

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. DAR-_____

Appeals Court No. 2019-P-0665

DOR O/B/O RADELIS POLANCO,

Plaintiff-Appellee,

v.

JOSHUA GRULLON

Defendant-Appellant.

On Appeal From A Civil Contempt Order
Of The Essex Probate And Family Court

**DEFENDANT-APPELLANT'S
APPLICATION FOR DIRECT APPELLATE REVIEW**

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REQUEST FOR DIRECT APPELLATE REVIEW

Pursuant to Rule 11 of the Massachusetts Rules of Appellate Procedure, Defendant-Appellant Joshua Grullon ("Mr. Grullon") requests that this Court grant direct appellate review of the Essex Probate and Family Court's Order of Civil Contempt (Honorable Randy J. Kaplan), dated November 1, 2018 and docketed on November 8, 2018, finding Mr. Grullon in contempt of court and incarcerating him for ten days subject to payment of a purge amount of \$500 without first appointing counsel to represent him.

STATEMENT OF PRIOR PROCEEDINGS IN THIS CASE

Mr. Grullon and Plaintiff-Appellee Radelis Polanco ("Ms. Polanco") were divorced on November 17, 2017. Per the divorce decree, Mr. Grullon was ordered to pay \$123 per week in child support through the Massachusetts Department of Revenue ("DOR").

On July 11, 2018, DOR filed a Complaint for Contempt in the Probate and Family Court ("the Probate Court") alleging Mr. Grullon was behind in child support payments by \$3,690. DOR served its Complaint on Mr. Grullon on October 15, 2018. With limited assistance of counsel from Veterans Legal

Services, Mr. Grullon filed an Answer and Counterclaim for Modification on October 19, 2018.¹

On November 1, 2018, Mr. Grullon appeared before the Probate Court for the contempt hearing. (See Ex. B (November 1, 2018 Hearing Transcript).) Counsel for DOR appeared before the Probate Court, as did Ms. Polanco. (Id.) Due to resource constraints, Veterans Legal Services could only help Mr. Grullon prepare his answer on a limited assistance basis, so he was not represented by counsel at the contempt hearing.

After a brief hearing, lasting only eight minutes, the Probate Court found Mr. Grullon guilty of civil contempt for non-payment of child support and ordered that he serve ten days in jail subject to paying a \$500 purge amount. (Ex. C (November 1, 2018 Order on Complaint for Civil Contempt (Kaplan, J.) (hereinafter, "the Contempt Order").) The Probate Court did not appoint counsel for Mr. Grullon or make specific findings regarding Mr. Grullon's ability to pay the past-due child support or the purge amount. (Id.) The Probate Court further ordered that Mr. Grullon's weekly child support payments be increased to \$153.75 per week, leaving the principal support order unchanged but requiring an additional 25% of the original order to be applied to the arrearages, then fixed at

¹ The Probate Court also declined to act on Mr. Grullon's Counterclaim for Modification filed with his Answer to the Complaint for Contempt.

\$5,636. (Id. at 2.) Mr. Grullon was unable to pay the \$500 purge amount and was immediately taken into custody and incarcerated. He served the full ten-day sentence at the Middleton House of Correction from November 1 through November 11, 2018. Although the penalties imposed by the Probate Court began immediately and the Contempt Order was technically final, the Probate Court scheduled a further hearing on the contempt proceedings for January 17, 2019, and verbally ordered Mr. Grullon to "get a job." (Ex. B at 8:21-22.)

On November 29, 2018, Mr. Grullon timely filed a notice of appeal of the Contempt Order in the Probate Court. On December 10, 2018, Mr. Grullon then filed a petition for interlocutory relief under M.G.L. c. 231 § 118 in the Appeals Court. That petition was denied by the Appeals Court (Henry, J.) on December 13, 2018, upon a finding that interlocutory relief was inappropriate, as the Contempt Order was in fact a final judgment and thus immediately appealable. In accordance with that decision, Mr. Grullon filed a motion to stay further contempt proceedings in the Probate Court pending appeal of the Contempt Order and marked it for hearing at the second contempt hearing.

The second contempt hearing before the Probate Court was delayed a week at DOR's request and took place on January 24, 2019. (See Ex. D (January 24, 2019 Hearing Transcript).) The parties and DOR appeared, with DOR again acting as counsel for Ms. Polanco. At the hearing, DOR counsel testified that Mr.

Grullon was now in compliance with the Contempt Order,² so the Probate Court declined to hear Mr. Grullon's motion to stay as moot. The Probate Court did not make any further findings before issuing the January 24, 2019 Judgment. (Ex. D at 4:1-4; Ex. E (January 24, 2019 Judgement on Complaint for Civil Contempt).) That same day, Mr. Grullon filed a Complaint for Modification of the child support order because the Probate Court had refused to act on his prior Counterclaim for Modification. (Ex. D at 5:5-10.)

On February 21, 2019, the Probate Court modified his support to \$32 per week, retroactive to October 19, 2018, in accordance with the Child Support Guidelines. (Ex. G, (February, 21, 2019 Judgment of Modification on Complaint for Modification).) Notably, Ms. Polanco did not appear at the hearing on Mr. Grullon's Complaint for Modification, but DOR counsel advocated against the downward modification on her behalf. (See Ex. F (February 21, 2019 Hearing Transcript).)

Mr. Grullon filed a renewed notice of appeal on February 22, 2019:

(i) affirming his appeal of the Contempt Order, (ii) further stating his intent to

² Mr. Grullon was able to bring himself into compliance by making payments totaling \$1,880 between November 10, 2018 and January 24, 2019. This exceeded the amount due of \$1,845 (10 weeks at \$153.45 per week). Mr. Grullon was only able to bring himself into compliance after receipt of unanticipated additional educational assistance from the United States Department of Veterans Affairs resulting in a small refund from New England Tractor Trailer School which he used to make a lump sum payment.

concurrently appeal the January 24, 2019 Judgment and (iii) requesting that the Appeals Court hear the matter as a single appeal. On April 19, 2019, the Probate Court issued notice of assembly of the record. This appeal was docketed on May 3, 2019. Mr. Grullon now brings this timely petition for direct appellate review.

STATEMENT OF FACTS RELEVANT TO THIS APPEAL

At the November 1, 2018 hearing on the Complaint for Civil Contempt, Mr. Grullon was not represented by counsel. Veterans Legal Services was unable to send an attorney to the Family and Probate Court in Salem on that day, and the Family and Probate Court did not appoint an attorney to advocate on behalf of Mr. Grullon.

During the hearing, DOR counsel made inaccurate representations concerning the status of Mr. Grullon's case. Specifically, DOR incorrectly stated or implied that: (i) Mr. Grullon had not filed for modification of the child support order, (Ex. B at 3:14); (ii) Ms. Polanco was not in receipt of public assistance benefits, (id. at 8:11-14); and (iii) Mr. Grullon had the ability to pay despite the evidence to the contrary on his financial statement and his testimony regarding his recent history of incarceration for a criminal matter, (id. at 9:2-7). Despite his attempts, Mr. Grullon was not able to effectively challenge DOR's inaccurate representations, which the Probate Court appeared to accept at face value. DOR counsel also explicitly requested that Mr. Grullon be incarcerated, subject to his

payment of the \$500 purge amount, for failing to make the required child support payments. (Id. at 6:6-10.) Ms. Polanco said only one word during the entire hearing. (Id. at 8:20.)

The Probate Court failed to make explicit findings as to whether Mr. Grullon had the ability to pay the child support he owed. The Probate Court acknowledged Mr. Grullon's testimony that he was incarcerated at various points in the prior year, was unemployed, and was enrolled in classes at New England Tractor Trailer School that were paid for by the United States Department of Veterans Affairs ("VA") through its vocational rehabilitation program. (Id. at 3:34 to 5:12; 7:2-18.). However, the Probate Court did not ultimately make findings on whether or not Mr. Grullon was able to make the required payments now or at the time they became due, nor did the Probate Court find that he had the ability to pay the purge amount.

The hearing concluded with the following exchange between the Probate Court and Mr. Grullon:

THE COURT: . . . You need to get a job, sir, and I want to see when you come back here, I am going to order, I'm not going to incarcerate you today. . . . I need to see that you have a job and that you're doing something. I understand because of your criminal record, that's an issue, but you need to do something because [Ms. Polanco is] not getting any money.

MR. GRULLON: She's fine.

THE COURT: Well, sir, if that's your attitude, then maybe I'll be rethinking what I am going to do today, sir.

MR. GRULLON: Your Honor, I just wanted to say that she is well taken care of. I've been assured by the, by Jamie Melendez who is the Lawrence Veterans --³

...

THE COURT: Sir, you do understand you have a child and this is your obligation.

MR. GRULLON: I do.

THE COURT: It's nobody else's obligation. So telling me she's fine and it's not a big deal, now I'm rethinking what I am going to do. Because that's a really poor attitude to come in here. I was giving you a break today.

MR GRULLON: Yeah, I just stepped on my own –

THE COURT: You did. \$500, ten days in jail.

MR. GRULLON: I just shot myself.

THE COURT: Yeah, you did, sir.

(Id. at 8:21 to 10:6.)

This exchange set forth in the transcript reflects how quickly the Probate Court shifted from securing compliance to imposing a punitive sanction more akin to criminal contempt proceedings.

³ The parties' child is likely entitled to benefits pursuant to M.G.L. c. 115 because of Mr. Grullon's military service. Mr. Melendez, the Veterans Services Officer for the City of Lawrence, is responsible for administering those benefits to residents of the City of Lawrence.

**STATEMENT OF ISSUES
OF LAW RAISED BY THIS APPEAL**

This appeal raises four significant issues:

1. Whether the United States and Massachusetts Constitutions guarantee an indigent defendant the right to counsel in civil contempt proceedings for nonpayment of child support where counsel from the Department of Revenue seeks incarceration.

This issue was raised before the Probate Court in Mr. Grullon's December 21, 2018 motion to stay the Contempt Order and further contempt proceedings pending appeal, and in Mr. Grullon's petition for interlocutory appeal of the Order, and therefore was raised and properly preserved in the Probate Court.

2. Whether the Probate Court erred and/or abused its discretion by finding Mr. Grullon in civil contempt and sentencing him to jail without finding that he had the ability to pay the past due child support both at the time it became due and the purge amount as required under Turner v. Rogers, 564 U.S. 431 (2011), and Massachusetts law.

This issue was raised before the Probate Court in Mr. Grullon's December 21, 2018 motion to stay the Contempt Order and further contempt proceedings pending appeal, and in Mr. Grullon's petition for interlocutory appeal of the Order, and therefore was raised and properly preserved in the Probate Court.

3. Whether the Department of Revenue failed to fulfill its obligation to affirmatively assist the Defendant with his request for modification pursuant to M.G.L. c. 119A.

This issue was raised before the Probate Court at the November 1, 2018 hearing, (Ex. B at 5:12 to 6:25; 7:19-21), and therefore was raised and properly preserved in the Probate Court.

4. Whether the Probate Court erred by failing to act upon the Defendant's Counterclaim for Modification included with his Answer, filed October 19, 2018.

This issue was raised before the Probate Court at the January 24, 2019 hearing, (Ex. D at 4:18 to 9:11), and therefore was raised and properly preserved in the Probate Court.

ARGUMENT

I. The United States and Massachusetts Constitutions Guarantee An Indigent Defendant The Right To Counsel In Civil Contempt Hearings Opposing Government Counsel

The Probate Court violated Mr. Grullon's due process rights under the United States and Massachusetts Constitutions by failing to provide him with counsel where government counsel represented the Plaintiff and sought Mr. Grullon's incarceration.

In Turner v. Rogers, the U.S. Supreme Court considered whether the federal Due Process Clause requires an automatic right to counsel in civil contempt proceedings against an indigent defendant where the government with "counsel or some other competent representative" is Plaintiff, and strongly suggested a right to counsel in such cases, emphasizing "the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with the power to take his life or liberty wherein the [government] is represented by experienced and learned counsel." Id.

The outcome in Turner largely hinged on the need to guard against an asymmetry of representation, the dangers of which are illustrated in Mr. Grullon's case. Id. at 447-48. Mr. Grullon's liberty was at stake, and he was entitled to the constitutional protections of procedural due process. See id. at 445. However, Mr. Grullon, appearing pro se, was left "without the professional legal skill to protect himself . . . before a tribunal with the power to take his . . . liberty" while Ms. Polanco's interests were represented by the government's "experienced and learned counsel." See id. at 449. The damage caused by Mr. Grullon's pro se status is evident: the Probate Court effectively told him he inadvertently ruined his own case. Moreover, the Probate Court failed to follow federal and state law regarding determining ability to pay, but Mr. Grullon, as an untrained lay advocate was wholly unaware of this, demonstrating the critical need for counsel.

Where government counsel brings a case against an unrepresented defendant, particularly one living in poverty, the state's legal and factual assertions are likely to go unchallenged. The state's request for incarceration and a purge amount is also likely to go unchallenged. Once incarcerated, an indigent defendant has no meaningful remedy for the court's failure to provide the necessary procedural safeguards, such as the required finding of the defendant's ability to pay. Where the Plaintiff is represented, the erroneous deprivation of a defendant's liberty is likely. This Court should thus find that an indigent defendant facing incarceration is entitled to counsel in a civil contempt hearing brought by government counsel.

Over and above Turner, "[The] Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language." Goodridge v. Dept. of Public Health, 440 Mass. 309, 328 (2003). The due process clause of the Massachusetts Constitution frequently has been utilized to extend rights, and particularly the right to counsel, to areas where the U.S. Supreme Court has declined to do so. E.g., compare Adoption of Meaghan, 461 Mass. 1006 (2012) (right to counsel in termination of parental rights) and Guardianship of V.V., 470 Mass. 590 (2015) (right to counsel

in guardianship proceedings), with Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) (declining right to counsel in termination of parental rights).

This Court has "on occasion afforded the individual's interest in physical liberty more protection than required by the United States Supreme Court," Aime v. Commonwealth, 414 Mass. 667, 681 n.18 (1993), including on the question of right to counsel when physical liberty is at stake. See, e.g., Commonwealth v. Patton, 458 Mass. 119, 125-26 (2010) ("We have taken a somewhat more expansive view than the Supreme Court and held that whenever imprisonment palpably may result from a violation of probation, 'simple justice' requires that, absent waiver, a probationer is entitled to assistance of counsel"); Commonwealth v. Gomes, 407 Mass. 206 (1990) (defendant entitled to counsel prior to incarceration for nonpayment of court-ordered fine).

Civil contempt proceedings fit squarely within this Court's prior right to counsel jurisprudence, as imprisonment may result from such proceeding. Moreover, this Court would be in good company in recognizing a right to counsel for civil contempt proceedings post-Turner.⁴

⁴ See, e.g., Rutherford v. Rutherford, 296 Md. 347, 358, 464 A.2d 228 (1983) (right to counsel in civil contempt); State ex rel. Family Support Div. - Child Support Enforcement v. Lane, 313 S.W.3d 182, 186 (Mo. App. 2010) (noting that "the distinction between a 'criminal' and a 'civil' proceeding is irrelevant if the outcome of the civil proceeding is imprisonment"); Tetro v. Tetro, 544 P.2d 17, 19 (Wash. 1975) (respondent in civil contempt is entitled to counsel); State v. Stone, 268 P.3d 226 (Wash. App. 2012) (due process requires appointment of counsel in

II. The Probate Court Erred When It Failed To Determine Whether Mr. Grullon Had The Ability To Pay Before Finding Him In Civil Contempt

In a civil contempt, due process requires that the court determine whether the defendant has the ability to comply with the underlying order. Turner, 546 U.S. at 446. In Turner, the Supreme Court held that one of the essential procedural safeguards rendering an automatic right to counsel unnecessary in a civil contempt hearing is "an express finding by the court that the defendant has the ability to pay." Id. at 448.

Similarly, under Massachusetts law, a court may not find a defendant in civil contempt where it does not find that the defendant had the ability to pay at the time the contempt judgment is entered. E.g., Dolansky v. Dolansky, 84 Mass. App. Ct. 1112 (2013) (Rule 1:28 decision).

Here, the Probate Court did not find that Mr. Grullon had the ability to pay, either at the time the child support payments were due or the purge amount at the time of the hearing, and there is no evidence to support that conclusion. The Probate Court did not even check the box on the form Order indicating the

enforcement proceedings brought by prosecutor if incarceration is a possibility); Pennsylvania v. Diaz, 2018 PA Super. 175, 191 A.3d 850 (2018) (defendants facing incarceration for failure to pay fines have right to counsel where government was plaintiff).

Defendant has the ability to pay. (Ex. C at 2.) This was clear error, and further demonstrates the critical need for counsel.

The Probate Court did not identify income or assets Mr. Grullon could have used to make payment, stating only: "[s]omehow you've been managing to live and be able to go to school." (Ex. B at 9:2-3.) Mr. Grullon testified that he was incarcerated at various times, unemployed but training to improve his prospects and expected to return to work after graduating from New England Tractor Trailer School.⁵ (Id. at 7:6-15.) The record also reflects the Probate Court initially decided against incarceration because it understood Mr. Grullon did not have the ability to pay, noting that it "underst[ood] because of [Mr. Grullon's] criminal record [getting a job is] an issue." (Id. at 9:5-6.) The Probate Court considered requiring Mr. Grullon to start on the day of the hearing "making some regular payments" but not requiring the full amount in arrears, nor the full purge amount DOR counsel requested and noting it expected Mr. Grullon to have a job soon. (Id. at 9:1-7.)

The fundamental distinction between criminal contempt (which triggers a right to counsel) and civil contempt is whether the purpose of the contempt is to coerce compliance or to punish bad behavior. Here, the record

⁵ If present, counsel also could have drawn the Court's attention to Mr. Grullon living with his parents and the VA covering his educational costs.

reflects how quickly the two issues can be conflated when a defendant is unrepresented. Mr. Grullon was incarcerated for what the Probate Court perceived as a "really poor attitude." (Id. at 10:1.) Even in a criminal contempt, this would not justify a jail sentence – the comments interpreted as a "poor attitude" were an attempt to clarify facts, not an insult or affront to the Probate Court. Due process and Massachusetts law require the court make findings of the defendant's ability to pay and that his non-payment was in fact willful. The Probate Court clearly erred in failing to do so. Further, its decision to incarcerate Mr. Grullon was entirely punitive and divorced from consideration of whether he was able to comply.

The heightened protections contemplated by Turner are also consistent with the Commonwealth's recently expanded due process rights for defendants facing incarceration for failure to pay fees under the recent Criminal Justice Reform Legislation of 2018. The legislature has determined that "a court shall not commit a person to a correctional facility solely for non-payment of money owed" if such person established, by a preponderance of the evidence, an inability to pay. M.G.L. c. 127 § 145(b) as modified by The Acts of 2018, Ch. 69. The legislature further stated that "[a] court shall not commit a person to a correctional facility for non-payment of money owed if such a person is not represented by counsel for the commitment proceeding, unless such person has waived counsel." Id. The legislature has demonstrated a clear intent to reduce

incarcerations due to poverty. As a similarly situated individual, facing incarceration, Mr. Grullon deserved equal protection and representation.

III. DOR Failed To Fulfill Its Obligation Pursuant To M.G.L. c. 119A To Affirmatively Assist The Defendant With His Request for Modification

Pursuant to M.G.L. c. 119A § 2, the Department of Revenue "shall provide IVD services to children and families, whether or not they are recipients of public assistance, to establish, *modify*, and enforce child support obligations. Said services shall include. . . the establishment, *modification*, and enforcement of child support orders." (emphasis added). The law is clear that DOR has an obligation to assist families, not just custodial parents.

When the Probate Court asked if Mr. Grullon had filed a modification, he testified that he had "no means of doing so. . . I have no idea where to serve her." (Ex. B at 5:14-16.) Mr. Grullon stated that he previously tried to file a modification in Springfield, where he lives, (see id. at 6:1-5) and the Probate Court instructed Mr. Grullon to "talk to DOR again," (id. at 6:18). Mr. Grullon stated he tried to reach out to DOR numerous times including leaving a voicemail with no response. (Id. at 7:19-21.) His testimony established that he requested assistance from DOR on numerous occasions unsuccessfully.

DOR's website states "[w]e provide services to parents who pay child support and parents and caretakers who receive child support." Commonwealth of Massachusetts, Department of Revenue, Child Support Enforcement Division

(CSE) (May 23, 2019), <https://www.mass.gov/orgs/child-support-enforcement-division>. However, DOR did not assist Mr. Grullon. Rather, it treated him as an adversarial party and advocated solely for Ms. Polanco, despite the agency stating it did not have a subrogation interest. DOR plainly failed to provide Mr. Grullon with the services required under M.G.L. c. 119A, thus depriving him of due process and equal protection under the law.

