

THE FAMILY COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY



ROSEMARIE CORWIN, : File No.
 :
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 Petitioner, : Petition No.
 :
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 v. : **ORDER**
 : PETITION FOR MODIFICATION
 BRYSON KOOLEN,ⁱ : OF CUSTODY
 :
 Respondent. : **IN THE INTERESTS OF:**
 : Lilly Koolen-Corwin (DOB: 3/26/2011)

ORDER

Currently before the Court is a request to adopt the parties' proposed consent order as a Court Order to resolve the underlying Petition for Modification of Custody. As a result of the application of 13 Del. C. § 725A, the Court was unable to initially adopt the proposed consent order without first making certain findings. As such, the Court notified the parties and held a hearing.

BACKGROUND

The Court takes judicial notice of the entire record in this matter. Only the background relevant to this Order is discussed herein.

The Petitioner in this matter is Rosemarie Corwin (hereinafter "Mother"). The Respondent in this matter is Bryson Koolen (hereinafter "Father"). The parties are natural parents to the minor child, Lilly Koolen-Corwin (hereinafter "Child").

On April 1, 2015, the parties entered into a Permanent Consent Order regarding Custody and Visitation. On April 2, 2015, a Commissioner of this Court signed that Consent Order. The Order indicated that the parties would have joint custody and shared placement of the Child.

On May 24, 2018, Mother filed a Petition to Modify Custody Order (hereinafter “Petition”). Mother requested placement and sole custody of the Child.

On June 12, 2018, Father filed an Answer to Mother’s Petition to Modify Custody Order. Among other things, Father’s Answer noted that Mother resides with her fiancé, Aiden P. Hinrichs, who is a registered sex offender (hereinafter “Hinrichs”).

On July 24, 2018, the parties attended mediation and reached an agreement regarding custody. The parties’ agreement was that they would have joint custody of the child. Mother would have physical placement of the child, and Father would have visitation. The parties thereafter presented the Court with a proposed consent order and requested that the Court enter this agreement as an Order.

On August 17, 2018, the Court held a Case Management Conference. The Court indicated that it was unable to enter an Order which would result in a Child primarily residing with a registered sex offender, without making specific written findings.¹ The Court noted that the statute creates a presumption against placement, and noted that the parties may overcome the presumption by proving certain elements exist. A hearing was scheduled to receive evidence relevant to the applicability of §724A.

On February 6, 2019, the Court held a hearing in order to determine if the presumption against placement, contemplated by §724A, was overcome. The evidence received at that hearing is discussed below. Both parties appeared, and proceeded *pro se*. Hinrichs was also present, and testified.

Mr. Hinrichs’s relevant criminal convictions are as follows: on May 21, 2007, when he was 22 years old, Hinrichs was charged with, and subsequently pled guilty to Rape Fourth Degree- Sexual Penetration Victim less than 16 Years Old.² Hinrichs testified that the victim was a friend of a friend, and was 12 years old.

On October 1, 2007, Hinrichs was sentenced as follows: five years of level 5 supervision by the Department of Correction, suspended for six months at supervision level 4 Home Confinement, followed by three years at supervision level 3. Hinrichs was required to register as a sex offender. Hinrichs was also required to complete a mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate. Hinrichs was to have no contact with any minor child under the age of 18. On November 1, 2007, the sentence was modified so that Hinrichs could have supervised contact with his niece who was under 18 years of age. Hinrichs is a Tier II Registered Sex Offender

¹ See 13 Del. C. §725A

² 11 Del. C. §770(a)(3)(b)

On February 28, 2008, Hinrichs was found to have violated his probation. It is unclear what the specific circumstances of this violation were.

On June 28, 2010, Hinrichs pled guilty to Criminal Trespass Third Degree³; First Degree Reckless Endangerment⁴; Disregarding a Police Officer Signal⁵; and Resisting Arrest.⁶ Also on June 28, 2010, Hinrichs was found to have violated his probation, presumably due to his guilty plea.

On November 20, 2012, Hinrichs pled guilty to Manufacturing, Delivering, or Possessing with Intent to Deliver, a Controlled Substance, with an Aggravating Factor.⁷ Although it is unclear what was found to be the aggravating factor, as would be defined by 16 Del. C. §4751A, a review of the associated documentation indicates that Hinrichs was in the car with two minors, identified as his girlfriend's children, when the incident took place. He was also charged with Conspiracy Second Degree, and two counts each of Unlawfully Dealing with a Child and Possession of Drug Paraphernalia, all of which were *nolle prossed* pursuant to his guilty plea.

