had "violent episodes" and "had been arrested." He was "suicidal on and off" and Joanne had to stay home with him, RA at 616;

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[20] Joanne acknowledges it is implicit in the trial court's findings that, but for Robert's support, she has no ability to maintain a similar marital lifestyle. Though there was a paucity of testimony on marital lifestyle, Joanne submits that the parties' agreement sheds some light on the *quantum* of support that would be needed to maintain a lifestyle similar to that enjoyed during the marriage: not only did Robert agree to pay Joanne $12,000 per month in alimony, but he also agreed to exclude from any subsequent consideration up to $100,000 of Joanne's income. See RA at 014 at ¶1.d. It is impossible to conclude that Joanne will be able to maintain a "similar lifestyle" after alimony is eliminated in August, 2020 as she previously did with upwards of $244,000 of combined income. [$144,000 in alimony ($12,000 x 12 months) + upwards of $100,000 of earnings.]

- a daughter was involved in gymnastics that required "a lot of traveling around the country," RA at 616;

- Joanne attended law school full-time while taking care of the children "while Dr. Popp could further his career," RA at 614;

- after Joanne passed the Bar Robert "got a really good opportunity" in Washington, D.C. and she and Robert "knew it would really help his career in the future" so "[h]e went to D.C." and "came home whenever he could. He did have [his own] apartment in D.C." where he remained for five years during which Joanne took care of their three children, RA at 616; and

- Joanne never made more than $9,000 in Social Security wages, RA at 617.

Joanne submits that these sacrifices are additional, "necessary" "grounds" to "deviate" from the durational limits prescribed by the Act, even if those are to be applied. See also infra.

IV. THE PROBATE & FAMILY COURT ERRED WHEN IT REQUIRED THAT ROBERT'S ALIMONY OBLIGATIONS AUTOMATICALLY TERMINATE IN AUGUST, 2020.

While the Act now sets presumptive limits on *duration* of alimony, G.L. c. 208, § 49, it makes "no change in the fundamental purpose of alimony, which is to provide for post divorce economic support of a spouse who was financially dependent during the marriage." Hassey v. Hassey, 85 Mass. App. Ct. at 524. Moreover, as the Appeals Court has explained "[w]here

future events cannot be predicted with any measure of certainty, an alimony award should be based on present conditions. A complaint for modification based on a material change...is the means for dealing with future events." Goldman v. Goldman, 28 Mass. App. Ct. 603, 613 (1990). While potential future employment is among the factors a judge may consider when awarding alimony:

> an arbitrary limitation on the duration of an alimony obligation to a spouse whose needs are current and predictable is unwarranted when based on an assumption of future events, the occurrence of which is uncertain or unpredictable.

Sampson v. Sampson, 62 Mass. App. Ct. 366, 371 (2004).

Here, the trial court offers no justification for terminating Joanne's alimony in August, 2020 other than its rote reliance on the durational provisions of the Act, and even then, considering only the second marriage, the court's findings make no mention of Joanne's argument that additional time should have been "tacked on" to the second marriage, commenting "You broke the chain." RA at 66, 789-794. The record is silent as to any future event or predictable prospects of meaningful employment of any type that would enable Joanne to be economically self-sufficient

at any time, let alone by August, 2020. Clearly, there were none.

While the trial judge's findings fell short of referring to Joanne as "not employable," cf. Green v. Green, 84 Mass. App. Ct. 1109 (Memorandum and Order Pursuant to Rule 1:28)(2013), such a finding would have been warranted here. This was not a case in which Joanne had a past history of meaningful, economically self-sustaining employment followed by a "brief hiatus." Cf. Zaleski v. Zaleski, 469 Mass. at 241. Nor does the evidence suggest that Joanne was a "knowledgeable business owner," who simply needed "some time" to reintegrate into the workforce, cf. Fechtor v. Fechtor, 26 Mass. App. Ct.859, 867-868 (1989), or was somehow involved in "creative bookkeeping" designed to artificially deflate her income. Cf. Graham v. Graham, 86 Mass. App. Ct. 1109 (Memorandum and Order Pursuant to Rule 1:28)(2014).

Though she did have a law degree, Joanne hardly practiced law in the 23 year expanse of the parties' marriages. See RA at 615. And, in 16 of these 23 years, Joanne had no income at all, and her earning capacity continued to be virtually nonexistent at the time of trial. Moreover, Joanne's myriad, chronic

health issues, as the court found, "limit her employment options." Implicit in these conclusions are the subsidiary findings that Joanne is not currently self-supporting and that she lacks the ability to be so -- now or at any specific point in the future.

In sum, there was ample evidence that this was, in effect, a marriage of long-term duration, and there was no evidence that Joanne could earn in excess of what she earned in her "best" year, viz. $9,080. See RA at 687 (¶63, referring to uncontested trial exhibit #21).

The judge's findings offer no explanation for ignoring G.L. c. 208, § 48 in determining the proper duration of the marriage, or:

- how Joanne's presently limited employment options will expand,
- how her illiquid (and net negative) assets will markedly grow, or
- how her long-standing and undisputed "chronic health issues," which Robert acknowledges were taken "into account" when the parties initially divorced and he agreed to pay her alimony unhinged by any specific duration, see RA at 665, will improve

with the passage of time to enable her to support herself in any fashion, let alone in a manner "similar" to the lifestyle enjoyed during the

marriage. The trial court's August, 2020 termination date was "arbitrary" in light of her "current and predicable" needs. The elimination of Robert's financial obligations in August, 2020 simply does not "bear [any] relation to the financial circumstances of the parties." Goldman v. Goldman, 28 Mass. App. Ct. at 612 (*reversing* 8 year alimony award). As it is uncertain whether Joanne ever "will be able to earn sufficient additional income so as to render alimony unnecessary," the durational limit was inequitable, improper and should be vacated. See Sampson v. Sampson, 62 Mass. App. Ct. at 371 (*vacating* 3 year alimony award). See also D.L. v. G.L., 61 Mass. App. Ct. 488, 510 (2004)(striking 10-year alimony term); Bowring v. Reid, 399 Mass. 265, 268 (1987)(3-year limited alimony provision unwarranted absent "clear and adequate explanation")[21]

V. EVEN IF IT WAS PROPER TO ASCRIBE A FUTURE TERMINATION DATE, THE PROBATE & FAMILY COURT ABUSED ITS DISCRETION BY REFUSING TO DEVIATE FROM THE DURATIONAL LIMITATIONS PRESCRIBED BY G.L. C. 208, § 49(B).

The Act prescribes various, presumptively

[21] While these cases pre-dated the Act, their reasoning is apt here.

mandatory, durational limits on general term alimony[22] based on the length of the marriage. Throughout the Act, however, are various safety-nets -- phrased in a variety of ways -- that may be used to deviate from these presumptions. G.L. c. 208, § 49(b), provides that "deviation beyond the time limits of this section" is available if "*required in the interests of justice.*" Similarly, § 53(e) permits the court to "deviate from duration[al]...limits" if doing so "*is necessary.*" Finally, uncodified section 4 enables the court to exceed the durational limits if the court finds that deviation "*is warranted.*"[23]

None of these phrases is defined by the Act. While interpretation surely is case and fact dependent, there is currently no known appellate

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[22] See uncodified section 4(b) of the Alimony Reform Act, which provides that "Existing alimony awards shall be deemed general term alimony."

[23] The deviation factors in the Act are designed to allow judges to exercise discretion for the betterment of an alimony recipient. Indeed, as one commentator notes "there is a minority of cases to which the court should not apply the alimony guidelines, and the Act provides safeguards for those cases….Such a discretion allows judges flexibility, providing a safety valve for alimony recipients in extreme circumstances necessitating an adjustment from the Guidelines." R. Biscardi, *Dispelling Alimony Myths: the Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 Western New England Law Rev. at 34-35.

guidance on what these standards mean. In short, even if it *was* proper for the trial court to ascribe a future termination date, if deviation from the Act's durational limits here, at this time and on these facts, was not "in the interests of justice," "necessary," or "warranted," it is difficult to conceive of a case in which it would be.

