20-P-76 Appeals Court

LISA M. DOLAN vs. SHAUN T. DOLAN.

No. 20-P-76.

Norfolk. November 13, 2020. - March 2, 2021.

Present: Henry, Sacks, & Englander, JJ.

Divorce and Separation, Alimony, Modification of judgment.

Complaint for divorce filed in the Norfolk Division of the Probate and Family Court Department on August 1, 2012.

A complaint for modification, filed on September 1, 2017, was heard by Patricia A. Gorman, J.

William Sanford Durland, III, for the husband.
Miriam Goldstein Altman for the wife.

SACKS, J. Shaun T. Dolan (husband), the former spouse of Lisa M. Dolan (wife), appeals from a Probate and Family Court modification judgment that, although it reduced his alimony obligation, delayed the reduction's effective date until five

months after the modification judgment issued.[1] The judge's decision to delay the implementation of the husband's reduced alimony obligation was based, in part, on the husband's receipt of capital gains income from the sale of an asset assigned to him in the divorce. The husband contends that the judge's consideration of such income ran afoul of G. L. c. 208, § 53 (c) (1), enacted as part of the Alimony Reform Act (act), which provides that, "[w]hen issuing an order for alimony, the court shall exclude from its income calculation . . . capital gains income and dividend and interest income which derive from assets equitably divided between the parties under [G. L. c. 208, § 34]." We affirm.

Background. We summarize the relevant facts found by the judge, supplementing them with undisputed evidence in the record. See Pierce v. Pierce, 455 Mass. 286, 288 (2009). The parties were married in September 1988. During the marriage, the husband was the primary wage earner and the wife was principally responsible for managing the household and caring for the parties' two children. The parties enjoyed an "upper

[1] The parties disagree as to whether the support order at issue in this case is purely alimony or a combination of alimony and child support. Although there is some discussion of the children's needs in the findings accompanying the amended divorce judgment and the modification judgment, both judgments expressly characterize the husband's support obligation as "alimony . . . payable as unallocated support." Accordingly, the discussion that follows pertains to alimony only.

class lifestyle" for most of the marriage, funded largely by the husband's income from his business, East Coast Benefit Plans, Inc. (ECBP). At the time of the divorce, the husband was both a coowner and an employee of ECBP, earning annual employee compensation of $481,233.

Pursuant to the amended divorce judgment dated June 6, 2016 (nunc pro tunc to December 22, 2015), the husband was required to pay "alimony to [the w]ife in the amount of $2,885 per week, payable as unallocated support in the amount of $12,501.67 per month." The amended divorce judgment provided that "nothing . . . shall preclude either party from filing a complaint for modification upon a material change of circumstances." The marital estate was divided equally, with each party receiving assets worth approximately $3.9 million. Among the assets assigned to the husband was his fifty percent ownership interest in ECBP, which was worth $838,500 at the time of the divorce. For purposes of alimony, the divorce judge attributed an annual income of $31,200 to the wife, consistent with her part-time earning history. In calculating the alimony award, the divorce judge considered the various statutory factors under G. L. c. 208, § 53 (a), including the marital lifestyle, the wife's need for support, and the husband's ability to pay. The divorce judge also ordered the wife to pay forty percent of the children's college expenses, and the husband to pay the

remaining sixty percent, after essentially exhausting the children's educational accounts.

In August 2017, the husband and his business partner sold ECBP to Digital Insurance LLC (OneDigital).[2] Pursuant to the asset purchase agreement executed with OneDigital, the husband received an initial lump sum payment of $1,973,416.50 in August 2017, a second lump sum payment of $433,360.50 in August 2018, and twenty-four monthly instalments of $4,166.67 between August 2017 and July 2019. The agreement also provided for a potential third lump sum payment in August 2020, depending on the amount of OneDigital's earnings attributable to ECBP. The husband also executed an employment agreement with OneDigital, guaranteeing him annual compensation of $300,000 for the first two years (August 2017 to August 2019), subject to adjustment thereafter at OneDigital's discretion.

