

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYLE HARRINGTON, ¹	§	
	§	No. 288, 2005
Defendant Below,	§	
Appellant,	§	Court Below: Family Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
MELINDA HARRINGTON,	§	File No. CN04-08364
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted: December 7, 2005
Decided: January 10, 2006

Before **STEELE**, Chief Justice, **BERGER** and **JACOBS**, Justices.

ORDER

This 10th day of January 2006, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Kyle Harrington (“Father”), appeals from a Family Court decision and order awarding primary residential custody of Nancy Harrington (“Daughter”) to Melinda Harrington (“Mother”). Father contends that the Family Court abused its discretion in failing properly to apply the Best Interest of the Child standard to the facts of this case. Because the Family Court’s decision is supported by the record and reflects a logical and orderly reasoning process, we affirm.

¹ The Court, *sua sponte*, has assigned pseudonyms to the parties under SUPR. CT. R. 7(d)

2. Father and Mother are the natural parents of Daughter, who is eleven-years old. Father is a lead crew dispatcher with Amtrak, who works from 7:00 p.m. to 7:00 a.m. three or four days a week.² Mother works for Bank of America from 7:30 a.m. to 4:00 p.m., Monday through Friday.³ Father and Mother divorced in September 2004, but continued living together until they sold the marital home in November 2004. Since then, they have lived apart.

3. Between November and December 14, 2004 (the date of a mediation conference in this matter), the parties shared custody of Daughter. Father would drop off and pick up Daughter at school and care for her when he was not working. After the mediation hearing, an interim order was entered granting primary custody to Mother and visitation to Father every other weekend, plus one night a week. So long as it did not interfere with Daughter's schooling, that arrangement would revert to full shared custody as soon as Father secured living arrangements that included a separate room for Daughter.

4. Daughter's academic performance began to deteriorate in October 2004. Daughter has a learning disability with a communication disorder and auditory processing problems. Her special education teacher, Beverly Callahan,

² Until May 2005, Father's weekly schedule fluctuated, but he testified that it is now permanent: Sunday, Monday, Tuesday, and alternate Saturdays.

³ While the parents were married, Mother also worked at the Hair Cuttery in the evenings. She is now employed only at Bank of America, and sometimes has to work overtime.

testified at the Family Court hearing that Daughter's performance worsened in the fall of 2004, but after Ms. Callahan brought the matter to the parents' attention, since January 2005 Daughter has shown steady and consistent improvement.

5. Father challenged the interim custody arrangement as not providing him sufficient time to have a meaningful relationship with Daughter. Instead, Father sought a weekly alternating custody arrangement. In his testimony before the Family Court, Father emphasized how before the divorce he had been involved in all aspects of Daughter's life, especially her education and homework. Father also noted that Mother had rebuffed his efforts to have weekday visitation under the interim arrangement. Finally, Father voiced concerns that a man with whom Mother was associating,⁴ one Raheem Fonseca, may be involved in selling narcotics.

6. After a hearing, the Family Court awarded primary residential custody to Mother and visitation to Father on alternate Wednesdays. The Court found that Daughter, as a special needs child, requires more stability and consistency in her life, which having her primary residence with Mother would provide. The Court also permitted the Father to pick up Daughter from school on the days he does not work (Wednesday, Thursday, and Friday) and return Daughter to Mother's home

⁴ Mother characterizes Mr. Fonseca as a friend; Father characterizes him as Mother's boyfriend.

for dinner on those evenings when he does not have visitation. The Court found that arrangement preferable to having Daughter placed in day care on those days.

7. Father moved for reconsideration, which the Family Court denied. Father then filed a timely notice of appeal.

8. On appeal from the Family Court, this Court reviews a trial judge's findings of fact for abuse of discretion.⁵ As long as the trial court's factual findings are the product of an orderly and logical deductive process and supported by the record, we will not disturb them.⁶ When the determination of facts depends on witness credibility, this Court will not substitute its own opinion for that of the trier of fact who heard the witnesses and assessed their credibility.⁷

9. In a dispute over residential placement, the Family Court must reach its decision in accordance with the child's best interests—a standard that is codified at 13 *Del C.* § 722:

The Court shall determine the legal custody and residential arrangements for a child in accordance with the best interests of the child. In determining the best interests of the child, the Court shall consider all relevant factors including:

- (1) The wishes of the child's parent or parents as to his or her custody and residential arrangements

⁵ *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).

