

NOT FOR PUBLICATION

NO. 26194

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

JANE DOE, Petitioner-Appellant, v.
JOHN DOE, and CHILD SUPPORT ENFORCEMENT AGENCY,
STATE OF HAWAI'I, Respondents-Appellees

EMERSON
CIRK APPELLATE COURTS
STATE OF HAWAI'I

2005 NOV - 8 AM 10: 06

FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-P NO. 02-1-0322)

SUMMARY DISPOSITION ORDER

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

This is a paternity case concerning a male child, born on November 16, 2001 (Son). This appeal involves issues other than paternity.

Respondent-Appellee John Doe (Father) was born on April 9, 1945. The woman (Step-Mother) who married Father on January 9, 1993 was born in 1950 or 1951. Petitioner-Appellant Jane Doe (Mother) was born on March 7, 1978. The man (Ex-Husband) whom Mother married on March 22, 2001 and divorced on May 23, 2001, during her pregnancy with Son, was born on October 31, 1967.

Mother gave birth to a male child (Half-Brother) in 1992 or 1993. Neither Father nor Ex-Husband is Half-Brother's biological father. The record does not identify Half-Brother's biological father. Nevertheless, Half-Brother lives with Ex-Husband. As noted above, Mother gave birth to Son on November 16, 2001. Sometime prior to Son's birth, Father had

NOT FOR PUBLICATION

retired.

On March 12, 2002, Mother filed a Petition for Paternity naming Father and Ex-Husband as Respondents. On April 1, 2002, Ex-Husband filed an Appearance and Waiver. On May 17, 2002, Judge Gale L.F. Ching entered an Order Regarding Genetic Testing which stated, in relevant part, that "[Step-Mother] shall not have any contact with [Son] unless approved in writing by [Mother]." The July 2, 2002 genetic test results indicated that Father was Son's biological father.

On August 2, 2002, Court Officer Barbara Wung Shintani completed her Status Report/Recommendation. On March 31, 2003, court-appointed custody evaluator Marvin W. Acklin, Ph.D., completed his report and recommendation.

In "Petitioner's Trial Memorandum" filed on April 4, 2003, Mother alleged, in relevant part:

17. Father was able to maneuver a civil TRO [Temporary Restraining Order] against [Ex-Husband] into an agreement under which [Ex-Husband] would have no contact with [Son]. Father had no legal right to make such a request, and as a result Mother can not [sic] enjoy many of [Half-Brother's] activities when she is caring for [Son] because [Ex-Husband] is usually present.

The trial was held over a period of three days by Judge R. Mark Browning during the months of April, May, and June 2003. On July 21, 2003, Judge Browning entered a Judgment which states, in relevant part:

Defendants [Ex-Husband] and CHILD SUPPORT ENFORCEMENT AGENCY, STATE OF HAWAII having been excused from further proceedings;
. . ., now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

NOT FOR PUBLICATION

1. [Father] is the Father of [Child] born on [sic] [Mother] on November 16, 2001,
2. PRESUMPTION REBUTTED: The presumption of paternity of [Ex-Husband] is rebutted and he is dismissed from this action as a party defendant. Accordingly, his name shall be deleted from the caption of this case.
3. LEGAL CUSTODY: Mother and Father are awarded joint legal custody of [Son].
4. PHYSICAL CUSTODY: Mother and Father are awarded shared physical custody of [Son] with Mother having [Son] four (4) days each week, and Father having [Son] three (3) days each week.
. . . .
6. THIRD PARTY CONTACTS: [Step-Mother] may have contact with [Son] and the prohibition against such contact is rescinded. [Ex-Husband] shall have no contact with [Son].^{1/}

(Footnote added.)

On July 29, 2003, Father filed a Motion for Reconsideration and/or Further Hearing in which he sought a specific custody schedule and a shared child dependency tax exemption in alternate years.

On September 12, 2003, Father filed a motion seeking enforcement of the custody orders. On September 18, 2003, after a hearing on September 17, 2003, Judge Allene R. Suemori entered an order stating, in relevant part:

^{1/} The findings of fact entered on April 2, 2004 re the July 21, 2003 Judgment state, in relevant part, as follows:

33. [The man (Ex-Husband) Plaintiff-Appellant Jane Doe (Mother) married during her pregnancy with the male child (Son) born on November 16, 2001] physically abused and terrorized [Mother], and on another occasion did the same to Defendant[-Appellee John Doe (Father)]. Moreover, [Ex-Husband] has not shown sufficient interest in the [Son].

34. [Ex-Husband] poses a significant risk of physical and emotional harm to [Son].

