

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-1209

C.O.

vs.

N.B.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

N.B. (father) appeals from an amended judgment issued by a judge of the Probate and Family Court addressing C.O.'s (mother's) complaint for modification and the father's counterclaim thereto. On appeal, the father's sole argument is that the judge abused his discretion in failing to grant the father sole legal custody of the parties' minor child. We affirm.

Background. The parties were never married; they have one child together. A judgment dated March 17, 2014, entered awarding the mother, by agreement, primary physical custody of the child and shared legal custody (2014 judgment); the 2014 judgment also included a parenting schedule. On August 21, 2017, the mother filed a complaint for modification seeking sole

legal custody, an increase in child support, and changes to the parenting schedule.

On January 9, 2018, the mother filed an amended complaint for modification (amended complaint) seeking, among other things, to suspend the father's parenting time based on allegations of sexual abuse of the child made against the paternal grandmother,¹ and the child's ingestion of poison while in the father's care. That same day, the mother sought and received an emergency order (January 9 order) suspending the father's parenting time until the criminal investigation concluded; a hearing on the motion was scheduled for the following week.

After a hearing on January 16, 2018, on the mother's motion to suspend the father's visitation, a further temporary order (January 16 order) entered vacating the January 9 order and reinstating the provisions of the 2014 judgment relating to the father's parenting time. In the January 16 order, the judge prohibited ("out of an abundance of caution") the paternal grandmother's unsupervised care of the child, and scheduled a review hearing on January 30, 2018, to further address the mother's motion and the father's opposition. Also on January 16, 2018, the Department of Children and Families (department)

¹ The mother later testified at trial that she may have "overreacted" in making the sexual abuse allegations.

interviewed the child regarding the sexual abuse allegations and, after later completing its investigation, did not support the allegations.²

In the meantime, the father filed a counterclaim to the mother's amended complaint, seeking, among other things, sole legal custody, primary physical custody, and termination of the child support order. As a basis for a change in circumstances, the father claimed that the child had entered school full time; that the mother had moved five times within three years and changed her cell phone number and email address numerous times making it difficult for him to contact her; that she had falsely accused him and the paternal grandmother of sexual abuse; that the child was often left by the mother in the care of a third party; and that the mother was unable to engage in healthy coparenting. Also, on January 25, 2018, the father filed an emergency motion to suspend the mother's parenting time; the motion was scheduled to be heard at the January 30 hearing, and the father's parenting time was extended until that date.

After a hearing on January 30, 2018, the judge issued further temporary orders that vacated the January 16 order in its entirety (including provisions relating to the paternal grandmother), granted the father temporary physical custody,

² The investigator's report was included with the department records that were admitted at trial as exhibit twenty-three.

maintained shared legal custody, ordered supervised parenting time for the mother with an appointed supervisor, suspended the father's child support obligation, and ordered the mother to engage in mental health services.³ On February 15, 2018, the judge appointed a Category E guardian ad litem (GAL) to conduct an investigation and make recommendations as to the appropriate custody arrangement and parenting schedule in the best interests of the child.

On August 2, 2018, the mother sought and received against the father an ex parte harassment prevention order pursuant to G. L. c. 258E. In her accompanying affidavit, she alleged that, in December 2014 ("and dates thereafter"), the father intimidated and harassed her by calling the local police to her home reporting a "domestic altercation," and made a similar report in July 2018, causing the mother to fear what the father would do next "and the impact it could have on [her] and [her] family." The order was terminated on August 10, 2018, at the hearing after notice.

³ The department's investigator testified at the January 30 hearing that, although her investigation into the alleged sexual abuse charges was not complete, she was concerned, as was the father, with the mother's parenting abilities based on her paranoid behavior; the investigator indicated that the mother needed to seek treatment for her mental health issues. The judge found credible the father's and the investigator's concerns.

On January 24, 2019, the judge issued further temporary orders (January 24 order) expanding the mother's parenting time and allowing for the visits to be supervised by the maternal grandparents. On August 19, 2019, the parties agreed that the mother could enjoy unsupervised parenting time, leaving the parenting schedule in the January 24 order otherwise unchanged.

In October 2018, the GAL submitted her final report to the judge. The report was based on interviews with each parent, the child, the department, the child's pediatrician, and certain collaterals named by the mother and the father. In the report, the GAL recommended, among other things, that physical custody of the child should remain with the father; that if shared legal custody continued, a parenting coordinator should be retained⁴; that, alternatively, if the judge deemed shared legal custody no longer appropriate, the father should be granted sole legal custody; that the mother's parenting time should continue with supervision by the maternal grandparents until such time as the father felt comfortable with unsupervised visits, and should include no overnight visits; and that the child should be enrolled in individual therapy to cope with the changes in her

⁴ The judge stated at trial that he likely would not appoint a parenting coordinator for use after trial, but that "it probably would make sense" to retain one if the parties could agree.

life. Although the GAL did not testify at trial, her report was admitted as an uncontested exhibit.

After three nonconsecutive days of trial occurring in August and September 2019, at which both the mother and the father were represented by counsel, on January 6, 2020 (nunc pro tunc to December 6, 2019),⁵ the amended judgment issued on the mother's amended complaint and the father's counterclaim. The mother's motion to dismiss her amended complaint was allowed and her complaint was dismissed. As to the father's counterclaim, it was ordered that the father have primary physical custody, with unsupervised parenting time for the mother, and that shared legal custody continue.

Although the father claimed that the parties could not effectively coparent the child, the judge found this assertion not credible. The judge also determined that the mother's mental health issues (the topic of much of the testimony and evidence at trial) had not affected her ability to parent the child or to coparent with the father. The judge found that the parents successfully worked together in securing counseling for the child, "as well as other aspects of parenting," and had been respectful to each other in the child's presence; the parents

⁵ On January 6, 2020, the father's motion to alter or amend the December 6, 2019 judgment was allowed (nunc pro tunc to December 6) only as to the parenting schedule for Christmas Eve and Christmas day.

had on two occasions together participated in Halloween trick-or-treating with the child. The judge did find the father "controlling in some ways" and that sometimes he wanted things "his way, and his way alone." The judge instructed that inappropriate conversations with the child by both parents needed to cease.

The amended judgment further provided a detailed parenting plan for the mother, occurring unsupervised, as agreed to by the father, including a schedule for holidays, vacations, and when the father was required to travel. The judge declined to follow the recommendation of the GAL to continue with the mother's supervised parenting time, finding that the mother had never placed the child in harm's way and always prioritized the child's best interests; the judge did not find credible the father's assertions that the mother put the child in risky situations. In addition, the father's child support obligation was terminated, and the mother was ordered to pay \$40 in weekly child support to the father. The parties were ordered to keep each other informed as to current contact information, and the family was instructed to utilize a shared scheduling application to keep track of the child's medical appointments, school information, and extracurricular activities to assist the parties in coparenting. All provisions of the 2014 judgment not modified were reaffirmed and remained in full force.

Discussion. The father's sole argument on appeal is that the judge abused his discretion in maintaining shared legal custody of the child. He does not specifically challenge any of the judge's written findings or claim legal error. However, in supporting his argument, the father contends there was overwhelming evidence as to the mother's animosity toward the father affecting her ability to coparent, that her mental health issues prevented her from acting in the child's best interests and placed the child at risk, that the mother's frequent moves disqualified her from having joint legal custody, and that the judge erred in finding the father's behavior controlling. We address each of the father's arguments in turn.

"Shared legal custody carries 'mutual responsibility and involvement by both parents in major decisions regarding the child's welfare including matters of education, medical care and emotional, moral and religious development'" (citation omitted). Mason v. Coleman, 447 Mass. 177, 181-182 (2006). A judge may modify legal custody upon finding that modification is in the child's best interests. See G. L. c. 209C, § 10 (a). "The determination of which parent will promote a child's best interests rests within the discretion of the judge . . . [whose] findings . . . 'must stand unless they are plainly wrong.'" Macri v. Macri, 96 Mass. App. Ct. 362, 369 (2019), quoting Hunter v. Rose, 463 Mass. 488, 494 (2012). "[F]or joint custody

or shared responsibility to work, both parents must be able mutually to agree on the basic issues in child rearing and want to cooperate in making decisions for [their] child[]." Macri, supra, quoting Rolde v. Rolde, 12 Mass. App. Ct. 398, 404 (1981). "We review custody determinations for an abuse of discretion." Macri, supra.

First, the judge declined to hold the mother exclusively responsible for hostility between the parties and did not credit the father's position or testimony that the parties had been unable to effectively coparent. The record supports the judge's specific findings that the mother's frequent changes in telephone numbers and e-mail addresses did not affect the parties' coparenting; that the parties worked cooperatively in agreeing that the child should participate in counseling and together obtained a provider; that, despite the issues between the parties, they had always been respectful of each other in the child's presence; and that the parties amicably participated in certain holidays together. The mother testified that she could continue to coparent with the father.⁶ "Findings of fact

⁶ The father misconstrues the GAL's recommendations for legal custody. In her report, the GAL stated that "[s]hould the [c]ourt decide to keep legal custody shared," she recommended that a parenting coordinator be appointed; or if the judge decided that "co-parenting at this time is unrealistic," she recommended that legal custody be granted to the father. However, the judge declined to adopt the GAL's recommendations, as was his prerogative, because "[w]hile a judge may consider a

shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge [] the credibility of the witnesses." J.S. v. C.C., 454 Mass. 652, 657 (2009), quoting Mason, 447 Mass. at 186.

Second, although the mother's mental health issues were a topic of concern at trial, the judge determined that those issues did not affect the mother's ability to successfully coparent. In particular, the judge found that the mother was compliant with her mental health treatment and concluded that, despite exhibiting behavior linked to her mental health issues, she was able to parent the child without risk, made the child's best interests a priority, and was able to coparent with the father. Testimony from the parenting time supervisor and the maternal grandmother supported the judge's conclusions.⁷ "[T]he judge's factual findings and the conclusions [he] drew are supported by the evidence presented at trial and were well within [his] discretion to make." J.S., 454 Mass. at 657-658.

GAL's recommendations, the judge is required, as [he] did here, to draw [his] own conclusions in deciding the case." D.B. v. J.B., 97 Mass. App. Ct. 170, 182 (2020).

⁷ In addition, the psychologist that conducted the psychological evaluation on the mother provided expert testimony opining that the mother's personality disorder diagnosis was "questionable" and that she, in fact, "ha[d] no personality disorder" or any mental health impairment that would affect her parenting ability.

Third, the mother's frequent moves over the specified three-year period (beginning in 2017) appear to have no bearing on the determination of legal custody. Contrast E.K. v. S.C., 97 Mass. App. Ct. 403, 409 (2020) (mother's inability to act in best interests of child demonstrated by her decisions relating to child's health and educational needs and inappropriate parenting decisions). The scant testimony relating to the mother's various moves within a short time period lacked any detail as to the reason for the moves and failed to demonstrate how those moves affected the mother's ability to coparent. Her final move to the maternal grandmother's home in Pembroke put an end to the mother's housing instability, a concern that more readily affected shared physical custody and not legal custody.

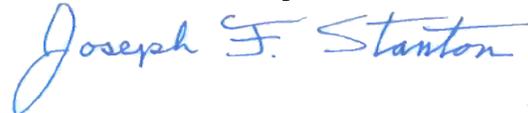
Finally, there is sufficient support in the record to demonstrate that the father's behavior appeared "controlling," as the judge found. The mother testified, as did the father, that the father kept a detailed journal or log of parenting time the mother allegedly missed (contradicted by the mother), and that the father frequently listened in on conversations between the mother and the child to determine to his satisfaction the appropriateness of those conversations. In December 2017, the father began involving the maternal grandmother in his disputes with the mother, inappropriately sending emails to the maternal grandmother's work email after being asked several times by the

mother to stop. Based on that evidence, the judge could reasonably characterize the father's behavior as controlling. See J.S., 454 Mass. at 657-658.

"Contrary to the father's characterization of the judge's decision, we conclude that it represents a thorough, careful examination and evaluation of the trial evidence, reflecting a balanced weighing of facts and independent judgment." J.S., 454 Mass. at 659. Although the judge ultimately reached a conclusion that is contrary to the father's view of the facts of this case, the judge was entitled to do so. See id. After careful review, we discern no error or abuse of discretion in the judge's decision to maintain the parties' joint legal custody of the child.⁸

Amended judgment affirmed.

By the Court (Milkey,
Lemire & Singh, JJ.⁹),



Clerk

Entered: September 8, 2021.

⁸ The mother's request for double costs and appellate attorney's fees is denied.

⁹ The panelists are listed in order of seniority.