IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHELLY HALL,[1]	§	
	§	No. 540, 2007
Petitioner Below,	§	
Appellant,	§	Court Below: Family Court of
	§	the State of Delaware in and for
v.	§	Sussex County
	§	
GEOFF WAKLEY,	§	C. A. No. CS02-03862
	§	
Respondent Below,	§	
Appellee.	§	

Submitted: April 16, 2008
Decided: May 23, 2008

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

O R D E R

This 23rd day of May 2008, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. Shelly Hall ("Mother"), the petitioner-below, appeals from a Family Court order denying her petition to modify a Custody and Visitation Order designating Mother and Geoff Wakley ("Father") as joint legal custodians of their two minor children, but granting primary residential placement to Father. On appeal, Mother claims that in denying her petition the Family Court abused its discretion, by failing to appropriately consider and balance the factors set forth in

[1] The Court, *sua sponte*, has assigned pseudonyms to the parties under Supr. Ct. R. 7(d).

13 *Del. C.* §§ 722 and 729. We conclude that the Family Court did not abuse its discretion and, therefore, affirm.

2. Mother and Father are the parents of two minor children, Hunter Wakley and Garrett Wakley, ages 12 and 9 respectively. On March 29, 2004, the Family Court entered a Custody and Visitation Order, designating Mother and Father as joint legal custodians of the children, granting primary residential placement to Father during the school year (with visitation rights for Mother), and providing for shared residential placement during the summers based on a weekly alternation. Mother appealed from the Family Court's order, which this Court affirmed on January 14, 2005.

3. Over one year later, on May 11, 2006, Mother filed a petition in the Family Court to modify the March 29, 2004 Custody and Visitation Order. Mother's petition sought a modification of the prior arrangement from one of primary residence with Father to one of shared primary residence under which the children would reside with Mother during alternating weeks throughout the year. On August 23, 2007, the Family Court held a hearing, at which Mother, Father, Mother's current husband, the maternal grandparents, Mother's babysitter, and both children, testified.[2] The Family Court denied Mother's petition on September 10, 2007. This appeal followed.

[2] The judge interviewed each child *in camera* on the record.

4. On appeal, Mother claims that the Family Court abused its discretion in denying her modification petition because that court failed appropriately to consider and balance the factors set forth in 13 *Del. C.* §§ 722 and 729. Specifically, Mother claims that the Family Court: (i) gave excessive weight to Mother's estrangement from her own mother; (ii) gave insufficient weight to the children's desire to spend an equal amount of time with their parents; (iii) made factual findings not supported by the record; (iv) repeatedly relied on factual findings made in the 2004 Custody and Visitation Order instead of focusing on the developments that occurred since that initial order; and (v) concluded that any harm that "might conceivably" be caused by a modification of the residential arrangement outweighs any potential benefit.

5. The sole issue on appeal is whether the Family Court abused its discretion by denying Mother's petition for modification of the initial Custody and Visitation Order. Because the petition was filed more than two years after the initial order,[3] the Family Court was required to consider the factors stated in 13 *Del. C.* § 729(c)(2): (a) "[w]hether any harm is likely to be caused to the child by a modification of [the] prior order, and, if so, whether that harm is likely to be

[3] At the Family Court hearing, the parties disagreed as to whether Section 729(c)(1) or (2) was applicable. The Family Court accepted Mother's position and applied the less stringent standards of Section 729(c)(2). Because that determination is not disputed on appeal and is supported by the language of the statute, we use the same standard as that adopted by the Family Court.

outweighed by the advantages, if any, to the child of such a modification;" (b) "[t]he compliance of each parent with prior orders of the Court concerning custody and visitation;" and (c) the eight "best interests of the child" factors stated in 13 *Del. C.* § 722[4] and any other "relevant factors."[5]

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[4] 13 *Del. C.* § 722(a) provides:

> (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 cohabiting 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; and
> (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.

[5] 13 *Del. C.* § 729(c)(2) provides:

> (2) If the application for modification is filed more than 2 years after the Court's most recent order concerning these matters, the Court may modify its prior order after considering:
> a. Whether any harm is likely to be caused to the child by a modification of its prior order, and, if so, whether that harm is likely to be outweighed by the advantages, if any, to the child of such a modification;
> b. The compliance of each parent with prior orders of the Court concerning custody and visitation and compliance with his or her duties and responsibilities under § 727 of this title including whether either parent has been subjected to sanctions by the Court under § 728(b) ... since the prior order was entered; and
> c. The factors set forth in § 722 of this title.

6. On appeal from an order of the Family Court, this Court reviews the facts and the law, as well as the inferences and deductions made by the Family Court.[6] If the law was correctly applied, determinations regarding child custody are reviewed for abuse of discretion.[7] This Court will accept the factual findings of the Family Court if they are sufficiently supported by the record and are the product of an orderly and logical reasoning process. Only when the findings of the Family Court are clearly wrong and the doing of justice requires their overturn will this Court reverse those findings.[8]

7. Mother first claims that the Family Court abused its discretion under 13 *Del. C.* §§ 722 and 729 by placing excessive weight upon Mother's estrangement from her own mother ("Grandmother"). The Family Court judge emphasized repeatedly that Mother is estranged from Grandmother—a fact that Mother does not dispute.[9]

8. Title 13, Section 722(3) of the Delaware Code specifically directs the Family Court to consider "[t]he interaction and interrelationship of the child with his or her ... grandparents." Here, those relationships were especially important,

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

[7] *Russell v. Stevens*, 2007 WL 3215667, at *2 (Del. Supr.) (citations omitted).

