18-P-729 Appeals Court

THEODORE W. MACRI, JR. vs. SHEILA MARY MACRI.

No. 18-P-729.

Middlesex. February 4, 2019. - November 1, 2019.

Present: Green, C.J., Agnes, & Desmond, JJ.

Divorce and Separation, Alimony, Child support, Child custody, Modification of judgment. Parent and Child, Child support, Custody. Evidence, Earning capacity.

Complaint for divorce filed in the Middlesex Division of the Probate and Family Court Department on July 25, 2011.

Following review by this court, 89 Mass. App. Ct. 1115 (2016), the case was heard by Patricia A. Gorman, J.

Susan E. Stenger for the husband.
Rachael M. Soun (David E. Cherny also present) for the wife.

DESMOND, J. Theodore W. Macri, Jr. (husband), the former spouse of Sheila Mary Macri (wife), appeals from a Probate and Family Court judgment, dated January 12, 2018, entered after remand (remand judgment), challenging (1) the amount of income attributed to him, (2) the amount of unallocated support

(combined alimony and child support) awarded to the wife, and (3) the transfer of sole legal custody of the parties' child to the wife. We affirm.

Background. The parties, who married in May of 1998, lived in New York City until the husband's employer, Deutsche Bank, promoted him to a position in Singapore in April of 2000. In 2005, the husband was transferred to Hong Kong, where he remained until his resignation from Deutsche Bank in 2011. Between 2008 and 2011, the husband's annual earnings at Deutsche Bank ranged from $751,680 to $1,034,028. The wife initiated divorce proceedings in Hong Kong in 2008 and was permitted to relocate to Massachusetts with the parties' child in August of 2010. The husband moved to Massachusetts in 2011 and filed complaints regarding child support and custody in the Probate and Family Court. A four-day trial was held before a judge of the Probate and Family Court, concluding in September of 2012.

A judgment, dated December 31, 2013 (as amended on May 28, 2014), issued in which the judge (1) granted the parties joint legal custody of their child, (2) attributed an annual income of $400,000 to the husband, who was unemployed at the time of the trial, and (3) ordered the husband to pay unallocated support of $10,000 per month. The husband appealed from the amended judgment, principally challenging the amount of income attributed to him. This court vacated so much of the amended

judgment as set forth the unallocated support order and remanded the matter for a redetermination of the husband's earning capacity, stating that the attributed annual income of $400,000 was "inappropriate" insofar as it was "base[d] [on] the husband's . . . earnings he made from another country" without "any expert testimony on the husband's earning potential in the United States" or on any "comparable salaries." Macri v. Macri, 89 Mass. App. Ct. 1115 (2016). The wife thereafter filed a counterclaim seeking to modify legal custody, which was consolidated with the remanded support matter and tried over the course of two days before the same judge in December of 2017. Dr. Peter Cohen, a "vocational consultant" retained by the wife to assess the husband's earning capacity, was permitted to testify as an expert witness and his report was entered into evidence at the trial.

The judge issued the remand judgment, dated January 12, 2018, granting sole legal custody to the wife and ordering the husband to pay unallocated support of $10,000 per month (retroactive to January 1, 2014). The judge found that the husband had not exercised reasonable efforts to obtain appropriate employment and attributed to him an annual income of $440,400 for 2014 to 2016, and $475,000 for 2017. The present appeal by the husband followed.

Discussion. The husband challenges the amount of attributed income, the amount of unallocated support, and the modification of legal custody. We address his arguments in turn.

1. Attribution of income. The husband contends that the amount of income attributed to him, in excess of $400,000 per year, rests on insufficient evidence. We disagree.

"Both the [Alimony Reform Act (act), G. L. c. 208, §§ 48-55,] and the [Massachusetts Child Support Guidelines (Guidelines)] permit a judge to attribute income to a party who 'is unemployed or underemployed.'" Emery v. Sturtevant, 91 Mass. App. Ct. 502, 509 n.10 (2017), quoting G. L. c. 208, § 53 (f); Guidelines § I(E) (2013).[1] Before considering a supporting spouse's potential earning capacity, rather than the spouse's actual income, the judge must determine that the spouse is capable of earning more with "reasonable effort." Emery, supra at 509. See Guidelines § I(E) (2013); Guidelines § I(E)(2) (2017).[2] In making such a determination, the judge is required

[1] The "attribution of income in the alimony context is not different in rationale from that in the child support context." C.D.L. v. M.M.L., 72 Mass. App. Ct. 146, 153 n.5 (2008). See G. L. c. 208, § 53 (b) (for purposes of calculating alimony "income shall be defined as set forth in the [Guidelines]").

