

Term 

NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

TRACY B. STEELE vs. CAROLYN R. STEELE.

➔13-P-1366➔

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The husband appeals from the award of alimony to his former wife and the division of marital assets. We consider the decision of the Probate and Family Court judge to be based on a comprehensive and thoughtful exercise of her discretion, and therefore affirm the judgment. We refer to the facts as they may apply to the issues.

*Alimony.* The judge found that the traditional lifestyle chosen by the parties over the course of their twenty-three year marriage resulted in steadily increasing earning capacity for the husband, while the wife's ability to command a salary in the workplace diminished correspondingly after more than two decades as a homemaker. She also found that the combined efforts of the parties enabled them to enjoy a comfortable middle class existence and that the wife remains dependent to some extent on the husband's earning capacity to continue that lifestyle. The judge calculated that approximately thirty percent of the husband's compensation was required to enable the wife to continue the previous marital lifestyle, and that a transfer of this amount would not diminish the husband's corresponding ability to do likewise. [FN1] In calculating compensation subject to the wife's share, the judge also appropriately distinguished compensation earned by the husband after the parties separated, as well as contingent earnings, specifically stock options, awarded in contemplation of future work rather than to reward past effort. '[S]tock options awarded after the marriage has terminated but obtained as a result of efforts expended during the marriage should be subject to equitable distribution.' *Baccanti v. Morton* 434 Mass. 787, 799 (2001), quoting from *Pascale v. Pascale*, 140 N.J. 583, 610 (1995).

In sum, the judge properly considered the factors assigned by the Legislature and made rational determinations based on them. See G. L. c. 208, § 34; *Rice v. Rice*, 372 Mass. 398, 401 (1977). We discern no merit in the husband's assertions respecting the wife's needs or his ability to provide the amount ordered. The judge's findings and rulings are supported by the record and do not constitute an abuse of discretion. See G. L. c. 208, § 53(e)(1)-(9).

Finally, we concur with the judge's conclusion that the predivorce separation agreement may be altered without a showing of material change in circumstances equivalent to that required for the modification of a judgment of divorce. The judge properly concluded that modification of a divorce judgment cannot, a priori, precede the judgment itself. The purpose of a separation agreement is to provide a temporary arrangement to allow the parties to proceed towards a settlement without undue delay. It would obviously defeat that purpose if the separation itself needed to be vigorously disputed by the parties to avoid the specter of enduring disadvantage. See, e.g., *Knox v. Remick*,

371 Mass. 433, 436 (1976).

*Asset distribution.* The judge found that the parties contributed in unequal measure to the marital assets, and generally favored the husband in varying amounts depending on the parties' relative contributions to specific assets. [FN2] The husband however contests several components of the award.

The parties separated in 2005 and lived apart thereafter; the judgment of divorce was not obtained until 2013, eight years later. The husband assigns error to the judge's valuation of the marital estate as of the time of the judgment, asserting the estate should have been valued as of the date of separation. The judge however found that 'the parties chose to stay married and continue their economic partnership' after separation. This is supported by the filing of joint tax returns and the parties' intended refinancing of the marital home while continuing to list it as a joint asset. The record further reveals that the husband did not provide evidence of the 2005 valuation of all assets, thus impeding the judge's ability to use that date in any event. [FN3] Again, we discern no abuse of discretion.

*Judgment affirmed.*

By the Court (Cohen, Graham & Grainger, JJ.),

Entered: April 11, 2014.

FN1. The husband's assertion, reliant on the phrase 'base earned incomes' found in the judge's order, that the additional award of an equal percentage of the husband's annual bonus was in excess of the amount required for the wife to maintain the marital lifestyle is unavailing. The judge found that one-third of the difference in the parties' base incomes should be shifted to the wife. See G. L. c. 208 § 53(b). As that represented approximately thirty percent of the husband's gross base salary, she applied the same proportional shift to bonuses limited by a cap representing average bonuses during the marriage. This was well within the discretion set forth in G. L. c. 208, § 34. See *L.J.S. v. J.E.S.*, 464 Mass. 346, 350 (2013).

FN2. Thus, for example, the judge took into account the husband's postseparation contributions to the marital home (awarding him fifty-five percent), the wife's previous withdrawals from a joint account (awarding the husband sixty percent of all bank accounts) and the specific motor vehicles already possessed by each party (awarding fifty-five percent of their combined value to the husband). The judge divided the husband's retirement accounts equally between the parties.

FN3. The judge found that the husband did not provide documentary evidence of the 2005 valuation of the marital residence or the extent to which it was encumbered at that time. Further, the husband testified to his recollection of the 2005 balances of two accounts, but did not supply statements. END OF DOCUMENT



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