

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SUSAN TATUM, <sup>1</sup>	§	
	§	No. 399, 2006
Respondent Below,	§	
Appellant,	§	Court Below—Family Court of the
	§	State of Delaware in and for New
v.	§	Castle County
	§	
KEVIN YOST,	§	File No. CN94-06703
	§	Pet. Nos. 05-27827 (RSC)
Petitioner Below,	§	06-08633 (custody mod.)
Appellee.	§	

Submitted: May 11, 2007  
Decided: August 15, 2007

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

**ORDER**

This 15<sup>th</sup> day of August 2007, having considered the opening brief filed by Susan Tatum through her counsel and the *pro se* answering brief filed by Kevin Yost, it appears to the Court that:

(1) This appeal is from the Family Court’s decision of June 27, 2006, on Susan Tatum’s motion for modification of custody and Kevin Yost’s petition for a rule to show cause (“RSC”). The Court has concluded that this matter must be remanded for further proceedings.

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<sup>1</sup> By Order dated March 27, 2007, the Court *sua sponte* assigned pseudonyms to the parties. Del. Supr. Ct. R. 7(d).

(2) Tatum and Yost have joint custody of their two sons. Kevin will turn fifteen this month, and Karl is twelve.<sup>2</sup> In 1998, Yost was granted primary residential placement of both boys, and Tatum was awarded visitation.<sup>3</sup> Since 1998, Tatum and Yost have litigated custody and placement issues.

(3) In 2004, Tatum filed a motion for modification of custody. Tatum sought shared residential placement on a week-to-week basis. In December 2004, the Family Court determined that Tatum and Yost should share residential placement on an alternating six-month basis beginning July 2005.<sup>4</sup> Tatum was granted the boys' placement for the first six months on the condition that she provided information to the Court by January 2005.<sup>5</sup> In the interim, Tatum and Yost were required to comply with the prior 1998 order granting residential placement to Yost and visitation to Tatum.

(4) In February 2005, the Family Court stayed the December 2004 order until further notice, on the basis that Tatum had not submitted the

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<sup>2</sup> The Court has *sua sponte* assigned pseudonyms to the parties' children. Del. Supr. Ct. R. 7(d).

<sup>3</sup> *Tatum v. Yost*, Del. Fam. Ct., CN94-06703, Pet. No. 97-06955, Wasserstein, J. (May 28, 1998).

<sup>4</sup> *Tatum v. Yost*, Del. Fam. Ct., CN94-06703, Pet. No. 02017, Wasserstein, J. (Dec. 29, 2004).

<sup>5</sup> Tatum was required to provide the Court with an official report outlining the probationary status of her roommate.

information that was due in January 2005.<sup>6</sup> As a result of the stay, the December 2004 order did not take effect in July 2005 and the prior 1998 order remained in full force and effect.

(5) Under the 1998 order, Tatum was allowed five weeks of visitation in the summer. Tatum did not return Kevin and Karl to Yost at the conclusion of the 2005 summer visitation.<sup>7</sup>

(6) In late August 2005, Yost filed a RSC petition against Tatum. In early September 2005, Yost reclaimed Kevin and Karl when he picked them up early from school. Yost was successful in restoring residential placement with Karl. Kevin, however, resisted the change and returned to Tatum's residence.<sup>8</sup>

(7) The Family Court learned of Kevin's de facto placement with Tatum at a March 17, 2006 hearing on Yost's RSC.<sup>9</sup> The Court directed that Tatum and Yost seek counseling for Kevin and take turns taking Kevin to counseling appointments.

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<sup>6</sup> *Tatum v. Yost*, Del. Fam. Ct., CN94-06703, Pet. No. 04-02017, Wasserstein, J. (Feb. 14, 2005).

<sup>7</sup> Tatum later contended that she did not understand and/or was not aware that the Family Court had stayed the December 2004 order.

<sup>8</sup> Yost testified that Kevin "threw a terrible tantrum" and was "hell bent on going back to his mother's residence." Hr'g Tr. at 14 (Mar. 17, 2006).

<sup>9</sup> Tatum appeared with counsel at the hearing and was represented by counsel at all subsequent hearings.

