# SJC deems couple's habit of saving relevant to setting alimony

## With decision, court joins 'vast majority' of states

If a couple has a sufficient combined post-dissolution income to allow the payee spouse to sustain such a lifestyle, a Probate & Family Court judge may consider the couple's habit of saving for a "rainy day" in setting the payor's alimony amount, the Supreme Judicial Court has ruled.

In *Openshaw v. Openshaw*, the husband contended that Probate Court Judge Edward G. Boyle III improperly considered the parties' custom of allocating a sizable portion of income as savings in setting the amount of spousal support.

The SJC noted that the plain meaning of "marital lifestyle" in G.L.c. 208, §53, is the characteristic way the couple chose to live their life during the marriage, including the typical way they allocated their income.

"Thus, the plain meaning of the alimony statute's directive that the judge must consider the 'marital lifestyle' and the 'ability of each party to maintain the marital lifestyle' requires consideration of saving where the evidentiary record shows it was a regular practice during the marriage," Justice Dalila Argaez Wendlandt wrote for the court.

Wendlandt said the court's construction of "marital lifestyle" is "buttressed" by G.L.c. 208, §53(b), which references the recipient's "need," which the court had since defined as "the amount required to enable [the recipient spouse] to maintain the standard of living she had at the time of the divorce."

While some couples save, others spend lavishly on vacations, art or vehicles — what Wendlandt called "consumption spending." Either way, those lifestyles are relevant to the setting of alimony, she said.

The husband argued that alimony should be calculated based strictly on the marital level of consumption of goods and services.

But if the family budget during the marriage had been characterized by regular saving, the recipient spouse receiving alimony calculated only based on consumption "either must reduce that level of consumption in order to continue the pattern of saving that characterized the marital lifestyle or must abandon the practice altogether," which would frustrate the alimony statute's purpose of maintaining each spouse's marital lifestyle if possible, Wendlandt wrote.

The husband also argued that the couple's habit of saving is "already subsumed in the marital estate in the form of assets" being divided. Taking it into account when setting alimony would be tantamount to counting it twice, he contended.

The court agreed that the judge must ensure that the financial arrangement is fair "as a whole" but reiterated that nothing in §34, governing the division of the marital estate, precluded consideration of the parties' custom of saving as part of the "marital lifestyle" under §53.

"[I]f routine saving is not considered in connection with the determination of alimony, the recipient spouse will be forced to rely on the appreciation of current assets while the payor spouse will be able to continue the full extent of the marital lifestyle, including regular saving," Wendlandt wrote.

The court noted that it was joining "the vast majority of jurisdictions" in recognizing a judge's right to consider a married couple's established practice of saving during the marriage as a component of setting alimony.

The 28-page decision is Lawyers Weekly No. 10-029-24.

## Undercutting temporal limits?

The wife's attorney, Shaun B. Spencer of Sharon, said the SJC not only

rendered the right decision, but a fair one that "recognizes the realities" both for high-earning divorcing couples and those of more modest means who have still been frugal during their marriage.

Going forward, counsel will want to marshal evidence establishing that there either was or was not a pattern of saving in their client's marriage, depending on what side of the case they are on, he said.

Left for a future decision is just how occasional or sporadic a practice of saving money needs to be to not qualify as part of a couple's marital lifestyle, Spencer added.

The husband's lawyer, Jason V. Owens of Hingham, said that he and his client obviously viewed the issue of "savings alimony" differently but accepted the court's decision on what was a matter of first impression.

He added that they were pleased that the SJC remanded the case on the separate issue of the couple's liabilities, which will provide his client an opportunity to seek some relief from the overall judgment.

As for the implications of the decision, Owens said he believed it changes the "need component of alimony."

Throughout the history of alimony in Massachusetts, litigants first had to establish the recipient's need to preserve the lifestyle during the marriage, he said. Now, that may be changing.

"It's relatively easy to demonstrate savings in a case where there's substantial marital assets," he said. "By virtue of building up the marital estate, a recipient will now be able to point to that and say that my need includes being able to continue to accumulate assets, whether we call it cash savings or appreciation or something else."