Also on November 20, 2012, Hinrichs was found to have violated his probation, presumably due to the plea of the same date. This violation of probation resulted in Hinrichs being sentenced to two years and nine months of level 5 supervision by the Department of Correction, suspended for eighteen months at supervision level 3. This Sentencing Order also reimposed all conditions of the original Order.

On July 3, 2013, Hinrichs completed an Alcohol and Drug Treatment Program, organized by Gateway Foundation.⁸ It is unclear what this program entailed. Hinrichs testified that he was required to participate in the program because of his November 2012 conviction, and that the program lasted approximately four months. Hinrichs also testified that he was in TASC after he left Gateway, and completed that program.

On April 4, 2014, the November 20, 2012 Violation of Probation Sentencing Order was modified to note that Hinrichs successfully graduated from the Drug Court Program (TASC). All other terms and conditions of the Order remained as originally imposed.

³ 11 Del. C. §821

⁴ 11 Del. C. §604(a)

⁵ 21 Del. C. §4103

⁶ 11 Del. C. §1257

⁷ 16 Del. C. §4753(2)

⁸ See Petitioner's Exhibit 1.

Father stated that he would like the agreement to be signed. Father also stated that he had no concerns for the Child's safety with Hinrichs.

Mother also testified that she had no concerns for the Child's safety when she is with Hinrichs.

Hinrichs testified that he is residing with Mother. He testified that he is no longer on probation, but when he was on probation, he was unable to have contact with any minor except his nieces. Hinrichs testified that, after his 2007 Rape conviction, he was enrolled in a "sex offender program, but it wasn't a class, *per se*." He went on to testify that the program was required by the State. The program was held at the Probation and Parole center, consisted of courses and weekly meetings, and occurred concurrently with his probation.

DISCUSSION

The analysis herein was necessitated when the parties requested modification of their Custody Order which was entered by consent. An order entered by the Court by consent of all parties, an interim order or a written agreement between the 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 13 Del. C. §722.⁹ In considering a modification of custody, the Court is specifically required to consider evidence of domestic violence provided for the Child Protection from Domestic Violence and Sex Offenders Act (hereinafter "the Act").¹⁰ Furthermore, the Court is required to consider the criminal history of the parties and any other resident of a party's household.¹¹ The Court's consideration of the aforementioned led to the Court recognizing that the Tier II registered sex offender status of Mother's live-in fiancé, Hinrichs, would limit the Court's ability to place the Child in Mother's home.

The Court's ability to order that a child reside primarily with a sex offender is limited by the Act. 13 Del. C. §724A is applied where parties request the Court order or modify residential placement of a child, as is the case here, and creates a rebuttable presumption that a child shall not be placed in a situation which would result in that child primarily residing with a sex offender. §724A reads as follows:

⁹ 13 Del. C. § 729(b)

¹⁰ 13 Del. C. §722

¹¹ 13 Del. C. § 722(a)(8)

§ 724A. Rebuttable presumption against unsupervised visitation, custody or residence of a child to a sex offender

- (a) Notwithstanding other provisions of this title, there shall be a rebuttable presumption that no sex offender shall be awarded sole or joint custody of any child, that no child shall primarily reside with a sex offender, and that no sex offender shall have unsupervised visitation with a child.
- (b) The above presumptions may be overcome if:
- (1) There is not a criminal sentencing order prohibiting same; and
 - (2) There have been no further sexual offenses or criminal acts of violence; and
 - (3) The sex offender is in compliance with the terms of probation, if applicable; and
 - (4) The sex offender has successfully completed an intensive program of evaluation and counseling designed specifically for sex offenders and conducted by a public or private agency or a certified mental health professional, and as a result of such, does not pose a risk to children; and
 - (5) The sex offender has successfully completed a program of substance abuse counseling if the court determines such counseling is appropriate; and
 - (6) The best interests of the child would be served by giving residential or custodial responsibilities for the child or visitation with the child to the sex offender.
- (c) Notwithstanding other provisions of this title, where the child who is the subject of the petition is also the victim of the sex offender, the court shall not award joint or sole custody to the sex offender, nor permit the sex offender to exercise custodial or residential responsibilities, nor permit any visitation, without considering expert testimony from a certified mental health professional that such a custodial, residential or visitation arrangement is in the child's best interests. If such a custodial, residential or visitation arrangement is determined under this subsection to be in the best interests of the child, the court shall then apply the remaining factors set forth in subsection (b) of this section.
- (d) In those cases in which more than 1 party is a sex offender, or where the party currently having custodial rights has permitted the sex offender to exercise residential or custodial responsibilities for the child or have visitation with the child, in violation of a criminal or civil court order, the case shall be referred by the court to the Division of Family Services of the Department of Services for Children, Youth and Their Families for

investigation as to whether the child is abused, dependent or neglected as a result of these circumstances.

- (e) If a child is conceived and subsequently born as the result of an act of rape of any degree or unlawful sexual intercourse, in either the first or second degree with the mother, the biological father of said child shall not be permitted visitation privileges under this section. This subsection shall apply only where the father pleads guilty or nolo contendere, or is convicted of any degree of rape or unlawful sexual intercourse, in either the first or second degree.

The Act enumerates six elements which must all be met in order to rebut the presumption against ordering a custody arrangement where the child would be primarily residing with a sex offender. The Act defines “sex offender” as “any person designated by the courts of this State as a Risk Assessment Tier II or III sex offender under [11 Del. C. §4121], or a person designated and treated as such by a court or a jurisdiction outside of Delaware, regardless of whether the sex offender’s victim was an adult or a child.”¹² Therefore, Hinrichs is a sex offender within the meaning of §724A. The Court now analyzes those six elements, as follows:

(1) There is not a criminal sentencing order prohibiting same:

Regarding his sentencing orders and probation, Hinrichs testified that he did not have a copy of his Sentencing Order, and was unsure what occurred which resulted in him being found to have violated his probation. The language of §724A specifically requires the Court to review the sex offender’s criminal history and Sentencing Orders. This Court presumes that the General Assembly intended for the Court to obtain these documents, on its own initiative, where a *pro se* party did not provide them to the Court. Thus, the Court obtained certified copies of the relevant Sentencing and Violation of Probation Orders from Superior Court.

A criminal sentencing order prohibiting Hinrichs from being in contact with a minor does not appear to currently be in effect.

(2) There have been no further sexual offenses or criminal acts of violence:

The Act requires the Court to find that Hinrichs has not committed any criminal acts of violence subsequent to the adjudication of his sex offense. However, the Act provides no clarification regarding what constitutes a criminal act of violence for purposes of the

¹² 13 Del C. §723A

Act. The Delaware Supreme Court determined that, at least some, violent felonies which are defined by 11 Del. C. §4201, could be properly considered under the Act.¹³

As is relevant to Hinrichs, 11 Del. C. §4201 classifies the following felonies as violent felonies: 11 Del. C. §604, Reckless Endangering First Degree; and 16 Del. C. §4753 Drug Dealing-Aggravated Possession, Class C Felony.

On or about June 28, 2010, Hinrichs pled guilty to Reckless Endangering First Degree.¹⁴

On or about November 20, 2012, Hinrichs pled guilty to Drug Dealing-Aggravated Possession, a Class C Felony.¹⁵

Both of these offenses are defined as violent felonies by 11 Del. C. §4201. Therefore, there have been further criminal acts of violence. Both offenses were also after the adjudication of Mr. Hinrichs conviction for fourth degree rape. There have been no further sexual offenses.

At this point, because all of the circumstances in §724A (1-6) must be present, the parties will be unable to overcome the presumption that no child shall primarily reside with a sex offender. In the interest of a complete analysis, the Court will proceed in analyzing the remaining elements.

(3) The sex offender is in compliance with the terms of probation, if applicable:

Hinrichs is no longer on probation, therefore this element is satisfied by inapplicability.

(4) The sex offender has successfully completed an intensive program of evaluation and counseling designed specifically for sex offenders and conducted by a public or private agency or a certified mental health professional, and as a result of such, does not pose a risk to children:

¹³ Mullens v. Kilborne, 187 A.3d 552 (Del. 2018) (Considering whether certain gun crimes were violent felonies).

¹⁴ 11 Del. C. §604

¹⁵ 16 Del. C. §4753

Hinrichs testified that he participated in a program as a condition of his probation. He was unable to provide adequate information for the Court to determine whether this program was sufficient to satisfy this element. This Court has previously determined that this prong is satisfied where “[the sex offender] successfully completes an intensive program of evaluation and counseling designed specifically for sex offenders and conducted by a public or private agency or a certified mental health professional, and as a result, they no longer pose a risk to children.”¹⁶ The Court would need much more evidence than Hinrichs was able to provide in order to conclusively determine whether this prong is satisfied.

(5) The sex offender has successfully completed a program of substance abuse counseling if the court determines such counseling is appropriate:

It is unclear if this element is referring to counseling deemed appropriate by the Family Court interpreting the Act, or if it is referring to counseling deemed appropriate by the Court which adjudicated the sex offense. Therefore, the Court will address both interpretations. Insofar as the Act may refer to a determination by this Court, the Court has no reason to deem a substance abuse program appropriate at this point. Insofar as the Act may refer to counseling deemed appropriate by the Court which adjudicated the sex offense, the Superior Court did order Hinrichs to complete certain substance abuse programs. On July 3, 2013, Hinrichs completed an Alcohol and Drug Treatment Program, organized by Gateway Foundation. It is unclear what this program entailed. Hinrichs testified that it lasted four months. Hinrichs testified that, after Gateway, he also participated in TASC. There was insufficient testimony regarding the classes Hinrichs took. The Court will assume that the classes were sufficient to satisfy this element. However, since the second element has not been satisfied, the satisfaction of this element would not be dispositive.

(6) The best interests of the child would be served by giving residential or custodial responsibilities for the child or visitation with the child to the sex offender:

Due to the stage of the proceedings at the time the parties requested that their proposed consent order be recognized, the Court did not receive evidence concerning the Child’s best interests. Such an analysis, for purposes of this Order, would also be largely irrelevant.

¹⁶ See: Dep't of Servs. for Children, Youth, & Their Families, Div. of Family Servs. v. K.E., 2017 WL 4335164, at *6 (Del. Fam. Ct. June 2, 2017).

Therefore, being unable to satisfy the second and fourth elements of §724A(b), the parties are unable to overcome the presumption that no child shall primarily reside with a sex offender.

The Court now analyzes the other provisions of §724A. There is no evidence to suggest that the Child or Mother was a victim of Hinrichs. Therefore, the conditions set forth in §724A (c & e) do not apply here. Mother and Father are also not sex offenders. Therefore, the condition set forth in §724A(d) does not apply.

The Act operates where the Family Court determines custody, residency, and visitation as part of a custody proceeding.¹⁷ The Court is required to make a written finding regarding the presumption regardless of whether the parents of a child acquiesce to a placement that is contrary to the presumption.¹⁸ Furthermore, the Court looks beyond the parties' testimony as to their opinion of the Sex Offender when analyzing the elements in §724A.¹⁹

CONCLUSION

The parties requested that the Court enter their proposed consent order regarding modification of custody. The proposed consent order would result in the Child primarily residing with Hinrichs, who is a Tier II registered sex offender. In order for the Court to enter the parties' proposed consent order, the parties must overcome the presumption that a child shall not be placed to reside primarily with a sex offender. In order to overcome that presumption, the parties must establish all six elements enumerated in §724A(b) with respect to Hinrichs. The Court finds that the parties satisfy elements one, three, and five with respect to Hinrichs. The Court finds that the parties were unable to satisfy elements two and four. The Court abstained from analyzing the sixth element, regarding the child's best interests, as it would not have been determinative to this decision and would require an analysis that is premature at this stage.

The parties were unable to satisfy elements two and four relevant to Hinrichs. Therefore, the presumption, that no child shall be placed with a sex offender, is unrebutted. Accordingly, the Court cannot enter the proposed consent order as requested by the parties. Unfortunately, under these circumstances, the Court is unable to enter an Order which would involve the Child primarily residing with Hinrichs. The Court is certainly

¹⁷ Div. of Family Servs. v. O'Bryan, 164 A.3d 58, 61 (Del. 2017).

¹⁸ T.C. v. S.S., 2011 WL 11546684, at *5 (Del. Fam. Ct. Nov. 22, 2011).

¹⁹ Id. At *8

willing to consider a consent order which would not require the child to primarily reside with Hinrichs, should the parties decide to present it with one.

The parties shall contact the Court within twenty (20) days to advise whether they would like to proceed to a hearing on the underlying Petition for Modification of Custody; return to mediation to attempt to restructure their agreement; or if Mother wishes to dismiss her Petition for Modification of Custody. All contact with the Court shall be in writing, with a copy forwarded to the other party.

IT IS SO ORDERED this 20th day of February, 2019.

/Peter B. Jones/

PETER B. JONES, JUDGE

PBJ/Imp

cc: Father
Mother
File

ⁱ To protect the privacy of those involved in this action, the Court assigned pseudonyms.