

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC EDEN)
) No. 111, 2001
 Petitioner Below)
 Appellant,) Court Below: Family Court
 v.) of the State of Delaware in
) and for New Castle County
)
 ERIN MURPHY DUNCKEL,) File No. CN98-07191
) Petition Nos. 00-12176, 00-16489,
 Respondent Below,) 00-27183
 Appellee.)

Submitted: November 8, 2001

Decided: January 3, 2002

Before **WALSH, BERGER,** and **STEELE,** Justices.

ORDER

This 3rd day of January, 2002, it appears to the Court that:

1. Eric Eden appeals several orders issued by the Family Court regarding his son. Specifically, Eden argues that: a) the trial judge erred by not following the recommendation of the child's therapist in establishing visitation, b) the trial judge erred in requiring him to assume full financial responsibility for the child's private education, c) the trial judge erred in refusing to allow discovery regarding an email submitted as evidence, and d) the trial judge erred in failing to explain the basis for awarding attorney's fees to mother.

2. The history of litigation between the parties is complicated and it is unnecessary for our purposes to outline it here. For the following reasons, the Family Court orders are AFFIRMED in part, and VACATED in part.

3. This Court reviews Family Court visitation decisions for abuse of discretion and will not disturb the decision absent a clear showing of abuse. The trial judge is not bound by recommendations provided by expert witnesses and is free to weigh all evidence presented in coming to his decision. Here, the child's therapist recommended that summer visitation with mother in California be no longer than three two-week blocks and that father be available between the two-week blocks. The schedule established by the court provided mother two three-week visits with a one-week period in between for father, or (according to another order) a three-week visit in July and a three-week visit in August. In coming to this decision, the trial judge noted that the first alternative minimized the child's travel time and also that the father has family in California. After considering all of the best interest of the child factors, the court originally awarded father primary residential care, with significant visitation for mother. It was not an abuse of discretion for the trial judge to expand visitation slightly beyond the therapist's recommendation to afford mother an approximately equivalent amount of visitation time as she had previously enjoyed. The trial judge did follow the

recommendation that the visitation periods be divided so as not to separate the child from the father for significant amounts of time.

4. Whether the child attends private or public school, father, as residential parent, is entitled to make the ultimate decision. In determining that father would bear the cost of tuition if the parties were unable to reach an agreement, the trial judge noted mother's objections and concerns regarding private education. While the therapist testified that the private school the child is currently attending meets his emotional needs, there is no evidence that the child requires *special education*. Also, father argues throughout about financial hardship and mother's income is minimal. *Renzi v. Renzi*,¹ cited by both parties, appears to bear on this case. When it concluded that the father was not required to contribute to the child's private school costs, the Family Court in *Renzi* stated, "absent an overwhelming and compelling special need for private education which public schools clearly and unmistakably cannot provide, where disputes between parents of limited means arises concerning this issue, the Court will nearly always come down on the side of public education..."² Therefore, the trial judge appropriately ordered that father assume the entire cost of private education for the child.

¹ Del. Fam., CN91-83906, Wakefield, J. (July 2, 1992).

² *Id.*

5. With regard to the request for discovery, the court found the motion moot (the court had already dismissed father's Motion for Sanctions). Despite father's credibility argument, it does not appear that the email could have had a significant impact on the litigation or the outcome. It was well within the trial court's discretion to dismiss the motion, particularly given that the expense and inconvenience far outweighed any relevance.

6. More problematic, however, are the orders awarding attorney's fees to mother. Although the Family Court has broad discretion in awarding fees, it must "explain[] the basis for its award and identify[] those portions of the record that support its reasoning and conclusion."³ Here, the trial judge failed to indicate any basis whatsoever in support of an award of attorney's fees to mother, and therefore, the fee orders are vacated.⁴

NOW, THEREFORE, IT IS ORDERED that the orders of the Family Court are AFFIRMED in part, and VACATED in part.

BY THE COURT:

/s/ Myron T. Steele
Justice

³ *Smith v. Francisco*, No.230, 2000, Del. Supr., Berger, J. (February 2, 2001 and May 16, 2001) (ORDER).

⁴ When the Family Court makes no fee award, consistent with the American Rule, no explanation is required. *Julin v. Julin*, Del. Supr., No. 77, 2001, Dec. 17, 2001 (*Per Curiam*).