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The curious case of variable support orders

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When a Massachusetts court issues a support order after trial, it will almost always be a fixed sum, unchanged until a later modification judgment.

We accept that a judge's self-adjusting orders would offend due process, which precludes modification of a judgment without agreement, or a full trial vetting of changed circumstances.

But does that orthodoxy have a solid foundation? Or is it simply an unchallenged distortion of Supreme Judicial Court precedent? Can the presumption against self-adjusting orders, as found by the Appeals Court, persist? Should it?

The Alimony Reform Act case, *Hassey v. Hassey*, 85 Mass. App. Ct. 518 (2014), recently highlighted the issue. A trial judge had ordered a flat sum of periodic alimony, plus 30 percent of the husband's gross pre-tax bonuses, as additional spousal support.

The Appeals Court reversed the contingent part because:

"[T]he *self-modifying* feature of the order … is not based on a judicial determination, supported by subsidiary findings of fact, of an increase in the wife's need accompanied by the husband's ability to provide for the same." (Citation omitted) (Italics ours) *Id.*, at 528.

The descriptor "self-modifying" is critical. Chosen over "self-adjusting," "self-executing," "contingent" or "variable," it was coded to the court's view, as stated in Note 18, that:

"[A] general term alimony award established as a percentage of income and not as a fixed amount *may* be valid in *some* circumstances." (Italics ours) *Id.*

Note 18 indirectly explains its source by citing two cases that, ironically, upheld variable orders, beginning with *Wooters v. Wooters*, 42 Mass. App. Ct. 929, 930 (1997), in which:

"[T]he husband was about to undergo a serious operation, and it was uncertain how much he would be able to work ... [and his] ... compensation ... had considerable fluctuations … . These circumstances presented a special case that 'well might have suggested the use of [a] *self-executing formula*.'" (Citations omitted) (Italics ours) *Id.*, at 929-931.

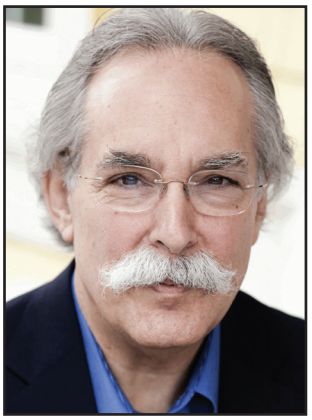
The *Wooters* citation is remarkable both for its stated presumption against variable support orders, with a "special case" required for rebuttal, and for its use of the term "self-executing," and *not* "self-modifying."

Thus, when upholding or vacating identical percentage of gross income orders — only the percentages differed — the Appeals Court used different, self-fulfilling labels. And it did so at the cost of inconsistency with SJC precedent, as we will show.

The second case in Note 18 is the SJC's *Stanton-Abbott v. Stanton-Abbott*, 372 Mass. 814 (1977), which the note identifies as the root of the *Wooters* presumption:

"[I]n a 'special case,' a general term alimony award containing a 'self-executing formula' that is based on the recipient spouse's needs may be permissible." *Id.*, at 817.

The citation cuts to the heart of the problem, as revealed by *Stanton-Abbott*. In that case, the SJC reviewed a modification judgment. Among changes found, the parties lived on different continents, and the wife had been seriously injured in an automobile collision. The trial court increased the



amount of periodic alimony, and it ordered future adjustment, without further court action, to meet increases in the cost of living.

The SJC affirmed, after summarizing the husband's claim that:

"... the judge was without authority to include … the provision regarding adjustment by the retail price index [because it] would itself constitute *a modification of the judgment* ... [without] demonstration by the party favorably affected that conditions had changed justifying the modification, and without procedural due process for the [other] party ..."

