

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON GILBERT, <sup>1</sup>	§
	§ No. 466, 2012
Respondent Below-	§
Appellant,	§
v.	§ Court Below—Family Court
	§ of the State of Delaware,
	§ in and for Kent County
GAYLE BRADLEY,	§ File No. CK05-02494
	§ Petition No. 12-02409
Petitioner Below-	§
Appellee.	§

Submitted: January 18, 2013  
Decided: February 26, 2013

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

**ORDER**

This 26<sup>th</sup> day of February 2013, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Aaron Gilbert ("Father"), filed this appeal from a Family Court order, dated July 31, 2012, which granted the petition of Gayle Bradley ("Mother") for modification of custody. After careful consideration, we conclude that the Family Court applied the wrong standard in reviewing the petition for modification of custody. Accordingly, we find

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<sup>1</sup> The Court previously assigned pseudonyms to the parties pursuant to Supreme Court Rule 7(d) and uses pseudonyms herein when referring to the parties' minor children.

that this matter must be remanded to the Family Court for further proceedings.

(2) The record reflects that the parties are the parents of a twelve-year-old daughter, Mary, and a nine-year-old son, Tony. Father initially filed a petition for custody of the children in March 2007. On August 15 2007, primary placement was awarded to Father after Mother failed to appear at the custody hearing. On August 24, 2007, Mother filed a motion to modify custody. On July 16, 2008, the Family Court awarded the parties' joint custody of Mary and Tony, with Father having primary residential placement. In August 2008, Father filed a petition to modify Mother's visitation schedule because of Father's planned move to Pittsburgh, Pennsylvania. On April 20, 2009, the Family Court granted Father's petition to modify Mother's visitation in order to allow him to move to Pittsburgh with the children. As part of that order, the Family Court awarded Mother visitation with the children on alternating yearly holidays, during all school breaks, and for eight weeks in the summer with Father providing transportation to and from all visits.

(3) In July 2009, Mother filed a Rule to Show Cause alleging Father's noncompliance with the prior visitation order. On December 9, 2009, the Family Court upheld its prior visitation schedule but ordered that

future visitation exchanges would occur at the People's Place in Milford, Delaware with Father providing the transportation of the children to and from Pennsylvania. On February 21, 2011, Mother filed a petition for modification of custody. The Family Court scheduled a hearing on that petition on January 19, 2012. Prior to the start of the hearing, the Family Court informed Mother that, because she had filed her petition within two years of the Family Court's April 20, 2009 custody order, Mother was required to prove that modification was necessary on the basis that "continuing enforcement of the prior order may endanger the child[ren]'s physical health or significantly impair [their] emotional development."<sup>2</sup> Mother conceded that she could not meet her burden of proof, so the Family Court dismissed her petition.

(4) Following that dismissal, Mother immediately filed another petition to modify custody on January 19, 2012, which Father opposed. The Family Court held a hearing on June 19, 2012. Both parties appeared, *pro se*, and testified. Mother testified that Father had not brought the children for several visits pursuant to the Court order, including a Mother's Day visit and a spring break visit, and, moreover, had brought the children late for their Christmas break visit. Father testified that he had the missed spring

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<sup>2</sup> DEL. CODE. ANN. tit. 13, § 729(c)(1) (2009).

break visit was the result of the children's school cancelling their spring break in order to make up snow days. He testified that he was not late in bringing the children for Christmas break pursuant to the terms of the visitation order because it was his year to have the children for Christmas and the visitation order provided that the holiday schedule took precedence over the school break schedule. Finally, Father stated that any missed visits under the court order were later made up by extending the children's summer visitation with Mother. While Mother initially testified that she not seen her children since December 2011, she later conceded that Father had brought the children for an unscheduled visit in January 2012 when he returned to Delaware for a Family Court hearing.

(5) The Family Court also heard the testimony of several additional witnesses and then separately interviewed each child on the record. One of the witnesses testified about an incident in which Mother, while the children were in her car, bumped into the back of Husband's wife's vehicle and then drove off. The parties' daughter, Mary, confirmed that this incident happened while she was in Mother's car. Mary indicated to the trial judge that, while she was all right living with Father, she preferred to live with Mother. Tony told the judge that he was happy with his current living

arrangements with Father. The Family Court reserved its decision at the conclusion of the hearing.

(6) On July 31, 2012, the Family Court issued its order granting Mother's petition for modification of custody. The trial court, citing 13 Del. C. § 729(b),<sup>3</sup> reviewed the best interest factors set forth in 13 Del. C. § 722<sup>4</sup> and the evidence regarding each factor. The court noted that both parties appeared to be caring and loving parents despite their differences with each other. The court found that the best interests were essentially equal for each parent. The court noted, however, that pursuant to its prior custody decision,

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<sup>3</sup> DEL. CODE. ANN. tit. 13, § 729(b)(1) (2009). Section 729(b) provides that “[a]n order entered by the Court by consent of all parties...concerning the legal custody of a child or his or her residence may be modified at any time by the Court in accordance with the standards set forth in § 722 of this Title.”

<sup>4</sup> 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:

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

Father had been ordered to facilitate the children's visitation with Mother given his relocation to Pennsylvania, six hours away. Father failed to do that. Further, the Family Court found that both children expressed a desire to spend more time with Mother and that the parties' daughter specifically expressed a preference to live with Mother.

(7) In reviewing a motion for modification of custody that is filed more than two years after the Family Court's most recent custody order, the Family Court may modify its order after considering: (i) whether any harm is likely to be caused to the children by the custody modification (and weighing that harm against any potential advantages); (ii) the compliance of the parents with prior custody orders; and (iii) the best interests of the children in accordance with 13 Del. C § 722. 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 noted, the weight given to one factor or combination of factors will be different in any given proceeding.<sup>5</sup>

(8) In this case, the Family Court incorrectly utilized the standard of review set forth in 13 Del. C. § 729(b), which applies to prior custody orders entered by consent. In this case, the prior custody order under review

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<sup>5</sup> *Fisher v. Fisher*, 691 A.2d 619, 623 (Del. 1997).

had been entered by the Family Court after a full, contested hearing on the merits. Thus, the Family Court was obligated to utilize the more stringent standard of review set forth in 13 Del. C. § 729(c)(2), which requires that the trial court review more than just the best interest factors of § 722. Under these circumstances, we find it necessary to vacate the Family Court's decision dated July 31, 2012 and remand this matter to the Family Court for further consideration consistent with this Order

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is VACATED. This matter is hereby REMANDED. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger  
Justice