

# Kowalska-Davis v. Davis

Appeals Court of Massachusetts

February 27, 2012, Entered

10-P-2191

## Reporter

2012 Mass. App. Unpub. LEXIS 213 \*; 81 Mass. App. Ct. 1116; 962 N.E.2d 244

HANNA EWA KOWALSKA-DAVIS vs. RANDALL LYNDON DAVIS.

**Notice:** DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

**Disposition:** [\*1] The second amended judgment of divorce nisi is affirmed.

**Judges:** By the Court, Berry, Cohen & Sikora, JJ.

## Opinion

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### MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

By a second amended judgment of divorce nisi the former husband was ordered, among other things, (1) to pay alimony to the former wife in the amount of \$3,000 a month, said payments to continue until the death of either party or the remarriage of the wife, (2) to pay child support to the wife in the amount of \$2,000 a month until the child was emancipated, and (3) to maintain insurance on his life (with the wife named as beneficiary) in an amount not less than \$1,000,000 so long as he has an alimony/child support obligation. The wife was granted exclusive use and occupancy of the former marital home until such time as the parties' child graduated from high school.<sup>1</sup>

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<sup>1</sup> The judgment recites that upon the child's graduation from high school the real estate shall be placed on the market and the net sales proceeds divided equally between the parties, except that from the husband's share of the net proceeds he shall pay to the wife the [\*2] sum of \$79,000 representing one-half the equity in his dental practice and the commercial real estate in which the practice is located. (At the time of trial in 2006 the child was nine years of age.) The judge found that notwithstanding the expert testimony at trial concerning the value of the former marital home, inasmuch as the court was not dividing the equity in the home at the time, and was having the parties continue to hold title to the property as tenants in common, there was no need to find the fair market value of the home at present. By virtue of the judge's order, each party would share equally in any rise or decline in the value of the asset.

The parties' assets were also divided. The husband has appealed from certain provisions of the second amended judgment.<sup>2</sup>

We affirm the second amended judgment.

1. The "use and occupancy" provision. The husband argues that the judge abused her discretion by failing to value the former marital home and by allowing the wife to remain in the home without requiring her to buy out his interest. [\*3] He asserts that the judge's order, which delays substantially receipt of his interest in the property, locks him into an untenable cotenancy with the wife, leaves him in precarious financial circumstances and forces the child (when with the husband) "to live in a lesser environment than that enjoyed by the mother."

At the outset, the "use and occupancy" provision in the present case is a "traditional child support provision" which is directed towards the best interests of the child.<sup>3</sup> See Hartog v. Hartog, 27 Mass. App. Ct. 124, 128, 535 N.E.2d 239 (1989); LoStracco v. LoStracco, 32 Mass. App. Ct. 1, 4, 584 N.E.2d 633 (1992). Such provisions may result in significant delays in the realization by the parties of their interest in the marital property. See Johnson v. Johnson, 425 Mass. 693, 696 n.5, 682 N.E.2d 865 (1997). To the extent the husband claims that he has been left in a poor economic condition as a result of the judge's orders, the judge found that both parties currently enjoy a middle income lifestyle. It is also apparent from the court's findings and judgment that the wife currently has limited financial resources apart from her interest in certain retirement accounts. We perceive no error in the judge's failure to require [\*4] the wife to buy out the husband's interest. We also cannot say (particularly on the limited record before us<sup>4</sup> that the judge abused her discretion by failing to add conditions or "safeguards" to the use and occupancy provision due to the wife's alleged lack of fiscal responsibility in the past.

2. Rehabilitative alimony. The husband argues that "the scope of the alimony should have been limited to rehabilitative on the rationale that wife was underemployed at the time of the divorce and does not need permanent alimony." The principles governing alimony awards of limited duration that are intended to be "rehabilitative" are set out in cases such as Adlakha v. Adlakha, 65 Mass. App. Ct. 860, 869-870, 844 N.E.2d 700 (2006), and need not be rehearsed.<sup>5</sup> It is enough to say that "[b]efore awarding rehabilitative [\*5] alimony, the recipient spouse's realistic prospects for self-sufficiency must be "considered with care."" Id. at 870, quoting from Ross v. Ross, 50 Mass. App. Ct. 77, 80, 734 N.E.2d 1192 (2000). See Heins v. Ledis, 422 Mass. 477, 485 n.4, 664 N.E.2d 10 (1996) (rehabilitative alimony appropriate when it is "relatively certain that financial support is needed only for a temporary period").