[2] Here, the judge properly applied the 2013 Guidelines when determining the husband's earning capacity for 2014 to 2016, and the 2017 Guidelines when determining the husband's earning capacity for 2017.

to consider several factors, including the supporting spouse's "assets, residence, education, training, job skills, literacy, criminal record and other employment barriers, age, health, past employment and earnings history, as well as the [spouse's] record of seeking work, and the availability of employment at the attributed income level, the availability of employers willing to hire the [spouse], and the relevant prevailing earnings level in the local community." Guidelines § I(E)(3) (2017).[3]

Here, the judge's findings reflect consideration of all factors required by the Guidelines. The husband was fifty-one years old and in good health at the time of the remand trial. The husband had worked in the financial sector for over twenty-five years, holding a variety of titles, including vice president, director, managing director, general manager, and senior consultant. After leaving Deutsche Bank and returning to the United States in 2011, the husband remained unemployed until February of 2013, when he began working as a consultant for SC Lowy. The husband's position at SC Lowy required him to divide his time evenly between Boston and New York, and paid an annual

[3] Section I(E) of the 2017 Guidelines include certain additional factors not listed in § I(E) of the 2013 Guidelines. See Guidelines § I(E) (2013) ("The Court shall consider all relevant factors including without limitation the education, training, health, past employment history of the party, and the availability of employment at the attributed income level").

salary of $125,000. The husband voluntarily terminated his employment with SC Lowy on April 13, 2016, and although he claimed to have been searching for a job since that time, the judge did not find the husband's "stated desire to find employment . . . sincere." The judge found the husband had not exercised reasonable efforts to secure appropriate employment, noting that he "could not remember the names of executive search firms he had worked with, did not join job clubs or respond to advertisements in professional journals; and more often than not, forwarded his resume by e-mail rather than contacting individuals at companies directly."[4] Cf. Emery, 91 Mass. App. Ct. at 503 (reversing income attribution where husband accepted substantially lower-paying position in his field of expertise after extensive job search).

The judge credited Dr. Cohen's assessment that, based on the husband's education, training, and transferable skills, the husband fell within the category of a "long-range planning executive," and was "highly employable" in a wide range of positions in the financial sector. The judge credited Dr. Cohen's determination that, as of November, 2017, there were a total of 5,014 available positions in the Boston area involving

[4] Indeed, when testifying at the trial on remand, the husband could not recall the name of a single recruiter with whom had he spoken in the past year.

fixed income, corporate finance, and alternative investments (positions which the husband specifically claimed to be searching for).[5] The judge further credited Dr. Cohen's opinion that the husband's annual earning capacity was $440,400 from 2014 through 2016, and $475,000 in 2017, based on average reported earnings for "long-range planning executive[s]" in the Boston area.[6] The judge therefore concluded that the husband had been "underemployed" while working for SC Lowy, and had remained "unreasonably unemployed" since leaving that position.

The husband challenges the judge's reliance on Dr. Cohen's analysis, contending that there was no evidence of any available positions listing an annual compensation of over $400,000. The judge, however, "was not required to point to a specific

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[5] Dr. Cohen also determined that there were 17,273 job listings for positions involving fixed income, corporate finance, alternative investments, and distressed debt in the New York City area as of November, 2017.

[6] These figures were derived from wage data compiled by the Economic Research Institute (ERI), a "database for up-to-date market compensation information" used by most Fortune 500 companies and various United States government agencies, including the Internal Revenue Service. ERI's wage data revealed "mean annual earnings for the Boston Metropolitan area" of $440,400 in 2014 and $475,000 in 2017, for "job titles related to a 'long-range planning executive,'" including "Client Manager; Financial Consultant; Financial Services Representative; Financial Specialist; Investment Officer; Personal Banker; Registered Representative; Relationship Banker; Relationship Manager; Select Banker Planning/Development; Vice President Planning Executive; and Vice President Planning & Development."

position or job opening" when attributing income to the husband. C.D.L. v. M.M.L., 72 Mass. App. Ct. 146, 157 (2008). As Dr. Cohen explained at the trial, the current job postings he reviewed generally did not disclose compensation, thus he researched wage data for long-range planning executives in the Boston area for 2014 and 2017 when forming his opinion of the husband's earning capacity. The husband did not present his own expert witness to rebut Dr. Cohen's testimony. On this record, we discern no abuse of discretion in the judge's decision to credit Dr. Cohen's analysis and ultimate opinion of the husband's earning capacity. See Ulin v. Polansky, 83 Mass. App. Ct. 303, 307-308 (2013) ("Trial judges have 'extensive discretion' with respect to the admission of expert testimony, . . . and are free as fact finders to accept or reject that testimony once admitted, as did the judge in this case"). We are therefore satisfied that the judge's findings demonstrate appropriate consideration of "the availability of employment at the attributed income level, the availability of employers willing to hire the [husband], and the relevant prevailing earnings level" in the Boston area. Guidelines § I(E)(3) (2017).

