

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KATHLEEN MARTIN, ¹	§	
	§	No. 380, 2011
Petitioner Below,	§	
Appellant,	§	
	§	Court Below: Family Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
JACK MARTIN,	§	
	§	File No. CN09-06092
Respondent Below,	§	Petition Nos. 09-38909
Appellee.	§	09-40353
	§	11-07181

Submitted: January 4, 2012
Decided: February 6, 2012

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

ORDER

This 6th day of February, 2012, on consideration of the briefs of the parties, it appears to the Court that:

1) Kathleen Martin (Mother) appeals from a Family Court order that awards primary custody of her child to Jack Martin (Father) from and after the date on which the child starts kindergarten. The child will be 5 years old in May 2012, and it is assumed by all parties that the child will begin kindergarten in August 2012.

¹This Court *sua sponte* assigned pseudonyms to the parties by Order dated July 29, 2011, pursuant to Supreme Court Rule 7(d).

2) Mother was unrepresented at the January 2011 hearing that resulted in this custody order. The parties agreed to the 2-2-3 custody arrangement they had been using. But it is apparent from the record that neither parent had considered the custody arrangement that would be in place when the child starts kindergarten, as that date was more than 1 ½ years away.² Nonetheless, the court proposed changing the joint custody arrangement to grant primary custody to Father when the child starts school. The court explained that it was “doing an opinion that’s going to last until [the child] is 18”³

3) The court asked Mother whether she agreed to its proposed post-kindergarten custody arrangement. Mother said, “Okay.” The colloquy continued:

THE COURT: You’re sure?

MS MARTIN: Well, I think a lot could change between now and then, I guess and if things do change, then I guess it can be addressed in a year-and-a-half.

THE COURT: Right, but you need to understand, that there’s something called 13 Delaware Code, Section 729, okay. So, because we have had a full hearing already, if I enter the order, even though I would say it’s partly by agreement from the two of you, okay? It would be a higher standard, if you wanted to change it, it would be a harder standard to

² Appellant’s Appendix, A-19.

³ Appellant’s Appendix, A -20.

change the order, that's just for the first two years. And that's the way the statute is written⁴

4) After this explanation, Mother continued to agree with the court's proposed custody order. In addition, she told the court that she did not feel pressured by the court.

5) The court entered its first order on February 23, 2011. Mother filed a notice of appeal, but the appeal was dismissed after the trial court entered an order in March 2011 stating that the February order was not a final order. On July 12, 2011, the court held another hearing, at which time Mother was represented. Her counsel asked to be heard on the change in custody, but the court refused, saying that the matter had been litigated fully, and that the Supreme Court could deal with it. On July 14, 2011, the trial court entered another custody order, which incorporated the terms of the February order. This appeal followed.

6) The trial court based its decision primarily on its belief that the parties agreed to the terms of the order, including the change in custody. But the record, as a whole, does not support that conclusion. It is true that Mother agreed at the January hearing. Her comments, however, indicate that she thought the kindergarten custody issue could be addressed when the child actually was ready for kindergarten. Thus,

⁴Appellant's Appendix, A-20-21.

to the extent that she agreed, it appears that she did not understand what she was agreeing to, from a legal standpoint. Mother's immediate appeal of the February order, and her counsel's effort to be heard on the matter at the July hearing provide further evidence that Mother did not agree to the change in custody.

7) In sum, we conclude that the trial court's custody decision was founded on an incorrect premise, and must be revisited. On remand, we expect the court to consider the child's best interests based on the parties' current circumstances.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court be, and the same hereby is REVERSED and REMANDED for further action in accordance with this Order. Jurisdiction is not retained.

BY THE COURT:

/s/ Carolyn Berger
Justice