

NOTICE: Summary decisions issued by the Appeals Court pursuant to its 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 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

14-P-620

HAROLD G. PHYSIC

vs.

MAUREEN C. PHYSIC.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This divorce case was initially resolved through a court-adopted separation agreement. After colloquy, a Probate and Family Court judge found that both Harold G. Physic (husband) and Maureen C. Physic (wife) had read and understood the separation agreement and that it was fair and reasonable in all the circumstances. The separation agreement was incorporated and merged into a judgment of divorce nisi.

The month after the judgment of divorce nisi became absolute, the husband sought modification of the separation agreement. He contended that he, the wife, and her counsel discussed the separation agreement, which was drafted by the wife's counsel, before presenting it to the judge, and that he was effectively in shock during this process: despite being the one who filed the underlying complaint for divorce, he claimed

to have been "blindsided" by the wife having counsel, and by her counsel having drafted a separation agreement. In any event, three months after the husband filed the complaint for modification, the parties again entered into an agreement, one modifying their separation agreement. The same judge approved the modified separation agreement, merging it into the judgment. Shortly thereafter, the parties sought entry of a qualified domestic relations order (QDRO) to divide the husband's pension consistent with the provisions of the judgment incorporating the now-modified separation agreement. That motion was allowed and the QDRO executed.

A few months later, the husband filed a motion for relief from judgment under Mass.R.Dom.Rel.P. 60(b). His essential argument was that despite the modifications made to the separation agreement, the judgment remained unfair to him. The rule 60(b) motion was denied (by the same judge) and the husband now appeals.

Under the familiar standard we review an order on a rule 60(b) motion for abuse of discretion. See Owens v. Mukendi, 448 Mass. 66, 72 (2006). After the husband filed his notice of appeal, the parties filed an assented-to motion under rule 60(b). This motion was allowed, and the judgment has been modified to address almost all of the aspects of the judgment to which the husband objected. Although the husband urges us to

address the denial of the rule 60(b) motion as of the time it was entered, this subsequent action in the trial court renders moot most of the husband's case. The only aspect of the judgment that remains operative to which the husband specifically objects is the provision relating to the division of the husband's pension, which was implemented by the QDRO.

We cannot find an abuse of discretion in the judge's refusal to grant the requested relief. The husband entered into an agreement for judgment that the judge found fair and reasonable. The husband subsequently concluded that it was not fair. He then sought, and obtained, modification of some of the terms of that agreement. That is, he agreed that the problems with the initial stipulated agreement for judgment had been resolved to his satisfaction.

Absent some compelling reason not present here, a court need not provide a party with relief from a judgment that incorporates both a settlement agreement and a modification of that agreement, both of which that party assented to and both of which were found fair and reasonable at the time of incorporation into the judgment. The husband also challenges the QDRO. That order, however, merely implements the terms of the modified judgment to which the husband agreed, so even if the challenge to the QDRO is properly before us, we find it without merit. To the extent the husband intends to argue here

that his name was improperly signed by someone else on the motion seeking approval of the QDRO, he failed to press the point below, making this allegation only in passing in his memorandum in support of his rule 60(b) motion. We decline to consider this argument in the first instance on appeal.

Order denying rule 60(b)
motion affirmed.

By the Court (Berry, Katzmann
& Vuono, JJ.¹),

Clerk

Entered: August 28, 2015.

¹ The panelists are listed in order of seniority.