

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KIMBERLY D. POE, ¹	§	
	§	No. 220, 2005
Petitioner Below,	§	
Appellant,	§	Court Below: Family Court of
	§	the State of Delaware in and for
v.	§	New Castle County
	§	
HOWARD B. POE,	§	CN02-10558
	§	
Respondent Below,	§	
Appellee.	§	

Submitted: December 14, 2005

Decided: January 10, 2006

Before **HOLLAND, 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. Kimberly D. Poe (“Mother”) appeals from the denial of her motion to modify custody. We conclude that the Family Court committed no legal error or abuse of discretion, and that the record sufficiently supports the Family Court’s factual findings and conclusions. Therefore, we affirm.

2. Mother and Howard B. Poe (“Father”) are the natural parents of nine year-old Harrison and seven year-old Hunter. To resolve legal custody and residency disputes relating to the children, the parties entered into a Custody

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

Stipulation and Order on June 25, 2004. That Order provided that the children would spend alternate two days, plus the entire weekend with each parent, *e.g.*, Monday and Tuesday with Father, Wednesday and Thursday with Mother, Friday through Sunday with Father, the following Monday and Tuesday with Mother, etc.

3. The Order also required the parents to participate in co-parenting counseling. The parents began counseling with David Mandelbaum, Ph.D., who was later succeeded by Diana Terrell, Ph.D. The children were required to attend therapy sessions with Harriet Ainbinder, Ph.D., and the parties were ordered to meet with Samuel Romirowsky, Ph.D. (who had performed the original custody evaluation) to monitor their progress under the shared custody arrangement.

4. After entry of the Stipulation and Order, Mother and Father continued to be hostile and uncooperative toward each other, and could not agree on issues relating to the children's healthcare and extracurricular activities. On January 20, 2005, Mother filed a Motion to Modify Custody Order, requesting sole medical custody and primary residence of the children. Father filed a Response and Counter-Motion seeking the same relief.

5. The Family Court denied Mother's motion, but modified the shared residency arrangement so that Monday and Tuesday of each week would be spent with Father, and Wednesday and Thursday of each week would be spent with Mother. The Family Court also modified legal medical custody so that all medical

decisions would be referred to the staff of A.I. DuPont Institute for Children, with the parties being directed to follow the recommendations of the Institute staff. Mother has appealed from the Family Court Order modifying custody.

6. Mother's three claims on appeal challenge the Family Court's application of the "best interests of the child" standard. This Court reviews the Family Court's application of the law to the facts and the sufficiency of evidence supporting its findings for an abuse of discretion.² This Court will not disturb the findings of fact unless they are clearly wrong and justice requires their overturn.³ Nor will this Court substitute its own fact findings 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 reasoning process.⁴

7. Mother first contends that the Family Court misapplied the "best interests of the child" standard in this case. Under Delaware law the standard for modification of legal custody and residential placement based upon a Stipulation and Order is the best interests of the child.⁵ That standard is codified at 13 *Del. C.* § 722, which provides:

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

³ *Id.*

⁴ *Id.*

⁵ 13 *Del. C.* § 729(a).

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 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.

8. Mother contends that the trial court gave excessive weight to preserving the *status quo* rather than applying the standard quoted above. Contrary to Mother's argument, the trial court correctly noted that there had not been a hearing on the merits, and therefore conducted an analysis of the best interests standard as required.

9. With respect to statutory Factor (1), Mother contends that the trial court should have found that factor in her favor, because she filed for primary placement and for full legal custody over medical decisions, whereas Father conceded that he sought only continuation of the shared residential arrangement. The trial court noted the interests of both parties as the statute required, but kept in place the shared custody arrangement. We find that that decision logically accommodated both parents' interests and was not erroneous.

10. Mother next contends that the trial court gave undue weight to the children's interests in its consideration of Factor (2), because of the children's young ages and because the only reason the children wanted the shared arrangement was that (i) the Father did not make them attend religious or tae kwon do classes, and (ii) they enjoyed spending time with their step-brother Kyle at Father's home. The trial court ruled that Factor (2) was very important in its analysis, and gave weight to the children's desire to continue a shared custody arrangement. The record supports the trial court's ruling and we will not disturb it.⁶

11. Factor (3) requires the Family Court to consider the relationship of the children with their parents, family, and other members of the individual

⁶ That ruling was based on testimony from Dr. Romirowsky, who quoted the boys' statement to him: "Dr. Sam, please don't make any changes. We like it the way it is."

households. Mother contends that the Family Court failed properly to consider her testimony that while in her care, the children interacted frequently with cousins the same age, whereas Father's only showing was that the children's step-brother Kyle had a positive impact on the children while the children were living with Father. The Family Court found, based on the evidence including the testimony of Dr. Romirowsky, that the children interacted closely with both parents, which supported maintaining the shared custody arrangement.

