IN THE SUPREME COURT OF THE STATE OF DELAWARE

LISA MARTIN,[1]	§	
	§	
Respondent Below-Appellant,	§	No. 206, 2001
	§	
	§	
v.	§	Court Below—Family Court
	§	of the State of Delaware,
WALTER MARTIN,	§	in and for Sussex County
	§	File No. CS99-04675
Petitioner Below-Appellee.	§	Petition Nos. 99-38650
	§	and 99-35721

Submitted: December 7, 2001
Decided: February 11, 2002

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

O R D E R

This 11th day of February 2002, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Lisa Martin ("Mother"), filed this appeal pro se from an order of the Family Court, dated April 4, 2001. Among other things, the Family Court order granted primary residential custody of the parties' two minor children to the appellee, Walter Martin ("Father"). Having reviewed the parties' respective contentions and the record below, we find that the record does not support the Family Court's findings and conclusions. Accordingly,

[1] The Court has assigned pseudonyms pursuant to Supreme Court Rule 7(d).

the Family Court's order must be REVERSED, and this matter must be REMANDED for further proceedings consistent with this Order.

(2) The record reflects that the parties met and began living together in Virginia in 1992. At the time, Father was stationed in Virginia with the Navy, and Mother was a Virginia resident. Mother's two sons from her prior marriage, Joe and Steve, lived with the parties in their home in Virginia Beach. The parties eventually were married in 1994. It was the second marriage for each of them. After his discharge from the Navy, Father had difficulty finding permanent employment in Virginia. Therefore, at the end of 1995, Father took a job in Sussex County, Delaware as an emergency medical technician (EMT). Mother, who had worked for several years as an emergency room technician at a Children's Hospital in Virginia, remained in Virginia. Father stayed in Delaware and worked twelve-hour shifts for four days, and then returned home to Virginia for four days.

(3) Mother gave birth to the parties' son, Robert, in March 1996.[2] In January 1997, Mother, who again was pregnant, moved to Delaware with Robert to be with Father. Mother's thirteen and sixteen-year-old sons from her

[2] Robert was the parties' second child. Their first child, a daughter, died several days after her birth in 1995. Mother received psychological counseling following this tragedy.

first marriage chose to remain in Virginia with their biological father. At the time of the move to Delaware, the parties had no connection to Delaware other than Father's job. All of the Mother's immediate family remained in Virginia. Father had no family in Virginia or Delaware. At the time of the move, the parties had received a discharge in bankruptcy in Virginia. Both parties acknowledged their bad credit history.

(4) The parties rented an apartment in Milford, Delaware. Mother found a job with Milford Hospital. The parties' daughter, Rachel, was born in May 1997. Because of the parties' work schedules, the children required childcare. Mother's co-worker Karen sometimes would babysit the children. In September 1999, Father told Mother that he was leaving her for Karen. Mother testified that she asked Father to come to marriage counseling with her, but Father refused. Father did not dispute this claim. Father moved out of the marital home, leaving his wife and his children, and moved in with Karen and her two children.[3] Mother immediately began to receive counseling to help her deal with the stress of the marital break-up. Her treatment included a prescribed anti-depressant, which Mother testified she took until December 1999.

(5) Although it is not entirely clear on the record before us, Mother apparently filed a petition against Father for Protection from Abuse (PFA) in October 1999.[4] The parties, neither of whom was represented by counsel, apparently resolved the PFA by consent. Attached to Mother's opening brief on appeal is an incomplete copy of a Family Court order dated November 12, 1999 entering a PFA against Father. That order reflected that Father consented to Mother moving back to Virginia.[5] The order also reflected that Father would have visitation with the children in accordance with his four days on/four days off work schedule.

(6) The parties, still acting pro se, filed cross-petitions for custody of their children. In February 2000, after retaining counsel, Father apparently filed motions to vacate or modify the PFA order. Father also filed a motion for discovery and psychological evaluation of Mother based on her prior history of psychological treatment. The Family Court granted that motion on July 3, 2000 and ordered "father, mother, and the parties' minor children to undergo

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[3] There was testimony that, at the time Father moved out of the marital home, the parties were subject to proceedings to evict them from their Milford apartment.

[4] There is no documentation in the Family Court record concerning the PFA proceedings, although Mother has attached two pages of the three page PFA order to her opening brief.

[5] Two days before she was scheduled to move, however, Father filed a motion for interim relief requesting the Family Court to enjoin Mother from moving to Virginia with

a psychological evaluation to be performed by a pychologist [sic] of father's choosing." The costs of the evaluations initially were to be paid by Father.