(8) The Family Court adjourned the March 17 RSC hearing for the purpose of reviewing Kevin’s school records. The Court reconvened the hearing on March 30, 2006. Tatum appeared at the March 30 hearing; Yost did not.<sup>10</sup>

(9) On March 21, 2006, Tatum filed a motion for modification of custody.<sup>11</sup> Tatum sought “full custody and residential placement” with

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<sup>10</sup> At the March 30 hearing, Tatum testified that (i) Kevin was residing with her and was scheduled to go to his first counseling appointment the following week; (ii) Karl was spending alternate weekend visitation with her and was otherwise residing with Yost in accordance with the 1998 order; and (iii) Yost had not picked Kevin up for his most recent weekend visitation.

<sup>11</sup> Hearing transcripts in the Family Court record reflect that Tatum’s motion for modification of custody was not unexpected. The March 17, 2006 hearing transcript provides:

[TATUM’S COUNSEL]: Your Honor, if I could get some guidance. Are you saying that you want a petition for custody hearing started?

THE COURT: If that’s what your client wants then she has to file a petition.

\* \* \*

THE COURT: So I will reschedule the rule to show cause to look at the reports cards and then if your client wishes to have a petition for custody filed and you arrange for [Yost] to pick up the papers we’ll consolidate both things.

\* \* \*

THE COURT: In the event that mother files a[n] affidavit for modification of custody, that latter shall be heard at the same time as the rule to show cause if service has been made on father. Sir, if he files a petition for custody modification and he calls you on the telephone or you go to his office and pick it up.

See Hr’g Tr. at 15, 17, 32 (Mar. 17, 2006). The June 23, 2006 hearing transcript provides:

THE COURT: Did mom file for custody?

[TATUM’S COUNSEL]: Yes, Your Honor.

See Hr’g Tr. at 5 (June 23, 2006).

“liberal visitation” for Yost or, in the alternative, shared residential placement in accordance with the December 2004 order.

(10) The Family Court conducted a hearing in June 2006 on Yost’s RSC petition and Tatum’s motion for modification of custody. Tatum appeared at the hearing; Yost did not.<sup>12</sup>

(11) By order dated June 27, 2006, the Family Court ruled on Yost’s RSC petition and Tatum’s motion for modification of custody. “Given [Yost’s] default,” the Court reimposed the December 2004 order effective July 2006 but with one significant change. The Court ruled that Tatum and Yost would share residential placement of Karl but not Kevin. The Court granted primary residential placement of Kevin to Tatum. This appeal followed.

(12) Tatum makes three arguments in her opening brief on appeal. Tatum argues that the Family Court committed reversible error when it decided her motion for modification of custody in the absence of a best interest analysis under title 13, section 722 of the Delaware Code. Next, Tatum argues that the June 27, 2006 decision should be reversed because it ruled that Kevin and Karl should be separated for six months of every year.

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<sup>12</sup> At the June 23, 2006 hearing, Tatum testified that (i) Kevin was continuing to reside with her and that Karl was residing with Yost; (ii) Karl was regularly spending alternate weekend visitation with her; and (iii) Yost had been taking Kevin to every other counseling appointment but had not picked Kevin up at all for alternate weekend visitation.

Third, Tatum argues that the Family Court's decision should be reversed for its failure to award her full custody and primary residential placement of both boys despite having declared Yost in default.

(13) Yost filed a *pro se* answering brief. Yost's position is as follows:

I [Kevin Yost], father of [Kevin Yost and Karl Yost] contest that the mother [Susan Tatum] is and has been in contempt of court from start to present in these proceeding. A simple background check of the kids while in her custody will show that. I'm in agreement with [Kevin] living with his mother and [Karl] living with father as is at present and [Karl] has improved greatly.

(14) Appellate review of an appeal from a Family Court custody decision extends to the facts and the law.<sup>13</sup> To the extent the Family Court's decision implicates rulings of law, our review is *de novo*.<sup>14</sup> Findings of fact are not disturbed unless they are found to be clearly erroneous and justice requires that they be overturned.<sup>15</sup>

(15) When deciding residential custody, or when otherwise making a substantial change in a child's living arrangement, the Family Court is required to determine what is in the best interests of the child.<sup>16</sup> The Court

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<sup>13</sup> *Wife (J.F.V.) v. (Husband O.W.V., Jr.)*, 402 A.2d 1202, 1204 (Del. 1979).

<sup>14</sup> *In re Heller*, 669 A.2d 25, 29 (Del. 1995).

<sup>15</sup> *Solis v. Tea*, 468 A.2d 1276, 1279 (Del. 1983)

<sup>16</sup> See Del. Code Ann. tit. 13, § 722 (1999 & Supp. 2006) (governing best interests of child).

is required make a best interests determination even when one of the parties is in default.<sup>17</sup>

(16) The Family Court determines a child's best interests by considering "all relevant factors" including eight factors that are listed in title 13, section 722 of the Delaware Code.<sup>18</sup> The Court considers and balances the best interest factors "in accordance with the factual circumstances of the evidence presented."<sup>19</sup>

(17) It is generally preferable for the Family Court to explicitly refer to the statutory factors of section 722 when determining the best interests of a child.<sup>20</sup> "This Court cannot conduct a meaningful appellate review of a permanent custody judgment unless the Family Court sets forth a

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<sup>17</sup> *Harper v. Harper*, 826 A.2d 293, 296 (Del. 2003).

<sup>18</sup> The statutory best interest factors are (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; (f) past and present compliance by both parents with their rights and responsibilities to their child; (g) evidence of domestic violence; and (h) the criminal history of any party or any other resident of the household. Del. Code Ann. tit., 13 § 722(a).

<sup>19</sup> *Fisher v. Fisher*, 691 A.2d 619, 623 (Del. 1997).

<sup>20</sup> *Compare Fisher v. Fisher*, 691 A.2d 619 (Del. 1997) (remanding for new hearing and explicit reference to section 722 criteria when the Family Court had made a dramatic change in the children's current living arrangement), *and Jones v. Lang*, 591 A.2d 185 (Del. 1991) (concluding that the Family Court decision under peculiar circumstances of case demonstrated satisfactory implicit application of the statutory factors of section 722).

complete analysis of the consideration it gave to all of the factors in [s]ection 722.”<sup>21</sup>

(18) Title 13, section 729 of the Delaware Code sets forth the legal standards applicable to a motion seeking modification of custody or residential placement.<sup>22</sup> When considering a motion to modify that is filed two years or more after the Court’s most recent custody/residential placement order, the Court is required to determine the motion in accordance with the best interest factors of section 722.<sup>23</sup> When considering a motion to modify that is filed less than two years from the Court’s most recent custody/residential placement order, the Court is not required to make a best interest analysis unless, after a hearing, it has made a threshold determination that continuing enforcement of the prior custody/residential placement order may endanger the child’s physical health or significantly impair his or her emotional development.<sup>24</sup>

(19) In this case, when considering Tatum’s 2004 motion for modification of custody and issuing its December 2004 order, the Family Court was appropriately guided by the statutory framework governing the modification of prior custody/residential placement orders. After

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<sup>21</sup> *Fisher v. Fisher*, 691 A.2d 619, 623 (Del. 1997).

<sup>22</sup> Del. Code Ann. tit. 13, § 729 (1999).

<sup>23</sup> Del. Code Ann. tit. 13, § 729(c)(2)(c).

<sup>24</sup> Del. Code Ann., tit. 13, § 729(c)(1).



determining the applicable legal standard under section 729, the Court considered and referred, at least implicitly, to the best interest factors of section 722.

(20) This Court has concluded that the Family Court should have applied the statutory factors governing the modification of prior custody/residential placement orders explicitly when considering Tatum's 2006 motion for modification of custody. Accordingly, the Court will remand this matter to the Family Court for reconsideration of Tatum's 2006 motion for modification of custody.

NOW, THEREFORE, IT IS HEREBY ORDERED that this matter is REMANDED to the Family Court for reconsideration of Tatum's 2006 motion for modification of custody and an evidentiary hearing thereon. When deciding the motion, the Family Court should consider the facts adduced at the hearing in June 2006 as well as the evidence admitted at the remand hearing regarding the present circumstances of the parties and their children. The hearing should take place within thirty days of the date of this Order. Jurisdiction is not retained.

BY THE COURT:

/s/Henry duPont Ridgely  
Justice