Some legislatively sanctioned "grounds for deviation" include:

1. chronic illnesses, see G.L. c. 208, § 53(e)(1);

2. a "party's inability to provide for that party's own support by reason of that party's deficiency of property, see G.L. c. 208, § 53(e)(8); and

3. a "party's inability to provide for that party's own support by reason of that party's deficiency of...maintenance or employment opportunity," see G.L. c. 208, § 53(e)(8).

While any one (1) of the above "grounds" properly may serve as a basis to deviate from the durational limits of the Act, all three (3) are present here:

First, the judge's findings acknowledge Joanne's "chronic" and "on going" health problems, which "limit her employment options." Neither the findings nor the trial court's rationale explains how Joanne's presently limited options will so markedly improve

with the passage of time as to enable her to meet her future needs without support from Robert. To be sure, given the undisputed and "on going" nature of her health issues, it is more likely than not that her ailments will only worsen going forward.[24] At a minimum, there was no evidence to suggest that Joanne's health will improve sufficiently by August, 2020 to enable her (then at age 52) to explore more expansive employment options. See Henry v. Henry, 525 A.2d 267 (N.H. Sup. Ct. 1987)(*reversing* termination of alimony, *finding* abuse of discretion where husband knew at time of divorce wife had debilitating medical

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[24] The case of Green v. Green, 84 Mass. App. Ct. 1109 (Memorandum and Order Pursuant to Rule 1:28)(2013), decided by a panel of the Appeals Court, is analogous. There, as here, the parties maintained a "traditional partnership," with the husband serving as the primary wage earner, and the wife as the primary homemaker and caretaker to the couple's five children. The wife had multiple health issues, including cataracts, diabetes, asthma, arthritis and hypertension. The trial court found the 68-year old wife was "not employable" and ordered alimony to continue until the husband retired from teaching. The panel concluded there was "good cause to deviate from" the presumption that alimony should terminate upon the payor reaching full retirement age. The court went a step further and concluded that "it was error" to assume the wife's share of the husband's pension thereafter would be an "adequate substitute" for her alimony. The case was remanded to determine whether an equal division of husband's pension will "adequately replace alimony, and whether alimony should continue" even after husband's retirement.

conditions, and *holding* "trial court is not permitted simply to ignore" the worsening of wife's physical condition).

Second, Joanne had no assets upon which she could rely to support herself. In fact, it is clear from the trial court's findings that at the time of trial Joanne had more debt than assets - all of which is in home equity. The judge's findings do not reflect how, especially after her support from Robert has so materially diminished, that Joanne would be able to acquire sufficient assets by August, 2020 that she could use to meet her needs.

Finally, the trial court observed that Joanne not only "has no income other than alimony," she also is unable to meet her weekly expenses "[e]ven with the current alimony order of $12,000 per month." It is thus inconceivable how if she is unable to meet her needs at that level, she could possibly meet her reasonable needs after its elimination in August, 2020. Given her precarious financial situation, and her apparent inability to independently meet her economic needs, it is reasonable to infer, based on the trial court's findings, that after her alimony terminates Joanne may become a public charge. As a

matter of public policy, that result is fundamentally incongruous with Massachusetts decisional law. See e.g. Keller v. O'Brien, 420 Mass. 820, 826 (1995) (payor may have continuing duty to pay even after payee remarries if the result would otherwise shift the burden of support to the taxpayers of the Commonwealth). At a minimum, it is presently "uncertain or unpredictable" whether and to what extent Joanne will be able to become economically self-sufficient by August, 2020. Should her circumstances so change between now and then, Robert may file a Complaint for Modification.

CONCLUSIONS

For the reasons set forth above, the Probate & Family Court's Judgment, to the extent it imposes a termination date on Robert's obligation to pay Joanne alimony should be vacated and stricken.

Respectfully submitted,
JOANNE POPP
By her counsel,

May 16, 2016

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

APPEALS COURT
NO. 2016-P-479

ROBERT L. POPP,
Plaintiff-Appellee

vs.

JOANNE M. POPP,
Defendant-Appellant.

RULE 16(K) CERTIFICATION

I, Richard M. Novitch, believe and hereby certify that the underlying brief of the appellant, Joanne Popp, complies with the rules of court that pertain to the filing of briefs.

Richard M. Novitch, BBO# 636670

CERTIFICATE OF SERVICE

I hereby certify that I have this 16th day of May, 2016 served the foregoing Brief of the Appellant by mailing copies of same to:

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ADDENDUM

86 Mass.App.Ct. 1109
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

Steven R. GRAHAM
v.
Elaine M. GRAHAM.

August 26, 2014.

By the Court (WOLOHOJIAN, AGNES & HINES, JJ.). [2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The plaintiff, Steven Graham (husband), appeals from two judgments of the Probate and Family Court that (1) found him in contempt for his wilful failure to comply with an order to pay alimony to his former wife, the defendant, Elaine M. Graham (wife), and (2) dismissed his complaint for modification. The husband argues that the judge abused her discretion in dismissing his complaint for modification. We affirm.

Background. On June 17, 1997, the husband and wife were divorced after thirty years of marriage. The parties entered into a separation agreement that provided that the husband pay the wife the sum of $881.50 per week until August 1, 1999, and thereafter pay the reduced amount of $786.50 per week. The agreement also provided that alimony would terminate upon the death of either party, upon the wife's remarriage, or upon the husband's voluntary retirement from the practice of law. On June 6, 2011, the husband filed a complaint for modification with the Middlesex Division of the Probate and Family Court Department alleging that there had been a material change in circumstances. On January 12, 2012, the wife filed a complaint for contempt, alleging that the husband was in arrears of his alimony obligation. The judge dismissed the husband's complaint for modification, found him in contempt, and ordered him to pay $38,479 in past due alimony.

Discussion. On appeal, the husband asserts that the trial judge erred by failing to apply the provisions of the Alimony Reform Act of 2011, St.2011, c. 124, codified at G.L. c. 208, §§ 34, 48–55(act), to the pending complaint for modification. We disagree. The act took effect on March 1, 2012, during the pendency of this case. In the case of marriages of twenty years or less, the act establishes presumptive termination dates for general term alimony. See G.L. c. 208, § 49(b); *Holmes v. Holmes,* 467 Mass. 653, 657–658 & n. 6 (2014). In the case of long-term marriages, the default provision under the act is that "general term alimony orders shall terminate upon the payor attaining the full retirement age." G.L. c. 208, § 49(f). However, the statute admits exceptions. For example, it allows judges to "set a different alimony termination date for good cause shown" provided that written findings of the reasons for such an order are made. G.L. c. 208, § 49(f)(1). In any case, as the judge pointed out in her thorough decision, the act provides that any person who has reached full retirement age (as defined in G.L. c. 208, § 48) on or before March 1, 2015, may file a complaint for modification on or after March 1, 2013. See St.2011, c. 124, § 6. The husband, who will reach full retirement age before March 1, 2015, contends that this provision requires immediate termination of his alimony. He overlooks, however, the settled principle that a legislative enactment cannot amend or supersede the judgment of a court. See *Opinion of the Justices,* 234 Mass. 612, 621 (1920), and cases cited. The judge was correct in interpreting § 6 of the act to mean that a payor who will reach full retirement age before March 1, 2015, may file a complaint for modification on or after March 1, 2013. The husband filed his complaint prior to March 1, 2013. Because he did not refile his complaint thereafter, he derives no benefit from the act in the case before us. [1]

