19-P-175 Appeals Court

MELISSA A. MICHELON vs. KURT W. DESCHLER.

No. 19-P-175.

Middlesex. November 5, 2019. - January 10, 2020.

Present: Rubin, Wolohojian, & Henry, JJ.

Probate Court, Divorce, Findings by judge. Divorce and Separation, Findings, Child custody. Practice, Civil, Findings by judge.

Complaint for divorce filed in the Middlesex Division of the Probate and Family Court Department on June 18, 2014.

The case was heard by William F. McSweeny, III, J.

Maureen McBrien for the mother.
Jennifer Koiles for the father.

WOLOHOJIAN, J. In this appeal from a judgment of divorce nisi, the central issue is whether the judge's findings, which were adopted essentially verbatim from the father's proposed findings and rationale, nonetheless evidence the required "badge of personal analysis" (citation omitted). Cormier v. Carty, 381

Mass. 234, 237 (1980). For the reasons we set out, we conclude they do not.

The parties were married on March 1, 2003, and have three children. The mother filed a complaint for divorce on June 18, 2014, pursuant to G. L. c. 208, § 1B, based on an irretrievable breakdown of the marriage. The husband answered and counterclaimed, seeking a divorce on the same grounds. The parties stipulated to temporary orders pertaining to the children's schedules, child support payments from the father, and the allocation of day care and extracurricular activities. Prior to trial, they also stipulated to various facts, including that "[R (the first child)] is entering the second grade and completed Kindergarten and first grade in the Hudson Public Schools. [C (the second child)] is entering Kindergarten this fall. [Z (the third child)] attends daycare at CHAPS Academy in Hudson, Massachusetts."

Also pretrial, the parties entered into two partial stipulations for judgment, which covered the children's holiday and vacation parenting schedules, the allocation of educational costs and expenses, health insurance and uninsured health expenses, the division of property (personal and real), life insurance, and income taxes. In short, all that was left for trial were the nonholiday and nonvacation parenting schedule, the question of joint legal custody over educational and

religious decisions,[1] and the question where the children were to go to school. After the trial (during which both parties testified[2]), the judge awarded equal parenting time to the parties, awarded joint legal custody, and ordered that the children be moved to the Sudbury school system. Judgment entered accordingly, and additionally incorporated the terms of the parties' partial stipulations for judgment.

On appeal, the mother argues that the judge abused his discretion in awarding equal parenting time to both parents, awarding joint legal custody over educational decisions, see note 1, supra, and ordering that the children be moved to the Sudbury school system. As a threshold matter, she also asserts that the judge's findings and rationale, which were adopted virtually verbatim from the father's submission, do not demonstrate that the judge independently evaluated the evidence.

Ordinarily, even where findings are recited verbatim from a party's proposal, we do not reject them out-of-hand if they are

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[1] The parties were awarded joint legal custody over the parties' unemancipated children. As provided in the divorce judgment, "The implementation of shared legal custody requires the [p]arties to consult and agree on major life decisions for the [c]hildren, including upbringing, education and major medical procedures." Below, the mother agreed to joint legal custody, except with respect to educational and religious decisions. Now, on appeal, the mother challenges legal custody only to the extent it concerns educational decisions.

[2] The mother's then-boyfriend also testified.

supported by the evidence. Care & Protection of Olga, 57 Mass. App. Ct. 821, 823-824 (2003). A judge's findings will not be disturbed unless they are clearly erroneous. Mass. R. Dom. Rel. P. 52 (a). "A finding is clearly erroneous . . . when there is no evidence to support it, or when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made'" (citation omitted). Care & Protection of Olga, supra at 824. However, "findings which fail to evidence a 'badge of personal analysis' by the trial judge must be subjected to stricter scrutiny by an appellate court" (citation omitted). Cormier, 381 Mass. at 237. The findings should show that the judge personally prepared them or "so reworked a submission by counsel that it is clear that the findings are the product of his independent judgment." Id. at 238. See Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep't of Mental Retardation (No. 1), 424 Mass. 430, 451 (1997) (findings evidenced by badge of personal analysis because judge rejected certain characterizations and heavily edited many findings); Anthony's Pier Four, Inc. v. HBC Assocs., 411 Mass. 451, 465 (1991) (findings are product of judge's independent judgment where judge deleted specific language from counsel's submissions, incorporated some of opposing counsel's proposed findings, and drafted findings and conclusions of his own);

