COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. _____

Middlesex, ss.

GERALDINE GRIFFIN, Appellant

V.

HARRY MICHAEL KAY, Appellee

Appeals Court No. 2021-P-0302

APPELLANT'S APPLICATION FOR FURTHER APPELLATE REVIEW

Dated: July 6, 2022

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I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW.

Pursuant to M.R.A.P. 27.1, the Appellant, Geraldine Griffin ("Ms. Griffin"), respectfully requests that the Supreme Judicial Court grant further appellate review of the Appeals Court's decision dated June 15, 2022.

II. PRIOR PROCEEDINGS.

The Middlesex Probate & Family Court (Boorstein, J.), entered a Judgment of Divorce *Nisi* dated March 2, 2004, which incorporated a Separation Agreement of the parties dated February 9, 2004 ("Agreement") (RAI/2). By its terms, the parties' Agreement expressly survived the Judgment in all respects, retaining independent legal significance as a contract between the parties. Specifically, paragraphs 13 and 14 of the Agreement expressly stated as follows:

> 13) At the hearing on the complaint, a copy of this Agreement shall be submitted to the Middlesex Probate & Family Court and incorporated in the Judgment Nisi by leave of the Court. Notwithstanding the incorporation of this Agreement in the Judgment Nisi, **it shall not be merged in the Judgment, but shall survive the same and be forever binding upon the Husband and the Wife** and their heirs, executors, administrators and assigns for all time, retaining its independent significance as a contract between the parties. Provided, however, **in the event of a material negative and involuntary change in the circumstances of either party, that party may seek to modify the provisions of this agreement most affected by that change.** The purposes of this paragraph are (1) to protect both parties against any attempt by the other party to vary the terms of this Agreement as to interspousal support and property division after the entry of Judgment Nisi and/or final, judgment, and (2)

to enable the Husband and Wife to procure an enforcement of the terms of this Agreement incorporated in a judgment of divorce in the Middlesex Probate & Family Court or as a binding contract in any Court with jurisdiction over the person or property of the other party

14) Except as set forth in paragraph 13 above, if any judicial judgment should be sought or entered with respect to alimony and/or support for the Wife or Husband, or division of property pursuant to Massachusetts General Laws, Chapter 208, Section 34, **neither party will seek to have such judgment or any modification thereof provide for payments or property transfer different in any way from those provided for in this Agreement.** No judgment or modification of the same shall be in substitution for the contractual obligations of this Agreement. In the event of default by either party, the other shall have the right to enforce the contractual obligations of this Agreement, or the provisions of such judgment, or both, but relief shall in no event be duplicated.

(RAI/29-30) (Emphasis supplied).

The Agreement additionally provided in Exhibit A,

inter alia, that:

a. Commencing on June 1, 2005 and continuing monthly thereafter, Mr. Kay shall pay to Ms. Griffin $7,500 per month as alimony.

b. Payments shall continue until the first to occur of the following:
   i. the death of Ms. Griffin;
   ii. the death of Mr. Kay;
   iii. the remarriage of Ms. Griffin.

c. If on January 31, 2006, or any subsequent January 31, the Consumer Price Index for Urban Wage Earners and Clerical Workers, Boston Massachusetts published by the Bureau of Labor Statistics of the United Stated Department of Labor (the "CPI") is greater than it was on January 31, 2005, the monthly alimony payments shall be adjusted commensurately for the following year by the percentage increase that the CPI on such date exceeds the CPI on January 31, 2005; provided,

that the increase shall not be greater than the increase in Mr. Kay's gross earned income for the same period. The increase shall be on a cumulative basis based on Mr. Kay's income for 2004 and the CPI as of January 31, 2005.

d. Notwithstanding anything to the contrary, the parties agree to review alimony payments upon the normal retirement of Mr. Kay.

(RAI/32-33).

On March 30, 2004, the Appellee Harry Michael Kay ("Mr. Kay") filed an Assented to Motion for Relief from Judgment, seeking the following relief:

> Michael Kay moves pursuant to Mass. R. Dom. P. Rule 60(a) to correct a clerical mistake in the Judgment of Divorce Nisi entered on May 2, 2004. The parties' Separation Agreement was incorporated into the judgment of divorce. The terms of the agreement were to survive subject to the limited change of circumstance provision in paragraph 13 on page 6 and an alimony review upon the defendant's normal retirement as provided in Exhibit 'A', paragraph 7.

(RAI/42).

On March 31, 2004, the trial court (Boorstein, J.) allowed the Assented to Motion and entered an Amended Judgment of Divorce Nisi, *nunc pro tunc* to March 2, 2004 (RAI/43-45). The Amended Judgment of Divorce Nisi included the following language:

> It is further ordered that the parties shall comply with the terms of an Agreement dated February 9, 2004 which is filed, incorporated and not merged into this Judgment but nevertheless shall survive and have independent legal significant subject to the limited change of circumstances provision in paragraph 13 on page 6 and an alimony review upon the defendant's

> normal retirement as provided in Exhibit A, paragraph 7.

(RAI/43-44).

On May 3, 2017, Ms. Griffin filed a Complaint for Contempt which alleged that Mr. Kay failed to pay her additional alimony from 2006 through 2017 pursuant to the COLA provisions set forth in the parties' Agreement and that the arrearage owed to her was $152,568 as of May 1, 2017 (RA1/19, 46-54).

On June 9, 2017, Mr. Kay filed a Complaint for Modification, seeking retroactive termination and/or reduction of his alimony obligation back to the date of service and termination of his obligation to maintain life insurance for Ms. Griffin (RAI/19, 55). Ms. Griffin was served with the Summons and Complaint on June 26, 2017 (RAI/19). On July 10, 2017, Ms. Griffin filed an Answer to Mr. Kay's Complaint for Modification stating, *inter alia*, that the provisions set forth in the parties' Agreement expressly survived the Judgment, retaining independent legal significance (RAI/19, 56-60).

On September 7, 2017, Ms. Griffin filed a Motion to Dismiss pursuant to Rule 12(b)(1) and 6 and a supporting Memorandum of Law, asserting that Mr. Kay's Complaint failed to allege a sufficient claim upon which the relief requested therein may be granted due to the fact that the

parties' Agreement specifically survived the Court's Amended Judgment of Divorce dated March 31, 2004 (*nunc pro tunc* to March 2, 2004) and Mr. Kay had failed to allege a "material negative and involuntary change in the circumstances" as required pursuant to the express terms of the Agreement (RAI/19, 61-96). On September 20, 2017, the trial court (Peterson, J.) denied the Motion to Dismiss, stating:

> The Husband's alimony payments upon his normal retirement **merged** into the judgment **and is modifiable upon a material and substantial change of circumstances.**

(RAI/125-126) (emphasis supplied).

On August 15, 2018, Ms. Griffin filed an Amended Complaint for Contempt, alleging that Mr. Kay failed to pay for her health insurance costs for 2018 (RAI/21, 156-171). On September 19, 2018, Mr. Kay filed an Answer to Amended Complaint for Contempt (he had not previously filed any Answer to the original Complaint for Contempt) (RAI/21, 172-173).

After a four (4) day trial in September, October and November 2018, on September 19, 2019, the trial court (Rivers, J.) entered a Judgment on Ms. Griffin's Amended Complaint for Contempt and Mr. Kay's Complaint for

Modification ("Judgment") and issued a Rationale and Findings of the same date (RAII/22-45).

On October 10, 2019, Ms. Griffin served upon Ms. Kay a Motion to Alter/Amend Findings of Fact and Rationale dated September 19, 2019 (Rivers, J.) pursuant to Mass. R. Dom. Rel. P. 52(b) ("Motion to Amend Findings of Fact and Rationale") and a Motion to Alter/Amend Judgment on Complaint for Modification and Complaint for Contempt dated September 19, 2019 (Rivers, J.) pursuant to Mass. R. Dom. Rel. P. 59(e) ("Motion to Amend Judgment"), together with the required Statements in Support (RAII/46-114). Ms. Griffin attached to her Statement in Support of Plaintiff's Motion to Alter/Amend Judgment an Affidavit of David M. Gannett re: COLA Calculations dated October 7, 2019 (RAII/108-114).

On October 24, 2019, Mr. Kay served Statements in Opposition to both Motions to Amend (RAII/115-128). Mr. Kay also filed a Motion to Strike Affidavit of David M. Gannett re: COLA Calculations in which he alleged that the Affidavit was an attempt to introduce new evidence which would not be subject to cross-examination (RAII/129-133). Ms. Griffin filed a Motion to Strike Defendant's Oppositions to Motions to Amend, alleging that Mr. Kay's Statements in Opposition were not timely served upon Ms.

Griffin in accordance with subsection (a)(2) of Supplemental Probate and Family Court Standing Order 2-99 (RAII/134-136). On December 30, 2019, Mr. Kay's Motion to Strike was allowed, and Ms. Griffin's Motion to Strike was denied (RAII/137, 138).

On March 18, 2020, the trial court (Rivers, J.) allowed in part and denied in part the Motion to Alter/Amend Findings of Fact and Rationale, and denied the Motion to Amend Judgment (RAII/139-148). The trial court (Rivers, J.) issued a Corrected Rationale and Findings dated March 18, 2020 *nunc pro tunc* to September 19, 2019 (RAII/149-171).

On April 13, 2020, Ms. Griffin filed a Notice of Appeal wherein she appealed the following:

1. Interlocutory Order on Ms. Griffin's Motion to Dismiss Pursuant to Rule 12(b)(1) and 6 and on Defendant's Complaint for Contempt dated September 20, 2017/docketed on January 2, 2018 (Peterson, J.);

2. Judgment dated September 19, 2019/docketed on September 30, 2019 (Rivers, J., presiding);

3. Corrected Rationale and Findings dated March 18, 2020 *nunc pro tunc* to September 19, 2019/docketed on March 23, 2020 (Rivers, J.);

4. Order on Ms. Griffin's Motion to Alter/Amend Judgment dated March 18, 2020/docketed on March 23, 2020 (Rivers, J.);

5. Order on Ms. Griffin's Motion to Alter/Amend Findings of Fact and Rationale dated March 18, 2020/docketed on March 23, 2020 (Rivers, J.); and

6. Order on Mr. Kay's Motion to Strike Affidavit of David M. Gannett Re: COLA Calculations dated December 30, 2019/docketed on March 23, 2020 (Rivers, J.).

(RAII/172-235).

The Appeals Court (Vuono, Shin, Singh, JJ) heard oral argument on February 11, 2022. On June 15, 2022, the Appeals Court vacated those portions of the orders denying Ms. Griffin's Motions to Alter/Amend the Modification Judgment and the Findings to the extent that they denied her requests related to the calculation of Mr. Kay's alimony arrearage under the COLA provision. The portion of the Modification Judgment pertaining to Mr. Kay's alimony arrearage due under the Separation Agreement's COLA provision was vacated and the case was remanded for further proceedings consistent with the Appeals Court's opinions. The Judgment was otherwise affirmed.

No rehearing was sought in the Appeals Court.

III. STATEMENT OF FACTS.

Ms. Griffin does not dispute the facts stated in the Appeals Court decision and has not restated them here pursuant to M.R.A.P. 27.1. In addition to the facts stated in the decision, the following facts are also relevant.

Ms. Griffin (age 74 at the time of trial and now age 78) had a history of breast cancer for which she was in

remission and she took high blood pressure medication (RAII/151).

The trial court found that "Ms. Griffin relied upon the alimony payments from Mr. Kay in order to meet her reasonable needs and maintain a significantly modified semblance of the parties' marital lifestyle" (RAII/160). The trial court credited Ms. Griffin's testimony that "her entertainment and vacation expenses are 'ridiculously' less than what she customarily spent during the marriage" and noted that she last had a vacation in 2009 and had no entertainment or hobbies (RAII/162).

Ms. Griffin expected to receive net proceeds from the sale of her Nantucket home totaling less than $150,000 (RAII/161). The only other assets listed on Ms. Griffin's trial Financial Statement were two automobiles with a total estimated value of $10,200, two checking accounts totaling $9,941.58, $1,000 in cash and $45,000 in personal property (RAIX77-79). Those assets total $206,200. Ms. Griffin also listed on her trial Financial Statement credit card debt totaling $32,800 and outstanding legal fees of $16,091.75 (RAIX/80). Thus, Ms. Griffin's anticipated net worth after sale of the Nantucket home was approximately $157,308.25.

Mr. Kay testified that his June 21, 2017 Rule 401 Financial Statement, signed under the penalties of perjury

and submitted to the Court, was a "pro-forma" Financial Statement based upon his anticipated retirement, rather than an actual statement of his financial circumstances at the time he signed it (RAVIII/99). In this "pro-forma" Financial Statement, Mr. Kay claimed $0 in salary and $0 in self-employment income (RAIX/49). At the time of completing this Financial Statement, Mr. Kay represented in Footnote 2 that his expected 2016 Schedule K-1 income from his law practice was approximately $86,673 (RAIX/59). In reality, however, Mr. Kay's 2016 Schedule K-1 revealed that his ordinary business income from Pritchard & Kay was almost four (4) times greater than what he had represented, totaling $410,600 (RAIV/493). Although Mr. Kay represented in both his Complaint and at trial that he was "winding down" his practice and retiring, his W-2 wage statement for 2017 evidenced that he received $179,999.92 in annual salary during 2017, and his Schedule K-1 evidenced that he received $367,000 in cash distributions from Pritchard & Kay, totaling $546,999.92 in the aggregate (RAI/55; RAIV/492, 493; RAVIII/123, 129). Mr. Kay also represented in his Trial Memorandum that he has been operating Pritchard & Kay "in the red" (RAI/200-201). During cross-examination, however, Mr. Kay acknowledged that in calendar year 2017 Pritchard & Kay reported ordinary business

income, after deducting all business expenses (including his salary), totaling over $351,000 (RAVIII/249). Similarly, through July 2018, Pritchard & Kay reported a net profit of over $73,000, which was in addition to Mr. Kay's salary during this same time period of approximately $140,000 in the aggregate (RAVIII/246, 249).

In his Trial Memorandum, Mr. Kay stated: "Debra inherited during the marriage and is of sufficient means to assist Kay with paying his living expenses once he is retired" (RAI/198). During trial, Mr. Kay acknowledged that this was a truthful statement (RAVIII/107). Mr. Kay also testified that "My wife pays half of the expenses, and she pays expenses over and above that to the extent that we need it. My expectation is that she's going to continue to do that" (RAVIII/82). Despite this acknowledgment, Mr. Kay consistently referenced "$0.00" on the first page of every Rule 401 Financial Statement he filed in connection with this matter for the corresponding subparagraph II(p) specifically entitled "Contributions from Household Members" (RAIX/3, 18, 31, 49).

Mr. Kay and his wife Debra's combined income totaled $959,889 in 2015; $1,099,388 in 2016; and $879,601 in 2017 (RAII/155). An unsigned loan application which was dated January 8, 2016 and created through a telephone interview

with Mr. Kay and his wife reflected that they had a collective net worth of $12,644,967.17 (RAVII/19-20). A signed loan application with the same date reflected that Mr. Kay and his wife had a net worth of $8,929,258.55 (RAVII/24-25). It is notable that Mr. Kay also claimed under the penalties of perjury on that loan application that he signed that he was not obligated to pay alimony, which was a false statement (RAVII/25).

At the time of the divorce in 2004, Mr. Kay represented on his Financial Statement that his weekly expenses totaled $4,443.33 (RAIX/62). Of that total amount, $3,000 was the amount of support that he was paying to Ms. Griffin at that time (RAVIII/139; RAIX/62). Based upon Mr. Kay's June 21, 2017 "pro forma" Financial Statement, he represented that his post-retirement living expenses will total approximately $8,640.01 per week, almost six (6) times greater than what they had been at the time of the divorce (RAIX/52).

On his June 21, 2017 "pro-forma" Financial Statement, Mr. Kay listed the following expenses: $48,371.96 per year for entertainment; $24,186.24 per year for vacation; and $12,093.12 per year for charitable contributions (RAIX/51-52). These three (3) discretionary expenses, alone, total $84,651.32 annually in the aggregate. Comparatively, the

trial court specifically noted that Mr. Kay's tax-deductible alimony obligation to Mr. Griffin prior to modification in this case totaled $90,000 annually (RAII/155).

Mr. Kay and his wife own a home in Palm Desert, California which the trial court found to have a fair market value of $2,300,000 (despite the fact that it was purchased in 2008 for $2,500,000 and Mr. Kay and his wife represented on a 2016 loan application that it had a value of $3,000,000) (RAII/156; RAVII/24). This home is approximately 4,000 square feet, with four bedrooms and four-and-one-half baths (RAVIII/217). Mr. Kay and his wife also own a second home in Northbrook, Illinois. At the time of trial, Mr. Kay claimed that the fair market value of this property was $1,500,000, but the trial court did not credit his testimony and instead found it had a value of $2,130,000 based on the fair market value listed on a 2016 loan application (RAII/156-157; RAVII/24). This home is also approximately 4,000 square feet, with three bedrooms and four baths, and sits on a 5-acre private lake (RAVIII/160).

In addition to these two homes, at the time of trial Mr. Kay owned four (4) automobiles, including two Mercedes,

a vintage 1973 Cadillac and a 2013 Ford Mustang, which were valued collectively at $127,000 (RAII/156).

Mr. Kay also belongs to the following private country clubs: Twin Orchard Country Club in Chicago, Illinois and Bighorn Country Club in Palm Desert, California, the latter of which requires an initiation fee of $100,000 and annual dues of an additional $35,000 (RAII/158). During the twelve (12) month period from August 2017 through August 2018, Mr. Kay spent $46,856.90 at Twin Orchard, and during the eight (8) month period from January through August 2018, Mr. Kay and his wife spent an additional $60,820.58 at Bighorn (Id.). Mr. Kay testified that his Financial Statement at the time of trial reflected 50% of the Bighorn expenses, which would correlate to $30,410.29 annually (Id.). Mr. Kay's individual country club membership expenses at Twin Orchard and Bighorn, alone, totaled $77,267.19 in the aggregate, or $1,485.90 per week (Id.). The trial court stated "it is worth noting that that Mr. Kay acknowledged that his payments towards the two clubs is more than what he is obligated to pay Ms. Griffin in alimony" (Id.).

Mr. Kay possesses an American Express Centurion "Black" credit card (RAVIII/228). During the six (6) month period from March 2018 through August 2018, Mr. Kay and his wife charged approximately $162,000 on this credit card, of

which over $124,431.43 was personally charged by Mr. Kay (RAVIII/228-229). These charges consisted of purchases for discretionary expenditures such as dinners at various steak houses and other high-end restaurants, clothing, travel, concerts and sporting events (RAVIII/230-232).

Mr. Kay's Financial Statement filed at the commencement of trial identified assets with a total value of $3,215,817.93, including therein liquid assets plus retirement assets totaling $2,013,102 in the aggregate. Mr. Kay also reflected zero current liabilities (RAIX/8-9). By comparison, Mr. Kay's Rule 401 Financial Statement that was filed at the time of the divorce in 2004 identified assets, exclusive of the Nantucket Property that was solely retained by Ms. Griffin incident to the divorce, with a total value of $1,618,000, as well as liabilities totaling $254,726 (RAIX/65, 66, 69).

IV. STATEMENT OF THE POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT.

Ms. Griffin seeks leave to obtain further appellate review of the Appeals Court's ruling affirming the trial court's Interlocutory Order on Ms. Griffin's Motion to Dismiss Pursuant to Rule 12(b)(1) and 6 and on Defendant's Complaint for Contempt dated September 20, 2017/docketed on January 2, 2018 (Peterson, J.) and Judgment dated September

19, 2019/docketed on September 30, 2019 (Rivers, J., presiding) that the trial court could modify the alimony provisions of the parties' surviving Separation Agreement.

Ms. Griffin also seeks leave to obtain further appellate review of the Appeals Court's ruling in its Judgment dated September 19, 2019/docketed on September 30, 2019 (Rivers, J., presiding) that the trial court did not abuse its discretion by failing to achieve a fair balance of sacrifice between the parties in its modified alimony award.

V. STATEMENT AS TO WHY FURTHER APPELLATE REVIEW IS APPROPRIATE.

1. The Appeals Court Misapplied this Court's Moore v. Moore Decision.

Further appellate review is warranted in this case because the Appeals Court misapplied the Commonwealth's long-standing legal principles enunciated by this Court in the seminal case of Moore v. Moore almost forty years ago that surviving separation agreements remain non-modifiable by a court, and that where there is a contradiction between the terms of a court's judgment of divorce and the parties' separation agreement regarding merger verses survival, it is the terms of the agreement (not the judgment) which control the disposition of that important issue. 389 Mass. 21 (1983).

Whether a separation agreement is to be merged in the decree or is to survive the decree as a bar to future modification is to be determined from a fair reading of the agreement as a whole. Freeman v. Sieve, 323 Mass. 652, 656 (1949). In this regard, it is well-settled that the "general rule [is that] unless the parties expressly provide otherwise, their separation agreement will be held to survive a subsequent divorce decree incorporating by reference the terms of the agreement." DeCristofaro v. DeCristofaro, 24 Mass. App. Ct. 231, 237 (1987) (alteration in original),

quoting Surabian v. Surabian, 362 Mass. 342, 345-346 n. 4 (1972).

Merger "is not lightly to be presumed." Hills v. Shearer, 355 Mass. 405, 408 (1969) (internal citation omitted). In fact, the public policy of the Commonwealth strongly favors the survival of separation agreements, as such a policy "supports finality and predictability, allows the parties to engage in future planning, and avoids recurrent litigation in the highly charged emotional area of divorce law." Ames v. Perry, 406 Mass. 236, 240-241 (1989).

The parties' Agreement in this case contains no language whatsoever that could be construed as indicating that any portions thereof merged with the underlying divorce judgment. Rather, by its express terms, the Agreement expressly survived the Amended Judgment of Divorce, was forever binding upon the parties and retained independent legal significance as a contract between the parties. The only recognized exception to the survival language is contained within paragraph 13 of the Agreement, which states that "in the event of a material negative and involuntary change in the circumstances of either party, that party may seek to modify the provisions of this Agreement most affected by that change" (RAI/29) (Emphasis supplied).

Paragraph 13 of the Agreement clearly recites the purpose of the survival language that is contained in the Agreement as follows:

> The purpose of this paragraph are (1) to protect both parties against any attempt by the other party to vary the terms of this Agreement as to interspousal support and property division after the entry of Judgment Nisi and/or final, judgment, and (2) to enable the Husband and Wife to procure an enforcement of the terms of this Agreement incorporated in a judgment of divorce in the Middlesex Probate & Family Court or as a binding contract in any Court with jurisdiction over the person or property of the other party.

(Id.). As further indication of the surviving nature of Mr. Kay's alimony obligation and the judicial non-modifiability of the provisions set forth therein, paragraph 14 of the Agreement further states as follows:

> **Except as set forth in paragraph 13 above**, if any judicial judgment should be sought or entered with respect to alimony and/or support for the Wife or Husband, or division of property pursuant to Massachusetts General Laws, Chapter 208, Section 34, neither party will seek to have such judgment or any modification thereof provide for payments or property transfers different in any way from those provided for in this Agreement. **No judgment or modification of the same shall be in substitution for the contractual obligations of this Agreement**. In the event of default by either party, the other shall have the right to enforce the contractual obligations of this Agreement, or the provisions of such judgment, or both, but relief shall in no event be duplicated.

(RAI/29-30) (Emphasis supplied).

The Court's Amended Judgment of Divorce Nisi provided in pertinent part as follows:

> It is further ordered that the parties shall comply with the terms of an Agreement dated February 9, 2004 which is filed, incorporated and not merged into this Judgment but nevertheless shall survive and have independent legal significance **subject to the limited change of circumstances provision in paragraph 13 on page 6 and an alimony review upon the defendant's normal retirement as provided in Exhibit A, paragraph 7.**

(RAI/43-44) (Emphasis in original). As is expressly set forth above, the Court's Amended Judgment specifies incorporation into the Judgment only. It makes no provisions for merger of any of the terms contained therein, and only acknowledges a limited change of circumstance provision "in the event of a material negative and involuntary change in the circumstances of either party" (RAI/43). In fact, the words "merged" or "merger" appear nowhere in either the parties' Agreement or the Court's Amended Judgment.

Mr. Kay's decision to wind down his law practice with the expectation of becoming fully retired was not an "involuntary" change in circumstances such that the limited change of circumstance provision set forth in the parties' Agreement may be invoked. Notably, the trial court specifically found that "Mr. Kay's retirement was not a "negative and involuntary change" (RAII/154).

The parties' Agreement provides that Mr. Kay's alimony obligation shall continue until the first to occur of the following: (a) Ms. Griffin's death; (b) Mr. Kay's death

(subject to a life insurance obligation); or (c) Ms. Griffin's remarriage (RAI/32). Paragraph 7 of Exhibit A of the Agreement also states that "the parties agree to review alimony payments upon the normal retirement of the Husband" (RAI/33). However, unlike the limited change of circumstance provision in the Agreement which expressly permitted a judicial modification "in the event of a material negative and involuntary change in the circumstances of either party," paragraph 7 simply states that the parties agreed, as between themselves, to review Mr. Kay's alimony payments upon his normal retirement. This paragraph does not state that "the parties agree to review alimony payments upon the normal retirement of the Husband *and if they cannot so agree the Court shall have the authority to modify the Husband's alimony payments*." Nor does paragraph 13 state that "[p]rovided, however, in the event of a material negative and involuntary change in the circumstances of either party, *or upon the Husband's normal retirement*, that party may seek to modify the provisions of this agreement most effectuated by that change." There is nothing contained anywhere in the parties' Agreement, or the trial court's Amended Judgment of Divorce, whereby the parties conferred upon the trial court any jurisdiction to modify Mr. Kay's alimony payments upon his normal retirement. In addition, paragraph 18 of the

Agreement makes clear that "[t]his Agreement shall not be altered or modified except by an instrument in writing signed and acknowledged by the [parties]." No such instrument, signed and acknowledged by the parties as required by the terms of the Agreement, exists.

It is also well-settled that a parties' agreement to confer jurisdiction upon the Court to judicially modify one term or provision of an otherwise surviving agreement based upon a specific factual occurrence does not open the door to further modifications based upon factual circumstances which have not been expressly reserved for judicial modification. This long-standing principle of contract interpretation in the context of surviving separation agreements was recently reiterated by this Court in Lalchandani:

> As noted by the judge, the **'agreement to modify one term or provision of an otherwise surviving agreement does not open the door to further modifications**. . . .' Moreover, 'an ambiguity is not created simply because a controversy exists between parties, each favoring an interpretation contrary to the other.'

Id. at 824 (internal citations omitted) (Emphasis supplied).

The trial court's and Appeals Court's determinations that Mr. Kay's alimony obligation merged and was modifiable upon his normal retirement based upon a consideration of the terms of the Amended Judgment of Divorce are contrary to well-established case law. Specifically, in the case of Moore

v. Moore, 389 Mass. 21 (1983), the Supreme Judicial Court ("SJC") addressed whether a surviving Separation Agreement could be enforced to preclude modification of its terms notwithstanding contrary language contained in the Court's divorce decree which expressly stated that the terms of the agreement "merged" and were modifiable. In holding that it is the terms of the parties' Agreement which controls, the SJC expressly stated as follows:

> **The husband looks to the language of the decree negating the survival of the agreement as a basis for his allegation that the agreement no longer has any force or effect. He argues that a Probate Court's authority to issue or to modify a decree may not be abridged by a valid separation agreement. [citations omitted]. Thus, he asserts, the probate judge lawfully restricted the operation of the agreement, and the agreement's survival provision may not prevent that result. We do not agree.**
>
> A probate judge has broad discretion to establish the terms of a decree without facing restrictions imposed by the parties. However, the judge has no authority to use the decree to modify a valid and independent separation agreement solely on the ground that it shall not survive the decree.

Moore, 389 Mass. at 23-24 (emphasis supplied).

The Appeals Court in a footnote attempted to distinguish Moore from the facts of this case, claiming that the parties in this case "jointly sought to amend the divorce judgment to specify two exceptions to the agreement's survival provisions." 101 Mass. App. Ct. at 245 n. 5. Yet this argument ignores the fact that the parties'

Separation Agreement permitted them to modify its terms only "by an instrument signed and acknowledged by the Husband and the Wife" (RAI/31). The one page Motion for Relief from Judgment upon which the Appeals Court relies was not signed by either party. (RAI/42.) Nor did it even contain the words "merge" or "merger."

Had the parties' Agreement authorized the trial court to review and modify Mr. Kay's alimony obligation upon his normal retirement, the Agreement would have expressly stated as such in paragraph 13 by including this review process as among the limited change of circumstance provisions which were carved-out for future modification by the Court. Quite literally, Mr. Kay's interpretation of paragraphs 13 and 14 of the Agreement and paragraph 7 of Exhibit A is unsupportable absent the insertion of additional language in the Agreement which is not present, an approach that contravenes basic rules of contract interpretation. See Bourgeois v. Hurley, 8 Mass. App. Ct. 213, 216 (1979) (the legal effect to be given a document must be based upon the words of the document itself).

In its order denying Ms. Griffin's Motion to Dismiss, the trial court wrote, "If the parties never intended to review alimony payments upon the Husband's normal retirement in Court, they would not have sought to change the prior

Judgment that survived the Judgment" (RAI/126). However, the Motion for Relief from Judgment to which Ms. Griffin assented did not modify the parties' surviving Agreement by conferring authority upon the trial court to modify Mr. Kay's alimony obligation when he reached his normal retirement if the parties could not so agree (RAI/42). In addition, the Amended Judgment could not as a matter of law supersede the specific terms of the Agreement. See Moore, 389 Mass. at 23-24.

For all of the foregoing reasons, the trial court lacked jurisdiction to modify the parties' surviving Agreement upon Mr. Kay's retirement, and Mr. Kay's Complaint for Modification should have been dismissed. The Appeals Court's misapplication of the seminal case of Moore contravenes well-established legal principles enunciated by this Court and should be corrected by this Court in the interest of justice and to avoid future misapplications.

2. The Appeals Court Misapplied this Court's Pierce v. Pierce "Fair Balance of Sacrifice" Test.

The Appeals Court concluded, "While the reduction in the husband's alimony obligation was substantial, we cannot, on this record, say that the judge failed to achieve a fair balance of sacrifice between the parties." 101 Mass. App. Ct. at 245. This conclusion is erroneous and should be reversed in the interest of justice, for all

of the reasons set forth in the principal Brief that Ms. Griffin submitted to the Appeals Court and because it misapplied the test as set forth by this Court in Pierce v. Pierce, 455 Mass. 293 (2009).

Without continued alimony from Mr. Kay at the $90,000 level previously paid, Ms. Griffin is left without the financial resources to maintain herself at any semblance of the standard of living the parties enjoyed during their marriage, or which Mr. Kay admittedly enjoys at the present time and will admittedly continue to enjoy even after his retirement. The trial court's modified alimony award of $24,960 per year (less than the equivalent of the current minimum wage) leaves Ms. Griffin (now age 78) in dire straits, while Mr. Kay is easily able to enjoy his two luxurious homes, country club memberships and other significant discretionary expenditures. Such an outcome failed to effectuate the required "fair balance of sacrifice" and was an abuse of the trial court's discretion.

CONCLUSION

Wherefore, Ms. Griffin respectfully requests that this Honorable Court allow this Application for Further Appellate Review.

Respectfully submitted,

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Dated: July 6, 2022

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 20(a) of the Massachusetts Rules of Appellate Procedure

I, Robert J. Rivers, Jr., hereby certify that the foregoing Application for Further Appellate Review complies with the rules of court that pertain to the filing of such Mass. R. A. P. 20(a).

I further certify that the foregoing Application complies with the applicable length limitation in Mass. R. A. P. 27.1(b) because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and contains less than ten (10) total pages of a statement why further appellate review is appropriate.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on July 6, 2022, I have made service of this Application for Further Appellate Relief upon the attorneys of record for Harry Michael Kay, by the Electronic Filing System, on:

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ADDENDUM

Rescript

Griffin v. Kay, 101 Mass. App. Ct. 241 (2022)

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 21-P-302

GERALDINE GRIFFIN

vs.

MICHAEL KAY.

Pending in the Probate & Family Court for the County of Middlesex

Ordered, that the following entry be made on the docket:

Those portions of the orders denying the wife's motions to alter or amend the modification judgment and the findings are vacated to the extent they denied her requests related to the calculation of the husband's alimony arrearage under the agreement's COLA provision.

The portion of the modification judgment pertaining to the husband's alimony arrearage due under the agreement's COLA provision is vacated, and the case is remanded for further proceedings consistent with the opinion of the Appeals Court. The judgment is affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date June 15, 2022.

101 Mass.App.Ct. 241
Appeals Court of Massachusetts,
Middlesex.

Geraldine GRIFFIN

v.

Harry Michael KAY.

No. 21-P-302
|
Argued February 11, 2022
|
Decided June 15, 2022

Divorce and Separation, Alimony, Modification of judgment, Separation agreement. Probate Court, Divorce. Contract, Separation agreement. Contempt.

Complaint for divorce filed in the Middlesex Division of the Probate and Family Court Department on February 14, 2002.

A complaint for contempt, filed on May 3, 2017, and a complaint for modification, filed on June 9, 2017, were heard by Janine D. Rivers, J.

