Doe v. Doe

Appeals Court of Massachusetts

September 4, 2013, Entered

12-P-1354

Reporter
2013 Mass. App. Unpub. LEXIS 884 *; 84 Mass. App. Ct. 1109; 993 N.E.2d 373

JANE DOE vs. JOHN DOE.[1]

Notice: DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 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 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.

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PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Prior History: Doe v. Doe, 83 Mass. App. Ct. 1111, 2013 Mass. App. Unpub. LEXIS 142 (2013)

Disposition: [*1] Judgment dated December 5, 2011, affirmed. Order dated March 22, 2012, denying postjudgment motions affirmed.

Judges: Cypher, Vuono & Meade, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

By a judgment of divorce nisi of the Probate and Family Court dated December 5, 2011, the former wife was awarded sole legal and physical custody of the parties' four ***children*** (ages six through ten) and was allowed to remove the ***children*** from Massachusetts to California. The former husband was granted visitation with the ***children*** and was ordered, among other things, to pay the wife $80 a month as ***child*** support. After the husband's motion for new trial pursuant to Mass.R.Dom.Rel.P. 59, and motion for relief from judgment pursuant to Mass.R.Dom.Rel.P. 60(b), were denied, the husband filed a notice of appeal from the divorce judgment. We affirm.

1. Background. The parties were married in 2001 and last lived together in early 2009. In June, 2009, the wife filed a complaint for divorce and, by temporary order, the husband was directed to pay $80 a month as ***child*** support. Visitation schedules providing the husband with parenting time were established by the court. Thereafter, there were a number of developments in [*2] the matter. In early 2010, the husband was diagnosed with stage three melanoma and, in the summer of 2010, he reportedly began a course of chemotherapy. Also in 2010, the wife and ***children*** were forced to move from the former marital home after the landlords, the husband's three brothers, evicted her and the ***children***. During the period of the parties' separation, the wife became engaged to a man who

[1] The case is impounded. We use pseudonyms for the parties.

lives in California.[2] The wife's fiancé has been paying all of the expenses of the wife and ***children***, including the wife's rent, car payment, car insurance, and food. In December, 2010, trial was scheduled for May 13, 2011. In January, 2011, the husband's then attorney withdrew from the case by motion. The husband, an attorney, has proceeded pro se.

On May 13, 2011, the day set for trial, the husband, without notice to the wife, requested a continuance due to poor health.[3] Among other things, the husband represented at the hearing on his motion that he had been on chemotherapy since August, 2010, that he was currently doing "chemo injections" (which the husband described as interferon therapy) [*3] every other day, and that the treatment gave him flu-like symptoms which, he stated, left him debilitated. The husband also indicated that as a result of his treatment, he had cognitive/short term memory loss issues. The wife's counsel opposed the motion.

After considering "all of the competing interests," the judge "reluctantly denied the motion."[4] Immediately following the denial, the husband became upset at the result, announced he was going home and thereupon left the courtroom. At the husband's request, the security officer in the lobby called for an ambulance, which transported the husband from the courthouse.

The case proceeded to trial without the [*4] husband's presence. The primary issues, the judge stated, were the legal and physical custody of the ***children***, the ***removal*** of the ***children*** to California, and a parenting plan.[5] In awarding the wife custody of the ***children***, the judge found that she has been the primary caretaker of the ***children*** all their lives and virtually their sole caretaker since the parties' separation in 2009. The judge also quoted from the Family Service Clinic report that "the ***children***'s school reported that [the wife] has a strong connection to her ***children*** and that the ***children*** are clean, well-nourished and on time for school." In addition, the judge made findings concerning, and explained his reasons for the allowance of the wife's request to remove the ***children*** to California (discussed infra).

Following the issuance of the judgment of divorce nisi dated December [*5] 5, 2011, the husband filed, in a single document, a motion for relief from judgment pursuant to Mass.R.Dom.Rel.P. 60(b) and a motion for new trial pursuant to Mass.R.Dom.Rel.P. 59. The motions, in large part, recount the husband's medical issues and allege that the husband's "battle with cancer did not allow him to fully defend himself or advocate for the judgment that he rightfully deserved."[6] After the motions were denied by the judge, the husband, as we have stated, filed a notice of appeal from the divorce judgment.[7],[8]

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[2] At trial, the wife's fiancé testified that he had known the wife for approximately twenty years.

[3] Although both parties state in their briefs that the husband moved orally for the continuance, the judge stated at the commencement of the hearing on the motion that the husband had "filed" a motion to continue the trial. The following entry dated May 13, 2011, also appears on the docket: "H's Motion for continuance of trial date." If a written motion was filed, it is not included in the appendix. We note that our decision does not turn on the point.

[4] The judge, as we shall discuss, made findings addressing the denial of the motion.

[5] The judge could not discern any issue regarding a division of assets, noting that the husband's financial statement (filed with the court on the day of trial but not admitted in evidence) listed no assets, and the wife's financial statement listed no assets other than an automobile purchased for the wife by her fiancé after the parties' separation.

[6] The husband attached as an exhibit to the motions a hospital record from May 13, 2011 (the date of trial). The document recites, inter alia, that after the husband left the courthouse he was taken by ambulance to the hospital emergency room where he complained of dizziness and received IV fluids. The husband was dismissed from the emergency room that same day. The husband also included as an exhibit a letter, on hospital letterhead and signed by a registered nurse, indicating that the husband discontinued his interferon therapy in late September, 2011, some four months after trial, because of severe side effects.

[7] The husband's appeal from the divorce judgment would [*6] appear to be properly before this court. The husband proceeds in his brief, however, as if it were the order denying his postjudgment motions that is before us. Where, as here, a party fails to list the order denying postjudgment motions as an issue in his notice of appeal, it has been held that the order is not before us for decision. See, e.g., Zeller v. American Safety Razor Corp., 15 Mass. App. Ct. 919, 920, 443 N.E.2d 1349 (1983); Rothkopf v.

2. [*7] The motion for continuance. "We review the judge's denial of the motion for continuance to see whether there has been abuse of discretion." Botsaris v. Botsaris, 26 Mass. App. Ct. 254, 256, 525 N.E.2d 1353 (1988). "Continuances shall be granted only for good cause . . ., Mass.R.Dom.Rel.P. 40(b) (1975), [and] '[t]he legitimate illness of a litigant is generally 'good cause' for granting a continuance.'" Ibid., quoting from Monahan v. Washburn, 400 Mass. 126, 129, 507 N.E.2d 1045 (1987). In ruling on a motion for continuance based on illness, a "judge is, of course, entitled to look at what has gone before and to consider the quality of supporting documentation." Ibid. See Hunnewell v. Hunnewell, 15 Mass. App. Ct. 358, 363-364, 445 N.E.2d 1080 (1983).

The husband argues that the judge abused his discretion in denying the motion for continuance as there is nothing in the record to suggest that the course of proceedings had been other than standard, there was no prior request for continuance, and his medical condition was well documented and hampered his ability to actively participate in the trial.

While we are sympathetic, as was the judge, to the husband's medical diagnosis, we cannot say that the judge abused his discretion in denying [*8] the motion for continuance. The husband's motion was made on the day of trial and without notice to the wife -- notwithstanding the husband's claim that he had long been experiencing the adverse effects of his treatment regimen. That aside, the judge properly could consider that despite the husband's illness, the husband presented no affidavits (medical or otherwise), or other medical documentation to support his position that he was unable to participate meaningfully at the trial. Contrast Botsaris v. Botsaris, 26 Mass. App. Ct. at 256-257 (where the medical documentation of wife's condition, which described wife as currently incapable of pursuing rigors of legal proceedings, was "complete and convincing").[9] Indeed, the judge had the opportunity to observe the husband in the courtroom and to hear his lengthy argument on the motion (in excess of twenty minutes). See id. at 257 (recognizing the importance of the judge's opportunity to observe the party requesting a continuance based on illness). The judge stated that he was unable to detect any memory loss during that argument and stated further that "there was nothing exhibited in the courtroom" which would have warranted the husband [*9] calling an ambulance. The judge also noted that the husband had been the defendant in a criminal jury case just two weeks prior to the date scheduled for the divorce trial and had been represented by privately retained counsel.

Consideration could also be given to the facts that this case (which involves, in large part, the custody and ***removal*** of the ***children***) had been pending for almost two years, that the trial had been scheduled for five months, that the husband, by his own choice, had not seen the ***children*** since January 2, 2011, and that the husband had difficulty in making a specific time request for the continuance.[10] See ibid. In addition, "[s]ome attention could be paid to the fact that the wife was ready with proof on the hearing date."[11] Hunnewell v. Hunnewell, 15 Mass. App. Ct. at 363-

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Williams, 55 Mass. App. Ct. 294, 295 n.2, 770 N.E.2d 493 (2002). But see Glidden v. Colby Assocs., 5 Mass. App. Ct. 900, 900, 370 N.E.2d 451 (1977). Nonetheless, we address the husband's arguments in his brief concerning the denial of the motion for continuance and the ***removal*** of the ***children*** from the ***Commonwealth***. Treating the order denying the postjudgment motions as being before us, on the arguments made, we do not disturb the order or the divorce judgment.

[8] The husband's motion to stay a portion of the judgment of divorce nisi was denied by the judge. The husband's motion in this court for a partial stay of execution of the divorce judgment was denied by the single justice. On the husband's appeal from the denial, the order of the single justice was affirmed. Doe v. Doe, 83 Mass. App. Ct. 1111 (2013).

[9] While the husband suggests in his brief that the wife, through counsel, could have accessed his medical records between December, 2010, and May, 2011, it was not her burden of proof.

[10] The judge stated in his memorandum of decision that "[o]n inquiry from the court, husband [*10] reported that it could be as long as six months from the termination of his chemotherapy to the point where he would be ready to proceed."

[11] In opposing the husband's motion, the wife's counsel stated, inter alia: "I've subpoenaed witnesses. I have a witness on call. I've prepared for trial all week. I've prepared my trial exhibits. . . . We've prepared today to go forward with trial."

364. Finally, the judge indicated that certain of the husband's actions during these proceedings were not in good faith.[12]

3. The ***removal*** of the ***children***. When, as in the present case, the party seeking ***removal*** is the sole physical custodian of the ***children***,[13] the judge must consider the request under the two-pronged test set out in Yannas v. Frondistou-Yannas, 395 Mass. 704, 711-712, 481 N.E.2d 1153 (1985). Smith v. McDonald, 458 Mass. 540, 547, 941 N.E.2d 1 (2010). The first consideration is whether there is a good reason for the move, a "real advantage." Yannas, 395 Mass. at 711. "The advantage may be economic; it may be support of family residing in another jurisdiction; or it may be any other 'good, sincere reason for wanting to remove.'" Pizzino v. Miller, 67 Mass. App. Ct. 865, 870, 858 N.E.2d 1112 (2006), quoting from Yannas, 395 Mass. at 711. See Altomare v. Altomare, 77 Mass. App. Ct. 601, 607-608, 933 N.E.2d 170 (2010). If it is determined that there is a good, sincere reason for the custodial parent wanting to remove to another jurisdiction, "the inquiry then turns to whether the move is consistent with the ***children***'s best interests." Pizzino v. Miller, 67 Mass. App. Ct. at 870. This involves a collective consideration of the interests of the ***children***, [*12] the custodial parent, and the noncustodial parent. Yannas, 395 Mass. at 711-712.

Here, the judge found, and the record supports, that the wife had a good, sincere reason for seeking to remove the ***children*** to California. The wife desired to live with her fiancé and would gain emotional support from the move. Both the wife and the ***children*** would also benefit financially from the relocation as the wife's fiancé provided all of their economic support.

The husband argues, however, that the judge failed to evaluate the "additional standards" under Yannas or to make any determination whether the ***removal*** of the ***children*** from the ***Commonwealth*** was in their best interests. In the husband's view, "[t]he only consideration made by the judge was the financial support that wife's boyfriend could provide."

Contrary to the husband's position, the judge indicated that he had "balanc[ed] all the interests in the case." As we have stated, the move to California would provide the wife with financial and emotional advantages.[14] Clearly, as the judge found, the move was in the wife's best interests. In determining the ***children***'s [*13] best interests, the judge considered not only the vital financial advantages to the ***children*** from the move,[15] but noted that the

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[12] Notably, the judge found that despite detailed orders establishing visitation in the case, the husband was inconsistent with the exercise of visitation and unilaterally ceased contact with the ***children*** on January 2, 2011, without explanation. Nonetheless, when the wife took the ***children*** to California over the February, 2011, school vacation, the husband came to court and filed a complaint for contempt alleging noncompliance with the parenting schedule. He also filed a motion for return of the ***children*** to the ***Commonwealth***, which resulted in an order that the ***children*** be returned by February 28, 2011. The judge stated that "[a]fter hearing the testimony regarding husband's lack of adherence to the parenting plan beginning in December, 2010 and continuing through the date the complaint was filed it is impossible [*11] to conclude that the complaint for contempt was filed in good faith." The complaint for contempt was dismissed.

[13] The husband does not challenge in any meaningful way the award of custody to the wife.

[14] The husband asserts that no evidence was presented at trial that the wife's situation with her boyfriend had any indicia of permanency; the [*14] wife was not engaged to be married to her boyfriend at the time of trial. This assertion flies in the face of the wife's and her fiancé's testimony that they were engaged at the time of trial, and the judge's finding to that effect.

[15] The judge found that although the wife has vocational skills as a home health aide, she lacks the ability to be the sole financial support of the family. Continuing, the judge found that the husband, though now suffering from melanoma, has never earned substantial sums as a lawyer and has never provided in excess of $80 per month in support since the commencement of this case. While stating that financial considerations should never be the primary focus of a ***removal*** case, the judge indicated that he could not ignore the fact that the husband is unable to support the ***children*** at this time.

In addition to the financial advantages to the ***children*** from the move, the judge heard uncontroverted evidence concerning the living accommodations for the ***children*** at the wife's fiancé's home in California, the school systems in the fiancé's home town, and the various recreational activities available in the area.

children's best interests were interwoven with the well-being of the custodial parent. See Pizzino v. Miller, 67 Mass. App. Ct. at 870 (in assessing whether quality of ***child***'s life may be improved by change, judge may consider any improvement flowing from an improvement in quality of custodial parent's life). In addition, the judge gave careful consideration to the ***children***'s interest in maintaining a relationship with the husband, see Yannas, 395 Mass. at 711, stating: "Unfortunately, the husband's failure to visit the ***children*** with any type of consistency has not been in their best interests and I cannot find that a ***removal*** to California would lessen the ***children***'s contact with the husband when such contact has been sporadic or non-existent." While recognizing that the husband has had serious medical issues, the judge stated that "it appears that the failure to visit is a result of more than just his medical issues."

Finally, in considering the interests of the husband, the [*15] judge, as we have observed, noted the husband's failure to exercise regularly his rights of visitation as well as the fact that the wife had offered (and the court had ordered) up to four weeks of visitation per year between the husband and the ***children***.

In all of the circumstances, it was not an abuse of discretion or an error or law to authorize the wife to remove the ***children*** to California.

Judgment dated December 5, 2011, affirmed.

Order dated March 22, 2012, denying postjudgment motions affirmed.

By the Court (Cypher, Vuono & Meade, JJ.),

Entered: September 4, 2013.

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