[8] *Delong v. Stanley*, 1997 WL 673713, at *1 (Del. Supr.) (citations omitted).

[9] *Hall v. Wakley*, No. CS02-03682 (Del. Fam. Ct. September 10, 2007), at 8, 18, 22 (hereafter, Family Court Decision).

because the maternal grandparents help Father in taking care of the children and are very involved in the children's day-to-day lives. The grandparents provide before and after school care for the children, assist with their schoolwork, participate in leisure activities with them, and take the children on vacations. If Mother's petition were granted, that would have increased the interaction between Mother and the maternal grandparents. But, the Family Court found that "the very visible coldness shown by Mother [towards Grandmother] ... made clear to the Court that [Mother's] toxicity … would be visible and have an adverse effect on the children."[10] As the Family Court further commented: "Garrett, described as usually very loving, vocal, and expressive around his grandparents, acted extremely cautious when talking to his grandmother at a soccer game while he was on visitation with his mother."[11]

9. Having determined that the modified residential arrangement sought by Mother might adversely affect the children because of Mother's estrangement from Grandmother, the Family Court properly next considered, under 13 *Del. C.* § 729(c)(2)(a), whether that harm was "likely to be outweighed by the advantages, if any, to the child of such a modification." The Family Court concluded that Mother's "toxicity" towards her own parents would likely cause significant harm

[10] Family Court Decision, at 18.

[11] *Id.* at 19.

to the children's relationship with their grandparents and that "whatever possible advantages might be to a shared placement arrangement, such advantages would not outweigh the likely harm Mother's toxicity would cause to the very beneficial relationship the boys enjoy with their grandparents."[12] We conclude that the significance the Family Court placed on Mother's estrangement with Grandmother was not an abuse of discretion, and that the record supports the conclusion that the Family Court judge reached.

10. Mother's second claim of error is that the Family Court abused its discretion under 13 *Del. C.* §§ 722 and 729 by giving too little weight to the children's stated desire to spend an equal amount of time with their parents.[13] Hunter told the judge that he wanted a "week-on/week-off" arrangement for the entire year so that he and his brother could spend the "same amount of time with our mom and with our dad." Garrett similarly indicated that he would like the year long "week-on/week-off" arrangement, because that way "I can see my mom, my dogs some more, and I can play some more with them."

11. The Family Court's decision indicates that the judge did consider the wishes of the children, but did not give them "great weight," because "neither child was able to articulate clear reasons why they wanted to make changes from the

[12] *Id.* at 23.

[13] The judge interviewed each of the children separately, *in camera*.

previous Order" other than the "basic fairness for each of their parents to have equal time with them."[14] Although the children (ages 12 and 9 respectively) expressed, in our view, sufficient reasons for wanting to spend more time with Mother, it was not an abuse of discretion to give their wishes little weight. The wishes of the child are only one among eight statutory factors that the Family Court must consider, in addition to all other "relevant factors." The Family Court must independently consider each of the statutory factors—none of which is solely determinative—and must then give each factor "its due weight and importance relative to the other factors in a manner reflecting the best interests of the child in question."[15] "The amount of weight given to one factor or combination of factors will be different in any given proceeding."[16] Because the Family Court carefully analyzed and weighed the remaining statutory factors and other relevant factors, we cannot conclude that the Family Court abused its discretion in giving little weight to the children's wishes.

12. Mother next claims that the Family Court abused its discretion by making factual findings not supported by the record, specifically with respect to a trip to York, Pennsylvania that Mother took with the two children:

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[14] Family Court Decision, at 13, 15-16.

[15] *Holmes v. Willey*, 2002 WL 27436, at *1 (Del. Supr.) (citing *Friant v. Friant*, 553 A.2d 1186, 1188 (Del. 1989)).

[16] *Fisher v. Fisher*, 691 A.2d 619, 623 (Del. 1997).

> The Court has concerns, however, that Mother, without letting Father know of her plans, took the children out-of-State on motorcycles with her husband to the Harley Davidson Factory in York, Pennsylvania. A review of Mapquest on the internet informed this Court that this was at least a three hour trip each way ... covering over 300 miles round trip, and traveling on several major high speed highways.[17]

13. Mother argues that the Family Court judge incorrectly found that the trip was taken on motorcycles. In fact, the trip was actually by car and Mother had testified that she and the children had a "picnic in the car." Father does not dispute that this factual finding was erroneous. He submits, however, that the error was not "central" to the Family Court judge's reasoning and ultimate decision, because the judge was not focusing on the means of transportation. We agree.

