

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

20-P-540

PING YE

vs.

YONG XUE.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Ping Ye (mother), appeals from an order of a Probate and Family Court judge dismissing the mother's complaint for contempt against the defendant, Yong Xue (father). We vacate the dismissal order and remand the case for further proceedings.

Background. The parties, who married in New York and lived together in Massachusetts, divorced in 2006 after six years of marriage. Together they share one child, who was four years old at the time of the divorce. A judge of the Probate and Family Court issued a judgment of divorce nisi approving the parties' separation agreement, and the relevant child-related provisions were incorporated in the judgment.¹ The agreement provided that

¹ The agreement provided that "all matters relating to the child, including support and health insurance, . . . shall be merged

the father, then a full-time graduate student, would initially pay the mother \$782.50 per month in child support² and, once the child entered elementary school, \$382.50 per month. The agreement further provided, "In the event that the [father] obtains gainful employment, the monthly child support the [father] shall pay shall be in the amount calculated in accordance with [the Massachusetts] Child Support Guidelines" (Guidelines).

About one week before the child's seventeenth birthday, the mother, pro se, filed a complaint for contempt, a complaint for modification, and a motion for temporary child support in the Probate and Family Court. The mother alleged that the father began working full time in June 2007, after receiving a master in business administration from Yale Business School. She claimed that he was in contempt of the judgment of divorce nisi because he had failed to pay child support according to the Guidelines after obtaining gainful employment, and because he

into [the] [j]udgment of [d]ivorce." The judgment provided, apparently in error, that the separation agreement "is incorporated but not merged." Whether the child support provisions were merged, which affects the showing that must be made to obtain modification of the judgment, see DeCristofaro v. DeCristofaro, 24 Mass. App. Ct. 231, 235-237 (1987), ultimately has no bearing on our decision, as we conclude that the mother is not seeking, and need not seek, a modification of the judgment.

² Simultaneously with the issuance of the judgment of divorce nisi, the judge entered a pro forma support order requiring the father to pay the mother child support in the amount of \$782.50.

had refused to disclose his financial information to the mother so that she could calculate the amount due to her under the Guidelines.³ She also sought orders increasing the amount of child support owed, and the arrearages due, under the Guidelines. When the mother filed the complaints and motion, she resided in Pennsylvania and the father resided in Illinois.

The father filed a motion to dismiss both complaints, solely on jurisdictional grounds. See Mass. R. Dom. Rel. P. 12 (b) (1). He asserted that Massachusetts courts lacked jurisdiction under G. L. c. 209D, § 2-206, to enforce the order or under G. L. c. 209D, § 2-205, to modify the order. A brief hearing, limited to discussion of the jurisdictional question, was held on the motions.⁴ Subsequently, the judge dismissed the complaint for modification, without prejudice, for lack of jurisdiction. However, she dismissed the complaint for contempt with prejudice, on the ground that "the language in the divorce agreement upon which the plaintiff relies is not so clear and unequivocal as to support a finding of contempt." This

³ In a pretrial memorandum, apparently filed on the day of the hearing on the father's motions to dismiss, the mother further alleged that in July 2016, "the father began paying an additional \$400 per month, for a total of \$1,182.50 per month," but that he threatened to withhold the extra \$400 if she were to file a lawsuit against him.

⁴ Both parties were represented by counsel at the hearing.

constituted an adjudication on the merits. See Mass. R. Dom. Rel. P. 41 (b) (3).⁵

The mother filed a timely notice of appeal from the order dismissing the contempt complaint. Approximately forty days after the order dismissing her complaint was entered, she filed a motion for reconsideration, which the judge denied. The mother did not file a separate notice of appeal from the order denying the motion for reconsideration.

Discussion. A complaint for contempt "is the usual means for enforcement of a judgment or order for child support." Quinn v. Quinn, 49 Mass. App. Ct. 144, 147 (2000). However, "[t]o find a civil contempt, 'there must be a clear and undoubted disobedience of a clear and unequivocal command. . . . Where the order is ambiguous or the disobedience is doubtful, there cannot be a finding of contempt.'" Cooper v. Keto, 83 Mass. App. Ct. 798, 804 (2013), quoting Birchall, petitioner, 454 Mass. 837, 851-852 (2009).

The mother contends that the child support provisions in the separation agreement included an automatically adjusting order enforceable in Massachusetts courts without the need for a

⁵ The mother characterizes the judge's ruling as a dismissal for failure to state a claim. See Mass. R. Dom. Rel. P. 12 (b) (6). Although the father did not move to dismiss for failure to state a claim, had the judge dismissed the complaint solely on jurisdictional grounds, the dismissal would not have been on the merits. See Mass. R. Dom. Rel. P. 41 (b) (3).

modification of the judgment. We agree.⁶ In Naranjo v. Naranjo, 63 Mass. App. Ct. 256, 256-257 (2005), the parties' agreement, incorporated in the divorce judgment, provided that the father would pay ninety-five dollars per week in child support, and that "[c]hild support shall be reviewed each year on May 1st and shall be based on the child support guidelines." The court held that the father's child support obligation "was subject to automatic adjustments of the sort we have approved." Id. at 258. The formula that the parties agreed upon, making the father's child support obligation contingent on his completing business school and obtaining employment, when his income could be expected to increase, and then basing it on the Guidelines, was a reasonable, practical, and enforceable provision. See Stanton-Abbott v. Stanton-Abbott, 372 Mass. 814, 816 (1977) (judgments for alimony or child support "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").

⁶ Although the mother did not specifically articulate this argument until her motion for reconsideration, the denial of which is not before us, the judge dismissed the complaint on a motion to dismiss based solely on jurisdictional grounds. In these circumstances, the mother had no opportunity to make the argument, which was plausibly suggested by the allegations of her complaint. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008); Colorio v. Marx, 72 Mass. App. Ct. 382, 386 (2008).

Although the mechanism for determining the father's child support obligation was reasonable and permissible, the precise amount of child support he was required to pay was not clear and certain. Determining the amount due under the Guidelines requires the knowledge of both parties' incomes and expenses and performance of a calculation that requires some degree of sophistication. Yet nothing in the parties' agreement required an exchange of financial documents. Even if this requirement can be inferred, it is not the type of clear and unequivocal command on which a finding of contempt can be based. See Smith v Smith, 93 Mass. App. Ct. 361, 363 (2018); Wooters v. Wooters, 74 Mass. App. Ct. 839, 843-844 (2009); Sax v. Sax, 53 Mass. App. Ct. 765, 772 (2002).

In these circumstances, where the mother alleged that the father failed to comply with an enforceable child support order, yet where the failure did not appear to rise to the level of contumacious conduct, we think the judge acted precipitously in dismissing the complaint for contempt essentially for failure to state a claim. "A complaint for civil contempt is 'intended to achieve compliance with the court's orders for the benefit of the complainant.'" Mahoney v. Mahoney, 65 Mass. App. Ct. 537, 540 (2006), quoting Furtado v. Furtado, 380 Mass. 137, 141 (1980). Establishing the father's child support obligation and arrearages did not require a modification of the agreement (for

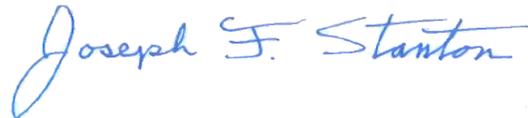
which the court lacked jurisdiction because of the parties' relocation, see G. L. c. 209D, § 2-205). See Naranjo, 63 Mass. App. Ct. at 259 ("there was no need to 'modify' the judgment" to determine father's obligation under agreement requiring yearly review based on Guidelines). Moreover, we have repeatedly affirmed orders entered in contempt proceedings compelling the payment of support orders and arrearages, even where a finding of contempt was unsustainable. See Smith, 93 Mass. App. Ct. at 364 & n.3; Wooters, 74 Mass. App. Ct. at 844; Mandel v. Mandel, 74 Mass. App. Ct. 348, 351 (2009); Poras v. Pauling, 70 Mass. App. Ct. 535, 541-543 (2007). "[T]he Probate Court [is] empowered to enter an order for payment of monies due pursuant to its determination of the parties' rights under the separation agreement." Colorio v. Marx, 72 Mass. App. Ct. 382, 389 (2008), quoting Krapf v. Krapf, 55 Mass. App. Ct. 485, 491 (2002), S.C., 439 Mass. 97 (2003). Cf. Feinstein v. Feinstein, 95 Mass. App. Ct. 230, 234 (2019) ("A modification on a complaint for contempt may occur even in the absence of a contempt finding").

Conclusion. "Taking the allegations of [the mother]'s complaint as true, and drawing all inferences in [her] favor, we conclude that [she] may be able to establish facts that would entitle [her] to relief." Mahoney, 65 Mass. App. Ct. at 542. The order dismissing the mother's complaint for contempt is vacated, and the case is remanded for clarification of the

father's child support obligation under the separation agreement, an exchange of financial statements pursuant to Rule 401 of the Supplemental Rules of the Probate and Family Court, and a determination of what amounts, if any, are due from the father to the mother.⁷

So ordered.

By the Court (Massing,
Henry & Ditkoff, JJ.⁸),


Clerk

Entered: May 3, 2021.

⁷ The Probate and Family Court appears to have continuing jurisdiction under G. L. c. 209D, § 2-206 (a), to enter an order clarifying, but not modifying, the parties' support obligations under the judgment of divorce nisi. See Vaile v. Porsboll, 128 Nev. 27, 30-32 (2012). The father does not argue otherwise.

⁸ The panelists are listed in order of seniority.