

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-648

ARTHUR T. SHAW

vs.

KRISTINE SHAW.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Arthur T. Shaw (husband), appeals from a judgment (modification judgment) that modified the judgment of divorce nisi (divorce judgment), challenging the award of alimony to Kristine Shaw (wife) and the retroactivity of that award. He also appeals from the order denying as untimely his motion to amend. For the reasons that follow, we affirm the modification judgment. We reverse the order denying the husband's motion to amend, and remand the matter for further proceedings consistent with this memorandum and order.

Background. The parties' divorce ended a marriage of approximately nineteen years during which two children were born. Pursuant to the September 9, 2014 divorce judgment, which incorporated and merged the provisions of the parties' separation agreement (agreement) pertaining to the children,

health insurance, and alimony, the parties agreed that neither would pay child support to the other, and that the husband would be solely responsible for the payment of the children's college expenses. With respect to alimony, Exhibit B to the agreement instructed that:

"5. Neither party shall pay alimony to the other until the first to occur of June 1, 2018; or the date upon which [the youngest child] is no longer a full time undergraduate student or when she resumes permanent residence with the [wife].

"6. The amount of alimony shall be determined by the Court at the time it is payable, and the husband's payment of college expenses shall be considered at the time an alimony order is entered, not including any college loans taken prior to that date.

"7. Alimony shall be paid until as set forth in [G. L. c. 208, §§ 48-54]."

On or about April 26, 2018, in anticipation of their youngest daughter's graduation from college, the wife filed a complaint for modification of the divorce judgment seeking an order of weekly alimony under the terms and conditions of the agreement. On December 5, 2019, trial was held on the wife's complaint for modification, at which both parties were represented by counsel and both the husband and the wife testified as to their current income.¹

¹ The parties' posttrial filings (i.e., written closing arguments, proposed findings and conclusions of law, and proposed judgments) are not included in the record appendix.

Relying on the parties' trial testimony and admitted financial statements (both current and at the time of divorce), the judge found that the husband's current weekly income, after certain adjustments,² was \$2,960, and his gross weekly expenses totaled \$2,345, giving him "an excess of net weekly income over expenses of approximately \$615." The judge also found that the husband's assets had a present value of \$295,000, and the husband had approximately \$150,000 in liabilities. Based on the foregoing, the judge determined that the husband had the ability to pay alimony to the wife.

In contrast, the judge found the wife's weekly income, after making certain adjustments³ and deducting her postdivorce overtime pay, totaled \$737. See G. L. c. 208, § 54 (b) (2) (exclusion of income from postdivorce overtime). Her current weekly expenses, after certain adjustments, totaled approximately \$1,471, leaving the wife with a weekly deficit of approximately \$714. The wife's assets were valued at \$262,500 (including \$90,000 in equity from her condominium purchased with

² The judge noted that the husband's stated weekly income did not include postdivorce deductions from his pay for contributions to savings, deferred compensation, a flex spending account, or life insurance. The judge also excluded from the husband's weekly income \$135 derived from his postdivorce role as director of the police department's emergency operations.

³ The judge adjusted the wife's income to reflect deductions for state and federal taxes and various other amounts as she did with the husband's weekly income.

proceeds from the husband's buyout of her interest in the marital home), with stated liabilities totaling approximately \$42,000. The judge thus determined that the wife was in need of weekly support from the husband. Based on the wife's weekly income deficit and the husband's weekly income surplus (which he had from and after June 1, 2018), the judge determined that the husband had the ability and obligation to pay the wife weekly support to assist her in meeting her needs.

The modification judgment entered on February 14, 2020, ordering the husband to pay to the wife weekly alimony of \$400, retroactive to June 1, 2018. The judge determined that under G. L. c. 208, § 49 (b) (4), the duration of the husband's alimony obligation was 187.5 months, or 15.6 years (eighty percent of the total number of months of the parties' marriage - - 234.43); neither party disputed the marriage duration calculation, nor was it an issue at trial. As a result of the retroactivity of the alimony order, the husband owed \$36,000 in arrears, of which he was required to pay a lump sum of \$20,000 by March 27, 2020, and beginning the following week to pay an additional \$100 weekly until the remaining \$16,000 arrearage was satisfied. The wife was awarded \$1,000 in deferred attorney's fees resulting from the husband's failure to timely produce certain discovery.

On March 2, 2020, the husband (acting pro se) filed and served a motion to amend the modification judgment requesting that the judge insert a definitive alimony termination date "to minimize the risk of adverse tax consequences regarding the proper treatment of alimony under the judgment." On April 14, 2020, the judge denied the motion in a margin order that read: "as not timely served per [Mass. R. Dom. Rel. P.] 59 (e)." The husband now appeals from both the modification judgment and the order denying his motion to amend.

Discussion. a. Modification judgment. The husband argues that the judge erred by applying an incorrect standard for determining the parties' level of income. Specifically, he contends that the judge should have treated the wife's modification complaint to be an initial request for alimony and therefore should not have excluded the wife's postdivorce overtime income from the "basic alimony calculation." Because the husband raises this issue for the first time on appeal, the issue is waived. Smith v. Sex Offender Registry Bd., 65 Mass. App. Ct. 803, 810 (2006).⁴

The husband also claims that the judge erred in (a) failing to meaningfully consider his payment of the children's college

⁴ In any event, as discussed further infra, Clemence v. Sklenak, 98 Mass. App. Ct. 646, 648-649 (2020), supports the wife's position that her complaint should be treated as one for modification.

expenses, and (b) making the alimony order retroactive to June 1, 2018. We disagree.