⁶ *Id.*

⁷ *Id.*

- (2) The wishes of the child as to his or her custodian(s) and residential arrangements
- (3) The interaction and interrelationship of the child with his or her parents, grandparents, siblings, persons cohabitating in the relationship of husband and wife with a parent of the child, any other residents of the household or persons who may significantly affect the child's best interests
- (4) The child's adjustment to his or her home, school and community
- (5) The mental and physical health of all individuals involved
- (6) Past and present compliance by both parents with their rights and responsibilities to their child under § 701 of this title
- (7) Evidence of domestic violence as provided for in Chapter 7A of this title
- (8) The criminal history of any party or any other resident of the household including whether the criminal history contains pleas of guilty or no contest or a conviction of a criminal offense.

The Family Court should not apply those criteria in a fixed and mechanical fashion, but may weigh each factor as appropriate to arrive at a decision that reflects the child's best interests.⁸ Father contends that the Family Court abused its discretion in performing the Section 722 analysis, and challenges each of the Family Court's findings (or the absence thereof) as to the enumerated factors.

10. Father first challenges the Family Court's finding that statutory factor No. (1) (interest of the parents) favored Mother. The Family Court found that

⁸ *Holmes v. Wooley*, 2002 WL 27346, at *1 (Del. Jan. 3, 2002).

Mother had a stronger interest in custody because she had petitioned for primary residential custody, whereas Father had not filed any written application.

11. Father explains that he first learned of Mother's desire to have primary (rather than shared) custody at the interim hearing, but by that point, it was too late for him to file a counterclaim for primary custody. He contends, however, that the pleading in which he sought review of the mediator's recommendation signaled his desire to have shared custody rather than simply visitation rights. Because Mother's petition for divorce (to which Father filed no counterclaim) sought joint legal custody but only visitation rights for the Father, and because Father's motion to reconsider the interim decision did not explicitly state that he sought shared custody, it was reasonable for the Family Court to find that statutory factor No. (1) favored Mother.⁹

12. Father next claims that the Family Court interviewed Daughter, but failed to account for her wishes in accordance with statutory factor No. (2). Father argues that given Daughter's age (11 years), Daughter was fully capable of sharing her views with the trial judge, but the judge gave her views no weight, contrary to what the statute required. Although the Family Court Judge did interview

⁹ In support of his argument that he wanted shared custody just as much as Mother desired primary custody, Father also offers that Mother was amenable to Father taking care of Daughter when he was not working. In fact, the Family Court's decision reflects that interest by allowing him to care for Daughter after school, and therefore the argument fails to support Father's position that the Family Court's analysis did not consider the parents' interests.

Daughter, he did not mention her preferences in his decision. Mother responds that it is unlikely that the trial court would disregard any preference that Daughter had articulated during the interview. Rather, given the discretion available to the trial court in weighing the statutory factors, it is equally or more likely that the interview did not yield a clear preference for either parent.

13. Father next contends that the Family Court failed to consider his testimony about Raheem Fonseca in its evaluation of statutory factor No. (3) (interaction of child with persons living in the household). Father claims that Mr. Fonseca is Mother's new boyfriend and that she once told Father that Mr. Fonseca may deal in narcotics. Mother responds that Mr. Fonseca is only a friend, and denies having made any such statements about him. The Family Court warned Father that it would only consider concrete evidence of criminal activity, not mere speculation. The Family Court did, however, allow one hearsay statement from Father into evidence—that Mother told Father that Mr. Fonseca dealt in narcotics. Although the Family Court did not discuss that testimony in its decision (having found that factor No. (3) favored neither party), it is reasonable to conclude from the evidence that the Family Court gave Father's allegation little or no weight. We will not disturb findings based on witness credibility.

14. Father next raises five separate factual challenges to the Family Court's finding that statutory factor No. (4) favored Mother (the child's adjustment

to home, school and community). Father contends that: (i) the Court mischaracterized that factor as involving “routine;” (ii) no expert evidence was presented to show that Daughter needed more stability in her custody arrangement because of her disability; (iii) a witness, Ms. Callahan, credited both parents with Daughter’s improved academic performance; (iv) the record shows that Daughter’s grades fluctuate; and (v) Mother’s work schedule is more unstable than Father’s.

