Cavanagh v. Cavanagh

Supreme Judicial Court of Massachusetts

April 4, 2022, Argued; August 8, 2022, Decided

SJC-13222.

Reporter
490 Mass. 398 *; 191 N.E.3d 975 **

MICHAEL D. **CAVANAGH** *vs*. **LYNN** A. **CAVANAGH**.

Notice: Amended September 9, 2022.

Prior History: Hampden. COMPLAINT for divorce filed in the Hampden Division of the Probate and Family Court Department on September 16, 2015.

A complaint for modification, filed on March 31, 2020, was heard by *Ellen M. Randle*, J.

The Supreme Judicial Court granted an application for direct appellate review.

Headnotes/Summary

Headnotes

MASSACHUSETTS OFFICIAL REPORTS HEADNOTES

Divorce and Separation > Child support > Modification of judgment > Alimony > Separation agreement > Findings > *Statute* > Construction > *Evidence* > Conversation between husband and wife

Statement that in cases involving a separation agreement that has been merged into a judgment of divorce, the parties should include the judgment in the record transmitted to this court. [403-404]

In a divorce case in which the parties sought a modification of a child support order and one party sought alimony for the first time, the judge abused her discretion in choosing to calculate child support and then, without conducting the fact-specific analysis of the family's circumstances required by G. L. c. 208, § 53 (*a*), denying alimony on the basis that G. L. c. 208, § 53 (*c*) 2, prevented the use of the payor's income to calculate alimony. [404-411]

In the circumstances of an action seeking a modification of a child support order in a judgment of divorce, the judge abused her discretion in interpreting the father's obligation regarding his youngest son's schooling in such as manner as to render it illusory [411-417]; however, the judge did not abuse her discretion in ruling that the parties' middle son was emancipated upon his agreement to enter the United States Military Academy, where that son was not principally dependent on either parent at that point [417-420].

In an action seeking a modification of a child support order in a judgment of divorce, the judge properly excluded from the calculation of the father's gross income in-kind income that did not constitute a regular source of income, but the judge abused her discretion in excluding interest, dividends, and capital gains on the father's savings and 401(k) plan; on the other hand, the judge did not abuse her discretion in including income that the father received from a second job; moreover, the judge did not abuse her discretion in including in the calculation of the father's income employer contributions to the father's retirement account and health savings account. [420-425]

In an action seeking a modification of a child support order in a judgment of divorce, the judge abused her discretion in giving retroactive effect to her modification order to a date for which there was no support in the record. [425-426]

This court vacated a finding made in an action seeking a modification of a child support order in a judgment of divorce, where the finding departed from the Probate and Family Court judge's pretrial order without good and sufficient reason, did not appear to be relevant to any issue decided in the case, and was clearly erroneous. [426-428]

[*399] This court concluded that, where an action seeking a modification of a child support order in a judgment of divorce involved a contract made by the parties, the action fell within the contract exception to the spousal disqualification rule; further, this court ordered that, on remand, both parties should be permitted to testify about private marital communications concerning the relevant provision of a separation agreement that was incorporated and merged into the judgment of divorce. [428-430]

Counsel: *Jeff Goldman* (*Emma Diamond Hall* also present) for the mother.

Ann E. Dargie for the father.

Judges: Present: BUDD, C.J., GAZIANO, LOWY, CYPHER, WENDLANDT, & GEORGES, JJ.

Opinion by: CYPHER

Opinion

[**980] **CYPHER**, J. This case arises out of a postdivorce dispute concerning child support and alimony, in which both parties sought a modification of the child support order issued as part of the divorce judgment, and the mother sought alimony for the first time. We are asked to determine whether a provision of the Alimony Reform Act (act), G. L. c. 208, § 53 (*c*) (2) (§ 53 [*c*] [2]), prohibits an award of alimony where child support has been ordered. The parties also seek review of several conclusions of the Probate and Family Court judge as to the meaning of certain provisions in the judgment of divorce, which incorporated and merged the parties' separation agreement. We are also asked to determine whether the judge impermissibly exceeded the scope of the pretrial order, which, pursuant to Mass. R. Dom. Rel. P. 16, enumerated the issues to be decided at trial. Finally, the parties dispute which of the father's sources of income and benefits properly constitute "gross income" for the purposes of calculating child support. We hold that § 53 (*c*) (2) allows for the concurrent award of child support and alimony. We also conclude that several of the judge's rulings related to the divorce judgment and calculation of child support constituted error requiring us to vacate certain portions of the judgment and remand the case for further proceedings.

Background. We present the relevant facts and procedure as found by the Probate and Family Court judge, supplemented by undisputed facts in the record, and reserving certain facts for later discussion. See *Connor* v. *Benedict*, 481 Mass. 567, 568, 118 N.E.3d 96 (2019). [*400] Michael Cavanagh (father) and Lynn Cavanagh (mother) were divorced on November 7, 2016, after an approximately twenty-one year marriage. During the marriage, the parties had three sons. The two older sons currently are over the age of majority. The oldest son graduated from college in May 2021. The middle son is a cadet at the United States Military Academy at West Point (West Point). The youngest son, who is still a minor, attends a private preparatory school previously attended by the two older sons.

Prior to and during the first year of the marriage, the father attended school to become a physician's assistant (PA). Before and during the marriage, the father incurred approximately $80,000 in educational debt. During the first year of the marriage, the parties lived with the mother's parents before moving into a house purchased by the mother

with her father. The father was not able to be on the mortgage due to his debt. The entirety of the father's debt was paid off during the marriage.

The father has worked at an orthopedic surgical practice since in 1997. He took a second job at a medical center in approximately 2012 for the purpose of financing the children's private school education. Prior to and in the first years of the marriage, the mother worked as a teacher at a Catholic school. After the birth of the parties' oldest son in 1999, the mother left her job to remain home and care for him. The mother continuously was out of the work force to raise the parties' three sons.[1]

[**981] During the marriage, the parties enjoyed a comfortable, middle-class lifestyle. They routinely bought used cars that were no older than two to three years at time of purchase, replacing them when they were no longer serviceable. The parties took camping vacations using a recreational vehicle owned by the mother's parents three to four times per year, including an annual vacation to Disney World. The parties had a pool built at the marital home, which home was kept in good repair. All three sons attended a private Catholic school beginning in kindergarten. The oldest son attended a private preparatory school from ninth through twelfth grades. The middle son attended the private [*401] preparatory school from seventh through twelfth grades. The youngest son was enrolled in third grade at the Catholic school at the time of the divorce.

The mother returned to work as a teacher at the Catholic school in September 2016, approximately two months before the entry of the divorce judgment, and she continues to work there. The Catholic school provides services to local public school students. The mother works at the Catholic school in two capacities: as a teacher on behalf of the Catholic school and as a Title I program instructor on behalf of the local public school system. The mother would like to work as a regular teacher for the public school system, where she believes she could earn more money, but she currently lacks the requisite credentials and lacks the financial resources necessary to obtain such credentials. The judge found the mother's gross weekly income to be $719.24. The father continues to work as the head PA at the orthopedic surgical practice and as a per diem PA at the medical center. The judge found the father's gross weekly income to be $4,388.

Pursuant to the divorce judgment, the mother received physical custody of the then-minor children, and the parties were to share legal custody. The divorce judgment also provided that the father "shall be responsible for payment up to $20,000 annually toward [the middle son's] tuition cost at [the private preparatory school] for his three years at the school … [and] shall contribute up to $20,000 per year toward an agreed upon prepatory [*sic*] school for [the youngest son]." The mother was to "be responsible for the payment of [the youngest son's] tuition at [the Catholic school]." The father was obligated to pay $800 per week in child support for the parties' three children.[2] The parties agreed, and the divorce judgment provided, that the father's job with the medical center would not be used to calculate either child or spousal support obligations in the future, in consideration of the father's obligation to contribute toward the cost of the children's education.

Presently before this court are cross appeals from a judgment of modification on the father's complaint and the mother's counterclaim for modification of the child support order, and on the mother's counterclaim for alimony, legal fees, and a determination that the youngest son be permitted to continue attending the [*402] preparatory school at which he is enrolled. In the year before trial, each party filed complaints for contempt against the other, [**982] related to the enrollment of the parties' youngest son at the private preparatory school previously attended by the parties' two older sons. In July 2020, the judge found the mother in contempt for unilaterally removing the youngest son from the Catholic school and enrolling him at the preparatory school despite the father's expressed disagreement with that decision. The judge found that the father was not in contempt for failing to contribute to the

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[1] The mother briefly returned to the work force as a substitute teacher from November 2014 to around February 2015. At that time, the father was "gone early in the morning until night." The mother was responsible for the children both in the morning before school and after they returned home from school; both parties participated in transporting their middle son to and from his various athletic obligations.

[2] The parties acknowledged that this was an upward deviation above the child support guidelines to account for the substantial costs the mother paid related to the middle son's athletic training.

costs of the youngest son's education at the preparatory school. The father brought a second complaint for contempt in September 2020, alleging that, despite the judge's prior judgment of contempt against the mother, the mother had not withdrawn the parties' youngest son from the preparatory school.

As relevant to these appeals, there was undisputed and uncontroverted testimony at trial that (1) in 2014, the father made public statements in front of the mother indicating that the parties' youngest son would be sent to the preparatory school for seventh grade; (2) at the time of the divorce, the mother thought the parties had agreed to send their youngest son to the preparatory school for seventh grade; (3) when it became apparent to the mother that the parties either no longer or never agreed to that course of action, she made significant efforts over a period of several months prior to the start of the youngest son's seventh grade year to engage the father in discussions to come to a mutual agreement as to the youngest son's schooling; (4) throughout that time, the father categorically refused to engage in any such discussions, stating that the only course of action he would accept would be to require the youngest son to continue attending the Catholic school and to make no contributions towards the youngest son's schooling for seventh and eighth grades. A provision of the divorce judgment requires that, in the event of a dispute concerning any provision of the divorce judgment, "the parties shall make a good faith effort to reach a mutual agreement."

After a trial in 2021 on the parties' modification claims and on the second complaint for contempt filed by the father, the judge made the following rulings: (1) the father is not obligated to contribute to the youngest son's education at the preparatory school; (2) the parties' two older sons are emancipated for child support purposes; (3) the father shall pay child support in the amount of $650 per week for the youngest son; (4) the father shall [*403] receive relief with respect to the child support reduction retroactive to the week of June 4, 2021, which was the week following the date the oldest son graduated from college; (5) the father shall not pay alimony to the mother; and (6) the parties are responsible for their own legal fees and costs. The judge dismissed the father's complaint for contempt as duplicative of his earlier complaint. The parties each appealed from the judgment of modification, and we granted the mother's application for direct appellate review.

Discussion. 1. *Separation agreement and judgment of divorce*. Before addressing the issues raised on appeal, we must address an inadequacy in the record before us.

While the parties and the judge below refer variously to the provisions of the judgment of divorce and the provisions of the parties' separation agreement, we observe that the separation agreement expressly provided that it "shall be incorporated and merged into said judgment [of divorce] and shall not survive as an independent contract." Thus, as of the entry of the divorce judgment, the separation agreement no longer has any independent legal effect. Its terms have been merged with and superseded by the provisions of [**983] the judgment of divorce, whether all, some, or none of the provisions of the separation agreement have been incorporated into that judgment.[3] See *Halpern* v. *Rabb*, 75 Mass. App. Ct. 331, 338-339, 914 N.E.2d 110 (2009). See also *Clement* v. *Owens-Clement*, 98 Mass. App. Ct. 632, 635 n.3, 159 N.E.3d 164 (2020) (alimony provision in separation agreement did not survive but merged with divorce judgment).

Our review of these appeals could have been hampered by the parties' failure to provide us with a copy of the divorce judgment or to indicate whether all provisions of the separation agreement were incorporated into the judgment. Without the judgment of divorce, it was unclear to us whether all of the provisions of the separation agreement referenced by the judge and the parties were incorporated into the judgment of divorce, in which case

[3] A judge may not approve and incorporate into a divorce judgment a separation agreement or provisions contained therein where the agreement as a whole or the relevant provisions are not "fair and reasonable" or are not "free from fraud and coercion." *Stansel* v. *Stansel*, 385 Mass. 510, 514, 432 N.E.2d 691 (1982), quoting *Reeves* v. *Reeves*, 318 Mass. 381, 384, 61 N.E.2d 654 (1945).

they properly could be the subject of the action presently before us, or whether some may not have been incorporated, in which [*404] case those provisions would have no legal effect.[4]

As an exercise of our discretion, we obtained the judgment of divorce from the Probate and Family Court and confirmed that all provisions of the separation agreement were incorporated and merged into the judgment of divorce. Mass. R. A. P. 18 (a) (1) (D), as appearing in 481 Mass. 1637 (2019). We emphasize that this is not an action an appellate court is required to take. See *id.* ("The court may decline to permit the parties to refer to portions of the record omitted from the appendix, but the fact that parts of the record are not included in the appendix shall not prevent the court from relying on such parts"). It is the duty of the parties to provide "any parts of the record relied upon in the brief." Mass. R. A. P. 18 (a) (1) (A) (v) (a). We therefore caution that, in future cases involving a separation agreement that has been merged into a judgment of divorce, the parties should include the judgment in the record transmitted to this court.

2. *Availability of concurrent child support and alimony under the act*. The parties both sought a modification of the child support order that issued as part of the divorce judgment, and the mother additionally sought alimony for the first time. The judge first calculated the appropriate amount of child support pursuant to the Child Support Guidelines (May 2018) (guidelines), and in light of her earlier determination that the oldest and middle sons were emancipated. The judge then determined that no alimony could be awarded to the mother for the sole reason that the judge had "considered all of [the father's] gross income in setting the child support order."

The parties disagree about the interpretation and application of § 53 (*c*) (2) of the act. Specifically, the mother argues that § 53 (*c*) (2) cannot be interpreted according to its plain language where such an interpretation would conflict with both other [**984] provisions of the statute and the expressed legislative purpose in enacting the act. The father argues that, pursuant to the plain language of § 53 (*c*) (2), alimony is unavailable to the mother because child support has been ordered. The father also argues that an award of alimony is based on a recipient's need for [*405] support, and the mother has no need for alimony so long as she is receiving child support.

Determinations as to whether and in what form and amount to award alimony generally are reviewed for an abuse of discretion. See *Drapek* v. *Drapek*, 399 Mass. 240, 247, 503 N.E.2d 946 (1987). Questions of statutory interpretation, however, are considered de novo. *Boss* v. *Leverett*, 484 Mass. 553, 556, 142 N.E.3d 1113 (2020).

"In interpreting the meaning of a statute, we look first to the plain statutory language." *Worcester* v. *College Hill Props., LLC*, 465 Mass. 134, 138, 987 N.E.2d 1236 (2013). G. L. c. 4, § 6. "[W]e look not only to the specific words at issue but also to other sections [of the statute], and 'construe them together … so as to constitute an harmonious whole consistent with the legislative purpose.'" *Malloy* v. *Department of Correction*, 487 Mass. 482, 496, 168 N.E.3d 330 (2021), quoting *Pentucket Manor Chronic Hosp., Inc.* v. *Rate Setting Comm'n*, 394 Mass. 233, 240, 475 N.E.2d 1201 (1985). "Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent … and the courts enforce the statute according to its plain wording … so long as its application would not lead to an absurd result" (quotations and citation omitted). *Worcester*, *supra*. Where there is doubt or ambiguity about the meaning of a statutory provision, the court may turn to extrinsic sources to determine legislative purpose and intent. See *Malloy*, *supra*. General Laws c. 4, § 6, provides that, as a general rule, "[w]ords and phrases shall be construed according to the common and approved usage of the language." However, the statute also provides that "[i]n construing statutes the following rules shall be observed, unless their observance would involve a construction inconsistent with the manifest intent of the law-making body or repugnant to the context of the same statute." *Id.* Thus, as § 6 makes clear, all rules of statutory construction serve the overarching principle that we "construe statutory language to effectuate legislative intent." *Commonwealth* v. *Rossetti*, 489 Mass. 589, 609, 186 N.E.3d 729 (2022). See G. L. c. 4, § 6; *Chin* v. *Merriot*, 470 Mass. 527, 532, 23 N.E.3d 929 (2015).

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[4] We note, however, that even where the provisions of a separation agreement "are merged and do not survive the divorce judgment, 'it is nevertheless appropriate for a judge to take heed of the parties' own attempts to negotiate terms mutually acceptable to them' when determining whether to modify" such judgment. *Chin* v. *Merriot*, 470 Mass. 527, 535, 23 N.E.3d 929 (2015), quoting *Pierce* v. *Pierce*, 455 Mass. 286, 302, 916 N.E.2d 330 (2009).

a. *History of alimony and the act*. "The Alimony Reform Act of 2011, St. 2011, c. 124, [codified at G. L. c. 208, §§ 34, 48-55,] changed the legal framework under which courts may award alimony when a marriage ends in divorce." *Zaleski* v. *Zaleski*, 469 Mass. 230, 231, 13 N.E.3d 967 (2014). In Massachusetts, a court's authority to award alimony is statutory. *Id.* at 233. This authority "has existed in the Commonwealth since 1786." *Id.* at 233 n.8, citing St. 1785, [*406] c. 69. Under the statute in effect prior to the act's enactment, the Legislature provided that "[u]pon a divorce or upon petition at any time after a divorce, the court may order either of the parties to pay alimony to the other." G. L. c. 208, § 34, as amended by St. 1974, c. 565. Although this statute provided that judges had to consider certain factors in setting an alimony order, it included no standard regarding types of alimony or permanency or modification of alimony orders. See *id.* See also Kindregan, Reforming Alimony: Massachusetts Reconsiders Postdivorce Spousal Support, 46 Suffolk U. L. Rev. 13, 22-23 (2013). As a result, judges had broad discretion to formulate alimony judgments, and alimony [**985] awards appeared to be somewhat unpredictable. *Id.* at 23.

