

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIELLE C. BRADLEY,	§
	§ No. 426, 2007
Respondent Below,	§
Appellant,	§ Court Below – Family Court
	§ of the State of Delaware,
v.	§ in and for Sussex County
	§ File No. CS01-03922
SIMON J. BURTON, JR.,	§
	§
Petitioner Below,	§
Appellee.	§

Submitted: March 12, 2008

Decided: March 13, 2008

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

ORDER

This 13th day of March 2008, it appears to the Court that:

1) The respondent-appellant, Danielle C. Bradley (“the Mother”), appeals from a judgment of the Family Court transferring primary physical placement of her son (“Stanley”) to the petitioner-appellee, Simon J. Burton (“the Father”). On appeal, the Mother claims that: first, the Family Court abused its discretion by granting primary placement of Stanley to the Father; and second, the Mother was prejudiced by ineffectiveness of counsel during the Family Court proceedings. We have concluded that the judgment of the Family Court must be affirmed.

2) The Mother and the Father are Stanley's natural parents. Stanley was born on August 11, 1999. The Mother and the Father separated in 2003, after which Stanley's primary physical placement was with the Mother. The parents shared joint custody and the Father had visitation rights. Both the Mother and the Father have a criminal record stemming from a physical altercation that took place between them in 2004.

3) In 2006, a Protection From Abuse Order ("PFA") was issued as a result of several telephone arguments between the Mother and the Father. The PFA prohibited the Father from contacting the Mother. Nevertheless, the PFA required, in addition to the Father's regular visitation rights, telephone contact between the Father and Stanley twice a week. The Mother was found in contempt of the PFA on January 12, 2007, because those telephone contacts were not always taking place and because of the Mother's tardiness in dropping Stanley off for his visitation with the Father.

4) On July 28, 2006, the Father filed a Petition for Custody seeking continued joint custody but primary physical placement of Stanley with him. The Mother filed a cross-Petition for Custody requesting sole custody and primary physical placement with her. A hearing on the petitions took place on July 17, 2007, during which the following facts were established.

5) The Mother lives in her parents' four-bedroom house with her parents, her son from another relationship, her brother, her brother's wife, and their son (Stanley's cousin). Stanley shares a bedroom with his cousin, who is about the same age. The Mother is employed at Applebee's as a server. The Father lives alone in a single-wide mobile home with two bedrooms. At the Father's home, Stanley has his own room. The Father is an Operations Manager at Utiloquest. While with the Father, Stanley sees both his paternal grandparents and cousins.

6) Stanley's second-grade teacher, Maria Yager ("Yager"), testified that Stanley was an average student. She also stated that during the 2006-2007 school year, Stanley had eighteen absences (approximately seven of which were unexcused) and was tardy ten times. Yager indicated that while Stanley's attendance record was not ideal, she did not feel that it adversely affected his academic record in a significant way. The Mother testified that the reason Stanley was often late to school was because of his Wednesday night visitation with the Father. The record reflects, however, that only two of the ten incidents when Stanley was late for school occurred on Thursdays.

7) Stanley has asthma, food allergies, and difficulty with excessive coughing. The Mother is a smoker and has smoked in the car when Stanley

was with her. The Father does not smoke. Both parents take Percocet prescribed by a doctor.

8) Stanley is undergoing counseling because of issues with aggression. It appears that Stanley once tried to smother his younger brother, abused the family pets, and fought with his maternal cousins. Stanley's counselor did not testify.

9) The Father testified about two incidents where Stanley was disciplined—once by his Mother, and once by his maternal uncle—with visible bruises being left. The Father called the Division of Family Services, but, after investigating the matter, the Division took no action.

10) Stanley testified that he would like to live with the Father because “[h]e does good things for me.” Stanley explained that the Father buys him toys, brings him to visit his cousins, and cooks him crabs.

11) At the conclusion of the hearing, primary physical placement of Stanley was granted to the Father, with visitation rights for the Mother. The parties' joint legal custody was continued. This appeal followed.

12) The first issue on appeal is whether the Family Court erred in transferring Stanley's primary physical placement to the Father. The Mother claims that the Family Court abused its discretion because there was

insufficient evidence to support the conclusion that primary physical placement with the Father would be in Stanley's best interest.

13) If the law was correctly applied, decisions regarding child custody are reviewed for an abuse of discretion.¹ "It is only when the rulings of law or the findings in the Family Court are clearly wrong and the doing of justice requires their overturn that we are free to make contradictory findings."²

14) The Family Court is vested with "wide discretion" to determine custody but it must consider "each of the eight 'best interest' factors under 13 *Del. C.* § 722(a), none of which is solely determinative."³ Here, the

¹ See *Russell v. Stevens*, 2007 WL 3215667, at *2 (Del. Supr.) (citations omitted).

² *DeLong v. Stanley*, 1997 WL 673713, at *1 (Del. Supr.) (citations omitted).

³ *Russell v. Stevens*, 2007 WL 3215667, at *2. Section 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;

Family Court recited and discussed each of the statutory factors before deciding to continue joint custody and awarding primary physical placement to the Father. The Family Court acknowledged that Stanley would be well taken care of while living either with the Mother or the Father, and that the statutory factors weighted “pretty equally.” The trial judge concluded, however, that Stanley’s interests would be best served if primary physical placement was with the Father.

15) The Family Court found that the following factors weighed in favor of the Father: Stanley, although only seven years old at the time, indicated that he wanted to live with the Father (factor 2); and the Mother violated the PFA with respect to Stanley’s telephone contact with the Father (factor 6).⁴ The remaining factors were not found to weigh for or against either party, but the trial judge noted that Stanley was tardy for school several times and “probably [had] seven unexcused absences.” The Family Court further emphasized that the Mother smoked in the car with Stanley even though he has asthma. With respect to the credibility of both the

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- (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.

⁴ In addition to the eight statutory factors, the Family Court may consider “all other relevant evidence” to help determine what is in the best interest of the child. *Russell v. Stevens*, 2007 WL 3215667, at *2.

parents and the witnesses during the hearing, the Family Court held that “the credibility factor in this case favors the Father.”

16) Because the trial judge carefully considered all the statutory factors and because those findings are supported by the evidence, the record reflects that the Family Court did not abuse its discretion in deciding to continue joint custody and awarding primary physical placement of Stanley to the Father.

17) The second issue, raised for the first time on appeal, is that the Mother was prejudiced by ineffective assistance of counsel during the Family Court proceedings. Because this argument was not raised before the Family Court, we decline to consider it on appeal.⁵

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Family Court are AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice

⁵ See Supreme Court Rule 8; *Duross v. State*, 494 A.2d 1265, 1268-69 (Del. 1985); *Winters v. Winters*, 2001 WL 1142314, at *2 (Del. Supr.).