Attorneys and Law Firms

Robert J. Rivers, Jr. (Jessica M. Dubin also present) Boston, for the wife.

Maureen McBrien (Wendy O. Hickey, Boston, & Alexander D. Jones, Wellesley, also present) for the husband.

Present: Vuono, Shin, & Singh, JJ.

Opinion

SINGH, J.

****1** At the time of their 2004 divorce, Geraldine Griffin (wife) and Harry Michael Kay (husband) executed a separation agreement (agreement) requiring the husband to pay alimony of $90,000 per year, subject to an upward cost of living adjustment (COLA) to be determined annually based on changes in the Consumer Price Index (CPI) and the husband's annual "gross earned income." "Gross earned income" was not defined in the agreement. In 2017, the wife filed a complaint for contempt alleging ***242** that the husband failed to pay additional alimony as required by the agreement's COLA provision. The husband then filed a complaint for modification seeking to reduce or terminate alimony because of his retirement.

After a four-day trial on the parties' consolidated complaints, a judge of the Probate and Family Court issued a judgment (modification judgment) that (1) reduced the husband's alimony obligation to $480 per week ($24,960 per year), and (2) found the husband not guilty of contempt because the parties' failure to define "gross earned income" rendered the COLA provision ambiguous. In the accompanying findings of fact, the judge supplied a definition for "gross earned income." She did not, however, use that definition to determine the amounts owed by the husband under the COLA provision.

The wife appeals,[1] arguing that the judge (1) impermissibly modified the parties' surviving agreement; (2) failed to achieve a "fair balance of sacrifice," as required by Pierce v. Pierce, 455 Mass. 286, 296, 916 N.E.2d 330 (2009), when reducing the husband's alimony payments by seventy-two percent; and (3) should have determined the husband's alimony arrearage under the COLA provision using her definition of "gross earned income." We vacate so much of the modification judgment and the related postjudgment orders as pertains to the determination of the husband's COLA arrearage, and we remand for further proceedings consistent with this opinion. We affirm the modification judgment in all other respects.

Discussion. 1. Modification of surviving agreement. The wife first contends that the judge was without the authority to modify the husband's alimony obligation on the basis of his retirement, because the parties' agreement survived the divorce judgment and was not subject to judicial modification. We disagree.

We begin with two familiar principles. First, a separation agreement that merges with the divorce judgment loses its independent significance and is therefore modifiable by a judge upon a material and substantial change in circumstances. See Chin v. Merriot, 470 Mass. 527, 534-535, 23 N.E.3d 929 (2015); DeCristofaro v. DeCristofaro, 24 Mass. App. Ct. 231, 235, 508 N.E.2d 104 (1987). Second, a separation agreement that survives the divorce judgment, unlike a merged agreement, retains its force as an independent contract and is ***243** generally not modifiable by a judge.[2] See Chin, supra at 535 n.12, 23 N.E.3d 929; DeCristofaro, supra at 235-236, 508 N.E.2d 104. The question whether an agreement merged with the divorce judgment is "afforded plenary review" (citation omitted). Colorio v. Marx, 72 Mass. App. Ct. 382, 386, 892 N.E.2d 356 (2008). "It is the intent of the parties which controls, ... and that intent is determined from the whole agreement." DeCristofaro, supra at 237, 508 N.E.2d 104.

****2** Here, the agreement contained the following paragraphs addressing survival and modification:

> "13. .... Notwithstanding the incorporation of this [a]greement in the [divorce judgment], it shall not be merged in the [j]udgment, but shall survive the same ... retaining its independent significance as a contract between the parties. Provided, however, in the event of

a material negative and involuntary change in the circumstances of either party, that party may seek to modify the provisions of this agreement most [a]ffected by that change."

"14. Except as set forth in paragraph 13 above, if any judicial judgment should be sought or entered with respect to alimony ... neither party will seek to have such judgment or any modification thereof provide for payments ... different in any way from those provided for in this [a]greement."

"18. This [a]greement shall not be altered or modified except by an instrument in writing signed and acknowledged by the [h]usband and the [w]ife."

Additionally, in exhibit A, paragraph 7, the agreement provided that "[n]otwithstanding anything to the contrary, the parties agree to review alimony payments upon the normal retirement of the [h]usband."[3]

A divorce judgment, issued on March 2, 2004, provided that the agreement was "incorporated and not merged into this [j]udgment but nevertheless shall survive and have independent legal significance." However, on March 23, 2004, the husband filed a motion, assented to by the wife, seeking to "correct a clerical ***244** mistake" in the divorce judgment insofar as "[t]he terms of the agreement were to survive subject to the limited change of circumstance provision in paragraph 13 on page 6 and an alimony review upon the defendant's normal retirement as provided in [e]xhibit 'A', paragraph 7." On March 31, 2004, an amended divorce judgment issued, providing that the agreement was "incorporated and not merged into this [j]udgment but nevertheless shall survive and have independent legal significance subject to the limited change of circumstance provision in paragraph 13 on page 6 and an alimony review upon the defendant's normal retirement as provided in [e]xhibit A, paragraph 7" (emphasis added). Neither party objected to the language used in the amended divorce judgment -- indeed, it mirrored the language used in the assented-to motion to amend.

The wife contends that the agreement made "no provisions for merger ... and only acknowledge[d] a limited change of circumstance provision 'in the event of a material negative and involuntary change in the circumstances of either party.' " She asserts that the language in the agreement pertaining to the husband's retirement did not authorize modification on that ground; rather, it merely required the parties to privately review alimony once the husband had retired, with no ability to seek judicial review. However, as found by the judge,[4] the parties' actions following the execution of the agreement demonstrated their intent to treat the husband's retirement as a ground for modification. Insofar as the language of the agreement left the parties' intentions regarding the husband's retirement somewhat unclear, they clarified their intentions by seeking to amend the divorce judgment to provide that the agreement survived "subject to" two exceptions: (1) a negative and involuntary material change in circumstances, and (2) the husband's retirement. See ***245** Parrish v. Parrish, 30 Mass. App. Ct. 78, 87, 566 N.E.2d 103 (1991) ("to understand the subject matter of the agreement, to the extent it is doubtful or ambiguous, we resort to the conduct of the parties to determine 'the meaning that they themselves put upon any doubtful or ambiguous terms' " [citation omitted]). Although the parties chose to use "subject to" rather than "merge," their agreed-upon language inserted into the amended judgment clearly identified the husband's retirement as one of two exceptions to the agreement's survival, thus evidencing their intent for alimony to be judicially modifiable upon the husband's retirement.[5] See id. at 85-87, 566 N.E.2d 103 (use of word "merge" not dispositive; parties' intention regarding merger controls, determined from agreement as whole and extrinsic evidence if agreement leaves parties' intention in doubt). Accordingly, it was not error to treat the husband's retirement as a basis for modification of alimony.

