

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS OR THE PACIFIC REPORTER

NO. 26893

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

DANA L. BEAUDOIN, Plaintiff-Appellee,
v.
DALE J. BEAUDOIN, JR., Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-D NO. 01-1-0439)

NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant Dale J. Beaudoin, Jr. (Dale)

appeals from the Judgment and Order Regarding Child Custody, Relocation, Visitation and Child Support entered in the Family Court of the Second Circuit on October 1, 2004 (October 1, 2004 Order) by Judge Simone C. Polak.

Dale and Plaintiff-Appellee Dana L. Beaudoin (Dana) were married on February 15, 1997. Their son was born on July 29, 1997. Their daughter was born on October 6, 1999. The February 11, 2003 Stipulated Judgment Granting Divorce and Awarding Child Custody awarded joint legal custody and shared physical custody of the children. Dale had physical custody of the children from Sunday at 8:30 a.m. until Wednesday at 8:30 a.m. Dana had physical custody of the children from Wednesday at 8:30 a.m. until Sunday at 8:30 a.m. Explicit exceptions were made for some holidays and some special days.

On April 27, 2004, Dana filed a motion announcing her desire to move with the children to Oregon and seeking the award of sole legal and physical custody of the children to her. After a two-day trial in July 2004, the court entered the October 1, 2004 Order awarding Dana sole legal and physical custody of the children subject to Dale's rights to have the children visit him for four weeks during the summer, and during alternate Christmas/winter break and spring break school vacations. It was further ordered that "[t]he parties shall be equally responsible for the costs of all air transportation for the minor children, including the costs of an escort to travel with them on the flight."

On February 3, 2005, the court entered "Findings of Fact and Conclusions of Law in Support of Judgment and Order Regarding Child Custody, Relocation, Visitation and Child Support Filed October 1, 2004".

Dale contends that Dana did not prove and the court did not find that any material change of circumstance had occurred after the divorce judgment. We disagree. Finding of Fact (FOF) No. 37 is supported by the evidence and it states that "[t]he credible evidence presented at trial indicates that the custodial arrangement set forth in the Judgment is not in the children's best interests."

Although Dana, as the party requesting the change, has the burden of proof of showing that the change is in the

children's best interest, Dale cites FsOF Nos. 105 and 129, and Conclusions of Law (CsOL) Nos. 1 and 2, in support of his contention that he "was place[d] by the judge in the unfortunate position of having to show that the unknown situation and circumstances somewhere in Oregon was harmful to the children if he was to prevail." We disagree. The record is clear that the court properly placed the burden of proof on Dana.

Dale contends that Dana failed to prove, and the court failed to find, that the award of sole legal and physical custody to Dana was in the best interests of the children. We disagree. COL No. 2 is supported by the record. It states that "[c]onsidering the totality of the circumstances of this case, it is in the children's best interests that Dana be permitted to relocate with the minor children to Oregon."

Although not raised as a point on appeal, Dale complains that the court "refused to hear from one of the children." This occurred when, at the conclusion of the trial, counsel for Dale argued that "I think that it is appropriate for the Court to hear from the children directly." Hawaii Revised Statutes § 571-46(3) (Supp. 2005) states that "[i]f a child is of sufficient age and capacity to reason, so as to form an intelligent preference, the child's wishes as to custody shall be considered and be given due weight by the court[.]" We conclude that the court did not abuse its discretion.

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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 applying the law relevant to the issues raised and arguments presented,

IT IS HEREBY ORDERED that the Judgment and Order Regarding Child Custody, Relocation, Visitation and Child Support entered on October 1, 2004 is affirmed.

DATED: Honolulu, Hawai'i, September 28, 2006.

On the briefs:

Renee M.L. Yuen
for Defendant-Appellant.

Elizabeth C. Melehan
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge