

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1787

KEVIN J. SANAVAGE

vs.

STAISHA CHAVIS.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant mother appeals from an amended judgment of the Probate and Family Court on a complaint for custody, support, and parenting time, filed by the plaintiff father pursuant to G. L. c. 209C.¹ On appeal, the mother argues that (1) the judge improperly increased the father's parenting time, creating an "unofficial shared physical custody arrangement," (2) several provisions in the amended judgment governing the coparenting terms and communications between the parties violated certain of her constitutional rights under the First and Fourteenth Amendments to the United States Constitution, and (3) the judge prematurely ordered shared responsibility for the payment of the parties' ten year old child's college expenses.

¹ The father did not submit a brief in this appeal.

Based on the reasons stated below, we affirm in part and vacate in part.

Background. The parties, who never married, share one minor child born in July 2008; the father's name appears on the child's birth certificate. Shortly after the parties began dating, the mother became pregnant and the parties moved in together. After the child's birth, the parties agreed that the mother would stay home with the child and that the father would be the sole financial provider; he sometimes worked three jobs to meet the family expenses, which ultimately put a strain on the relationship. The parties struggled financially and often fought over money, sometimes in the child's presence. The father often drank alcohol excessively, and was emotionally and verbally abusive to the mother. The parents could not effectively communicate with each other and, when the child was two years old, the father moved out of the parties' apartment and lived with a coworker for six to eight months; during the father's absence, he continued to contribute to the child's expenses and the household bills, but visited the child only once.

The father eventually moved back to live with the mother because he missed the child; the parties did not reconcile their relationship, but agreed to live together as coparents for the benefit of the child. Although the father returned to

reestablish his relationship with the child, he continued to drink frequently and spent little time at home, sometimes being absent for an entire weekend; he claimed that the mother was distant, that he had "connectivity issues" when attempting to communicate with her via e-mail, and that the mother interfered with his relationship with the child. The mother testified that the parties argued about financial expenses because the father would inform her that bills were paid when they were not, and would withhold funds from her needed to purchase personal hygiene products.

In September 2016, when the child was eight years old, the mother moved with the child out of the family's apartment; she eventually went to live with the pastor of her church, whom she wed in 2018.² When the mother returned to the parties' apartment to retrieve her personal items, she found them in garbage bags on the back porch, covered in snow and debris and unsalvageable. The father failed to provide any financial support for the child after the mother and child moved from the family's apartment, and the parties' inability to communicate continued. According to the father, he was unaware of where the mother and the child

² The pastor has four teenage children from a previous marriage; the child gets along well with his children, referring to them as her brothers and sisters.

were living during this time, learning of their whereabouts around the time that he initiated these proceedings.

On October 19, 2016, the father filed a complaint for custody, support, and parenting time. At a hearing on February 3, 2017, the parties stipulated to, among other things, shared legal custody of the child, the mother retaining primary physical custody, and the father receiving parenting time; the stipulation was incorporated into a temporary order of the same date.³ The parties also agreed that neither would disparage the other (or allow a third party to do so) in the child's presence, neither would question the child about the other parent, neither would consume alcohol or drugs while the child was in their care, and that each would make the child available for an evening telephone call with the other.

On December 15, 2017, the father's motion for a requested investigation by the probation department for recommendations regarding custody, parenting time, and parental issues was allowed. After interviewing the mother, the father, the child,

³ The temporary order granted the father parenting time each week from Tuesday at 5:45 P.M. to Wednesday morning at school drop-off, as well as every other weekend from Friday evening at 5:45 P.M. to Monday morning at school drop-off. A subsequent sua sponte temporary order modified the conditions when the child had no school and the timing of nightly telephone calls between the child and the noncustodial parent, and required that the parties provide each other with current residential addresses and contact information.

and the child's teacher and pediatrician (and visiting the parties' respective homes), the investigating probation officer recommended in his March 16, 2018 report to the judge that the custody and parenting schedule outlined in the February 3, 2017 temporary order should continue permanently. He also recommended that other aspects of the temporary order remain in effect, such as prohibiting disparaging remarks in front of the child, retaining e-mail as the primary mode of communication between the parents, and retaining nightly telephone calls between the child and the noncustodial parent; he additionally recommended that neither parent encourage the child to refer to a third party as "mother, father, mom, or dad."

After a two-day trial held on January 8 and 9, 2019, judgment entered on February 28, 2019. The judgment was later amended (on April 23, 2019) only with respect to the issue of the tax dependency deduction (paragraph numbered seven); the amended judgment incorporated all the other terms of the February 28 judgment. Also on April 23, 2019, the judge issued his findings and rationale.

In his findings, the judge determined that because the child was happy and emotionally stable and the mother had been the child's primary caretaker all of her life, the custodial arrangement should not be disturbed, with the mother retaining primary physical custody, and the parties sharing legal custody.

However, based on the father's credible testimony that he wished to be part of the child's life and have more parenting time to develop a closer bond with the child, the judge found it in the child's best interest to have additional uninterrupted time with the father each week and that "the child w[ould] benefit from having the [f]ather part of her life on a consistent and regular basis." As a result, the judge, aside from maintaining the alternating weekend schedule, increased the father's parenting time every week to from Tuesday evening at 6:45 P.M. to Thursday morning at school drop-off, thereby providing the father an additional overnight with the child each week.⁴ In effect, over a two-week period, the judgment provided an approximately sixty percent to forty percent division of parenting time in the mother's favor. The judge also included in the judgment, among other things, specific provisions governing the mother and the father's conduct and communications with respect to coparenting the child, the sharing of college expenses, and orders pertaining to custody exchange locations for scheduled parenting time.

As noted, the judge amended provisions in the judgment not relevant to this appeal, and the mother timely appealed.

⁴ Also, on weekends when the child is in the father's care and she has no school on Monday, the father's parenting time was extended until Monday evening at 6:30 P.M.

Discussion. 1. Custody determination. The mother first argues that the judge's award of primary physical custody to her is illusory, and in effect, acts as an "unofficial shared physical custody arrangement," which is impermissible under the facts of this case. We disagree.

General Laws c. 209C, § 10, governs the award of custody to parents of nonmarital children. Under G. L. c. 209C, § 10 (a), the court may award custody to either parent, or to both of them jointly, "as may be appropriate in the best interests of the child." The statute does not permit an award of joint custody unless one of two situations applies: (1) "the parents have entered into an agreement pursuant to [G. L. c. 209C, § 11,]" or (2) "the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to this chapter and have the ability to communicate and plan with each other concerning the child's best interests." G. L. c. 209C, § 10 (a). Absent an approved custody agreement, if "the record reflects a hostile and tumultuous relationship between the parties," in order to award joint custody, a judge must make a positive finding that the parents have the ability to communicate effectively. Smith v. McDonald, 458 Mass. 540, 553 (2010). See Custody of Odette, 61 Mass. App. Ct. 904, 905 (2004).

Here, there has been no formal agreement between the parties as to physical custody,⁵ and the judge expressly found that the parents "have had difficulty in communicating between themselves as to co-parenting for the child's upbringing." As a result, the mother is correct that an award of joint physical custody would be improper in this case. The question we must answer is whether the judge's order, which facially awards primary physical custody to the mother, constitutes an impermissible and unofficial joint physical custody award. We conclude that it does not. In fact, as submitted in a post-oral argument letter by the mother, the parenting time order allows the child to be in the mother's custody 58.9 percent of the time, while providing parenting time with the father 41.1 percent of the child's time. Thus, we discern no error or abuse of discretion by the judge in determining legal and physical custody of the child, or the amount of parenting time granted to the father. See L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

2. Coparenting terms and communication between the parties. The mother next argues the judge violated her fundamental rights under the First and Fourteenth Amendments to

⁵ The parties stipulated early in the proceedings to joint legal custody of the child, and legal custody was not a disputed issue at trial.

the United States Constitution, when the judge determined it was in the best interests of the child to order specific coparenting terms and communications between the parties generally, and during custodial exchanges (as contained in numbered paragraphs two, three, and ten), that restricted both parents' speech and interfered with their respective rights to parent. We agree that a number of provisions contained within these portions of the judgment, and disputed by the mother, placed an impermissible restraint on the mother's speech and interfered in her child rearing. In addition, the judge failed to provide specific findings to justify a compelling State interest in placing such restrictions on the mother, or to explain why these limitations were necessary to protect the compelling interest asserted as justification for such restraint. We conclude, therefore, that the disputed provisions of the judgment contained in numbered paragraphs two and three infringe on the mother's constitutional rights and must be vacated.

a. First Amendment. A prior restraint in violation of the First Amendment is an administrative or judicial order that prohibits "certain communications when issued in advance of the time that such communications are to occur." Shak v. Shak, 484 Mass. 658, 661 (2020), quoting Alexander v. United States, 509 U.S. 544, 550 (1993). Prior restraints are "extraordinary remedies," and are "permissible only where the harm expected

from the unrestrained speech is grave, the likelihood of the harm occurring without the prior restraint in place is all but certain, and there are no alternative, less restrictive means to mitigate the harm." Shak, supra at 661-662, quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976). Accordingly, a prior restraint will not be upheld unless it is "justified by a compelling State interest to protect against a serious threat of harm," and the limitation on speech is "no greater than is necessary to protect the compelling interest that is asserted as a justification for the restraint." Shak, supra at 663, quoting Care & Protection of Edith, 421 Mass. 703, 705 (1996). In addition, an "important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say'" (citation omitted). Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 573 (1995). See id. (State "may not compel affirmance of a belief with which the speaker disagrees").

Although the judge clearly was attempting to reduce future conflict between the parties in fashioning the judgment as he did, he failed to provide specific findings justifying the State's interests in the restraints imposed; instead he simply stated that the orders were made in "the best interest of the . . . child," which alone is not enough to justify a prior restraint on speech. Absent from this record is any evidence

demonstrating that any "harm expected from the [mother's] unrestrained speech is grave," Shak, 484 Mass. 661-662, or likely to cause harm to the child, or that there was no less restrictive alternative to mitigate any harm. See id. at 662.

b. Fourteenth Amendment. "The liberty interests of parents protected by the due process clause of the Fourteenth Amendment to the United States Constitution are also protected by our State Constitution." Blixt v. Blixt, 437 Mass. 649, 652 (2002), citing McCarthy v. Sheriff of Suffolk County, 366 Mass. 779, 785 (1975). See Youmans v. Ramos, 429 Mass. 774, 784 (1999) (liberty interest of parent "protected by art. 10 of the Massachusetts Declaration of Rights and the due process clause of the Fourteenth Amendment to the United States Constitution"). "[T]here exists a 'presumption that a fit parent will act in the best interest of his or her child.'" Blixt, supra at 655, quoting Troxel v. Granville, 530 U.S. 57, 69 (2000).

Similar to limitations on speech, a judge's written findings intruding into the parental relationship must demonstrate that a State's interference with such a relationship is necessary to protect the child from significant harm and to "ensure[] a careful balance between the possibly conflicting rights of parents in securing their parental autonomy, and the best interests of children in avoiding actual harm to their

well-being." Blixt, 437 Mass. at 658. Here, there were no such findings supporting the judgment.

Thus, we shall remand the disputed portions of the judgment pertaining to the coparenting terms (paragraph numbered two) and communications between the parties (paragraph numbered three) so that the judge may modify those terms that infringe on the mother's First Amendment and Fourteenth Amendment rights, or make further specific findings justifying the restrictions imposed by the judgment.⁶ See Care & Protection of Edith, 421 Mass. at 705.

3. College expenses. The mother's final argument contends that it was premature for the judge to order the parties to share the costs and expenses of any post-high school, undergraduate education for the child. We agree.

"[A]s a general rule, support orders regarding the future payment of post-high school educational costs are premature and should not be made." Ketterle v. Ketterle, 61 Mass. App. Ct. 758, 765 (2004), quoting Passemato v. Passemato, 427 Mass. 52, 54 (1998). "Support orders must address the 'current needs' of the children." Lang v. Koon, 61 Mass. App. Ct. 22, 25 (2004), quoting Bush v. Bush, 402 Mass. 406, 410 (1988). "The limited

⁶ Numbered paragraph nine, which we shall also vacate, likewise contains provisions that infringe on the mother's fundamental rights as a parent.

circumstances that do justify orders for future educational expenses have involved children with special needs or profligate parents." Lang, supra. Neither circumstance is present here.

At the time of the judgment in this case, the child was ten years old and college was not imminent. Because the particular facts of this case do not justify an order for future educational expenses, the order was premature. See L.W.K. v. E.R.C., 432 Mass. 438, 452-454 (2000) (order to secure payment of post-high school education costs for ten year old child was premature); Lang, 61 Mass. App. Ct. at 26-27 (where no special findings made, order for payment of post-high school education costs for eleven and fifteen year old children was premature).

Conclusion. In numbered paragraph two (coparenting terms) of the amended judgment, the bulleted subparagraphs are vacated, with the exception of the fifth, eighteenth, twenty-third, twenty-fifth through thirty-first, and thirty-third subparagraphs; and in numbered paragraph three (communication), the bulleted subparagraphs are vacated, with the exception of the first through second, fourth, and sixth through seventh subparagraphs, and the matter is remanded for further proceedings consistent with this memorandum and order. Numbered paragraph nine (education) of the amended judgment is vacated in its entirety. Numbered paragraph ten (exchange location) shall be modified by striking the last sentence of the third

paragraph, and striking the fourth paragraph in its entirety.
The amended judgment is otherwise affirmed as so modified.

So ordered.

By the Court (Neyman, Henry &
Desmond, JJ.⁷),



Clerk

Entered: March 2, 2021.

⁷ The panelists are listed in order of seniority.