****3** 2. Fair balance of sacrifice. The wife next argues that the seventy-two percent reduction in the husband's alimony obligation failed to achieve the requisite "fair balance of sacrifice," Pierce, 455 Mass. at 296, 916 N.E.2d 330, because it created a significant disparity in the parties' lifestyles. Because the divorce judgment predates the Alimony Reform Act, G. L. c. 208, §§ 49-55, we apply "the standards for modification existing at the time the judgment entered." Chin, 470 Mass. at 535, 23 N.E.3d 929.

"[I]n determining whether the amount of alimony should be modified based on a change of circumstances following entry of an earlier judgment for alimony," the judge "must consider [the] factors [set forth in G. L. c. 208, § 34,[6]]" while "keep[ing] in mind that 'the statutory authority of a court to award alimony ***246** continues to be grounded in the recipient spouse's need for support and the supporting spouse's ability to pay' " (citation omitted). Pierce, 455 Mass. at 295-296, 916 N.E.2d 330. "[T]he recipient spouse's need for support is generally the amount needed to allow that spouse to maintain the lifestyle he or she enjoyed prior to termination of the marriage." Id. at 296, 916 N.E.2d 330. "When, however, the supporting spouse does not have the ability to pay, the recipient spouse 'does not have an absolute right to live a lifestyle to which he or she has been accustomed in a marriage to the detriment of the provider spouse.' " Id., quoting Heins v. Ledis, 422 Mass. 477, 484, 664 N.E.2d 10 (1996). In such cases, "[t]he judge must consider all the statutory factors and reach a fair balance of sacrifice between the former spouses when financial resources are inadequate to maintain the marital standard of living." Pierce, supra.

Here, the judge made the following relevant findings. With respect to the husband's ability to pay, the judge found that

his income had declined considerably upon retiring from his law practice, with his present income totaling approximately $73,165 per year (or $1,407 per week), consisting of Social Security and income generated from his assets. The judge found that the husband would entirely deplete his assets by age seventy-six if he maintained his lifestyle and continued to pay the wife alimony of $90,000 per year (in addition to paying for her Medicare supplement and a life insurance policy to secure his alimony obligation, both of which he remained obligated to pay under the modification judgment).[7]

With respect to the wife, the judge found that she had been out of the workforce for decades and is not employable. In addition to alimony, the wife presently receives Social Security income of $1,087 per month. Although she attempted to supplement her income in the past by renting out her Nantucket home (which she received as part of the divorce settlement), the home was too expensive for her to maintain even while living a "limited and reduced lifestyle," resulting in her encumbering the property with a mortgage and incurring other debts. At the time of the modification trial, the Nantucket home was under a purchase and sale agreement, and the wife expected to receive "modest" net proceeds of approximately $150,000 after paying off her debts and capital gains taxes. The judge found that "upon the sale of the ***247** Nantucket home, [the wife] will most notably have a reduction in living expenses thereby significantly decreasing her need for maintenance." The judge also considered the wife's receipt of greater assets at the time of the divorce, and her enjoyment of the Nantucket home for many years after the divorce while at the time of the divorce the husband lived in a one-bedroom condominium.

****4** The wife complains of the disparity in the parties' lifestyles, asserting that she is unable to meet her needs with the substantially reduced alimony award. The judge found that the husband does not live a "particularly lavish post-divorce lifestyle," but it is "more in keeping with the former marital lifestyle" than the "limited and reduced lifestyle" currently maintained by the wife.[8] However, the judge found that the husband's present lifestyle is attributable, in part, to the financial contributions of his current spouse (who does not owe a duty of support to the wife). See Pierce, 455 Mass. at 299-300, 916 N.E.2d 330 (affirming sixty-two percent reduction in alimony where payor's ability to maintain lifestyle after retiring was made possible, in part, by his current spouse's financial contributions). Moreover, the judge did not find the wife's claimed expenses credible because they were based on her lifestyle while residing in the Nantucket home, which she was in the process of selling. The judge found that eighty-nine percent of the wife's claimed expenses of $2,652.13 per week ($137,910.76 per year) were associated with the Nantucket home. The judge did not credit the wife's claim that her expenses would remain the same after moving out of the Nantucket home, finding that many significant expenses associated with the property (including a mortgage payment of $5,328 per month, gardening expenses of $939 per month, and "expensive repairs") were "unlikely to be replicated in her new home."[9] We see no reason to disturb the judge's assessment of the wife's credibility in this regard. See Johnston v. Johnston, 38 Mass. App. Ct. 531, 536, 649 N.E.2d 799 (1995).

The judge's findings reflect consideration of all relevant factors under G. L. c. 208, § 34. See Pierce, 455 Mass. at 295-296, 916 N.E.2d 330. While ***248** the reduction in the husband's alimony obligation was substantial, we cannot, on this record, say that the judge failed to achieve a fair balance of sacrifice between the parties. See id. at 296, 299-300, 916 N.E.2d 330. Accordingly, we discern no abuse of discretion in the modified alimony award. See id. at 293, 916 N.E.2d 330.

3. COLA provision. The wife next contends that the judge, after resolving the ambiguity in the COLA provision by supplying a definition for "gross earned income," abused her discretion in failing to determine the husband's arrearage under the COLA provision using that definition. The COLA provision provided that:

> "[i]f on January 31, 2006, or any subsequent January 31, the Consumer Price Index for Urban Wage Earners and Clerical Workers, Boston Massachusetts published by the Bureau of Labor Statistics of the United States Department of Labor (the 'CPI') is greater than it was on January 31, 2005, the monthly alimony payments shall be adjusted commensurately for the following year by the percentage increase that the CPI on such date exceeds the CPI on January 31, 2005; provided, that the increase shall not be greater than the increase in the [h]usband[']s gross earned income for the same period. The increase shall be on a cumulative basis based on [the] [h]usband[']s income for 2004 and the CPI as of January 31, 2005."

The judge credited the wife's expert witness, who testified that the agreement "requires a computation and comparison between the cumulative increases of the CPI as compared to the cumulative percentage increases in [the husband's] gross earned income." The judge found that, "[p]ursuant to the parties' [s]eparation [a]greement, it is clear that [the husband] and [the wife] intended that there would be some adjustment to [the husband's] alimony obligation" based on increases in the CPI. However, the judge found that the COLA provision "is ambiguous because it does not provide an exact definition of 'gross earned income.' " The judge proceeded, however, to resolve the ambiguity by supplying a definition for "gross earned income": the husband's "W-2 and ordinary business income (off the K-1) only."[10] See ***249** President & Fellows of Harvard College v. PECO Energy Co., 57 Mass. App. Ct. 888, 896, 787 N.E.2d 595 (2003) ("When the parties to a ... contract have not agreed with respect to a term which

is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court" [citation omitted]). The judge then calculated the husband's "gross earned income" for every year from 2004 through 2017. Despite clarifying the ambiguous term and determining the husband's annual " 'gross earned income' for purposes of implementing the COLA provision[ ]," the judge did not use those income figures to calculate the husband's arrearage under the COLA provision formula.[11] Instead, the judge merely concluded that the ambiguity rendered a contempt finding inappropriate and found the husband not guilty of contempt.

