

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JANE DOE, <sup>1</sup>	§
	§
Petitioner Below-	§ No. 455, 2005
Appellant,	§
	§
v.	§ Court Below—Family Court
	§ of the State of Delaware,
JOHN DOE,	§ in and for New Castle County
	§ File No. CN02-10363
Respondent Below-	§ Petition No. 02-34004
Appellee.	§

Submitted: August 25, 2006

Decided: October 31, 2006

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

**ORDER**

This 31<sup>st</sup> day of October 2006, upon consideration of the parties' briefs and the record on appeal, it appears to the Court that:

(1) The appellant, Jane Doe (Mother), filed this appeal from the Family Court's denial of her petition for custody of her youngest daughter. After consideration of the parties' respective positions on appeal, we conclude that this matter must be remanded to the Family Court for further proceedings consistent with this order.

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<sup>1</sup> The Court has assigned pseudonyms to the parties pursuant to Supreme Court Rule 7(d).

(2) The record reflects that Mother filed for divorce in October 2002. John Doe (Father) answered the petition in January 2003. Both parties requested the Family Court to retain jurisdiction to decide ancillary matters, including custody of their three children. In July 2003, Mother filed her first interim petition for custody of the parties' three children. Father responded by filing a motion to dismiss for lack of subject matter jurisdiction. At the time, Father was living in Oregon but had filed no custody petition there.

(3) After a hearing, the Family Court found no basis to dismiss Mother's custody petition for lack of subject matter jurisdiction. The Family Court concluded it had jurisdiction for several reasons. First, both parties had requested the Family Court to decide the issue of custody. Second, under former 13 Del. C. § 1903(2),<sup>2</sup> Mother and two of the children resided in the state, plus there was available in Delaware substantial evidence concerning the children's present or future care, education, and other personal relationships. Third, under former 13 Del. C. § 1903(4), it appeared that no other state would have jurisdiction.

(4) After analyzing the reasons why Delaware had jurisdiction to decide the parties' custody dispute, the Family Court went on to conclude:

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<sup>2</sup> The Family Court's jurisdiction in child custody matters is now set forth in 13 Del. C. § 1920.

“Delaware has subject matter jurisdiction to decide the legal and residential custody of [the parties’ two eldest children]. It does not have jurisdiction to decide the custody of [the parties’ youngest child], who has resided in the country of China since August 2000. The Motion to Dismiss the custody request of both parties for lack of subject matter jurisdiction IS DENIED.” Mother filed an appeal to this Court from the Family Court’s March 5, 2004 ruling but later voluntarily dismissed the appeal.

(5) In August 2005, Mother filed another petition for interim custody of the parties’ youngest daughter. Mother asserted that her daughter had moved from China in July 2005 and was living with Father in Oregon. On September 8, 2005, the Family Court summarily denied Mother’s petition on the ground that it lacked jurisdiction over the child based on its March 5, 2004 ruling. Mother filed this appeal.

(6) After briefing was completed in this appeal, Father’s counsel filed a document on October 3, 2006 entitled “Motion to Notify Court of Illinois Court’s Finding on Custody.” Attached to counsel’s document is a hand-written order purportedly from the Circuit Court of the Twelfth Judicial Circuit of Will County, Illinois granting custody of the parties’ youngest daughter to Father. Based on this order, counsel requests that Mother’s appeal be dismissed.

(7) The Court has carefully considered the parties' respective positions on appeal. We conclude that this matter must be remanded to the Family Court for further proceedings consistent with this Order. The physical presence of the child in Delaware is not necessary to the Family Court's jurisdiction to determine custody of the child.<sup>3</sup> It was undisputed that the parties' youngest daughter was a United States citizen. Because it offered no legal rationale, it is unclear to this Court the basis for the Family Court's initial determination in 2004 that it lacked jurisdiction to decide custody of the parties' youngest child. Moreover, even assuming that the Family Court properly exercised its discretion in refusing to determine custody of the parties' youngest daughter while she was living in China, we find no basis for the Family Court's refusal to determine custody once the child returned to the United States in July 2005.

(8) Consequently, we conclude that the Family Court's September 8, 2005 order must be vacated and this matter remanded to the Family Court for a hearing on custody of the parties' youngest daughter and to determine the impact, if any, of the Illinois court proceedings on Delaware's jurisdiction in this matter. In the interest of justice, the Family Court shall

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<sup>3</sup> 13 Del. C. § 1920(c) (Supp. 2004).

appoint counsel to represent Mother at State expense and, if necessary, an interpreter.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is VACATED and this matter is REMANDED for further proceedings consistent with this order. Jurisdiction is not retained.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice