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COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

JULIA LONDERGAN vs. ADRIANA CARRILLO.

08-P-1699

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is an appeal by Adriana Carrillo from those portions of a divorce judgment in a same-sex marriage that awarded physical custody of the two minor boys to Julia Londergan, joint legal custody to both parents, rehabilitative **alimony** of \$200 per week for two years to Londergan, and \$1,250 per week in child support to Londergan. We affirm.

Londergan and Carrillo had a commitment ceremony on September 27, 1997 and were married on May 27, 2004. The trial judge correctly treated the parties as having been married from the time of their commitment ceremony. They have two children: one son whose biological mother is Londergan, and another son whose biological mother is Carrillo. The parties cross-adopted their sons.

Londergan filed for divorce on September 22, 2006, and temporary orders were entered by a different probate judge, which provided for a so-called 'nesting' arrangement whereby each parent had equal time with the children, with the parent caring for the children during her time staying in the marital home and the other parent staying elsewhere.

After a seven-day trial, and after receiving reports from two guardians ad litem, the trial judge made extensive findings of fact and, on March 31, 2008, entered a judgment of divorce nisi.

1. *Custody orders.* The nesting arrangement caused tension among the parties, and the children did not do well. The judge, after making findings as to the strengths and weaknesses of each parent, found both to be fit parents (finding 249) and that the children loved them both and wanted to spend equal time with each of them (finding 246). Based on the fact that Londergan had been the primary caretaker of the children and had been the stay-at-home mother, while Carrillo had assumed the role as breadwinner and worked demanding hours as a surgeon, although she too had taken care of the children, the judge, finding that the 'nesting arrangement' had been injurious to the children, awarded physical custody to Londergan with visitation rights to Carrillo. The judge was not required to follow the recommendation of one of the guardians ad litem to continue shared physical custody and, in view of the hostility between the parties, did not abuse her discretion in making the award. See *Rolde v. Rolde*, 12 Mass. App. Ct. 398, 405-406 (1981). See also *Kendall v. Kendall*, 426 Mass. 238, 251 (1997), cert. denied, 524 U.S. 953 (1998). Nor did she abuse her discretion in awarding legal custody to both parents. Although the parties were hostile to one another, the judge divided

their specific responsibilities so as to avoid problems insofar as feasible (judgment rulings 40-51). Although Carrillo faults the judge for leaving therapy decisions to Londergan, the parties must mutually approve the therapist (judgment rulings 47-48). There was no error.

2. *Financial orders.* The judge determined that Carrillo's gross income as an orthopedic surgeon in 2007 was an estimated \$201,856, and that she will continue to receive raises and bonuses and also some gifts from her mother. Londergan, although trained as a lawyer, had a gross income of \$37,960, but the judge found she has an earning capacity of \$70,000. The judge determined that in view of the debts of the parties -- they had lived well beyond their means -- Londergan will have to seek more lucrative employment. The judge ordered the two-year rehabilitative **←alimony→** in order for Londergan to find suitable work. If she, however, earns \$70,000 within the two-year period, **←alimony→** will stop (also it will stop on the death of either party or on Londergan's remarriage). [FN1] Contrary to Carrillo's claims, the judge made extensive findings on Londergan's career and acted within her discretion in awarding rehabilitative **←alimony→**. See *Heins v. Ledis*, 422 Mass. 477, 485 n.4 (1996); *Fechtor v. Fechter*, 26 Mass. App. Ct. 859, 867 (1989).

The judge's order for child support also was not an abuse of discretion in view of the income of both parties. Carrillo points to Londergan's weekly costs. Those figures, however, do not include the cost of housing.

Carrillo complains that under the orders she will have to pay more than she earns. Although it would have been helpful if the judge had more fully spelled out how she arrived at the amount of child support, the judge did not abuse her discretion in making the award, in view of her findings as to Carrillo's finances and her future earning capacity (findings 78-82, 86, 87, 104). The standard of living of both spouses will go down. As the judge found, 'The parties' spending habits were irresponsible, excessive and reckless with regard to eating out, traveling, vacationing, and private school. Even though [Carrillo] earned a significant salary, it was not limitless. The parties never stopped to see if they could afford to spend such large amounts of money, and as a result, the parties have significant credit card debt.' (RA. 330)

In conclusion, we find no error in the judgment. We do not consider Carrillo's appeal frivolous and do not consider it appropriate to award Londergan legal fees for the appeal.

The judgment is affirmed. The posttrial order staying the **←alimony→** provision of the judgment is vacated. The orders on all other posttrial motions are affirmed.

So ordered.

By the Court (Graham, Dreben & Sikora, JJ.),

Entered: July 22, 2009.

FN1. The **←alimony→** provision of the judgment was stayed by another probate judge pending appeal and sale of the marital home. (The judge issuing the judgment had retired.)