(7) The parties were divorced on August 15, 2000. The PFA order was vacated by agreement of the parties on October 5, 2000. Father was married to Karen, his third wife, in December 2000. The custody hearing eventually was held on April 2, 2001. Testifying on Father's behalf were: Ted Wilson, the psychologist chosen by Father; Crystal Berry, the daycare worker who watched the children while they were visiting with Father; Karen Martin, Father's third wife; and Father. Testifying on Mother's behalf were: Marzie Poole, Mother's mother; and Mother. On April 4, 2001, the Family Court entered an order awarding joint custody to the parties, with primary residential placement with Father.

(8) Our standard of review of a decision of the Family Court extends to a review of the facts and law, as well as inferences and deductions made by the trial judge.[6] If the trial court has correctly applied the pertinent law, our review is limited to abuse of discretion. We will not substitute our opinion for the inferences and deductions of the trial judge where those inferences are

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the children. The Family Court denied that motion.

[6] *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983).

supported by the record and are the product of an orderly and logical deductive process.[7]

(9) Under Delaware law, the Family Court is required to determine legal custody and residential arrangements for a child in accordance with the best interests of the child. The criteria for determining the best interests of the child are set forth in Section 722 of Title 13 of the Delaware Code.[8] The criteria in Section 722 must be balanced in accordance with the factual circumstances presented to the Family Court in each case. As this Court has

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[7] *Id.*

[8] Section 722(a) provides:

> 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:
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> (1) The wishes of the child's parent or parents as to his or her custody and residential arrangements;
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> (2) The wishes of the child as to his or her custodians(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;
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> (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; and
>
> (7) Evidence of domestic violence as provided for in Chapter 7A of

noted, the weight given to one factor or combination of factors will be different in any given proceeding. Because it is possible that the weight of one factor will counterbalance the combined weight of all other factors and be outcome determinative in some situations, we have held that, when a decision of the Family Court will result in a dramatic change in a child's living arrangements, the Family Court must address each aspect of Section 722 explicitly rather than implicitly.[9]

(10) In this case, the Family Court specifically reviewed all of the factors enumerated in Section 722. After reviewing the testimony and the best interests factors, the Family Court concluded:

> Of all the above criteria, the Court found most significant the close interaction involved in father's present family, wife and stepchildren included, in a realistic plan which involves both parents having normal regular working hours and the ability to gain strength from each other in taking care of their children. The Court is also encouraged by the more realistic plans of father to obtain a larger home, although it was not the most important factor in the Court reaching its decision. The other factor which the Court believed carried considerable weight was the rage that mother has thus far shown towards father and stepmother. The Court has concerns that placing the children with mother could well lead to serious psychological damage to the children by reason of mother's derogatory attitude, which, thus far, she has not been able to hide from the children.

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this title.

[9] *Fisher v. Fisher*, 691 A.2d 619, 623 (Del. 1997).

(11) We have reviewed the facts and the law in this case, as well as the trial judge's inferences and deductions. Given the record before us, we find that the Family Court's conclusions were reached on the basis of a wholly inadequate record and, therefore, were not the product of an orderly and logical deductive process. In the first instance, it does not appear on this record that any psychological evaluation of the children was conducted as ordered by the Family Court on July 3, 2000. If such an evaluation occurred, there was no testimony about it and no mention of it in the Family Court's opinion. Given the apparent animosity between Father and Mother and the parties' respective allegations of violence by the other parent toward the children, none of which were supported by any evidence other than the parties' self-serving testimony, an independent psychological evaluation of these children should have been conducted.

(12) Furthermore, the only expert testimony presented to the Court was the testimony of Dr. Wilson, the psychologist retained by Father. Dr. Wilson testified that he met four times with Father and two times with Mother. Dr. Wilson administered only one test to both parties, as well as to Father's new wife. The results of this test, the Minnesota Multiphasic Personality Inventory 2, yielded "marginally valid profiles" for all three individuals. Dr. Wilson

opined that the test results did not suggest any psychopathology on the part of either party and that both parties appeared to love their children and appeared capable of providing their children with nurturing.

(13) Dr. Wilson did express concerns about both parties, however. Specifically, as to Father, Dr. Wilson testified that the best predictor of future conduct is past conduct and that Father's history of failed marriages raised a concern about the long-term stability of his present marriage. Dr. Wilson also found "disturbing" Father's criticism of Mother and her values in response to a question about why primary placement of the children with Father would be in the children's best interests. As to Mother, Dr. Wilson expressed concern that Mother appeared to be less candid in her responses to Dr. Wilson's questions. Dr. Wilson also testified, based on a one-hour interview with Mother and the children, that Mother appeared depressed and was not able to control the children and to redirect their behavior appropriately. Ultimately, Dr. Wilson concluded that the four days on/four days off schedule was not in the children's best interests and that primary placement should be with Father because Father represented a "more consistent…alternative for the children with regard to structure, consistency and can provide a stable environment and my concern is that Mrs. [Martin] cannot do that."