***2** The husband further alleges that the probate judge erred in calculating income for purposes of modification. In order to prevail in an action for modification of alimony, the plaintiff must demonstrate a material change in circumstances since the entry of the earlier judgment. See *Hassey v. Hassey,* 85 Mass.App.Ct. 518, 527–528 (2014). A probate judge "enjoys considerable discretion in fashioning an appropriate modification judgment, and ... the judgment may not be reversed in the absence of an abuse of discretion." *Pierce v. Pierce,* 455 Mass. 286, 293 (2009). In her findings, the probate judge determined that the husband's diminished income was nothing more than "creative bookkeeping." While it is ordinarily impermissible for a judge to attribute income of a second spouse to a party, see G.L. c. 208, § 54(*a*), income may be attributed if the trial judge determines that a party's depressed income is the result of a voluntary, deliberate choice. See *Schuler v. Schuler,* 382 Mass. 366, 371–372 (1981). In the first year of his newly founded firm, the husband was responsible for eighty-nine percent of

the firm's earnings, yet he unilaterally decided to forego a salary. His new wife and law firm partner, who is responsible for only eleven percent of the firm's earnings, however, received a salary. Noting this discrepancy in earnings and the partners' relationship to one another does not rise to the level of "whimsy, caprice, or arbitrary or idiosyncratic notions." *Pierce, supra,* quoting from *Bucchiere v. New England Tel. & Tel. Co.,* 396 Mass. 639, 642 (1986). We therefore conclude that the judge did not abuse her discretion.

The wife's motion for appellate attorney's fees is denied.

Judgments affirmed.

All Citations

86 Mass.App.Ct. 1109, 14 N.E.3d 968 (Table), 2014 WL 4187526

Footnotes

1 The judge recognized, and we agree, that there is no bar to the husband filing a new complaint seeking termination of the alimony order.

2 Justice Hines participated in the deliberation on this case while an Associate Justice of this court, prior to her appointment as an Associate Justice of the Supreme Judicial Court.

84 Mass.App.Ct. 1109
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

John H. GREEN
v.
Ruth E. GREEN.

No. 12–P–1430.
|
August 30, 2013.

By the Court (BERRY, WOLOHOJIAN & SULLIVAN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The wife appeals from a judgment of divorce nisi, arguing essentially that the financial division is inequitable. We conclude that the judge acted within her discretion in dividing the assets evenly and awarding the wife alimony of $875 per week until the husband retires from teaching. However, we also conclude that the record does not contain sufficient information about the value of the husband's teaching pension to support the financial award for the period after the husband retires from teaching. We therefore affirm in part but remand for further proceedings on the question of postretirement support for the wife.

Background. The parties had a long-term marriage that lasted forty-seven years. Their partnership was traditional: while the husband was the primary wage earner (working first as an engineer and then as a high school physics teacher [1]), the wife maintained the home and raised the couple's five children. Through this partnership, the parties achieved a middle class lifestyle and accumulated meaningful assets. At the time of trial, the husband and wife were both sixty-eight years old. The husband's health was generally good, but the wife had multiple health issues, including cataracts, asthma, diabetes, arthritis, and hypertension. Given the parties' age, the judge found that they had limited opportunities to acquire future assets and income, and also found that the wife was "not employable and is dependent on her Husband for support." [2] The primary issues at trial were property division and alimony. With regard to property division, the judge concluded that "anything other than an equal division of the marital estate" would be inappropriate. [3] She therefore divided the parties' nonpension assets approximately evenly. [4] With regard to alimony, the judge awarded the wife $875 per week until, among other events, the husband retires from teaching. The husband has two pensions—one from his engineering job (with an annual defined benefit of $52,457) and one from his teaching job (with an unknown benefit). The parties agreed to treat the engineering pension as a stream of income and not a divisible asset. [5] The judge ordered the husband to maintain the wife as the sole beneficiary of the engineering pension upon his death, and she ordered an equal division of the teaching pension. [6]

