

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALLEN G. KILBORN, ¹	§
	§ No. 136, 2005
Petitioner Below-	§
Appellant,	§
	§ Court Below—Family Court of the
v.	§ State of Delaware in and for New
	§ Castle County
SUSAN COLLINS,	§ File No. CN98-09498
	§ Petition Nos. 0408497; 0430008
Respondent Below-	§
Appellee.	§

Submitted: August 5, 2005
Decided: October 18, 2005

Before **BERGER, JACOBS** and **RIDGELY**, Justices.

ORDER

This 18th day of October 2005, upon consideration of the appellant’s opening brief and the appellee’s motion to affirm pursuant to Supreme Court Rule 25(a), it appears to the Court that:

(1) The petitioner-appellant, Allen G. Kilborn (“Father”), appeals from the Family Court’s March 11, 2005 order denying his motion to modify visitation and granting, in part, the motion of respondent-appellee, Susan Collins (“Mother”), to modify custody. Mother has moved to affirm

¹ This Court has sua sponte assigned pseudonyms to the parties and their minor child. Supr. Ct. R. 7(d).

the Family Court's judgment on the ground that it is manifest on the face of Father's opening brief that the appeal is without merit. We agree and affirm.

(2) The parties, who are divorced, have one minor child named Allen, Jr., who is 10 years old. Following a custody hearing, the Family Court issued orders dated October 3, 2000 and November 1, 2000, which provided that Mother and Father would share joint legal custody of Allen, who would reside 50% of the time with Mother and 50% of the time with Father on an every-other-week basis. At that time, Father, who is a Delaware lawyer, maintained a residence in Wilmington, Delaware, and worked as an attorney in Wilmington. Father now maintains his primary residence in Philadelphia, Pennsylvania, although he continues to work as an attorney in Wilmington. Mother continues to maintain her primary residence in Wilmington, Delaware. Allen attends a private school in Wilmington.

(3) In March 2004, Father filed a motion to modify visitation. The motion sought additional visitation with Father in order to permit Allen to participate in extracurricular sports activities in Philadelphia. In September 2004, Mother moved to modify custody. Mother's motion sought sole legal and residential custody of Allen, with visitation rights for Father. At that

time, Mother was remarried and living with her husband and their 2 year-old son in Wilmington.

(4) Following a hearing on March 9, 2005, the Family Court issued an order dated March 11, 2005, in which it granted sole legal custody of Allen to Mother, but ordered that Allen continue to reside with both parents on an equal shared basis. The Family Court further ordered Mother and Father to discuss with each other all major issues involving Allen and, in the event they were unable to agree, Mother would have final decision making authority.

(5) In this appeal, Father's sole claim is that the Family Court did not have the authority to issue its March 11, 2005 order, because Mother did not attach an affidavit to her motion to modify custody as required by Del. Code Ann. tit. 13, § 730. The statute provides that:

A party seeking . . . modification of a custody decree shall submit together with his or her moving papers an affidavit setting forth facts supporting the requested order . . . and shall give notice . . . to other parties to the proceeding, who may file opposing affidavits. The Court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits. . . .

(6) Our review of the record relating to Father's claim reflects the following: On September 9, 2004, Mother filed in the Family Court a preprinted form entitled "Motion and Affidavit to Modify Custody Order,"

which alleged that: Father was living in Philadelphia, Father did not inform Mother of his move to Philadelphia until a year after he had done so; Father had enrolled Allen in activities in Philadelphia without consulting Mother; and Father had not provided Allen with separate sleeping accommodations. The form was signed by Mother's attorney and was stamped with the attorney's seal as a notarial officer in the State of Delaware. The form also was accompanied by a separate preprinted form entitled "Custody Separate Statement in Compliance with 13 Del. Code, Sec. 1909," which included additional information regarding the custodial arrangements for Allen.

(7) In his response to Mother's motion, Father contested the substantive allegations in the motion and raised the procedural objection that the motion did not attach a notice or proposed form of order and did not include an affidavit in support of the facts alleged. Father requested that Mother's motion be summarily dismissed because it did not meet the requirements of Family Court Civil Procedure Rule 7(b).²

(8) The transcript of the March 9, 2005 hearing on the parties' respective motions reflects that Father never raised the issue of Mother's allegedly defective motion at any point during the hearing. At the beginning

² That rule provides as follows: "An application to the Court for an order shall be by motion which . . . shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The motion shall be accompanied by a notice and a proposed form of order. Where a motion is based upon particular facts, it should be supported by affidavit(s) or other material."

of the hearing, Father stated: “Your Honor, the only thing I’m looking for you to do is to allow [Allen] to play sports in one place rather than being split between two places.” On the day after the hearing, Father wrote a one page, single-spaced letter to the Family Court Judge requesting that the Judge interview Allen to ascertain his wishes concerning his participation in sports in Philadelphia and Wilmington. Nowhere in the letter did Father mention Mother’s alleged procedurally defective motion, any lack of notice regarding the issues raised at the hearing or any prejudice resulting from the alleged procedural defect.

(9) Following the entry of the Family Court’s March 11, 2005 order, Father filed a “Motion to Dismiss Pursuant to 13 Del. C. § 730,” wherein he asserted that, due to Mother’s failure to attach an affidavit to her motion to modify custody, he was “prejudiced . . . by not being advised of the facts to be relied upon in support of the Motion both in Father’s preparation of Father’s Response and presentation of evidence and witnesses at the March 9, 2005 hearing.” On March 28, 2005, the Family Court denied Father’s motion as “untimely and moot.”³

(10) Father’s claim is patently without merit. The record reflects that he abandoned any argument concerning an alleged technical defect in

³ Father’s subsequent motion to permit Allen to be interviewed by the Family Court Judge was also denied as untimely.

Mother's motion by participating in a full-blown hearing on the substantive issues in the case without ever mentioning that procedural argument. Father's belated attempt to raise the issue, first in his motion to dismiss and then in this appeal, is frivolous and disingenuous. Although Father did not attempt to argue that he was prejudiced by the alleged technical defect in his opening brief on appeal, he did raise that argument in his motion to dismiss filed in the Family Court. There is no basis whatsoever in the record for that argument. The Family Court is required to disregard minor technical defects that do not affect the substantial rights of the parties.⁴ We, thus, find no error or abuse of discretion by the Family Court in denying Father's motion to dismiss.

(11) It is manifest on the face of Father's opening brief that this appeal is without merit because the issues presented on appeal are controlled by settled Delaware law and, to the extent that judicial discretion is implicated, clearly there was no abuse of discretion.

⁴ Fam. Ct. Civ. Proc. R. 61.

NOW, THEREFORE, IT IS ORDERED that, pursuant to Supreme Court Rule 25(a), the appellee's motion to affirm is GRANTED. The judgment of the Family Court is AFFIRMED.

BY THE COURT:

/s/ Jack B. Jacobs
Justice