15. The Family Court anchored its custody decision on the greater stability and consistency that a primary residence with Mother would provide for Daughter. Specifically, the Family Court found that: “the primary factor, which favors retaining primary residential custody with Mother, is factor (4), the child’s adjustment to her school, home and *routine*” (emphasis added). Father contends that the Family Court mischaracterized that factor, which requires consideration of adjustment to school, home and community, but not “routine.” That apparently casual misstatement, if error, was harmless. The Family Court correctly focused on Daughter’s improved adjustment to school since she began living primarily with Mother rather than shuttling between two homes.

16. Father correctly observes that no expert testimony supports the Family Court’s conclusion that Daughter needed greater stability and consistency in the home because of her disability. Although she was not a psychological expert, Ms. Callahan, Daughter’s special education teacher, did testify about Daughter’s

improved performance in school while she was living primarily with Mother. Thus, it was reasonable for the Family Court to conclude that Daughter had thrived under such consistent living conditions, and to decline to alter that arrangement.¹⁰

17. Father next contends that the Family Court erred in not considering statutory factor No. (6) (compliance with prior custody arrangements by the parents) in its decision, despite Father's testimony that Mother had denied him weekday visitation rights under the interim arrangement. The Family Court found that the parties were able to talk to and cooperate with each other about Daughter. The Family Court also found that Father had not pursued his weekday visitations, despite his claim that Mother would not allow those visits. In concluding that the parents were able to communicate effectively about Daughter without addressing Father's claim that Mother had denied him weekday visitation, the Family Court apparently found Father's explanation for not pursuing visitation not credible. This Court will not disturb a credibility determination.

18. Father's final claim on appeal is that the Family Court failed to adequately address statutory factors Nos. (5) (parties' mental health), (7) (history

¹⁰ That conclusion was rational and logical even given the evidence, emphasized by Father, that Ms. Callahan attributed Daughter's academic turn-around to both parents' credit, that Daughter's grades regularly fluctuate (perhaps suggesting that her grade improvement should not be considered at all), and that Mother's work schedule was more unstable than Father's schedule because she often would work overtime. There is undisputed evidence that Daughter's school work improved after the interim custody decision awarding primary residential placement to Mother. This Court will not disturb the Family Court's factual findings that are not clearly wrong.

of domestic violence) and (8) (criminal records). Father concedes that there is no record evidence that those factors favor either Mother or Father.¹¹ Nevertheless, he claims, the absence of their discussion in the decision is reversible error, because the Family Court was required independently to address each factor and give it appropriate weight.¹²

19. That argument, in our view, lacks merit. Although we have previously stated that it is preferable for the Family Court to address each of the Section 722 factors explicitly,¹³ in this case the Family Court did articulate the factors it found most relevant to its decision and explained why it relied on them. The trial court's failure to explicitly address factors for which there was no relevant evidence of record does not constitute reversible error. If any of those factors was important, the parties would have addressed and alerted the Family Court to them at the trial level. The parties did not. Therefore, we affirm the Family Court's award of primary residential custody to Mother.

¹¹ Although Father contends that the Court could have considered his testimony about Mr. Fonseca's potential criminal activity under factor (8), Father presented no evidence of any such criminal history.

¹² For support, Father relies on *Fisher v. Fisher*, 691 A.2d 619, 623 (Del. 1997), in which we reversed and remanded a Family Court decision which stated that it had "reviewed all of the factors set forth in § 722" with no further discussion of those factors. We held that this "Court cannot conduct a meaningful appellate review of a permanent custody judgment unless the Family Court sets forth a complete analysis of the consideration it gave to all of the factors in Section 722." *Fisher* is distinguishable because there, the Family Court made no discussion of any factors, whereas in this case, the Court did articulate and discuss the factors it considered relevant.

¹³ *Jones v. Lang*, 591 A.2d 185, 188 (Del. 1991).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is **AFFIRMED**.

BY THE COURT:

/s/ Jack B. Jacobs
Justice