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13-P-411

Appeals Court

JULIE C. SIBERT vs. W. OLIN SIBERT

No. 13-P-411.

September 12, 2014, Entered

Present: Graham, Vuono & Hines, JJ.

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

On appeal from a judgment of divorce nisi, the plaintiff, Julie C. Sibert (wife), contends that the judge erred by (1) awarding her insufficient alimony without explanation, and (2) directing the parties' counsel to equalize funds taken from the marital estate in order to pay attorneys' fees. W. Olin Sibert (husband) has filed a cross appeal asserting error in the division of assets. As we conclude that the provisions for alimony and asset division must be set aside, we remand the case to the Probate Court for further proceedings.<sup>1</sup> We also reverse the judge's order pertaining to the equalization of attorneys' fees.

1. *The wife's appeal.* a. *The alleged error in the alimony award.* The central objective of alimony is, subject to the availability of resources, maintenance of the more dependent spouse in an economic style close to which the spouse had become accustomed during the marriage. See Gottsegen v. Gottsegen, 397 Mass. 617, 623-624, 492 N.E.2d 1133 (1986). Although a judge

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<sup>1</sup> The remainder of the judgment is not challenged on appeal and is not affected by our decision.

who has considered all of the factors set forth in G. L. c. 208, § 34, has considerable discretion in fashioning an alimony award, see Heins v. Ledis, 422 Mass. 477, 480-481, 664 N.E.2d 10, (1996), the reasons for the judge's rulings must be apparent in his findings and rulings, "either explicitly or by clear implication." Bowring v. Reid, 399 Mass. 265, 267-268, 503 N.E.2d 966 (1987). The "mere listing of findings, even if detailed, is not enough." *Id.* at 268.

The alimony award in question requires the husband to pay the wife \$1,600 per week, until her death or remarriage. The wife asserts that the award is insufficient to cover her needs, the cost of which, she claims, exceeds \$3,000 per week, and that the judge's findings on this point are inadequate. We conclude that, although the judge considered all of the factors enumerated in § 34, he failed to make explicit findings with respect to the wife's needs or the husband's income. As a result, we are unable to ascertain the rationale for the alimony award.<sup>2</sup>

Our concern over the absence of any rationale for the amount of alimony is compounded by the fact that the judge made findings that cast doubt on his conclusion that the wife's station in life was "as it was when the parties lived together," whereas the husband's station in life had voluntarily declined "a bit." Indeed, this finding appears to be based solely on the parties' stipulation that the husband moved to a smaller home valued at approximately one third of the value of the marital residence, which the wife retained, but without any regard to

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<sup>2</sup> Noting that an alimony award must take into account his ability to pay, the husband suggests that the award represents thirty-five percent of his weekly gross income and that, net of alimony, the award leaves the parties in similar financial circumstances. While this may be the case, we note that an alimony award of \$1,600 per week more closely reflects the amount agreed to by the parties in their pretrial agreement. That agreement also required the husband to pay another \$1,300 per month to the wife for support and included a provision whereby the husband would continue to maintain a health savings account to pay for the wife's uninsured medical expenses. Given these circumstances, we cannot be certain whether the award of \$1,600 actually reflects the husband's ability to pay.

the parties' relative equities once mortgages and buyout payments were factored in.<sup>3</sup>

Additionally, the judge found that the wife has "no income to speak of" and has not been employed in a paying capacity in nearly two decades. He also acknowledged the wife's "numerous health problems," but ruled that the wife would no longer receive payment for her uninsured medical expenses that previously were reimbursed by the husband's health savings account.<sup>4</sup> Given these inconsistencies, among others, it is not clear whether the alimony award is sufficient to enable the wife to maintain the upper middle income standard of living that the parties enjoyed during the marriage.<sup>5</sup> See Pestana v. Pestana, 74 Mass. App. Ct. 779, 781-783, 910 N.E.2d 939 (2009).

We also discern no rationale for the two month gap in coverage between the award for unpaid temporary support, made pursuant to an agreement by the parties and which covered the period from October 1, 2010, to July 31, 2011, and the alimony award, which was made retroactive to October 2, 2011. We note that counsel for the husband conceded at oral argument that the wife was entitled to support for August and September of 2011. This issue should like-wise be clarified on remand.

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<sup>3</sup> Although the wife retained the marital home with an estimated value of \$1,049,000, she is responsible for the mortgage (\$249,597.52) and related expenses. In addition, she was ordered to pay the husband \$226,000 for his interest in the property within one year of the judgment.

<sup>4</sup> The judge expressed some skepticism regarding the wife's health problems noting that they did not prevent her from engaging in physical activity or impede her volunteer work with the Girl Scouts, but he made no findings as to whether the uninsured and costly health treatments were necessary or why relieving the husband from maintaining the health savings account was equitable in the circumstances.

<sup>5</sup> As discussed more fully infra, because the proposed asset division is not clear, we cannot be certain that the alleged alimony deficit is offset by the marital assets assigned to the wife. See Sampson v. Sampson, 62 Mass. App. Ct. 366, 369, 816 N.E.2d 999 (2004) (alimony and property division are interrelated remedies that cannot be viewed in isolation).

b. *The equalization order.* In response to the parties' requests for attorneys' fees, the judge ordered, sua sponte, that "Each party shall bear their own legal fees and costs incurred in connection with this matter. However, counsel are specifically directed to equalize any funds taken from the marital estate so as to pay attorney's fees." We agree with the wife that where, as here, the judge failed to determine the reasonableness of the attorney's fees incurred, the sources of such payments, or how the parties may have otherwise been spending marital assets during the course of the proceedings, the order is improper and must be reversed.

2. *The husband's appeal.* The husband contends that the judge's division of assets lacks clarity. We agree. The allocation of the noninherited assets is set forth in a chart, which is incomplete. From all that appears, and as the husband suggests in his brief, the chart was taken from the husband's proposed findings of fact, but with significant clerical mistakes.<sup>6</sup>

The judge's assignment of inherited assets is similarly unclear. To begin with, the chart allocating inherited assets appears to assign all the assets to the wife. However, even a cursory review of the judgment indicates that such a result was not intended. Next, although the judgment provides that the parties shall divide all inherited assets, sixty-four per-cent to the inheriting party and thirty-six percent to the noninheriting party, the judgment also divides some of these same assets fifty-fifty. Absent clear explanation, this result cannot stand. See Williams v. Massa, 431 Mass. 619, 626, 728 N.E.2d 932 (2000).<sup>7</sup>

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<sup>6</sup> The chart set forth in the husband's proposed findings lists the assets under columns entitled "husband" and "wife," whereas the chart included in the judge's findings has no column headings and all assets are listed in a single column.

<sup>7</sup> We likewise discern no readily apparent rationale for the award of \$50,058 to the wife pursuant to an agreement of the parties, notwithstanding that the same agreement had a similar provision for the husband.

The husband's remaining arguments set forth on page thirty-one of his brief consist of little more than a series of allegations and, as such, do not rise to the level of appellate argument. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975). Accordingly, we do not address them.<sup>8</sup>

3. *Conclusion.* A remand is required so that the judge may further consider and articulate the rationale for the alimony award and clarify the division of the marital assets. The order regarding the equalization of attorney's fees is reversed. The husband's request for appellate attorney's fees is denied as is his request that the case be remanded to a different judge. The remainder of the judgment is affirmed.

So ordered.

By the Court (Graham, Vuono & Hines, JJ.),

Entered: September 12, 2014.

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<sup>8</sup> We specifically decline, however, to instruct the judge to modify his order that the husband maintain a life insurance policy in the amount of \$1,000,000 payable to the wife while he has alimony obligations.