14. The trip to the Harley Davidson factory was mentioned three times in the Family Court's opinion.[18] First, the trip was mentioned in the context of the 13 *Del. C.* § 729(c)(2)(b) analysis of the "compliance of each parent with prior orders of the Court concerning custody and visitation and compliance with his or her duties and responsibilities under [13 *Del. C.* § 727]," *i.e.* parents' duty to keep each

[17] Family Court Decision, at 9.

[18] *Id* at 9, 25, 29.

other informed about the children.[19] The Family Court discussed the trip while comparing Father's and Mother's ability to keep one another informed about the children, and noted that Mother organized the trip "without letting Father know of her plans."[20] Although the Family Court judge also later mentioned the general danger of travel by motorcycle, it appears that the thrust of the judge's concern was Mother's failure to communicate with Father—a theme that appears throughout the Family Court opinion.

15. The second and the third time the trip was mentioned was as part of the Family Court's 13 *Del. C.* § 722(a)(6) analysis of "past and present compliance by both parents with their rights and responsibilities to their child under [13 *Del. C.* § 701]."[21] The Family Court noted again that Mother had taken the children out-of-state without informing Father of her plans, and that Mother admitted that she told

[19] 13 *Del. C.* § 727(a) relevantly provides:

> [E]ach parent has the right to receive, on request, from the other parent, whenever practicable in advance, all material information concerning the child's progress in school, medical treatment, significant developments in the child's life, and school activities and conferences, special religious events and other activities in which parents may wish to participate and each parent and child has a right to reasonable access to the other by telephone or mail.

[20] Family Court Decision, at 9.

[21] 13 *Del. C.* § 701(a) relevantly states:

> The father and mother are the joint natural guardians of their minor child and are equally charged with the child's support, care, nurture, welfare and education.… Where the parents live apart, the Court may award the custody of their minor child to either of them and neither shall benefit from any presumption of being better suited for such award.

the children to lie about their age so they could take the tour at the Harley Davidson factory even though they were not old enough for that.[22]

16. The record shows that the Family Court's analysis of that trip did not center upon the "motorcycle versus motor vehicle" issue, but rather upon Mother's failure to communicate with Father, and the inappropriateness of telling her children to lie. We conclude, for those reasons, that the Family Court judge's erroneous finding that the trip was taken by motorcycle was harmless.

17. Mother next contends that the Family Court abused its discretion by repeatedly relying on factual findings made in the 2004 Custody and Visitation Order instead of focusing on the developments that occurred since that time. In our view, that contention lacks merit. In ruling upon a petition for modification of a residential arrangement, the statutory scheme of 13 *Del. C.* §§ 722 and 729 requires the Family Court to proceed to a "re-examination" of the "factors which were determinative in a prior custody decision [and which] are susceptible to change."[23] Therefore, in making references to its prior factual findings, the Family Court acted well within its statutory mandate.

18. To be specific, Mother claims that it was improper for the Family Court to conclude: "Two and one-half years ago, Mother failed to provide any evidence to

[22] Family Court Decision, at 29.

[23] *Friant v. Friant*, 553 A.2d 1186, 1191 (Del. 1989).

support her allegations that Father drank excessively and had a bad temper." In our view, that statement was not inappropriate, where it was immediately followed by a statement of the current *status quo*: "At the present hearing, Mother made no such allegations. Instead, she stated that Father is a good father."[24]

19. The other reference criticized by Mother is the reference to Mother's infidelities that lead to her separation from Father and to her estrangement from Grandmother—specifically the fact that Mother started dating her current husband only a few weeks after her separation from Father.[25] This Court has held that, in custody and visitation cases, extramarital activities of one parent represent a relevant consideration in determining the best interests of the children.[26] Here, the Family Court noted not only that Mother started dating her current husband in 2002, but also that Mother married him in 2004, and that as of 2007, Mother's marriage to her new husband "demonstrat[es] at least two and one-half years of additional stability since the prior hearing."[27] The Family Court's re-examination of

[24] Family Court Decision, at 10. The Family Court expressly stated that: "As the Court reviews these various relevant factors, the Court compared the present circumstances to those circumstances that existed back in March 2004." *Id.* at 10.

[25] *Id.* at 21-22.

[26] *Martin v. Martin*, 2002 WL 229502 (Del. Supr.) (citing *Elizabeth A.S. v. Anthony M.S.*, 435 A.2d 721, 724-25 (Del. 1981)).

[27] Family Court Decision, at 11, 21.

Mother's family life—both before and after the initial hearing—was entirely appropriate.

20. Mother's final claim of error is that the Family Court abused its discretion by concluding that any harm that "might conceivably" be caused by a modification of the residential arrangement outweighs any potential benefit. Mother appears to imply that the Family Court used an inappropriate standard of review under 13 *Del. C.* § 729. If that is her contention, it lacks merit because the Family Court correctly stated that the standard of review was whether any harm was "likely" to be caused by the modification sought by Mother and whether that harm was outweighed by any advantage of the modification.[28]

21. In short, the Family Court's ultimate decision to deny Mother's petition was reached after a careful analysis of all the relevant factors, was properly based on facts and inferences supported by the record, and was the product of an orderly and logical reasoning process.

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

BY THE COURT:

/s/ Jack B. Jacobs
Justice

[28] *Id.* at 6-7.