COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1040

KIMBERLY PARKER

vs.

KEVIN PARKER.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant (father) appeals from a contempt judgment in this postdivorce proceeding. The plaintiff (mother) asserted several bases for contempt, but the father was found guilty of only one: he was found to have violated a provision of the parties' divorce judgment that the parties' communications be "respectful and businesslike," because in three e-mails to the mother he had referred to his combined alimony and child support payments as an "allowance." The father was found not in contempt as to the mother's other allegations, but the judge issued several further orders (in the contempt judgment) to clarify ambiguities and to add terms to certain provisions of the divorce judgment; on appeal the father challenges, in particular, an order that requires the father to bring the child to a particular Sunday school educational program (taught by the

mother) during the father's parenting weekends. For the reasons that follow, we reverse the finding of contempt, but affirm the contempt judgment in all other respects.

Background. The parties filed for divorce in 2013, and a judgment of divorce nisi entered in January 2016. The parties had stipulated on a variety of issues, and their stipulation was incorporated into the 2016 judgment. Over the ensuing years, the father's obligations under several of these provisions became a point of contention between the parties. The father filed a complaint for modification in May of 2019 requesting several changes to the divorce judgment.[1] The mother filed the complaint for contempt underlying the present appeal in July of 2019.

The complaint for contempt raised a number of issues, two of which are material to this appeal.[2] First, the mother alleged that the father "regularly disparage[d] the Mother in his email communication to her and addresse[d] her in a condescending tone." In particular, the mother complained that the father had referred to his alimony and child support obligations as the

[1] The father's complaint for modification had not yet been decided when the complaint for contempt was considered.

[2] The mother's complaint also alleged violations of the divorce judgment regarding their daughter's use of her cell phone and other "electronic media," the father's failure to adequately ensure that the mother could access their daughter's educational records, and the father's refusal to provide "supporting documentation" of his income in certain circumstances.

mother's "allowance." Second, the mother alleged that the father had repeatedly failed to bring their daughter to Sunday school sessions during his parenting weekends, thereby effecting an unauthorized "change in . . . religious instruction." The Probate and Family Court judge found the father guilty of contempt for failure to communicate with the mother in a "respectful and businesslike" manner, stating that his usage of the term "your allowance" in the e-mails had been "objectively and reasonably disrespectful." The judge imposed no sanction against the father despite this finding. The judge found the father not guilty of the remaining contempt allegations; however, the judge elected to issue four "further order[s] of implementation" to resolve ambiguities in various provisions of the divorce judgment. One of these orders stated that the father must bring the daughter to Sunday school during his parenting weekends, except for weekends that he was scheduled to have custody of the child for four or more consecutive overnights.

Discussion. 1. The finding of contempt for the use of the term "allowance." The father argues that the finding of contempt must be reversed because his use of the term "allowance" was not "objectively and reasonably disrespectful." Among other things, the father points out that the term "allowance" is a term of art employed in a similar context by

several Massachusetts statutes, that his usage was in line with historical usage of the term, and that in any event he was not notified in advance that the mother found the usage disrespectful.

"In order to hold a party in contempt, the judge must find '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." Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dept. of Mental Retardation (No. 1), 424 Mass. 430, 442-443 (1997), quoting Warren Gardens Hous. Coop. v. Clark, 420 Mass. 699, 700 (1995). We review the ultimate conclusion on the contempt finding under the abuse of discretion standard. Judge Rotenberg Educ. Ctr., Inc., supra at 443.

The judge found the father in contempt of paragraph 12 of the divorce judgment, titled "Parental Guidelines," which stated in relevant part that "[t]he content and tone of each parent's written communication with the other shall be respectful and businesslike." As noted, the judge based this finding on three e-mail communications sent by the father to the mother between 2016 and 2019. The first e-mail was sent on August 23, 2016, and stated:

> "The e-transfer of your child support and alimony allowances didn't work as it was this past week [sic], so you will notice that I made three deposits in your account:

> the alimony, the typical child support payment, and a $15 differential between the previous child support amount and the current amount."

The second e-mail, sent almost two years later and dated August 4, 2018, stated:

> "Which amounts are you speaking of? Your allowance or bills for [daughter]? [T]here was a transfer into your account yesterday by my records. I don't see any other bills unit [sic] sent me other than the ones that I had paid a few weeks back that we had already communicated about."

On April 11, 2019, the mother first addressed the father's use of this term, writing in an e-mail:

> "Lastly, in the Judgment, you are also in contempt as you have not provided the supporting documents to me in a timely manner regarding February payments of child support (which you have been incorrectly calling 'an allowance' in past emails) since 2016 after I have continued to ask for them . . . ."

Several months later, on July 19, 2019, the father once again used the term allowance in an e-mail:

> "Are you talking about the allowance due today? The electronic transfer should be going thru. Let me check the bank."

The cited evidence did not support a finding of contempt. The father is correct that the word "allowance" is a term of art that is used in several Massachusetts statutes to describe payments made to a dependent spouse. See G. L. c. 208, § 17 (titled "Pendency of action; allowance; alimony"); G. L. c. 208, § 35 ("The court may enforce judgments, including foreign decrees, for allowance, alimony or allowance in the nature of

alimony, in the same manner as it may enforce judgments in equity"); G. L. c. 208, § 37 ("After a judgment for alimony or an annual allowance for the spouse or children . . ."). The term has long been used, and while it is somewhat archaic, appearing more often in older opinions, see, e.g., Eldridge v. Eldridge, 278 Mass. 309, 314 (1932); Brown v. Brown, 222 Mass. 415, 416-417 (1916); Hill v. Hill, 196 Mass. 509, 518 (1907); Graves v. Graves, 108 Mass. 314, 317 (1871), the term has appeared in more recent opinions as well. See Chin v. Merriot, 470 Mass. 527, 534 n.11 (2015) (quoting § 37 and noting that statutory language has been in place "since at least 1860"); Barry v. Barry, 409 Mass. 727, 729-730 (1991).[3]

We doubt very much that the correct use of a term of art in written communication can be found to be objectively disrespectful, but in any event, here the father was never notified that the mother considered the term to be so. The father used the term three times over a three-year span. The mother did not reference his use of the term until her April 11, 2019 e-mail, and even then she did not state that she found the term disrespectful -- rather, her e-mail asserts that the father's use of the term was incorrect. The father used the

[3] Indeed the term appears, in a related context, in the current Child Support Guidelines. See Child Support Guidelines § I.A.11 (2018).

term only one additional time thereafter, and nothing about the context of that usage indicates disrespect. The judge's decision also mentions the "content and tone" of other of the father's e-mails, but it identifies no other specific e-mails. As a matter of law, on these facts, the father cannot be said to be in "clear and undoubted disobedience" of the provision requiring respectful written communications[4] between the parties. See Judge Rotenberg Educ. Ctr., Inc., 424 Mass. at 443.[5]

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[4] The father also suggests that the respectful communications provision was ambiguous, and that he could not be found in contempt because "reasonable parties can disagree as to what language objectively qualifies as 'respectful' versus 'disrespectful' and what is or is not considered 'businesslike' communication." See Judge Rotenberg Educ. Ctr., Inc., 424 Mass. at 443 (stating that party may not be found in contempt of ambiguous order). Ruling as we do, we need not address this issue, although we note that similar provisions are not uncommon in divorce judgments.

[5] Despite finding the father guilty of contempt, the judge imposed no sanction, stating in her order: "the Court declines to presently order that the Father pay a portion of the Mother's attorney's fees . . . . However, the Court reserves its right to issue an order imposing such attorney's fees and and/or [sic] other sanctions against the Father in the event that there is any new con-compliance [sic] with court orders."

The father argues that this ruling was error, because it "leave[s] open the possibility of ordering [father] to pay [mother's] attorney's fees relating to a complaint for contempt which had been adjudicated." We need not reach this argument; however, we do not read the order in the same way as the father. Rather, it seems clear that the judge "decline[d]" to award attorney's fees to the mother for the instant contempt complaint. The judge's order merely put the father on notice that any "new [n]on-compliance," with the newly clarified divorce judgment, might not receive the same treatment regarding "attorney's fees . . . and/or other sanctions."

2. The further orders of implementation. The father next argues that the judge abused her discretion when she entered the "clarify[ing]" order requiring the father to bring the child to the Sunday school program that the child had historically attended, even during the father's parenting weekends. We perceive no abuse of discretion.

The issue the mother raised required the judge to attempt to harmonize several arguably conflicting provisions of the divorce judgment. Paragraph 4 of that judgment provided that the mother would have "final decision-making authority after receiving input from the Father" "over any major decision concerning the health, educational and general welfare of the minor child." Paragraph 5, in turn, defined "major decisions" to include a "change in . . . religious instruction." Taken together, these sections indicated that the father could not unilaterally change the child's Sunday school religious instruction, since that was a "major decision" as to which the mother had final authority.

On the other hand, paragraph 9 of the divorce judgment stated that "Father shall have parenting time" on alternate weekends, from Friday evening until Sunday evening at 7 P.M., and paragraph 7 stated that "[n]either parent shall schedule the child for an activity or appointment that occurs during the other parent's parenting time unless mutually agreed." In the

father's view, the contention that he must bring the child to Sunday school during his parenting time was inconsistent with both paragraph 9 and paragraph 7, particularly where the mother was teaching the Sunday school. The father also argued that the mother's decision-making power merely granted her the authority to choose that the child be raised Christian, rather than the authority to decide which specific church or course the child must attend.

While the judge did not find the father in contempt, one of her further orders aimed to resolve the above ambiguities. The order stated that the mother's "final decision-making" authority regarding the child's "educational activity" included the authority to require the father to bring the child to the Sunday school during his parenting weekends, unless the father was scheduled to have parenting time for four or more consecutive overnights. The judge concluded that her order did not "unreasonably burden the Father's parenting time."

The father's argument on appeal is twofold. First, he argues that the judge's order "modified" a prior custody order, and that such was error where the judge failed to make the necessary finding of a "material and substantial change in circumstances." See G. L. c. 208, § 28. We do not agree, however, that the judge's order is properly characterized as a modification of custody. Rather, the ambiguities discussed

above have been present in the divorce judgment from the beginning; the divorce judgment implicitly contemplated that the child's religious instruction would continue as it had historically, since any "change in . . . religious instruction" was a "major decision" ultimately committed to the mother's authority. While the father's parenting time was also set forth in the divorce judgment, the arguable conflict between the father's parenting time and the child's religious instruction during the father's parenting weekend merely gave rise to an issue that the judge, in her discretion, needed to resolve. The judge's order thus clarified the parties' obligations, and we perceive no abuse of discretion in the judge's decision, as the judge plainly took into account the competing concerns, and made some provision for the father when he had extended overnights.

The father next argues that it was inappropriate for the judge to enter orders that construed or clarified the divorce judgment, in response to a complaint for contempt. Again, we disagree.

A judge may "implicitly" treat a complaint for contempt as a motion for clarification. Colorio v. Marx, 72 Mass. App. Ct. 382, 385 (2008) (court looks to substance of pleading rather than title to determine whether "fair notice [was given to father] of the basis and nature of the action against him"). This rule makes eminent sense, because complaints for contempt

will often arise out of disagreement as to what a judgment requires. Accordingly, where ambiguities exist in a divorce judgment, a "hearing [on a complaint for contempt] present[s] an opportunity for the judge to clarify . . . the meaning and requirements" of the judgment, and "[t]he judge [is] not precluded from issuing an order" clarifying the terms of a contested provision even where no finding of contempt is supported. Pedersen v. Klare, 74 Mass. App. Ct. 692, 698-699 (2009).

Here the judge's orders were permissible in response to the contempt complaint, as the "basis and nature of the action" put the father on notice that an adjudication of the contempt complaint might well result in a clarification of his obligations under the divorce judgment. Colorio, 72 Mass. App. Ct. at 386. See Pedersen, 74 Mass. App. Ct. at 699. Moreover, the judge had issued the original divorce judgment, and was "in a unique position to clarify what she meant" with respect to language that had become a point of contention. Poras v. Pauling, 70 Mass. App. Ct. 535, 543 (2007). While the result is an imposition on the father's parenting time, the judge considered the various relevant concerns, and also acknowledged that the issue might be revisited on the father's pending complaint for modification.

The finding that the father is guilty of contempt in paragraph 5 of the contempt judgment is reversed. In all other respects, the contempt judgment is affirmed.

So ordered.

By the Court (Meade, Englander & Grant, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: June 21, 2021.

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