

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27665

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

T.D., Petitioner-Appellant,
v.
J.H., Respondent-Appellee,
and
CHILD SUPPORT ENFORCEMENT AGENCY,
STATE OF HAWAII, Respondent

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-PATERNITY NO. 04-1-0404)

MEMORANDUM OPINION

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

The father (Father) of a female child (Daughter) born on March 10, 2000, appeals from a December 12, 2005 Judgment entered in the Family Court of the First Circuit.¹ We affirm.

Father and Daughter's mother (Mother) commenced living together in 1999. Mother and Father ceased living together in the summer of 2003. Father commenced this case on April 8, 2004. Paternity was not disputed. On September 1, 2004, the family court entered a Stipulated Order requiring Father to pay \$340 per month for child support. On February 2, 2005, after a trial on January 10, 2005, the family court entered findings of fact and conclusions of law.

On February 24, 2005, the family court entered an "Order Regarding Custody, Visitation and Support Orders After Voluntary Establishment of Paternity Filed 4/8/04", wherein it

¹ Judge William J. Nagle, III, presided.

ordered, in part:

The parties shall be awarded joint legal custody of the minor child with physical custody awarded to Mother, subject to Father's rights of reasonable visitation.²

As joint legal custodians, the parties shall make every major decision involving the child together. . . .

. . . .

If the parties are unable to agree on a legal decision even after fully engaging in discussions and consultations with each other, Mother shall make the final decision.

. . . Mother is awarded reasonable attorney fees and costs incurred in this matter.

On February 28, 2005, Father filed "Plaintiff's Motion to Reconsider Court's Award of Attorney's Fees". On March 7, 2005, Father filed the first notice of appeal. On October 27, 2005, the Hawai'i Supreme Court entered an order dismissing the appeal. On November 18, 2005, the family court entered an "Order Approving Award of Attorney's Fees and Costs and Denying Plaintiff's Motion to Reconsider". On December 12, 2005, the family court entered a Judgment in the amount of \$10,921.76 (\$9,993.69 for attorney fees plus \$928.07 for costs). On December 15, 2005, Father filed the second notice of appeal. This case was assigned to this court on June 20, 2006.

Father challenges the family court's award of (1) joint legal custody of Daughter with tie-breaking power to Mother,³ and (2) physical custody of Daughter to Mother, subject to Father's specified rights of visitation. Noting that he

² The family court awarded liberal specified rights of visitation.

³ We conclude that the award of "joint legal custody" subject to the proviso that "[i]f the parties are unable to agree on a legal decision even after fully engaging in discussions and consultations with each other, Mother shall make the final decision," is not the award of "joint legal custody". It is the award of sole legal custody to Mother subject to the requirement that she shall reasonably consult with Father prior to making a decision on a question involving a subject matter included within the ambit of the phrase "legal custody".

"filed his Petition for Paternity or Custody seeking to preserve the parties [sic] heretofore informal joint legal and physical custody agreement[,] " Father contends that the alteration of an informal shared custody arrangement constitutes a change in custody which requires a material change in circumstances.

May the family court, over the objection of one parent, change the parents' non-court-ordered informal shared custody arrangement absent a material change in circumstances? In light of the following, the answer is yes.

First, Hawaii Revised Statutes § 571-46 (Supp. 2005), states in relevant part:

Criteria and procedure in awarding custody and visitation.

In the actions for divorce, separation, annulment, separate maintenance, or any other proceeding where there is at issue a dispute as to the custody of a minor child, the court, during the pendency of the action, at the final hearing, or any time during the minority of the child, may make an order for the custody of the minor child as may seem necessary or proper. In awarding the custody, the court shall be guided by the following standards, considerations, and procedures:

- (1) Custody should be awarded to either parent or to both parents according to the best interests of the child[.]

Second, to obtain the family court's change of a custody order, as opposed to an informal shared custody arrangement between the parties, the movant "must show a material change of circumstances since the previous custody order, and must show that such a change of custody is in the best interest of the child." Nadeau v. Nadeau, 10 Haw. App. 111, 121, 861 P.2d 754, 759 (1993).

Third, in this case, the specifics of the "informal shared custody arrangement" was a question of fact and the court

found "that MOTHER has been the primary care giver for [Daughter]. While FATHER contends that the parties have shared more or less equal time with [Daughter] since the breakup in 2003, the Court finds MOTHER's testimony on this issue to be more credible."

Accordingly, we affirm the December 12, 2005 Judgment.

DATED: Honolulu, Hawai'i, August 31, 2006.

On the briefs:

Arnold T. Phillips
for Petitioner-Appellant.

Craig G.H. Yim
for Respondent-Appellee.



Chief Judge



Associate Judge



Associate Judge