

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSEPH W. SMITH, JR.,	§	
	§	No. 230, 2000
Petitioner Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Family Court
	§	of the State of Delaware
DIANE E. FRANCISCO,	§	in and for New Castle County
	§	File No. CN95-10288
Respondent Below,	§	
Appellee.	§	

Submitted: March 6, 2001

Decided: May 16, 2001

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

O R D E R

This 16<sup>th</sup> day of May, 2001, on consideration of the briefs of the parties, it appears to the Court that:

1) Joseph W. Smith, Jr. appeals from decisions of the Family Court awarding attorneys' fees to his ex-wife, Diane E. Francisco. Smith argues that the Family Court abused its discretion in several respects. Primarily, he contends that the Family Court failed to consider the parties' current financial condition and improperly concluded that his appeal had been baseless.

2) It is apparent from the record that, from the time their son was born, both parents have been actively litigating issues concerning custody, visitation and child

support. In 1997, after the Family Court decided to give primary residential custody to Francisco, both parties moved for reargument. The Family Court denied Francisco's motion and ruled that Smith's motion was untimely. Smith appealed and, before reaching the merits of his appeal, this Court determined that Smith's motion for reargument had been timely filed. As a result, the matter was remanded and the Family Court considered Smith's motion for reargument on the merits.

3) Smith's motion for reargument was denied and his appeal to this Court, also, was unsuccessful. More than four months after the revised Order affirming the Family Court custody decision, and within a few weeks after Smith had requested increased contact periods with his son, Francisco filed the present motion for attorneys' fees.

4) The Family Court granted Francisco's motion, in part. The trial court awarded \$2520 of the \$5101 that was requested, with the notation that the award was justified by "equitable considerations." Smith filed a motion for reargument, which was summarily denied. Thereafter, the Family Court awarded Francisco \$427.50 in additional attorneys' fees with respect to the failed motion for reargument.

5) By Order dated February 2, 2001, this Court remanded and asked the Family Court to explain the basis for its award of attorneys' fees and to identify

those portions of the record that support its decision. On remand, the Family Court noted its broad discretion and made the following findings: (i) Smith has been litigious; (ii) neither party is in a position of financial superiority over the other; and (iii) to deny an award of fees to Francisco would be to take money from the child.

6) Since the Family Court did not specify the basis for its financial conclusions and did not evaluate whether Smith's litigiousness was unreasonable under the circumstances, we conclude that the court did not consider these factors significant in its decision to award attorneys' fees. Rather, it appears that the Family Court awarded attorneys' fees because Smith lost his appeal and because he should have known that he had little chance of success. The Family Court noted that Smith has a right to appeal an adverse decision, but said that, in doing so, he assumed the risk that he would have to pay attorneys' fees if he lost.

7) The so-called American Rule with respect to attorneys' fees is that each party bears its own expenses regardless of the outcome of the case.<sup>1</sup> That rule has been modified by 13 *Del.C.* §731, which authorizes an award of attorneys' fees "after considering the legal and factual basis for the action, the results obtained, the financial resources of the parties, and such other factors as the Court deems just and

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<sup>1</sup> *Goodrich v. E.F. Hutton Group, Inc.*, Del. Supr., 681 A.2d 1039 (1996).

equitable....” The statute does not entirely abrogate the American Rule, as do some fee-shifting statutes.<sup>2</sup> Rather, it allows the court to award attorneys’ fees if the enumerated factors and any other equitable considerations warrant an exception to the American Rule.

8) In this case, there were several potentially significant equitable factors that the Family Court did not consider. First, although Smith did not prevail on his appeal, it was not manifestly without merit. Second, the timing of Francisco’s motion for attorneys’ fees raises a question as to her motivation. She did not seek fees immediately, or even soon, after prevailing on the custody matter. Instead, she filed her motion shortly after Smith sought increased contact with his son. The Family Court did not address this issue. Third, the Family Court did not obtain any current information before concluding that neither party was in a position of financial superiority. The fact that Smith has been litigating *pro se* for the past three years suggests that Francisco may be in a better financial position than Smith. Finally, the fee award cannot be justified on the basis that the money Francisco spends on attorneys’ fees is money taken from her son. Where, as here, the parents

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<sup>2</sup> See, e.g., 21 *Del.C.* §2515 (anyone who violates statute governing sale of motor vehicle without catalytic converter shall pay purchaser “all reasonable costs and attorneys’ fees for bringing an action pursuant to this section.”)

have joint custody, attorneys' fees paid by either party indirectly takes money from their child.

9) We are not unmindful of the Family Court's broad discretion in these matters and we understand the importance of making overly litigious parties accountable for their conduct. But the norm remains the American Rule, and being the losing party, without more, should not result in an award of attorneys' fees. In this case, we conclude that the award was supported only by the fact that Smith was the losing party. Accordingly, we reverse.

NOW, THEREFORE, IT IS ORDERED that the Family Court Orders dated March 27, April 17 and May 16, 2000, be and the same hereby are VACATED.

BY THE COURT:

/s/ Carolyn Berger  
Justice