Jansen v. Alemu

Appeals Court of Massachusetts

March 20, 2017, Entered

16-P-4.

Reporter
2017 Mass. App. Unpub. LEXIS 268 *; 91 Mass. App. Ct. 1111; 81 N.E.3d 825; 2017 WL 1048124

BRIAN V. JANSEN *vs.* DIGIST S. ALEMU.

Notice: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS 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 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, 881 N.E.2d 792 (2008).

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Prior History: Alemu v. Jansen, 85 Mass. App. Ct. 1101, 2014 Mass. App. Unpub. LEXIS 212, 3 N.E.3d 615 (2014)

Judges: Vuono, Wolohojian & Shin, JJ. [*1]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant, Digist S. Alemu (mother), and the plaintiff, Brian V. Jansen (father), have a child who was born in February, 2012. In this appeal, the mother

challenges a judgment issued by a judge of the Probate and Family Court awarding the parties joint physical and legal custody of their child. We conclude that, despite evidence of discord and some domestic violence between the parties, the weight of the evidence supports the judge's decision that shared custody was in the best interests of the child. Accordingly, we affirm.

Background. We summarize the facts found by the judge.[1] The parties became involved in a romantic relationship in 2009 and a few years later they conceived a child. They did not marry, but they began to live together about one month before the child was born. During the pregnancy, the father attended all but one of the mother's prenatal care appointments, and he was present for the birth of the child. Each of the parties took time off from work to care for the child, and they shared day-to-day parenting responsibilities.

The parties' relationship became strained in August, 2012, when the father informed [*2] the mother that he did not want a second child. In November, 2012, the mother raised the issue of having a second child again and became very upset when the father said he did not want another child. She physically assaulted the father, who sustained minor injuries. After this incident, the parties continued to reside together until January 8, 2013, when the mother obtained a temporary restraining order against the father, who then moved out of the home. That order expired on July 23, 2013. The mother obtained a second restraining order on July 8, 2014, which, the judge found, was vacated after a hearing on July 21, 2015.

After the parties separated, the father filed a complaint seeking custody, support, and visitation, and the mother raised identical counterclaims. While the case was pending, despite the fact that the mother had obtained two restraining orders, both parents remained actively engaged in parenting their child and the judge found that the child was happy and healthy. The judge further found that, given the parties' proven history of cooperation, there was no reason to believe they could not exercise joint responsibility for the child. After noting numerous instances where [*3] the parties had made concessions to one another without court intervention, the judge concluded that "the parties could return to the working relationship they previously had" and that joint legal custody was in the child's best interests.

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[1] We observe that the mother's brief contains a selective version of the facts which rely, in part, on impounded material that has not been made part of the record on appeal, and on an ex parte affidavit that was never introduced as an exhibit at trial. We rely, however, on the judge's findings unless they are shown to be clearly erroneous. See *Mason* v. *Coleman*, 447 Mass. 177, 186, 850 N.E.2d 513 (2006).

Discussion. The mother challenges the award of joint legal custody, claiming that the judge's findings with respect to the parities' ability to communicate with each other are clearly erroneous and, therefore, joint custody is not in the best interests of the child. We disagree.

"The best interests of the child is the 'touchstone inquiry' in child custody, visitation, and relocation cases." *Smith* v. *McDonald*, 458 Mass. 540, 544, 941 N.E.2d 1 (2010), quoting from *Custody of Kali*, 439 Mass. 834, 840, 792 N.E.2d 635 (2003). A judge may award joint custody only "if the parents have entered into an agreement pursuant to [G. L. c. 209C, § 11,] or the court finds that the parents have successfully exercised joint responsibility for the child prior to the commencement of proceedings pursuant to [G. L. c. 209C] and have the ability to communicate and plan with each other concerning the child's best interests." G. L. c. 209C, § 10(*a*). "A custody determination 'presents the trial judge with a classic example of a discretionary decision.'" *Murphy* v. *Murphy*, 82 Mass. App. Ct. 186, 193, 971 N.E.2d 825 (2012), quoting from *Youmans* v. *Ramos*, 429 Mass. 774, 787, 711 N.E.2d 165 (1999). On appeal, we review such a determination for abuse of discretion. See [*4] *ibid.*

We are not persuaded by the mother's claim that the judge's findings regarding the parties' ability to communicate and plan with each other concerning their child's well-being are clearly erroneous. Although, as the mother notes, at one point the parties were required to meet at the Worcester police station when exchanging physical custody of their child, and there was some evidence that even when there was no restraining order in place communication between the parties had been minimal, the weight of the evidence supports the judge's conclusion that the parties have been able to set their differences aside and make adjustments for the benefit of their child. For example, the parties agreed to spend five to fifteen minutes together each time their son moved from one of their homes to the other, so as to allow him time to adjust. In November, 2013, they agreed to change the exchange time and location without having to involve the court. They also arranged for their child to spend Mother's Day with his mother and Father's Day with his father, for him to show off his Halloween costume to both parents at the same time, and for him to have separate birthday parties with each parent. [*5]

The mother further claims that joint custody could not be properly awarded because the judge failed to make adequate findings regarding domestic violence. If the evidence establishes "a pattern or serious incident of abuse," a presumption is created in favor of sole legal custody, but that presumption may be rebutted by a preponderance of the evidence establishing that joint custody is in the child's best interests. G. L. c. 209C, § 10(*e*), inserted by St. 1998, c. 179, § 6. Here, the

judge did not find a serious incident of abuse, nor a pattern of abuse, so as to give rise to the presumption. Rather, she found that "the isolated incidents that allowed [m]other to obtain the [restraining orders] did not represent a pattern of abuse." She also noted that the mother failed to appear for a renewal hearing on her first restraining order, and that the second restraining order was vacated upon the father's motion. The mother points out that the second restraining order was not vacated, but rather was modified to change the location where the parties exchanged the child, however, the critical fact is that the order did, in fact, ultimately terminate.

In sum, based on our review of the record, we discern no abuse of discretion [*6] and, as a result, we affirm the judgment.

So ordered.

By the Court (Vuono, Wolohojian & Shin, JJ.[2]),

Entered: March 20, 2017.

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[2] The panelists are listed in order of seniority.