25-P-281 Appeals Court

LIZ L. vs. URSEL U.[1]

No. 25-P-281.

Suffolk. November 14, 2025. - September 15, 2026.

Present: Rubin, Brennan, & Wood, JJ.

Divorce and Separation, Alimony, Division of property. Husband and Wife, Antenuptial agreement. Contract, Antenuptial agreement, Construction of contract. Intent. Evidence, Intent.

Complaint for divorce filed in the Suffolk Division of the Probate and Family Court Department on November 7, 2019.

The case was heard by Frances M. Giordano, J.

Thomas H. Sosnowski, of New York (David E. Cherny also present) for the wife.
Corey Stoughton, of New York (Joshua W. Bean, of New York, also present) for the husband.

WOOD, J. In 2000, ten days prior to their wedding, Liz L. (wife) and Ursel U. (husband) executed an antenuptial agreement

[1] The parties' names are pseudonyms.

(agreement), which they have agreed was valid and enforceable, addressing various financial matters in the event of a divorce.[2] Among other things, the agreement contained certain provisions for alimony and shielded from equitable division much of the husband's extensive wealth, including his interests in several family trusts and holdings in various entities connected to his family's business (company). Following the commencement of divorce proceedings in 2019, a judge of the Probate and Family Court incorporated the agreement's terms into a 2024 judgment of divorce nisi (divorce judgment). The wife appeals from the divorce judgment, principally challenging (1) the judge's decision to terminate alimony upon the husband's attainment of full retirement age under the Alimony Reform Act (ARA) of 2011, G. L. c. 208, § 49 (f), inserted by St. 2011, c. 124, § 3; (2) the judge's exclusion from the assets subject to division under G. L. c. 208, § 34 (§ 34), of interests in the company that the husband acquired during the marriage; and (3) the manner in which the judge deducted the wife's advance for legal fees from her share of the divisible assets. The husband cross-appeals,

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[2] This case is subject to an impoundment order issued by the trial court that has remained in effect pursuant to S.J.C. Rule 1:15, § 2 (b), as appearing in 472 Mass. 1301 (2015). The impoundment order is lifted with respect to "the information contained in the opinion [which] is necessary to the resolution [of] the case." See Adams v. Adams, 459 Mass. 361, 362 n.1 (2011), S.C., 466 Mass. 1015 (2013).

contending that the judge made a mathematical error that artificially inflated the value of some of his divisible assets, and thus the total value of the assets subject to division. Because we conclude that the judge erred in interpreting the parties' agreement, we vacate the provisions of the divorce judgment pertaining to alimony and property division, and remand for further proceedings consistent with this opinion.

Background. We summarize the trial judge's relevant findings, supplementing them with undisputed facts in the record, and reserving other facts for later discussion. Cavanagh v. Cavanagh, 490 Mass. 398, 399 (2022). The parties married in 2000, were married for nineteen years when the wife filed for divorce, and had two children.

1. Antenuptial agreement. The parties executed their agreement on October 4, 2000, setting forth various provisions pertaining to alimony and property division. The agreement's alimony provision stated that the wife did not waive her right to alimony if, at the time of the divorce, the parties had children or had been married for at least nine years.[3] The alimony provision also stated, among other things, that, if the parties had children, the amount of alimony "to be paid" should

[3] The wife otherwise waived her right to alimony, and the husband waived any rights that he might have to alimony.

allow the wife to maintain a lifestyle similar to that maintained by the parties with the children before the divorce.

With respect to property division, the agreement categorized each party's individually held assets as either (1) "Separate Property" or (2) "property, other than Separate Property" (non-separate property). The agreement defined "Separate Property" as property owned by each party and listed on that party's exhibit to the agreement, together with property acquired during the marriage through specifically enumerated methods of acquisition. The agreement stated:

> "The term 'Separate Property' as used in this Agreement shall include the property described in the Exhibit of the party whose name appears therein, together with (a) the proceeds of any of said property which is sold; (b) all property subsequently acquired with said proceeds; (c) all property which is presently held in trust for either party or is hereafter received by such party by gift, inheritance, bequest or devise, outright or in trust, or by distribution (whether income or principal) from a trust; (d) any other property so designated in writing by both [the husband] and [the wife] after the date of their marriage; (e) any appreciation or enhancement in value of any of the property described in this paragraph; and (f) the income from Separate Property."

At the time the parties executed the agreement, the total value of the wife's separate property was a small fraction of the value of the husband's separate property (which included various investments, real estate, and trust interests).

The husband waived any rights he might have in the wife's separate property and non-separate property. The wife, however, did not similarly waive all rights in the husband's property. Instead, the agreement provided her with specified rights in the husband's separate property that varied according to the length of the marriage, and preserved her rights, if any, in his non-separate property. Specifically, as relevant here, section 4.C of the agreement stated with respect to separate property:

> "If the termination of the marriage occurs upon or after the fourteenth anniversary of the marriage, [the wife] shall have the same rights with respect to an equitable division or assignment of [the husband]'s Separate Property under [§ 34], or to the applicable, comparable laws of any other jurisdiction in the event of a termination of the marriage by divorce . . . but in no event shall [the wife] be entitled to less than the amount she would receive under Paragraph 4B [applicable if the marriage lasted between nine and fourteen years] above. However, for purposes of this paragraph C, [the husband]'s Interests in [the company] and [the husband]'s Trust Interests, shall be excluded from the Separate Property which may be subject to an equitable division or assignment."