35. It is not in [Son's] best interest to have any type of contact with [Ex-Husband].

NOT FOR PUBLICATION

The parties shall have a 4/3 timesharing. [Father] shall have timesharing (w/[Son]/overnight included) from Thursday at 8 am through Sunday at 8:00 a.m. [Mother] shall [have] timesharing w/[Son] from Sunday at 8:00 a.m. through Thursday at 8:00 a.m. All exchanges of [Son] shall occur at the Honolulu Police Department (Main Beretania Street Station). [Step-Mother] shall not be present during said exchange.

The Temporary Restraining Order in FC-DA . . . is hereby amended to reflect timesharing arrangements set forth herein.^{2/}

(Footnote added.)

After a hearing on October 2, 2003, Judge Suemori entered an Order Amending Paternity Judgment Filed July 21, 2003, which stated, in relevant part:

The parties shall immediately contact June Ching to schedule their parenting counseling w/ Dr. Ching. Dr. Ching's focus shall be aimed at co-parenting & educational opportunities for the subject child.

In addition, the parties shall only communicate w/ each other via email & a journal/note book that shall be exchanged at each time sharing exchange of [Son]. All visitation exchanges shall be made at the Beretania Station of the Honolulu Police Department in the front entrance area in view of HPD officer(s).

On October 6, 2003, Mother filed two motions requesting (1) the family court's permission for her to move to Arizona with Son and amendment of child custody, visitation, and support orders; (2) payment of delinquent child support; and (3) the family court's grant of her "request for an Order For Protection of no less than three (3) years' duration[.]"^{3/}

^{2/} There is no indication in the record that the court presiding in this FC-P 02-1-0322 was authorized to enter orders in the FC-DA case.

^{3/} In one of her two motions, Mother alleged, in relevant part, as follows:

12. On the morning of September 10, 2003 I petitioned for, and received a Temporary Order For Protection under FC-DA NO. [. . .] based on a physical confrontation with [Father] who made threats against my life the day before;

13. I am truly afraid for my safety-for my very life, because

NOT FOR PUBLICATION

On October 9, 2003, after a hearing on October 2, 2003, Judge Browning decided Father's July 29, 2003 motion for reconsideration, in relevant part, as follows: "The Parties shall alternate claiming [Son], as their dependent for tax exemption purposes on an annual basis. [Mother] shall claim [Son] as her dependent exemption in 2003 & in every even-numbered year thereafter & [Father] shall claim [Son] in 2004 & in every odd-numbered year thereafter[.]"^{4/} (Footnote added.)

On October 9, 2003, after a hearing on October 6, 2003, Judge Suemori entered an order stating, in relevant part:

[Mother's] Motion for Relief After Order or Decree is hereby denied with prejudice as the court finds that there are no material change [sic] in circumstances. [Mother] is restrained from permanently re-locating from Hawaii w/[Son]. In the event that [Mother] elects to re-locate to Arizona, then [Father] shall be awarded temporary sole physical custody.

On October 31, 2003, Mother filed a notice of appeal.

On April 2, 2004, Judge Browning entered "Findings of

[Father] has threatened my life before, has assaulted me on more than one occasion, and has damaged my property;

14. I am fearful that if [Father] has the freedom to even come around my apartment building he will further harass, threaten, and assault me; and I know that as long as I live in Hawai'i he will continue to do these things because he has told me "this will never end[.]"

^{4/} This order indicates that both parties may claim the child dependency deduction in 2004. In contrast, finding of fact no. 10 entered on April 2, 2004 re the motion for reconsideration states as follows:

10. [Mother] has claimed [Son] as a tax exemption in her individual tax returns since his birth in 2001, through tax year 2003. Therefore, it is fair and equitable to award [Father] the tax exemption claim beginning tax year 2004 and every odd-numbered year thereafter.

This finding indicates that Father is authorized to claim a dependency deduction for Son in 2004 and 2005 and every odd-numbered year thereafter.

NOT FOR PUBLICATION

Fact and Conclusions of Law Re: 'Judgment,' Filed on July 21, 2003".

On April 2, 2004, Judge Browning also entered "Findings of Fact and Conclusions of Law Re: 'Order Granting [in Part] and Denying [in Part] [Father's] Motion for Reconsideration and/or Further Hearing, Filed on July 29, 2003,' Filed on October 9, 2003".

On April 12, 2004, Judge Suemori entered "Findings of Fact and Conclusions of Law Re: 'Order Amending Paternity Judgment Filed July 21, 2003,' Filed on October 2, 2003".

On April 12, 2004, Judge Suemori also entered "Findings of Fact and Conclusions of law Re: 'Order Re: Petitioner's Motion and Affidavit for Relief After Order or Decree Filed October 6, 2003,' Filed on October 9, 2003".

This appeal was assigned to this court on February 1, 2005.

1.

Mother challenges the part of the July 21, 2003 Judgment that specifies that "[Step-Father] shall have no contact with [Son]." Implicitly, she also challenges COL no. 10 entered on April 2, 2004, which states: "The preponderance of the evidence showed that it is in [Son's] best interest to require [Mother and Father] to preclude [Step-Father] from having any contact with [Son]."

