

NOT FOR PUBLICATION

NO. 25880

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

JO ANN QUON DONNELLY, Plaintiff-Appellant,
WILLIAM HORACE DONNELLY, Defendant-Appellee

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

2005 MAR 31 AM 9:50

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 99-0236)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Nakamura, JJ.)

Plaintiff-Appellant Jo Ann Quon Donnelly (Jo Ann) and Defendant-Appellee William Horace Donnelly (William) are the parents of a male child (Son), born on November 5, 1995. Jo Ann appeals from the following orders entered in the Family Court of the First Circuit: (1) the March 28, 2003 order that changed the legal and physical custody of Son to joint; (2) the April 25, 2003 order reducing child support; and (3) the May 15, 2003 order denying Jo Ann's request for a new trial, and granting Jo Ann's request for reconsideration, but deciding not to change the March 28, 2003 order.

We vacate the March 28, 2003 order and the April 25, 2003 order and remand for further proceedings consistent with this opinion.

BACKGROUND

On January 2, 2002, Jo Ann was awarded sole legal and physical custody of Son, subject to William's rights of reasonable visitation.

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On January 14, 2003, Mother filed a motion asking that William's "visitation with the minor child of the parties . . . be restricted and modified and [William] should not be allowed to have overnight visitation until further order of the Family Court."

On February 5, 2003, Judge Allene Suemori entered an Order for Short Trial. This order scheduled the trial to occur on March 28, 2003, allowed each party a maximum of sixty minutes to present their case, allowed only the parties to testify, and stated:

5. The disputed issue(s) at trial shall be limited to:
 - (a) Restriction of [William's] visitation of the minor child of the parties.
 - (b) [Jo Ann's] request for reimbursement of medical costs.
 - (c) [Jo Ann's] request for reimbursement of attorney's fees.
- No issues shall be presented to the Court other than as specified in this paragraph.

Judge Gregg H. Young presided over the March 28, 2003 trial. The transcript of the evidentiary part of this trial has a total of ninety-three pages.

In her presentation, Jo Ann noted that Son "is ill today with chronic sinus and eye allergy" that required the parties to communicate regarding his medicines, condition, and treatment, alleged that William refuses to communicate, and noted that "the remedy that we are asking, therefore, is is [sic] that the visitation be limited."

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After Jo Ann testified, while William was testifying, it is reported on page eighty-five of the transcript that William stated, in relevant part, that "[t]here's -- there's a mass of confusion that's going on towards the well being of my son, and coming here doesn't suit it, Your Honor. That's why, in and of itself, with all of these circumstances, I'm gonna ask for temporary custody of my son for six months."

It is reported at page ninety-four of the transcript that, at the conclusion of the trial, Judge Young orally decided as follows:

THE COURT:

Okay. Based on your motion for change of custody, I'm going to change it and grant joint custody, that way you folks won't have a communication problem. . . .

[COUNSEL FOR JO ANN]: Joint legal custody, Your Honor?

THE COURT: Joint legal and physical custody. . . .

[COUNSEL FOR JO ANN]: Your Honor, that's what it was before and we went through great lengths to change that, Your Honor.

THE COURT: I'm changing it back. . . .

[COUNSEL FOR JO ANN]: Your Honor, he is not even --

. . . .

[COUNSEL FOR JO ANN]: -- asking for that, Your Honor.

. . . .

[COUNSEL FOR JO ANN]: He has not filed a --

THE COURT: He just made a motion.

. . . .

THE COURT: I'm accepting his oral motion.

On March 28, 2003, Judge Young entered an order stating, in relevant part, as follows:

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- (1) Custody shall be changed to joint legal and physical as of today.
- (2) Time sharing shall be one week/one week beginning Monday 3/31. Drop off/pick up shall be at school on Mondays. In summer, at [Jo Ann's] residence.
- (3) Communication shall be by writing & voice mail.
- (4) Child support shall be recalculated; [William] to submit guidelines w/in 20 days.
- (5) [William] to pay [Jo Ann] \$635.32 within 90 days of this order.
- (6) [Jo Ann's] requests for attorney's fees are denied.

On April 25, 2003, after a hearing, Judge Young entered an order which states, in relevant part, as follows:

Child Support shall be reduced from 620.00/mo. to 160.00/mo. per recalculated child support guidelines from May 1st, 2003.

In addition, since joint custody started March 28th, 2003[,] [Jo Ann] shall utilize the 620.00 child support from April toward the payment of the \$635.32 from the March 28th court order. [William] shall pay [Jo Ann] balance of \$175.32 to make up difference owed to [Jo Ann] and include \$160.00 for child support based upon a joint custody.

On April 11, 2003, Jo Ann filed a motion for a new trial or for reconsideration of the March 28, 2003 order. On May 15, 2003, after a hearing on May 9, 2003, Judge Young entered an order denying Jo Ann's request for a new trial, granting Jo Ann's request for reconsideration, but deciding not to change its March 28, 2003 order, and ordering counsel for Jo Ann to submit proposed findings of fact through William within twenty days.

On August 21, 2003, Judge Young entered William's proposed findings of fact and conclusions of law.

CONCLUSION

The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S.

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319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). In this case, with respect to custody of Son, the family court denied Jo Ann's right to the basic elements of procedural due process of law.

Accordingly, we vacate the March 28, 2003 order and the April 25, 2003 order and remand for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, March 31, 2005.

On the briefs:

Blake T. Okimoto
for Plaintiff-Appellant.


Chief Judge

R. Steven Geshell
for Defendant-Appellee.


Associate Judge


Associate Judge