The agreement separately defined "Interests in [the company]" and "Trust Interests," which section 4.C excluded from the separate property subject to equitable division or assignment, as follows:

> "(i) the expression 'Interests in [the company]' shall mean shares of stock of any class and debentures of or issued by [the company] . . . or any other organization succeeding to or carrying on all or any substantial portion of the business of [the company] and any interest in any partnership or corporation that was issued to the shareholders of the [company] as a dividend on shares in the [company] . . . but shall not include (a) the shares of any registered investment company or other type of pooled investment vehicle managed by [the company] or any affiliate, (b) any Interest in [the company] purchased by [the husband] within two years prior to the date either

> party has filed an action for divorce . . . , or (c) any Interest in [the company] that [the husband] has acquired at any time after the date of this Agreement with the intent of reducing that portion of his Separate Property that would otherwise be subject to equitable division; and (ii) the expression 'Trust Interests' shall mean all interests in the trusts described on Exhibit A-1 and any trusts subsequently funded or created by anyone other than [the husband]."

As to non-separate property, section 7 provided, "Nothing herein contained shall affect the rights, if any, of [the wife] (i) in or to a property settlement from [the husband]'s property, other than Separate Property . . . ."

The agreement provided that it "shall not be merged" into a judgment of divorce "but shall survive" the same and "shall be forever binding and conclusive on the parties." The agreement further provided that it "contain[ed] the entire understanding of the parties," and could "not be altered, amended or abrogated in any manner" (except by a written instrument executed by the parties).[4]

2. Marital lifestyle. The parties enjoyed an "extraordinary, upper-class lifestyle" during the marriage, maintaining several multimillion-dollar residences with staff, amassing a fine art and antiques collection, and traveling

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[4] An agreement that does not merge, and instead survives, the divorce judgment retains independent legal significance as a contract. See G. L. c. 208, § 1A. Cf. Gottsegen v. Gottsegen, 397 Mass. 617, 619 (1986).

frequently by private jet, among other things. Although the husband earned a generous income working for one of the company's business entities, the parties' lifestyle was largely funded by the husband's family trusts (which owned several of the residences occupied by the parties during the marriage). During the marriage, the wife was primarily responsible for raising the parties' two children (born in 2003 and 2006), managing the household staff at each residence, decorating the residences, and attending to the family's philanthropic endeavors.

3. Divorce proceedings. In November 2019, the wife filed a complaint for divorce. At the time that the complaint was served on the husband, the parties had been married for nineteen years and three months.

A ten-day trial was held in May 2022. During the trial, 2,699 exhibits were entered in evidence and five witnesses (including both parties) testified.[5] Significantly, prior to trial, the parties filed a stipulation that the agreement was valid and enforceable. The judge incorporated the stipulation into the judgment. Despite agreeing to its enforceability, the parties presented substantially different interpretations of the

[5] The three other witnesses were each party's "lifestyle expert" and the president of the private trust company that administers the husband's family trusts.

agreement's provisions pertaining to alimony and property division. Relevant to this appeal, the wife asserted that the agreement entitled her to receive alimony indefinitely and to an equitable division of interests in the company that the husband acquired with cash or company loans during the marriage. The husband, however, asserted that any alimony awarded by the judge would presumptively terminate on his sixty-seventh birthday pursuant to G. L. c. 208, § 49 (f), of the ARA, and that the agreement excluded all of his interests in the company acquired during the marriage from equitable division, regardless of the method of acquisition. The judge issued the divorce judgment in December 2024. Her summary of the relevant procedural history, findings of fact, and conclusions of law spanned eighty-nine pages and included 445 findings.

With respect to alimony, having determined the agreement to be "incomplete" as to "duration," the judge applied the ARA's retirement provision, ordered the husband's alimony obligation to terminate upon his attainment of full retirement age in 2031,[6] and denied the wife's request to deviate beyond that presumptive termination date. Consistent with the agreement's alimony provision, the judge (1) found that "the amount the wife needs to maintain a lifestyle similar to the lifestyle the parties

[6] Or upon the wife's death or remarriage.

maintained with their children prior to the termination of the marriage is $5,808,322" annually;[7] (2) subtracted from that $5.8 million annual lifestyle figure the wife's annual income from other sources (including investment income and child support), arriving at a net general term alimony obligation of $4,015,215 per year ($334,602 per month); and (3) found that the amount of the husband's alimony obligation would not "cause his lifestyle to be reduced below that of the wife."

As for property division, the judge assigned the wife fifty-five percent of the parties' divisible assets and deducted from her share the legal fees the husband had paid on her behalf. To effectuate this, the judge ordered the husband to transfer a fixed sum to the wife. The parties also retained their respective nondivisible separate property. The judge found the husband's nondivisible separate property to include all of his trust interests, all interest in the company acquired before marriage, and certain interests in the company acquired during the marriage.

Discussion. On appeal, the wife challenges the duration of the alimony award, and both parties challenge certain aspects of

[7] This amount includes, among other things, expenses associated with renting three separate residences; maintaining a fourth residence; extensive travel (including by private jet); and acquiring art and antiques.

the property division. Because the parties' arguments turn largely on the interpretation of their agreement, we begin with "traditional principles of contract law" that guide our review. Jones v. Jones, 101 Mass. App. Ct. 673, 681 (2022).[8]

"Contract principles apply to antenuptial agreements, and the interpretation of an antenuptial agreement is a question of law, which we review de novo." Rudnick v. Rudnick, 102 Mass. App. Ct. 467, 470 (2023). The agreement must be "construe[d] . . . based on a fair construction of the contract as a whole and not by special emphasis upon any one part" (quotation and citation omitted), Duval v. Duval, 101 Mass. App. Ct. 752, 757-758 (2022), "while also recognizing that every word is to be given force so far as practicable" (quotation and citation omitted), id. at 758. See General Convention of the New Jerusalem in the U.S. of Am., Inc. v. MacKenzie, 449 Mass. 832, 835 (2007) ("The words of a contract must be considered in the context of the entire contract rather than in isolation"). "[W]hen the language of a contract is clear, it alone determines the contract's meaning . . ." (citation omitted). Duval, supra.

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[8] We do not review the judge's finding that the agreement is valid and enforceable because neither party challenges it. See Rudnick v. Rudnick, 102 Mass. App. Ct. 467, 470 (2023) (for antenuptial agreement to be enforceable, it must be both [1] fair and reasonable at time of execution, and [2] conscionable at time of divorce).

With those principles in mind, we turn to the parties' contentions regarding alimony and property division.

1. Alimony. The parties disagree whether the ARA's retirement provision, G. L. c. 208, § 49 (f), which presumptively terminates alimony upon a payor attaining full retirement age, was applicable to the alimony award.[9]

During the proceedings below, the wife contended that the ARA's retirement provision was inapplicable because (1) the parties executed a surviving, nonmodifiable agreement containing an "affirmative covenant" that obligated the husband to pay alimony indefinitely if the parties had children; (2) the parties intended for the husband's alimony obligation to be construed under the law in effect when the agreement was executed in 2000; and (3) applying the ARA's retirement provision (which went into effect in 2012) to the husband's alimony obligation would constitute an impermissible modification of the parties' valid and enforceable antenuptial agreement. See Korff v. Korff, 64 Mass. App. Ct. 94, 97-98 (2005) (once antenuptial agreement is determined to be valid and

[9] General Laws c. 208, § 49 (f), effective in March 2012, creates a presumption that alimony shall automatically terminate when the payor attains full retirement age, which may be rebutted if the recipient demonstrates good cause to deviate beyond the presumptive termination date. See G. L. c. 208, § 49 (f) (1). Section 53 (e) of G. L. c. 208 sets forth a list of nonexhaustive grounds for deviation.

enforceable, judge is "obligated to enforce its terms as written" and cannot modify it).

The husband, however, contended that the ARA's retirement provision was applicable because (1) the parties' agreement merely contained a nonwaiver, or reservation, of the wife's right to seek alimony if any children were born of the marriage; and (2) the agreement lacked express language addressing the duration of alimony, thereby demonstrating the parties' intent to leave that issue for future determination under the law in effect at the time of divorce (rather than the law in effect in 2000). See Vedensky v. Vedensky, 86 Mass. App. Ct. 768, 769 & n.2 (2014) (where parties' agreement was incorporated into pre-ARA divorce judgment and contained reservation of rights to seek future alimony, alimony awarded in subsequent modification proceeding was properly subject to ARA then in effect).

The judge concluded that the agreement merely reserved the wife's right to seek alimony in the future, leaving the determination of her entitlement to alimony to the law in effect at the time of divorce. The judge also concluded that the parties' agreement was "incomplete" as to the duration of any alimony award because it did not specify when alimony would terminate and instead left the issue "to be determined by the Court." The judge stated that the agreement's "silence as to when alimony terminates [did] not compel [her] to determine that it continues indefinitely" and, thus, applying the ARA's retirement provision would not alter the parties' agreement. Ultimately, the judge ordered the husband's alimony obligation to terminate upon his attainment of full retirement age pursuant to G. L. c. 208, § 49 (f), and denied the wife's request for a deviation extending alimony beyond that date.

We conclude that (1) the law as it stood at the time of the agreement, rather than at the time of the divorce, applies; (2) the parties' agreement was not merely a reservation of rights, but rather establishes an affirmative obligation for the husband to pay alimony if at the time of the divorce the parties have children; and (3) the ARA does not apply to the alimony provision of the agreement.

a. Applicable law. In determining the law applicable to the parties' agreement, "[a]s a general rule, the law existing at the time an agreement is made necessarily enters into and becomes part of the agreement." Feakes v. Bozyczko, 373 Mass. 633, 636 (1977). "In contrast, laws enacted after the execution of an agreement are not commonly considered to become part of the agreement unless its provisions clearly establish that the parties intended to incorporate subsequent enactments into their agreement." Id.[10] See Mayor of Salem v. Warner Amex Cable Communications Inc., 392 Mass. 663, 666-667 (1984) (Mayor of Salem) (holding that statutory amendment was inapplicable to parties' agreement executed two years earlier because agreement did not expressly state that future amendments would apply).