In September 2017, the husband filed a complaint for modification seeking a reduction in alimony, largely on the basis of his reduced salary resulting from the sale of ECBP. A two-day modification trial was held before a different judge

[2] The husband and his business partner decided to sell ECBP because the business had been struggling since 2014. Between late 2014 and 2015, ECBP lost several clients, resulting in significant revenue losses. Although the husband and his business partner took measures to mitigate the losses (including laying off employees, reducing overhead expenses, and reducing their own salaries by $100,000 each), ECBP suffered a decline of nearly $1 million in revenue between 2015 and the end of 2017.

(modification judge) in December 2018. The modification judgment, dated March 19, 2019, provided in relevant part that, "[c]ommencing August 1, 2019, [the husband] shall pay alimony to [the wife] in the amount of $1,680.00 per week, payable as unallocated support . . . . The Court intends that the unallocated support payment . . . shall continue to be deductible to [the husband] and taxable to [the wife]" for purposes of the parties' Federal income tax returns. The judgment thus reduced the husband's weekly support obligation by $1,205 per week.

The modification judge found "several material changes of circumstances" since the parties' divorce, including (1) the sale of ECBP, "resulting in [the husband's] receipt of a large lump sum and time-limited monthly payments from the sale but also resulting in a decrease in his employment income"; and (2) the children's enrollment in college (both children were in high school at the time of the divorce trial). The modification judge found that, with respect to the children's college expenses, the husband was contributing $50,000 per year and the wife was contributing $33,000 per year.

The modification judge found that both parties continued to enjoy an upper class standard of living, although their postdivorce lifestyles reflected a slight decline from the marital lifestyle. The modification judge found that both

parties "continue[d] to have significant assets," although they had decreased in value somewhat since the divorce.[3] The modification judge affirmed the prior attribution of income to the wife of $31,200 per year ($600 per week), and found her expenses to be $4,444 per week (although they would decrease to $4,100 by August 2019 due to the parties' eldest child graduating from college). The modification judge determined that the wife "continue[d] to have a need for support" from the husband.

With respect to the husband, the modification judge found that his reported gross weekly income of $15,064.20 -- which included both his OneDigital salary and payments received from the sale of ECBP -- represented a "significant increase" from his income at the time of the divorce. However, the modification judge found that "beginning in August 2019, it is expected that [the husband] will have a single source of income, namely, his employment at OneDigital," resulting in his income "decreas[ing] by more than [thirty-five percent] as compared with the time of the divorce." The modification judge found that "in light of the above, [the husband] has the ability to continue to pay his current alimony obligation through July

[3] The modification judge found the husband to have assets totaling $2,653,819, and the wife to have assets totaling $3,066,022.

2019." The modification judge reduced the husband's alimony obligation to $1,680 per week commencing on August 1, 2019, finding that the modified alimony award achieved a "fair balance of sacrifice" between the parties. Pierce, 455 Mass. at 296. The present appeal by the husband followed.

Discussion. 1. Consideration of income from assets. The husband principally contends that the modification judge's decision to treat his ECBP sale proceeds as income available to continue paying the existing alimony order, and thus to delay the implementation of his reduced alimony obligation until the ECBP instalments concluded in July 2019, was in direct contravention of G. L. c. 208, § 53 (c) (1). The husband argues that because the ECBP payments derived from an asset assigned to him at the time of the divorce, considering that income in connection with his request for a downward modification of alimony was error.

The wife, however, contends that a downward modification of alimony involves a two-step process under the act: (1) the judge must make a threshold determination that the payor has met his or her burden of demonstrating a material change in circumstances, pursuant to G. L. c. 208, § 49 (e); and (2) the judge must then calculate the modified alimony award pursuant to the parameters set forth in G. L. c. 208, § 53 (b)-(c). The wife argues that the husband has improperly conflated § 53 (c)

(1), which excludes certain income from consideration during the second step of the modification process, with the separate and distinct threshold inquiry under § 49 (e), i.e., whether there has been a material change in circumstances warranting modification.

Because this case "involves a question of statutory interpretation, . . . we review [it] de novo." Duff-Kareores v. Kareores, 474 Mass. 528, 533 (2016). "Although we look first to the plain language of the provision at issue to ascertain the intent of the Legislature, we consider also other sections of the statute, and examine the pertinent language in the context of the entire statute." Id., quoting Chin v. Merriot, 470 Mass. 527, 532 (2015). Here, the provisions of the act at issue are § 49 (e) and § 53 (c) (1). Section 49 (e) provides that "general term alimony may be modified in duration or amount upon a material change of circumstances warranting modification."[4] Section 53 (c) (1) provides that "[w]hen issuing an order for alimony, the court shall exclude from its income calculation

[4] Another statutory provision relating to a judge's authority to modify a prior alimony award is set forth in G. L. c. 208, § 37, which was left unchanged by the act and provides, in relevant part, that "[a]fter a judgment for alimony . . . 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 . . . and the payment thereof, and may make any judgment relative thereto which it might have made in the original action."

. . . capital gains income and dividend and interest income which derive from assets equitably divided between the parties under section 34" (emphasis added).

The husband urges us to construe § 53 (c) (1) as prohibiting a judge from considering capital gains income derived from an asset received in the divorce when making the threshold material change in circumstances determination under § 49 (e). Although it is clear that § 53 (c) (1) excludes such income for purposes of calculating a modified alimony order during the second step, § 49 (e) contains no language expressly excluding such income from consideration during the first step. Had the Legislature intended the prohibition contained in § 53 (c) (1) to apply to the threshold material change in circumstances determination, it could have included language to that effect in § 49 (e), but it did not. See Chin, 470 Mass. at 537, quoting Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 126 (2006) (court will not "read into the statute a provision which the Legislature did not see fit to put there"). Instead, the language of section § 49 (e) continues to reflect the longstanding rule that "[a] party seeking to modify an existing alimony award 'must demonstrate a material change of circumstances since the entry of the earlier judgment.'" Emery v. Sturtevant, 91 Mass. App. Ct. 502, 507 (2017), quoting

Vedensky v. Vedensky, 86 Mass. App. Ct. 768, 772 (2014). See Balistreri v. Balistreri, 93 Mass. App. Ct. 515, 519 n.14 (2018) ("Even within the field of alimony, the act did not result in a wholesale displacement of our existing law").

In determining whether a payor has met his or her burden of demonstrating a material change in circumstances warranting a downward modification of alimony, it is well settled that a judge must consider the totality of the payor's financial circumstances, including his or her income and available assets. See Schuler v. Schuler, 382 Mass. 366, 370-373, 375-376 (1981);[5] Greenberg v. Greenberg, 68 Mass. App. Ct. 344, 347-348, 350-351 (2007); Katz v. Katz, 55 Mass. App. Ct. 472, 481 (2002) ("Capital assets should be used to evaluate a supporting spouse's ability to pay alimony in a modification proceeding"); Pagar v. Pagar, 9 Mass. App. Ct. 1, 6-8 (1980). Cf. Krokyn v. Krokyn, 378 Mass. 206, 213-214 (1979); Croak v. Bergeron, 67 Mass. App. Ct. 750, 757-758 (2006); Cooper v. Cooper, 43 Mass. App. Ct. 51, 54-55 (1997).

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[5] "[W]hen an ex-husband voluntarily liquidates his business, a capital asset, and thereby diminishes his future earning capacity, we believe that it would be unjust to hold that he is automatically relieved of future alimony payments, even if it ultimately becomes necessary to pay the ex-wife a portion of the proceeds from the sale." Schuler, 382 Mass. at 376, quoting Sieber v. Sieber, 258 N.W.2d 754, 757 n.2 (Minn. 1977).

We see no indication that the Legislature intended to change this rule through the enactment of § 53 (c) (1). Section 53 (c) (1), by its own express terms, applies only when "issuing" an alimony order. There is a clear distinction between ordering a party to pay alimony with income derived from an asset received in the divorce -- which § 53 (c) (1) was designed to prevent -- and determining whether a payor's income and assets together demonstrate an ability to continue paying an existing alimony obligation. See Katz, 55 Mass. App. Ct. at 481, quoting Krokyn, 378 Mass. at 213-214 ("Common sense and basic concepts of fairness support the notion that ownership of a valuable asset demonstrates ability to pay without further inquiry as to whether payment can be enforced directly against the asset"). Accordingly, in a modification proceeding, § 53 (c) (1) applies when the judge is calculating a modified alimony order, after the judge has made a threshold determination that there has been a material change in circumstances warranting modification. We therefore see no error in the modification judge's consideration of the husband's income from the sale of ECBP when determining whether he met his burden of demonstrating a material change in circumstances. See Greenberg, 68 Mass. App. Ct. at 350 ("It was . . . [the husband's] burden to establish that a material change in his circumstances prevented

him from meeting his current alimony obligations out of income and assets").

2. Effective date of modification. We likewise see no abuse of discretion in the modification judge's decision to delay the implementation of the reduced alimony obligation to August 1, 2019, rather than reducing alimony retroactively to the date of service of the husband's complaint for modification in 2017. See Holmes v. Holmes, 467 Mass. 653, 661 (2014) (modification of alimony reviewed for abuse of discretion).[6] "[T]he central inquiry in a case involving modification of both child support and alimony is whether, and to what extent, the parties' financial circumstances have changed since the entry of the prior judgment. 'The change may be in the needs or the resources of the parties . . . or in their respective incomes.'" Emery, 91 Mass. App. Ct. at 508, quoting Kernan v. Morse, 69 Mass. App. Ct. 378, 383 (2007). See Schuler, 382 Mass. at 370–371 ("A substantial and permanent decrease in the income of the support provider is one of the material circumstances to be considered in a request for reduction of a support

[6] "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision . . . such that the decision falls outside the range of reasonable alternatives" (citation omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

[obligation];" however, "such a decrease does not alone compel a modification").[7]

Here, the modification judge found that, under the totality of the circumstances, the husband retained the ability to pay his original alimony obligation through July 2019, when his monthly instalment payments from the sale of ECBP terminated. The modification judge implicitly concluded that there would be no material change in the husband's ability to pay the existing order until August 1, 2019. Based on the record before us, we conclude that the modification judge's decision to delay the implementation of the husband's reduced alimony obligation did

[7] In Schuler, 382 Mass. at 377-378, the evidence as a whole, including consideration of the husband's assets as well as his income, was held to warrant a finding that the husband was able to make the alimony and support payments mandated by the original judgment, and thus was not entitled to a downward modification of his obligations.

not fall "outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).[8,9]

Modification judgment dated March 19, 2019, affirmed.

[8] The husband also argues that the judge engaged in inequitable "double dipping" by treating an asset divided at the time of the divorce as a stream of income for purposes of calculating alimony. See Croak, 67 Mass. App. Ct. at 758-759 ("'double dipping' [is used] to describe the seeming injustice that occurs when property is awarded to one spouse in an equitable distribution of marital assets and is then also considered as a source income for purposes of imposing support obligations" [citation omitted]). Because the husband did not raise this argument below, we decline to consider it. See Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006). That said, even if we were to reach the double dipping issue, it would not change our conclusion in this case. Here, the judge did not use the ECBP payments to calculate a modified award; she simply considered those payments when assessing whether the husband met his burden of demonstrating a material change in circumstances. Moreover, "even assuming for argument's sake that this case implicates double counting, the judge's determination still would not constitute an abuse of discretion. While disfavored, double counting is not prohibited as a matter of law." Ludwig v. Lamee-Ludwig, 91 Mass. App. Ct. 36, 39 (2017). "The trial judge must look to the equities of each situation," which the judge clearly did in this case. Id.

[9] The wife's request for attorney's fees is denied.