Discussion. While equitable division of property continues to be governed by G.L. c. 208, § 34, we note that the Alimony Reform Act (Act) took effect shortly before this case was tried. In making an award of alimony, a judge must now operate within the Act's framework. See G.L. c. 208, § 34, as amended by St.2011, c. 124, §§ 1–2; G.L. c. 208, §§ 48–55, inserted by St.2011, c. 124, § 3. Similar to prior law, the Act defines alimony 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." [7] G.L. c. 208, § 48. Cf. *Gottsegen v. Gottsegen,* 397 Mass. 617, 623–624 (1986) (prior statutory authority to award alimony was "grounded in the recipient spouse's need for support and the supporting spouse's ability to pay"). The Act directs judges to consider a nonexclusive list of factors to determine the form, amount, and duration of alimony, see G.L. c. 208, § 53(*a*), [8] and sets presumptive limits on duration and amount. [9] With regard to general term alimony, the Act permits judges to deviate from the presumptive limits on duration, and to deviate where necessary from the presumptive limits on amount. See, e.g., G.L. c. 208, §§ 49(*b*), 49(*f*)(1), and 53(*e*). The recent amendments also recognize the interrelationship between alimony and property division, see *D.L. v. L.*, 61 Mass.App.Ct. 488, 508 (2004), by expressly incorporating "the amount and duration of alimony, if any, awarded" into the list of factors judges must consider when dividing property. See G.L. c. 208, § 34, third sentence.

***2** Here, the wife challenges the overall financial division, arguing that both the allocation of assets and the alimony award are insufficient. Because the Act does not depart from the long-standing principle that alimony and property division

"are interrelated remedies that cannot be viewed apart," *D.L. v. G.L.,* 61 Mass.App.Ct. at 508, on review we assess the fairness of the "financial arrangement as a whole." *Grubert v. Grubert,* 20 Mass.App.Ct. 811, 822 (1985). The parties, in their briefs, have argued first (and implicitly request that we review first), the division of assets. We turn to that question.

In allocating the parties' assets, the judge made findings of fact corresponding to each of the required statutory factors, see G.L. c. 208, § 34, and she essentially divided the assets down the middle. The wife argues that she should have received more than fifty percent of the marital assets, but it was within the judge's discretion to divide the assets evenly, especially where the judgment includes other provisions to support the wife. Unlike the situation in *Grubert,* where the wife's only source of support after the husband's death would be proceeds from selling her home, here the judge not only awarded alimony, but she also split the teaching pension and required the husband to maintain the wife as the beneficiary of his engineering pension. Cf. *Grubert,* 20 Mass.App.Ct. at 818–819. The wife also argues that the judge erred by awarding her only $73,679 on a pre-tax basis from the husband's Fidelity IRA, but we think it is clear (and the husband agrees) that $73,679 represents an after-tax amount. [10]

With regard to alimony, the judge awarded the wife $875 per week in general term alimony until, among other events, the husband retires from teaching. By subtracting discretionary home maintenance costs of $472 per week from the wife's reported expenses, the judge found that the wife's fixed weekly expenses are $705.93, and we cannot say that that finding was "clearly erroneous ." See *Sampson v. Sampson,* 62 Mass.App.Ct. 366, 370 (2004). When the alimony is combined with the wife's Social Security payments, her weekly income stream is nearly $1,100, which, as the judge explained, "more than meets the fixed needs of Wife" and allows for some discretionary spending and anticipated home improvements.

Furthermore, to the extent that G.L. c. 208, § 49(*f*) (creating a presumption that alimony shall terminate when the payor reaches full retirement age [as the husband has]) has application in this case, [11] the judge here implicitly found that there was good cause to deviate from that presumption, see G.L. c. 208, § 49(*f*)(1), and her factual findings show that she considered the relevant statutory grounds for deviation, including the wife's age, poor health, and lack of employment opportunity. [12] See G.L. c. 208, § 53(*e*). We conclude that the judge acted well within her discretion in awarding alimony to the wife even though the husband had already reached full retirement age, and we see no error in the amount of alimony awarded for the period until the husband's retirement.

***3** While it is apparent to us why the judge found it necessary to award weekly alimony of $875, it is not apparent why alimony should cease when the husband retires from teaching. See *Adams v. Adams,* 459 Mass. 361, 371 (2011) (judge's conclusions must be apparent in findings and rulings). It seems that the judge terminated alimony upon the husband's retirement from teaching with the expectation that his teaching pension would then effectively replace the alimony amount. However, without any evidence of the value of the teaching pension benefit, it was error to assume that it will be an adequate substitute for weekly alimony of $875. While we affirm all other aspects of the judgment, we remand the matter so the judge can take evidence to determine the anticipated value of the teaching pension benefit and assess whether an equal division of that pension (as currently ordered) will adequately replace alimony, and whether alimony should continue and, if so, in what amount. [13]

Conclusion. The judgment dated April 25, 2012, is vacated to the extent that it terminates alimony after the husband's retirement from teaching, and the matter is remanded solely for the purpose of determining the value of the husband's teaching pension, as herein discussed, and what amount of alimony (if any) the wife should receive after the husband's retirement from teaching. The judgment is otherwise affirmed. [14]

So ordered.

