

SUPREME COURT OF THE STATE OF DELAWARE

Drake v. Orlando

No. 461, 2016 (Del. Apr. 19, 2017) · No. No. 461, 2016 · Decided April 19, 2017

SUMMARY

The Delaware Supreme Court affirmed a Family Court order granting the parents joint legal custody, awarding the mother primary placement, and permitting her to relocate with the children to Arizona. The Court held that the Family Court properly applied the child-best-interests factors and that the father's failure to provide a custody-hearing transcript prevented review of his factual challenges.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	Per curiam; Valihura, Justice; Vaughn, Justice; Seitz, Justice
JURISDICTION	Delaware
DECIDED	April 19, 2017
DOCKET	No. 461, 2016
DISPOSITION	affirmed
PROCEDURAL POSTURE	Steven Drake appealed a Family Court order awarding the parties joint legal custody, granting Catherine J. Orlando primary placement of their two minor children, awarding Drake visitation, and permitting Orlando to relocate with the children to Arizona.
STANDARD OF REVIEW	The Supreme Court reviews both the law and the facts; conclusions of law are reviewed de novo, factual findings are reviewed for clear error, and supported inferences and deductions of the Family Court will not be supplanted. The custody ruling was also reviewed for error or abuse of discretion.
PRECEDENTIAL VALUE	Published Delaware Supreme Court order; no standard reporter citation appears in the source.
PARTIES	Steven Drake v. Catherine J. Orlando

TOPICS

child custody relocation appellate procedure standard of review domestic violence

PRACTICE AREAS

family law

appellate procedure

civil procedure

QUESTIONS PRESENTED

1. Whether the Family Court failed to consider evidence concerning alleged domestic violence, drug use, treatment of the children with non-prescribed medication, and the Mother's employment history.
2. Whether the Family Court properly applied the statutory best-interests-of-the-child factors in awarding joint legal custody, primary placement to the Mother, and permission to relocate to Arizona.
3. Whether the Father's failure to provide a transcript of the custody hearing prevented appellate review of his factual challenges.

HOLDINGS

1. An appellant challenging factual findings in a Family Court custody decision must provide an adequate record, including the necessary hearing transcript; without the transcript, the Supreme Court lacked an adequate basis to evaluate the Father's claims that the Family Court failed to consider particular evidence.
2. The Family Court did not err or abuse its discretion in awarding the parties joint legal custody, granting the Mother primary placement, and permitting her to relocate with the minor children to Arizona.

KEY QUOTATIONS

“In the absence of a transcript of the custody hearing, this Court lacks an adequate basis for evaluating the Father’s claims that the Family Court failed to consider certain evidence.” (¶ 8)

“We therefore affirm the Family Court’s decision that it was in the minor sons’ best interests for the parents to have joint legal custody with the Mother having primary placement of the minor sons in Arizona.” (¶ 9)

FACTUAL BACKGROUND

The parties are the parents of two minor sons and an older son. They initially agreed to joint legal custody and shared placement under an interim consent order, but the Mother later sought permission to relocate outside Delaware for pharmacist employment. After hearings involving the parties, the children, the older son, and teachers, the Family Court awarded joint custody, gave the Mother primary placement, allowed relocation to Arizona, and granted the Father visitation.

PROCEDURAL HISTORY

The parties filed cross-petitions for custody and were subject to cross protection-from-abuse orders. After custody and rule-to-show-cause hearings, the Family Court entered its August 23, 2016 order awarding joint custody, primary placement to the Mother, and permission to relocate to Arizona. Drake appealed, but did not provide a transcript of the custody hearing.

DISPOSITION

affirmed

CASES CITED

- Mundy v. Devon, 906 A.2d 750, 752 (Del. 2006)
- Wife (J.F.V.) v. Husband (O.W.V., Jr.), 402 A.2d 1202, 1204 (Del. 1979)
- Trioche v. State, 525 A.2d 151, 154 (Del. 1987)
- Mahan v. Mahan, 2007 WL 1850905, at *1 (Del. June 28, 2007)
- Burton v. Burton, 2005 WL 1950214, at *1 (Del. July 19, 2005)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF THE STATE OF DELAWARE STEVEN DRAKE, I § § No. 461, 2016 Petitioner/Respondent Below, § Appellant, § Court Below_Family Court § of the State of Delaware v. § § Pile No. CK15-02171 CATHERINE J. ORLANDO, § Petition Nos. 15-24079, § 15-25848 and 16-06581 Respondent/Petitioner Below, § Appellee. § Submitted: February 24, 2017 Decided: April 19, 2017 Before VALIHURA, VAUGHN, and SEITZ, Justices.

O R D E R This 19th day of April 2017, upon consideration of the parties' briefs and the record below, it appears to the Court that: (1) The appellant, Steven Drake ("the Father"), filed this appeal from a Family Court order dated August 23, 2016.

The Family Court order granted the parties' joint custody of their two minor children, granted the appellee, Catherine J. Orlando ("the Mother"), primary placement of the children with the Father having visitation rights, and granted the Mother's petition for permission to relocate to Arizona.

We find no error or abuse of discretion in the Family Court's decision. Accordingly, we affirm the Family Court's judgment. 1 The Court previously assigned pseudonyms to the parties under Supreme Court Rule 7(d). (2) The parties are the parents of two minor sons. They are also the parents of an older son.

On August 7, 2015, the Mother filed a petition for custody seeking primary placement of the minor sons. On August 19, 2015, the Father filed a petition for custody. The parties were subject to cross orders of protection from abuse ("PFA") based upon petitions they had filed against each other.

(3) In an interim consent custody order entered on December 29, 2015, the parties agreed to joint legal custody of the minor children with shared placement. On January 22, 2016, the Mother filed a petition for permission to relocate outside of Delaware so she could find employment as a pharmacist.

The Family Court denied the petition and held relocation would be addressed at the custody hearing. In March 2016, the Mother filed a petition for a rule to show cause alleging the Father Was in violation of the December 29, 2015 interim custody order.

(4) The Family Court held hearings on the cross petitions for custody and the Mother's petition for a rule to show cause on April 15, 2016 and May 27, 2016. The Family Court heard testimony from the parties, the minor children, the parties' older son, and several of the minor sons' teachers.

In an order dated August 23, 2016, the Family Court granted the parties' joint custody of their two minor children, granted the Mother primary placement of the children with the Father having visitation rights, and granted the Mother permission to relocate to Arizona so she could obtain employment as a pharmacist there. This appeal followed.

(5) This Court's review of a Family Court decision includes a review of both the law and the facts.² Conclusions of law are reviewed de nova³ Factual findings will not be disturbed on appeal unless they are clearly erroneous."

We will not substitute our opinion for the inferences and deductions of the trial judge if those inferences are supported by the record.⁵ (6) Under Delaware law, the Family Court must determine legal custody and residential arrangements for a child in accordance with the best interests of the child.

The criteria for determining the best interests of a child are set forth in 13 Del. C. § 722. The best interest factors include: (i) the wishes of the parents regarding the child's custody and residential arrangements; (ii) the wishes of the child regarding her custodians and residential arrangements; (iii) the interaction and interrelationship of the child with her parents, grandparents, siblings, persons cohabitating in the relationship of husband and wife with a parent of the child, and any other residents of the household or persons Who may significantly affect the child's best interests; (iv) the child's adjustment to her home, school, and community; (v) the mental and physical health of all individuals involved; (vi) past 1 Mundy v. Devon, 906 A.2d 750, 752 (Del.

2006). 3 Id. " 1a 5 Wife (J.F. V.) v. Husband (O. W. V., J.-), 402 A.zd 1202, 1204 (Del. 1979). 3 and present compliance by both parents with their rights and responsibilities to the child under 13 Del. C. § 701; (vii) evidence of domestic violence; and (viii) the criminal history of any party or any resident of the household⁶ (7) On appeal, the Father argues that the F amin Court failed to consider a July 2015 police report describing a physical altercation between the Mother and the Father, the Mother's past abuse of the Father and the minor sons, the Mother's use of drugs and treatment of the minor sons with medicine not prescribed by a doctor, and the Mother's termination from pharmacist jobs in Delaware.

The August 23, 2015 order reflects that the Family Court did consider the parties' differing accounts of the July 2015 incident, as well as the nolle prosequi of the subsequent charges against

the Mother, the Father's claims of abuse and treatment with non-prescribed drugs by the Mother, and the parties' differing accounts of the Mother's inability to find pharmacist work in Delaware.

The Mother argues that the Father's failure to provide a transcript of the custody hearing prevents this Court from reviewing the factual findings of the Family Court. (8) Although the Father had the burden of supplying a transcript of the custody hearing," he chose not to obtain one after the Family Court denied his motion to waive the transcript fee. A civil litigant does not have an absolute right 6 13 Del.

C. § 722. 7 Supr. Ct. R. 9(e)(ii); Supr. Ct. R. 14(e); *Trioche v. Sm!e*, 525 A.2d 151, 154 (Del. 1987). 4 to obtain a copy of a transcript at State expense.⁸ Even an appellant who is permitted to proceed in forma pauperis on appeal is required to make his own financial arrangements to obtain the necessary transcripts.⁹ In the absence of a transcript of the custody hearing, this Court lacks an adequate basis for evaluating the Father's claims that the Family Court failed to consider certain evidence.¹⁰ (9) After a careful review of the parties' briefs and the record, we find no error or abuse of discretion in the Family Court's ruling.

The Family Court correctly applied the law and considered the best interest factors under 13 Del. C. § 722. We therefore affirm the Family Court's decision that it was in the minor sons' best interests for the parents to have joint legal custody with the Mother having primary placement of the minor sons in Arizona. NOW, THEREFORE, IT IS ORDERED that the judgment of the Family Court is AFFIRMED.

BY THE COURT: 3 *Mahan v. Mahan*, 2007 WL 1850905, at *1 (Del. June 28, 2007). 9 *Id.* 10 See, e.g., *Burton v. Burton*, 2005 WL 1950214, at *1 (Del. July 19, 2005) (holding the father's failure to provide transcripts of Family Court hearing precluded appellate review of his claim that the Family Court erred in awarding sole custody of the child to the mother).