**5 On appeal, the wife does not quarrel with the lack of a contempt finding against the husband. Rather, she maintains, and we are persuaded, that because the judge resolved the ambiguity in the COLA provision by providing a definition for "gross earned income," the judge should have used that definition to establish an arrearage amount under the COLA provision formula. It is well settled that, even in the absence of a contempt finding, judges possess inherent authority to clarify the rights and obligations of the parties based upon the issues raised in a complaint for contempt, see Colorio, 72 Mass. App. Ct. at 384-385, 892 N.E.2d 356, and "to enter an order for payment of monies due pursuant to [their] determination of the parties' rights under the separation agreement." Id. at 389, 892 N.E.2d 356, quoting Krapf v. Krapf, 55 Mass. App. Ct. 485, 491, 771 N.E.2d 819 (2002), S.C., 439 Mass. 97, 786 N.E.2d 318 (2003). See Smith v. Smith, 93 Mass. App. Ct. 361, 364, 100 N.E.3d 781 (2018); Wooters v. Wooters, 74 Mass. App. Ct. 839, 844, 911 N.E.2d 234 (2009). While the husband correctly asserts that there is no strict rule requiring a judge to order the payment of monies due in the absence of a contempt finding, we think the particular circumstances of this case warranted such an order.

"Absent countervailing equities, separation agreements that retain their independent significance are subject to the same rules of construction and interpretation applicable to contracts generally.... As such, it is the intent of the parties that controls." *250 Krapf, 55 Mass. App. Ct. at 489, 771 N.E.2d 819. Where, as here, (1) the judge found that the parties clearly intended for upward adjustments of alimony pursuant to the COLA provision, and (2) the parties agreed that the husband was in arrears pursuant to the COLA provision (but disagreed as to the arrearage amount because of their different definitions for "gross earned income"), the judge had the authority to enforce the parties' intentions using her own definition for "gross earned income" to calculate the husband's arrearage under the COLA provision. See Siebe, Inc. v. Louis M. Gerson Co., 74 Mass. App. Ct. 544, 549-550, 908 N.E.2d 819 (2009) ("When the intentions of the parties can be clearly inferred from the terms of the contract, the court will enforce those intentions as long as they 'can be fairly carried out consistent with settled rules of law' " [citation omitted]).

Adjudicating the wife's complaint for contempt without clarifying the husband's unpaid alimony obligation under the COLA provision left the wife with only one other avenue for relief: filing a complaint for declaratory judgment. See Krapf, 55 Mass. App. Ct. at 487, 771 N.E.2d 819. But where the issue of the husband's COLA arrearage was squarely before the judge and capable of resolution at that time,[12] it would be contrary to the interest of judicial economy to require the wife to initiate a new action, which would necessitate further litigation and expenditure of the court's and the parties' resources. Accordingly, the matter is remanded for the judge to determine the husband's alimony arrearage under the COLA provision formula using the judge's definition of "gross earned income" (and the income figures that she calculated for each year). We leave to the judge's discretion whether to request further submissions from the parties on this issue.

Conclusion. Those portions of the orders denying the wife's motions to alter or amend the modification judgment and the findings are vacated to the extent they denied her requests related to the calculation of the husband's alimony arrearage under the COLA provision. The portion of the modification judgment pertaining to the husband's alimony arrearage due under the agreement's COLA provision is vacated, and the case is remanded for further proceedings consistent with this opinion. The judgment is otherwise affirmed.[13]

**6 So ordered.

All Citations

--- N.E.3d ----, 101 Mass.App.Ct. 241, 2022 WL 2137001

Footnotes

1 The wife appeals from the modification judgment and several related orders denying her motions to dismiss and to alter or amend the modification judgment and findings.

2 Surviving agreements are only modifiable upon a showing of "something more" than a material change in circumstances (i.e., "countervailing equities"), which was not argued or demonstrated here. DeCristofaro, 24 Mass. App. Ct. at 235-236, 508 N.E.2d 104.

3 The agreement further provided that alimony would terminate upon the first to occur of either party's death, or the wife's remarriage.

4 The wife filed a motion to dismiss the husband's complaint for modification, asserting that the surviving agreement could not be modified on the basis of the husband's retirement. The motion judge (who did not preside over the modification trial) denied the wife's motion in an order dated September 20, 2017, finding that "[i]f the parties never intended to review alimony payments upon [the] [h]usband's normal retirement in [c]ourt, they would not have sought to change the prior [j]udgment," and thus "the [h]usband's alimony payments upon his normal retirement merged into the judgment and is modifiable." The trial judge found that the motion judge "resolved" the question whether the "[a]limony language merged or survived" and "reiterate[d] the [motion judge's] prior finding that the [h]usband's alimony payments upon his normal retirement merged and is modifiable."

5 The case relied on by the wife, Moore v. Moore, 389 Mass. 21, 448 N.E.2d 1255 (1983), is distinguishable because in that case, the judge's decision to include merger language in the divorce judgment was at odds with the parties' clear intention for the entire agreement to survive the judgment. Id. at 25-26, 448 N.E.2d 1255. Here, by contrast, the parties jointly sought to amend the divorce judgment to specify two exceptions to the agreement's survival provision.

6 These factors include:

> "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 ... the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates and the contribution of each of the parties as a homemaker to the family unit."

G. L. c. 208, § 34.

7 At the time of the modification trial, the husband was sixty-seven, and the wife was seventy-four.

8 Although the husband reported rather significant country club expenses on his financial statement, the judge found that a portion of these expenses were "legitimate business expenses" to entertain his legal clients -- expenses that he would presumably no longer incur once retired.

9 While the wife did not know where she would live after moving out of the Nantucket home, the judge credited her

testimony that she was looking at rental properties starting at $2,100 per month.

10 The wife's expert prepared calculations of the husband's "gross earned income" using his W-2 income, K-1 income, and his company-paid health insurance premiums and retirement contributions. The judge, however, "agree[d] with [the husband's] position in that [health insurance premiums and retirement benefits] should not be included when determining [the husband's] gross earned income for purposes of applying the COLA provision."

11 Apart from the failure to define "gross earned income," the parties identify no other ambiguity in the COLA provision of the agreement, and we see none. See Colorio, 72 Mass. App. Ct. at 386, 892 N.E.2d 356 (interpretation of separation agreement is question of law subject to plenary review).

12 In her motion to amend the modification judgment, which was denied, the wife requested that the husband's COLA arrearage be established using the judge's definition of "gross earned income."

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