

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SUSAN L. TAYLOR,	§
	§ No. 397, 2006
Petitioner Below-	§
Appellant,	§
	§ Court Below—Family Court
v.	§ of the State of Delaware
	§ in and for Kent County
IVAN TAYLOR,	§ File No. CK01-04610
	§ Petition Nos. 04-27620
Respondent Below-	§ 04-33118
Appellee.	§ 05-04250
	§ 06-02560
	§ 06-02562
	§ 04-28723

Submitted: September 27, 2007

Decided: October 5, 2007

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justice

ORDER¹

This 5th day of October 2007, upon consideration of the opening brief and appendix and the record below, it appears to the Court that:²

(1) The petitioner-appellant, Susan L. Taylor (“Mother”), filed an appeal from the Family Court’s June 27, 2006 order, which dismissed three

¹ The Court has sua sponte assigned pseudonyms to the parties and their minor children. Supr. Ct. R. 7(d).

² Following the withdrawal of the appellee’s counsel, the Court received an out-of-time motion from the appellee requesting an extension of time to file the answering brief. The appellee was given until April 27, 2007 to file his brief. On May 7, 2007, the Clerk’s Office sent a brief delinquency notice to the appellee. In the absence of any response from the appellee, the Clerk notified the parties on May 18, 2007 that the matter would be decided on the basis of the opening brief and the record.

of her petitions for a rule to show cause and two of her petitions for a modification of custody, and which granted the petition of the respondent-appellee, Ivan Taylor (“Father”), for a modification of visitation. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) The record reflects that the parties are divorced and have two children born of their marriage, Betsy, age 10, and Anna, age 8. Mother is an Air Force veteran who has been diagnosed with post-traumatic stress disorder, neck injuries resulting from an auto accident, and depression. In 2003, the Family Court issued a custody order providing that the parties would share joint legal custody of the children and that, because of concerns about Mother’s mental health, Father would have primary residential custody. Father resides in Delaware. Shortly after the Family Court issued its custody order, Mother left Delaware and, since then, has resided in Florida.

(3) By consent order dated May 6, 2004, Mother was permitted visitation with the children in Florida according to the following schedule: six weeks of summer vacation, Christmas vacation, spring break in odd-numbered years, and Thanksgiving break in even-numbered years. The record reflects that the girls visited with Mother in Florida only once---in the summer of 2004.

(4) Mother maintains that she is unable to travel from Florida to participate in any Family Court proceedings in Delaware because of her physical problems and because the presence of her former husband intensifies her post-traumatic stress disorder. She has filed numerous motions to participate in the Family Court proceedings by telephone. The Family Court has denied all such motions on the ground that it cannot decide Mother's petition for a modification of custody unless it can directly assess Mother's physical capabilities, emotional stability and credibility.

(5) The record reflects that, on October 27, 2005, the Family Court held a hearing on Mother's petitions for a rule to show cause, Mother's petitions for a modification of custody, and Father's petition for a modification of visitation. The record further reflects that, on October 31, 2005, the Family Court dismissed Mother's petitions because of her failure to appear for the hearing despite being duly notified. Mother subsequently requested that the hearing be re-opened on the ground that air travel in Florida had been curtailed due to a hurricane. Even though there was no evidence that Mother had ever purchased an airplane ticket, the Family Court nevertheless granted Mother's request and re-scheduled the hearing for April 17, 2006. Mother's motion to participate by telephone was denied.

(6) In March 2006, the Family Court issued an order scheduling an evidentiary hearing for March 28, 2006 on Mother's repeated requests to participate in the Family Court proceedings by telephone. The Family Court noted that it had reviewed all the medical documentation submitted by Mother's psychiatrist and nursing care manager in support of her requests. At the hearing, Mother, her psychiatrist and her nursing care manager were permitted to testify by telephone. The psychiatrist, Dr. Adam Karwatowicz, testified that Mother's stress would be relieved by allowing her to participate in the Family Court proceedings by videophone at a site different from her former husband.

(7) Based upon Dr. Karwatowicz' testimony, the Family Court ordered that Mother could participate in the Family Court's April 17, 2006 hearing by videophone, but that she was responsible for the cost of the videophone hook-up in Florida and for arranging the hook-up between a site in Florida and the Family Court in Delaware. The Family Court further ordered that, if Mother could not make the arrangements for a videophone hook-up in Florida, she would have to travel to Sussex County, Delaware, and participate by videophone from the Family Court in that location. The record reflects that Mother was duly notified of the Family Court's order.

