Vassiliou v. Vassiliou

Appeals Court of Massachusetts

August 8, 2014, Entered

13-P-457

Reporter
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STACEY L. VASSILIOU *vs.* DEAN J. VASSILIOU.

Judges: [*1] Fecteau, Sullivan & Maldonado, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This case came before us on the wife's appeal from a judgment of divorce nisi of the Probate and Family Court dated July 30, 2012. Following remand, the probate judge increased the husband's ***child*** support obligation from $899 a week to $1,313 a week, retroactive to July 30, 2012, and ratified all other orders (including those orders concerning the husband's stock options). For the reasons set forth below, we vacate so much of the order concerning the stock options as grants to the husband any stock options "that [had] not vested as of the date of [the divorce] judgment" and remand the matter to the Probate Court for further proceedings. In all other respects, we affirm the judge's orders.

1. *Background*. The parties were married in New Jersey in December, 1993, and last lived together in Massachusetts in April, 2011.[1] Two ***children***, a daughter and a son, were born of the union. They were, respectively, fourteen and ten years of age at the time of trial.

The husband is forty-three years old and is in good health. During the marriage, [*2] he worked at a number of positions, in different areas of the country. The wife accompanied him on each move. His "positions have regularly increased in prestige and responsibility, as well as salary." The husband was the primary income earner for the family and further contributed to the care of the ***children*** and homemaking responsibilities, particularly during periods of unemployment.

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[1] The judge found that the marriage was irretrievably broken as of January 1, 2011.

In March, 2011, the husband accepted employment as a senior executive at a privately held company in Massachusetts. He received a base pay of $200,000 a year, with a possible bonus of up to $60,000.[2] In addition, the husband was granted the option to purchase 172,152 shares of company stock. At the time of trial, 43,038 shares had vested. One-sixteenth of the remaining shares were to vest on the last day of each quarter after the husband had been with the company for one year (i.e., each quarter after March 21, 2012). At the time of trial, the husband had not exercised any of the options and, the judge found, the options "currently" had no value. The judge found that the husband has weekly expenses of about $2,092, not including ***child*** support or alimony.

At the time of the trial, the wife was forty-two years old and was generally in good health. She has a college degree and worked periodically (and part-time) during the marriage as a hairdresser, earning about $250 a week.[3] The wife also enrolled in a paralegal program. During the marriage, the wife was the primary caretaker for the minor ***children***, with the exception of those periods of time when the husband was unemployed and periods during the infancy of each ***child***. The wife listed her weekly needs at $1,772.92.

The parties enjoyed an upper middle class station in life. They owned, among other things, a large house (which was heavily mortgaged) and various bank and retirement accounts. The parties anticipate that their ***children*** [*4] will attend college. The judge also addressed the family dynamics vis-a-vis the ***children*** as well as the needs of the ***children***.

By a judgment of divorce nisi dated July 30, 2012, the wife was awarded primary physical custody of the parties' ***children*** but her request to remove the ***children*** from the ***Commonwealth*** was denied. The husband was ordered to pay ***child*** support in the amount of $899 a week; he was not ordered to pay the wife alimony. The judgment further provided, among other things, for the division of the parties' property and, with respect to the husband's stock options, recites: "Half of any shares of the stock options offered to Husband by his employer that have already vested as of the date of this judgment shall be made available to Wife. Any shares that have not vested as of the date of this judgment shall belong solely to Husband."

The wife appealed from the divorce judgment challenging numerous provisions contained therein. On January 6, 2014, we remanded the matter to the Probate Court with respect to alimony/support, the division of assets, and the stock options. On the question of support, we noted particularly the gap between the wife's total income and her apparent [*5] expenses. As we have stated, the judge increased the base ***child*** support obligation of $899 a week to $1,313 a week, retroactive to July 30, 2012. All other orders and obligations were ratified and confirmed.

2. *Alimony and* ***child*** *support*. In denying the wife alimony in his original findings and rationale, the judge relied on G. L. c. 208, § 53(*c*)(2), inserted by St. 2011, c. 24, § 3, which provides that "[w]hen 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." The judge then proceeded on the assumption that under § 53(*e*), he maintained discretion in awarding alimony notwithstanding § 53(*c*)(2).[4] The judge chose not to exercise his discretion in this case based on a number of stated considerations, including the parties' income, their contributions to the marriage, their employability, and their capability to maintain the marital lifestyle. In his supplemental findings, the judge again made reference to the restrictions of G. L. c. 208, § 53(*c*)(2), and noted that in order to maximize the wife's total support amount received, he had considered all available income [*6] for purposes of ***child*** support thus rendering all support received from the husband as non-taxable income to the wife. We need not comment further on § 53(*c*)(2), as it appears from the judge's findings, viewed in their entirety, that even apart from this section, the judge

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[2] In 2012, the husband's bonus was approximately [*3] $46,849.

[3] The wife testified that at the time of the parties' marriage she worked as a product coordinator at a management consulting firm. She left her position when the husband obtained employment in a different State. The wife stated that she went to hairdressing school to provide her with some flexibility when the parties moved around and when the parties' ***children*** were born. The wife also testified that the parties agreed to her being a stay-at-home mother.

[4] Both parties in their briefs appeared to proceed generally on the same assumption as the judge.

concluded that the wife was not entitled to alimony at this time. We have reviewed the record which supports the judge's findings and conclusions.

In fashioning the ***child*** support award on remand, the judge found that the wife's reported expenses of $1,772.92 were reasonable at the time of the divorce.[5] The judge further determined that a base ***child*** support award of $899 a week in accordance with the ***Child*** Support Guidelines (2013) (guidelines) would not be appropriate. The judge explained that the base award, together with the court-ordered award of 23.34% of the husband's bonus income ($210.29 a week in 2012) and the wife's income from employment ($250 a week) amounted to $1,359.29 a week, an amount well short of the wife's reasonable needs and, as the judge noted, approximated twenty-seven percent of the parties' combined [*7] gross income in 2012 of $259,849. The judge found that the wife's share of the combined available income was disproportionately low in comparison to that of the husband, rendering the parties' households significantly unequal in terms of financial resources and, therefore, contrary to the best interests of the ***children***. Accordingly, the judge found that the circumstances of this case warranted an upward deviation with respect to the husband's ***child*** support obligation in an amount sufficient to more fully cover the gap between the wife's expenses and income. The judge relied upon Rule IV par. 2(6) of the guidelines (circumstances which may support deviation include those where "application of the guidelines would result in a gross disparity in the standard of living between the two households such that one household is left with an unreasonably low percentage of the combined available income").[6] The judge determined that a ***child*** support order of $1,313 would accomplish this result.

Contrary to the husband's suggestion, the judge's decision to deviate from the guidelines is supported by findings of fact and a clear explication of the rationale for the deviation. In the circumstances of this case, we fail to discern error. To the extent the husband also challenges as unlawfully onerous the retroactive nature of the ***child*** support order, claiming that he did not at the time the orders entered have a [*9] financial source (or assets) from which he could satisfy the obligation, we also fail to discern error. As we discuss in section 3, *infra*, the husband will be receiving roughly sixty percent of the parties' assets.[7]

3. *The property division*. In dividing the parties' property (exclusive of the husband's unvested stock options), the judge considered, and made findings concerning, the G. L. c. 208, § 34 factors, see *Adams* v. *Adams*, 459 Mass. 361, 371, 945 N.E.2d 844 (2011), and made particular note of the husband's substantial economic and noneconomic contributions to the family. See *Moriarty* v. *Stone*, 41 Mass. App. Ct. 151, 157, 668 N.E.2d 1338 (1996) ("[P]arties' respective contributions to the marital partnership remain the touchstone of an equitable division of the marital estate"). The judge found that the husband's overall contributions throughout the marriage were greater than those of the wife. On review of the [*10] record, we cannot say that the judge abused his discretion in assigning to the husband roughly 60% of the marital estate.

4. *The unvested stock options*. In *Baccanti* v. *Morton*, 434 Mass. 787, 796-797, 752 N.E.2d 718 (2001), the Supreme Judicial Court held that unvested stock options are assets that may be included in a party's assignable estate. The court concluded that "in those cases in which the division of options is contested, in order to determine

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[5] The husband takes issue with the judge's statement that it was disingenuous for the husband to assert that the wife's expenses were "unreasonable" when he reported his own needs at $2,092 a week. The husband [*8] points out that his needs included a payment of over $800 a week for the joint mortgage liability on the former marital home, where he resided at the time of trial. The house was then on the market. While the husband's assertion is correct, it overlooks the judge's finding that the husband anticipates purchasing a new home or renting a home for approximately $2,000 a month ($465.12 a week). The husband will continue to have house/apartment expenses. At all events, the judge found specifically that the wife's reasonable needs were $1,772.92 a week.

