Beras v. Masterman

Appeals Court of Massachusetts

June 4, 2013, Entered

12-P-1566

Reporter
2013 Mass. App. Unpub. LEXIS 616 *; 83 Mass. App. Ct. 1134; 988 N.E.2d 471; 2013 WL 2395180

MAYRA BERAS vs. CHRISTOPHER MASTERMAN.

Judges: [*1] Cohen, Graham & Fecteau, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff (mother) and the defendant (father) are the parents of a daughter (child), born August 4, 2003. Under the terms of an agreement incorporated into a judgment of paternity dated October 5, 2007, the parties were granted joint legal custody, the mother was granted primary physical custody, and the father was afforded liberal visitation. At that time, the child was enrolled in a private Catholic school in Medford, where the mother resides,[1] and, in lieu of child support, the

[1] It appears that this choice was made primarily because the school was preferable to the public school option available to the child. Neither parent is a practicing Catholic.

father was ordered to pay the child's school tuition ($4,200 per year), to provide medical insurance for the child, and to contribute one-half ($30 per week) of the cost of the child's after-school program.

At the end of the 2009-2010 academic year, the school attended by the child was closed. The mother wanted her to attend another private Catholic school in Medford. The father, who moved into the Newton home of his fiancée (now wife), wanted the child to attend [*2] the public school in their neighborhood. When the parties were unable to come to agreement, the mother filed a complaint for modification seeking child support and a revised visitation schedule. The father responded with a counterclaim seeking physical custody of the child. After a three-day trial in August, 2011, a judge of the Probate and Family Court issued a temporary order maintaining the parties' joint legal custody of the child, but awarding primary physical custody to the father -- thereby allowing the child to start school in Newton, as of September, 2011. The mother was granted liberal parenting time, and was not ordered to pay child support.[2] In January, 2012, the judge issued a detailed formal decision, in which he determined that there had been material and substantial changes in the circumstances, and that it was in the child's best interests to grant primary physical custody to the father. See G. L. c. 209C, § 20. The parenting arrangements set forth in the modification judgment were essentially those contained in the temporary order, except that the judgment increased the mother's parenting time.

Subsequently, the trial judge retired, and a different judge allowed the father's motion to amend the judgment to provide that the "mother shall be responsible for transporting the child to and from school or father's residence for all of her visits." Before us is the mother's appeal from the modification judgment and from the order regarding transportation, which, she argues, impairs her parenting time and should not have been decided without a hearing.

Contrary to the mother's position, the trial judge was entitled to conclude in his discretion that there had been material and substantial changes in the parties' circumstances since the entry of the 2007 paternity judgment.[3] See R.S. v. M.P., 72 Mass. App. Ct. 798, 803, 894 N.E.2d 634 & n.9 (2008). The more difficult question for the judge was whether modification of custody was in the child's best interests. It is plain from the judge's findings that he wrestled with his decision. The

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[2] The mother's financial situation was precarious, and the father did not [*3] seek support from her.

[3] Among other things, the judge found that the child had resided with the father for several months between November, 2007 and April, 2008; the mother had married, in September, 2007, but then entered into a long-term cohabiting relationship with another man who became an active presence in the child's life; the father had become engaged to (and later married) a woman with a son approximately the same age as the child, and had transitioned to a "more secure and stable" lifestyle.

findings contain troubling observations about both parents,[4] but also establish that both parents are caring and devoted to the child. Ultimately the judge concluded that the child's best interests would be served by having her spend the majority [*4] of her time in the father's home environment, while having generous amounts of time with her mother. The judge also was cognizant of the advantage to both parents of avoiding the cost of private school, and considered it to be in the child's best interests for the mother to solidify her financial situation to allow her to become financially independent should the need arise. However, contrary to the mother's argument, we do not think the judge placed undue weight on the mother's financial difficulties (which, he acknowledged, resulted, in part, from the lack of support she received from the father) or the father's residency in a desirable school district.

We recognize that modification of child custody arrangements under G. L. c. 209C, § 10, is not to be undertaken lightly. Here, however, the judge's memorandum reflects that he was well aware of the gravity of his decision. After review of the entire record, and mindful of the deference we owe to the trial judge's exercise of discretion, see Smith v. McDonald, 458 Mass. 540, 547, 941 N.E.2d 1 (2010), we are unable to conclude that he abused that discretion in deciding to grant primary physical custody to the father, especially where he also gave the mother liberal parenting time and imposed no child support obligation upon her. We therefore affirm the corrected modification judgment. We also affirm the orders denying the mother's postjudgment motions.

We note, however, that an important component of the corrected modification judgment was an order that the case be reviewed before the end of the 2011-2012 school year.[5] The trial judge then retired, and no such review occurred, reportedly because the case [*6] was on appeal. We therefore remand the case to the Probate and Family Court for prompt initiation of the review process, consistent with the terms of the judgment, so that any appropriate adjustments may be implemented before the start of the child's 2013-2014 school year. During that

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[4] The judge characterized the father as engaging in "manipulative [*5] behavior" and the mother as engaging in "dishonesty." The findings reflect that each of them has experienced periods of instability, and each has engaged in unconstructive behavior towards the other.

[5] Paragraph 22 of the judgment provides: "A review hearing shall be scheduled to coincide with the end of the 2011-2012 school year to see how [the child] is doing. A guardian ad litem shall be appointed on the question of asserting or waiving the psychotherapist privilege [the child] may have with her current therapist. Furthermore, a guardian ad litem investigator shall be appointed for the limited purpose of obtaining school records and speaking to [the child's] teachers and, if the privilege is waived, with [the child's] therapist. The guardian ad litem shall then file a report of the information received. The report shall not contain recommendations. The review hearing is not an opportunity to relitigate the case. The purpose of the hearing is to simply check on [the [*7] child's] status."

review, further consideration shall be given to the transportation issue that was resolved on the father's motion without a hearing.[6]

So ordered.

By the Court (Cohen, Graham & Fecteau, JJ.),

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[6] The father's request for appellate attorney's fees and costs pursuant to Mass.R.A.P. 25, as appearing in 376 Mass. 949 (1979), is denied.