The act was enacted after a task force of "legislators, lawyers and judges, along with representatives from the Massachusetts Bar Association, the Boston Bar Association, the Massachusetts Women's Bar Association and the American Academy of Matrimonial Lawyers, worked together monthly for more than a year, reviewing and redrafting [then] current alimony laws." Lawmakers See Support Broadening for Major Alimony System Changes, State House News Service, May 17, 2011. It was intended to make alimony awards fairer and more predictable, while providing for some judicial discretion to tailor awards in the specific circumstances of a given case. See Report of the Joint MBA/BBA Alimony Task Force, Alimony or Spousal Support Guidelines Where There Are No Dependent Children 1 (2010); McDonald, Alimony Reform Approved, Oct. 5, 2011, https://patch.com/massachusetts/milford-ma/alimony-reform-approved [https://perma.cc/9PMG-WGY9]; UPI, Reforms Make Mass. Alimony 'More Fair,' Sept. 26, 2011, https://www.upi.com/Top_News/US/2011/09/26/Reforms-make-Mass-alimony-more-fair/63301317074885/?st_rec=5571549864000&u3L=1 [https://perma.cc/4AH4-GDZ4]; State House News Service (Sen. Sess.), July 28, 2011; Amendment Would Give Judges More Power Over Settled Alimony Cases, State House News Service, July 18, 2011.

Passage of the act brought sweeping changes to Massachusetts alimony law. In many ways, it provided clear guidance surrounding the award of alimony. The act established four distinct types of alimony and set limits on the duration of all types. St. 2011, c. 124, § 3, inserting G. L. c. 208, §§ 48-55. General Laws c. 208, § 48, establishes the following four types of alimony:

> (1) "'General term alimony,' the periodic payment of support to a recipient spouse who is economically dependent";
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> [*407] (2) "'Rehabilitative alimony,' the periodic payment of support to a recipient spouse who is expected to become economically self-sufficient by a predicted time, such as, without limitation, reemployment; completion of job training; or receipt of a sum due from the payor spouse under a judgment";
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> (3) "'Reimbursement alimony,' the periodic or one-time payment of support to a recipient spouse after a marriage of not more than [five] years to compensate the recipient spouse for economic or noneconomic contribution to the financial resources of the payor spouse, such as enabling the payor spouse to complete an education or job training"; and
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> (4) "'Transitional alimony,' the periodic or one-time payment of support to a recipient spouse after a marriage of not more than [five] years to transition the recipient spouse to an adjusted lifestyle or location as a result of the divorce."

The act sets forth specific standards for when an award of alimony must terminate, based on the type of alimony awarded and the length of the marriage. G. L. c. 208, §§ 49-52. Under the current framework, a judge is permitted to order alimony for "an indefinite length of time" only where such order is for general term alimony and where "the length of the marriage was longer than [twenty] years." G. L. c. 208, § 49 (*c*).

In fashioning an alimony award, "[a] judge *must* consider and weigh all the relevant factors [under G. L. c. 208, § 53 (*a*),[5]] but where the supporting spouse [**986] has the ability to pay, 'the 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 [*408] termination of the marriage*'"[6] (emphases added). *Young* v. *Young*, 478 Mass. 1, 6, 81 N.E.3d 1165 (2017), quoting *Pierce* v. *Pierce*, 455 Mass. 286, 296, 916 N.E.2d 330 (2009). See *Zaleski*, 469 Mass. at 235-236. "Absent good reason, in a long[-]term marriage, there is no justification for the life-style of one spouse to go down while the other remains high." *Goldman* v. *Goldman*, 28 Mass. App. Ct. 603, 611, 554 N.E.2d 860 (1990). "'[I]t is important that the record indicate clearly that the judge considered all the mandatory statutory factors,' and that the reason for her conclusion is apparent in her findings" (citation omitted). *Zaleski*, *supra* at 236, quoting *Rice* v. *Rice*, 372 Mass. 398, 401, 361 N.E.2d 1305 (1977).

b. *Construction of § 53* (c) *(2)*. In one respect, the act has caused "serious problems of interpretation for the courts." Kindregan, 46 Suffolk U. L. Rev. at 39. General Laws c. 208, § 53 (*c*) (2), instructs: "When issuing an order for alimony, the court shall exclude from its income calculation: … gross income which the court has already considered for setting a child support order." We agree that a plain language interpretation of § 53 (*c*) (2) whereby alimony is nearly absolutely prohibited where child support has already been awarded is untenable given that such an interpretation of § 53 (*c*) (2) would conflict with other provisions of the act that indicate clear legislative intent to require a fact-specific consideration of the parties' circumstances when determining whether and how to award alimony, § 53 (*a*), and to permit concurrent awards of alimony and child support, § 53 (*g*). We must construe § 53 (*c*) (2) in the context of these other provisions of the act, so that the act "constitute[s] a[ ] harmonious whole consistent with the legislative purpose." *Malloy*, 487 Mass. at 496.

In creating four distinct types of alimony and providing a list of factors a judge must consider in deciding whether and how to award alimony to a former spouse, the act as a whole provides that a judge should tailor a decision whether or in what form and amount to award alimony to the specific circumstances of a particular family. See G. L. c. 208, §§ 48-53. Section 53 (*g*) expressly contemplates an order of "alimony *concurrent with or subsequent to* a child support order" (emphasis added). Section 53 (*a*) sets forth the factors judges must consider when determining whether or in what form and amount to award alimony. [*409] Section 53 (*a*) does not permit judges to deny a request for alimony without making a fact-specific inquiry into the parties' circumstances, as evaluated through the application of these mandatory statutory factors. Even a plain language interpretation of § 53 (*c*) (2) must take these additional relevant provisions into account.

[**987] Additionally, we note that it makes little sense to tie the availability of alimony to the provision of child support where child support and alimony serve distinct purposes: child support is intended to provide financial support for *children* of the parties, whereas alimony is intended to provide financial support to an economically dependent *former spouse*.[7] Compare G. L. c. 208, § 28, and *White* v. *Laingor*, 434 Mass. 64, 66, 746 N.E.2d 150 (2001) (child support is for maintenance and benefit of children), with G. L. c. 208, § 48 (describing four types of alimony, all of which provide support for former spouse, making no mention of any child-care responsibilities of such former spouse). The two also "stand[ ] on a different footing" where parties may validly bargain away their own right

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[5] General Laws c. 208, § 53 (*a*), provides:

"In determining the appropriate form of alimony and in setting the amount and duration of support, a court *shall consider*: [(1)] the length of the marriage; [(2)] age of the parties; [(3)] health of the parties; [(4)] income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; [(5)] economic and non-economic contribution of both parties to the marriage; [(6)] marital lifestyle; [(7)] ability of each party to maintain the marital lifestyle; [(8)] lost economic opportunity as a result of the marriage; and [(9)] such other factors as the court considers relevant and material" (emphasis added).

[6] In light of this case law, contrary to the implication made by the father, a recipient spouse's need is *not* defined as an amount required to maintain a former spouse at a subsistence level based on current reported expenses.

[7] For this reason, the father's argument that the mother can have no need for alimony so long as she receives child support is without merit.

for support in the form of alimony, but "[p]arents may not bargain away the rights of their children to support" (citation omitted). *White*, *supra*. The Legislature has stated that it is "the public policy that dependent children shall be maintained as completely as possible from the resources of their parents." G. L. c. 208, § 28. See *White*, *supra*. We have stated that such policy "'will take precedence over the freedom of the parties to enter a binding contract' that could potentially jeopardize the children's interests" (citation omitted). *Id.*

We understand that, pursuant to the plain language of § 53 (*c*) (2), income that has been used to calculate a child support order may not be used to calculate alimony. However, we interpret this plain language in the context of the other provisions of the act, discussed *supra*. Where, as here, a judge chooses to calculate child support and then denies alimony on the basis that § 53 (*c*) (2) prevents the use of the payor's income to calculate alimony, the judge has abused her discretion because she has failed to do the fact-specific analysis of the family's circumstances required by § 53 (*a*). Therefore, in context, we read §§ 53 (*a*), (*c*) (2), and (*g*) together to require that a judge consider, under the statutory factors set forth in § 53 (*a*), the equities surrounding an award [*410] where alimony is calculated first and where child support is calculated first.

Thus, pursuant to the act, in cases where child support is contemplated, before a judge properly may exercise her discretion to decide whether and in what format and amount to award alimony, the judge must do the following:

> (1) Calculate alimony first, in light of the statutory factors enumerated in § 53 (*a*) and the principle that, with the exception of reimbursement alimony, the amount of alimony should be determined with reference to the recipient spouse's need for support to allow the spouse to maintain the lifestyle enjoyed prior to the termination of the parties' marriage. *Young*, 478 Mass. at 6.[8] Then calculate child support using the parties' postalimony incomes.
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> (2) Calculate child support first. Then calculate alimony, considering, to the extent possible, the statutory [**988] factors enumerated in § 53 (*a*). We acknowledge that in the overwhelming majority of cases, the calculation of child support first will preclude any alimony being calculated in this step.
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> (3) Compare the base award and tax consequences of the order that would result from the calculations in step (1) with those of the order that would result from the calculations in step (2), above. The judge should then fashion an order which would be the most equitable for the family before the court, considering the mandatory statutory factors set forth in G. L. c. 208, § 53 (*a*), and the public policy that children be supported as completely as possible by their parents' resources, G. L. c. 208, § 28, and then fashion the order such that it reflects, or alternatively is responsive to, those considerations. Where the judge chooses to issue an order that does not include [*411] any award of alimony, the judge must articulate why such an order is warranted in light of the statutory factors set forth in § 53 (*a*).[9] *Zaleski*, 469 Mass. at 236, citing *Rice*, 372 Mass. at 401.