Here, the judge found that although the wife may be "underemployed,"<sup>6</sup> the husband's proposal that any alimony awarded to the wife "be rehabilitative in nature with the amount of alimony decreasing in increments over time," was

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<sup>2</sup> In his notice of appeal, the husband also appeals from "related orders" on earlier posttrial motions concerning the original judgment and the first amended judgment. We do not discuss these separately, as the second amended judgment effectively disposed of those motions.

<sup>3</sup> The judge stated that "[g]iven the acrimony of the parties' divorce, including the involvement of a Guardian ad Litem . . . allowing the parties' child to remain in the former marital home until he graduates from high school will provide stability and continuity and is in his best interests."

<sup>4</sup> Large portions of the transcript have not been included in the record appendix or the supplemental record appendix.

<sup>5</sup> Although this court has long stated that alimony of limited duration, or rehabilitative alimony, "is viewed with some circumspection in Massachusetts," see Bak v. Bak, 24 Mass. App. Ct. 608, 622, 511 N.E.2d 625 (1987); Adlakha v. Adlakha, 65 Mass. App. Ct. at 870, we are cognizant that the Act Reforming Alimony in the Commonwealth (St. 2011, c. 124), effective March 1, 2012, contains provisions for rehabilitative alimony.

<sup>6</sup> The judge found that the wife received an MBA degree in 1985 and worked outside the home as a marketing director for a business until 1994 (at which time she was earning about \$35,000 a year). Since 1995 the wife, who was the primary homemaker for the parties and caretaker for the child, has been self-employed as a jewelry designer. Her average annual income derived from her jewelry business during the period 2001 through 2005 was just under \$3,200.

neither realistic nor supported by law. In view of the judge's findings concerning, for example, the wife's age at the time of trial (47), her absence from the workforce outside the home for over eleven years, [\*6] and her limited future opportunities, we cannot say that the judge erred by failing to fashion a rehabilitative alimony award.

3. Life insurance. In the circumstances presented here, the judge did not abuse her discretion by failing to order that one-half of the life insurance benefit be placed in trust for the child or that there be a reduction in coverage over time. See Freedman v. Freedman, 49 Mass. App. Ct. 519, 521, 524, 730 N.E.2d 913 (2000). Similarly, we perceive no error in the judge's failure to order that the wife continue her insurance in trust for the benefit of the child. Cf. Britton v. Britton, 69 Mass. App. Ct. 23, 28 n.6, 865 N.E.2d 1174 (2007) (alimony).

4. Double dipping. The judge awarded the wife one-half the equity in the husband's dental practice (which [\*7] practice has a staff of twenty people) and the commercial real estate. See note 1, supra. The husband states that because the dental practice is the primary source of funds supporting the family, it should not have been treated as a separate marital asset for division between the spouses. In the husband's view, "[t]o assign a value to the business and allocate part of that value to wife creates a double-dipping for wife which is inequitable for husband."

"Commentators use the phrase 'double dipping' to describe the seeming injustice that occurs when property is awarded to one spouse in an equitable distribution of marital assets and is then also considered as a source of income for purposes of imposing support obligations." Champion v. Champion, 54 Mass. App. Ct. 215, 219, 764 N.E.2d 898 (2002). "We have, however, declined to find inequitable double dipping where it is possible to 'identify separate portions of a given asset of a divorcing spouse as the separate bases of the property assignment and any alimony or support obligations.'" Adlakha v. Adlakha, 65 Mass. App. Ct. at 865, quoting from Dallessio v. Dallessio, 409 Mass. 821, 828, 570 N.E.2d 139 (1991), S.C., 413 Mass. 1007, 604 N.E.2d 676 (1992). See Adams v. Adams, 459 Mass. 361, 394, 945 N.E.2d 844 (2011). [\*8] "For example, where one spouse is the sole proprietor of a small business, it was possible to identify these separate bases by distinguishing the income of the business from the reasonable salary of the owner-operator, which was deducted as an expense from the business income." Adlakha v. Adlakha, 65 Mass. App. Ct. at 865, citing Sampson v. Sampson, 62 Mass. App. Ct. 366, 375, 816 N.E.2d 999 (2004). See Adams v. Adams, 459 Mass. at 394.

Here, the husband asserts, inter alia, that the judge did not make findings which demonstrate that she separated the owner's income from the rest of the business net income before she allocated half of the business to the wife.

The judge valued the husband's dental practice as set out in the margin.<sup>7</sup> It is to be noted that the judge stated specifically that she employed the methodology used by the husband's expert. There is at least a suggestion in the husband's expert's report, as well as in a page of transcript in the supplemental appendix, that the expert may have considered an owner's salary. See Adlakha v. Adlakha, 65 Mass. App. Ct. at 865-866 (no improper double dipping where, in valuing wife's medical practice, parties' experts deducted a reasonable salary expense [\*9] for the wife).<sup>8</sup>

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<sup>7</sup> In his report, the husband's expert, using "two basic valuation methods," established a range of value for the husband's dental practice between \$188,000 and \$225,000. More particularly, the expert, utilizing an "excess earnings" method (of \$200,000 [the salary of the highest paid dentist at the practice], a 2.5% capitalization rate and a 55% market discount), valued the practice at \$225,000. Using a "marketplace" method the expert valued it at \$188,000. The expert then employed a "reconciliation process," involving the weighting of various factors, and ultimately determined that the value of the practice was \$205,000.

In her findings the judge stated that the husband's expert valued [\*10] the husband's dental practice at \$225,000. The judge rejected this opinion of value as the capitalization rate and market discount were both higher than the court deemed appropriate: "Adjusting the market discount and capitalization rate but using the methodology of husband's expert, the court finds that the fair market value of the husband's dental practice is \$300,000.00, with a debt of \$177,000.00 and net equity of \$123,000.00." The judge determined that the value of the husband's one-eighth interest in the commercial real estate was \$35,000.

To the extent the husband argues that the judge erred in finding that the husband's expert had valued the dental practice at \$225,000 (rather than \$205,000), it is apparent that the judge had in mind and utilized the excess earnings method used by the husband's expert. See generally Fechtor v. Fechter, 26 Mass. App. Ct. 859, 863, 534 N.E.2d 1 (1989).

Unfortunately, as we have noted, we have not been provided with the entire transcript, including all of the testimony of the expert. It simply is not clear whether there was additional evidence before the court which sheds light on the point. The husband, as appellant, has the burden of demonstrating error. See, e.g., Houston v. Houston, 64 Mass. App. Ct. 529, 531 n.5, 834 N.E.2d 297 (2005), and cases cited. In the circumstances, we decline to disturb the judgment for the reason of possible double dipping.<sup>9</sup>

5. Additional arguments. There is nothing in any additional arguments raised by the husband that would cause us to set aside the court's orders.

The second amended judgment of **divorce** nisi is affirmed.

By the Court, Berry, Cohen & Sikora, JJ.

Entered: February 27, 2012.

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<sup>8</sup> One of the experts in Adlakha used as a "check" the capitalized excess earnings method, presumably the same method used by the husband's expert in the present case.

<sup>9</sup> We note also that although Massachusetts looks with disfavor on so-called double dipping, Adams v. Adams, 459 Mass. at 394, it is not prohibited [\*11] as matter of law. See Champion v. Champion, 54 Mass. App. Ct. at 222; Croak v. Bergeron, 67 Mass. App. Ct. 750, 759, 856 N.E.2d 900 (2006).