Owens said *Openshaw* creates the potential for disparate treatment.

"You may see similarly situated recipients receiving different amounts of alimony based on how large the marital estate is, with the somewhat paradoxical result of those with less assets receiving less alimony, even though one might think that they have a greater need," he said.

While not disagreeing with the result or the court's rationale, Wellesley family law attorney Kimberley J. Joyce said she wished the SJC had grappled with the preexisting case law and explained its reasoning for departing from it.

One possibility is that the court was accounting for the fact that the Alimony Reform Act imposed new temporal limitations on alimony. Prior to the act, it was not unusual for an alimony payor to remain on the hook well into what otherwise might have been a period of retirement, she said.

"Cases such as *Cooper v. Cooper*, *Bernier v. Bernier* and *Williams v. Massa* made clear that alimony was for current need, and that an award that exceeded current need was not permissible," she said.

Even the post-act case law, such as the Appeals Court's 2014 decision in *Hassey v. Hassey*, confirmed that "need" for alimony was limited to current need. By definition, "savings" is for future needs, Joyce noted.

"It's difficult for me to really see how the SJC got here from the established case law, and without even acknowledging it," she said. "It must have had its reasoning, but it's not apparent to me from the decision."

The decision represents a notable change to the landscape, Joyce added.

"If I have a pending case where I represent the payor, I'm nervous, because now I know that if the facts support it, the recipient is going to make a claim for alimony that is more than they might otherwise have been able to make, because now they're going to say that savings was a component of the marital lifestyle," Joyce said. "If the parties have been able to save anything, you can't really get out from under the fact that they've had, as part of the

marriage, a savings component."

Whenever the SJC or Appeals Court adds a new wrinkle to existing case law, the bar tends to rush to reference it in their own cases, said Boston family law attorney Jared D. Spinelli. Whether *Openshaw* is a good fit will depend on the facts of the individual case.

At the end of the day, *Openshaw* is also about the "wide latitude" Probate & Family Court and other judges are given to exercise their discretion, Spinelli said.

"As long as they write their opinions correctly and have findings of fact that support where they're coming from, it's going to be very hard to change any of these decisions," he said.

Like Joyce, Boston family law attorney Richard M. Novitch said he believes the effect of the decision will be to extend the duration of alimony past the durational limits of the Alimony Reform Act.

In this instance, by incorporating savings into the calculation of alimony, the recipient spouse was provided the equivalent of a couple of extra years' worth of alimony, he noted.

Wellesley Hills family law attorney Jonathan E. Fields said it will also be interesting to see how judges begin to work through some of the follow-on questions from *Openshaw*, such as how to treat pre-tax 401K contributions made through an employer versus after-tax contributions to a brokerage account or to a Roth IRA when it comes to "savings alimony."

## Modest spenders

Amy and Glen Openshaw were married in Salt Lake City in 1991 and eventually moved to Massachusetts. They had six children and enjoyed an upper-middle-class lifestyle.

Despite earning more than $1.3 million annually, the Openshaws were modest spenders and routinely allocated significant portions of their income to investments and savings, making monthly contributions to specific investment and retirement accounts. They also consistently donated approximately 10 percent of their income to their church in accordance with their Mormon faith.

In December 2018, after nearly 30 years of marriage, the wife filed a complaint for divorce. In June 2021, the trial judge entered a judgment of divorce nisi and granted sole legal and primary physical custody of the couple's remaining minor child to the wife.

With respect to alimony, the judge ordered the husband to pay the wife $5,020 a week, an amount derived from the wife's reported total weekly spending provided on her most current financial statement, which included $1,000 a week in savings and $730.64 a week in charitable giving. Together with child support, the judgment required the husband to make a total weekly payment of $6,000 to the wife.

Citing the husband's higher earning potential, the judge divided the marital estate 55 percent to the wife and 45 percent to the husband, but then skewed that division further in the wife's favor by making the husband responsible for the vast bulk of the couple's liabilities — an aspect of the decision that the SJC reversed.

After the judgment entered, the husband appealed, and the SJC transferred the case on its own motion.