

SUPREME COURT OF THE STATE OF DELAWARE

Mullens v. Kilborne

No. 370, 2017 · No. No. 370, 2017 · Decided May 21, 2018

SUMMARY

The Delaware Supreme Court reversed a Family Court order that vacated a prior custody judgment awarding primary residential placement to the father. The Court held that the father’s 1999 conviction for carrying a concealed deadly weapon was not a violent felony because the offense involved a non-firearm weapon, and remanded for consideration of his expert evaluation regarding the statutory presumption against custody for sex offenders.

CASE DETAILS

COURT	Supreme Court of the State of Delaware
WRITING FOR THE COURT	Leo E. Strine, Chief Justice; Karen L. Valihura, Justice; James T. Vaughn, Jr., Justice
JURISDICTION	Delaware
DECIDED	May 21, 2018
DOCKET	No. 370, 2017
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Father appealed the Family Court's order vacating its prior custody judgment, awarding Mother sole custody, and limiting Father to supervised visitation.
PRECEDENTIAL VALUE	Published Delaware Supreme Court order; precedential status is not expressly stated in the source text.
PARTIES	Jonathan Mullens v. Tiffany Kilborne

TOPICS

- child custody
- statutory interpretation
- evidence
- appellate procedure
- family law procedure

PRACTICE AREAS

- family law
- appellate procedure
- statutory interpretation
- evidence

QUESTIONS PRESENTED

1. Whether Mullens's 1999 conviction for carrying a concealed deadly weapon was a violent felony under Delaware law when the conviction was for a class G felony rather than the firearm-related class D felony.
2. Whether the Family Court erred by refusing to consider Mullens's expert evaluation in determining whether he had overcome the presumption against custody under 13 Del. C. § 724A.
3. Whether the Family Court properly vacated its prior custody judgment and awarded Mother sole custody based on its erroneous classification of the 1999 conviction.

HOLDINGS

1. Only firearm offenses under 11 Del. C. § 1442 are designated as violent felonies under 11 Del. C. § 4201(c). Because Mullens's conviction was a class G felony and not the firearm-related class D felony, it was not a violent felony.
2. Because the Family Court incorrectly found that Mullens had been convicted of a violent felony, it erred by refusing to consider his expert evaluation as evidence relevant to rebutting the presumption against custody under 13 Del. C. § 724A.

KEY QUOTATIONS

“This Court has noted that the rebuttable presumption of Section 724A is a “true rule of evidence and its only effect is to shift the burden of producing evidence.”” (3)

“Only firearm offenses under 11 Del. C. § 1442 are designated as violent felonies by 11 Del. C. § 4201.” (4)

FACTUAL BACKGROUND

Jonathan Mullens and Tiffany Kilborne are the parents of a daughter born in 2007. Mullens is a registered Tier II sex offender based on a 1993 guilty plea and also had a 1999 conviction for carrying a concealed deadly weapon. The Family Court initially awarded Mullens primary residential placement after considering the child's best interests, but later concluded that the 1999 conviction was a violent felony that prevented him from rebutting the statutory presumption against custody and refused to consider his expert evaluation.

PROCEDURAL HISTORY

The parties initially agreed to joint custody with Father having primary residential placement. After Mother petitioned for modification, the Family Court entered a February 20, 2017 judgment continuing Father's primary residential placement while granting Mother visitation. The Family Court later reconsidered the matter sua sponte, vacated that judgment on August 16, 2017, awarded Mother sole custody, and restricted Father to supervised visitation. Father appealed, and the Delaware Supreme Court reversed and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The Family Court must reconsider the matter on a priority basis, including Father's expert evaluation, and conduct further proceedings consistent with the Delaware Supreme Court's order. Jurisdiction is not retained.

CASES CITED

- Division of Family Services v. O'Bryan, 164 A.3d 58, 63 (Del. 2017)

OPINION

PER CURIAM.

IN THE SUPREME COURT OF THE STATE OF DELAWARE JONATHAN MULLENS,¹ § § No. 370, 2017 Respondent Below- § Appellant, § § v. § Court Below—Family Court § of the State of Delaware TIFFANY KILBORNE, § § File No. CK08-01263 Petitioner Below- § Petition No. 15-05215 Appellee. § Submitted: March 23, 2018 Decided: May 21, 2018 Before STRINE, Chief Justice; VALIHURA and VAUGHN, Justices.

ORDER This 17th day of May 2018, upon consideration of the opening brief² and the record on appeal, it appears to the Court that: (1) The appellant, Jonathan Mullens ("Father"), filed this appeal from the Family Court's judgment dated August 16, 2017, which vacated, sua sponte, its February 20, 2017 judgment awarding primary residential custody of the parties' minor daughter to Father.

Having reviewed Father's arguments on appeal and the record below, we conclude that the Family
1 The Court assigned pseudonyms to the parties under Supreme Court Rule 7(d). 2 The appellee, Tiffany Kilborne ("Mother"), did not file an answering brief on appeal.

The Clerk of the Court, therefore, informed the parties that the matter would be considered solely on the basis of Father's opening brief and the record below. Court erred as a matter of fact and law in vacating its prior judgment.

Accordingly, we reverse. (2) The parties are the parents of one daughter, who was born on January 23, 2007. On December 16, 2008, the parties entered a consent agreement providing for joint custody with Father having primary residential placement. Mother's visitation was to occur upon agreement of the parties.

On February 24, 2015, Mother filed a petition for modification of custody. The Family Court appointed counsel to represent Mother. Father appeared pro se. After a hearing, the Family Court considered the best interest factors of 13 Del. C. § 722, including Father's prior criminal history,³ and determined that it was in the child's best interests for Father to retain primary residential placement.

But, the Court granted Mother visitation every other weekend and at holidays, as well as extended visitation in the summer. (3) On June 20, 2017, the Family Court issued an order informing the parties that it had reconsidered, sua sponte, its award of primary residential placement with Father.

The Family Court stated that it had allowed Father, a registered sex offender, to have custody without any 3 The Family Court acknowledged that Father is a registered Tier II sex offender as a result of a 1993 guilty plea (when Father was a teenager) and that Father had a later weapons charge. 2 evidence that Father had rebutted the presumption against custody and placement under 13 Del.

C. § 724A.4 (4) After a hearing on August 16, 2017, the Family Court issued an order vacating its February 20, 2017 custody order awarding Father primary residential placement. The Family Court noted that Father had pled guilty to unlawful sexual contact in 1993 and, as a result, was a registered Tier II sex offender.

The Family Court also noted that Father pled guilty in 1999 to a charge of carrying a concealed deadly weapon. The Family Court held that as a result of his 1999 conviction of a violent felony, Father could not rebut the presumption against custody set forth in 13 Del. C. § 724A.5 Thus, the Family Court refused to consider the expert evaluation that Father submitted as evidence to rebut the presumption against him having custody of the 4 Subchapter II of Chapter 7A of Title 13 of the Delaware Code, entitled Child Protection From Sex Offenders Act, became effective on July 31, 2007, more than a decade after Father was placed on the sex offender registry.

13 Del. C. § 724A(a) provides that “there shall be a rebuttable presumption that no sex offender shall be awarded sole or joint custody of any child, that no child shall primarily reside with a sex offender, and that no sex offender shall have unsupervised visitation with a child.” This Court has noted that the rebuttable presumption of Section 724A is a “true rule of evidence and its only effect is to shift the burden of producing evidence.” *Division of Family Services v. O’Bryan*, 164 A.3d 58, 63 (Del.

2017). 5 13 Del. C. § 724A(b) provides that the presumption against custody may be overcome if: (1) there is no criminal sentencing order prohibiting it; and (2) there have been no further “sexual offenses or criminal acts of violence;” and (3) the sex offender is in compliance with any applicable terms of probation; and (4) the sex offender has successfully completed a sex offender’s program; and (5) the sex offender has completed substance abuse counseling if court-ordered to do so; and (6) the best interests of the child would be served by giving residential or custodial responsibilities to, or visitation with, the sex offender.

3 parties’ daughter.⁶ The Family Court vacated its prior order, awarded Mother sole custody of the child, and ordered that Father could only have supervised visitation. Father appeals that ruling. (5) In his opening brief on appeal, Father contends, among other things, that the Family Court erred in holding that he had been convicted of a violent felony in 1999.

Father contends that he pled guilty in 1999 to carrying a concealed deadly weapon under 11 Del. C. § 1442, which was designated a class G felony because the weapon in question was not a

firearm.⁷ Father asserts that, under 11 Del. C. § 4201(c), a conviction for carrying a concealed deadly weapon is only designated as a violent felony if the deadly weapon was a firearm.

(6) Father is correct. Only firearm offenses under 11 Del. C. § 1442 are designated as violent felonies by 11 Del. C. § 4201. Father's criminal history reflects that he was convicted of a class G felony and not the more serious class D felony under Section 1442.

Thus, the Family Court erred in finding that Father had been convicted of a violent felony in 1999 and that, therefore, the Family Court was not required to consider Father's 6 As interpreted by the Family Court, the rebuttable presumption under Section 724A(a) becomes irrebuttable under Section 724A(b)(2) if, after being placed on the sex offender registry, the offender is convicted of any felony designated as a "violent felony" under 11 Del.

C. § 4201(c). While we question the Family Court's interpretation of Section 724A(b)(2), we need not resolve that issue for the purposes of this appeal. ⁷ Under 11 Del. C. § 1442, a conviction for carrying a concealed deadly weapon is elevated to a class D felony if the deadly weapon is a firearm. ⁴ expert evaluation in determining if he had overcome the presumption of Section 724A.

Accordingly, we conclude that this matter must be remanded to the Family Court for further consideration, on a priority basis, of Father's expert evaluation. NOW, THEREFORE, IT IS ORDERED that the decision of the Family Court is REVERSED.

The matter is REMANDED to the Family Court for further proceedings consistent with this Order. Jurisdiction is not retained. BY THE COURT: /s/ Karen L. Valihura Justice 5