IN THE SUPREME COURT OF THE STATE OF DELAWARE

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| DONNA H. MANN, | ) | |
| | ) | No. 707, 2011 |
| Respondent Below, | ) | |
| Appellant, | ) | Court Below: Family Court |
| | ) | of the State of Delaware in and |
| v. | ) | for Kent County |
| | ) | |
| GALE B. GREEN, | ) | C.A. No. 10-04716 |
| | ) | |
| Petitioner Below, | ) | |
| Appellee. | ) | |

Submitted: May 2, 2012
Decided: July 19, 2012

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

***O R D E R***

This 19th day of July 2012, it appears to the Court that:

(1) On January 20, 2010, Father filed a request for Modification of Visitation. After a hearing, the trial judge issued an order granting Father's request to "exclude" the Child from contact with a man who pleaded guilty to Third Degree and Fourth Degree Sex Offenses and any individual who has been placed on a sex offender registry. Mother raises two arguments on appeal: the trial judge (1) granted relief outside the scope of Father's request and (2) erred by applying the "best interests of the child" test. We find no merit in Mother's claims and affirm.

(2) Donna Mann and Gale Green divorced on October 21, 1996. Mother initially had primary placement of the Child. In 2005, a Commissioner in Family Court granted Father temporary custody because the Child faced a risk of harm if he remained in Mother's custody. Two years later, a Family Court judge entered a comprehensive custody order providing joint legal custody and primary placement of the Child with the Father. Because of Mother's mental health concerns, the judge ordered that Mother's visitations be supervised by another person. In 2008, a judge removed that requirement after a Rule to Show Cause hearing at which a Dr. Villabona testified that Mother was mentally fit to lift the supervised visitation requirement. Later Mother began working for Dr. Villabona's office.

(3) Father filed a Petition to Modify Visitation on January 20, 2010 to restrict the Child's contact with Dr. Villabona because of Dr. Villabona's past sexual offense guilty pleas. At the hearing, Father moved to amend his pleadings and expand the "exclusion" to include any person who has pleaded guilty or otherwise been listed on a sexual registry.[1] The trial judge denied the request to amend the pleading. Nevertheless, in the November 28, 2011 order, the judge granted "Father's request to modify Mother's visitation to exclude the Child from

[1] In the time between Father's filing of the petition on January 20, 2010 and the hearing, Father learned that during visits with Mother, Child spent unsupervised time with a high risk sex offender on the Delaware Sexual Offense Registry. This discovery prompted Father to amend the pleadings in order to expand the restriction to any individual who has been placed on a sex offender registry.

contact with [Doctor Villabona], or any individual who has been placed on a sex offender registry."[2]

(4) Mother argues that the judge erred by expanding the exclusion to include contact with any individual placed on a sex offender registry because it conflicts with the judge's previous denial of Father's motion to amend the pleadings. In effect, Mother proposes a new rule of law that prohibits a Family Court judge from granting relief if the judge previously denied a motion to amend pleadings requesting that additional relief. We review a decision involving a rule of law *de novo*.[3]

(5) Mother's contention fails for two reasons. First, Father made the following statement in the original Petition to Modify Visitation: "Petitioner prays that a Summons issue to Respondent and that the Court grant relief prayed for or *such other relief as may be just*."[4] Father's Petition to Modify Visitation "excluding" the Child's contact with Dr. Villabona is based on a history of sexual offenses. In 2002, Dr. Villabona pleaded guilty to a Third Degree Sex Offense (felony) on a female minor and a Fourth Degree Sex Offense (misdemeanor involving moral turpitude) on a female minor. Given Father's reason for filing a

[2] Opening Br. Ex. A, at 11.

[3] *Waters v. Division of Family Services*, 903 A.2d 720, 724 (Del. 2006).

[4] App. to Opening Br. A-14 (emphasis added).

Petition to Modify Visitation, the judge's expanded "exclusion" from contact with any individual placed on a sex offender registry constitutes a natural extension of "other relief as may be just." Because Father did not need to amend his pleadings to request an "exclusion" from contact with all individuals placed on a sex offender registry, the judge's denial of the request is irrelevant.

(6) Second, the Family Court judge acted within his statutory authority to modify the visitation agreement in order to be consistent with the child's best interests. Under 13 *Del. C.* § 728(a), Family Court judges must determine "a schedule of visitation with the other parent, consistent with the child's best interests. . ."[5] The best interests of the child is a term of art defined in 13 *Del. C.* § 722(a), which includes but is not limited to eight wide ranging factors for the judge to consider. Thus, the judge has broad statutory authority to modify visitation orders in the "best interests of the child," even if the parent has not specifically requested that relief in the Petition to Modify Visitation.

(7) Turning to the best interests of the child factors, Mother argues on appeal that the trial judge incorrectly applied the first three enumerated factors. The trial judge properly identified the best interests of the child test under 13 *Del. C.* § 722(a) as the appropriate law to apply when modifying visitation agreements.

[5] 13 *Del. C.* § 728(a).

Thus, "[i]f the trial court has correctly applied the law, our standard of review is for abuse of discretion."[6]

(8) Factor one of the best interests of the child test requires the judge to consider "[t]he wishes of the child's parent or parents as to his or her custody and residential arrangements."[7] Father wishes to have the Child kept away from Dr. Villabona and any person listed on a sex offender registry. Mother, who currently works for Dr. Villabona, wants the Child to maintain his relationship with the Doctor. Because the parents cannot agree, the judge gave deference to Father because he has primary residential custody. Mother argues that this factor should not favor either party because the parents have joint custody over the minor child.

(9) *D.V.N. v. K.D.O.* holds that a "primary placement parent has the final say on decisions after first attempting to come to an agreement with the other parent on what is best for the child, especially in *major areas*."[8] In this case, the trial judge held that "a disagreement regarding whether a child should be allowed to associate with an adult who has pled guilty to or is on a sexual offender registry for sexual misconduct with minors is a *major issue*."[9] We agree that contact with

[6] *Jones v. Lang*, 591 A.2d 185, 186 (Del. 1991).

[7] 13 *Del. C.* § 722(a)(1).

[8] *D.V.N. v. K.D.O.*, 2009 WL 1205105, at *13 (Del. Fam. Feb. 23, 2009) (emphasis added).

[9] Opening Br. Ex. A, at 6-7 (emphasis added).

sex offenders is a major issue in raising a child. Therefore, the trial judge did not err by giving deference to the primary placement parent's wishes.

(10) Factor two of the "best interests of the child" test considers "[t]he wishes of the child as to his or her custodian or custodians and residential arrangements."[10] This factor favors allowing contact with Dr. Villabona because the Child testified that he would like to maintain his relationship with the Doctor, enjoyed his time with the Doctor, and felt comfortable spending time with the Doctor despite knowledge of the past guilty pleas. Mother claims that the trial judge erred by not giving this factor sufficient weight in light of the Child's maturity.

(11) Although a child's wishes must be considered, a trial judge can assign weight to each factor. Here, the judge limited his discussion of this factor to three factual statements made by the Child. The fact that the judge made no connection from these statements to the best interests of the child implies that the judge gave little weight to the Child's statements. On the other hand, the judge specifically held that testimony by Father "indicates that he is concerned that the Child, at the age of 15, is not emotionally developed enough at his age to be able to make wise choices regarding the people he associates with . . . ."[11] Because the Child cannot

[10] 13 *Del. C.* § 722(a)(2).

[11] Opening Br. Ex. A, at 3.

make appropriate decisions regarding whether or not to spend time with Dr. Villabona, the judge logically discounted the Child's wishes.

(12) Factor 3 of the "best interests of the child" test considers "[t]he 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."[12] The Child has a half sister by the same mother. Because of the distance between primary residences, the Child and the half sister only spend time together when they are with Mother. In addition, a court order prevents that half sister from being in Dr. Villabona's presence. Because spending time with the Doctor necessarily reduces the amount of time that can be spent with the half sister, the Family Court judge held that this factor favors Father.

(13) Mother claims that this factor should not weigh in Father's favor because the few hours that the Child spends with Dr. Villabona do not take away from the Child's ability to spend time with his half sister. Her argument, however, fails to challenge the trial judge's reasoning. Mother also argues that the Child can arrange visitation specifically for the Child and his half sister apart from Mother's visitation. Although Mother's argument is correct, it fails to consider the fact that Father's principal residence is in Texas while the half sister lives in Delaware. We

[12] 13 *Del. C.* § 722(a)(3).

affirm the trial judge's holding that factor three favors excluding the Child from contact with Dr. Villabona and individuals who have been placed on a sex offender registry.

(14) Mother's final contention is that the trial judge's conclusion that further contact with Dr. Villabona would seriously impair the Child's emotional and psychological development, has no record support because the judge did not give specific reasons and merely referenced the best interests of the child factors. This is simply not fact. The trial judge listed many instances of Dr. Villabona's sexual misconduct, including two guilty pleas for Sexual Offenses and admitted sexual relations with a 22 year old female patient, which violated the Board of Medical Practices Rules and Regulations. Based on these specific reasons, the trial judge concluded that "Doctor's past behavior could easily serve as a negative influence on the Child."[13] The Child testified that he had spoken to the Doctor about the actions and the Doctor denied their occurrence. We agree with the judge's finding that "[b]y denying that such instances occurred, Doctor is not only demonstrating a pattern of irresponsibility, but his actions may also be taken to imply to the teenage mind that the actions themselves are indeed acceptable."[14] We conclude the factual record supports the trial judge's holding that further

[13] Opening Br. Ex. A, at 8.

[14] *Id.* at 9.

contact with Dr. Villabona would seriously impair the Child's emotional and psychological development, and we therefore must find no abuse of discretion.

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

BY THE COURT:

/s/ Myron T. Steele
Chief Justice