Here, the parties' agreement contains no indication that they intended to be bound by future changes in the law with respect to alimony. See Mayor of Salem, 392 Mass. at 666-

[10] In Feakes, 373 Mass. at 634, 636, the parties' separation agreement provided that child support would terminate upon the children attaining the age of "majority," which was then twenty-one under the common law. A new statute was later enacted lowering the age of majority to eighteen. Id. at 636. The Supreme Judicial Court held that it was error to apply the new statutory age of majority to the father's child support obligation in the absence of any indication that the parties intended for future enactments to apply to their agreement. Id. at 636-638. Here, the trial judge sought to distinguish the case at hand from Feakes because the latter involved a separation agreement that had already been incorporated into a judgment when the statutory question arose. However, that distinction is immaterial inasmuch as the relevant date is when the agreement is executed, not when it is incorporated into a judgment. See Feakes, supra at 636 (under general rule, agreement incorporates law in effect when it "is made" and excludes "laws enacted after [its] execution" [emphases added]). This is especially true where, as here, the agreement was intended to survive the divorce judgment and retain significance as an independent contract -- which, among other things, preserved the parties' ability to enforce it like an ordinary contract. See Rubin v. Rubin, 29 Mass. App. Ct. 689, 697 (1991) (surviving agreement may be enforced in action at law for breach of contract).

667.[11,12] We thus conclude that the law in effect at the time the agreement was executed in 2000, but not subsequent enactments,

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[11] Contrary to the husband's assertion, the language of section 6 waiving rights to alimony under "future laws" fails to establish that the parties intended future laws to govern alimony rights not expressly addressed in the agreement. The language of section 6, including the reference to future laws, is clearly intended to waive all potential rights to alimony beyond those expressly provided for in section 5. This is reflected in section 6's express waiver of any potential alimony rights that could arise "if the parties have no living children at [the time of divorce] and the termination of the marriage occurs prior to the ninth anniversary of the marriage." Section 5 creates an obligation to pay alimony under only two circumstances -- if the parties have children, or if the marriage lasts at least nine years. Accordingly, section 6 reflects the parties' clear intent to waive any potential rights to alimony that could arise outside the two limited circumstances expressly provided for in section 5.

[12] We are unpersuaded by the husband's contention that the parties' failure to include in section 5 an express reference to G. L. c. 208, § 34, which governed both property division and alimony in 2000, "demonstrates that they did not intend to incorporate existing alimony law into the [agreement]." The relevant inquiry is not whether the parties expressly stated their intent to incorporate the law existing at the time the agreement was made. Rather, under the general rule, incorporation of existing law (and exclusion of subsequently enacted laws) is presumed <u>unless</u> the parties expressly state their intent to be bound by future changes in the law. See <u>Mayor of Salem</u>, 392 Mass. at 666-667; <u>Feakes</u>, 373 Mass. at 636. We are unpersuaded by the husband's attempts to distinguish <u>Mayor of Salem</u> and <u>Feakes</u> by relying on the framework of <u>General Motors Corp</u>. v. <u>Romein</u>, 503 U.S. 181, 189 (1992). <u>Mayor of Salem</u> does not stand for the narrow proposition that a subsequently enacted statute (or amendment) affects the construction, i.e., legal effect, of an agreement only if the agreement expressly references the law in effect when it was made. The husband's attempt to distinguish <u>Feakes</u> fares no better because it rests on his claim that the agreement merely reserves the wife's right to <u>seek</u> alimony and therefore creates no vested right to <u>receive</u> alimony. The husband contends that,

applies to the agreement. See id.; Feakes, 373 Mass. at 636. The inquiry does not end here, however.

b. Affirmative obligation and the ARA. In determining whether the parties' agreement established an enforceable obligation for the husband to pay alimony, or a mere reservation of the wife's right to seek alimony in the future, the parties' intentions control. See Mayor of Salem, 392 Mass. at 667; Feakes, 373 Mass. at 636. Because the words of the parties' agreement remain the most important evidence of their intention, see Robert Indus., Inc. v. Spence, 362 Mass. 751, 755 (1973), we examine the language of section 5, which addresses alimony:

> "5. Termination of Marriage with Children or Termination of Marriage on or after Ninth Anniversary -- Alimony. [The husband] and [the wife] acknowledge that if they have children at the time of termination of the marriage, it could create difficulties in their relationships with their children if, following the termination of the marriage, the parents enjoyed substantially different lifestyles. Therefore, the parties agree that, if the parties have children at the time of the termination of the marriage, [the wife] expressly does not waive her right to receive alimony or support from [the husband] and that they will in good faith negotiate (and, if appropriate, from time to time renegotiate) an amount of alimony to be paid by [the husband] to [the wife] to allow her to maintain a lifestyle similar to the lifestyle the parties maintained with their children prior to the termination of the marriage, taking into consideration all other sources of support available

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because the agreement merely reserves the wife's right to seek alimony and creates no vested right to receive alimony, the subsequent enactment of the ARA does not alter the agreement's legal effect. As discussed herein, we do not agree with the husband that the alimony provision merely reserves the wife's right to seek alimony.

> to [the wife] (including without limitation child support payments and earnings on investments); provided, however, that such payments shall not cause [the husband] to reduce his lifestyle below that of [the wife's]. [The wife] expressly does not waive her right to receive alimony or support from [the husband] if the termination of their marriage occurs on or after the ninth anniversary of their marriage, whether or not they have children." (Emphases added.)

The language of section 5 reflects the parties' intent to create an affirmative obligation to pay alimony rather than merely to reserve the wife's right to seek it. The first sentence expresses the parties' shared desire to avoid "difficulties in their relationships with their children" caused by "substantially different" postdivorce lifestyles. The second sentence achieves that purpose by providing that the wife reserves her right to alimony and that the parties "will in good faith negotiate . . . an amount of alimony to be paid by [the husband]" (emphases added). The parties' use of "will" and "to be paid," rather than permissive or conditional language (e.g., "may" or "if"), is significant. See Matthews v. Rakiey, 38 Mass. App. Ct. 490, 495 (1995) ("will" -- like "shall" and "must" -- is "language of an unmistakably mandatory character" [citation omitted]). See also Rosnov v. Molloy, 460 Mass. 474, 479 (2011) ("may" is typically permissive, whereas "shall" usually imposes mandatory obligation [citation omitted]). The second sentence also contains three parameters for calculating the amount of alimony: (1) the amount must allow the wife to maintain a lifestyle similar to that which the parties maintained with the children prior to the divorce, (2) the alimony calculation must account for the wife's other sources of income (including, but not limited to child support and investment income), and (3) the alimony payments cannot cause the husband's lifestyle to decline below that of the wife. Finally, the agreement does not specify any event that would terminate the obligation; to the contrary, the second sentence contains temporal language ("from time to time") reflecting the parties' agreement to an indefinite duration for the husband's alimony obligation.[13]

We agree with the wife that the first two sentences of section 5 unambiguously express the parties' intention to establish an indefinite and enforceable, affirmative obligation for the husband to pay alimony if they have children, with three specific parameters for calculating the amount to be paid. Cf. Korff, 64 Mass. App. Ct. at 97-98 (parties' antenuptial agreement established enforceable, nonmodifiable alimony obligation that generally called for husband to pay wife percentage of income subject to annual adjustments, even though

[13] Black's Law Dictionary 915 (12th ed. 2024) defines "indefinitely" as "[f]or a length of time with no definite end."

alimony provision lacked necessary mechanism to calculate income and was thus vulnerable to manipulation by husband).

In sum, because we have concluded that the parties intended to be bound by the law in effect at the time they executed the agreement, the ARA is inapplicable to the husband's enforceable, affirmative alimony obligation. Accordingly, on remand, the judge shall amend the divorce judgment to make clear that the ARA's durational limit shall not apply to the husband's alimony obligation.[14]

2. Property division. The parties raise the following contentions with respect to the property division. First, the wife contends that the judge erroneously excluded from the divisible assets the following interests in the company acquired during the marriage: company shares the husband received during the marriage, interests he received as dividends on those shares, and debentures he acquired during the marriage. Second, the wife asserts that the judge erroneously deducted the wife's

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[14] The judge thus erred in concluding the agreement is incomplete because it does not specify a durational limit on alimony. The absence of a specified end date does not render the agreement incomplete; rather, it reflects the parties' agreement to an alimony obligation of indefinite duration. Beyond that, the agreement provides that "[t]his Agreement may not be altered, amended or abrogated in any manner, except by an instrument in writing duly executed and acknowledged by both of the parties." Because the parties' agreement survived, rather than merged with, the divorce judgment, it may not be modified under the familiar "material change in circumstances" standard.

advance distribution of legal fees from her share of the net divisible assets (i.e., the assets remaining after all advance distributions were already deducted), rather than from her share of the gross divisible assets (i.e., the total assets prior to the deduction of advance distributions). Third, the husband contends that the judge made a mathematical error that artificially inflated the value of his divisible assets. We address the parties' contentions in turn.

a. Interests in the company. At issue is the judge's exclusion from the husband's divisible assets of the following interests in the company that he acquired during the marriage: (1) company shares purchased with loans from the company; (2) interests in company investor entities received as dividends on those shares; and (3) company debentures[15] purchased with cash. The wife contends that the judge erroneously treated these interests in the company as nondivisible based on an incorrect interpretation of the parties' agreement. Our review begins with an examination of the agreement's language to ascertain the parties' intentions. See Robert Indus., Inc., 362 Mass. at 755.

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[15] As stated in the judge's findings, debentures are "long-term debt instruments that provide a favorable rate of return," which are made available to the company's "senior employees, shareholders, and their spouses."

i. Parties' intentions. As described above, the agreement contains the following relevant provisions concerning property division.

> "[Section] 2. Definition of Separate Property. The term 'Separate Property' as used in this Agreement shall include the property described in the Exhibit of the party whose name appears therein, together with (a) the proceeds of any of said property which is sold; (b) all property subsequently acquired with said proceeds; (c) all property which is presently held in trust for either party or is hereafter received by such party by gift, inheritance, bequest or devise, outright or in trust, or by distribution (whether income or principal) from a trust; (d) any other property so designated in writing by both [the husband] and [the wife] after the date of their marriage; (e) any appreciation or enhancement in value of any of the property described in this paragraph; and (f) the income from Separate Property."
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> "[Section] 4. Termination of Marriage -- Property Settlement from [the Husband's] Separate Property. In the event of the divorce . . . of the parties . . . , [the wife] shall be entitled to the following payments from [the husband's] Separate Property:
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> ". . . .
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> "B. If the termination of the marriage occurs within the period from the ninth anniversary of the marriage until the fourteenth anniversary of the marriage, [the husband] shall pay to [the wife] the greater of (i) seven hundred fifty thousand dollars ($750,000) plus an amount equal to one hundred thousand dollars ($100,000) multiplied by the number of years (or any portion thereof) which have elapsed between the ninth anniversary of the marriage and the date of the termination of the marriage or (ii) an amount equal to twenty-five percent (25%) of [the husband's] Separate Property. For purposes of this paragraph B, [the husband's] Separate Property shall not include [the husband's] Interests in [the company] nor his Trust Interests. For purposes of this Agreement, the following definitions shall apply: (i) the expression 'Interests in [the company]' shall mean shares of stock of any class and debentures of or issued by [the company] . . . or any other

organization succeeding to or carrying on all or any substantial portion of the business of [the company] and any interest in any partnership or corporation that was issued to the shareholders of the [company] as a dividend on shares in the [company] . . . but shall not include (a) the shares of any registered investment company or other type of pooled investment vehicle managed by [the company] or any affiliate, (b) any Interest in [the company] purchased by [the husband] within two years prior to the date either party has filed an action for divorce . . . , or (c) any Interest in [the company] that [the husband] has acquired at any time after the date of this Agreement with the intent of reducing that portion of his Separate Property that would otherwise be subject to equitable division; and (ii) the expression 'Trust Interests' shall mean all interests in the trusts described on Exhibit A-1 and any trusts subsequently funded or created by anyone other than [the husband].

"C. If the termination of the marriage occurs upon or after the fourteenth anniversary of the marriage, [the wife] shall have the same rights with respect to an equitable division or assignment of [the husband's] Separate Property under [G. L. c. 208, § 34], or to the applicable, comparable laws of any other jurisdiction in the event of a termination of the marriage by divorce, . . . but in no event shall [the wife] be entitled to less than the amount she would receive under Paragraph 4B above. However, for purposes of this paragraph C, [the husband's] Interests in [the company] and [his] Trust Interests, shall be excluded from the Separate Property which may be subject to an equitable division or assignment." (Emphases added.)

"[Section] 7. Rights in Property Other than Separate Property.

"A. ·Nothing herein contained shall affect the rights, if any, of [the wife] (i) in or to a property settlement from [the husband's] property, other than Separate Property, or (ii) to receive alimony or support from [the husband], other than alimony or support from or based upon [the husband]'s Separate Property, in the event of the divorce . . . of the parties and any such rights are in addition to [the wife's] rights under Paragraphs 4 and 5 above.

"B. [The husband] waives, releases and covenants not to pursue any claim or right which he might otherwise have

> (i) in or to [the wife's] property, other than Separate Property or (ii) to receive alimony or support from [the wife], in the event of the divorce . . . of the parties."

Upon examining the plain language of sections 2, 4, and 7 (along with other relevant sections), we conclude that the agreement creates two main categories of assets, separate property and non-separate property. "Separate Property" is defined in section 2. As used in section 7, the only place it appears, the term "non-Separate Property" encompasses any property that does not meet the definition of "Separate Property." The wife retained certain rights to the husband's separate property, which are triggered by the length of the marriage. Section 4 outlines the minimum property settlement to which the wife is entitled from the husband's separate property depending on the length of the marriage (section 4.B applies to a marriage of between nine and fourteen years, and section 4.C applies to a marriage of over fourteen years). If the parties have been married for at least fourteen years at the time of divorce, <u>all</u> non-separate property and <u>some of the husband's</u> separate property will be divisible pursuant to § 34. There are two subcategories of the husband's separate property, though, that are never subject to division: (1) "Trust Interests" and (2) "Interests in [the company]," as defined in section 4.B, which excludes the three categories of interests enumerated in subsections (a), (b), and (c) (section 4.B exclusions), discussed infra.

The definitions for "Trust Interests" and "Interests in [the company]" that appear in section 4.B apply to the entire agreement. Section 4.C uses those defined terms to exclude the husband's "Trust Interests" and "Interests in [the company]" held as separate property from the separate property subject to equitable division after fourteen years of marriage.

The crux of the parties' dispute is whether interests in the company that fall within section 4.B's definition of "Interests in [the company]" but do not qualify as "Separate Property" under section 2 are divisible.

The parties agree that in the circumstances of their divorce, any asset acquired during the marriage that falls within one of the three section 4.B exclusions from the definition of "Interests in [the company]" shall be treated as divisible. The parties disagree, however, as to the appropriate treatment of the interests in the company acquired during the marriage that do not fall within one of the three section 4.B exclusions.

The wife contends that interests in the company that do not fall within section 2's definition of "Separate Property" are divisible like all other non-separate property. The husband contends that any assets that meet section 4.B's definition of

"Interests in [the company]" are nondivisible separate property. We agree with the wife's interpretation. Under the agreement, "interests in the company" that are Separate Property are exempted from division. The agreement contains no exemption from division with respect to any property that is not separate property. "Interests in the company" that are not separate property are, therefore, divisible.

As the wife argues, sections 2, 4, and 7.A of the agreement, when read together, establish the framework to be applied when determining whether an asset of the husband is divisible. Section 2 defines the husband's "Separate Property," section 4 governs the equitable division of that property, and section 7.A preserves the wife's rights, if any, in the husband's "property, other than Separate property." Therefore, an asset is subject to equitable division under section 4 only if it qualifies as "Separate Property" under section 2. Otherwise, its division is governed by section 7.A. The agreement contains no restriction on the division of interests in the company that are non-separate property.

And, unless a company interest was included in the exhibits attached to the agreement or acquired during the marriage using one of the enumerated methods of acquisition listed in section 2, it is non-separate property. Because it could not have been listed on the exhibits attached to the agreement, an interest in the company acquired during the marriage qualifies as "Separate Property" only if it was acquired through one of the methods enumerated in section 2. A company interest acquired through a method that was not enumerated in section 2 is therefore non-separate property and subject to equitable division under section 7.A.

The plain language of the agreement thus resolves the issue. Section 4.B defines the category of assets that constitute "Interests in [the company]," but it does not provide that every asset within that definition is separate property. Rather, whether a company interest is "Separate Property" is determined under section 2.

The third of the section 4.B exclusions excludes from "Interests in [the company]" any company interest acquired by the husband during the marriage "with the intent of reducing that portion of his Separate Property that would otherwise be subject to equitable division" (emphases added). The third exclusion thus contemplates that an interest in the company acquired during the marriage may be subject to equitable division and does not support the husband's contention that every asset falling within section 4.B's definition of "Interests in [the company]" is nondivisible separate property.

The husband's contrary interpretation would produce an absurd result. See Foster v. Hurley, 444 Mass. 157, 162 (2005), quoting Krapf v. Krapf, 439 Mass. 97, 105 (2003) ("[W]e must construe the . . . agreement in a manner that 'appears to be in accord with justice and common sense and the probable intention of the parties . . . [in order to] accomplish an honest and straightforward end [and to avoid], if possible, any construction of a contract that is unreasonable or inequitable'"). If all assets that meet section 4.B's definition of "Interests in [the company]" automatically become nondivisible separate property, the husband could intentionally reduce his divisible non-separate property by converting it into nondivisible company interests, and the wife would have no recourse. Under his proposed interpretation, he could, for example, convert his earned income (which the judge correctly found was divisible non-separate property) or the parties' joint assets into what he argues are nondivisible interests in the company, producing the unjust and absurd result of rendering marital property nondivisible and stripping the wife of her marital interests -- a result that could potentially render the agreement unenforceable. See DeMatteo v. DeMatteo, 436 Mass. 18, 31-32, 35-38 (2002). Accordingly, even beyond the plain language of the agreement, the husband's proposed construction is not "a reasonable interpretation of the parties' agreement." Merrimack College v. KPMG LLP, 88 Mass. App. Ct. 803, 806 (2016).

ii. <u>Exclusion of interests in the company acquired during marriage</u>. Having concluded that the wife's interpretation is correct, we next examine the interests in the company acquired by the husband during the marriage to determine whether the judge erroneously excluded them from the husband's divisible assets.

The judge rejected the wife's interpretation of the agreement that, for an asset to qualify as a nondivisible company interest, it must first meet the definition of "Separate Property" under section 2. The judge instead adopted the husband's interpretation that any asset meeting section 4.B's definition of an "Interest[] in [the company]," regardless of whether it also meets the definition of "Separate Property," must be treated as nondivisible property. With respect to the company shares, interests in company investor entities received as dividends on those shares, and debentures acquired by the husband during the marriage, the judge excluded them from the husband's divisible assets on the basis that they constituted nondivisible interests in the company and did not fall under one of the section 4.B exclusions.[16]

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[16] Although the judge did not explicitly state her rationale for excluding certain debentures acquired during the marriage, we presume that she treated them as nondivisible interests in the company because, unlike the other debentures acquired during

Specifically, the judge treated as nondivisible the following assets acquired by the husband during the marriage and determined to constitute "[i]nterests in [the company]" under section 4.B: (1) 359,366 company shares purchased with loans from the company; (2) interests in company investor entities received as dividends on those company shares; and (3) company debentures purchased with cash.[17] These assets were made available to the husband largely because of "his senior level of employment at [the company]," not because of his membership in his family, and were available on the same terms to other senior employees.

Where there is no indication in the judge's findings or elsewhere in the record that the aforementioned interests in the company meet the definition of "Separate Property" in section 2,

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the marriage, they did not fall within one of the three section 4.B exclusions.

[17] The judge found that, at the time of trial, company debentures valued at a total of about three quarters of all the company debentures owned by the husband were divisible because they fell under the section 4.B exclusions to the definition of "Interests in [the company]." Some were purchased during the two-year window prior to the divorce proceedings. Others consisted of debentures acquired with the intent of reducing the husband's divisible separate property. On the asset division chart, however, as the husband points out, the value of the husband's nondivisible debentures appears to be higher than the amount one gets by subtracting the debentures identified as divisible from the total number of debentures. That discrepancy is addressed in part 2.c of this analysis, _infra_, which pertains to the husband's cross appeal.

it was error for the judge to treat them as nondivisible interests in the company. We are unpersuaded by the husband's contention that the debentures acquired during the marriage meet the definition of "Separate Property" because they were acquired with income from separate property (i.e., cash distributed to the husband from one of his family trusts). There is no evidence to support that claim. But even if that were true, and it appears that the debentures were purchased with loans that were paid off by the ultimate sale of that stock, while "income from [separate property]" does indeed meet the definition of "Separate Property" in section 2, an asset acquired with income from separate property does not meet the definition of "Separate Property" unless it was purchased with proceeds from the sale of an asset listed on the exhibits to the agreement.[18] In essence, the cash used to purchase the debentures at issue would have needed to be proceeds from the sale of premarital separate property for those debentures to meet the section 2 definition of "Separate Property," and thus qualify as nondivisible

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[18] As explained earlier, see background part 1, supra, the definition of "Separate Property" includes (1) all property listed on the exhibits to the agreement, along with (a) the proceeds from any such property that is later sold, and (b) new property subsequently acquired with those proceeds; (2) property received by a party in trust, or by income or principal distribution from a trust; (3) any appreciation in value of any assets included in the definition of "Separate Property"; and (4) income from separate property.

"Interests in [the company]" under section 4.B. There is no indication that the husband acquired any of the assets at issue in such a manner; accordingly, it has not been shown that any were separate property, and it was error for the judge to exclude them from the husband's divisible assets.

Accordingly, on remand, the judge shall include in the husband's divisible assets the excluded company shares, interests in company investor entities received as dividends, and debentures acquired by the husband during the marriage, and assign fifty-five percent to the wife subject to other necessary adjustments to the property division discussed infra. To the extent that the redistribution of assets increases the wife's income, the judge may, in her discretion, recalculate the amount of the husband's alimony payments in light of the wife's increased income (using the same criteria used to calculate the original amount).

b. Advance distributions. During the pendency of the divorce proceedings, the parties executed a "stipulation for advance distributions" providing, in relevant part, that as of April 1, 2020, the husband would pay the legal fees and expenses incurred and paid by each party, or paid on his or her behalf, to all counsel "through the date of settlement or adjudication by [the Probate and Family Court]." Furthermore, the stipulation provided that such payments "shall be deemed an advance distribution of assets to that party and credited against his or her share of the marital estate awarded under the terms of the [agreement], and pursuant to [§ 34], in particular against each party's share of their jointly held and [the husband's] Separate Assets." The parties filed a joint motion to enter the aforementioned stipulation as an order, which was allowed on March 4, 2021.

In the divorce judgment and accompanying findings of fact, the judge treated the legal fees the husband paid on the wife's behalf as an advance distribution and deducted those fees from her fifty-five percent share of the remaining divisible assets. The judge did not, however, deduct the husband's legal fees from his forty-five percent share of the divisible assets or include either party's legal fees in the total divisible assets before dividing them. The wife contends that this was error, asserting that the judge should have added the legal fees paid on behalf of each party back into the divisible marital estate, determined each party's share of the resulting total, and then deducted the legal fees paid on behalf of each party from that party's share of the total divisible assets. We agree.

The husband contends that the judge did not err because the stipulation did not specifically require the legal fees to be added back to the divisible marital estate before dividing it. Although the husband correctly notes that the stipulation contained "no variation of the phrase 'add back' (or anything like it)," it expressly stated that each party's legal fees "shall be . . . credited against . . . each party's share of" the divisible assets (emphases added). The judge could have accomplished the parties' clearly stated intention that each party's legal fees be credited against that party's share of the divisible assets by adding the total legal fees paid to the divisible estate, dividing the resulting total between the parties pursuant to her § 34 analysis, and then deducting each party's advance distribution from that party's respective resulting share. Deducting legal fees only from the wife's share of the remaining divisible assets (with no corresponding deduction of fees from the husband's share) was error and accordingly must be cured on remand.[19]

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[19] As for the wife's remaining contention that the judge erred by including in the divisible assets the wife's claimed fifty percent interest in the parties' jointly held property, we are unpersuaded. She claims that her "[fifty percent] ownership stake in the parties' jointly held property" was nondivisible because the agreement excludes her separate property from division and waives the husband's interest in her non-separate property. The wife's argument fails for two reasons. First, the judge correctly determined that the parties' agreement does not "address the division of jointly titled assets," and therefore divided those assets pursuant to § 34. All references in the agreement to the "wife's property" clearly pertain to property in which the wife has an ownership interest but the husband does not. Second, the mere fact that the parties jointly own a marital asset does not mean that the wife has a fifty-percent interest in that asset. Depending on how an asset is titled, the wife's ownership interest could be more or less

c. The debentures. The husband claims that the judge erroneously overstated the value of some of his preexisting debentures -- and thus the total divisible assets. He contends that the judge "erroneously deem[ed] the value of [his] preexisting debentures as gains on the 1972 Trust distributions," and thus "double-counted that value" because the preexisting debentures were "already included . . . in buckets of debentures that [the judge] determined were either (1) non-divisible because they were acquired before November 2017, or (2) divisible because they were acquired during the Two-Year Window." We agree that he identified a discrepancy, see note 17, supra, but we leave for resolution on remand the question which is the correct figure.

As the husband correctly observes, the judge's findings of fact and the asset tables set forth in her rationale contain inconsistent values for both the debentures and the divisible assets. The delta between the judge's two stated values for the divisible assets equals the amount of the discrepancy in the total value of the debentures. It appears that the judge relied

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than fifty percent. The wife does not cite anything in the record establishing her ownership interest in each of the parties' jointly held assets. Moreover, there is no presumption under Massachusetts law that each spouse is entitled to fifty percent of a marital asset. See Williams v. Massa, 431 Mass. 619, 626 (2000) ("an equitable, rather than an equal, division of property is the ultimate goal of G. L. c. 208, § 34").

on this overstated figure in dividing the marital assets, potentially resulting in an erroneous division. We need not determine whether the husband is correct that the discrepancy is the result of double-counting certain debentures, nor do we need to determine which, if any, of the figures in the judge's findings are correct. We leave the resolution of those factual issues for the judge on remand.

In light of the discrepancies between the amounts stated in the judge's findings and the amounts listed in the rationale asset tables (and the ultimate amounts awarded in the divorce judgment), on remand, the judge should amend her findings to state the correct value for the husband's debentures and adjust the value of the parties' divisible assets if necessary.

Conclusion. So much of the divorce judgment as pertains to property division and alimony is vacated, and the case is remanded for further proceedings consistent with this opinion. The alimony order set forth in the divorce judgment shall remain in effect as a temporary order during the pendency of the remand, unless otherwise ordered by the judge. The divorce judgment is affirmed in all other respects.

So ordered.