12. The Family Court also gave significant weight to Factor (4), which considers the children's adjustment to home, school and community. The Family Court concluded that shared custody was in the children's best interests. Mother challenges that finding, claiming that there is no evidence to indicate that a change in residential placement would affect either child's school performance because, if given primary custody, she would send the children to the same school. The Family Court considered the testimony of experts, including an expert who interviewed the children's teachers and school officials, and reported that the children were excelling in school. Because it appeared that the children were thriving under the current shared arrangement, the Family Court weighed that factor in deciding to maintain the shared custody *status quo*.

13. Factor (5) considers the health and mental well-being of the parties. Mother contends that the trial court gave excessive weight to the testimony of two

psychologists, who recommended shared custody but had less exposure to the family than did Dr. Ainbinder, who had seen the children 17 times and recommended primary placement with Mother.

14. The trial court heard testimony from Dr. Romirowsky, who had conducted an in-depth custody evaluation of the family and administered psychological tests to the parties. Dr. Romirowsky recommended that custody continue to be shared, albeit with a slight modification because the constant shifting between homes was stressful. Dr. Romirowsky's testimony was supported by Dr. Terrell, who also recommended shared custody. Dr. Ainbinder also testified that the constant shift in residences was troublesome, but she recommended primary placement with Mother, because Mother was better able to transport the children to their activities.

15. Although the trial court noted that all three experts were duly qualified and respected, it relied on the shared custody recommendations of Drs. Romirowsky and Terrell over that of Dr. Ainbinder. That determination is within the trial court's purview as a fact finder and will be upheld where, as here, the appellant failed to show that that finding constituted a reversible injustice.

16. Mother also contends that the trial court failed adequately to consider the children's health and health care decisions (specifically, Hunter's illnesses) under Factor (5). The trial court addressed the parents' disputes over Hunter's

illnesses, finding specifically that Mother believes that Hunter has asthma, while Father does not. Hunter has also been diagnosed with intermittent explosive disorder, and the parents disagree whether he should take medication for that behavioral condition. The Family Court ultimately concluded that legal medical custody should remain joint, and that all disputes over treatment will be submitted to the Alfred I. DuPont Institute doctors, whose recommendations shall be followed. Given the depth and intensity of the parents' disagreements, and the parents' inconsistent treatment of Hunter's medical issues, the Family Court's solution was orderly and logical, and will be sustained.

17. Factor (6) considers the parents' compliance with their obligations to the children. Mother claims that that factor favored primary residence with her, and that the Family Court erred by failing to address that factor. Although the trial court did not specifically reference "Factor (6)," it did note Dr. Terrell's testimony that "these parties have different approaches to child rearing and different concerns about the children's health and their activities." The trial court also noted Dr. Mandelbaum's testimony that the parents simply "cannot stand one another." Mother admits in her brief that "[n]either party, according to the other, respected the other parties' rights or responsibilities concerning the children." Because the overwhelming evidence of record indicates that the parents cannot communicate

effectively or respect each others' decisions, the trial court did not err by favoring neither Mother nor Father on this factor.

18. Mother's final claim of error is that the trial court failed to consider evidence of domestic violence under Factor (7), which (Mother claims) favored primary placement with her. Mother proffers her own testimony about incidents where Father bruised Hunter's arm and where Father drove his car at her; as well as the testimony of Vivian Thompson (Division of Family Services investigator) about Father slapping Hunter when he was younger, Father hurting Mother in the presence of the children, and Father allegedly bruising a step-daughter who came to Mother's defense.

19. The trial court acknowledged Ms. Thompson's thorough investigation of Mother's abuse allegations and Ms. Thompson's conclusion that although Father had bruised Hunter's arm, that did not constitute abuse. The evidence presented by Mother largely concerned allegations of abuse between Mother and Father (who no longer reside together), and Ms. Thompson's determination that the incident with Hunter was not abusive. Thus, the trial court's refusal to find that the abuse allegations warranted placement with Mother was not clearly wrong and will be upheld.

20. In analyzing the best interests factors, the Family Court thoroughly reviewed the evidence before it. That evidence supports the Family Court's factual

findings and its conclusion that continuing a shared custody arrangement—modified to provide more stability in the schedule and medical decisions—was in the children’s best interests. Accordingly, there was no abuse of discretion.

21. Mother’s next claim of error is that the trial court failed to give proper notice and time for her to present witnesses essential to determining the children’s health and health care issues under the best interests standard. Before the custody modification hearing, Mother moved for additional time to present witnesses.⁷ The trial court reserved ruling on that motion until the conclusion of the hearing on April 21, 2005. At that time, the Family Court announced that the motion was granted and that the remainder of the day was available for calling additional witnesses. Neither party was prepared to call such witnesses on that day, however. The trial court then reviewed Mother’s proffered witness list to determine whether it needed to reconvene on the following Monday, April 25, 2005, to take more

⁷ Before filing the motion for additional time, the parties were informed by the trial court that no additional time was available for extension on the actual date of trial.

testimony. The trial court declined to hear some of the proffered witnesses, but did hear two additional witnesses that day.⁸

22. Without citation to any authority, Mother argues that the trial court committed legal error by failing to give more notice to the parties concerning its plans to take additional testimony, and by declining to hear from several of her proffered witnesses about her children's medical issues.⁹ Assuming without deciding that that constituted error, the error was harmless in the circumstances of this case.

23. The trial court heard testimony from both parents and Dr. Romirowsky, and concluded that the parents could not agree as to how to treat (or even whether to acknowledge at all) their children's medical issues. Essentially, Mother sought to introduce more physician testimony to show that her view of the children's illnesses was the correct one, and that therefore she should be awarded primary medical custody. As noted, the trial court modified the custody arrangement so

⁸ The trial court declined to hear testimony from Dr. John DeFrate regarding Hunter's intermittent explosive disorder, Dr. Katharine King about Hunter's asthma, and Drs. Donna Stevenson and Gail Schofield about Harrison's ADHD and chronic tic. The Court agreed to hear testimony from Dr. Scheid (the children's primary physician), but Dr. Scheid was unavailable on the short notice. The Family Court also accepted a report from Dr. Geimeier (Hunter's initial allergist), but did not take his testimony. Finally, the trial court heard testimony from Vicki Thompson of the Division of Family Services and Dr. David Mandelbaum (the parties' initial co-parent counselor). Mother notes that she had only one business day to prepare for those witnesses' testimony.

⁹ Mother also argues that she was denied the chance to cross-examine some of the medical experts, because the trial court received that testimony as hearsay or in the form of written reports.

that all future medical decisions were to be submitted to the A.I. DuPont Institute, whose recommendations the parties were bound to follow.

24. We are unable to conclude that the trial court's refusal to hear additional testimony about the nature of the children's illnesses was improper. There was abundant record evidence of the parents' inability to agree on whether or how to treat the children's medical problems. Additional testimony designed to show that Mother had a better understanding of those problems would have been cumulative, especially given her admission that she is over-protective. The trial court's decision to remove all medical decisions from both parties was a logical solution. Although the trial court's notice to the parties about their pending ability to call more witnesses may have been too short, no showing was made that that resulted in reversible prejudice.

25. Mother's final claim is that the trial court made erroneous factual findings about the children's medical problems. She argues that the Family Court: erroneously (i) found (contrary to the evidence she presented) that Hunter did not have asthma, (ii) failed to address Harrison's neurological problems at all, and (iii) failed to arrive at any plan for how issues relating to the children's psychological and neurological concerns should be decided.

26. Mother's arguments lack merit. The Family Court's misstatement about Hunter's asthma is not reversible error, nor is its failure to address Harrison's

neurological problems, because the true issue is not what illnesses the children have, but the parents' inability to evaluate and treat those conditions consistently. As stated above, the trial court logically resolved the parents' inability to agree on the children's medical treatments by requiring them to refer all medical disputes to the Institute.

27. We conclude that the record supports the trial court's factual findings and conclusions, and the trial court made no errors of law and did not abuse its discretion.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice