



02/11/87 WILLIAM B. LEWIS v. LYNNE D. LEWIS

1987 | Cited 0 times | Superior Court of Delaware | February 11, 1987

Dear Counsel:

This is the Court's decision on appellant William B. Lewis' ("father") appeal from the decision of the Family Court ordering him to contribute, along with appellee Lynne D. Lewis ("mother") from whom he was divorced, toward the private educational expenses of his daughter.

Pursuant to their divorce, husband and wife entered into a written custody agreement on July 22, 1980 with respect to their two-year-old daughter. The agreement provided for mother to serve as the custodial parent and for the parents to confer on matters which concerned the health, education and general welfare of the child. Best efforts were to be used to agree upon the selection of schools and colleges.

Upon the child turning three, the parents agreed to enroll her at the Asbury Methodist Church's daycare facility.

In 1982, when the child was approximately four, the mother informed the father of her desire to send the daughter to Caravel Academy for kindergarten. At that time the father objected on the ground that he felt the child too young to attend kindergarten. He explained that he thought that the child should remain in the safe, secure environment that she had at Asbury and start in public school in a year. The mother wanted the child to attend private school because of its full day program and the academic advantages she felt that it offered.

Despite the father's objections, the mother enrolled the child in Caravel Academy. Once enrolled, the father attended, at his daughter's request and with his second wife, some school programs and at least one PTA meeting.

The trial court concluded that the father was in accord and tacitly agreed to the private schooling of the daughter, and that he had sufficient financial resources to pay his proportionate share of such schooling. As such, the court ordered that the father contribute toward the private school education of his daughter.

An appeal to the Superior Court shall lie from any order, ruling, decision, or judgment of the Family Court. Family Court Rule 300. The findings of the trial court will not be disturbed on review, unless they are clearly wrong, and Superior Court will not substitute its own findings for that of the trier of fact. *Wife (J.F.V.) v. Husband (O.W.V., Jr.)*, Del. Supr., 402 A.2d 1202 (1979).



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The father argues on appeal that the trial court's finding that he tacitly agreed to the private school education of his daughter was error, and further that the court's legal Conclusion that an objecting parent may be responsible for private school costs incurred by a unilateral decision of the custodial parent was error.

The trial court's finding that the father tacitly agreed to the private school education is in this Court's view based upon substantial evidence and therefore not clearly wrong. The husband and his second wife involved themselves to some extent in the daughter's school activities. Additionally, the father did entertain the idea of enrolling his stepson in private school, while maintaining his objection to his daughter's attendance. Apparently once the child was enrolled, the father agreed that she continue at Caravel because of his opposition to having her ride the bus in order to attend public school. Finally, the father admitted in the trial court proceedings below that his preference for his daughter waiting a year and then enrolling in public school was based upon his belief that if the child attended public school he would not have to pay for the education or day care. (Transcript p. 15)

The father cites *O'Sullivan v. Cope*, Del. Fam., File No B3520, Connor, J. (2-14-86) for the proposition that absent an agreement between the parents or some compelling necessity therefor, a child support order cannot validly impose private educational costs on an objecting parent. The mother distinguishes the *O'Sullivan* case from the case sub judice on the basis that in *O'Sullivan*, the sole custodian mother failed and refused to consult with the father as to the child's education based on a court ordered requirement. In the case sub judice the custody agreement requires that the parents confer. The Court fails to see the distinction but notes that in the case sub judice, the mother did confer with the father in accordance with the teaching of *O'Sullivan*, but decided to enroll the daughter despite any objections expressed by the father at that time.

In opposition to the father's position that an objecting parent cannot be required to pay for private school educational costs, the mother cites 13 Del.C., § 728 for the proposition that the custodial parent has the authority to determine, among other things, the child's education. 13 Del.C. § 728 states as follows:

"Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, healthcare, place of residence and religious training, unless the Court after hearing finds, upon motion by the non-custodial parent, that a specific limitation of the custodian's authority would be in the best interest of the child."

In 1980, the parties agreed in writing that the mother would have full custody of the child until she reaches age 18, and must confer about education decisions. This Court interprets such agreement in light of 13 Del.C., § 728 to require the parents to confer, but not necessarily to agree, with the ultimate decision-making power in the custodial parent.

In *Maust v. Maust*, Del. Fam., File No. E4512, Gallagher, J. (July 6, 1983), *aff'd* Del. Supr., 83A-AU-2,



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Walsh, J. (February 14, 1984), a case factually similar to the case sub judice, Judge Gallagher stated:

"It should be noted that the custodian has the authority to determine the child's education. There is a presumption of reasonableness afforded the custodial decision. The choice of the custodial parent, if reasonable, must be respected and the expense shared by the parties as part of primary support unless pursuant to statute the Court limits or denies the custodial parent's authority and choice with respect to private education. The non-custodial Parent cannot sit by and do nothing. He or she must file the appropriate motion if custodial authority is to be limited. (Id at p. 5).

The father distinguishes the facts in Maust from those in the case sub judice by pointing to the fact that in Maust the father did not object to the child's private school education, and that the child had in fact attended private school with the father's consent for eight years. Although the cases may be factually dissimilar in this respect, such is no basis for rejecting the use of Maust for the proposition for which it was offered. The fact that the father did not object to the child's private school education and the fact that the child had attended private school for eight years with the father's consent were not factors upon which the Court based its decision, but were merely considered in determining how much weight to give a non-custodial parent's statement that he or she does not agree with the choice of private education over public education.

The Court in Maust stated that in order to limit the custodial authority, the non-custodial parent might show:

- (1) That it is not a reasonable decision to educate this child in private school; or
- (2) That if private education is appropriate for this child a private school other than the one selected by the custodial Parent is the proper choice; or
- (3) That the non-custodial parent is not financially able to contribute to the expense of private education; or
- (4) That the other good and sufficient reason the choice of private education should be disapproved.

The Court stated that it would give little weight to the bold statement of the non-custodial parent that he or she does not agree with the choice of private over public education. It was recognized by the Court as an unfortunate reality that the non-custodial parent may well oppose the choice of private school simply to limit his or her financial exposure for child support, ignoring the financial contribution that must also be made by the custodial parent towards the cost of such education. The father's testimony in the proceeding before the trial court indicates that his objection may fit into such category.

The Court in Maust viewed the statute as providing a remedy for the non-custodial parent to oppose



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private school education. If he or she fails to move pursuant to the statute, then he or she will be obliged to contribute toward the cost of such education. In Maust the non-custodial parent failed to move pursuant to the statute. In the case sub judice although the father did voice objection to the private school education of his daughter, he did not move pursuant to the statute to limit the mother's custodial right to choose the educational facility which their daughter would attend. As such it is appropriate to require him to contribute to the costs of such education as part of primary support. See Brainard v. Brainard, Del. Fam., Case Nos. 1860-79 and C3729, James, J. (May 27, 1980). Aff'd Del. Supr., 80A-JN-17, Christie, J. (June 2, 1981).

Even if this Court were to conclude that the father did move pursuant to the statute, a finding that he had not met his burden of proof as set forth in Maust would be unavoidable. Id at p.6.

IT IS SO ORDERED.

Very truly yours,

JOSHUA W. MARTIN, III