Roche v. Boston Safe Deposit & Trust Co., 391 Mass. 785, 792 (1984) (where judge omitted many portions of counsel's submissions and added and condensed sentences, judge's findings had badge of personal analysis).

Here, the judge adopted verbatim the father's proposed findings of fact, only updating the ages of the children. The judge also by and large adopted the father's proposed rationale, deleting only four paragraphs and one sentence. The result of these deletions was to reject the father's characterizations of the mother's evidence. At the same time, the judge did not incorporate any of the mother's proposed findings on these points or otherwise make his own findings regarding that evidence, thus leaving a vacuum in the findings with respect to signification portions of the evidence. Notably the judge's findings and rationale are silent with respect to the troubling aspects of the mother's evidence, such as the father's alcohol consumption and his arrest for operating a motor vehicle while under the influence of alcohol, the episode regarding his alleged mistreatment of the family's ailing cat, his decision to allow R (a young child) to drive an all-terrain vehicle, the father's exposing the children to his multiple dating partners and enlisting them in helping him keep them from learning of each other, his watching pornography in the children's presence, the allegations of physical violence, and the ample evidence of

the parents' difficulties in communicating with each other regarding the children. The judge was not required to accept the mother's evidence, but the judge was required to deal with it; indeed much of it was uncontested. "Troublesome facts . . . are to be faced rather than ignored. . . . Only then is the judge's conclusion entitled to the great respect traditionally given to discretionary decisions." Adoption of Abby, 62 Mass. App. Ct. 816, 817 (2005), quoting Adoption of Stuart, 39 Mass. App. Ct. 380, 382 (1995).

In these circumstances, we are unable to assess the judge's order regarding parenting time or the award of joint legal custody over educational matters,[3] and these matters require

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[3] Shared legal custody is "generally appropriate only if the parties demonstrate an ability and desire to cooperate amicably and communicate with one another to raise the children." Mason v. Coleman, 447 Mass. 177, 182 (2006). Shared legal custody is "inappropriate for parents whose relationship to date has been 'dysfunctional, virtually nonexistent, and one of continuous conflict'" (citation omitted). Smith v. McDonald, 458 Mass. 540, 553 (2010).

> "Joint custody is synonymous with joint decision making and a common desire to promote the children's best interests. 'It is understandable, therefore, that joint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion,' Braiman v. Braiman, 44 N.Y.2d 584, 589-590 (1978) . . . . [I]n order to be effective 'joint custody requires . . . a willingness and ability to work together to reach results on major decisions in a manner similar to the way married couples make decisions.' Taussig & Carpenter, Joint Custody, 56 N.D. L. Rev. 223, 234 (1980)."

remand for further findings that address the difficult issues raised by the evidence. In addition, we are concerned by the complete absence of findings or explanation for the judge's order that the children attend the Sudbury school system (in which they had not previously been enrolled). Nothing in the findings or the rationale permit us to understand how the judge assessed the best interests of the children or the basis for the judge's conclusion that the children were best served by attending a new school system. Accordingly, the children's school placement also requires further findings.

For these reasons, so much of the divorce judgment as addressed the parenting schedule, the award of joint legal custody over educational matters, and the placement of the children into the Sudbury schools, is vacated. These issues are remanded for further proceedings as the judge in his discretion determines necessary, recognizing that circumstances since the time of the judgment may affect the judge's assessment of the children's best interests. The current provisions of the judgment will remain in effect until otherwise ordered in the trial court. The remainder of the judgment is affirmed.[4]

So ordered.

Mason, supra.

[4] We deny the father's request for appellate attorney's fees.