We also discern no merit in the husband's contention that the judge, in relying on Dr. Cohen's analysis, failed to take into account certain factors impeding the husband's ability to

obtain employment. The judge found there were no "barriers to [the husband] finding full-time employment," declining to credit the husband's assertion that his job prospects were limited by his age, background in Asian debt, and lack of an established Boston network. As there is nothing in the record convincing us that this credibility determination was "plainly wrong," we will not disturb it (citation omitted). Zaleski v. Zaleski, 469 Mass. 230, 237 (2014).

To be sure, this case is "distinguishable from the voluntary career change line of cases," Emery, 91 Mass. App. Ct. at 510, involving a party who has "taken an early retirement, or has chosen to pursue work in a totally unrelated field at a substantially reduced salary, despite the availability of higher-paying jobs commensurate with that party's education, training, and experience." Id. at 509. We have previously said that the voluntariness of a career change is not dispositive for purposes of income attribution, see id. at 510 n.12, 511, and we do not suggest here that a party is foreclosed from making a good faith, voluntary career change simply because the change results in less income.[7] The relevant inquiry in all income

[7] As we noted in Emery, "[i]t is neither reasonable nor fair to expect [a party], after . . . ha[ving] engaged in an extensive job search in his [or her] field of expertise and ha[ving] secured employment commensurate with his [or her] training and experience, to continue his [or her] job search

attribution cases, i.e., whether the party "could earn more with reasonable effort," id. at 511, requires consideration of the party's "specific circumstances," including a broad list of factors specified in the Guidelines. Guidelines § I(E)(3) (2017). The weight afforded to each factor is a matter within the trial judge's discretion, and depending on the circumstances of a particular case, certain factors may be weighed more heavily than others. See, e.g., Schuler v. Schuler, 382 Mass. 366, 374-375 (1981). Here, the judge carefully considered the husband's "specific circumstances," Guidelines § I(E)(3) (2017), and concluded that he could earn more with "reasonable effort." See Guidelines § I(E) (2013); Guidelines § I(E)(2) (2017). In light of the record before us, we discern no abuse of discretion in that conclusion. Cf. P.F. v. Department of Revenue, 90 Mass. App. Ct. 707, 711 (2016).

2. Unallocated support. The husband contends that the unallocated support award of $10,000 per month, encompassing both alimony and child support, substantially exceeds the needs of the wife and the child. We disagree.

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efforts indefinitely to avoid the risk of income attribution." Emery, 91 Mass. App. Ct. at 512.

An alimony award is generally limited to the recipient's need for support. See G. L. c. 208, § 53 (b).[8] If the supporting spouse has the ability to pay,[9] the recipient's "need" is typically the amount required "to maintain the lifestyle he or she enjoyed prior to termination of the marriage." Young v. Young, 478 Mass. 1, 6 (2017), quoting Pierce v. Pierce, 455 Mass. 286, 296 (2009). Child support, although "calculated as a percentage of parental income," M.C. v. T.K., 463 Mass. 226, 232 (2012), is also rooted in a determination of need, which is "defined, at least in part, by the[] parents' standard of living." Brooks v. Piela, 61 Mass. App. Ct. 731, 737 (2004). See Guidelines, Principles (2017) (child support should "meet[] the child's survival needs in the first instance, but, to the extent either parent enjoys a higher standard of living, allow[] the child to enjoy that higher standard").

Here, the judge found the parties enjoyed an "upper-class" standard of living for most of the marriage, although neither

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[8] "[T]he amount of alimony should generally not exceed the recipient's need or 30 to 35 per cent of the difference between the parties' gross incomes." G. L. c. 208, § 53 (b).

[9] The judge found that, based on the husband's attributed income, he has the ability to pay the unallocated support order of $10,000 per month while meeting his own living expenses. As this finding is not clearly erroneous, we decline to disturb it. See Millennium Equity Holdings, LLC v. Mahlowitz, 456 Mass. 627, 636-637 (2010) (finding "clearly erroneous" where it leaves reviewing court with "definite and firm conviction that a mistake has been committed" [citations omitted]).

party had been able to maintain that elevated lifestyle upon returning to the United States.[10] The judge found that both the wife and the child required support to maintain their "current" lifestyle (as reflected in the wife's weekly living expenses of $3,751.85), and that the "minimum presumptive order" under the Guidelines was not "appropriate in this case."[11] Although the husband claims the unallocated support order is excessive, the wife's financial statement reveals a net deficit of approximately $2,240 per week.[12] Accordingly, we cannot reasonably say the unallocated support award of approximately $2,308 per week ($10,000 per month) is "excessive" or "not rationally related to the reasonable needs" of the wife and the

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[10] While living in Asia, the parties were members of various private clubs, employed a live-in housekeeper, traveled internationally six to eight times per year staying at luxury resorts, dined out in "moderate to expensive" restaurants two to three times per week, enjoyed regular grooming and spa services, purchased bespoke and high-end clothing, and enrolled the child exclusively in private schools.

[11] In cases where the parties' combined annual income exceeds $250,000, the judge "should consider the award of support at the $250,000 level as the minimum presumptive order" and additional child support may be awarded at the judge's discretion. Guidelines § II(C)(2) (2017). Here, the judge found the monthly "minimum presumptive order" was $3,012 for 2014 to 2016 (calculated under the 2013 Guidelines), and $2,604 for 2017 (calculated under the 2017 Guidelines).

[12] The wife's financial statement reflects weekly gross income of $3,583.55 (salary and bonuses), deductions from pay of $2,071.35 (including health insurance, taxes, and retirement), and living expenses of $3,751.85.

child. Cooper v. Cooper, 62 Mass. App. Ct. 130, 136 (2004). We therefore discern no abuse of discretion in the amount of unallocated support ordered by the judge. See J.S. v. C.C., 454 Mass. 652, 660 (2009) (support awards reviewed for abuse of discretion).[13]

3. Legal custody. The husband contends that the modification of legal custody was improper as the judge's findings fail to demonstrate the existence of a material change in circumstances. See G. L. c. 208, § 28.[14]

We review custody determinations for an abuse of discretion. Schechter v. Schechter, 88 Mass. App. Ct. 239, 245 (2015).[15] "In custody matters, the touchstone inquiry [is] . . . what is 'best for the child.'" Hunter v. Rose, 463 Mass. 488, 494 (2012), quoting Custody of Kali, 439 Mass. 834, 840 (2003). See G. L. c. 208, § 28. "The determination of which parent will promote a child's best interests rests within the discretion of

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[13] "[A] judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made 'a clear error of judgment in weighing' the factors relevant to the decision, . . . such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

[14] A judge may modify custody upon finding "a material and substantial change in the circumstances of the parties has occurred and the judgment of modification is necessary in the best interests of the child[]." G. L. c. 208, § 28.

[15] See note 13, supra.

the judge . . . [whose] findings . . . 'must stand unless they are plainly wrong.'" Hunter, supra, quoting Custody of Kali, supra at 845. "[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] children" (quotation omitted). Rolde v. Rolde, 12 Mass. App. Ct. 398, 404 (1981).[16]

Here, the judge found that the parties' "significant difficulty" communicating with each other "ha[d] not improved" since the first trial in 2012. The judge described several instances of recent conflict between the parties, two of which concerned the child's unsuccessful application to ten private high schools for the 2017-2018 academic year. The judge found that the husband refused to consent to the child working with an educational consultant retained by the wife and unilaterally chose to include sensitive information regarding the child in the applications, over the wife's objection. The judge found that both decisions by the husband were contrary to the child's best interests and demonstrated that he was "unable to put [the child's] needs first in regard to his communication and

[16] "Shared legal custody" is defined as "continued 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." G. L. c. 208, § 31.

decision-making with [the wife]." The judge found that "[t]he parties' continued inability to communicate," as illustrated by the aforementioned incidents, constituted a "material and substantial change in circumstances," and that it was in the child's best interests to grant the wife sole legal custody. The husband claims there was no material change in circumstances because the parties' communication issues already existed at the time of the 2013 judgment. The judge, however, permissibly found that the parties' ongoing conflict had become contrary to the child's best interests as of 2017, thus warranting a modification of legal custody. See Rosenthal v. Maney, 51 Mass. App. Ct. 257, 262 (2001) (inferring material change in circumstances from best interests determination). We therefore discern no abuse of discretion in the judge's decision to grant sole legal custody to the wife. See Carr v. Carr, 44 Mass. App. Ct. 924, 925 (1998), cert. denied, 525 U.S. 1073 (1999) (joint legal custody not appropriate where "the relationship of the parties has been dysfunctional, virtually nonexistent, and one of continuous conflict").[17]

[17] To the extent we do not address the husband's other contentions, they "have not been overlooked. We find nothing in them that requires discussion" (citation omitted). Commonwealth v. Brown, 479 Mass. 163, 168 n.3 (2018).

Conclusion. The remand judgment dated January 12, 2018, is affirmed.[18]

So ordered.

[18] The wife's request for appellate attorney's fees is denied.