NOT FOR PUBLICATION

The record supports the family court's decision that Step-Father should not have any contact with Son. But the family court excused Step-Father from the case. Consequently, the wording of COL no. 10 is more appropriate than the wording of the Judgment.

2.

Mother challenges the October 9, 2003 order alternating the tax dependency deduction. Implicitly, she also challenges the following conclusion of law entered on April 2, 2004 re the October 2, 2003 hearing of Father's July 29, 2003 motion:

3. Pursuant to Haw. Rev. Stat. § 584-15(c), which authorizes this Court to issue an order that is directed to [Mother and Father] in the best interest of the child, [Mother and Father] each shall claim [Son] as a tax exemption in alternating years as directed in the Browning Order of October 9, 2003.

Mother contends that "[t]his is not a divorce case, and the family court therefore has no jurisdiction to divide property or assets (tax deductions included), equitable or otherwise."

Hawaii Revised Statutes § 584-15 (Supp. 2004) (Uniform Parentage Act) states, in relevant part:

(c) The judgment or order may contain any other provision directed against the appropriate party to the proceeding, concerning the duty of support, the custody and guardianship of the child, visitation privileges with the child, the furnishing of bond or other security for the payment of the judgment, or any other matter in the best interest of the child. . . .

(d) Support judgment or orders ordinarily shall be for periodic payments which may vary in amount. . . .

(e) In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, a court enforcing the obligation of support shall use the guidelines established under section 576D-7. Provision may be made for the support, maintenance, and education of an

NOT FOR PUBLICATION

adult or minor child and an incompetent adult child, whether or not the petition is made before or after the child has attained the age of majority.

We conclude that the family court's order authorizing a party to claim the annual tax deduction for a dependent child is within the ambit of the family court's authority to order child support, not property division. We further conclude that the family court did not abuse its discretion in allocating the annual tax deduction in this case. However, as noted in footnote 4 above, the October 9, 2003 order alternating the tax dependency deduction requires an amendment.

3.

Mother challenges the part of the October 9, 2003 order that states, in relevant part:

[Mother's] Motion for Relief After Order or Decree is hereby denied with prejudice as the court finds that there are no material change [sic] in circumstances. [Mother] is restrained from permanently re-locating from Hawaii w/ [Son]. In the event that [Mother] elects to re-locate to Arizona, then [Father] shall be awarded temporary sole physical custody.

This order was confirmed in the following "Findings of Fact and Conclusions of Law Re: 'Order Re: Petitioner's Motion and Affidavit for Relief After Order or Decree Filed October 6, 2003,' Filed on October 9, 2003" entered on April 12, 2004:

FINDINGS OF FACT

21. There was insufficient credible evidence showing any material change of circumstance had occurred after the 2003 trial or entry of the Judgment. [Mother's] post-judgment announcement of her plans to relocate away from [Hawai'i] was not a material change of circumstance that occurred after the trial or entry of the Judgment.

22. There was insufficient credible evidence that relocating to Arizona would be in [Son's] best interest.

NOT FOR PUBLICATION

23. If [Mother] relocates away from [Hawai'i], [Son] nevertheless would be subject to less disruption and fewer adverse effects if he remains in [Hawai'i] with [Father].

CONCLUSIONS OF LAW

7. There was a preponderance of credible evidence showing that [Mother] must be restrained from relocating from the State of [Hawai'i] with [Son] in order to prevent irreparable harm and, therefore, to further the best interest of [Son]. Therefore, a restraining order against [Mother] has been issued[.]"

The record supports these findings and the challenged order.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED as follows:

1. This case is remanded for amendment of the July 21, 2003 Judgment, entered by Judge Browning, by replacing the part that specifies that "[Step-Father] shall have no contact with [Son]" with "each of the parties shall preclude [Step-Father] from having any contact with [Son]."

2. This case is remanded for amendment of the October 9, 2003 order, entered by Judge Browning, alternating the tax dependency deduction to specify that Father shall be authorized to claim Son as his dependent for tax purposes for the year 2004 and in every odd-numbered year thereafter and that Mother shall be authorized to claim Son as her dependent for tax purposes in 2003 and in every even numbered year commencing 2006.

NOT FOR PUBLICATION

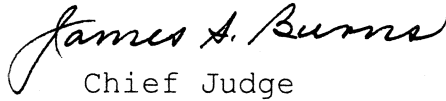
3. In all other respects, the family court's challenged orders are affirmed.

DATED: Honolulu, Hawai'i, November 8, 2005.

On the briefs:

Jane Doe, *pro se*
petitioner-appellant.

Mei Nakamoto,
for respondent-appellee.


Chief Judge


Associate Judge


Associate Judge