

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

21-P-341

STEPHANIE MCCREA

vs.

JOSEPH CLAYTON.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Stephanie McCrea, appeals from an order of the Probate and Family Court denying her motion to alter or amend a modification judgment requiring her to pay child support of \$129 per week to the father of their child, the defendant, Joseph Clayton.¹ For the reasons that follow, we conclude that the order denying the motion must be vacated. Consequently, we

¹ McCrea did not appeal from the underlying modification judgment. However, she did file a timely appeal from a sua sponte order dated February 22, 2021, that vacated the erroneous dismissal of Clayton's counterclaim for modification and "enter[ed]" a judgment on the counterclaim. A corrected modification judgment issued the same day, nunc pro tunc, which was substantively identical to the modification judgment. Given our conclusion that the judge abused his discretion in denying McCrea's motion to alter or amend the modification judgment, we need not address the appeal from the sua sponte order dated February 22, 2021.

remand the case to the Probate and Family Court for specific findings regarding McCrea's earning capacity.

Background. The parties are the parents of one child who currently resides with Clayton in Massachusetts. McCrea, who currently resides in Oregon, pleaded guilty to various criminal offenses and was sentenced to a term of incarceration. She was released from prison in November 2018. In August 2019, McCrea filed a complaint for modification of a foreign decree (Washington State), seeking to establish a parenting time schedule with the child. A hearing on the merits was held on July 7, 2020. The parties came to an agreement regarding the parenting schedule; however, they disagreed regarding Clayton's request for child support. Clayton argued that McCrea, who was unemployed, should be required to pay child support based on an attributed income consistent with full-time, minimum-wage employment. McCrea asserted that her status as a felon and the lack of job opportunities due to the COVID-19 pandemic prevented her from obtaining employment.

On November 5, 2020, a modification judgment issued that required McCrea to pay child support of \$129 per week. The judge attributed minimum-wage income to McCrea and found "no reason to deviate from the Child Support Guidelines" (guidelines) and "that the amount ordered is in the best interest of the minor child." The judge made no specific

findings regarding attribution of income. McCrea then filed a motion to alter or amend the modification judgment in which she asserted that the judge erred by attributing full-time, minimum-wage income to her without making the required finding that she could earn more with reasonable effort as required by various provisions of the applicable guidelines and pertinent case law. The motion included a detailed affidavit and documentation of McCrea's efforts to obtain employment. As noted, that motion was denied.

Discussion. McCrea's motion to alter or amend the modification judgment was essentially a motion for reconsideration, which we review for abuse of discretion. See Raheman v. Raheman, 59 Mass. App. Ct. 915, 916 (2003). We agree, as McCrea argues, that the judge erred in attributing full-time, minimum-wage income to her without making the required finding that she could earn more with "reasonable effort." See Massachusetts Child Support Guidelines § I(E)(1) (2018) ("Income may be attributed where a finding has been made that either parent is capable of working and is unemployed or underemployed" [emphasis added]).² See also Emery v. Sturtevant,

² In attributing income, "[t]he Court shall . . . consider the specific circumstances of the parent, to the extent known and presented to the Court, including, but not limited to, the assets, residence, education, training, job skills, literacy, criminal record and other employment barriers, age, health, past employment and earnings history, as well as the parent's record

91 Mass. App. Ct. 502, 511 (2017) ("neither this court nor the Supreme Judicial Court has affirmed an attribution of income made without a finding concerning the party's reasonable efforts to secure employment" [citation omitted]); Massachusetts Child Support Guidelines § I(E)(2) (2018) ("If the Court makes a determination that either parent is earning less than he or she could earn through reasonable effort, the Court should consider potential earning capacity rather than actual earnings in making its child support order").

Here, the absence of findings for attribution of income as required by the guidelines warrants the conclusion that the order denying McCrea's motion to alter or amend the modification judgment must be vacated. Accordingly, the case is remanded to the Probate and Family Court for specific findings regarding

of seeking work, and the availability of employment at the attributed income level, the availability of employers willing to hire the parent, and the relevant prevailing earnings level in the local community" (emphasis added). Massachusetts Child Support Guidelines § I(E)(3) (2018).

McCrea's earning capacity. Consideration should be given to the materials submitted by McCrea in support of her motion.

So ordered.

By the Court (Vuono,
Sullivan & Kinder, JJ.³),



Clerk

Entered: January 11, 2022.

³ The panelists are listed in order of seniority.