(14) In its decision, the Family Court recounted Dr. Wilson's testimony in some detail. The Court noted Dr. Wilson's limited interactions with the parties, particularly with Mother.[10] The Court acknowledged Dr. Wilson's conclusion that primary placement of the children should be with Father. Nonetheless, the Court discounted Dr. Wilson's opinion, stating that it had "difficulty finding support in Dr. Wilson's factual observations to reach his conclusion." Based on this record, we agree with the Family Court. Dr. Wilson's limited interactions and limited testing of the parties, which the Family Court found to be "inconclusive," provided little foundation for his ultimate opinion.

(15) Given the Family Court's rejection of Dr. Wilson's testimony, the Family Court was left to analyze the "best interests of the children" factors relying on the competing testimony of the fact witnesses, who included Mother, Father, Karen Matthews, Father's new wife, Crystal Berry, the children's daycare provider while with Father, and Marzie Poole, Mother's mother.

(16) In reaching its ultimate conclusion that primary residential custody should be with Father because Father's new family and living arrangements

[10] The Family Court found it significant that Dr. Wilson met with Mother and the children on a day that Mother had worked a full night shift in Virginia, then had driven four hours to Delaware to pick up the children, and then had to wait with the children for another

presented a more stable alternative for the children, the Family Court failed to address several salient, uncontroverted facts that were relevant to making a custody determination. First, the Family Court never acknowledged the circumstances surrounding Father's leaving the marital home and his children and moving in with the children's babysitter and her two children. Father testified that he moved in with Karen in the autumn of 1999 but that his divorce from Mother was not final until August 2000. Based on these facts, a reasonable inference is that Father was engaged in an openly adulterous relationship to which his children were exposed.[11] If true, such conduct, as it affects the "moral character development" of the children, is a relevant consideration in determining the best interests of the children, notwithstanding the adulterous parent's subsequent remarriage.[12]

(17) Furthermore, the Family Court concluded that the most significant factor in reaching its decision was "the close interaction involved in father's

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five hours in the car on a bad weather day before meeting with Dr. Wilson.

[11] The testimony also suggested that when the children were visiting with Father, both before and after his remarriage, they slept together on a bed set up for them in Father and Karen's bedroom.

[12] *See Elizabeth A.S. v. Anthony M.S.*, 435 A.2d 721, 724-25 (Del. 1981) (holding that, in custody and visitation cases, the Family Court should consider the effect of a parent's open and continuing adulterous conduct as it affects the child's moral and emotional development).

present family."[13] Yet, in determining that Father's "present family" was a more stable environment for the children, the Family Court did not acknowledge or attempt to reconcile Dr. Wilson's expressed concern that third marriages, in general, have an estimated 80% divorce rate. While this statistic may not be a determining factor on the issue of Father's stability, it is certainly relevant to the analysis of this factor, upon which the Family Court placed significant emphasis. As Dr. Wilson testified, the best predictor of future conduct is past conduct. We are concerned that the Family Court overlooked relevant evidence of Father's past instability, i.e. leaving the marital home and his children to move in with another woman, in reaching its ultimate conclusion that Father's "present family" was more stable.

(18) Moreover, given the emphasis the Family Court placed on the children's interactions with significant others, we are concerned that there is very little evidence in this record about the children's interactions with their family in Virginia. There was little, if any, testimony about the quality and nature of the relationships that the children have with their half-brothers and Mother's extended family or about the children's adjustment to their home in Virginia. Although the Family Court concluded that the children's

[13] We note the Family Court incorrectly referred to the children's new stepbrother

relationships with their half-brothers were not "significant," there is no evidence in this record to support such a conclusion.

(19) Finally, and most importantly, we are very concerned about the Family Court's conclusion that, notwithstanding the entry of a PFA order against Father, "there was no testimony [about domestic violence] that rose to the level of consideration by the Court in making its decision." Given the lack of documentation in the Family Court record about the PFA proceedings, and the limited testimony presented by the parties on that subject, we cannot conclude that the Family Court's treatment of this important factor was the product of a logical and orderly deductive process.

(20) We have concluded that this matter must be remanded to the Family Court for an entirely new hearing on the issue of permanent custody. The hearing should take place only after the parties and their children have been evaluated by a neutral expert selected by the Family Court in a manner that is fair to both parties. The Family Court should make its best efforts to schedule the custody hearing within 60 days after the issuance of this Court's mandate following appeal. In the interim, the Family Court's April 4, 2001 judgment shall remain in full force and effect.

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and stepsister as "half siblings." In fact, the children's only half-siblings live in Virginia.

NOW, THEREFORE, IT IS ORDERED that the decision of the Family Court is REVERSED, and this matter is REMANDED for a new custody hearing in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger
Justice