All Citations

84 Mass.App.Ct. 1109, 993 N.E.2d 373 (Table), 2013 WL 4604202

Footnotes

1 The husband was still teaching at the time of trial, even though he was past full retirement age, see 42 U.S.C. § 416(l)(1)(C), and earning $1,367.59 per week. He was also receiving $519.46 per week in Social Security income and $1,008.78 per week from his engineering pension.

2 The wife's only independent source of income is a weekly Social Security payment of $194.84.

3 Whereas the husband had proposed an equal division of marital assets, the wife sought sixty-five percent of the assets based on the husband's allegedly poor behavior during the marriage. The judge rejected the wife's request for a disproportionate allocation of assets, explaining that "[e]ach party exhibited certain conduct during ... the marriage which contributed to [its] eventual breakdown."

4 Assets were divided as follows:

Asset	Value	To Wife	To Husband
Marital Home	$259,000	$259,000	$0
Husband's Fidelity IRA	$413,540	$73,679	$339,861
Wife's Fidelity IRA	$3,894	$3,894	$0
Husband's Merrimack IRA	$24,012	$0	$24,012
Wife's Merrimack IRA	$31,833	$31,833	$0
Husband's Credit Union Account	$38,505	$0	$38,505
Wife's Credit Union Accounts	$36,613	$36,613	$0
Husband's Communications Stocks	$13,291	$0	$13,291
Husband's DSPP Common Stock	$10,552	$0	$10,552
Husband's vehicle	$2,400	$0	$2,400
Wife's vehicle	$13,000	$13,000	$0
TOTAL		$418,019	$428,621

5 Typically, pensions are treated as assets subject to equitable division. See *Casey v. Casey,* 79 Mass.App.Ct. 623, 629–630 (2011).

6 The judge made no findings about the value of the teaching pension, and both parties acknowledged at oral argument that the record is silent on that point.

7 The Act also defines four different forms of alimony. See G.L. c. 208, § 48 (defining general term alimony, rehabilitative alimony, reimbursement alimony, and transitional alimony). Here, the husband acknowledged that general term alimony was appropriate because of the length of the marriage and disparity of income.

8 The new alimony factors in G.L. c. 208, § 53(*a*), largely overlap with the property division factors in G.L. c. 208, § 34.

9 See, e.g., G.L. c. 208, § 49(*b*) (setting presumptive limits on duration of general term alimony based on length of marriage); G.L. c. 208, § 53(*b*) (providing that alimony generally should not exceed recipient's need or thirty to thirty-five percent of difference between parties' gross incomes).

10 The wife also argues that provisions in the judgment relating to life insurance, medical coverage, personal property, and preparation of the qualified domestic relations order were error, but we cannot say that those provisions create a "plainly wrong and excessive" financial division. *Heins v. Ledis,* 422 Mass. 477, 481 (1996).

11 The judge found, and the record supports, that the husband agreed and acknowledged that he has an obligation to pay alimony as long as he remains in his current position.

12 Although the judge did not enter written findings of her reasons for deviating—as required by G.L. c. 208, §§ 49(*f*)(1) and 53(*e*)—the parties have waived any argument that this was error. See *Correia v. Correia,* 70 Mass.App.Ct. 811, 816 (2007) (issues not raised below are generally deemed waived on appeal).

13 In addition to challenging the financial division, the wife also argues that the judge should have awarded her attorney's fees because the husband has a greater ability to pay. "A judge has considerable discretion in determining the necessity and the amount of attorney's fees." *Moriarty v. Stone,* 41 Mass.App.Ct. 151, 159 (1996). We discern no abuse of discretion here. Cf. *Drapek v.. Drapek,* 399 Mass. 240, 248 (1987) (judge acted within discretion in declining to award wife attorney's fees).

14 The husband's request for appellate attorney's fees and costs is denied.

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Massachusetts General Laws Annotated
Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 34

§ 34. Alimony or assignment of estate; determination of amount; health insurance

Effective: March 1, 2012
Currentness

Upon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction, the court of the commonwealth, provided there is personal jurisdiction over both parties, may make a judgment for either of the parties to pay alimony to the other under sections 48 to 55, inclusive. 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, including but not limited to, all vested and nonvested benefits, rights and funds accrued during the marriage and which shall include, but not be limited to, retirement benefits, military retirement benefits if qualified under and to the extent provided by federal law, pension, profit-sharing, annuity, deferred compensation and insurance. In fixing the nature and value of the property, if any, to be so assigned, the court, after hearing the witnesses, if any, of each of the parties, 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, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony, if any, awarded under sections 48 to 55, inclusive. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage. The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit. When the court makes an order for alimony on behalf of a spouse, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor do one of the following: exercise the option of additional coverage in favor of the spouse, obtain coverage for the spouse, or reimburse the spouse for the cost of health insurance. In no event shall the order for alimony be reduced as a result of the obligor's cost for health insurance coverage for the spouse.

Credits

Amended by St.1974, c. 565; St.1975, c. 400, § 33; St.1977, c. 467; St.1982, c. 642, § 1; St.1983, c. 233, § 77; St.1988, c. 23, § 67; St.1989, c. 287, § 59; St.1989, c. 559; St.1990, c. 467; St.2011, c. 124, §§ 1, 2, eff. Mar. 1, 2012.

M.G.L.A. 208 § 34, MA ST 208 § 34
Current through Chapter 106 of the 2016 2nd Annual Session

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Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 37

§ 37. Alimony; revision of judgment

Currentness

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.

The court, provided there is personal jurisdiction over both parties, may modify and alter a foreign judgment, decree, or order of divorce or separate support where the foreign court did not have personal jurisdiction over both parties upon the entry of such judgment, decree or order.

The court, provided there is personal jurisdiction over both parties to a foreign judgment, decree, or order of divorce for support, where such foreign court had personal jurisdiction over both parties, may modify and alter such foreign judgment, decree, or order only to the extent it is modifiable or alterable under the laws of such foreign jurisdiction; provided, however, that if both parties are domiciliaries of the commonwealth, then the court may modify and alter the foreign judgment in the same manner as it could have had the judgment, order, or decree been issued by the court; and provided further, that the court may not modify or alter the judgment, order or decree of a foreign jurisdiction which had personal jurisdiction over both parties concerning the division or assignment of marital assets or property.

Credits
Amended by St.1975, c. 400, § 38; St.1977, c. 495; St.1982, c. 642, § 2.

M.G.L.A. 208 § 37, MA ST 208 § 37
Current through Chapter 106 of the 2016 2nd Annual Session

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Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 48

§ 48. Definitions applicable to Secs. 49 to 55

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

M.G.L.A. 208 § 48, MA ST 208 § 48

Current through Chapter 106 of the 2016 2nd Annual Session

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Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 49

§ 49. Termination, suspension or modification of general term alimony

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

(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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

M.G.L.A. 208 § 49, MA ST 208 § 49
Current through Chapter 106 of the 2016 2nd Annual Session

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Part II. Real and Personal Property and Domestic Relations (Ch. 183-210)
Title III. Domestic Relations (Ch. 207-210)
Chapter 208. Divorce (Refs & Annos)

M.G.L.A. 208 § 53

§ 53. Determination of form, amount and duration of alimony; maximum amount; income calculation; deviations; concurrent child support orders

Effective: March 1, 2012
Currentness

<[Text of section applicable as provided by 2011, 124, Sec. 4.]>

(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.

Credits
Added by St.2011, c. 124, § 3, eff. Mar. 1, 2012.

M.G.L.A. 208 § 53, MA ST 208 § 53
Current through Chapter 106 of the 2016 2nd Annual Session