

**WORCESTER COUNTY BAR ASSOCIATION
FAMILY LAW SECTION**

TIPS ON CUSTODY MATTERS

Sole Legal Custody: Grants one parent the exclusive decision making authority regarding medical, educational and religion matters.

Joint Legal Custody: Requires, at least, the collaboration and ability to make joint decisions concerning these issues by the Parties for the child's best interests.

Legal custody is treated differently for married versus unmarried parents.

At the Temporary Order stage, there is a presumption in favor of shared legal for married Parties. This can be rebutted but it requires the Judge to make written findings why it should not be so.

At the Trial state, there is no presumption in favor of joint legal custody; however, unmarried Parties are treated differently. Under M.G.L. c. 209C § 10, the parents are not equal in their parenting rights and §10 provides unmarried Mothers with full custody unless a Judge makes specific findings of fact to justify shared physical or shared legal custody [cohabitation is an important factor here].

Two recent cases from the Appeals Court (2024) shed light on why/when an Appeals Court may decline or allow joint/shared legal custody.

Most illustrative and informative is the Pawle v. Donovan, 23-P-1355, Mass. App. Ct. (2024), case where shared legal custody was declined. In this case, the Justice outlined and identified grounds for declining and/or modifying a shared legal custody order.

The standard is still "what is in the best interests of the children".

The Court, in Pawle, identified the list of behaviors one may see when attempting a change in legal custody: hostile communication, unilateral decision making, inability to accept any criticism regarding parenting decision, belittling language to other parent, antagonistic communication style with other parent in texts, disagreements about medical and dental care, unilateral decision making in enrolling and un-enrolling child from activities and daycare. There was also evidence of mental health issues of the Father that impeded his ability to work collaboratively with the Mother. These are all factors considered in the "best interests" standard.

The Chesler v. Ivanova, 23-P-1309, Mass. App. Ct. (2024), case was a 209C case in which the Parties were unmarried. The Court awarded the Father sole legal custody on the modification. The biggest factor in Chesler was the Parties' inability to communicate about medical and educational issues of the child(ren).

To note, at the original adjudication in 2011, the Judge found the Parties had difficulties in communications, but awarded shared legal custody over concerns that if the Mother was granted

sole legal custody, that the Mother would control the Father's parenting time and not allow the Father to input on the child's life.

On the modification, the Judge found (101 findings) that shared legal custody was no longer appropriate because of these disputes and communication difficulties. The Judge further found it was the Father who was the moving force in obtaining the necessary medical and educational needs of the child.

SIDE NOTE thought: It is important to note in any of these custody cases, one must look towards the interference or hindrance of one Party in obtaining the medical and educational services for the child(ren), as these are major decisions that need to be decided on in the "best interests" of the child(ren). However, it does not appear that the award of legal or physical custody assists the Parties in disputes over the scheduling and choosing of extracurricular activities where such activities fall during both Parties' parenting time. This seems to be an on-going issue in many cases involving children.

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

23-P-1355

AMY PAWLE

vs.

SEAN DONOVAN.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Appellant, Sean Donovan (father),¹ and Appellee, Amy Pawle (mother), were briefly married before divorcing in December 2019.² The parties have one child together, who was born about a month after the parties were married. The divorce judgment, which incorporated the parties' separation agreement dated December 17, 2019, provided for joint legal custody but awarded primary physical custody to the mother. The judgment also provided the father parenting time every Monday morning through

¹ The father is a pro se litigant.

² The parties were married on July 8, 2018, and last lived together on February 15, 2019.

Tuesday afternoon, and every Thursday morning through Friday afternoon. No child support was ordered.

In January 2022, the mother filed complaints for modification and contempt.³ In response, the father filed a counterclaim for modification the following month.⁴ Following a nonconsecutive three-day trial, from October 2022 to February 2023, the judge issued modification and contempt judgments that granted the mother sole legal and physical custody, ordered the father pay retroactive and prospective child support, modified the father's parenting time, and found the father in contempt of the separation agreement. The father now appeals from both the modification and contempt judgments. We affirm the contempt

³ In her complaint for modification, the mother sought the following: (1) sole legal custody; (2) a modification of the father's parenting time in accordance with the child's best interests; (3) an order requiring the father to pay child support in an amount deemed appropriate under the child support guidelines; and (4) any other orders deemed appropriate.

⁴ In his counterclaim, the father sought the following: (1) sole legal custody; (2) a modification of his parenting time to include Sunday evenings; (3) an inclusion of a provision within the agreement providing for parenting time past age five; (4) an order requiring the mother to pay child support in the amount of \$200 per week, or whatever the court should decide; (5) an order stipulating that no parenting time shall be passed off to a third person without the written permission of the other parent; (6) an order that all decisions that pertain to "optional actions or activities," including preschool and optional medical or dental visits, shall only be "imposed upon" the child if both parents agree; (7) an order that the mother pay for the father's legal expenses should he require counsel; and (8) the removal of "unreasonable requirements" such as the parties' agreement to follow the American Academy of Pediatrics' recommendations.

judgment. With respect to the modification judgment, we vacate so much of the judgment as pertains to the father's parenting time and remand the case for further proceedings consistent with this memorandum and order. The modification judgment is otherwise affirmed.

Discussion. 1. Custody and parenting time. To support modification of child custody or parenting time "the [mother] must first establish that a material and substantial change in circumstance has occurred to warrant a change . . . and that the change is in the child's best interests." See E.K. v. S.C., 97 Mass. App. Ct. 403, 408 (2020); see also G. L. c. 208, § 28. "[T]he best interests analysis is a child-centered one that focuses on the specific needs and interests of a child and how these might best be met." Charara v. Yatim, 78 Mass. App. Ct. 325, 336 (2010). "In custody matters, the touchstone inquiry [is] . . . what is best for the child, and [t]he determination of which parent will promote a child's best interests rests within the discretion of the judge . . . [whose] findings . . . must stand unless they are plainly wrong" (quotations omitted). Malachi M. v. Quintina Q., 483 Mass. 725, 740 (2019), quoting Hunter v. Rose, 463 Mass. 488, 494 (2012). "[I]t is generally inappropriate to grant shared legal custody to parents who display a high level of acrimony that impedes their ability to jointly make decisions about the children's welfare." Imbrie v.

Imbrie, 102 Mass. App. Ct. 557, 571 (2023). The best interests of a child "are likely better served by ending the joint custodial arrangement," rather than "forcing the parties into a cooperative relationship they appear incapable of maintaining." O'Connell v. Greenwood, 59 Mass. App. Ct. 147, 156 (2003).

We review the judge's decision for abuse of discretion or clear error of law. Schechter v. Schechter, 88 Mass. App. Ct. 239, 245 (2015). In doing so, we defer to the judge's factual findings, "absent a showing that they are plainly wrong or clearly erroneous." Id.

Here, sufficient evidence was adduced at trial to support the judge's conclusion that a change in circumstances warranted granting sole legal custody to the mother, and that doing so was in the child's best interests. See E.K., 97 Mass. App. Ct. at 408. The judge heard extensive testimony from the mother detailing the challenges the parties have had making parenting decisions due to the father's hostile communication style and unilateral decision making. For example, the mother testified that the father does not "accept any criticism [in regards to parenting decisions] without then using abusive, belittling language towards [her]." To support this claim, the mother introduced text messages from the father reflecting his antagonistic communication style. The mother further testified that the father took issue with the child receiving routine

dental care such as X-rays to check for suspected cavities.⁵ When the child was referred to a pediatric dentist, the father notified the dentist's office that the parties were involved in a custody dispute, resulting in the dentist cancelling the child's appointment and the mother having to find a different dentist for the child. Additionally, the father unenrolled the child from preschool even though the separation agreement did not give the father the authority to do so.

The judge also considered the written psychological evaluation of the father conducted by a clinical psychologist⁶ as well as the psychologist's corresponding testimony. The psychologist concluded that the father suffers from paranoid ideation, delusional thinking, and demonstrated "significant scores" of self-importance and dominance which are traits

⁵ The father argues he suffered a due process violation because the judge did not allow a "rebuttal witness" to testify regarding a statement made by the mother's attorney that he "grabbed the x-ray machine" away from a dental technician during the child's dental examination. However, the father admits that the judge did not permit the witness to testify because she was "not on the list" and we discern no abuse of discretion in the judge's decision. Commonwealth v. Hinds, 494 Mass. 681, 694 (2024) (holding judge's decision to exclude witness reviewed for abuse of discretion).

⁶ After the mother filed a motion to compel a psychiatric evaluation of the father the judge ordered a psychiatric evaluation of both parents. The results of the mother's evaluation were unremarkable.

associated with narcissistic personality disorder.⁷ The psychologist testified that these traits would interfere with the father's ability to work collaboratively with the mother to make joint decisions about the child's medical care or education.⁸ The psychologist ultimately concluded that the father would benefit from mental health intervention, and failure to treat his mental health challenges would negatively impact the child's development.

As such, where the father's acrimonious communication style and mental health challenges prevent the parties from making joint decisions about their child's welfare, we discern no abuse of discretion in the judge's decision to grant the mother sole

⁷ In her decision, the judge erroneously stated that the psychologist used the term "psychopath with sociopathic tendencies" to describe the father. However, the judge's conclusion that the mother should be granted sole legal custody, partly due to the father's mental health difficulties, was well supported by the psychologist's evaluation and her testimony.

⁸ The father asserts that the judge erred by certifying the psychologist as an expert and failed to assess the reliability of the methodology the psychologist used to evaluate the father under the Daubert-Lanigan standard. See Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Commonwealth v. Lanigan, 419 Mass. 15 (1994). However, where the judge heard testimony that the psychologist is appropriately educated and licensed in clinical psychology, has nearly thirty years of experience providing psychological testing, and employed a testing methodology that is accepted in Massachusetts courts, we discern no abuse of discretion in certifying the psychologist as an expert. See Commonwealth v. Javier, 481 Mass. 268, 285 (2019).

legal custody of the child. See Imbrie, 102 Mass. App. Ct. at 571; Schechter, 88 Mass. App. Ct. at 245.

The judge also determined that there was a material change in circumstances sufficient to justify altering the father's parenting time. For example, the judge found that because the child is now attending school, the child would benefit from a "more traditional" parenting schedule that provides the father with parenting time on alternating weekends as well as afternoon and evening time during the week.⁹ However, this new parenting schedule results in an approximate one-third reduction in the father's parenting hours over a two-week period.¹⁰ While we agree that the judge was justified in altering the father's parenting schedule in consideration of the child's need to attend school, the judge's findings were insufficient to justify such a significant reduction in the father's total parenting hours. Indeed, while the judge determined that the father is "overwhelmingly possessive" of the child and fails to understand that the child requires separation from each parent to become

⁹ Under the former parenting schedule, the father's parenting time largely overlapped with school hours.

¹⁰ For example, while the separation agreement provides the father with one hundred thirty-two hours of parenting time over a two-week period, the new schedule provides the father with approximately eighty-five hours of parenting time over the same period with moderate variations if the child does not have school or camp on a given weekday.

independent and develop,¹¹ the judge did not explicitly justify the reduction in parenting time on this basis. See E.K., 97 Mass. App. Ct. at 408. Therefore, because it is unclear that the child's school attendance necessitates a significant reduction in the father's parenting hours, we vacate the so much of the modification judgment as it relates to the father's parenting time, and remand for further findings and a redetermination of the father's parenting time in light of such further findings.¹²

2. Child support. "[M]odification [of child support] is presumptively required whenever there is an inconsistency between the amount of child support that is to be paid under the existing support order and the amount that would be paid under the [Child Support Guidelines (guidelines)]." Morales v. Morales, 464 Mass. 507, 511 (2013). See Cavanagh v. Cavanagh, 490 Mass. 398, 423 n.22 (2022).¹³ See also G. L. c. 208, § 28;

¹¹ This finding was supported by the psychologist's evaluation and testimony.

¹² Throughout his brief, the father argues that the judge erred in assessing the credibility of various witnesses, including the mother and the psychologist. However, a credibility assessment is "quintessentially the domain of the trial judge . . . [and] is close to immune from reversal." Johnston v. Johnston, 38 Mass. App. Ct. 531, 536 (1995). We find no reason to upset the judge's assessments here.

¹³ Because the parties' combined available income does not exceed \$400,000 (the current maximum combined available income amount under the guidelines), see Child Support Guidelines

Child Support Guidelines § III (Aug. 2021). Moreover, "[t]o the extent possible, and consistent with common sense and justice, the modified judgment should take into account the earlier, expressed desires of the parties" as set forth in their separation agreement. Katzman v. Healy, 77 Mass. App. Ct. 589, 598 (2010), quoting Bercume v. Bercume, 428 Mass. 635, 644 (1999). See Fehrm-Cappuccino v. Cappuccino, 90 Mass. App. Ct. 525, 526-527 & n.1 (2016) (when modifying child support pursuant to Morales inconsistency standard, judge should also consider, to extent possible, parties' intentions set forth in separation agreement).

Here, in her complaint for modification, the mother sought child support from the father citing "a difference between the amount of the existing child support order and the amount that would result from the application of the Child Support Guidelines," as well as the father's failure "to contribute to the child's expenses as was contemplated by the parties when agreeing to no specific order for child support." In their separation agreement, the parties stated that "[n]either party shall pay the other child support unless a change in

§ II(C)(2) (Aug. 2021), the "inconsistency" standard for modification applies. See Morales, 464 Mass. at 510 n.4 (inconsistency standard applies to modification of child support where parties' combined available income does not exceed maximum combined available income under guidelines).

circumstances takes place that warrants . . . modification." At the time that the parties agreed to a zero dollar child support order in the separation agreement, the 2018 guidelines were in effect. At the time of the modification trial, the new 2021 guidelines were in effect. In attributing income to the father, the judge found that the father has the capacity to earn substantially more than what he claims to currently earn from his bicycle shop and did not accept the father's rationale that parenting the child prevents him from working full-time. The judge found that the father was capable of working full-time in a minimum wage position, in part because of the changed parenting schedule necessitated by the child's new school schedule. The judge used the father's attributed income to calculate child support under the current 2021 guidelines, resulting in a child support order of \$100 per week, thus reflecting an inconsistency with the previous zero dollar order set forth in the parties' 2018 agreement. See Morales, 464 Mass. at 511. Accordingly, we discern no abuse of discretion in the modification of child support. See Bobblis v. Costa, 94 Mass. App. Ct. 264, 266 (2018).

3. Contempt. The father submits that the contempt judgment should be vacated because he did not disobey an "unambiguous command" when he chose to unenroll the child from preschool. He further argues that the judge erred by awarding

the mother attorney's fees in connection with the contempt judgment. These arguments are also unavailing.

While it is true that "a civil contempt finding [must] be supported by clear and convincing evidence of disobedience of a clear and unequivocal command," such evidence exists here. Birchall, petitioner, 454 Mass. 837, 853 (2009). The parties' separation agreement lays out a clear decision-making structure that the parties must follow if "there exists a conflict of opinion . . . relative to a significant issue concerning the minor child's education (including preschool selection)" Under this structure, the mother must first notify the father in writing of "each non-emergency decision the parties need to make for the child." The father may then respond in writing with any objections. If the parties still cannot agree, the separation agreement gives the mother final decision-making authority. Therefore, the father's unilateral decision to unenroll the child from preschool was a clear and "unequivocal" violation of the separation agreement. See Birchall, supra.

As such, we discern no abuse of discretion in the judge's contempt order, or her decision to grant the mother legal fees and costs associated with securing the contempt judgment.¹⁴ See

¹⁴ The mother is also seeking attorney's fees in connection with this appeal. However, this request is denied. See John T. Callahan & Sons, Inc. v. Worcester Ins. Co., 453 Mass. 447, 449 (2009) (adopting "American Rule" which, in absence of statute or

Giannetti v. Thomas, 32 Mass. App. Ct. 960, 961 (1992) (finding award of attorney's fees and costs in civil contempt case properly left to judge's discretion).¹⁵

Conclusion. The contempt judgment, dated June 9, 2023, is affirmed. So much of the modification judgment, dated June 9, 2023, as pertains to the father's parenting time is vacated, and the case is remanded to the Probate and Family Court for further proceedings consistent with this memorandum and order. The modification judgment is otherwise affirmed. The parenting schedule set forth in the modification judgment shall remain in

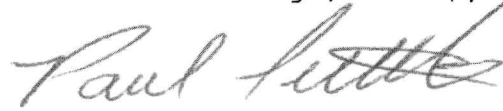
court rule, does not allow successful litigants to recover attorney's fees and expenses).

¹⁵ The mother moved to strike portions of the record appendix submitted by the father that were not part of the lower court record. The father then moved to strike the mother's appellee brief, as well as the supplemental appendix in its entirety. After careful review, the mother's motion is allowed and the father's motion is denied. See Commonwealth v. Torres, 470 Mass. 1020, 1022 n. 3 (2014) (allowing motion to strike where materials were not part of record before trial court); see also Mass. R. A. P. 18, as appearing in 481 Mass. 1637 (2019).

effect as a temporary order during the pendency of the remand unless the judge orders otherwise.

So ordered.

By the Court (Rubin,
Desmond & Singh, JJ.¹⁶),

A handwritten signature in cursive script, appearing to read "Paul Little".

Clerk

Entered: December 5, 2024.

¹⁶ The panelists are listed in order of seniority.

PAUL CHESLER,
vs.
VICTORIA IVANOVA.

No. 23-P-1309.

Appeals Court of Massachusetts.

Entered: November 18, 2024.

By the Court (Sacks, Shin & Hershfang, JJ.^[3]).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

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The mother, Victoria Ivanova, appeals from a Probate and Family Court modification judgment that gave the father, Paul Chesler, sole legal custody of the parties' daughter and terminated the father's obligation to pay child support. The mother also appeals from a separate judgment that found the father not guilty of contempt for his previous failure to pay child support. We affirm both judgments.

Background. After a brief relationship between the parties, the child was born in 2010. The father obtained adjudication of his paternity in 2011. The trial judge found the parties' difficulty in communicating created a risk that, if the mother were granted sole legal custody, she would allow the father only whatever input into the child's life she believed was appropriate, and that she would attempt to control his parenting time. The trial judge thus ordered a paternity judgment giving the parties joint legal custody, with primary physical custody to the mother, substantial parenting time for the father, and a requirement that he pay child support.

In late 2021, the mother filed a complaint for contempt alleging, as relevant here, that the father had failed to pay child support. Shortly thereafter, the father filed a complaint for modification of the paternity judgment, alleging that changed circumstances warranted giving him legal custody and primary physical custody of the child. He also sought elimination of his child support obligation.

After a two-day trial in 2023, a different judge found changed circumstances, described further infra, and entered a modification judgment granting the father sole legal custody and ordering shared physical custody with the parties having approximately equal parenting time. The judge also terminated the father's child support obligation, while preserving existing arrears. The judge issued a thorough rationale and, subsequently, 101 findings of fact. The judge also entered judgment for the father on the mother's contempt complaint, finding as relevant here that, although child support had not been current, the father's nonpayment was "not found to be willful [but] due to unemployment and lack of income." The judgment was silent on the issue of attorney's fees. The mother appealed from both judgments.

1. Modification judgment. We review a modification judgment (1) to determine whether the factual findings are "'clearly erroneous,' giving 'due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses,' Mass. R. Dom. Rel. P. 52(a) (2008)"; (2) for "errors of law"; and (3) for abuse of discretion. Pierce v. Pierce, 455 Mass. 286, 293 (2009). "The standard of review reflects substantial, but not unlimited, deference to the judge who saw the witnesses and heard the evidence." Id. We address in order the modification judgment's changes in legal custody and in child support.

a. Legal custody. Modification of the custody provisions of an existing paternity judgment may be ordered if a judge "finds that a substantial change in the circumstances of the parties or the child has occurred and finds modification to be in the child's best interests." G. L. c. 209C, § 20. Here, the judge ruled that both criteria were met.^[1]

He found that on four occasions between 2017 and 2021, the mother had become frustrated with the child and dropped her off for indeterminate stays with the father. On at least one of those occasions, over a period of eight days in September and October 2021, the mother made no effort to have contact with the child or the father and ceased responding to texts from either of them. The judge found the mother's explanation — that the father had blocked the child's telephone — not to be credible. The mother also made statements to the child suggesting that the mother was going to leave her and return to the mother's native country. And she "sent the child an ultimatum about where she would live and followed up with countdown texts," her explanation for which the judge again found not credible.

The judge further found that because of the parties' continuing difficulties in communicating with each other and making decisions together regarding the child, "shared legal custody is not appropriate." Although many of the parties' disputes had "fault on both sides," the judge found "troubling" the mother's lack of candor and her attempts to blame the father for her own poor decision-making. Under the original paternity judgment, the mother had been solely responsible for medical and dental care; the father told the mother it was a mistake not to take the child to the dentist, but the mother thought dental appointments were unnecessary. This resulted in the child's dental health being "nothing short of disastrous," including "roughly a dozen cavities," and required the father to arrange for the child to have a root canal, extractions, and other restorative procedures. The father "was also the moving force concerning getting the child needed therapeutic services and an educational evaluation."

For all of these reasons, the judge ruled that "since shared legal custody is not appropriate, the [c]ourt will grant sole legal custody of [the child] to the [f]ather, which the [c]ourt finds to be in her best interests. The [m]other shall continue to have the right to communicate with providers, to access information regarding the child, and to give input on major decisions concerning her." In addition, as mentioned, the judge ordered a parenting plan under which the parties would have approximately equal time with the child.

On appeal, the mother argues that no change in circumstances sufficient to support a modification had occurred. She argues that the parties had always had communication difficulties, as recognized by the original trial judge, and that their parenting had not changed by the time of the modification trial.

What the mother's argument overlooks is that the consequences for the child had grown more serious over time. The father had to arrange dental care to remedy conditions resulting from the mother's position that, despite the father's urgings, dental visits were unnecessary. After the mother's actions in September and October 2021, the child stated that she wanted to die or run away, but the mother made no attempt to arrange mental health care for the child; the father did so. Even if one took the view that the parents' own circumstances had not changed over time, modification is justified where a judge finds "a substantial change in the circumstances of the parties or the child has occurred and finds modification to be in the child's best interests" (emphasis added). G. L. c. 209C, § 20.

The mother's argument also overlooks that parents' "continued inability to communicate," as illustrated by significant and recent incidents, may itself constitute a "material and substantial change in circumstances" supporting a conclusion that it is "in the child's best interests to grant [one parent] sole legal custody." Macri v. Macri, 96 Mass. App. Ct. 362, 370 (2019). In that case, we rejected one parent's argument that "there was no material change in circumstances because the parties' communication issues already existed at the time of the [original] judgment," *id.*, under which the parents had joint legal custody. *Id.* at 363. Instead, we held, a judge "permissibly found that the parties' ongoing conflict had become contrary to the child's best interests [in the intervening years], thus warranting a modification of legal custody." *Id.* at 370. The mother offers no reason why *Macri* should not apply here.

The mother also argues that the judge "placed all the blame on [her] for the troubles the parents encountered." We cannot agree. The judge referred to both parties as "not respectful of each other's abilities," "unwilling[] to compromise," and responsible for "significant actions to increase the acrimony in this matter." But he found that the mother's conduct was particularly damaging to the child's best interests and that the father had taken steps to remedy the resulting harm.

Finally, the mother suggests that the award of sole legal custody to the father infringed, without sufficient justification, on her fundamental parental right to be involved in decisions affecting the child's education and religious upbringing. But, as the mother acknowledged at oral argument, she made no such claim to the judge. The issue is therefore waived. See Albert v.

Municipal Court of Boston, 388 Mass. 491, 493-494 (1983). In any event, the modification judgment provides that the father must inform the mother in advance of any major religious, educational, or medical decisions involving the child, and certain other matters such as a change in school, in time for the mother to provide input.

Accordingly, we see no error of law or abuse of discretion in the judge's decision to grant the father sole legal custody.

b. Child support. A judgment providing "for support of minor children shall be modified if there is an inconsistency between the amount of the existing order and the amount that would result from application of the child support guidelines." G. L. c. 209C, § 20. "There shall be a rebuttable presumption that the amount of the order which would result from the application of the guidelines is the appropriate amount of child support to be ordered." *Id.* "If, after taking into consideration the best interests of the child, the court determines that a party has overcome the presumption, the court shall make specific written findings" addressing, among other things, the justification for departing from the guidelines. *Id.*

Here, the judge found that "the child support guidelines indicate a very small payment from [m]other to [f]ather when the parents equally share costs and parenting time. At trial, [f]ather did not seek to be paid support and the court finds that the best interest of this child is served by no child support order." The judge therefore terminated the father's previous obligation to pay child support and did not enter any order that the mother pay child support to the father.

On appeal, the mother argues that the judge's findings were insufficiently specific, particularly with regard to the parties' incomes and expenses, to satisfy the requirements of G. L. c. 209C, § 20. For illustrative purposes, the mother includes as an addendum to her brief a child support guidelines worksheet, completed by her using income figures from the parties' trial financial statements, showing that the father should pay \$128 per week in child support.

As the father's brief points out, however, the income figures do not account for the father's one-time signing bonus and the mother's annual (albeit variable) bonus. When the income figures are adjusted, the parties' incomes are nearly the same. Moreover, the mother's illustrative worksheet appears not to account for the fact that the modification judgment shifted responsibility for paying the child's health insurance premium from the mother to the father effective in 2024. At oral argument, the mother had no explanation for how, after considering those factors, application of the child support guidelines nevertheless should have resulted in an order that the father continue to pay child support.

Notably, the trial court docket shows that, in the two months before trial, the parties filed their own child support guidelines worksheets, as well as proposed findings and orders. We would expect that if the judge's finding varied significantly and without basis from what the mother argued below was due, the mother would have included these items in her record appendix, yet she did not. It is "a fundamental and long-standing rule of appellate civil practice" that the appellant has an obligation "to include in the appendix those parts of the [record that] are essential for review of the issues raised on appeal." Shawmut Community Bank, N.A. v. Zagami, 30 Mass. App. Ct. 371, 372-373 (1991), S.C., 411 Mass. 807 (1992).

In these circumstances, the mother has shown no clear error in the judge's finding that the child support guidelines indicate only a very small payment would be due from her to the father. "A finding is 'clearly erroneous' 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 committed." Marlow v. New Bedford, 369 Mass. 501, 508 (1976), quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). "It is the appellant's burden to show that a finding is clearly erroneous." Allen v. Allen, 86 Mass. App. Ct. 295, 298 (2014). The mother has not carried her burden here.

Therefore, accepting the judge's finding that the guidelines indicated only a small payment by the mother, the judge departed from the guidelines only by relieving her of the obligation to pay that amount. Accordingly, although that departure was not supported by detailed findings as called for by G. L. c. 209C, § 20, the mother has shown no resulting prejudice from the absence of such findings. We see no basis to remand for further findings or otherwise to disturb the judge's determination that the father should no longer be required to pay child support.

2. Contempt judgment. The mother's challenge to the contempt judgment is that, although the father was found not guilty of contempt, the judge should nevertheless have awarded the mother her attorney's fees. She relies on the presumption for fees established by G. L. c. 215, § 34A, but her brief, in quoting that statute, omits critical language. The relevant sentence of the statute provides:

"In entering a judgment of contempt for failure to comply with an order or judgment for monetary payment, there shall be a presumption that the plaintiff is entitled to receive from the defendant, in addition to the

judgment on monetary arrears, all of his reasonable attorney's fees and expenses relating to the attempted resolution, initiation and prosecution of the complaint for contempt" (emphasis added).

G. L. c. 215, § 34A. The mother overlooks the emphasized language, which plainly limits the presumption to cases in which a defendant is found in contempt.

Recognizing that the judge found the father's previous nonpayment of child support not to be willful, the mother also suggests that caselaw makes a fee award proper "regardless of whether the defendant's actions were willful." In one of the two cases she cites, however, the defendant was found in contempt, and the court commented that good faith was not a defense. See Godard v. Babson-Dow Mfg. Co., 319 Mass. 345, 346, 349 (1946). The other case she cites, although not a contempt action, cites an earlier decision recognizing that a fine imposed in a contempt proceeding may include the plaintiff's attorney's fees. See Grunberg v. Louison, 343 Mass. 729, 736 (1962), citing Root v. MacDonald, 260 Mass. 344, 362 (1927). But in Root, the court was discussing relief available against "the party in contempt." Root, 260 Mass. at 362. Root and Grunberg thus have no application here.^[2] Rather, the general rule is that where a plaintiff has not prevailed in a contempt proceeding, an award of the plaintiff's attorney's fees is not appropriate. See Ventresca v. Town Manager of Billerica, 68 Mass. App. Ct. 62, 65-66 (2007).

Modification judgment affirmed.

Contempt judgment affirmed.

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

[1] Although the judge's rationale quoted the modification standard applicable to divorce cases, G. L. c. 208, § 28, on appeal neither party suggests that the result would be any different under G. L. c. 209C, § 20. The mother's brief relies on the divorce standard. In this decision we refer to the "substantial change in the circumstances" standard of G. L. c. 209C, § 20.

[2] The father's request for appellate attorney's fees is denied.

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