(8) After the issuance of the Family Court's order, the Family Court was contacted by the Florida 20th Judicial Circuit Court to arrange for the videophone hook-up. The April 17, 2006 hearing subsequently was re-scheduled for June 16, 2006 at the request of the Court Appointed Special Advocate ("CASA"). The record reflects that Mother was duly notified of the scheduling change. The Delaware court and the Florida court attempted up until the date of the hearing to set up the videophone hook-up. The record reflects that they were not able to do so because the two court systems do not have compatible video conferencing protocols.

(9) On June 16, 2006, a hearing took place on all of the outstanding petitions filed by Mother and Father. Father was present in the courtroom. Mother was in Florida on the speakerphone. She had made no arrangements for any witnesses to testify in her behalf. At the outset of the hearing, the Family Court judge noted the difficulties experienced by the courts in attempting to set up a videophone hook-up and asked Mother if she had arranged for a videophone hook-up from another site. Mother stated that she had not. The judge explained to Mother that she would not be permitted to testify by telephone regarding the custody issue. Mother then informed the judge that, after consulting with the ACLU and disability law counsel, she had been advised not to participate in the hearing. After Mother stated

definitively that she would not participate in the hearing, the Family Court responded as follows: “Okay, ma’am, that is your choice. If you don’t want to participate, then I can disconnect you.” Mother replied, “Thank you.” After disconnecting Mother, the Family Court proceeded to dismiss Mother’s petitions and hear evidence on Father’s petition to modify visitation.

(10) The evidence presented in support of Father’s petition was as follows. Di Rafter, a CASA caseworker, testified that she had interviewed Mother, Father, Betsy and Anna at length. She reported that the girls miss their mother, but are afraid to go to Florida to see her. The last time they visited Mother, Betsy was coached to use a teddy bear to describe how Father had abused her and then was videotaped with the teddy bear. An investigation by the Division of Family Services (“DFS”) uncovered no abuse by Father. Betsy was deeply upset by the incident. The girls told Rafter that Mother returns all the gifts they send to her and has failed to respond to their e-mails. Rafter stated that, if the girls were sent to Florida for a visit, she is not sure Mother would send them back.

(11) Father testified that he and the girls live with his fiancée, Jill, and her infant son, Allen. They live in a three-story townhouse with a finished basement. The girls share a bedroom. They go to school in the

neighborhood and get excellent grade reports. Father testified about the girls' visit with Mother in the summer of 2004. He could hear the stress in their voices when he spoke to them on the phone and was fearful that Mother would not return them to Delaware. He testified that he was investigated twice by DFS as a result of reports by Mother that Father had abused the girls. No evidence of abuse was ever found. Father testified that the girls get upset when they speak to Mother on the phone and that they do not want to go to Florida to visit her.

(12) The Family Court judge interviewed both girls on the record. Anna confirmed that the visit with Mother in 2004 had not gone well. Betsy stated that talking to Mother on the phone upsets her and that she was particularly upset by Mother's comments about Father being a bad person. Betsy stated that her conversations with Mother "would make me cry for about the rest of the night." In describing what happened during the visit in Florida she said, "It went really badly, because my grandpa, he would sit me in front of the teddy bear and he said, 'Pretend that this is your dad,' and he would make it do things that are very bad and say things that are bad"

(13) Salome Conley, a week-end investigator with DFS, testified that she had investigated the situation with the family. She had a phone conversation with Mother, who asked her where the girls would go if Father

were found to have abused them. Conley told Mother the girls would go to her. Conley also spoke with Betsy, who recounted the upsetting incidents that occurred during her visit with Mother in Florida.

(14) Steven Moores, a therapist for Delaware Guidance Services for Children, testified that the girls had been brought to him by Father for counseling in February of 2006. He stated that Father made every effort to be balanced in his presentation of the situation with Mother. While Father brings the girls to counseling, he does not remain in the room with them when they talk to Moores. Moores' opinion was that the girls were very disturbed by Mother's comments about Father. He also stated that Betsy felt guilty about being videotaped making false statements about her Father. It was also Moores' opinion that the girls are doing very well at this time and have adjusted well to Jill and her son. He did not believe that joint counseling with Mother and the girls should be attempted at this time because of the "very serious damaging effect" Mother has had on them.

(15) Following the hearing, the Family Court issued its order on Father's petition for modification of visitation. In the order, the Family Court found that there was substantial evidence of Mother's mental instability. The Family Court noted that Mother had repeatedly ignored its orders and had repeatedly made false accusations against Father with DFS

and the police. The Family Court stated that it was “alarmed” by Mother’s conduct during the girls’ visit with her in the summer of 2004. On the basis of those findings, the Family Court ruled as follows: “The Court finds that physical visitation between the children and their mother would endanger the children’s physical health and significantly impair their emotional development. The Court hereby stays all physical contact between mother and the children unless it is supervised and occurs in Delaware. The Court finds that telephone contact between mother and the children should continue . . . and may be monitored by the father for appropriateness.”

(16) In this appeal, Mother claims that the Family Court’s decision to proceed with the hearing in Mother’s absence violated her due process rights and that, due to several “procedural infirmities,” the Family Court’s decision is not the result of an orderly and logical deductive process.³ The alleged “procedural infirmities” are as follows: a) Mother was not present at the hearing; b) the CASA caseworker did not have sufficient time to develop the facts surrounding the case; c) the judge had filed a notice of recusal regarding matters involving the parties; and d) the venue for the hearing should have been changed.

³ To the extent Mother claims that the Family Court violated the Americans with Disabilities Act, that claim was not fully addressed by the Family Court and we, therefore, decline to address it in this appeal. Supr. Ct. R. 8.

(17) This Court's review of appeals from the Family Court extends to a review of the facts and the law as well as to a review of the inferences and deductions made by the judge.⁴ This Court will not disturb findings of fact unless they are clearly wrong and justice requires that they be overturned.⁵ If the Family Court has correctly applied the law, the standard of review is abuse of discretion.⁶ Errors of law are reviewed de novo.⁷ An order concerning visitation may be modified at any time if the best interest of the child would be served by such modification.⁸ In modifying a visitation order, the Family Court must specifically state its findings and conclusions in support of denying or restricting a parent's access to a child.⁹

(18) Mother's first claim is that her due process rights were violated by the Family Court's decision to proceed with the hearing in her absence. The transcript of the hearing clearly reflects that it was Mother's choice not to participate in the hearing. The Family Court explained, as it had several times previously, that its custody determination would require a direct assessment of Mother's physical and mental health, as well as her demeanor and credibility. The record reflects that the Family Court went out of its way

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

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

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

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

⁸ Del. Code Ann. tit. 13, § 728(a).

⁹ *Id.*

to assist Mother in presenting live testimony in support of her custody petition. Moreover, Mother was on notice that three of her petitions for a rule to show cause, two of her custody petitions, as well as Father's petition to modify visitation, would be considered by the Family Court at the hearing. When Mother made the decision not to participate in the hearing, she waived her right to pursue the claims made in those petitions as well as her right to testify in opposition to Father's petition. We conclude, therefore, that Mother's first claim is without merit.

(19) Mother's second claim is that the Family Court's decision is not the product of an orderly and logical deductive process. The record in this case, including the transcript of the hearing, reflects that the findings of the Family Court were amply supported by the evidence presented at the hearing. There is no suggestion of error or abuse of discretion on the part of the Family Court. Moreover, the Family Court fulfilled its obligation to specifically state its findings and conclusions in support of denying or restricting Mother's access to the children.

(20) There is no merit to Mother's claim of "procedural infirmities" in the proceedings. First, it was Mother's choice not to participate in the hearing. Second, the record reflects that the CASA caseworker understood the facts surrounding the case and was well prepared to testify. Third, there

is no evidence to suggest that the venue of the hearing should have been changed.

(21) Mother's fourth contention is that the judge should not have conducted the hearing because she previously had recused herself from matters involving the parties. The Family Court record reflects that the judge filed a form recusal notice on March 1, 2005, but, nevertheless, ruled on every motion and conducted every hearing involving these parties after that. This Court remanded the matter to the Family Court for an explanation of those circumstances. On remand, the Family Court judge explained that the recusal notice had been filed in error due to confusion concerning the identity of a former client. In her supplemental memorandum following remand, Mother accepts the judge's explanation and concedes this issue.¹⁰ We conclude, therefore, that Mother's second claim also is without merit.

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

BY THE COURT:

/s/ Randy J. Holland
Justice

¹⁰ Father did not file a supplemental memorandum.