[6] Deviation from the guidelines may also be warranted in circumstances "where application of the guidelines, particularly in low income cases, leaves a party without the ability to self support." Guidelines, Rule IV, par. 2(4).

[7] By order dated May 21, 2014, we allowed the husband's motion to request leave to file an amended complaint for modification due to his alleged job loss. Nothing contained in this memorandum and order would preclude the probate judge from making such orders for support as may be appropriate in that action.

whether and to what extent stock options may be included in the marital estate, the judge must determine if the options were given for efforts expended before, during, or after the marriage."[8] *Id*. at 799. This requires a finding as to the reason or reasons for which the options were given (i.e., for past, present, or future services).[9] *Id*. at 799-800. "The party challenging the inclusion of the options in the marital estate (presumably, the employee who was given the options) has the burden of proving that the options were given for future services to be performed after dissolution of the marriage.[10] In addition, this party has the burden of establishing that the non-employee spouse did not contribute to the employee spouse's ability to acquire the options [*11] at issue and, for that reason, the value of the options either in whole or in part should not be considered part of the marital estate." *Id*. at 800.

Here, the judge stated in his initial rationale that the stock options were granted to the husband "in order to both convince him to take a position with his employer, and to ensure his continued employment with that company."[11] In his supplemental findings, the judge indicated that the options, each of which would vest at a [*13] particular point in time, were "undoubtedly [given] as an incentive for Husband's continued employment." Accordingly, the judge stated, "the stock that remained unvested prior to entry of the Judgment of Divorce were simply expectancies that would not vest until the occurrence of a specific event, Husband's continued efforts and employment with [his employer]." Continuing, the judge stated that the "stock which vested after the divorce constitute assets acquired as a result of Husband's post-divorce efforts, without assistance from Wife."[12] The judge concluded that these shares should not be considered part of the marital estate.

In the instant matter, as in *Baccanti*, "[t]he record contains insufficient information for the judge to have determined the reason (or reasons) for which the options were granted." 434 Mass. at 803. The plan was not in evidence and there was no testimony by the husband concerning the reasons the options were awarded to him (e.g., were the options given to induce him to come to the company, a service provided during the marriage, or for future services, or both?) See *ibid*. There was also no testimony from a representative of the husband's employer, or an expert, to shed light on the reasons for the issuance of the options. The only documents before us are the employer's offer of employment to the husband and the 1 1/2 page option agreement (which cross references the plan we do not

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[8] The court further explained that if the options were given for efforts expended before or during the marriage, they are part of the marital estate. *Id*. at 799 n.7. If the options were given for efforts to be expended after the marriage, "in order to include them in the marital estate, the judge must determine whether the options were nonetheless given for efforts attributable to the marital partnership." *Ibid*.

[9] It is notable that the court discussed at length the forms of evidence which might be put before the judge so as to allow him or her to make the required finding, as well as other relevant factors or circumstances surrounding the grant of the options. "In making such a finding, the judge may look to the employee's stock option plan, testimony from the employee or a representative of the employer, or testimony from an expert witness, if any such evidence is offered. See, e.g., *In re Marriage of Hug*, [154 Cal. App. 3d 780, 784, 201 Cal. Rptr. 676 (1984)]. The judge also may consider any other relevant factors or circumstances surrounding the grant, including [*12] whether the options were 'intended to (1) secure optimal tax treatment, (2) induce the employee to accept employment, (3) induce the employee to remain with the employer, (4) induce the employee to leave his or her employment, (5) reward the employee for completing a specific project or attaining a particular goal, [or] (6) be granted on a regular or irregular basis.' *Davidson* v. *Davidson*, [254 Neb. 656, 665, 578 N.W.2d 848 (1998)]. Judges should be aware of the potential for fraud in this area, particularly the possibility of collusion between the employee and the employer as to the reasons behind the issuance of the stock options." *Id*. at 800.

[10] In discussing the burden of proof, the court explained that the party to whom the options are issued is in a better position to obtain information regarding the circumstances surrounding the grant. *Baccanti* v. *Morton*, 434 Mass. at 800.

[11] The judge also stated in his initial rationale that "[t]he options that have vested prior to the dissolution of the marriage are part of the marital estate. However, the court considers the remainder of the shares to be payment in exchange for Husband's continued employment after the dissolution of the marriage. The court finds that these shares will not be given for efforts attributable to the marital partnership, and are therefore not to be considered part of the marital estate."

[12] Notwithstanding the foregoing, the judge went on to acknowledge that the [*14] wife's efforts during the marital enterprise undoubtedly contributed to the husband's career success and his ability to obtain lucrative employment with his current employer. See *Baccanti* v. *Morton*, 434 Mass. at 799 n.6.

have), neither of which describes the reasons for the issuance of the options.[13] The mere existence of a vesting schedule, without more, would not ordinarily be sufficient (and is not sufficient [*15] here) to permit an inference that the options were granted for future services. Having failed to present sufficient evidence on the issue, "the husband could not meet his burden of proving that the options were given in whole or in part for future services to be performed after dissolution of the marriage and that at least a portion of them should not be included in the marital estate." *Id*. at 803-804.

In the circumstances, we conclude that all of the options should have been included in the marital estate. Once included in the marital estate, the judge has "broad discretion in dividing [the options] between the husband and wife" as informed by *Baccanti. Id*. at 804, and cases cited. The judge's determination as to any such division,[14] as well as the method chosen to effectuate any such division,[15] should be supported by findings of fact. See *Adams* v. *Adams*, 459 Mass. 361, 371, 945 N.E.2d 844 (2011); *S.L*. v. *R.L*., 55 Mass. App. Ct. at 885.

5. *The **removal** of the **children***. The standard in this case applicable to the ***removal*** of the ***children*** from the ***Commonwealth*** is set out in *Yannas* v. *Frondistou-Yannas*, 395 Mass. 704, 710-712, 481 N.E.2d 1153 (1985), and its progeny, and need not be restated. Here, the wife sought to remove the parties' ***children*** [*17] to New Jersey to be closer to her family. The wife claimed that such a move would ease her financial burden and give her increased support to better care for her ***children***.[16] In denying the wife's request to remove the ***children***, the judge found that the proposed move did not provide a demonstrably real advantage for either the wife or the ***children*** and was not in the ***children***'s best interests.[17] In light of the judge's findings concerning, for example, the wife's volatile and unpredictable relationship with her mother, the substantial doubt that the wife will be able to maintain a healthy relationship with her family, the absence of proof that the wife's employment opportunities would be greater in New Jersey, and the potential that the move would cause serious harm to the parties' ***children***, we fail to discern error in the denial of the wife's request.[18]

6. *Conclusion*. So much of the second amended judgment (in ratifying and affirming the original divorce judgment, as first amended) as grants to the husband any stock options that had not vested as of the date of the original judgment is vacated and the matter is remanded to the Probate Court for further proceedings consistent with this memorandum and order. In all other respects, the judgment is affirmed.

So ordered.

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[13] The documents also contain no information concerning, for example, whether the options were "qualified" or "non-qualified," or whether there were provisions for acceleration of the options.

[14] By our decision, we do not intimate that a fifty-fifty percent or sixty-forty [*16] percent division of the stock options is required.

[15] We note that the wife has challenged the judge's finding that the stock options currently have no value. We do not view this finding as a determination by the court that the options are worthless. In *Baccanti*, the court stated that "[w]hat distinguishes employee stock options from most other assets is the uncertainty of their value: an employee who has been given options may never realize any value from them if their vesting is contingent on continued employment and the employee is no longer employed by the company, or if the value of the stock when the options vest is less than the price at which the options can be exercised." 434 Mass. at 795. "A judge can provide for this uncertainty by dividing the shares at the time of dissolution and ordering any proceeds from the options to be divided if and when they vest and are exercised." *Id*. at 796.

[16] The judge stated that the reasoning for the wife's move was based on her claim that she had a strong relationship with her mother. The wife intended, upon ***removal*** of the ***children***, to move into her parents' home for a period of time.

[17] Although the judge found that the wife had not established a real advantage for the move, he nonetheless [*18] considered collectively the interests of each party and each ***child***. See *Yannas*, at 711-712.

[18] The guardian ad litem also recommended that the wife not be allowed to remove the ***children*** to New Jersey. Indeed, the judge found that the guardian ad litem had noted that, during the course of his investigation, the wife had changed her mind as to the ***removal*** seven times.

By the Court (Fecteau, Sullivan & Maldonado, JJ.),

Entered: August 8, 2014.

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