

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAWRENCE S. BOYER,	§	No. 389, 2002
	§	
Defendant Below,	§	
Appellant,	§	Court Below: Family Court of
	§	the State of Delaware in and for
v.	§	Kent County
	§	
AMANDA D. POOLE,	§	File No: CK98-03755
	§	
Plaintiff Below,	§	
Appellee.	§	
	§	

Submitted: December 17, 2002  
Decided: January 17, 2003

Before **VEASEY**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

**ORDER**

This 17<sup>th</sup> day of January 2003, upon consideration of the briefs of the parties it appears to the Court that:

(1) Lawrence S. Boyer appeals from the Family Court decision denying him shared placement of his son and modifying his visitation schedule.

(2) On May 20, 1998 appellant, Lawrence Boyer, and appellee, Amanda Poole, gave birth to a male child, Joseph.<sup>1</sup> The parents are unmarried and since his birth, Joseph has resided with his Mother.

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<sup>1</sup>*Boyer v. Poole*, Petition No. 02-00097, at \*1 (Del. Fam. Ct. 2002). The use of pseudonyms has been provided for Mother and Father pursuant to Supreme Court Rule 7(d).

(3) In April 1999, Boyer instituted a court action for custody of his son. This action was resolved by stipulation on June 14, 2000. Father was awarded joint custody of his son, with primary residence remaining with Poole, and standard visitation. Notwithstanding the terms of the stipulation, the parties cooperated with each other and Boyer was given more liberal visitations with his son.

(4) Father continued to enjoy frequent contact with his son until September 2001 when the parties had a disagreement. At that time, Poole unilaterally changed Boyer's contact with his son to the standard visitation agreement, reverting back to the stipulation of June 2000.

(5) After the change, Father observed that his son became emotionally upset during visitation exchanges. He attributed the change in attitude to the fact that he was not able to spend as much time with his son as before. As a result, Father filed a Petition for Modification of Visitation on September 24, 2001. The parties reached an agreement regarding visitation which was entered by the Commissioner on November 30, 2001. Pursuant to that order, Boyer was entitled to visitation on alternating weekends from Friday at 6:00 p.m. to Sunday at 6:00 p.m. Father also received an overnight visit every Tuesday from 3:00 p.m. until Wednesday at 8:00 a.m. During weeks when Father did not have a weekend visit he was to receive an overnight visit from Thursday at 3:00 p.m. to Friday at 8:00 a.m.

(6) After the visits were modified and agreed upon, Mother and Father again experienced some disagreements. As a result, Father filed a Motion for Modification of Custody on January 3, 2002. In connection with the proceedings a psychological evaluation was conducted by Dr. Joseph J. Nadel. Dr. Nadel found that the parties were able to cooperate when not in litigation, but that they currently had terrible communication. Dr. Nadel then concluded that shared placement would be best for all the parties including Joseph, the child.

(7) In light of the testimony of all the witnesses, including Dr. Nadel, the Family Court refused to grant Father shared placement.<sup>2</sup> The court did, however, modify the visitation arrangement. Pursuant to the modification Father was given overnight visitation from after school on Friday until Monday morning. He was also to visit with the child every Tuesday evening from after school until 8:00 p.m.<sup>3</sup>

(8) Boyer now appeals the Family Court's findings and judgment. He argues two issues on appeal: (a) whether the Family Court erred by failing to grant him shared placement of his son, and (b) whether the court erred by modifying his visitation schedule. We will address each issue in turn.

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<sup>2</sup>*Boyer*, Petition No. 02-00097, at \*8.

<sup>3</sup>*Id.* at 8-10.

(9) This Court's review of appeals from the Family Court extends to review of the facts and law as well as to a review of the inferences and deductions made by the judge.<sup>4</sup> This Court will not disturb findings of fact unless they are clearly wrong and justice requires they be overturned.<sup>5</sup> If the Family Court has correctly applied the law, the standard of review is abuse of discretion.<sup>6</sup> Errors of law, however, are reviewed de novo.<sup>7</sup>

(10) Boyer first argues that the trial court erred in failing to award him shared placement. Specifically Boyer seeks to modify the custody order of the court dated June 14, 2000. The Family Court may modify such an order pursuant to 13 *Del. C.* § 729(c) which states:

An order entered by the Court after a full hearing on the merits concerning the legal custody of a child or his or her primary residence may be modified only as follows:

(1) If the application for modification is filed within 2 years after the Court's most recent order concerning these matters, the Court shall not modify its prior order unless it finds, after a hearing, that continuing enforcement of the prior order may endanger the child's physical health or significantly impair his or her emotional development.<sup>8</sup>

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<sup>4</sup>*Wife (J. F. V.) v. Husband (O. W. V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).

<sup>5</sup>*Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983).

<sup>6</sup>*Jones v. Lang*, 591 A.2d 185, 186 (Del. 1991).

<sup>7</sup>*In re Heller*, 669 A.2d 25, 29 (Del. 1995).

<sup>8</sup>13 *Del. C.* § 729(c)(1).

(11) Pursuant to 13 *Del. C.* § 729, the Family Court may modify a consent order of custody after considering the best interests of the child.<sup>9</sup> The court in reviewing Boyer's current Petition for Modification of Custody applied the standards set forth in Section 722.<sup>10</sup> Therefore, the Family Court applied the correct law and this Court's review is limited to not disturbing the findings of fact unless they are clearly wrong and justice requires they be overturned.

(12) Title 13, Section 722 of the Delaware Code states that the Family Court must look to the best interests of the child when determining legal custody and residential arrangements. In making this determination the Court must consider the following factors:

- (a) The wishes of the child's parents as to his custody and residential arrangements;
- (b) The wishes of the child as to his custodian and residential arrangements;
- (c) The interaction and interrelationship of the child with other relatives with whom he lives;
- (d) The child's adjustment to his home, school and community;
- (e) The mental and physical health of all individuals involved;

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<sup>9</sup>*Rogers v. Williams*, 633 A.2d 747, 749 (Del. Fam. Ct. 1993).

<sup>10</sup>*Boyer*, Petition No. 02-00097, at \*1-2.

(f) Past and present compliance by both parents with their rights and responsibilities to their child;

(g) Evidence of domestic violence.<sup>11</sup>

(13) In analyzing the best interests of the child in this case, the Family Court ruled that shared placement was not appropriate. The court found that the parents both feel communication between them is terrible. The court reached this determination in reliance on the testimony by Dr. Nadel and the parents. Furthermore the court noted, “For any custody arrangement to work, especially a shared placement arrangement there must be a good relationship between the parties. It is evident by the testimony and the parties’ past behavior that there is some hostility and a lack of communication between them.”<sup>12</sup> The court also believed that Boyer was not considerate of Poole’s obligations to her family. In addition, the court was concerned about the increased use of Poole’s husband as a go-between for the parties.<sup>13</sup>

(14) The evidence and testimony indicate the court’s factual findings are logical and supported by the record. Dr. Nadel testified that the parties do not communicate much. He indicated that they reported that they only talk about one hour a month. Although he believed they talked more, he still felt that they needed to work

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<sup>11</sup>13 *Del. C.* § 722(a).

<sup>12</sup>*Boyer*, Petition No. 02-00097, at \*7.

<sup>13</sup>*Id.* at \*8.

on their communication. Furthermore, although Dr. Nadel believed that the parties have good communication when they are not in litigation, the evidence indicates that Boyer tends to use litigation when he does not receive what he wants. This supports the trial court's findings that communication between Mother and Father does need to be improved.

(15) Boyer contends that the Family Court did not appropriately consider the findings of his expert witness, Dr. Nadel. "A trial court may determine the weight and credibility to be accorded the testimony of any witness, including an expert."<sup>14</sup> This Court will not disturb the Family Court's determination of questions of credibility on appeal unless clearly erroneous.<sup>15</sup>

(16) The court gave appropriate consideration to the findings of Dr. Nadel. Dr. Nadel concluded that shared placement would be appropriate between the two parties. He gave this conclusion despite the fact that he found that the parties needed to improve their communication. The court found that communication is vital to a shared placement arrangement. Thus the court considered the testimony of Dr. Nadel but did not assign much weight to his conclusion because of the fact that the parties have poor communication and other problematic areas.

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<sup>14</sup>*Jones*, 591 A.2d at 188.

<sup>15</sup>*Wife (J. F. V.)*, 402 A.2d at 1204.

(17) The findings of the court with respect to awarding Boyer shared placement are not clearly erroneous. Accordingly the trial court did not abuse its discretion in denying Boyer shared placement.

(18) Boyer next contends that the Family Court erred by modifying the visitation order between Mother and Father. Again this Court's review of appeals from the Family Court extends to review of the facts and law as well as to a review of the inferences and deductions made by the judge.<sup>16</sup> This Court will not disturb findings of fact unless they are clearly wrong and justice requires they be overturned.<sup>17</sup> If the Family Court has correctly applied the law, the standard of review is abuse of discretion.<sup>18</sup> Errors of law, however, are reviewed de novo.<sup>19</sup>

(19) "An order concerning visitation may be modified at any time if the best interests of the child would be served thereby in accordance with the standards set forth in Section 728(a) of this title."<sup>20</sup> Pursuant to 13 *Del. C.* § 728(a) the Family Court must specifically state in an order its facts and conclusions in support of denying or restricting a parent's access to a child. Title 13, Section 722 of the

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<sup>16</sup>*Wife (J. F. V.)*, 402 A.2d at 1204.

<sup>17</sup>*Solis*, 468 A.2d at 1279.

<sup>18</sup>*Lang*, 591 A.2d at 186.

<sup>19</sup>*Heller*, 669 A.2d at 29.

<sup>20</sup>13 *Del. C.* § 729(a).



Delaware Code states that the Family Court must look to the best interests of the child when determining legal custody and residential arrangements.

(20) At the time of the June 2002 motion Boyer had visits with his son on alternating weekends from Friday at 6:00 p.m. until Sunday at 6:00 p.m., and Tuesday from 3:00 p.m. to Wednesday at 8:00 a.m. On weeks where he did not have a weekend visit he had a visit on Thursday from 3:00 p.m. until Friday at 8:00 a.m., and he had five weeks during the summer. The court modified the arrangement by awarding Boyer a visit every other weekend from Friday after school until Monday morning, Tuesday evenings from after school until 8:00 p.m., and six weeks during the summer.<sup>21</sup>

(21) The record indicates that Boyer testified that he would rather have a Sunday overnight visit with his son instead of a Tuesday overnight visit. The court then granted his request for the change. Furthermore, although the visitation schedule is modified, Boyer is basically given the same amount of time with his son that he had prior to the change. Accordingly, the Family Court did not err in modifying Boyer's visitation schedule.

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

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<sup>21</sup>*Boyer*, Petition No. 02-00097, at \*8-9.

BY THE COURT:

/s/ E. Norman Veasey  
Chief Justice