SJC to decide whether alimony may include ‘savings’ award

Husband decries $1K bump in weekly payment

A husband’s challenge to a hike in his weekly alimony payment by $1,000 has teed up for the Supreme Judicial Court the question of whether a judge can consider an asserted need to save for future expenses in determining an award of spousal support.

In *Openshaw v. Openshaw*, the financial statements filed by plaintiff Amy Sue Openshaw asserted that her need for alimony included $1,000 a week for savings and $730 a week for charitable contributions.

Following the conclusion of a 2021 trial, Plymouth Probate & Family Court Judge Edward G. Boyle III ordered defendant Glen R. Openshaw to pay $5,020 a week in alimony as part of a final judgment of divorce.

The husband appealed, arguing first that the alimony award impermissibly included $1,000 for the wife’s savings. He further argued that Boyle’s alimony award constituted an abuse of discretion in light of the court’s order requiring him to pay 98.6 percent of the $350,000 marital debt while only getting 45 percent of the marital estate.

The SJC transferred the case from the Appeals Court, soliciting amicus briefs on two questions: (1) Whether a spouse’s need for support under general term alimony should be determined by looking at the parties’ spending at the time of the separation leading to divorce; and (2) whether, for purposes of determining alimony, a spouse’s need may include “savings alimony” as well as charitable contribution components.

Oral argument is set for Dec. 6.

“Savings alimony comes within the broad discretion that the [alimony] statute grants to Probate & Family Court judges in these cases — as it must,” said Sharon attorney Shaun B. Spencer, who represents the plaintiff wife in *Openshaw*. “Every case is different and judges must have that discretion to deal with the variety of cases that come before them.”

Appellant Glen Openshaw is represented by Jason V. Owens. The Hingham attorney did not respond to a request for comment.

In arguing in his client’s appellate brief that the trial court abused its discretion by ordering $1,000 a week in savings alimony, Owens writes that “[a] plain reading of our case law suggest that it is inappropriate for a Massachusetts court to order need-based alimony for the sole purpose of funding the recipient’s future savings.”

Boston family law attorney Elaine M. Epstein believes that state law leaves room for both savings and charitable components in alimony awards.

“Our statutes, as I read them, don’t preclude or prohibit charitable and savings components from being considered as a factor of need,” Epstein said. “And neither do our statutes or caselaw define ‘marital lifestyle’ as spending at the time of separation.”

But family law attorney Jared D. Spinelli says he is skeptical of the entire notion of “savings alimony.”

“In our caselaw, we talk about ‘need’ being expenses to maintain a lifestyle,” the Boston lawyer said. “I’ve always thought of needs being necessities rather than luxuries within the fabric of one’s lifestyle. ‘Savings’ to me means there’s a surplus of income above and beyond need.”

2021 divorce

According to court records, the parties married in 1991 and had six children together. The wife filed for divorce in December 2018.

At the time of trial in 2021, three of the parties' children were emancipated, with a fourth expected to become emancipated in spring 2022.

At the time, the husband earned $30,514 a week while the wife earned $145 a week. The judge found that, including the marital home in Hanover, the parties had a combined $4.7 million in assets and $348,000 in liabilities. The judge's final judgment made the husband responsible for 98.6 percent of the marital debt, leaving the wife responsible for the remainder.

In dividing assets, the wife received approximately 55 percent of the marital estate while the husband received approximately 45 percent of the parties' equity.

The husband was ordered to pay child support of $980 a week and $5,020 a week in alimony.

In determining alimony, the judge found that the wife spent $80,000 in 2018, $93,000 in 2019, and $224,000 in 2020. In her financial statement, the wife claimed as expenses $1,000 a week in savings and $730 a week in charitable contributions, the latter reflecting tithing in accordance with the couple's Mormon religious faith.

In entering judgment, Boyle wrote that the husband "fails to recognize that a significant aspect of the parties' marital lifestyle was saving. Wife should be able to 'enjoy a more opulent lifestyle made possible by the frugality of their building years.'"

But Spinelli noted that both parties testified they lived frugal lives.

"To me, the benefit to the wife of that frugality is that they grew a significant amount of assets in the marital estate, so they had more liquid cash to divide. They had real estate with equity to divide. They had greater retirement accounts to divide," he said.

Spinelli said it was "heavy-handed" for the judge to allow the wife to benefit

from that frugality in the division of marital assets and then enter an alimony award based in part on the wife's "need" to continue to grow her savings.

"I don't think that is what our martial lifestyle caselaw says," he said.

Statutory landscape

Chapter 208, §53(b), states that "[e]xcept 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 30 to 35 per cent of the difference between the parties' gross incomes established at the time of the order being issued."

