IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| DONNA H. MICHAELS,[1] | § | |
| | § | No. 158, 2007 |
| Respondent Below-Appellant, | § | |
| | § | Court Below: Family Court of the State of Delaware in and for Kent County |
| v. | § | |
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| GEORGE B. GREGORY, | § | No. CK05-02278 |
| | § | |
| Petitioner Below-Appellee. | § | |
| | § | |

Submitted: August 14, 2007
Decided: September 18, 2007

Before **STEELE**, Chief Justice**, HOLLAND**, and **RIDGELY**, Justices.

***O R D E R***

This 18th day of September 2007, it appears to the Court that:

(1) Appellant Donna Michaels appeals a Family Court Order awarding primary placement of Brian Michaels with George Gregory, Brian's father, and granting Michaels, Brian's mother, supervised visitation.[2] Michaels makes three arguments on appeal. First, Michaels argues that the Family Court relied too

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

[2] In Case No. 157, 2007, Michaels appeals another Family Court Order granting custody of her daughter to Joseph Whitaker, the girl's father. Michaels filed a motion to consolidate before trial. That motion was opposed and ultimately denied by the Family Court on September 15, 2006.

heavily on the testimony of Dr. Theodore Wilson. Second, she asserts that the Court improperly considered hearsay evidence. Third, Michaels contends that the Court failed to consider the wishes of the child. We find no merit to her arguments and affirm.

(2) Brian Michaels was born on April 21, 1996. Although Michaels and Gregory were married, military rules required that they reside in different houses. Soon after giving birth to Brian, the couple divorced. The parties retained joint custody of Brian, with Michaels having primary placement.

(3) Michaels has suffered from mental health issues for some time. From 2003 to 2005, Michaels was in and out of hospitals for treatment for her depression after attempting to commit suicide four or five times. Her latest attempt was in June 2005. As a result, Gregory petitioned the Family Court at that time for Emergency Custody. That motion was granted on August 15, 2005. Since that time, Brian has been in the custody of Gregory in Georgia. Michaels filed a Motion for Temporary Visitation on August 1, 2005 and a Motion to Modify Custody on February 23, 2006. Following a one-day trial on December 6, 2006, the Family Court ordered joint custody of Brian with Gregory having primary placement and Michaels having supervised visitation. This appeal followed.

(4) In determining where the child should primarily reside, the trial court is to determine the best interest of the child.[3] Section 722 sets forth eight factors for the court to balance in making its determination. Because of the factual circumstances of each case, the consideration given to one factor or combination of factors will differ in each proceeding.[4] In fact, it is "quite possible that the weight of one factor will counterbalance the combined weight of all other factors and be outcome determinative in some situations."[5] Absent misapplication of the law, our standard of review is abuse of discretion.[6] Moreover, "this Court will not substitute its own opinion for the inferences and deductions made by the Trial Judge where those inferences are supported by the record and are the product of an orderly and logical deductive process."[7]

(5) First, Michaels argues that the trial judge should have assigned less weight to the testimony of Dr. Wilson because he never physically examined Michaels. "When the determination of facts turns on a question of credibility and the acceptance or rejection of the testimony of witnesses appearing before him, those findings of the Trial Judge will be approved upon review, and we will not

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[3] 13 *Del. C.* § 722(a).
[4] *Fisher v. Fisher*, 691 A.2d 619, 623 (Del. 1997).
[5] *Id.*
[6] *Jones v. Lang*, 591 A.2d 185, 187-88 (Del. 1991).
[7] *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983); *Jones*, 591 A.2d at 187.

substitute our opinion for that of the trier of fact."[8] Dr. Wilson was a stipulated expert. His testimony was based on the records of Michaels' expert, Dr. Samuel Romirowsky. It was within the trial judge's discretion to find Dr. Wilson's assessment more or less credible.

(6) Second, Michaels argues that the trial court relied on inadmissible hearsay evidence when it assessed the eighth statutory factor.[9] Specifically, Michaels contends that the judge should not have considered a criminal complaint. Michaels, however, never objected to its admission.[10] Therefore, we review for plain error.[11] Plain error exists when the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[12] These errors must be apparent on the face of the record and of such a basic, serious and fundamental character that they clearly deprive an accused of a substantial right or show manifest injustice.[13] The Family Court did not rely solely on the complaint in assessing this statutory factor. Evidence of the incident was admitted through at least one other witness at trial. Dr. Romirowsky also testified that

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[8] *Wife (J. F. V.) v. Husband (O. W. V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).
[9] 13 *Del. C.* § 722(a)(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.").
[10] The complaint was issued as part of a binder containing all of the evidence used by Dr. Romirowsky in his evaluation. The trial judge specifically asked counsel if she objected to the admission of the binder. She stated that she did not have any objection.
[11] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[12] *Id.*
[13] *Id.*

Michaels told him that she pled guilty to Reckless Endangering. On the facts of this case, the admission of the complaint did not deprive Michaels of a substantial right or show manifest injustice. Even if there had been an objection, any error was harmless.

(7) Finally, Michaels contends that the Family Court did not consider the wishes of the child in its analysis. She claims that the court, without explanation, failed to consider Dr. Romirowsky's testimony that Karen wished to reside with her mother. In the Order, the trial judge expressly states that he "accepts the testimony and conclusions of Dr. Wilson" because his "evaluation appears to be more involved."[14] Moreover, he expressly considered the wishes of the child: "[Brian] told the Court that he is doing well in Georgia . . . , he has lots of friends in Georgia and that he is on a basketball team. He also stated that he only has a couple of friends in Delaware. [Brian] told the Court that he gets along well with his sisters, . . . but that he wishes that he could see [Karen] more."[15] The trial judge properly analyzed this factor.

[14] *Gregory v. Michaels*, No. CK05-02278, at 7 (Del. Fam. Ct. Feb. 27, 2007).
[15] *Id.* at 3.

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

BY THE COURT:

/s/ Henry duPont Ridgely
Justice