To which SJC Justice Benjamin Kaplan responded:

"*This argument confuses the application of a contingent or variable clause of a judgment to events as they occur, with the modification of a judgment.* Judgments for alimony, child support ... are often written to ... make provision for ... future changes in the situation of the parties, such as the attainment by children of college age, or the remarriage of a spouse. So also such *judgments may contain clauses relating alimony or other payments, in various ways, to the future earnings or profits or means of the obligated (or benefited) spouse ... [W]e should not regard the corresponding shift in the rate of payment as a modification of the judgment which requires new justification in another court proceeding. The*

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judgment has remained the same although its variable terms, which were presumably argued and deliberated before they were approved, have produced results which in some sense are new … .” (Citations omitted) (Italics ours) *Id.,* at 1312.

Judge Kaplan's use of “self-executing” and “variable” to describe the cost-of-living inflator is entirely consonant with his view that these orders would not self-modify the new judgment.

Rather, it was a reasonable regulation of prospective support that could actually be modified by later judgment, if proven “inappropriate or oppressive.” *Id*. These words do not contract judges' authority, but acknowledge and support its sound use. Why else carefully distinguish modification of a judgment from a judgment with merely self-adjusting features?

By limiting variable orders to “special cases,” the Appeals Court distorts the *Stanton-Abbott* ruling. Its apparent basis is the SJC's observation that:

“[T]he locations of the parties and of the husband's resources presented a special case that well might have suggested the use of these self-executing formulas. Other consideration might apply to a case with more parochial contacts.” *Id.,* at 1313.

We see the Appeals Court as improperly elevating this closing comment to controlling status, while dispensing with “holding” language that preceded it.

It is nonetheless worth asking: What kind of future cases might the SJC have meant by “more parochial contacts” for situations in which self-adjusting orders, or specific kinds, might be inappropriate?

One might be a support payer with history and prospects of predictable and consistent income; or a case of relative short-term alimony; or, in contrast to *Stanton-Abbott*, a judgment made during a low-inflation era, like *Hassey*, where the cost of living is unlikely to exert predictably great pressure on existing support.

Each presents a situation in which self-adjustment, or in the last case, a COLA, may be superfluous or simply inessential. However, it is hard to see how these kinds of considerations support, let alone mandate, a strong presumption against self-executing orders generally.

Yet, by calling the order “self-modifying” the Appeals Court put the variable part of alimony in *Hassey* on the fast track to reversal, thus handcuffing judges from making carefully crafted support orders that reasonably anticipate future variables, in an effort to reduce family uncertainty and the need for future litigation.

This is highly consequential, because economic livelihoods are often complex and characterized by uncertainty. The recent *Hoegen v. Hoegen*, ___ Mass. App. Ct. ___ (2016) (holding restricted stock units a viable source of income for child support), illustrates that trial courts are often predictors of income that is, at best, uncertain.

Every time a judge predicts future income from a sophisticated source, the odds of later contempt or modification litigation increase. Rather than guess at the income value of future bonus or stock option income streams, is it not more rational to consider dividing them by a reasoned formula?

As divorce mediators, we strive to broaden options for divorcing families, not narrow them. We work to mitigate uncertainty and reduce litigation by discussing future “variables” like bonuses, equity-based compensation and other life changes. We often regulate the impact of change on families, with agreements that include self-adjusting features.

Constriction of trial court authority chills negotiations and mediations alike, since every divorce discussion proceeds in the shadow of the court.

Rather than encourage open exploration of mutual interests and options, *Wooters* and *Hassey* encourage parties, when negotiations get tough, to dig in and say, “You can't get a court to do that, so why should I agree to it?”

More critically, some worry that the highly visible application of the presumption against variable orders highlighted in *Hassey* may actually bar judges, now or later, from accepting agreements that do what the courts are otherwise barred from doing themselves.

So far as we know, trial judges are not yet rejecting variable support agreements in principle. But sometimes we only recognize a slippery slope from the bottom.

A renewed look at *Stanton-Abbott* and a shift of the *Wooters-Hassey* presumption to one in favor of well-reasoned variable support orders can only empower people to order their post-divorce lives more comprehensively. Trading “you can always go back and modify” for reasoned self-adjusting orders is a losing exchange for families and courts, alike.

The SJC paved the way nearly 40 years ago. It made sense then, and it makes sense now. MLW