IV. The Probate Court Erred By Failing To Act Upon The Defendant's Counterclaim For Modification Included With His Answer

The Probate Court also erred in refusing to act upon Mr. Grullon's counterclaim for modification and requiring that he instead file a new complaint for modification. At the January 24 hearing, when counsel inquired whether the counterclaim was prohibited by rule, the Probate Court noted only that it was something it did not allow. (Ex. D at 6:8-10). Counsel is not aware of any legal basis for refusing to allow counterclaims on complaints for contempt. On the contrary, other Massachusetts courts have permitted this practice without comment. See, e.g., Cesso v. Cesso, 83 Mass. App. Ct. 1125 (2013) (Rule 1:28 decision) (affirming in part a judgment on counterclaim for modification filed in response to complaint for contempt). Procedural matters such as the proper form for pursuing modification of a child support order should not differ based on the preferences of the courtroom where the action is heard.

**STATEMENT OF REASONS WHY
DIRECT APPELLATE REVIEW IS APPROPRIATE**

Under Massachusetts Rule of Appellate Procedure 11, direct appellate review is appropriate to address: "(1) questions of first impression or novel questions of law; (2) questions of law which should be submitted for final determination to the Supreme Judicial Court; (3) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (4) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court." Massachusetts Rule of Appellate Procedure 11(a).

Direct appellate review is appropriate here and should be granted for three reasons: (1) this appeal concerns questions of first impression; (2) this appeal concerns a question of law concerning the Constitution of the Commonwealth and of the United States; and (3) this appeal concerns a question of "such public interest that justice requires a final determination by the full Supreme Judicial Court."

I. This Appeal Concerns Questions Of First Impression

There appears to be no other Massachusetts appellate authority directly addressing the right to counsel and other procedural safeguards in civil contempt hearings seeking incarceration as mandated in Turner. There do not appear to be any other Massachusetts appellate authority addressing whether

indigent defendants in civil contempt hearings seeking incarceration are entitled to counsel under the United States or Massachusetts Constitutions. Finally, Turner left open, and no Massachusetts court has addressed, the question of whether an indigent defendant has a guaranteed right to counsel where the State, represented by counsel, brings an action for civil contempt and seeks incarceration. See Turner, 564 U.S. at 449. See also Petition of Crystal, 330 Mass. 583, 589 (1953) and Garabedian v. Commonwealth, 336 Mass. 119, 124 (1957) stating that due process confers a right to counsel, relying on decisions pre-Turner. Direct appellate review is necessary here for the Supreme Judicial Court to provide guidance to lower courts, including and especially the Family and Probate Court, on when counsel or other procedural safeguards are required in civil contempt hearings brought by state counsel and seeking incarceration of an indigent defendant.

II. This Appeal Concerns Questions Of Constitutional Law

Under Turner, a court contravenes a defendant's Fourteenth Amendment right to due process where it fails to find that the defendant had the ability to comply with an order before finding him in contempt and sentencing him to incarceration. Turner, 564 U.S. at 445 (stating the "ability to comply marks a dividing line between civil and criminal contempt . . . an incorrect decision (wrongfully classifying the contempt proceeding as civil) can increase the risk of

wrongful incarceration by depriving the defendant of the procedural protections (including counsel) that the Constitution would demand in a criminal proceeding"). If an indigent defendant lacks the ability to comply, but, as here, he is improperly deprived of his liberty, there are virtually no remedies to make him whole once the sentence is imposed. This is particularly true here, where a sentence of 10 days was imposed immediately.

III. This Appeal Concerns Questions Of Significant Public Interest

Withholding counsel or other procedural safeguards, such as determining the ability to comply, from indigent defendants in civil contempt hearings is not only harmful to the rights of each individual defendant, but it also undermines the purpose of civil contempt, especially in the context of child support payments. A defendant who is in fact unable to comply with a child support order will only fall further behind if incarcerated.⁶

Forcing indigent defendants to defend themselves in a civil contempt hearing against the State creates an untenable "asymmetry of representation" that the Supreme Judicial Court shall address. See Turner, 564 U.S. at 449 (noting that in "civil contempt proceedings where the underlying child support payment is

⁶ Here, as a result of his incarceration, Mr. Grullon was unable to finish his vocational program on schedule, thereby delaying his graduation by a few months and thus his ability to obtain his commercial driver's license and suitable employment.

owed to the State . . . the government is likely to have counsel or some other competent representative. . . . The average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel").

CONCLUSION

For the foregoing reasons, this appeal is appropriate for direct review by the Supreme Judicial Court.

Dated: May 24, 2019
Boston, Massachusetts.

Respectfully submitted,

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EXHIBIT A

Copy of Probate and Family Court Docket Entries

DOR O/B/O Radelis Polanco v. Joshua Gullon
Essex Probate and Family Court No. 16D2957DR

[Skip to main content](#)

ES16D2957DR Polanco Grullon, Radelis Yanet vs. Grullon, Joshua

- Case Type
- Domestic Relations
- Case Status
- Closed
- File Date
- 12/12/2016
- DCM Track:
-
- Initiating Action:
- Divorce 1B
- Status Date:
- 12/28/2017
- Case Judge:
- Bisenius, Hon. Theresa A
- Next Event:
-
-

Property Address

- [All Information](#)
- [Party](#)
- [Subsequent Action/Subject](#)
- [Event](#)
- [Docket](#)
- [Disposition](#)

Party Information

Polanco Grullon, Radelis Yanet
- Plaintiff

-
- DOD
-

Alias

Party Attorney

- Attorney
- Pro Se
- Bar Code
- PROPER
- Address
- Phone Number
-

[More Party Information](#)

Grullon, Joshua
- Defendant

-
- DOD
-

Alias

Party Attorney

- Attorney
- Elliott, Esq., Eve C. Savage
- Bar Code
- 684419
- Address
- Veterans Legal Services
- PO Box 8457
- Boston, MA 02114
- Phone Number
- (857)317-4474
- Attorney
- Richardson, Esq., Anna Schleelein
- Bar Code
- 673064
- Address
- Veterans Legal Services

PO Box 8457
Boston, MA 02114
• Phone Number
• (857)317-4474

[More Party Information](#)

Polanco, Radelis Yanet
- Resumed Name

DOD

Alias

Party Attorney

[More Party Information](#)

Subsequent Action/Subject

<u>SA/Subject #</u>	<u>Status Date</u>	<u>Pleading Party</u>	<u>Responding Party</u>	<u>Status</u>	<u>Description</u>
1	01/18/2018	Polanco Grullon, Radelis Yanet	Grullon, Joshua	Active	IVD DOR Contempt
2	07/19/2018	Polanco Grullon, Radelis Yanet	Grullon, Joshua	Closed	Modification CSP
3	03/19/2018	Polanco Grullon, Radelis Yanet	Grullon, Joshua	Closed	S/A - Complaint for Contempt
4	01/31/2019	Polanco Grullon, Radelis Yanet	Grullon, Joshua	Closed	S/A - Complaint for Contempt
5	02/21/2019	Grullon, Joshua	Polanco, Radelis Yanet	Closed	PILOT IVD Mod Complaint Only

Events

<u>Date</u>	<u>Session</u>	<u>Location</u>	<u>Type</u>	<u>Event Judge</u>	<u>Result</u>
11/27/2017 08:30 AM	Judge Sahagian Lawrence Session	2 Appleton Street, Lawrence	Trial Half Day	Sahagian, Hon. Mary Anne	Event Held
03/06/2018 08:30 AM	Judge Sahagian Lawrence Session	2 Appleton Street, Lawrence	Motion	Sahagian, Hon. Mary Anne	Event Held
03/15/2018 08:30 AM	Lawrence DOR Session	2 Appleton Street, Lawrence	Summons Issued, Contempt Returnable	DOR Judge	
03/21/2018 08:30 AM	Judge Sahagian Lawrence Session	2 Appleton Street, Lawrence	Summons Issued, Contempt Returnable	Sahagian, Hon. Mary Anne	Event Held: Case Dismissed
03/21/2018 08:30 AM	Judge Sahagian Lawrence Session	2 Appleton Street, Lawrence	Motion	Sahagian, Hon. Mary Anne	Event Held
07/11/2018 08:30 AM	Judge Sahagian Lawrence Session	2 Appleton Street, Lawrence	Pretrial Conference Domestic and Equity	Sahagian, Hon. Mary Anne	Event Held in Advance
11/01/2018 08:30 AM	Lawrence DOR Session	2 Appleton Street, Lawrence	Summons Issued, Contempt Returnable	DOR Judge	
01/17/2019 08:00 AM	Lawrence DOR Session	2 Appleton Street, Lawrence	Contempt Continued	DOR Judge	
01/24/2019 08:30 AM	Salem DOR Session	36 Federal Street, Salem	Motion	DOR Judge	
02/21/2019 08:00 AM	Lawrence DOR Session	2 Appleton Street, Lawrence	Motion	DOR Judge	

Docket Information			
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12/12/2016	Affidavit of Indigency Filed Applies To: Gullon, Radelis Y (Plaintiff)	2	
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12/29/2016	Affidavit Disclosing Care and Custody	5	Image
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12/29/2016	Affidavit of Indigency Approved 12/29/2016 Applies To: Gullon, Radelis Y (Plaintiff)	3	
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03/15/2017	Motion To Impound Address Applies To: Polanco Gullon, Radelis Yanet (Plaintiff)	9	Image
03/15/2017	Affidavit Of Plaintiff	10	Image
03/15/2017	Summons issued on complaint for Divorce.		
03/15/2017	Track assignment notice issued. A NOTICE: Track Assignment Notice 14 Month Track was generated and sent to: Plaintiff: Radelis Yanet Polanco Gullon		
03/15/2017	Motion To Impound ALLOWED on 03/15/2017 File Reference # 9	11	Image
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06/14/2017	Appearance by Attorney, Jared D. Spinelli, Esq., Party Name Joshua Gullon	17	Image
11/27/2017	Notice of Appearance of Radelis Yanet Polanco Gullon, Pro Se	18	Image
11/27/2017	Financial Statement Applies To: Polanco Gullon, Radelis Yanet (Plaintiff)	19	
11/27/2017	Financial Statement Applies To: Gullon, Joshua (Defendant)	20	
11/27/2017	Child Support Guidelines Worksheet	22	
11/27/2017	Separation Agreement Dated 11/27/2017	23	Image

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>	<u>Image Avail.</u>
11/28/2017	Child Support Guidelines Worksheet	21	
12/28/2017	Judgment/Decree of Dismissal on Counter Claim For Divorce Filed 05/08/2017 entered on 11/27/2017 Related to File Reference # 12 Judge: Sahagian, Hon. Mary Anne	24	Image
12/28/2017	Judgment of Divorce Nisi dated 11/27/2017 Judge: Sahagian, Hon. Mary Anne	25	Image
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01/18/2018	Subsequent Action for Modification filed	27	Image
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03/06/2018	Summons Filed, Date of Service 03/05/2018	34	Image
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11/01/2018	Mittimus issued on 11/1/18, Joshua Grullon, Joshua Grullon was adjudged to be in Civil Contempt and will be held at Essex County House of Correction for (10) (TEN) DAYS, UNLESS HE PURGE HIMSELF OF SAID CONTEMPT BY PAYMENT OF \$500.00. SAID PURGE AMOUNT SHOULD BE BY BANK CHECK OR MONEY ORDER MADE OUT TO THE DEPARTMENT OF REVENUE COMMONWEALTH OF MASSACHUSETTS unless he/she pays the sum of \$500.00.		
	Judge: Kaplan, Hon. Randy J		
11/01/2018	Summons Filed, Date of Service 09/27/2018	47	Image
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	Applies To: Grullon, Joshua (Defendant); Richardson, Esq., Anna Schleelein (Attorney) on behalf of Grullon, Joshua (Defendant)		
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	Applies To: Polanco Grullon, Radelis Yanet (Plaintiff)		
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<u>Docket Date</u>	<i>Docket Text</i>	<u>File Ref Nbr.</u>	<i>Image Avail.</i>
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Case Disposition

<u>Disposition</u>	<u>Date</u>	<u>Case Judge</u>
Judgment of Divorce Nisi	11/27/2017	Bisenius, Hon. Theresa A

EXHIBIT B

November 1, 2018 Hearing Transcript (Kaplan, J.)

DOR O/B/O Radelis Polanco v. Joshua Grullon
Essex Probate and Family Court No. 16D2957DR

Hearing

1

Volume: 1
Pages: 1-11
Exhibits: None

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

PROBATE AND FAMILY COURT
DEPARTMENT OF THE TRIAL COURT

Massachusetts Department of Revenue
on behalf of Radelis Polanco,
Plaintiff

v.

DOCKET NO. ES16D2957DR

Joshua Grullon,
Defendant

HEARING
BEFORE THE HONORABLE RANDY JILL KAPLAN

APPEARANCES:

For the Plaintiff:
599 North Avenue
Wakefield, Massachusetts 01880
By: Derek Scacchi, Esq.

For the Defendant:
By: Joshua Grullon, Pro se

Lawrence, Massachusetts
November 1, 2018

Roberta Katz
Approved Court Transcriber

1 P R O C E E D I N G S

2 (Commencing at 12:30 p.m.)

3 THE COURT: The Polanco and Grullon matter,
4 16D2957. Madam Interpreter.

5 THE INTERPRETER: Yes.

6 THE COURT: And for the record, sir.

7 MR. GRULLON: Joshua Grullon.

8 THE COURT: Thank you.

9 MS. POLANCO: Radelis Polanco.

10 THE COURT: Thank you.

11 Mr. Interpreter.

12 THE INTERPRETER: (Inaudible), Spanish
13 interpreter.

14 THE COURT: You've been sworn in already I
15 assume?

16 THE INTERPRETER: Yes, I have, Your Honor.

17 THE COURT: And counsel?

18 MR. SCACCHI: Derek Scacchi for the Department
19 of Revenue.

20 THE COURT: Okay.

21 MR. SCACCHI: Your Honor, before the court is
22 mother's contempt. The current obligation is from
23 the parties' November 27, 2017 divorce for 123 per
24 week. The current arrears in this matter is 5,636.

25 THE COURT: And father says in his answer that

1 he was incarcerated it looks like right after that
2 from December to March of this year and then again
3 from July until August. Is that accurate?

4 MR. SCACCHI: Correct. I haven't verified.
5 I'm taking father's answer at face value.

6 MR. GRULLON: Your Honor --

7 THE COURT: No, no, no. Sir, you're going to
8 get a chance. Sir, you're going to get a chance to
9 talk. Okay. And father has not, father --

10 Ma'am, I'm going to hear from counsel first and
11 then --

12 But there's been no modification filed,
13 correct?

14 MR. SCACCHI: Not to my knowledge, Your Honor.

15 THE COURT: And the arrears right now are
16 5,636?

17 MR. SCACCHI: Correct.

18 THE COURT: Okay.

19 MR. SCACCHI: We received one payment on
20 October 5 of 2018 for \$50. We also received a
21 payment through the abandoned property, the \$95 from
22 March 27th. And those have been the only two
23 payments we've received in this case.

24 THE COURT: So sir, in terms of when you were
25 incarcerated, so the divorce says it was in November.

1 Were you incarcerated out of this court on a
2 complaint for contempt or something else?

3 MR. GRULLON: It was an issue out of -- this
4 other matter was out of Peabody District Court on a
5 criminal.

6 THE COURT: And you were incarcerated from --

7 MR. GRULLON: For approximately a week. I
8 posted a thousand some odd bail.

9 THE COURT: Well, so then you weren't
10 incarcerated from December until March.

11 MR. GRULLON: And then subsequently a week
12 after, I was arrested in Beverly for a similar
13 charge.

14 THE COURT: So this is all criminal issues?

15 MR. GRULLON: Yes, Your Honor.

16 THE COURT: And then you were released in March
17 of 2018?

18 MR. GRULLON: Approximately.

19 THE COURT: And then what did you go back to
20 jail in July for?

21 MR. GRULLON: A similar matter.

22 THE COURT: Okay. And what's the status of
23 that case? Are you on probation?

24 MR. GRULLON: It's a pending criminal matter.
25 I'm on \$750 bail, scheduled to be in pretrial motions

1 on the 7th which is a week from today.

2 THE COURT: What's the criminal matter, the
3 most recent one?

4 MR. GRULLON: It is, it's classified as a
5 domestic. My ex-girlfriend alleged that I --

6 THE COURT: Not to do with this one?

7 MR. GRULLON: I haven't spoken to that woman in
8 months, aside from a couple of emails on regards to
9 seeing my daughter which she says to come and speak
10 to --

11 THE COURT: So sir, we're sticking to the money
12 issues. So did you even bother to file a complaint
13 for modification?

14 MR. GRULLON: Your Honor, I just have no means
15 of doing so. I have no idea where, where to serve
16 her.

17 THE COURT: Sir, you're here today. Just so
18 you understand, we don't have any ability to give --
19 I can determine an ability to pay but I am not going
20 to be able to wipe these arrears out.

21 MR. GRULLON: I have no intent on having you do
22 that, Your Honor.

23 THE COURT: So you need to file a complaint for
24 modification if you're not working, while you're here
25 today.

1 MR. GRULLON: Your Honor, I tried in
2 Springfield.

3 THE COURT: Here.

4 MR. GRULLON: I live in Springfield, Your
5 Honor.

6 THE COURT: Here, you're standing here today,
7 sir.

8 MR. GRULLON: I understand that, Your Honor.
9 The thing is that when I received the motion, I mean
10 the summons, it was a -- what is it, Hampden County
11 sheriff deputy.

12 THE COURT: So sir, just listen to what I am
13 saying. You're standing here today.

14 MR. GRULLON: Yes.

15 THE COURT: Here's where you have to file your
16 modification. Before you leave here today, you need
17 to file a complaint for modification, okay. You need
18 to talk to DOR because again, the arrears are going
19 to keep accruing. I can't get rid of them.

20 MR. GRULLON: I understand that.

21 THE COURT: So I just want to make it really
22 clear, so when I see you back here again next time, I
23 have made it clear to you that you can walk
24 downstairs and file your modification.

25 MR. GRULLON: It is crystal clear. I actually

1 have an attorney.

2 THE COURT: And so tell me what steps you have
3 been taking to look -- were you, in November of 2017,
4 were you employed?

5 MR. GRULLON: No, Your Honor. I've been
6 attending school. I've been going to New England
7 Tractor Trailer School. I have three companies that
8 are willing to hire me once I get my CDL license.

9 THE COURT: How are you paying for school?

10 MR. GRULLON: The VA. I've going in under the
11 Post 9/11 GI Bill.

12 THE COURT: So how much longer do you have for
13 school, sir?

14 MR. GRULLON: I'm scheduled to graduate
15 approximately around the 27th.

16 THE COURT: Of --

17 MR. GRULLON: Of this month.

18 THE COURT: Okay.

19 MR. GRULLON: The thing is that if -- and I've
20 tried to reach out to DOR but I left a voicemail,
21 too, but no response.

22 THE COURT: Okay. What are you looking for or
23 what's mother looking for, counsel?

24 MR. SCACCHI: Given that father has been out of
25 jail since August, we have over two months where he's

1 had the ability to find work or to seek work. Given
2 that there has been relatively no payments other than
3 the \$50, even when father has been out of jail, there
4 has been no effort to seek employment and to make
5 payments.

6 THE COURT: Okay. What are you looking for?

7 MR. SCACCHI: That an incarceration would be
8 appropriate.

9 THE COURT: How much?

10 MR. SCACCHI: 500.

11 THE COURT: Is that what you're looking for
12 now? Is mother getting any benefits or is this money
13 going to --

14 MR. SCACCHI: This is all going to mother.

15 THE COURT: Is that what you're looking for,
16 ma'am?

17 [Proceedings translated through the
18 interpreter.]

19 MS. POLANCO: Yes.

20 THE COURT: So I am going to put this over,
21 sir. I am going to put it over until December. You
22 need to get a job, sir, and I want to see when you
23 come back here, I am going to order, I'm not going to
24 incarcerate you today, but somehow -- but you will be
25 next time, sir, if you don't have a job and starting

1 today, you don't start making some regular payments.
2 Somehow you've been managing to live and be able to
3 go to school. You're telling me you're graduating on
4 the 27th, so I need to see that you have a job and
5 that you're doing something. I understand because of
6 your criminal record, that's an issue, but you need
7 to do something because she's not getting any money.

8 MR. GRULLON: She's fine.

9 THE COURT: Well, sir, if really that's your
10 attitude, then maybe I'll be rethinking what I am
11 going to do today.

12 MR. GRULLON: Your Honor, I just wanted to say
13 that she is well taken care of. I've been assured by
14 the, by Jamie Melendez (phonetic) who is the Lawrence
15 Veterans --

16 THE COURT: So if that's your attitude, now I'm
17 rethinking what I am going to do today, sir.

18 MR. GRULLON: No, but Your Honor, Your Honor,
19 like --

20 THE COURT: Sir, you do understand you have a
21 child and this is your obligation.

22 MR. GRULLON: I do.

23 THE COURT: It's nobody else's obligation. So
24 telling me she's fine and it's not a big deal, now
25 I'm rethinking what I am going to do. Because that's

1 really a poor attitude to come in here. I was giving
2 you a break today.

3 MR. GRULLON: Yeah, I just stepped on my own --

4 THE COURT: You did. \$500, ten days in jail.

5 MR. GRULLON: I just shot myself.

6 THE COURT: Yeah, you did, sir.

7 Okay, do you want to give me a date in January?

8 THE CLERK: We have January 3rd.

9 THE COURT: And I'll waive your appearance,
10 ma'am, if you don't want to appear.

11 THE CLERK: 3rd or 17th, Your Honor.

12 THE COURT: Why don't we do the 17th. That's
13 here?

14 THE CLERK: Yes, Your Honor.

15 THE COURT: Okay. Your appearance is waived
16 for the next hearing.

17 MR. SCACCHI: Thank you, Your Honor.

18 THE COURT: Thank you.

19 MS. POLANCO: I have another question.

20 THE COURT: So I can't conduct the hearing if
21 he's not here. So you can step outside and talk to
22 counsel.

23 (End at 12:38 p.m.)

24

25



The Commonwealth of Massachusetts
ADMINISTRATIVE OFFICE OF THE TRIAL COURT
 Office of Transcription Services (OTS)
 Two Center Plaza
 Boston, Massachusetts 02108

AUDIO ASSESSMENT FORM (AAF)

Approved Court Transcriber: Complete one (1) Audio Assessment Form (AAF) for each volume of transcript, attach the original AAF to the next to last page of each volume of transcript, and FAX a copy of the AAF to OTS at 617-878-0762.

TODAY'S DATE: 12/4/18 TRANSCRIBER NAME: Roberta Katz
 CASE NAME: DOR 080 Radelis Polanco v. Joshua Ceallon DOCKET NO.: _____
 JUDGE: Kaplan RECORDING DATE: ES16D 2957DR
 TRANSCRIPT VOLUME: 1 OF 1 Nov. 1, 2018

QUALITY OF AUDIO:
 (check one)
 excellent good fair poor

TYPE OF AUDIO:
 (check one)
 CD TAPE

- (check all that apply)
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 - low audio
 - low audio at sidebar
 - simultaneous speech
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TIME STAMP or INDEX NUMBER

COMMENTS: _____

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CERTIFICATE

I, Roberta Katz, an Approved Court Transcriber, do hereby certify that the foregoing is a true and accurate transcript of the audio recording provided to me in the above-entitled action.

I, Roberta Katz, further certify that the foregoing is in compliance with the Administrative Office of the Trial Court Directive of Transcript Format.

I, Roberta Katz, further certify that I neither am counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.



Roberta Katz, Approved Court Transcriber

Dated 12/4/18

EXHIBIT C

November 1, 2018 Order on Complaint for Civil Contempt (Kaplan, J.)

DOR O/B/O Radelis Polanco v. Joshua Grullon
Essex Probate and Family Court No. 16D2957DR

50

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

Essex Division

Docket No. ES 16D2957 DR

~~JUDGMENT~~ ORDER - ~~ON COMPLAINT FOR CIVIL / CRIMINAL CONTEMPT~~

Filed on: 7/11/18

Radelis Polanco, Plaintiff

v.

Joshua Grullon, Defendant

I. After hearing, it is adjudged that the defendant is:

NOT GUILTY of Contempt of this Court.

GUILTY of Contempt of this Court for having willfully:

- A. failed to pay child support / alimony, the arrearage of which is fixed at \$ 5,636.00, as of 10/30/18, excluding interest and penalties.
- B. failed to pay health insurance premiums for the plaintiff and / or minor child(ren).
- C. failed to pay medical bills in the amount of \$ _____.
- D. failed to allow the plaintiff visitation with the minor child(ren) on _____

- E. failed to report to the Probation Department of this Court regarding his/her job seeking efforts.
- F. failed to pay the attorney fees owed to the plaintiff's attorney in the amount of \$ _____.
- G. _____

(over)

7.002.991

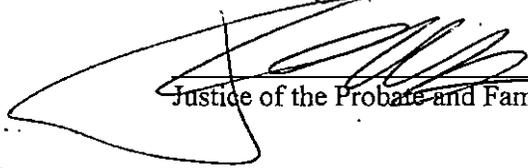
II. It is ordered that:

- A. the defendant pay \$ 153.75 ~~monthly~~ weekly, (\$ 30.75 of which shall be applied against the arrearage).
- B. the defendant pay \$ _____ weekly / monthly towards the arrearage of \$ _____.
- C. the parties shall comply with the stipulation dated _____ which is incorporated and merged into this order / judgment.
- D. the defendant shall report to the Probation Department of this Court each week with evidence of having sought employment from at least _____ employers. The Defendant shall provide the Probation Department with the name, address, and telephone number of the employers a copy of his/her job application or other proof of having actually applied for work. VIOLATION OF THIS PARAGRAPH SHALL BE DEEMED CRIMINAL CONTEMPT OF COURT AND MAY SUBJECT THE DEFENDANT TO A JAIL SENTENCE OF UP TO SIX MONTHS.
- E. the defendant shall pay attorney fees in the amount of \$ _____ and the cost of service of process which was necessary on this complaint, to wit, \$ _____.
- F. _____

After hearing with a full opportunity for the parties to be heard, and upon review of all the relevant and credible evidence presented, the Court finds, by **clear and convincing evidence**, and further Orders that:

- A. the defendant has the ability to pay this order.
- B. the defendant be committed to jail for 10 days or until he/she shall purge him/herself of said contempt by payment of \$ 500 OR until further order of the Court OR until he/she be otherwise discharged by due course of law.
- C. this sentence be suspended until _____.
- D. this matter is continued to January 17, 2019 at 8:00am however, defendant's appearance is waived

Date: 11/01/2018


Justice of the Probate and Family Court

Handwritten notes:
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EXHIBIT D

January 24, 2019 Transcript of Hearing (Kaplan, J.)

DOR O/B/O Radelis Polanco v. Joshua Grullon
Essex Probate and Family Court No. 16D2957DR

Hearing

Pages 1-10

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

PROBATE AND FAMILY COURT

DEPARTMENT OF THE TRIAL COURT

Massachusetts Department of Revenue

on behalf of Radelis Polanco,

Plaintiff

v.

DOCKET NO. ES16D2957DR

Joshua Gullon,

Defendant

HEARING

BEFORE: Honorable Randy Jill Kaplan

DATE: January 24, 2019

APPEARANCES:

Derek Scacchi, Esquire
For the Plaintiff

Eve Elliott, Esquire
For the Defendant

Hearing

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P R O C E E D I N G S

THE COURT: The Polanco and Grullon matter.

Name for the record -- who needs the interpreter? Just mother? Yes?

You don't need the interpreter, sir?

MR. GRULLON: No, Your Honor.

THE COURT: Okay. Name for the record, sir.

MR. GRULLON: Joshua Grullon.

THE COURT: Thank you.

MS. ELLIOTT: Eve Elliott, from Veterans Legal Services, on a limited assistance basis for Mr. Grullon.

THE COURT: Thank you.

MS. POLANCO: Radelis Polanco.

THE COURT: Thank you.

MR. SCACCHI: Derek Scacchi for the Department of Revenue.

THE COURT: So I know there's a motion to stay but in terms of since the last judgment, has there been compliance?

MR. SCACCHI: There has, Your Honor.

THE COURT: And the arrears right now are

Hearing

3

1 5,109?

2 MR. SCACCHI: Correct, Your Honor. In
3 fact, father has actually overpaid by \$35 from
4 that order to now.

5 THE COURT: And what's -- remind me again
6 what the weekly order is, 123?

7 MR. SCACCHI: 123, plus an additional 30,
8 \$30.75 to arrears.

9 THE COURT: Okay. And so he was looking
10 to go to judgment?

11 MR. SCACCHI: Well, we were until we --

12 THE COURT: Well, what am I going to
13 stay, counsel, if he's been making the payments?

14 MS. ELLIOTT: I would ask to stay the
15 pending contempt on this and our due date on
16 this. I mean if he's complying --

17 THE COURT: But I wasn't going to do her
18 a due date. So if he's paid and he's
19 compliant --

20 MS. ELLIOTT: My understanding it was put
21 on today for a review of the contempt.

22 THE COURT: Right.

23 MS. ELLIOTT: And so we were asking to
24 stay any further contempt proceedings.

Hearing

4

1 THE COURT: So we were going to go to
2 judgment because counsel says he's complying, so
3 I'm not going to make any further findings of
4 contempt. I was just going to go to judgment.
5 So what am I staying?

6 MS. ELLIOTT: I would have had the motion
7 to stay heard first but.

8 THE COURT: Well, I want to know what he
9 wants to do today. If he was asking for me to
10 make additional orders or to do anything else on
11 this case, I would hear you on the motion to
12 stay but if he's asking to go to judgment and
13 not make any additional orders and he says that
14 your client has been compliant, what am I
15 staying? I mean you certainly have a right to
16 appeal the order, whether it's stayed or not.
17 It's -- there is still an underlying support
18 order. I'm not going to stay that obligation,
19 and he hasn't filed a modification.

20 MS. ELLIOTT: He did file a counterclaim
21 for modification. So is the court's position
22 not to honor the counterclaim on the
23 modification?

24 THE COURT: No. The court's position is

Hearing

5

1 I have to hear it. So when was the counterclaim
2 for modification filed?

3 MS. ELLIOTT: It was filed with the
4 answer to the complaint for contempt.

5 THE COURT: Oh, you cannot file a
6 counterclaim on a contempt.

7 MS. ELLIOTT: It's a mandatory --

8 THE COURT: So you can file a
9 modification. You can't file -- there is no
10 such thing as a counterclaim on a contempt. So
11 you can file a modification and if, you know,
12 certainly if he filed this and he didn't
13 understand legally what he was to do, I can
14 certainly consider the date. And I'm looking at
15 his, you know, there is -- so certainly you can
16 talk to me when you file what's appropriate
17 about giving you a retroactive order back to the
18 date that this was filed, because again, that
19 issue wasn't raised. So once he's filed it, I
20 don't do anything until --

21 First of all, he still has \$5100. So
22 even if there's a modification, there is still
23 going to be some arrears. The arrears payment
24 right now is only \$30 a week. So if you want to

1 today while you're here file a modification and
2 have mother accept service, and you can
3 certainly ask that it is -- I didn't see this so
4 it wasn't brought to my attention and certainly
5 we wouldn't have scheduled it for a pretrial
6 because you can't file a counterclaim on a
7 contempt.

8 MS. ELLIOTT: And what's the basis for
9 that, that you can't file the counterclaim on
10 the contempt? Is there a rule that says that?

11 THE COURT: Because, A, I don't even
12 allow people to file counterclaims on other
13 contempts. So, but this is a modification.
14 This isn't even a contempt. So if this -- if
15 mother had filed a modification, he could file a
16 counterclaim. But again, based on the fact that
17 he did it, your relief can request that it be
18 retroactive back to whatever date that it was
19 filed. I'm assuming he didn't make service on
20 this because he just filed it as a counterclaim.
21 Technically he's required to make service on any
22 new pleading, so even if this was accepted as a
23 counterclaim, do you want to show me the service
24 that he made on this?

Hearing

7

1 MS. ELLIOTT: It was done by first class
2 mail. I mean --

3 THE COURT: That's not appropriate.

4 MS. ELLIOTT: The same way the co-motion
5 would be served.

6 THE COURT: This is not a co-motion, and
7 that's not how contempts are filed.

8 MS. ELLIOTT: I understand.

9 THE COURT: So again, I think you need to
10 file a modification which you can file today,
11 and I will certainly give you a pretrial date
12 but, you know, in terms of, you've got to still
13 appeal the judgment on -- why would you want me
14 to continue this over? He's telling me that
15 there is no --

16 MS. ELLIOTT: That's fine. If the
17 position of the court is that the contempt will
18 go to judgment today, then --

19 THE COURT: Right, so you need to --

20 MS. ELLIOTT: There is no further
21 contempt proceedings.

22 THE COURT: You need to file and serve an
23 appropriate modification. So again, if he filed
24 this counterclaim and he had actually served it,

1 I would have considered converting -- so he
2 can't still do it as a counterclaim but he
3 didn't even make service on this. This is a new
4 action. It's not a co-motion. You didn't plead
5 it as a co-motion. A co-motion can only be
6 filed on the form provided. So he either can
7 file a co-motion now or he can file a
8 modification.

9 But again, you know, on the judgment of
10 contempt, there is nothing, he can appeal it but
11 there is nothing -- I don't know why you would
12 want me to stay it because why would you come
13 back on this? They're willing to go to
14 judgment.

15 MS. ELLIOTT: That's fine. Then we'll go
16 to judgment without any further contempt
17 proceeding.

18 THE COURT: So if you file the
19 modification, you can talk to mother and see if
20 she'll accept service while you're here today.
21 And then I think it's a Lawrence, a Lawrence
22 case, correct?

23 MR. SCACCHI: Correct.

24 THE COURT: So we'll again give you a

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pretrial on that.

MS. ELLIOTT: And I would just ask for findings regarding the court's position on the modification counterclaim on the contempt.

THE COURT: I'm not making any findings. I'm just not giving you a date because it's not properly -- again, even if your argument is that it's properly done, there is no service and it is not pled as a co-motion. A co-motion can never be a counterclaim. A co-motion has to be a separate complaint. So, okay, thank you.

MR. SCACCHI: Thank you, Your Honor.

(End.)

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C E R T I F I C A T E

COMMONWEALTH OF MASSACHUSETTS

I, Roberta Katz, do hereby certify that
the foregoing transcript represents a complete,
true and accurate transcription of the
electronic recording furnished to me in the
above-entitled matter, to the best of my
knowledge, skill and ability.



ROBERTA KATZ Commission expires:

March 6, 2020

January 28, 2019

EXHIBIT E

**January 24, 2019 Judgment on
Complaint for Civil Contempt (Kaplan, J.)**

**DOR O/B/O Radelis Polanco v. Joshua Grullon
Essex Probate and Family Court No. 16D2957DR**

SA

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
PROBATE AND FAMILY COURT DEPARTMENT

Essex Division

Docket No. ES 16D2957-DR

~~ORDER~~ JUDGMENT ON COMPLAINT FOR CIVIL / CRIMINAL CONTEMPT

Filed on: 7/11/18

Radelis Polanco, Plaintiff

v.

Joshua Grullon, Defendant

I. After hearing, it is adjudged that the defendant is:

NOT GUILTY of Contempt of this Court.

GUILTY of Contempt of this Court for having willfully:

- A. failed to pay child support / alimony, the arrearage of which is fixed at \$ 5,109.00, as of 1/23/19, excluding interest and penalties.
- B. failed to pay health insurance premiums for the plaintiff and / or minor child(ren).
- C. failed to pay medical bills in the amount of \$ _____.
- D. failed to allow the plaintiff visitation with the minor child(ren) on _____

- E. failed to report to the Probation Department of this Court regarding his/her job seeking efforts.
- F. failed to pay the attorney fees owed to the plaintiff's attorney in the amount of \$ _____
- G. _____

(over)

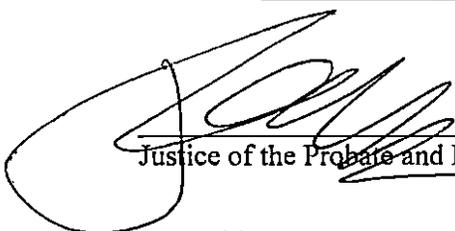
II. It is ordered that:

- A. the defendant pay \$ 153.75 weekly / monthly, (\$ 30.75 of which shall be applied against the arrearage).
- B. the defendant pay \$ _____ weekly / monthly towards the arrearage of \$ _____.
- C. the parties shall comply with the stipulation dated _____ which is incorporated and merged into this order / judgment.
- D. the defendant shall report to the Probation Department of this Court each week with evidence of having sought employment from at least _____ employers. The Defendant shall provide the Probation Department with the name, address, and telephone number of the employers a copy of his/her job application or other proof of having actually applied for work. VIOLATION OF THIS PARAGRAPH SHALL BE DEEMED CRIMINAL CONTEMPT OF COURT AND MAY SUBJECT THE DEFENDANT TO A JAIL SENTENCE OF UP TO SIX MONTHS.
- E. the defendant shall pay attorney fees in the amount of \$ _____ and the cost of service of process which was necessary on this complaint, to wit, \$ _____.
- F. _____

After hearing with a full opportunity for the parties to be heard, and upon review of all the relevant and credible evidence presented, the Court finds, by **clear and convincing evidence**, and further Orders that:

- A. the defendant has the ability to pay this order.
- B. the defendant be committed to jail for _____ days or until he/she shall purge him/herself of said contempt by payment of \$ _____ OR until further order of the Court OR until he/she be otherwise discharged by due course of law.
- C. this sentence be suspended until _____.
- D. this matter is continued to _____.

Date: 01/24/2019



Justice of the Probate and Family Court

Handwritten notes:
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EXHIBIT F

February 21, 2019 Hearing Transcript (Kaplan, J.)

DOR O/B/O Radelis Polanco v. Joshua Grullon
Essex Probate and Family Court No. 16D2957DR

Hearing

Pages 1-8

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS

PROBATE AND FAMILY COURT

DEPARTMENT OF THE TRIAL COURT

Massachusetts Department of Revenue

on behalf of Radelis Polanco,

Plaintiff

v.

DOCKET NO. ES16D2957DR

Joshua Grullon,

Defendant

HEARING

BEFORE: Honorable Randy Jill Kaplan

DATE: February 21, 2019

APPEARANCES:

Derek Scacchi, Esquire

For the Plaintiff

Eve Elliott, Esquire

For the Defendant

Hearing

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P R O C E E D I N G S

THE COURT: Your name for the record.

MS. ELLIOTT: Good morning, Your Honor, Eve Elliott from Veterans Legal Services on behalf of Mr. Grullon.

THE COURT: Your name, sir.

MR. GRULLON: Joshua Grullon.

MR. SCACCHI: Derek Scacchi for the Department of Revenue.

THE COURT: This is father's complaint for modification. The current order is 123 back from 2017?

MS. ELLIOTT: Yes, Your Honor. We were last before you in January on a review date on a complaint for contempt. Father had filed an answer and counterclaim in October to that complaint for contempt brought by mother and the Department.

THE COURT: On October 19th?

MS. ELLIOTT: Yes. And there is some question as to the procedural issue of whether that was properly brought and we'll settle that matter on appeal. But at this time he's filed this modification per your instructions from the

Hearing

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1 bench last time we were before you and we are
2 asking, I believe the guidelines are 32 per week
3 and we would ask to go retro on that to October
4 when that counterclaim was served.

5 THE COURT: And mother is not here,
6 counsel?

7 MR. SCACCHI: She is not, Your Honor.

8 THE COURT: And has anybody spoken to
9 her?

10 MR. SCACCHI: No, Your Honor. The mother
11 was here at the prior hearing. She's open on
12 assistance for another child, not in this case.
13 We did send her address (inaudible). We sent
14 her the -- we served her at the address that was
15 provided to us.

16 I will also add, Your Honor, the
17 guidelines that were run, we've actually two
18 sets of guidelines, Your Honor. There is the
19 one that my sister alluded to. I will also note
20 that father's income appears to have gone down
21 significantly and it looks like based on tips
22 from the prior financial statement that was just
23 filed on January 24th, there appears to be a
24 significant difference in his earnings which

Hearing

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1 was, my sister attributed to working less hours.
2 He's a pizza delivery driver for Domino's Pizza.

3 THE COURT: So the difference is --

4 MR. SCACCHI: In January it was 321 and
5 it's now 144, which has a significant impact on
6 the bottom line number.

7 THE COURT: Oh, I see.

8 So counsel, why, why did his numbers go
9 down?

10 MS. ELLIOTT: Your Honor, he's been
11 working less hours. I believe based on the
12 January financial statement was based off of two
13 pay stubs during which he worked approximately
14 90 hours over that period, whereas this
15 financial is based off of three pay stubs in
16 which he's worked approximately 40 hours.

17 THE COURT: But that's sort of, I don't
18 just base it on like the past couple of weeks.
19 Did he work at this job last year?

20 MS. ELLIOTT: No, this was a job that he
21 got in December of 2018.

22 THE COURT: And so how many hours is this
23 current pay stub based on, financial statement
24 based on?

Hearing

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1 MS. ELLIOTT: So 40 hours total
2 approximately, I believe 41 off of three pay
3 stubs.

4 THE COURT: So you're saying he's working
5 40 hours a week?

6 MS. ELLIOTT: He has worked about 40
7 hours off of the three different pay stubs, so a
8 total of 40 hours.

9 THE COURT: So my question, so where are
10 you coming up with this figure, the 144?

11 MS. ELLIOTT: I took the average. I took
12 the three pay stubs and took the average of what
13 he had earned over that period.

14 THE COURT: Right.

15 MS. ELLIOTT: As well as the average of
16 the tips.

17 THE COURT: But how, how much does he get
18 paid an hour?

19 How much are you paid an hour, sir?

20 MS. ELLIOTT: 12.

21 MR. GRULLON: 12.

22 THE COURT: And how many hours on
23 average, how long have you worked at this job?

24 MR. GRULLON: Since December.

Hearing

6

1 THE COURT: Since December. So what
2 would you say an average week is?

3 MR. GRULLON: Four days, eight-hour
4 shifts.

5 THE COURT: Excuse me?

6 MR. GRULLON: Four days a week, eight-
7 hour shifts.

8 MS. ELLIOTT: 24 hours a week.

9 MR. GRULLON: Roughly, unless they ask me
10 to stay.

11 THE COURT: So that's 288 and that
12 doesn't include tips.

13 And you used a figure of 321. Is mother,
14 is mother a customer?

15 MR. SCACCHI: She is, Your Honor. This
16 is a full service case. As I said, she's a
17 customer in her other case as public assistance.
18 This is full service.

19 THE COURT: But is she getting public
20 assistance on this case?

21 MR. SCACCHI: No.

22 THE COURT: Okay, so mother is not here.
23 Okay. And I will do a retroactive back to the
24 date of the order.

Hearing

7

1 MS. ELLIOTT: Thank you.

2 THE COURT: Okay.

3 MS. ELLIOTT: And I'm sorry, is that the
4 32 or the --

5 THE COURT: 32.

6 MS. ELLIOTT: Thank you.

7 MR. SCACCHI: And the retroactive will be
8 October --

9 THE COURT: October 19th.

10 MS. ELLIOTT: And that's to judgment,
11 Your Honor, or --

12 THE COURT: That's to judgment.

13 MS. ELLIOTT: Thank you.

14 (End.)

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C E R T I F I C A T E

COMMONWEALTH OF MASSACHUSETTS

I, Roberta Katz, do hereby certify that
the foregoing transcript represents a complete,
true and accurate transcription of the
electronic recording furnished to me in the
above-entitled matter, to the best of my
knowledge, skill and ability.



ROBERTA KATZ Commission expires:
March 6, 2020

April 2, 2019

EXHIBIT G

**February, 21, 2019 Judgment of Modification
on Complaint for Modification (Kaplan, J.)**

**DOR O/B/O Radelis Polanco v. Joshua Grullon
Essex Probate and Family Court No. 16D2957DR**

64

COMMONWEALTH OF MASSACHUSETTS

The Trial Court

Probate and Family Court Department

Essex Division

Docket No. ES 16D2957-DR

Massachusetts Department of Revenue, Child Support Enforcement Division (DOR) on behalf of

Joshua Grillon,
Plaintiff

v.

Radelis Polanco
Defendant

JUDGMENT OF MODIFICATION
on complaint filed on 01/24/19 (#60)

After hearing, all persons having been notified in accordance with the law, and [] plaintiff, [] defendant, [X] counsel for DOR, [] counsel for plaintiff, [X] counsel for defendant, [] interpreter / G.A.L./DCF/P.O. having appeared today it is hereby **ORDERED** and **ADJUDGED**: The judgment/order of this court dated _____ is modified as follows:

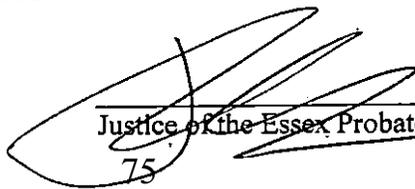
- The parties are ordered to comply with the Stipulation of Agreement dated _____ which is filed, incorporated, and merged into this Judgment and shall have no independent legal significance.
- This Court finds that there is an inconsistency between the amount of the existing order and the amount that results from application of the child support guidelines and orders the ~~Mother~~ Father to pay current child support in the amount of \$ 320 per week/month by income assignment through DOR effective 10/19, 2018.

This child support amount is for 1 child(ren), ~~the child in this case, and the child(ren) in the case(s) with the following docket number(s):~~ _____

- The Mother / Father owes an additional \$ _____ in past-due support (this amount includes / does not include interest and penalty assessed by DOR)
- The Mother / Father is ordered to maintain/obtain health insurance including [] dental [] vision coverage for the child.
 There is no information indicating that private health care coverage is available at a reasonable cost, or the cost creates an undue hardship for the payor, and the child's health care needs are being met by the Medicaid program. The Mother / Father must notify DOR (or the other parent if DOR is not providing services) if private health care coverage for the child becomes available to the parent.
- The obligation to pay current child support and provide health insurance for the child(ren) ends on the child(ren)'s [] 18th [] 21st [] 23rd birthday(s) on [] date: _____ unless ordered otherwise.
- Any past-due support due under prior orders and judgments is preserved.
- Both parties must notify DOR of any changes in their addresses, phone numbers, or employment.
- _____

All prior orders and judgments of this court remain in full force and effect unless modified herein.

02/21/2019
Date


Justice of the Essex Probate and Family Court
75

7.002.991

EXHIBIT H

Cesso v. Cesso, 83 Mass. App. Ct. 1125 (2013) (Rule 1:28 decision)

83 Mass.App.Ct. 1125
 Unpublished Disposition
 NOTICE: THIS IS AN UNPUBLISHED OPINION.
 Appeals Court of Massachusetts.

Thomas CESSO
 v.
 Cheryl CESSO.

No. 12–P–996.
 |
 April 19, 2013.

By the Court (GRAHAM, BROWN & GRAINGER, JJ.).

MEMORANDUM AND ORDER
 PURSUANT TO RULE 1:28

*1 Thomas Cesso (father) appeals from a Probate and Family Court judgment that modified the amount of child support and alimony he owes to his former wife Cheryl Cesso (mother). On appeal, the father asserts that the trial judge erred by failing to address his request for retroactive modification of his child support and alimony obligations.¹

Background. By a judgment of divorce nisi dated May 22, 2009, the mother was awarded primary physical custody of the parties' minor child and father was ordered to pay child support and alimony in the amount of \$1,730 per week.² On August 5, 2009, in response to the mother's complaint for contempt, the father filed a counterclaim seeking modification of the alimony and child support awards on the ground that he had become unemployed.³ On January 11, 2011, the Probate and Family Court judge entered a temporary order that directed the father to pay \$800 per week to the mother, \$500 allocated as child support and \$300 for alimony.⁴ The modification and contempt actions were tried over six days between May 18, 2010, and March 21, 2011. There was evidence at trial that the father had lost his new job and expected to receive eight weeks of severance pay, after which his only income would consist of unemployment benefits. The court entered a modification judgment dated June 13, 2011, directing the father to pay \$750 per week to

the mother in child support during the duration of his eight-week severance pay. After the end of the eight-week period, the modification judgment directed the father to pay thirty percent of his then-existing gross income to the mother. The father filed a motion to amend or alter the judgment, or alternatively, for clarification, on June 24, 2011. The court denied the motion to alter or amend, but allowed the motion to clarify in part to confirm that all payments required by the modification judgment were for child support only. The requirement of alimony was eliminated as of the date of the modification judgment. The father appealed from the modification judgment as clarified.

Discussion. The father asserts that the trial judge was required to make findings to support his decision not to modify child support and alimony obligations retroactively to the date of his modification counterclaim. The mother asserts that the judge's modification order, in fact, granted the father retroactive relief beginning March 18, 2011. Our review of the record supports the father's characterization.

We review the judge's decision not to award retroactive modification of child support and alimony to determine whether there was abuse of discretion. See *Boulter–Hedley v. Boulter*, 429 Mass. 808, 811 (1999), citing *Department of Revenue v. Foss*, 45 Mass.App.Ct. 452, 460 (1998). In *Boulter–Hedley*, the Supreme Judicial Court found the trial judge's decision to deny retroactive modification was an abuse of discretion where the judge failed to explain how he reached his conclusion. *Id.* at 812. The court stated that “[t]he judge should have provided an explanation for his conclusion, both for the benefit of the parties, and to enable an appellate court effectively to review the ruling.”

Ibid. See *Pierce v. Pierce*, 455 Mass. 286, 306 (2009) (remanding modification order to Probate and Family Court for consideration of father's request for retroactive alimony relief with instructions that such considerations be supported by findings and a statement of reasons).

*2 Here, the trial judge did not make any findings or provide a rationale for denying the father retroactive modification of his child support or alimony obligations. The order did not address the father's request for retroactive modification at all and, despite the trial lasting six days and spanning almost a year, the judge made no findings of fact to support his judgment. We conclude that findings and explicit rulings should have been provided

both for the benefit of the parties and to enable effective appellate review. *Boulter-Hedley v. Boulter*, *supra* at 811–812.

Conclusion. The portions of the modification judgment concerning retroactivity of the modification of the child support and alimony orders are vacated, and the case is remanded to the Probate and Family Court for findings

and rulings on that issue. The judgment is otherwise affirmed.

So ordered.

All Citations

83 Mass.App.Ct. 1125, 985 N.E.2d 874 (Table), 2013 WL 1688031

Footnotes

- 1 Below, the mother also filed a notice of appeal from the modification judgment as clarified, but has not entered a cross-appeal in this court. Thus we do not address her arguments seeking to overturn the modification judgment. See [Wheeler v. Springfield Sugar & Prods. Co.](#), 15 Mass.App.Ct. 979, 981 (1983). The mother has the ability to seek a modification of the child support order in the Probate and Family Court at any time based on changed circumstances. See [Brooks v. Piela](#), 61 Mass.App.Ct. 731, 734 (2004), citing [G.L. c. 208, § 28](#).
- 2 The father previously appealed the divorce judgment and we affirmed the support orders, but remanded for redetermination of the amount of waste of marital assets attributable to the father and, if necessary, adjustment of the property division. [Cesso v. Cesso](#), 79 Mass.App.Ct. 1131 (2011).
- 3 The father subsequently filed a separate complaint for modification on October 29, 2009, reasserting the same grounds for modification.
- 4 The father was unemployed at the time he filed his counterclaim for modification; however, in October, 2010, he found new employment and was earning \$130,000 annually. The temporary order was based on his new salary.

EXHIBIT I

Dolansky v. Dolansky, 84 Mass. App. Ct. 1112 (2013) (Rule 1:28 decision)

84 Mass.App.Ct. 1112

Unpublished Disposition

NOTE: THIS OPINION WILL NOT APPEAR
IN A PRINTED VOLUME. THE DISPOSITION
WILL APPEAR IN A REPORTER TABLE.

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.

Appeals Court of Massachusetts.

Iveta DOLANSKY

v.

Jan DOLANSKY.

No. 12-P-1545.

|

September 26, 2013.

By the Court (TRAINOR, MEADE & FECTEAU, JJ.).

*MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28*

*1 The former husband, Jan Dolansky, appeals from (1) a judgment of the Probate and Family Court dated March 10, 2011, ordering him to pay his former wife, Iveta Dolansky, alimony in the amount of \$150 per week and contribute \$8,400 to her attorney's fees;¹ and (2) a judgment of civil contempt dated October 20, 2011, in which the judge found the husband in contempt for having failed to pay his alimony and attorney's fees obligations. The husband was found liable for a total of \$6,950 at the contempt hearing, and the judge ordered that all amounts should accrue with statutory interest thereon.² On appeal, the husband challenges (1) the alimony award, arguing that the probate judge lacked authority to award alimony to the wife because the issue had not been reserved after the first trial, (2) the award of attorney's fees, arguing that the trial judge was without authority in

March, 2011, to reconsider her earlier denial of the wife's motion for attorney's fees, and (3) the contempt judgment entered against him, arguing that there was no evidence presented that he had the ability to pay. We affirm. 1. *Alimony*. The husband argues the original judgment of divorce nisi failed to properly preserve the issue of alimony for the second proceeding, and therefore the judge was barred from considering it by reason of res judicata. We disagree.

The trial judge did not abuse her discretion in awarding alimony to the wife, see [Drapek v. Drapek](#), 399 Mass. 240, 243 (1987), and the husband has failed to meet his burden to show the award was "plainly wrong and excessive." [Heins v. Ledis](#), 422 Mass. 477, 481 (1996), quoting from [Pare v. Pare](#), 409 Mass. 292, 296 (1991). The initial judgment of divorce nisi did specifically reserve the issue of marital debt and the division of the marital estate as issues for the second proceeding, in addition to resolving the issues of child support and custody. Absent the judge specifically reserving the issue of alimony as well, the husband claims this issue was barred from being litigated at the second trial. This argument ignores the fact that the wife specifically requested alimony in her complaint, and the wife continued to request alimony in her pretrial memorandum and at the pretrial conference for the second proceeding. Further, while the husband argued in his pretrial memorandum filed in advance of the second trial that the issue of alimony had not been properly preserved, he instead argued at the pretrial conference itself that the wife should not be awarded alimony because of her economic circumstances, and not because such argument was otherwise precluded. Because the husband was on notice on multiple occasions that the wife sought alimony, the judge's award was not in error.

Furthermore, the judge did not abuse her discretion in concluding the husband had the ability to pay \$150 per week in alimony, as the award was properly "grounded in the recipient spouse's need for support and the supporting spouse's ability to pay." [Woodside v. Woodside](#), 79 Mass.App.Ct. 713, 721 (2011), quoting from [Gottsegen v. Gottsegen](#), 397 Mass. 617, 624 (1986). While the husband did have outstanding debt obligations, the judge noted his weekly income of \$1,500.13 allowed him to satisfy both his expenses and the additional alimony payment of \$150 per week.³ The judge further found that

the wife's earning capacity was limited given her role as the children's primary caretaker and her ability to find only low-paid part-time employment. The wife was not working at the time of the marriage, nor did she work outside the home for the duration of the marriage. As of the time of trial, her weekly income was a combination of child support, paid by the husband, and food stamps. The judge properly considered all relevant factors in determining the alimony award, and we conclude there was no abuse of her discretion.

*2 2. *Attorney's fees.* The husband also argues the trial judge improperly awarded attorney's fees to the wife because a final judgment had already entered (the judgment of divorce nisi). The husband maintains that as a result, the judge had no ability to entertain the wife's motion for reconsideration of her request for attorney's fees. See [Franchi v. Stella](#), 42 Mass.App.Ct. 251, 258 (1997) (judges maintain inherent authority to reconsider issues previously raised until final judgment has entered). We disagree.

This court recognizes in divorce cases a “spouse's need for adequate legal representation” that is “not materially different from those other needs which fall within the more common meaning of alimony or support.”

[Grubert v. Grubert](#), 20 Mass.App.Ct. 811, 819 (1985). While judges typically may not entertain an application for attorney's fees and costs under G.L. c. 208, § 38, after a final judgment has entered, see [Freitas v. Freitas](#), 26 Mass.App.Ct. 196, 197 (1988), no such final judgment entered here for purposes of determining attorney's fees given the bifurcated nature of the overall proceedings. The divorce nisi proceeding represented only a partial judgment, and as previously noted, alimony, property division, and debt allocation had yet to be decided at the time the judgment nisi was entered. In divorce cases involving multiple proceedings such as this, courts should view—for the purposes of attorney's fees—the series of hearings, filings, and other actions throughout as one continuous proceeding without a final judgment until all matters are resolved. See [Hager v. Hager](#), 12 Mass.App.Ct. 887, 888–889 (1981). The judge in this case properly treated the bifurcated proceedings as a single ongoing proceeding for the purposes of awarding attorney's fees. We must note that “legal expenses may be a significant element of the financial disposition in a divorce case” and “counsel fees are often part of the

discussion of an over-all financial award.” [Freitas](#), *supra* at 201. The judge was therefore correct in viewing the bifurcated proceedings together for purposes of assessing attorney's fees as part of the overall award for the wife. There was no error.

In addition, no abuse of the judge's significant discretion occurred regarding the amount of attorney's fees awarded. [Robbins v. Robbins](#), 19 Mass.App.Ct. 538, 543 (1985) (“Rarely should [judges] be reversed if there is assurance that they have dwelt on the relevant considerations and have stayed within permissible evidentiary bounds”). The decision to award attorney's fees rests within the sound discretion of the trial judge, and the judge may do so after reviewing the evidence put forth. [Drapek v. Drapek](#), 399 Mass. at 248. “As long as the amount awarded is not incommensurate with an objective evaluation of the services performed ... [t]he award of such costs generally rests in sound judicial discretion.... [T]he award ... may be presumed to be right and ordinarily ought not to be disturbed.” [Ross v. Ross](#), 385 Mass. 30, 38–39 (1982), quoting from [Smith v. Smith](#), 361 Mass. 733, 738 (1972). The judge here had the opportunity to observe the wife's attorney during all phases of litigation. The judge was also personally familiar with the attorney's performance and the station of the parties, and had a detailed affidavit of the legal fees and services involved. There was no abuse of discretion in the award of attorney's fees.

*3 3. *Contempt judgment.* The husband argues that the judge erred in holding him in contempt because there was neither evidence nor a finding that he had the present ability to pay alimony and attorney's fees.

“[I]n order to find a defendant in civil contempt there must be a clear and unequivocal command and an equally clear and undoubted disobedience.” [Larson v. Larson](#), 28 Mass.App.Ct. 338, 340 (1990). “In addition, the defendant must be found to have the ability to pay at the time the contempt judgment enters.” *Ibid.* See [Aroesty v. Cohen](#), 62 Mass.App.Ct. 215, 220 (2004) (present ability to pay is prerequisite to finding of civil contempt).

While asserting that there was no evidence at the contempt hearing (which he did not attend) concerning his ability to pay the alimony and attorney's fees arrearages, the husband glosses over the burden of proof on the issue. [General Laws c. 215, § 34](#), inserted by St.1982, c. 328,

provides that “[a]t the hearing of a complaint for civil contempt, the defendant shall have the burden of proving his or her inability to comply with the pre-existing order or judgment of which the complaint alleges violation.” See *Diver v. Diver*, 402 Mass. 599, 603 (1988) (“burden of proof on the ability issue is on the defendant”). “Upon a showing that a defendant in a civil contempt proceeding is in arrears on his adjudicated support obligations, the defendant must come forward with evidence of a present inability to comply with the order or judgment, and if no such proof of inability is forthcoming the defendant can be found in civil contempt.” *Poras v. Pauling*, 70

Mass.App.Ct. 535, 540 (2007), quoting from *Kindregan & Inker, Family Law & Practice* §§ 72:3, 72:4 (3d ed.2002). The husband has failed to meet his burden demonstrating that he is unable to comply with the court order. The judge did not err in finding him in contempt.

*Judgments affirmed.*⁴

All Citations

84 Mass.App.Ct. 1112, 994 N.E.2d 817 (Table), 2013 WL 5353846

Footnotes

- 1 The trial judge had bifurcated the proceedings prior to trial in September, 2008, because she viewed the wife's complaint as also pertaining to issues of property division and alimony. A judgment of divorce nisi was awarded in the first proceeding on September 2, 2009, in which the parties were divorced, the wife was awarded physical custody of the children, and the husband was ordered to pay child support in the amount of \$403 per week. The issues of “marital debt and division of the marital estate” were specifically reserved.
- 2 The \$6,950 included \$4,500 in unpaid alimony and \$2,450 in unpaid attorney's fees.
- 3 It should be noted that the \$150 per week award was substantially less than the \$400 per week that the wife had requested.
- 4 The husband's request for attorney's fees on appeal is denied.

CERTIFICATE OF COMPLIANCE
PURSUANT TO MASS. R. APP. P 16(K)

I, Catherine Fisher, hereby certify that this application complies with the rules of court that pertain to the filing of applications for direct appellate review, including, but not limited to: Rule 20(a) (form and length of briefs, appendices, and applications for and responses to direct and further appellate review); and Rule 21 (redaction).

I further certify that the argument section of this application complies with the length limit of Mass. R. App. P. 11(b) for an application produced in a proportionally spaced font because it was prepared in 14 point Times New Roman font using Microsoft Word (2010) and contains 1,999 words.

Dated: May 24, 2019

/s/ Catherine Fisher

Catherine Fisher

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. DAR-_____

Appeals Court No. 2019-P-0665

DOR O/B/O RADELIS POLANCO,
Plaintiff-Appellee,

v.

JOSHUA GRULLON
Defendant-Appellant.

CERTIFICATE OF SERVICE

I, Catherine Fisher, hereby certify that on May 24, 2019, a true copy of Defendant-Appellant Joshua Grullon's Application For Direct Appellate Review, by first class mail, postage prepaid, and/or via the Supreme Judicial Court Clerk's Office:

Janet Fennell
Regional Counsel
Department of Revenue
Child Support Enforcement
36 Federal Street
Salem, Massachusetts 01970

Radelis Polanco
*Served via Supreme Judicial Court
Clerk's Office due to impounded
address*

Dated: May 24, 2019
Boston, Massachusetts

/s/ Catherine Fisher
Catherine Fisher

*Counsel for Defendant-Appellant
Joshua Grullon*