Meanwhile, Section 53(a) provides that, in determining appropriate alimony and setting the amount and duration of support, the court "shall" consider: "the length of the marriage; age of the parties; health of the parties; income, employment and employability of both parties, including employability through reasonable diligence and additional training, if necessary; economic and non-economic contribution of both parties to the marriage; marital lifestyle; ability of each party to maintain the marital lifestyle; lost economic opportunity as a result of the marriage; and such other factors as the court considers relevant and material."

According to Spencer, the SJC in previous rulings has rejected rigid definitions of what constitutes an expense necessary to maintain a marital lifestyle.

"The court has rejected any notion that investment types of spending — such as parties enjoying vacation homes, second homes, expensive jewelry, furs, what have you — can't be a part of lifestyle," Spencer said. "And there's really no reason why spending money on saving for the future should be any different. It's up to what the parties during the marriage decided to spend on."

Spencer added that he saw no reason why similar logic should not extend to charitable spending. Observing tithing as a religious practice, just like acts of charitable spending, yield psychological benefits that tangibly affect lifestyle, he said.

But in arguing for the husband that the award of savings alimony in his client's case was contrary to Massachusetts law, Owens cited the Appeals Court's 2004 decision in *Cooper v. Cooper*. In that case, the Appeals Court reversed a judge's post-divorce decision to increase the husband's annual alimony obligation by $300,000. The court reversed the lower court upon concluding that the new award was "far in excess" of the wife's and children's lifestyle during the marriage.

The court in *Cooper* held that an "alimony award that exceeds current need, so as to permit accumulation of assets or savings for the future, may be appropriate only when that award is made pursuant to G.L.c. 208, §34." That statute addresses alimony insofar as it relates to a division of property.

"I think what the husband is arguing is that savings [don't fall within the statutory definition of need] because it simply allows you to accumulate assets in the future and [the court] could only consider that as part of a division of property," Epstein said.

But Epstein pointed out that there are fundamentally compelling reasons why state law gives judges broad discretion in fashioning alimony.

"That's because the welfare of families is involved and that precludes one-size-fits-all solutions," she said.

Policy considerations

Financial expert Lori S. Johnson and attorney Margaret J. Palladino are co-executive directors of Mass Family Advocacy Coalition, a Wellesley-based nonprofit that advocates for reform in the state's Family Court system. The

organization filed an amicus brief in *Openshaw*, urging the SJC to recognize that it is within the authority of judges to award savings as a part of a component of alimony under G.L.c. 208, §53(b).

"Increasing personal savings is a deeply entrenched public policy goal and is especially critical for caregiving spouses, who face much greater financial insecurity post-divorce compared to supporting spouses," the MFAC brief states.

In addition, MFAC argues that determining alimony need requires an assessment of "all factors" under G.L.c. 208, §53(a), not simply the parties' spending at the time of divorce.

"This is a particularly big issue for caregivers who stepped away from their careers to take care of the family's children and then get divorced," Palladino said. "If their [alimony] is limited to just their expenses, then there is no ability to save. It's like going down a rabbit hole."

Johnson said her organization takes the position that savings alimony is allowed under Massachusetts' current statutory framework.

"We are arguing that 'need' does not equal 'expenses,'" Johnson said. "The legislative intent was to make alimony more predictable and cost less money in terms of legal expenses."

The amicus brief cited the SJC in its landmark 2022 decision in *Cavanagh v. Cavanagh* as expressly rejecting a supporting spouse's argument that alimony should be defined by the current expenses of the caregiver.

"Basing alimony on the [supporting spouse's] income is just fairer," Johnson said. "It provides parity between the parties."

Johnson and Palladino argue in their brief that "[h]igher-income payors such as Mr. Openshaw have seized on both the term 'marital lifestyle' in §53(a) and the conjunction 'or' in §53(b) to argue that their spouses who took on

the caregiving role for the family should not receive anything more than their exact spending predivorce or should not receive any alimony at all because they don't 'need' it. Such arguments fail. The legislature's inclusion of the word 'shall' in §53(a) requires a judge to consider all eight specified factors in that section, not just the two mentioning marital lifestyle. Included in the other six are factors that promote alimony for long-term caregivers, including 'lost economic opportunity as a result of the marriage.'"

Not allowing savings to be a component of alimony would be a grave mistake, Johnson said.

"It is devastating to caregivers post-divorce. The data we provide in our brief back that up," Johnson said. "Caregivers post-divorce have lower retirement income savings, they have lower Social Security, and they have lower 401k balances."

According to Palladino, §53(b)'s 30 to 35 percent of the difference between the parties' gross incomes should be the key point of reference in calculating alimony.

"The court should not get involved in how people are spending their money," she said. "Leave that to the parties."

MFAC took no position on the issue of whether, for purposes of determining alimony, a spouse's need may include components for charitable contribution.