The judge did not abuse her discretion in issuing the alimony order. "A judge has broad discretion when awarding alimony under the" Alimony Reform Act (act). Zaleski v. Zaleski, 469 Mass. 230, 235 (2014). 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." G. L. c. 208, § 48. Where, as here, the judge determined that the husband had the ability to pay, the alimony award was then "limited to the [wife]'s need for support." Macri v. Macri, 96 Mass. App. Ct. 362, 367 (2019). Her need for support equated to "the amount necessary to allow her to maintain the lifestyle she enjoyed prior to the termination of the marriage." Young v. Young, 478 Mass. 1, 7 (2017).

Because the parties first contemplated alimony in the divorce judgment, by waiving past and present alimony while reserving the right to seek future alimony upon the first condition to occur of June 1, 2018, or their daughter's college graduation, "the divorce judgment was the initial alimony award, and any subsequent request for alimony should be treated as a complaint for modification." Clemence v. Sklenak, 98 Mass. App. Ct. 646, 648 (2020). "This 'condition' [was] the functional equivalent of a stipulation to a material and substantial change

in circumstances." Id. at 649. Thus, the judge did not err in determining that the wife proved a material change in circumstances because the conditions for modification agreed to by the parties in the divorce judgment had been met. The judge then properly considered the relevant factors under G. L. c. 208, § 53 (a), in determining both the form and amount of the alimony award. See Vedensky v. Vedensky, 86 Mass. App. Ct. 768, 773 (2014). In weighing the relevant statutory factors, the judge specifically considered the parties' marital and current lifestyles and their ability to maintain that lifestyle, in concluding that the wife needed support from the husband due to her net weekly income deficit of \$714. See Pierce v. Pierce, 455 Mass. 286, 296 (2009); G. L. c. 208, § 53 (b).

After concluding that an alimony award was warranted, relying on the parties' respective weekly gross income and expenses, the judge determined the amount of the husband's weekly alimony obligation as \$400. The alimony order represented a fifteen percent difference between the parties' gross incomes. See G. L. c. 208, § 53 (b). The record supports the judge's findings, and the alimony award "flow[ed] rationally from the findings and rulings." Hassey v. Hassey, 85 Mass. App. Ct. 518, 524 (2014), quoting Williams v. Massa, 431 Mass. 619, 631 (2000). We discern no abuse of discretion.

Furthermore, the judge acted within her discretion in rendering the alimony award retroactive. See Pierce, 455 Mass. at 305-306. "Probate judges have full power and authority under [G. L. c. 208, § 37,] to modify [judgments] for alimony entered in divorce proceedings not only as to the future, but also as to arrears" (quotations and citation omitted). Id. at 305. Here, the judge made the alimony order retroactive to the date agreed to by the parties at the time of their divorce -- June 1, 2018. See Cooper v. Cooper, 62 Mass. App. Ct. 130, 134 (2004), quoting Huddleston v. Huddleston, 51 Mass. App. Ct. 563, 568 (2001) (modification judgment reviewed "to determine whether the judge gave appropriate consideration to the parties' intentions as expressed in their written agreement"). Furthermore, the judge's findings, and her crafting of a payment plan, reflect that she considered the husband's ability to pay the award.

b. Motion to amend. The husband claims that the judge erred in denying his motion to amend the judgment on the basis of untimeliness, as it was timely served in compliance with Mass. R. Dom. Rel. P. 59 (e). We agree.

"A motion to alter or amend the judgment shall be served not later than [ten] days after entry of the judgment." Mass. R. Dom. Rel. P. 59 (e). "In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute or rule, the day of the act, event, or

default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday." Mass. R. Dom. Rel. P. 6 (a).⁵

The modification judgment was entered on the docket on February 19, 2020. As a result, the husband was required to serve his motion to amend that judgment by February 29, 2020 -- a Saturday. See Mass. R. Dom. Rel. P. 59 (e). He served his motion on March 2, 2020. Because February 29, 2020, was a Saturday, and the next day (March 1, 2020) was a Sunday, the husband's motion was timely served on Monday, March 2, 2020. See Matter of the MacMackin Nominee Realty Trust, 95 Mass. App. Ct. 144, 155 (2019). See also Mass. R. Dom. Rel. P. 6 (a). The judge thus erred in denying as untimely the husband's motion to amend, and the matter must be remanded for the judge to rule on the merits of the motion.⁶

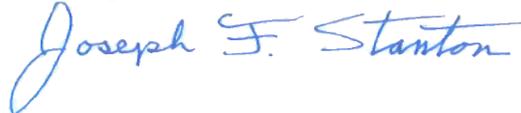
⁵ Identical to Mass. R. Civ. P. 6 (a), 365 Mass. 747 (1974).

⁶ We address an issue pertaining to the remand. In his motion to amend, the husband requested, among other things, that the modification judgment be amended to include the presumptive termination date for alimony under the act's durational limit. In her findings, the judge determined that the durational limit of 187.5 months began to run on June 1, 2018. However, after the judge made this determination and the parties filed their appellate briefs, this court released Clement v. Owens-Clement,

Conclusion. The modification judgment is affirmed. The order denying as untimely the husband's motion to amend is reversed, and the matter is remanded for further proceedings consistent with this memorandum and order.⁷

So ordered.

By the Court (Neyman, Shin & Singh, JJ.⁸),



Clerk

Entered: June 10, 2021.

98 Mass. App. Ct. 632 (2020), holding that where the parties waived past and present alimony but reserved the right to seek future alimony in their separation agreement, the durational limit clock began to run at the time of the divorce judgment, rather than at the time of the modification judgment. Id. at 636-637. Because the judge and the parties did not have the benefit of Clement during the modification proceedings, we leave to the judge's discretion whether to request supplemental memoranda from the parties regarding this issue on remand.

⁷ We deny the wife's request for attorney's fees.

⁸ The panelists are listed in order of seniority.