COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-19

ROMEO C. VILLAR

vs.

RAQUEL B. VILLAR.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff (husband) appeals from an amended judgment of divorce nisi contending that the Probate and Family Court judge erred in (1) declining to award him alimony, and (2) failing to equitably distribute the parties' assets and liabilities.[1] The husband further contends that his counsel provided ineffective assistance, that his testimony was improperly limited, and that

[1] The husband filed a notice of appeal from the amended judgment of divorce nisi dated April 18, 2019, which was docketed nunc pro tunc to April 3, 2019, the date of the original judgment of divorce nisi. Subsequent to the husband's notice of appeal, the judge entered a second amended judgment of divorce nisi on July 31, 2019. The husband did not file a notice of appeal from the second amended judgment, and thus, this appeal is not properly before us. See Mass. R. A. P. 4 (a) (3), as appearing in 481 Mass. 1607 (2019). However, because the wife did not move to dismiss the husband's appeal and fully briefed the issues in this case, "we proceed as if the notice of appeal were sufficient." Fazio v. Fazio, 91 Mass. App. Ct. 82, 84 n.7 (2017).

the judge should have provided him access to a Filipino-speaking interpreter at trial. We affirm.

Background. We summarize the record, incorporating the judge's findings of fact in support of the judgment of divorce nisi, reserving certain details for our discussion below. The parties were married on December 14, 1985, in Paranaque City, Metro-Manila, Philippines, and by the time of trial, they had been married for over thirty-two years. The parties last lived together in the marital home in West Stockbridge in October 2016. They have three adult children. At the time of trial, the husband lived in the marital home with one of their adult sons, and the wife rented an apartment in Springfield.

The husband moved from the Philippines to the United States between 2002 and 2003, and the wife and the three children followed in 2005. While in the Philippines, the husband worked at a bank, but retired early and opened a business selling manufactured wooden crates and pallets. After moving to the United States, the husband worked at a fishery for one year, enrolled in several agricultural seminars, and worked as a paralegal for two years from 2012 to 2014, but ultimately was the primary caregiver for the children until August 2017. At the time of trial, the husband was employed as a treatment plant operator for the city of Pittsfield, and earned approximately $39,000 yearly. Before the wife moved to the United States, she

received her dental and nursing license in the Philippines, and ran her own dental practice there. After moving to the United States, the wife obtained additional education to allow her to continue practicing dentistry in the United States. Due to her immigration status, however, the wife is permitted only to practice as a limited dentist in the United States, and as a result, cannot work in a private dental setting. At the time of trial, the wife was employed as a limited dentist at the Caring Health Center in the city of Springfield, earning approximately $85,800 per year.

The parties purchased the marital home in 2010, with title in the wife's name. At the time of trial, there was a $224,575.49 mortgage on the home, also in the wife's name, and the home was valued at $308,700. The parties owned two vehicles of roughly equal value, and each party had their own bank account. The husband had a retirement account valued at $1,333.87, and the wife had a defined contribution plan with a value of $5,000. The parties incurred significant liabilities during the marriage including parent student loans, in the wife's name, for the three children's college education in the amount of $75,685.17. The wife also received an Upstart loan in the amount of $35,908.29 that was used for the family's expenses while the wife was unemployed and studying to obtain her limited license. Individually, the wife accrued a total of $21,524.05

in credit card debt, and the husband accrued $2,000 of his own credit card debt.[2]

The amended judgment of divorce nisi provided that although the husband had a need for alimony, the wife did not have the ability to pay alimony to the husband. The judge therefore declined to enter a present award of alimony. The judge ordered that the marital home be sold, and that the proceeds from the sale be used to pay off the Upstart loan, as well the parent loans obtained for the children's education, with any excess distributed to the husband. In the event that the proceeds from the sale of the marital home were insufficient to cover these liabilities, the parties were ordered to share equally in satisfying those two particular liabilities. The judge ordered that each party be solely responsible for liabilities held in their own individual name. Further, other than the marital home, each party was permitted to retain assets in their own name, including their vehicles, individual bank accounts, and retirement accounts.

Discussion. 1. Alimony. The husband first contends that the judge abused his discretion in declining to award him

[2] In addition, both parties reported that they owed money to friends and family members ranging between $50,000 and $100,000. The judge, however, did not consider these private loans when distributing the parties' debts because he found no evidence to indicate that the parties were obligated to repay them.

alimony. Under the Alimony Reform Act of 2011 (act), alimony is defined as "the payment of support from a spouse, who has the ability to pay, to a spouse in need of support." Van Arsdale v. Van Arsdale, 477 Mass. 218, 219 (2017), quoting G. L. c. 208, § 48. The act does not define "ability to pay" or "need of support," but instead "identifies a number of factors that a judge must consider in 'determining the appropriate form of alimony and in setting the amount and duration of support,' and gives the judge the discretion to consider other factors that the judge deems 'relevant and material.'"[3] Young v. Young, 478 Mass. 1, 5 (2017), quoting G. L. c. 208, § 53 (a). "A judge has broad discretion when awarding alimony under the statute," Young, supra at 5-6, quoting Zaleski v. Zaleski, 469 Mass. 230, 235 (2014), and alimony determinations "will not be reversed unless plainly wrong and excessive." Hassey v. Hassey, 85 Mass. App. Ct. 518, 524 (2014).

Here, the judge considered the § 53 (a) factors in conjunction with each party's need for and ability to pay

[3] General Laws c. 208, § 53 (a), provides that, "a 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."

alimony informed, in part, by their incomes and weekly expenses. He found that "this was a long-term marriage where both parties were hardworking and industrious," which allowed them to enjoy a lower middle-class lifestyle, and provide for their children to pursue higher education. Despite the fact that both parties were in good health and duly employed, the judge found that each party's weekly expenses exceeded their weekly income. Accordingly, the judge concluded that "[w]hile it is clear that [the husband] has a need for alimony, it is also clear that [the wife] does not have currently the ability to pay alimony," and declined to enter an order of alimony. On this record, we are unable to conclude that this decision was an abuse of discretion.

The husband argues that the judge clearly erred in finding that the wife earned only $85,800 per year, and even if this finding was not erroneous, the judge should have found that the wife's income was a result of a voluntary reduction in hours, and as such, the judge should have used the wife's 2016 or 2017 income to calculate alimony. First, the record supports the judge's finding that the wife earned $1,650 weekly, or $85,800 yearly. Both the husband and the wife testified that the wife earned fifty-five dollars per hour, and the wife's trial testimony and her financial statement both reflect that she worked thirty hours per week at the Caring Health Center. It

was up to the trial judge to determine whether to credit the wife's testimony, and "[i]t is not our role to interpret the evidence differently." See Cerutti-O'Brien v. Cerutti-O'Brien, 77 Mass. App. Ct. 166, 169 n.3 (2010). The evidence at trial, credited by the judge, showed that the wife earned $1,650 weekly, and thus this finding was not clearly erroneous. See Michelon v. Deschler, 96 Mass. App. Ct. 815, 816 (2020), quoting Care & Protection of Olga, 57 Mass. App. Ct. 821, 824 (2003) ("A finding is clearly erroneous . . . when there is no evidence to support it, or when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made'").

Further, while a trial judge is permitted to consider the "potential earning capacity rather than actual earnings" of a party who "is earning less than he [or she] could with reasonable effort," Schuler v. Schuler, 382 Mass. 366, 374 (1981), a judge "is not obligated to use a party's potential earning capacity as the measure of the party's ability to pay." Pierce v. Pierce, 455 Mass. 286, 297 (2009). Instead, where a party "makes an involuntary, or a good faith voluntary, career change," the party's actual income is generally used in calculating his or her ability to pay alimony. See Schuler, supra at 373.

At trial, the wife testified that, when she first began working at the Caring Health Center, she worked sixty-four hours per week, but in May of 2017, her hours were reduced to thirty-six per week. She testified that her hours were again reduced in June 2017 when a new director was hired, and since that time, she has only been able to work thirty hours per week. The wife testified that she frequently requests and is denied additional hours, and also testified that she is actively seeking new employment where she can work and earn more on a weekly basis. It is undisputed that the wife earned a higher salary when she was working significantly more hours in 2016 and 2017, but it was up to the judge to determine whether to use the wife's potential earning capacity as the measure of her ability to pay. Here, where the wife testified that she was unable to gain additional employment with reasonable effort, the judge did not abuse his discretion in using her present income of $85,800 to assess her present ability to pay alimony. See Pierce, 455 Mass. at 297.

2. Equitable division. The husband next contends that the judge failed to equitably divide the parties' assets and liabilities, leaving him in a precarious financial position. "General Laws c. 208, § 34, vests broad authority in judges of the Probate and Family Court to make equitable division of the property included in the marital estate of divorcing parties .

. . ." Pfannenstiehl v. Pfannenstiehl, 475 Mass. 105, 110 (2016). Trial judges retain "broad discretion" in weighing and balancing the factors described in § 34.[4] See Kittredge v. Kittredge, 441 Mass. 28, 43-44 (2004). "As long as the judge's findings show that all relevant factors in § 34 were considered, and the reasons for the judge's conclusion are apparent and flow rationally from the findings and rulings, a judge's determination on the equitable division of marital property will not be disturbed." Williams v. Massa, 431 Mass. 619, 631 (2000). "We will not reverse a judgment with respect to property division unless it is 'plainly wrong and excessive.'" Zaleski, 469 Mass. at 245, quoting Baccanti v. Morton, 434 Mass. 787, 793 (2001).

The husband argues that the judge failed to consider that he earned significantly less than the wife in dividing the marital debts. However, contrary to the husband's contentions, the judge considered the income of both parties. In doing so,

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[4] The mandatory factors for property division include "the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties, the opportunity of each for future acquisition of capital assets and income, and the amount and duration of alimony, if any, awarded under [G. L. c. 208, §§ 48-55]. In fixing the nature and value of the property to be so assigned, the court shall also consider the present and future needs of the dependent children of the marriage." (Emphasis omitted.) Hassey, 85 Mass. App. Ct. at 522 n.10, quoting G. L. c. 208, § 34.

the judge determined that the most equitable action was to sell the marital home in order to reduce the substantial debt amassed by the parties. The judge additionally allocated the debt solely in the wife's name, which was substantially higher than the debt solely in the husband's name, to the wife alone. Both parties' liabilities exceeded their income, and the judge carefully considered this fact when equitably dividing the marital estate. We discern no abuse of the judge's broad discretion. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014) (defining abuse of discretion as decision that "falls outside the range of reasonable alternatives").

The husband also contends that the judge failed to consider the wife's dental and nursing licenses as assets to be equitably divided between the parties. However, the husband's argument is directly foreclosed by Drapek v. Drapek, 399 Mass. 240 (1987), where the court held that professional degrees and licenses are not assets subject to equitable distribution, nor is the increased earning capacity of the degree or license holder. See id. at 246.

3. Remaining claims. Lastly, we address the remainder of the husband's claims. The husband argues that he received ineffective assistance of counsel at his trial. However, "[a]s a general rule, there is no right to the effective assistance of counsel in civil cases," Commonwealth v. Patton, 458 Mass. 119,

124 (2010), and this case does not fit within any of the narrow exceptions to the general rule. See Lassiter v. Department of Social Servs., 452 U.S. 18, 27-28 (1981). As such, this argument is without merit.

Next, the husband argues that the judge improperly limited the trial to one day, and in doing so, curtailed his ability to present witnesses and to testify on his own behalf. While "[a] judge, as the guiding spirit and controlling mind of the trial, should be able to set reasonable limits on the length of a trial," including "the length of the direct and cross-examination of witnesses," Clark v. Clark, 47 Mass. App. Ct. 737, 746 (1999), the record does not reflect that the judge did so in this case. On the first day of trial, before testimony began, the judge asked both parties how many witnesses they planned to call, and how long they needed for the trial. Both parties informed the judge that they would only be presenting the testimony of one witness, the husband and the wife respectively, and that one day for trial would be sufficient. Moreover, there is no support in the record for the husband's claim that the judge "rushed through [his] testimony." The husband testified as the first and only witness in his case-in-chief, and there is nothing in the record to suggest that the husband asked for and was denied additional time.

Finally, the husband argues that the trial judge should have provided him access to a Filipino-speaking interpreter. The husband did not request the assistance of an interpreter until after the trial concluded. Under G. L. c. 221C, § 2, "[a] non-English speaker, throughout a legal proceeding, shall have a right to the assistance of a qualified interpreter who shall be appointed by the judge." Although the failure to request an interpreter does not constitute a waiver of this right, the party seeking the assistance of the interpreter bears the burden of showing that he is in fact a non-English speaker. See Crivello v. All-Pak Mach. Sys., 446 Mass. 729, 733 n.9 (2006). Section 1 of G. L. c. 221C defines a "[n]on-English speaker" as "a person who cannot speak or understand, or has difficulty in speaking or understanding, the English language, because he uses only or primarily a spoken language other than English."

Here, the husband failed to show that he meets the threshold requirement -- that he is, by definition, a "non-English speaker." G. L. c. 221C, § 1. While the husband contends that "[a]nyone in the [c]ourt room would have understood that [he] was not reasonably understanding the questions," this contention is not supported by the record. There were only a few occasions during the husband's testimony where he appeared to misunderstand the questions asked of him, and when the questions were repeated, the husband's answers were

responsive. Indeed, the husband's trial testimony was largely responsive and intelligible.[5] See Crivello, 446 Mass. at 736, quoting United States v. Carrion, 488 F.2d 12, 15 (1st Cir. 1973), cert. denied, 416 U.S. 907 (1974) ("It would be a fruitless and frustrating exercise for the appellate court to have to infer language difficulty from every faltering, repetitious bit of testimony in the record"). While the husband did testify on cross-examination that English was not his first language, he also testified that he learned to speak and write in English when he was a toddler. Notably, even if the husband could sufficiently establish that he is a non-English speaker and that the court committed error in failing to appoint him an interpreter, which we do not conclude, he has not alleged nor demonstrated that he suffered any prejudice as a result. See

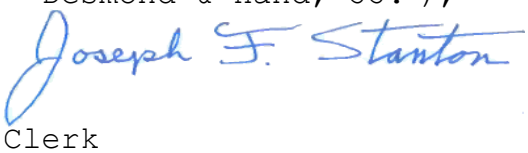
[5] In fact, while the husband was testifying, he explained several complex topics, in English, seemingly without difficulty. For example, the husband described his property holdings in the Philippines, articulated how he became a United States citizen, and explained how he, as a paralegal, successfully assisted his wife in contesting the revocation of her limited license.

Commonwealth v. Gautreaux, 458 Mass. 741, 754 (2011).

Accordingly, we see no reason to disturb the judgment.[6]

Second amended judgment of divorce nisi affirmed.

By the Court (Blake, Desmond & Hand, JJ.[7]),



Clerk

Entered: February 19, 2021.

[6] The wife's request for appellate attorney's fees and costs is denied.

[7] The panelists are listed in order of seniority.