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[8] General Laws c. 208, § 53 (*b*), provides:

"Except for reimbursement alimony or circumstances warranting deviation for other forms of alimony, the amount of alimony should generally not exceed the recipient's need or [thirty to thirty-five percent] of the difference between the parties' gross incomes established at the time of the order being issued. Subject to subsection (*c*), income shall be defined as set forth in the Massachusetts child support guidelines."

[9] Likely the only scenario where a judge may properly avoid articulating why alimony is not warranted where the judge denies alimony is where such denial is pursuant to a valid separation agreement, either independent from or as incorporated into a divorce judgment. However, where a separation agreement providing that no alimony shall issue has been both incorporated and merged into a divorce judgment, a judge should first evaluate a later request for new or modified alimony under the "material change in circumstances" standard. *Chin*, 470 Mass. at 534. If a material change in circumstances warranting a modification of the divorce judgment is found, the judge should then proceed according to the three-step framework outlined in this opinion.

As discussed *supra*, the parties' separation agreement was incorporated and merged into the judgment of divorce. Under the relevant provision, the parties waived only "past and present" alimony and "expressly reserve[d] the right for future alimony." Thus, a new award of alimony after the entry of the divorce would not require modification of the judgment and, therefore, does

We acknowledge that the judge in this case did not have the benefit of this decision when ruling on the mother's counterclaim for alimony. However, where the judge did not consider an award where alimony was calculated before child support and denied alimony without considering the mandatory statutory factors set forth in § 53 (*a*), the judge abused her discretion.

3. *The parties' obligations for the youngest son's schooling*. The mother contends that the judge erred in interpreting the language in the separation agreement providing that the father "shall contribute up to $20,000 per year toward an agreed upon preparatory school for [the youngest son]" to allow the father unilaterally to avoid any obligation to make such contribution by refusing to agree to any preparatory school, as such interpretation rendered the provision unenforceable. She further argues that the language of the provision is ambiguous such that extrinsic evidence of the parties' understanding of its meaning should not have been excluded. Specifically, the mother contends that she was prevented from testifying as to conversations she and the father had during the marriage concerning their agreement as to the youngest son's education plan, which informed their understanding of the meaning of the relevant provision of the separation [**989] agreement. She argues that the term "preparatory school" [*412] was understood to refer to the preparatory school attended by the parties' two older sons and to encompass the youngest son's attendance beginning in seventh grade and continuing through twelfth grade.

The mother presented undisputed and uncontroverted testimony that in 2014, which was around the time the marriage broke down, the father made statements both to the mother and to third parties while at a function at the preparatory school that he would "have children consecutively at [the preparatory school] for [thirteen] years in a row." The mother also presented undisputed and uncontroverted testimony that the youngest son finished sixth grade the same year the middle son graduated from the preparatory school. The mother understood that the only way the father's statement could have been true was if the youngest son began attending the preparatory school in seventh grade, and as a result, she understood the father's statement to mean that the youngest son would begin attending the preparatory school in seventh grade.

The father argues that where the separation agreement only obligates him to contribute to the youngest son's educational costs where the son is attending an "agreed upon preparatory school," the father properly may refuse to make such contributions where he disagrees with the school the youngest son is attending. The father also contends that he never had an obligation to pay for the youngest son's seventh and eighth grade years because the term "preparatory school" encompasses only grades nine through twelve and that he never agreed to send the youngest son to the preparatory school.

We observe that the mother's undisputed and uncontroverted testimony at trial was that, prior to enrolling the youngest son at the preparatory school where the parties had sent their two older children, she made repeated attempts over a series of several months to negotiate an "agreed upon preparatory school" with the father, including sending "probably hundreds of emails," offering alternative preparatory schools to which they might send the youngest son, and offering to split the cost of the preparatory school at which she wished to enroll the youngest son. The *only* option that the father was willing to agree to was keeping the youngest son enrolled at the Catholic school and contributing nothing to the youngest son's seventh or eighth grade schooling.

Thus, the mother's undisputed and uncontroverted testimony shows that, in offering multiple alternatives and concessions [*413] beyond what was required in the divorce judgment, the mother was "mak[ing] a good faith effort to reach a mutual agreement" with the father as to the youngest son's schooling. The father's actions, on the other hand, appeared to constitute a unilateral command where he categorically refused to discuss placing the youngest child in any preparatory school for seventh or eighth grade, in contravention of both the terms of the divorce judgment and the parties' status as joint legal custodians of the youngest son.[10]

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not require a finding of a material change in circumstances. The judge in this case, therefore, should on remand proceed directly to the three-step framework outlined above.

[10] We do not, however, conclude that this record requires a finding that the father failed to engage in the requisite good faith effort to come to a mutual agreement, where the issue was not litigated at trial and where a rehearing might yield greater development of the record on the same.

As noted *supra*, where the parties' separation agreement was merged into the judgment of divorce, "it retains no independent legal significance apart from the judgment." *Cournoyer* v. *Cournoyer*, 40 [**990] Mass. App. Ct. 302, 305, 663 N.E.2d 863 (1996), quoting *DeCristofaro* v. *DeCristofaro*, 24 Mass. App. Ct. 231, 235, 508 N.E.2d 104 (1987). However, because a separation agreement is a contract, to the extent that a judgment incorporates the terms of a separation agreement, we may apply contract principles to the interpretation of the judgment. See *Bercume* v. *Bercume*, 428 Mass. 635, 641, 704 N.E.2d 177 (1999); *Stansel* v. *Stansel*, 385 Mass. 510, 512-513, 432 N.E.2d 691 (1982), citing G. L. c. 208, § 1A.

The interpretation of the meaning of a term in a separation agreement or resulting divorce judgment is a question of law that we consider de novo. See *Lexington Ins. Co.* v. *All Regions Chem. Labs, Inc.*, 419 Mass. 712, 713, 647 N.E.2d 399 (1995). Where the language is clear, it determines the agreement's or judgment's meaning, but we may consider extrinsic evidence of the parties' and the court's intent where the language is ambiguous. *Balles* v. *Babcock Power Inc.*, 476 Mass. 565, 571, 70 N.E.3d 905 (2017), citing *EventMonitor, Inc.* v. *Leness*, 473 Mass. 540, 549, 44 N.E.3d 848 (2016). Language in a separation agreement or resulting divorce judgment "is ambiguous when it can support a reasonable difference of opinion as to the meaning of the words employed and the obligations undertaken" (quotation omitted). *Balles*, *supra*, quoting *Bank* v. *Thermo Elemental Inc.*, 451 Mass. 638, 648, 888 N.E.2d 897 (2008).

To determine whether the disputed language is ambiguous, we look to the disputed language itself as well as to the text of the agreement or judgment as a whole. *Balles*, 476 Mass. at 572. "Construction of an ambiguous judgment is much like interpret- [*414] ing other ambiguous written instruments, in that we are required to search the entire record for clues in attempting to divine the intentions of the parties and the court." *Jacobs* v. *Georgiou*, 922 S.W.2d 765, 769 (Mo. Ct. App. 1996). A separation agreement or resulting divorce judgment "should be construed in such a way that no word or phrase is made meaningless by interpreting another word or phrase." *Lexington Ins. Co.*, 419 Mass. at 713. Additionally, ambiguity in a written instrument should generally be construed against the party that drafted the ambiguous language. *Merrimack Valley Nat'l Bank* v. *Baird*, 372 Mass. 721, 724, 363 N.E.2d 688 (1977) ("As a general rule, a writing is construed against the author of the doubtful language if the circumstances surrounding its use and the ordinary meaning of the words do not indicate the intended meaning of the language" [citation omitted]).

Here, the judgment of divorce, incorporating the parties' separation agreement, provides that the father "shall be responsible for payment up to $20,000 annually toward [the middle son's] tuition cost at [a specific preparatory school] for his three years at the school … [and] shall contribute up to $20,000 per year toward an agreed upon prepatory [*sic*] school for [the youngest son]." The judgment provides that the mother would "be responsible for the payment of [the youngest son's] tuition at [the Catholic school he was attending at the time of the divorce]." It also provides that "[i]n the event of any dispute or disagreement concerning the performance, interpretation, meaning or application of the AGREEMENT, the parties shall make a good faith effort to reach a mutual agreement." We conclude that certain of these provisions are ambiguous.

The dispute turns on whether "preparatory school" encompasses seventh through twelfth grades or only ninth through twelfth grades, and further on whether it refers to the specific preparatory school [**991] previously attended by the parties' two older sons. The judge concluded that, where "there was and is no agreement between the parties that [the youngest son] attend the [preparatory school at which the mother enrolled him] for the 2020/2021 and 2021/2022 academic years (7th and 8th grades), Father is not obligated to contribute up to $20,000 annually for the cost of [the youngest son's] attendance for those academic years pursuant to the terms of the parties' Separation Agreement."

In light of the undisputed and uncontroverted testimony that the father absolutely refused to engage in discussions about a prepa- [*415] ratory school for the youngest son for seventh and eighth grade while the mother engaged in extensive efforts to come to a mutual understanding with the father about the youngest son's education, the judge's ruling effectively interpreted both the disputed provision of the divorce judgment and the provision surrounding the resolution of disputes to be inoperative by permitting the father to avoid any obligation to contribute to the youngest son's schooling through a unilateral refusal to engage in any efforts to come to an agreement about such school, despite the seemingly mandatory "shall contribute" language and the requirement that the parties engage in good

faith efforts to reach a mutual agreement where a dispute arises. The effect of this interpretation is that any purported obligation of the father related to the youngest son's schooling under the judgment is merely illusory. See *Shayeb* v. *Holland*, 321 Mass. 429, 432, 73 N.E.2d 731 (1947). We will not interpret the judgment to render its language meaningless and unenforceable, and we conclude that the judge's interpretation was an abuse of discretion. The only interpretation whereby all words and phrases have operative effect is as follows: The father is obligated to contribute up to $20,000 annually for the cost of the youngest son's attendance at a preparatory school, presuming that both parties can and do agree on a choice of preparatory school, where both parties have an obligation to make a good faith effort to come to a mutual agreement. In the event that the parties cannot agree despite such good faith efforts, the issue should be presented to the court for resolution. As the parties' agreement is expressly contemplated by the judgment, and because the separation agreement did not survive the judgment of divorce, the parties' inability to come to an agreement about the youngest son's schooling may constitute a material change in circumstances warranting modification of the provision of the judgment relating to the youngest son's schooling.[11] See *Chin*, 470 Mass. at 534-535 (when parties negotiate agreement that is "incorporated and merged" into divorce judgment, judgment is subject to modification based on material change in circumstances); *Stansel*, 385 Mass. at 515 (party seeking modification of divorce judgment where separation agreement did not survive must demonstrate material change of circumstances since entry of earlier judgment).

[*416] The record before us is insufficient to conclude that the term "preparatory school" as used in the divorce judgment referred to the specific preparatory school attended by the parties' two older sons, where other provisions of the judgment referred to the school expressly by name without reference to any agreement of the [**992] parties. The difference between the provisions indicates that the choice of school for the youngest son was not intended to be settled by the divorce judgment. However, the mother's testimony suggests that the parties may have, at some point after the time of the divorce, agreed that the youngest son would attend the same preparatory school as his older brothers. The testimony presented below regarding the father's *disagreement* appears to have been limited to a period of time beginning several years after the divorce. On remand, the judge should seek to ascertain whether, after the divorce judgment and prior to the father's recent expressed disagreement, he ever agreed to a choice of preparatory school for the youngest son. Applying contract principles to the provisions of the divorce judgment that incorporated the separation agreement, if an agreement was reached between the parties on this matter, then the father's later refusal may constitute a breach. See *Coviello* v. *Richardson*, 76 Mass. App. Ct. 603, 609, 924 N.E.2d 761 (2010) ("A repudiation of a contract is a material breach …"). These issues should be developed on rehearing.[12]

The remaining ambiguity in the provision is in whether the definition of "preparatory school" encompasses seventh through twelfth grades or only ninth through twelfth grades. As discussed *supra*, the interpretation of the meaning of the provision is a question of law that we consider de novo. See *Lexington Ins. Co.*, 419 Mass. at 713. Additionally, it is undisputed that the father, through counsel, drafted the separation agreement. Therefore, such language will be construed in favor of the mother. *Merrimack Valley Nat'l Bank*, 372 Mass. at 724. The mother testified that, to her, the term "preparatory school" included seventh and eighth grade. This testimony was not disputed. The mother's undisputed testimony was also that the father previously stated that they would have children at the preparatory school [*417] attended by the two older sons "consecutively for [thirteen] years in a row." As the middle son graduated from the preparatory school in 2020, and the youngest son was going into seventh grade in 2020, the only way this statement could have been true was if the youngest son attended the preparatory school beginning in seventh grade. The parties had also unenrolled their middle son from the Catholic school after sixth grade and enrolled him in the preparatory school for seventh through twelfth grades. Thus, the mother's understanding that the

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[11] "A change in a custody judgment, however, should be made pursuant to a complaint for modification under G. L. c. 208, § 28." *Williams* v. *Massa*, 431 Mass. 619, 636, 728 N.E.2d 932 (2000).

[12] Additionally, we note that the divorce judgment provides that, if the parties "are unable to agree, the matter in dispute may be submitted to the Probate Court for resolution." Here, the judge has already made a finding that it is in the youngest son's best interests to remain, at least through eighth grade, at the preparatory school where he is currently enrolled. There is ample support for such a finding in the record.

term “preparatory school” includes seventh and eighth grades was entirely reasonable.[13] We therefore interpret “preparatory school” to mean a private school encompassing grades seven through twelve.

The judge's determination that the father has no obligation to contribute to the youngest son's schooling until at least ninth grade and that the father has the right unilaterally to withhold agreement ever to send the youngest son to any preparatory school and thus avoid ever being obligated to contribute to the youngest son's schooling was an abuse of discretion.

[**993] 4. *Emancipation of the middle son*. The mother argues that the middle son's attendance at West Point does not constitute “entry into military service” such that the middle son is not emancipated for child support purposes. The father argues that the middle son is emancipated where his needs are fully met by the military and where 38 U.S.C. § 1965(1)(D) provides that the term “active duty” for the purposes of Servicemembers' Group Life Insurance includes “full-time duty as a cadet … at the United States Military Academy.” “We review child support orders … to determine if there has been a judicial abuse of discretion” (citation omitted). *J.S.* v. *C.C.*, 454 Mass. 652, 660, 912 N.E.2d 933 (2009).

“[T]he Commonwealth has recognized that merely attaining the age of eighteen years does not by itself endow young people with the ability to be self-sufficient in the adult world.” *Eccleston* v. *Bankosky*, 438 Mass. 428, 436, 780 N.E.2d 1266 (2003). Therefore, the Legislature has enacted a statute permitting postminority support for a limited number of years where the child is both “domiciled in the home of a parent” and “principally dependent upon said parent for maintenance.”[14] G. L. c. 208, § 28. See *Eccleston*, *supra* at 435-436.

[*418] Consistent with the parties' separation agreement, the divorce judgment provides that, for all provisions thereunder, including those related to child support, emancipation of the minor children occurs “upon the happening of any of” a number of enumerated events, including “[e]ntry into the military service of the United States.” As noted *supra*, it is well established that “[p]arents may not bargain away the rights of their children to support.” *White*, 434 Mass. at 66. Additionally, G. L. c. 208, § 28, confers on the court the power to award support for a child who has attained the age of eighteen in certain circumstances. “The parties, by [their] agreement, cannot deprive the court of this power.” *Madden* v. *Madden*, 359 Mass. 356, 363, 269 N.E.2d 89, cert. denied, 404 U.S. 854, 92 S. Ct. 95, 30 L. Ed. 2d 94 (1971). Thus, the parties may not agree that a child is emancipated under conditions broader than those provided for by statute and thereby prevent the court from considering whether to award child support for a child who may otherwise receive support under the statute, as such agreement would amount to the bargaining away of the child's right to support.[15] Therefore, whether the middle son is emancipated for child support purposes is governed not by the divorce judgment incorporating such agreement, but by G. L. c. 208, § 28, and depends on whether he is domiciled in the home of a parent and principally dependent on that parent for maintenance. There is no record [**994] evidence of the middle son's domicil. However, where we conclude that the middle son is not

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[13] Were we to examine this provision under the more deferential abuse of discretion standard, the result would be the same, where the judge appeared to consider only the father's interpretation of the provision.

[14] General Laws c. 208, § 28, provides in relevant part:

“The court may make appropriate orders of maintenance, support and education of any child who has attained age eighteen but who has not attained age twenty-one and who is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance. The court may make appropriate orders of maintenance, support and education for any child who has attained age twenty-one but who has not attained age twenty-three, if such child is domiciled in the home of a parent, and is principally dependent upon said parent for maintenance due to the enrollment of such child in an educational program, excluding educational costs beyond an undergraduate degree.”

[15] Parents may bargain to provide support to their children in more circumstances than provided for by statute. However, they cannot erode a child's statutory right to support by agreement. *White*, 434 Mass. at 66.

principally dependent on either parent, but instead is principally dependent on the United States military, the judge properly ruled that he was emancipated as of his entry at West Point.[16]

[*419] The mother argues that attendance at West Point is akin to attendance at any four-year college or university with a full scholarship. We disagree. "[T]he obligations to the government that a cadet undertakes and the governmental control to which he subjects himself when he enters the [Military] Academy are fully consistent with emancipated status." *Dingley* v. *Dingley*, 121 N.H. 670, 673, 433 A.2d 1281 (1981). See *Zuckerman* v. *Zuckerman*, 154 A.D.2d 666, 668, 546 N.Y.S.2d 666 (N.Y. 1989) (parties' son became emancipated when he entered West Point). But see *Howard* v. *Howard*, 80 Ohio App. 3d 832, 835, 610 N.E.2d 1152 (1992) (United States Coast Guard Academy cadet is "no different from any other college student on a full scholarship" and is not emancipated). While it is true that a cadet's obligation to serve as a commissioned officer begins after graduation, see 10 U.S.C. § 7448, other military service obligations are carried out while a cadet attends West Point. For example, cadets agree to "at all times obey … the Uniform Code of Military Justice." 10 U.S.C. § 7446(d). They "are trained in the duties of members of the [military]." *Porath* v. *McVey*, 884 S.W.2d 692, 696 (Mo. Ct. App. 1994). Further, they "shall perform duties at such places and of such type as the President may direct." 10 U.S.C. § 7449(b). See *Porath*, *supra*. "[M]any aspects of a cadet's daily life are subject to governmental regulation and supervision; and the government provides for practically all of the cadet's material needs." *Id.*[17] A letter provided to the parties by West Point states that "West Point falls under the Department of Defense rather [*420] than the Department of Education." Where the benefits provided to a cadet are in exchange [**995] for military service, we cannot say that the support provided by West Point is equivalent to a college scholarship.

The judge found that the middle son "has year-round obligations to the military and receives short periods of leave for holidays such as Christmas and Thanksgiving. [He] additionally is granted four weeks of non-consecutive leave throughout the year." The middle son receives a base pay, travel pay, and military health benefits. The judge reasonably found that "all of [the middle son's] needs are met by his enrollment with the military." West Point provided a letter to the parties explaining that, in all likelihood, they may not continue claiming their cadet child as a dependent on their tax returns where "the taxpayer must be able to show that he/she provided more than half of the dependent's support for the tax year. After totaling Cadet pay, food, education, and room and board, the Army provides Cadets with more than $40,000 per year. In most circumstances, the financial support a Cadet received from parent(s) or guardian(s) does not exceed this amount." Thus, we conclude that the judge did not abuse her discretion in ruling that the middle son was emancipated on July 14, 2020, on his agreement to enter West Point.[18]

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[16] This determination would be unchanged were our analysis pursuant to the parties' separation agreement, as incorporated into the divorce judgment. As discussed *infra*, entry into West Point is undoubtedly "[e]ntry into the military service of the United States." The mother argues that the judgment is ambiguous where it contains provisions covering college and "entry into military service" but not attendance at a service academy. We disagree. First, as noted *infra*, service as a West Point cadet has always been considered "service in the army." *United States* v. *Morton*, 112 U.S. 1, 4, 5 S. Ct. 1, 28 L. Ed. 613, 20 Ct. Cl. 519 (1884). Second, the terms of the judgment provide that emancipation occurs "upon the happening of *any of the following*" enumerated events. Therefore, the happening of a single enumerated event, regardless of whether any others have or have not occurred, is sufficient under this language to trigger emancipation pursuant to the divorce judgment, provided that the child is not emancipated earlier than he would otherwise be under G. L. c. 208, § 28.

[17] Federal law also provides that the "cadets of the United States Military Academy" are part of the "Regular Army," which "is the component of the Army that consists of persons whose continuous service on active duty in both peace and war is contemplated by law." 10 U.S.C. § 7075. The Comptroller General has concluded that "it is well established that service … as a cadet at the Military Academy is considered service in … the Army, since such academ[y is an] integral part[ ] of [that] service[ ]." Decision of the Comptroller General of the United States, B-195448, at 105-106 (Apr. 3, 1980) (Comptroller General), citing *Morton*, 112 U.S. 1, and others. The Comptroller General also noted, "[W]e have construed service at the academies as active Federal service." Comptroller General, *supra* at 106, citing 29 Com. Gen. 331 (1950), and others. The United States Supreme Court concluded in 1884 that "cadets at West Point were always a part of the army" and "service as a cadet was always actual service in the army." *Morton*, *supra* at 4.

[18] We stop short of holding that, as a matter of law, all cadets are emancipated for the purposes of child support. As West Point acknowledges, "[i]n most circumstances," a cadet will receive more financial support from West Point than from parents or

5. *Computation of income*. The mother contends that the judge undercounted the father's gross income for the purposes of child support by excluding the father's receipt of interest, dividends, and capital gains on investments, and his in-kind income from his work as an instructor on wilderness medicine adventure trips. The father argues that the judge properly excluded these items from the computation of the father's gross income where they do not represent regular sources of income. The father further argues that the judge abused her discretion by including the following in her calculation of the father's gross income for purposes of child [*421] support: income from his second job at the medical center and employer contributions to his retirement accounts and health savings account. The father also argues that there is no support in the record for the judge's calculation of his income from the medical center. We review for an abuse of discretion. *J.S.*, 454 Mass. at 660.

"The method for calculating and modifying child support orders is governed by statute and by the guidelines." *Morales* v. *Morales*, 464 Mass. 507, 509-510, 984 N.E.2d 748 (2013). General Laws c. 208, § 28, provides in relevant part:

> "In determining the amount of child support obligation or in approving the agreement of the parties, the court *shall apply the child support guidelines* … , and there shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered" (emphasis added).

Thus, application of the guidelines is mandatory.

Both the 2018 guidelines and the current 2021 guidelines provide that, for the purposes of calculating child support, "income is defined as gross income from whatever source, regardless of whether that income is recognized by the Internal Revenue [**996] Code or reported to the Internal Revenue Service or state Department of Revenue or other taxing authority."[19] Child Support Guidelines § I(A). Public assistance benefits based on financial need are excluded. *Id.* The guidelines provide a nonexclusive list of sources of income, including in relevant part "salaries, wages, overtime and tips"; "bonuses"; "interest and dividends"; "capital gains in real and personal property transactions to the extent that they represent a regular source of income"; and "perquisites or in-kind compensation to the extent that they represent a regular source of income." *Id.* The 2018 guidelines list also includes a catch-all provision of "any other form of income or compensation not specifically itemized above." Child Support Guidelines § I(A)(29).[20]

[*422] a. *Exclusions*. The judge expressly excluded for purposes of calculating child support "income and capital gains on Father's savings and 401K plan or Father's classes and trips through [the wilderness medicine adventure trips], as they do not 'represent a regular source of income.'" Where the guidelines provide that in-kind compensation may be considered part of a party's gross income only to the extent it represents a regular source of income, and where the judge reasonably concluded that the in-kind income received from the wilderness medicine adventure trips did not constitute a regular source of income,[21] it properly was excluded.

However, pursuant to the guidelines, "interest and dividends" are to be included without qualification in the calculation of gross income. In other words, unlike in-kind compensation or capital gains in real and personal property transactions, "interest and dividends" need not be a regular source of income to be included in the

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guardians. Where West Point acknowledges the possibility — however remote — that a cadet may receive the majority of his or her financial support from a parent or guardian, so too do we.

[19] The 2018 guidelines in effect at the time of trial and the 2021 guidelines now in effect do not differ in the relevant portions of their definitions of "income." See Child Support Guidelines § I(A) (Aug. 2021).

[20] The 2021 guidelines expand on this catch-all provision as follows: "any other form of income or compensation not specifically itemized above, including, but not limited to, alimony consistent with *Calvin C.* v. *Amelia A.*, 99 Mass. App. Ct. 714, 173 N.E.3d 24 (2021)." Child Support Guidelines § I(A)(30) (Aug. 2021).

[21] The father testified that he tried to limit such trips to twice a year, that he went on a trip in March 2020, and that he was listed as an instructor for a trip scheduled for March 2022. Based on this testimony, the judge did not abuse her discretion in concluding that in-kind income from these trips was not a "regular source of income."

calculation of a party's gross income. In addition, capital gains need only be a "regular source of income" where they relate to "real and personal property transactions." Therefore, to the extent that the "income and capital gains on Father's savings and 401K plan" included interest, dividends, and capital gains on transactions other than those related to real and personal property, the judge abused her discretion in excluding them from the calculation of the father's gross income for purposes of calculating child support.

b. *Income from second job*. The divorce judgment provided that income from the father's job at the medical center "shall not be utilized to calculate any future support obligations, whether child support or alimony." As noted *supra*, "[p]arents may not bargain away the rights of their children to support." *White*, 434 Mass. at 66. Thus, to the extent that this provision sought to preclude the use of the father's income from the medical center in future calculations of child support, it is void. As a result, not only was it within the judge's discretion to use such income in calculating [**997] child support, but it also likely would have been an abuse of [*423] discretion to exclude it where it falls squarely within the category of "salaries, wages, overtime and tips," and where the judge concluded that it was not being used to contribute to the educational costs of any of the children.[22] Additionally, the father's argument that there is no record support for the judge's calculation of his medical center income is without merit, where the record reveals that the judge used the income he received from the medical center the previous year.

c. *Employer contributions to retirement accounts*. Whether employer contributions to a retirement account count as income for the purposes of calculating child support appears to be a question of first impression in the Commonwealth. Contrary to the father's argument, it is not dispositive that employer contributions to retirement accounts are not included in the nonexhaustive list of income sources provided in the guidelines, nor is the fact that such contributions may not constitute currently taxable income, where the guidelines expressly include in the definition of "income" that which may not be "recognized by the Internal Revenue Code or reported to the Internal Revenue Service or state Department of Revenue or other taxing authority." Child Support Guidelines § I(A). As noted *supra*, it is "the public policy of the Commonwealth … that children be supported as completely as possible from parental resources." *White*, 434 Mass. at 66. Accordingly, the Child Support Guidelines provide an "expansive definition of 'income.'" *Fehrm-Cappuccino* v. *Cappuccino*, 90 Mass. App. Ct. 525, 529 n.7, 60 N.E.3d 1180 (2016).

Several other States previously have considered the issue. *Caskey* v. *Caskey*, 206 N.C. App. 710, 714-720, 698 S.E.2d 712 (2010) (collecting cases). The decisions are not uniform, with some States concluding that employer contributions to a retirement account constitute [*424] income for purposes of calculating child support and others concluding that they do not. *Id.* We find persuasive the conclusion of the Superior Court of Pennsylvania[23] that "if we were to determine that an employer's matching contributions are not income, it would be possible for an employee to enter into an agreement with his employer to take less wages in exchange for a heightened matching contribution. This would effectively permit an employee to shield his income in an effort to reduce his child support obligation." *Portugal* v. *Portugal*, 2002 PA Super 132, 798 A.2d 246, 253 (Pa. Super. Ct. 2002). Permitting such shielding of resources would violate the public policy of the Commonwealth. [**998] We therefore conclude that

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[22] The judge applied the "material and substantial change in circumstances" standard to modify the child support order. Although the correct result was reached, we note that under G. L. c. 208, § 28, "when a complaint seeking modification of a child support order is filed, modification is presumptively required whenever there is an inconsistency between the amount of child support that is to be paid under the existing support order and the amount that would be paid under the guidelines." *Morales* v. *Morales*, 464 Mass. 507, 511, 984 N.E.2d 748 (2013). As the modification is only presumptive, the judge properly could have considered the father's other financial contributions (or lack thereof) to support the children. Where, as here, the child support order was inconsistent with the guidelines, the relevant provision of the divorce judgment was void, and the judge concluded that the father was not making contributions above and beyond the amount of court-ordered child support, the presumption that a modification is required likely would not have been overcome.

[23] The Superior Court of Pennsylvania "is one of two statewide intermediate appellate courts." The Superior Court of Pennsylvania, https://www.pacourts.us/courts/superior-court [https://perma.cc/Z8T6-GULC].

employer contributions to a retirement account constitute income for the purposes of calculating child support. The judge did not abuse her discretion in using such contributions to calculate the father's gross income.[24]

d. *Employer contributions to health savings account*. Health savings accounts are governed by Federal law. See 26 U.S.C. § 223. A beneficiary may generally withdraw funds from a health savings account at any time for any purpose. See 26 U.S.C. § 223(d), (f). It is true that funds withdrawn and used to pay for [*425] "qualified medical expenses" are not taxed as part of an individual's gross income, whereas funds withdrawn and used for ineligible expenses are treated as taxable income of the beneficiary and are further subject to a twenty percent tax penalty. 26 U.S.C. § 223(f)(1), (4). However, although the tax implications may differ depending on the purpose of the withdrawal, funds generally may be withdrawn by the beneficiary at any time and for any purpose. Employer contributions to a health savings account, like employer contributions to a retirement account, properly are considered part of an employee's compensation package. See *Hoegen* v. *Hoegen*, 89 Mass. App. Ct. 6, 10, 43 N.E.3d 718 (2016). Thus, they properly constitute "income" for the purposes of calculating child support, and the judge did not abuse her discretion in counting them as such.

6. *Retroactive relief*. The father argues that relief with respect to the reduction in child support ordered by the judge should date back to the middle son's emancipation on July 14, 2020, and not to the date of the oldest son's graduation from college on May 22, 2021. He also argues that there is no support in the record for the date actually chosen for the retroactive reduction, which was June 4, 2021. The mother argues that the father was obligated to pay child support for two children at least through the oldest son's graduation from college.

"Whether to give retroactive effect to a modification order is a decision within the discretion of the judge." *Boulter-Hedley* v. *Boulter*, 429 Mass. 808, 809-810, 711 N.E.2d 596 (1999). The judge [**999] indicated that she was ordering "retroactive relief with respect to the child support reduction back to the week following the date the parties' oldest child graduated from college, namely, the week including June 4, 2021." It was the mother's undisputed testimony at trial that the oldest son graduated from college on May 22, 2021. Thus, although the judge stated that she would order a retroactive reduction in child support to the week following the oldest son's graduation, the date chosen appears to be two weeks after the graduation, and we can find no support in the record for that choice of date. We therefore conclude that it was an abuse of discretion. If the new child support order is to be given retroactive effect relative to the date of the oldest son's emancipation, it should be retroactive to the week immediately following Saturday, May 22, 2021, the date when the oldest son graduated from [*426] college and became emancipated.[25]

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[24] The father's argument that the use of such contributions to calculate child support constitutes an impermissible divestment of assets accrued following the divorce is without merit. In the first instance, the case to which the father cites, *Kuban* v. *Kuban*, 48 Mass. App. Ct. 387, 387-388, 721 N.E.2d 393 (1999), concerned the division of property between divorcing spouses. As part of that division, the wife was awarded "fifty percent of the husband's pension fund as of October 1, 1989 … , plus 'passive appreciation and investment experience' through June 1, 1996," which was after the date of divorce. *Id.* at 388. The court's conclusion was correct that, in the context of the division of marital assets, contributions made after the dissolution of the marriage and resulting appreciation in value of the fund "are most closely akin to 'property interest acquired after the dissolution of the marital partnership'" (citation omitted), *id.* at 389, but it has no bearing on this case. First, as noted *supra*, child support is a distinct concept, and is governed by distinct rules, from spousal support or spousal property division. An individual is generally not entitled to a portion of a former spouse's postdivorce assets. *Id.* However, because children have a right to an amount of support that is based on a parent's current income, G. L. c. 208, § 28, a child support order is subject to increase where a parent's income increases postdivorce. *Brooks* v. *Piela*, 61 Mass. App. Ct. 731, 734, 737-738, 814 N.E.2d 365 (2004). Second, to the extent *Kuban*, *supra* at 388, addressed "*passive* appreciation and investment experience," new contributions made either by a party or by a party's employer are active, rather than passive, and, at the time of contribution, constitute income rather than an asset, as wages and salary do.

[25] We note that it would be an abuse of discretion to award relief retroactive to the date of the middle son's emancipation on July 14, 2020, where the current order provides for support of only one child, and the father was obligated to provide support for two children through the oldest son's graduation from college in May 2021. Where we conclude that the parties had three unemancipated children until July 14, 2020, and then two unemancipated children until May 22, 2021, presumably the judge may calculate child support for two children and retroactively impose that amount for the period between the weeks of July 14, 2020,

7. *Findings beyond the scope of the pretrial order*. The judge's final pretrial order identified the following issues to be resolved at trial: (1) the party's responsibility for the costs of the youngest son's attendance at preparatory school, including the one in which he is currently enrolled; (2) whether the father's income from his second job should be used to calculate a child support order; (3) whether the parties' middle son is emancipated for child support purposes; (4) the amount of child support to be paid by the father for the support of any unemancipated marital children; (5) legal fees; and (6) alimony. Thus, all the issues to be decided at trial related to the finances of the parties; child custody and parenting time were not among the issues to be decided.

Rule 16 of the Massachusetts Rules of Domestic Relations Procedure, addressing pretrial procedure, provides in relevant part:

> "The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice."

"[O]nce the issues are defined in a final pretrial order, 'they ought to be adhered to in the absence of some good and sufficient reason.'" *Slade* v. *Slade*, 43 Mass. App. Ct. 376, 378, 682 N.E.2d 1385 (1997), quoting *Monod* v. *Futura, Inc.*, 415 F.2d 1170, 1173 (10th Cir. 1969). "The trial judge may alter the issues, modify the admissions or discharge [a] stipulation if satisfied that justice requires it." *Mitchell* v. *Walton Lunch Co.*, 305 Mass. 76, 80, 25 N.E.2d 151 (1939).

The mother argues that the judge abused her discretion by [*427] exceeding the scope of the pretrial order in finding that she disrupted the youngest son's relationship with the father by informing the son that the father refused to pay for preparatory [**1000] school. She also contends that there is no record evidence to support the finding. The father argues that this finding was relevant to determining the mother's credibility and that, thus, the judge did not abuse her discretion. We agree with the mother. As the mother argues, the issue was neither enumerated in the final pretrial order nor naturally related to any of the issues that were enumerated, all of which concerned support and not custody or parenting time, nor do we see its relevance to a credibility determination. Therefore, there was no "good and sufficient reason" warranting a departure from the pretrial order, and the judge's finding as to this matter was an abuse of discretion.

Additionally, the only evidence introduced on this issue at trial directly on this point was that the mother did *not* tell the youngest son of the father's unwillingness to pay for preparatory school and that the father told the youngest son that he could not attend the preparatory school. It was the mother's undisputed testimony that, when the youngest son informed her that the father had told the youngest son he could not go to the preparatory school, the mother's only response was to say, "I'm communicating with your father." There also was evidence of several alternative means by which the youngest son could have learned of his father's unwillingness to pay, including several visits to the child's home by the sheriff related to the mother being held in contempt for enrolling the youngest son at the preparatory school and the fact that the youngest son had to do summer homework for both the Catholic school and the preparatory school because it was unclear to which school he would matriculate in the fall. Thus, the judge's finding also appears to be clearly erroneous.[26] See *Adoption of Gregory*, 434 Mass. 117, 128, 747 N.E.2d 120 (2001).

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and May 22, 2021. However, the judge is not required to do so. *Whelan* v. *Whelan*, 74 Mass. App. Ct. 616, 627, 908 N.E.2d 858 (2009).

[26] We also note that, even had the mother informed the youngest son of the father's decision, it is unlikely that such act would rise to the level of alienation or disruption of the youngest son's relationship with his father, where the father conceded at trial that he has categorically refused to contribute to the youngest son's educational costs for seventh and eighth grades and where he does not think the youngest son should attend — at least for seventh and eighth grades, and possibly longer — the preparatory school attended by the two older sons. Although the father may be entitled not to have his relationship with his children negatively affected by the mother's actions, he is not entitled to avoid or be shielded by the mother from the negative consequences of his own actions.

Although the finding does not appear to be relevant to any of [*428] the issues decided in this case, it is foreseeable that it may have an impact on any future dispute over child custody or parenting time, and we thus conclude that the finding should be vacated.

8. *Spousal disqualification*. General Laws c. 233, § 20, First, provides in relevant part that "[e]xcept in a proceeding arising out of or involving a contract made by a married woman with her husband, … neither husband nor wife shall testify as to private conversations with the other."[27] The mother argues that [**1001] the spousal disqualification rule[28] set forth in G. L. c. 233, § 20, does not apply where the dispute surrounds the parties' separation agreement, which is a contract. Alternatively, the mother argues that, if the spousal disqualification does apply as a general rule, it nevertheless does not attach to communications between the parties during the marriage that were not private. The father argues that the court properly excluded the mother's testimony as to private conversations between the parties during the marriage.[29] In light of our conclusions *supra*, as to the import of the provision of the [*429] separation agreement addressing the youngest son's schooling and as to the middle son's emancipation, either that were resolved in the mother's favor or for which party statements would not be dispositive, we need not address whether the judge abused her discretion in excluding specific statements of the father on the basis of spousal disqualification. Because the issue will be relevant to the scope of evidence admissible on remand, however, we address whether the spousal disqualification applies here. The interpretation of G. L. c. 233, § 20, is a question of law that we review de novo. *Boss*, 484 Mass. at 556. See part 2, *supra*, for a discussion of the rules of statutory construction.

As a general matter, we note that the spousal disqualification is not triggered unless the proffered statements were made during a private conversation between two people who were married to each other at the time the conversation took place. G. L. c. 233, § 20, First. Thus, the following discussion is only relevant to the extent that either party, on remand, seeks to introduce evidence relating to such private conversations.

As discussed *supra*, the parties' separation agreement was merged into the judgment of divorce. "[T]he merger of [a separation] agreement in a [divorce] judgment is a substitution of the rights and duties under the agreement for those established by the judgment or decree."[30] *Bercume*, 428 Mass. at 641. [**1002] The provisions of the

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[27] The spousal disqualification also does not apply to paternity or child support proceedings under the Uniform Interstate Family Support Act, G. L. c. 209D, or in proceedings under G. L. c. 209C, which address the care and support of nonmarital children. G. L. c. 233, § 20, First. G. L. c. 209C, § 16 (*c*). There does not appear to be an analogous exception for child support proceedings relative to in-State married (or previously married) parties. Although it was not raised by the parties, we question whether this framework may implicate equal protection principles, and we invite future litigants to present the issue when the opportunity arises.

[28] The mother's analysis tended to conflate spousal disqualification with spousal privilege. "The spousal privilege is different from the rule of spousal disqualification . …" *Commonwealth* v. *Szerlong*, 457 Mass. 858, 859 n.3, 933 N.E.2d 633 (2010), cert. denied, 562 U.S. 1230, 131 S. Ct. 1494, 179 L. Ed. 2d 324 (2011). Compare G. L. c. 233, § 20, First (spousal disqualification), with G. L. c. 233, § 20, Second (spousal privilege). Only the disqualification is implicated here.

[29] The father also urges that the mother failed to preserve for appeal any objection to such exclusion. We disagree. "Ordinarily, an offer of proof is required to preserve the right to appellate review of the denial of an offer to introduce evidence through the direct examination of a witness." *Commonwealth* v. *Chase*, 26 Mass. App. Ct. 578, 581, 530 N.E.2d 185 (1988). Mass. R. Civ. P. 43 (c), 365 Mass. 806 (1974). However, an offer of proof is not necessary where "there [is] no doubt what testimony would be given." *Commonwealth* v. *Caldron*, 383 Mass. 86, 89 n.2, 417 N.E.2d 958 (1981).

Having reviewed the entirety of the trial transcript, we conclude that, as to the mother's proffered testimony about marital communications between the parties, the mother made sufficient offers of proof or the expected testimony was sufficiently obvious to preserve her right to appeal from the exclusion of such testimony. The mother made multiple attempts to testify as to conversations with the father, including about the youngest son's schooling. The mother's counsel also sought clarification from the court on the application of the disqualification. Finally, the mother's counsel attempted to make an offer of proof as to conversations between the parties concerning a purported agreement about their respective responsibilities throughout the marriage whereby the father generated nearly all of the marital income.

separation agreement do not survive, and the separation agreement loses all independent legal significance. *Id.* *Heistand* v. *Heistand*, 384 Mass. 20, 22, 423 N.E.2d 313 (1981). No action for breach of the separation agreement may be maintained. *Halpern*, 75 Mass. App. Ct. at 338-339. However, acknowledging that a separation agreement that has been incorporated and merged into a judgment of divorce provides the content of the judgment, we concluded *supra* that contract principles apply to the interpretation of the judgment. As noted in note 4, *supra*, we previously have stated that, even where a separation agreement merges with a judgment of divorce, a judge should "take heed of the parties'" [*430] negotiations when determining whether a modification of the judgment is warranted. See *Chin*, 470 Mass. at 535, quoting *Pierce*, 455 Mass. at 302. Thus, although no separate action may be maintained on a separation agreement that has merged with the judgment of divorce, it is not clear to us that an action, such as this, arising out of a divorce judgment that incorporated and merged the provisions of a separation agreement, does not in some capacity "involve" a contract made by spouses.

Additionally, as we have previously observed, G. L. c. 233, § 20, begins with the following statement: "Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows . …" See *Commonwealth* v. *Burnham*, 451 Mass. 517, 520-521, 887 N.E.2d 222 (2008), quoting G. L. c. 233, § 20. Thus, "[t]he general principle articulated at the beginning of § 20 is that any person may testify in any proceeding," and the spousal disqualification is itself an exception to this general principle. *Burnham*, *supra* at 521. We understand this language to evince a legislative intent to read broadly the exceptions to the spousal disqualification or, said differently, to interpret the spousal disqualification narrowly. See *Woods* v. *Executive Office of Communities & Dev.*, 411 Mass. 599, 605, 583 N.E.2d 845 (1992) ("where a provision, general in its language and objects, is followed by a proviso, … the proviso is to be strictly construed, as taking no case out of the provision that does not fairly fall within the terms of the proviso, the latter being understood as carving out of the provision only specified exception, within the words as well as within the reason of the former" [citation omitted]).

Therefore, where we understand the current action to involve a contract made by the parties, such action falls within the contract exception to the spousal disqualification such that, on remand, both parties shall be permitted to testify about private marital communications concerning the relevant provision of the separation agreement, as incorporated and merged into the judgment of divorce.

Conclusion. We affirm so much of the judgment as concerns the emancipation of the oldest and middle sons and the payment of each party's legal fees and costs. The remainder of the judgment is vacated and remanded as follows:

We vacate so much of the judgment as concerns (1) the denial of alimony; (2) the father's lack of obligation to contribute to the [*431] costs of the youngest son's attendance at the private preparatory school; (3) the exclusion from the calculation of the father's income any interest, dividends, and capital gains not related to real or personal property transactions, and any calculation of child support based on such erroneous exclusion; and (4) the calculation of the retroactivity of the child support reduction. [**1003] We vacate so much of the judge's rationale finding that the mother informed the youngest son that the father was unwilling to pay for the youngest son's education at the preparatory school, that the mother's actions have disrupted the youngest son's relationship with the father, and that the mother violated a clear and unequivocal command when she enrolled the youngest son at the disputed preparatory school.

On remand, the judge shall determine whether an alimony award is appropriate and, if so, in what form and amount, pursuant to the interpretation and procedure set forth in this opinion. The judge shall also hold a new hearing to determine (1) whether the parties, at some point after the divorce but prior to the father's recent expressed disagreement, agreed that the youngest son would attend the same preparatory school as the two older sons; and (2) whether the father failed to engage in good faith efforts to agree to a preparatory school. If the answer to either (1) or (2) is "yes," consistent with the legal conclusions in part 3 of this opinion, *supra*, the judge shall order that the

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[30] "The general rule is that unless the parties intend otherwise, a separation agreement survives a judgment of divorce that incorporates the agreement by reference." *McManus* v. *McManus*, 87 Mass. App. Ct. 864, 865, 35 N.E.3d 745 (2015).

father contribute up to $20,000 per year to the cost of the youngest son's attendance for grades seven through twelve at the preparatory school previously attended by the two older sons.

A new child support order shall issue based on a recalculation of the amount pursuant to the 2021 Child Support Guidelines[31] after any interest, dividends, and capital gains not related to real or personal property transactions have been added to the calculation of the father's gross income. To the extent the new calculation may result in an order for child support in an amount less than $800 per week, the judge shall reconsider the date of retroactive relief consistent with part 6 of this opinion, *supra*. [*432] Until a new child support order is issued, the existing child support provision in the judgment of modification dated July 14, 2021, shall remain in effect as a temporary order.

So ordered.

End of Document

[31] A calculation pursuant to the 2018 Child Support Guidelines would likely result in an award that is inconsistent with the current guidelines and itself would be grounds for modification of the order. G. L. c. 208, § 28 ("upon a complaint filed after a judgment of divorce, orders of maintenance and for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines").