NO. 23952

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

EDWARD JOSEPH CHING, Plaintiff-Appellee, v. TANYA LYNAE CHING, now known as Tanya Lynae Cassoni, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D No. 97-3119)

MEMORANDUM OPINION
(By: Burns, C.J. Watanabe, and Foley, JJ.)

In this appeal stemming from the child custody award in a divorce case, Defendant-Appellant Tanya Lynae Ching, now known as Tanya Lynae Cassoni (Mother), urges us to vacate the Findings of Fact (FsOF), Conclusions of Law (CsOL) and Order entered on October 12, 2000 (October 12, 2000 Order) by the Family Court of the First Circuit (the family court), Judge Dan T. Kochi (Judge Kochi) presiding. The October 12, 2000 Order modified the May 5, 1998 Decree Granting Divorce (the divorce decree) between Mother and Plaintiff-Appellee Edward Joseph Ching (Father) by awarding Father sole legal custody of their twin children (the twins or children).

We affirm the October 12, 2000 Order, as well as the order denying Mother's motion for reconsideration of the October 12, 2000 Order, filed on November 16, 2000.

BACKGROUND

Mother and Father were married in Honolulu, Hawai‘i on November 26, 1995. The twins, Hunter Levy Ching (Hunter) and Gabriella Kay Ching, were born on December 2, 1996. The marriage ran into difficulties, and on September 9, 1997, Father filed for divorce. Mother and Father eventually stipulated to a divorce decree that awarded sole physical custody of the twins to Father and joint legal custody to Mother and Father. The divorce decree awarded Mother "reasonable visitation rights[,]" to be established based on the recommendations of Mitchell J. Werth (Werth), the custody guardian ad litem appointed by the family court "to represent the interests of the children." The divorce decree specifically allowed Mother to

> have weekend visits pursuant to prior written agreement of [Father]. Further[,] a visitation schedule for [Mother] should be determined and executed with express written agreement by [Father] according to each parties [sic] availability outside of school or work.

Following the entry of the divorce decree, Mother's visitation times with the children gradually increased so that Mother and Father were sharing the children almost equally and Mother had the children for consecutive overnight visits on weekdays and weekends. In March 1999, Mother remarried and Father revised the visitation schedule to allow Mother to be with the children only every other weekday and part of Saturday.

On July 12, 1999, Mother filed a Motion and Affidavit for Post-Decree Relief, requesting a modification of custody and child support due to her remarriage and plan to move to Texas.

Mother sought permanent physical and legal custody of the children, as well as the following temporary relief:

> (1) a temporary time-sharing order . . . that provides for larger blocks of time for the children for each parent, with fewer exchanges between the parents;
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> (2) the amount of time that the children spend with [Mother] should be returned to the amount of time she had with the children before [Father] learned that she had retained counsel;
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> (3) the children should be with [Mother] when [Father] is not available to care for them;
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> (4) [Mother] should be authorized to take the children to her home in Texas for a summer visit.

On September 13, 1999, the family court, Judge Diana L. Warrington (Judge Warrington) presiding, entered an "Order Following Hearing on [Mother's] July 12, 1999 Motion for Post-Decree Relief" (the September 13, 1999 Order), finding that "due to [Mother's] regular and frequent visitation with the children since the entry of the [divorce decree], the fact of [Mother's] proposed relocation to Austin, Texas constitutes a material change in circumstances sufficient to warrant an investigation of the current custody and visitation arrangements" of Father and Mother.

Pursuant to the September 13, 1999 Order, as amended by an order filed on October 29, 1999, Judge Warrington appointed Stephanie A. Rezents (Rezents) as "the Custody Evaluator to investigate the current custody and visitation arrangements to determine what custody and visitation arrangements, now and in the future, are in the best interests of the parties' two (2) children[.]" Additionally, Judge Warrington ordered Mother and

Father to: (1) undergo a psychological evaluation and drug assessment, including a hair follicle[1] test, by Dr. Jerry Brennan, a clinical psychologist (Dr. Brennan); and (2) "submit to an immediate drug screen at Diagnostic Laboratory Services, Inc. no later than the close of business on August 5, 1999[.]" Furthermore: (1) Father was directed not to "cut or trim his hair until the hair follicle test is completed"; (2) Mother was permitted to take the children "to the Mainland for an appropriate period of time"; and (3) Mother and Father were instructed to work out the dates and duration of Mother's trip to Texas with the children.

On December 23, 1999, Father, accompanied by Rezents, went to Dr. Brennan's office for the court-ordered hair test. A section of Father's hair, approximately seven and a half centimeters in length, was cut from the back of Father's head and sent to National Medical Services, Inc. (NMS) for a drug screen analysis. By a letter to Rezents dated January 11, 2000, Dr. Brennan reported that he had received the NMS test results and they indicated positive use of cocaine[2] by Father. Dr. Brennan also explained:

> The estimated time frame in months, assuming hair grows on the average 1 cm/month, suggests that [Father] used cocaine . . . repeatedly within the last eight months. The hair

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[1/] According to the testimony at trial, the test was actually conducted on the hair shaft, not the hair follicle.

[2/] The test results were also positive for the presence of hydrocodone, an opiate. However, hydrocodone was an ingredient in a medication that Plaintiff-Appellee Edward Joseph Ching (Father) was then taking.

> being analyzed was 7.5 cm in length. This hair follicle analysis detects only chronic use which is defined as a dozen or more times in the interval being tested.

Numerous questions were subsequently raised about the validity of the NMS test results.[3]

Based on the positive NMS test results, however, the family court, Judge Warrington presiding, upon Mother's motion, suspended Father's time-sharing rights with the twins. As a result, the children went to live with Mother, and Father was only allowed supervised visitations with the children three times a week. Judge Warrington did not terminate Father's physical or legal custody of the children.

On February 25, 2000, Rezents filed her Custody Evaluator's Final Report, recommending that: (1) Mother be awarded sole physical and legal custody of the children, (2) Father's contact with the children continue to be supervised, and (3) Father's telephone calls to the children "be limited to no more than 15 minutes three times a week."

On September 11, 12, and 13, 2000, the trial on Mother's Motion and Affidavit for Post-Decree Relief, seeking a

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[3/] For example, Defendant-Appellant Tanya Lynae Ching, now known as Tanya Lynae Cassoni, (Mother) claimed that Father had cut his hair, in violation of the express order of the Family Court of the First Circuit. Father argued that the procedures used to collect, seal, and transmit his hair sample to National Medical Services, Inc. were faulty. He also claimed that his hair shaft had been contaminated when it was cut and handled by an employee of Dr. Jerry Brennan, who was not wearing gloves and had previously been convicted several times for drug offenses. Additionally, questions were raised about the reliability of the hair test, whether such tests were commonly accepted in the addiction medicine and chemical dependency community, and whether such tests were approved by the State of Hawai'i, Department of Health for use in drug testing. Finally, the result of a second, independent test of Father's hair shaft, less than a month after the first test, was negative for the presence of cocaine.

change in child custody and child support, was held before Judge Kochi. A total of twelve witnesses testified, and the bulk of trial time was spent on expert testimony regarding the reliability of the NMS test results.

On October 12, 2000, Judge Kochi entered his FsOF, CsOL and Order. The October 12, 2000 Order determined that the NMS test results were unreliable, denied Mother's motion, and modified the custody award portion of the divorce decree by granting Father sole legal custody of the twins. Among Judge Kochi's FsOF and CsOL were the following:

FINDINGS OF FACT

. . . .

> 9. On October 28, 1999 [Father] provided a urine sample at Dr. Brennan's office. From the sample provided, Dr. Brennan visually concluded the urine tested positive for heroin, an opiate. Dr. David Samuel Roth, M.D. [(Dr. Roth)], who was in the same building at the time, came down to Dr. Brennan's office. Dr. Roth, whose specialty is psychiatry and addiction medicine, confronted Dr. Brennan that not being a medical doctor he was not authorized to perform a urinalysis and that the urine sample needed to be sent to a certified laboratory for analysis.
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> 10. Another urine sample was taken and sent to Diagnostic Laboratory Services which concluded that the sample was negative. The sample showed the presence of hydrocodone, a medication which Dr. Wherenberg [sic] had previously prescribed for [Father's] back problems. Hydrocodone is an opiate. . . .
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> 11. This incident caused [Father] and his attorney at that time to doubt Dr. Brennan's qualifications to perform the hair follicle test. . . .
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> 12. By the Order filed December 21, 1999 [Father] was ordered to comply with the prior orders and submit to a hair follicle test by Dr. Brennan. [Father] was accompanied by [Rezents] that day [4] to Dr. Brennan's office for the taking of a hair sample which was sent to [NMS], Willow Grove, Pennsylvania for analysis.

[4/] The substantive evidence in the record indicates that Father's hair sample was collected on December 23, 1999.

13. The court's order filed December 21, 1999 states, "The issue as to whether [Father] cut his hair in violation of the court's order shall be reserved for trial."

14. [Rezents] observed [Father's] hair length on numerous occasions from September 14, 1999 when she was appointed custody evaluator until she accompanied [Father] to Dr. Brennan's office for the hair follicle test on December 21, 1999.[5] She noted that [Father's] hair was shoulder length when she saw him immediately after being appointed custody evaluator in September 1999. She noted [Father's] hair had been cut around the ears to "ear length" when she accompanied him to Dr. Brennan's office on December 21, 1999.[6] She believe [sic] [Father's] hair had been cut at least twice between September 1999 and the hair follicle test.

15. Exhibit 85A is a videotape taken on November 15, 1999. In the video [Father] is shown interacting with the children and clearly shows the length of his hair. His hair is shoulder length. There was no testimony that [Father's] hair had been cut between October 13, 1999 and November 15, 1999. Other than [Rezents'] testimony that [Father's] hair may have been cut around the ears, there was no direct testimony that [Father's] hair was cut on the back of his head between November 15, 1999 and date the hair sample was taken on December 21, 1999.[7]

16. The hair sample was taken from the back of the head. Although [Rezents] testified [Father's] hair was ear length, she could not say whether or not the hair in the back of the head had been cut or the hair only trimmed around the ears, leaving the hair in the back of the head uncut. Consequently, there was no evidence that [Father's] hair on the back of his head had been cut which would have affected the taking of the hair sample.

17. [Rezents], who was ordered by the court to accompany [Father] to Dr. Brennan's office for the hair follicle test, observed the cutting of [Father's] hair, the placement of the hair into the mailing container and the placement of the container into the mail box.

18. Among other things, [Father] claims the hair sample was contaminated because the mailer was already opened when he arrived at Dr. Brennan's office and Kevin Connor who cut his hair removed the latex gloves in the process of cutting his hair.

19. Dr. Andrew P. Mason, Ph.D. [(Dr. Mason)], a forensic toxicologist, was retained by NMS to verify the results of its tests performed on [Father's] hair. Dr. Mason until several years ago was a director of

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[5/] See footnote 4.

[6/] See footnote 4.

[7/] See footnote 4.

laboratories at NMS. He testified he set up the laboratory and the testing protocol for NMS.

20. Dr. Mason testified regarding NMS' protocol on receiving and testing of the hair sample at NMS.

21. Dr. Mason reviewed NMS' litigation packet (Exhibit 171), the test results of [Father's] hair. Based upon his review, Dr. Mason testified [Father's] hair tested positive for cocaine and contained cocaine to more than a reasonable scientific probability or certainty.

22. [Father] contended his hair sample was contaminated because Dr. Brennan did not follow the required protocol in obtaining his hair sample. Dr. Mason explained that even if the hair sample was externally contaminated with cocaine in the collection process, [Father's] hair was twice rinsed with methylene chloride to remove any contamination. Additionally, the methylene chloride rinses would be tested to confirm that there was no cocaine in the rinses. If cocaine is found in the rinses, the results for the test of the hair would be invalid because there could be external contamination of the hair.

23. Dr. Mason testified that hair samples can be contaminated by infusion of cocaine into the shaft of hair. However, based upon the manner in which the hair sample was collected in this case there was neither the means nor the opportunity to so contaminate the hair. The only possibility of contamination was external contamination which the methylene chloride rinses would remove.

24. NMS' test reported 31.64 ng/ml [(nanograms per milliliter)] of cocaine in [Father's] hair. The test was performed on a gas chromatograph/mass spectrometer (hereinafter "GCMS").

25. 20 ng/ml is the lower limit of the testing capability of NMS' GCMS, i.e., in reporting whether a sample is positive or negative for cocaine, a test result of less than 20 ng/ml is reported as negative or zero. In this instance, the quantity measured was 31.64 ng/ml and, therefore, reported to be positive for cocaine. (Exhibit 171, p.93)

26. As noted above, the lowest setting for the GCMS is 20 ng/ml. [Father's] hair sample was tested at the lowest 20 ng/ml setting of the GCMS. Exhibit KK is a blow-up of Exhibit 171, page 93, which indicates "Cutoff: 20.0" in the middle of the page signifying the GCMS 20 ng/ml setting.

27. Dr. Mark Raymond Hagadone, Ph.D. [(Dr. Hagadone)], a forensic toxicologist retained by [Father], testified that the same NMS litigation packet does not show to a reasonable scientific probability or certainty that there was cocaine in [Father's] hair sample.

28. Dr. Hagadone does not dispute a GCMS' ability to detect quantities of cocaine at 20 ng/ml. However, Dr. Hagadone contends that in this instance, the GCMS was

not properly calibrated at the 20 ng/ml setting to give a valid, supportable test result of 31.64 ng/ml.

29. Dr. Mason testified that a batch of 29 tests were run automatically at night. [Father's] hair was among the 29 tests performed. In order to test the instrument's calibration and integrity of the results, interspersed in the 29 tests were solutions of known quantities of cocaine. Known quantities of cocaine are tested as a quality control measure to verify that the instrument had operated within specifications throughout the entire run.

30. In this case both Drs. Mason and Hagadone agree the instrument did not validly measure a known 20 ng/ml solution of cocaine at the 20 ng/ml setting. The GCMS measured the known concentration of cocaine to be 26.27 ng/ml. (Exhibit 171, p. 68) In order for the result to be valid, the relative intensities under cocaine, molecular weights 303.2 and 272.1, as well as under D3 Coc, molecular weights 306.2 and 275.1, must fall within the acceptable range. In the test of this known 20 ng/ml sample of cocaine, the relative intensity under cocaine, molecular weight 272.1, is out of acceptable range and, therefore, the test result is invalid and unacceptable.

31. Both Drs. Hagadone and Mason agree that because the relative intensity under cocaine, molecular weight 272.1, was out of range, the resulting measurement of the known 20 ng/ml sample was invalid. (Exhibit 171, p. 68)

32. The next lowest known quantity of cocaine tested at the GCMS' 20 ng/ml setting was a known solution containing 60 ng/ml. (Exhibit 171, p. 65) The instrument measured 53.76 ng/ml of cocaine, within ±20% variation allowed for the instrument. Also, all the other criteria were met to make the measurement valid.

33. However, there were no tests of other known quantities of cocaine below 60 ng/ml to test the validity of the test results at those lower levels, i.e., there was no verification the instrument could validly measure concentrations of cocaine below 60 ng/ml. Dr. Hagadone therefore concluded the instrument was not properly calibrated to test for quantities of cocaine below 60 ng/ml and the test result measuring a quantity of 31.64 ng/ml was invalid.

34. According to Dr. Hagadone, in order for the test on [Father's] hair to be valid, the GCMS needed to be re-calibrated to correctly measure a known quantity of 20 ng/ml of cocaine and the entire test re-run.

35. Dr. Mason, on the other hand, claims re-running the tests was unnecessary because of the distinct cocaine "thumb print" indicating the substance in [Father's] test result was cocaine. Furthermore, the values for the relative intensities were selected by the computer software (Exhibit 171, p. 98) and, the instrument operator could look at the results and decide that the threshold selected by the computer was too low. Looking at the results, the instrument operator could decide that if the threshold was

adjusted, the test would be valid. That decision was within the discretion of the operator.

36. Dr. Mason claims that while the GCMS's ability to measure the quantity of cocaine at its lower limits may have placed the results of [Father's] hair test in doubt, the telltale "thumb print" of the substance shown in the test result was unmistakably cocaine. He claimed that no substance other than cocaine passing through the gas chromatograph would appear at that particular time in the test.

37. Dr. Hagadone disagreed. He testified that the "thumb print" cannot be said to be cocaine, unless all the other parameters of the test also indicate it is cocaine, i.e., the relative intensities also must fall within range. Dr. Hagadone further testified other substances may produce the same "thumb print."

38. Dr. Mason testified that the test results for [Father's] hair could be verified by extrapolating from the test results of the known 60 ng/ml sample. (Exhibit NN)

39. In the batch of 29 samples tested was a known sample containing no (zero) cocaine. However, the GCMS measured a small quantity of cocaine and the "thumb print" of cocaine appears. (Exhibit 171, p. 56) If one were to follow Dr. Mason's reasoning, the only conclusion to be reached from the "thumb print" is the presence of cocaine. But we know that there was no cocaine in the sample. Therefore, the instrument was contaminated or Dr. Hagadone is right in that an unknown substance is producing the cocaine "thumb print." Dr. Hagadone testified that in his experience, a test result for a solution containing "zero" cocaine would show no cocaine "thumb print," only a straight flat line where cocaine would normally appear.

40. Additionally, the test results of the rinse used on [Father's] hair sample are shown on pages 92 and 95 of Exhibit 171. According to Dr. Mason, unless the rinse showed no presence of cocaine, the test results of [Father's] hair sample would not be valid. The quantities of cocaine measured in the second rinse was 12.91 ng/ml (p. 92) and 11.31 ng/ml (p. 95) in the first rinse. Although the quantities measured are below the 20 ng/ml sensitivity of the instrument which NMS would consider negative, the distinctive "thumb print" of cocaine is present.

41. Therefore, either the hair sample was contaminated, the GCMS was contaminated, both the sample and the GCMS were contaminated, or the GCMS was exhibiting the "thumb print" of cocaine for a substance other than cocaine.

42. For all the above reasons, the court finds Dr. Hagadone's testimony credible that the test result for [Father's] hair sample was invalid and one cannot say with reasonable scientific probability or certainty that there was cocaine found in [Father's] hair sample.

43. The court finds the test for cocaine in [Father's] hair was negative.

44. Based upon the return of NMS' positive test result for cocaine, on January 18, 2000 [Mother] filed "[Mother's] Ex Parte Motion for Order Immediately Suspending [Father's] Time-Sharing Rights with Parties' Minor Children." Attached as Exhibit B thereto is Dr. Brennan's January 11, 2000 letter to [Rezents] concluding that the positive result meant [Father] was a chronic cocaine user.

45. Based upon [Mother's] ex parte motion, the court filed "Order Granting [Mother's] Ex Parte Motion for Order Immediately Suspending [Father's] Time-Sharing Rights with Parties' Minor Children" on January 18, 2000. Pursuant to the order, [Father's] time-sharing rights with his children was suspended until a further hearing on January 26, 2000.

46. [Rezents] testified that at the January 26, 2000 hearing that notwithstanding another independent test of [Father's] hair which was negative, his time[-]sharing rights should be restricted to err on the safe side.

47. By order filed January 28, 2000, the court denied [Father's] motion to re-instate his time-sharing rights with his children and permitted him only supervised visitation at PACT three times per week.

48. At trial, Dr. Brennan retracted his statement and conclusion in his January 11, 2000 letter to [Rezents] (Exhibit E) that NMS' positive test result showed [Father] was a chronic cocaine user having used cocaine more than a dozen times. This was not the result of the dispute regarding the validity of the NMS' test performed on [Father's] hair but because he was misinformed about what a positive test result signified.

49. Other than by implication that [Father] was a chronic cocaine user as a result of the positive NMS report, there was no evidence [Father] used cocaine.

50. In her report (Exhibit A), [Rezents] mentions a recorded telephone conversation which occurred on February 2, 2000. [Father] had called for a telephone visitation while the children were at the Cassonis'. In the course of that conversation Ms. Nancy Badin, [Father's] girlfriend, talked to Hunter about the "wolf" story. The conversation taped by the Cassonis was heard by [Rezents] and Ms. Anita Trubitt [(Ms. Trubitt)] (whose memo is attached to Exhibit A) and both came to the conclusion that the conversion was inappropriate because it caused Hunter to be frightened.

51. Dr. William T. Wright, Jr., M.D. [(Dr. Wright)], whose practice is in child and adult psychiatry, listened to the same taped conversation and reached a conclusion directly contrary to [Rezents] and Ms. Trubitt. He testified that the "wolf" story is Hunter's favorite story and reflects a method Hunter uses

to deal with an anxiety provoking situation. He concluded that Hunter is sensitive to the emotional state of his parents, i.e., while at [Mother's] and in her presence he cannot exhibit having a loving conversation with [Father] because that would displease [Mother]. The court, having listened to the taped conversation (Exhibit 85) played at trial, does not perceive any fear in Hunter's voice and finds Dr. Wright's conclusion to be credible.

52. The February 2, 2000 conversation with the children was taped by both the Cassonis and [Father].

53. Dr. Brennan stated in his psychological evaluation of [Father] that [Father] exhibits aggressive behavior, that he felt he was threatened by [Father] and that [Father] is a danger to others. Dr. Roth on the other hand testified that he has been threatened by the conduct of the Cassonis. [Werth], the previous custody guardian ad litem, testified of an incident where he believed [Mother] tried to run him over with her car.

54. It appears that both parties have done everything they can to manipulate whoever would tip the scale in their favor on the issue of the custody of the children. They have taped telephone conversations and taken videos in hopes it would reveal something which would be of assistance to them. It appears both have exhibited aggressive behaviors against those professionals they perceived did not support them.

55. From the totality of facts and circumstances the court finds that the children have been placed in the middle of their parents' dispute where they cannot freely display their affection for one parent in front of the other.

56. Dr. Roth testified that [Father] is not a substance abuser. This is based on his observation of [Father] over a period of time and the periodic drug screens that he has required [Father] to undergo.

57. Based on his observation and interaction with [Father], Dr. Roth disputes Dr. Brennan's report that [Father] is a danger to others.

58. Both parties appear to be under a great deal of stress as a result of this dispute. Both Dr. Brennan's and [Rezents'] reports comment on [Father's] behavior in this stressful milieu. There is nothing in the reports or evidence which indicate that [Father] is not a good father, did not take good care of the children while in his custody, that he did not provide a safe home environment or that he was unfit as a parent.

59. The parties are unable to amicably work together to agree on anything. Joint legal custody would not be in the best interests of the children as the parties would not be able to make any decision regarding the children without a fight and placing the children in the middle of the fight.

CONCLUSIONS OF LAW

. . . .

3. Based upon the disputed drug test results, the court's January 18, 2000 order suspended [Father's] time-sharing rights with his children and the court's order filed on January 28, 2000 permitted [Father] supervised visitation at PACT three times per week. However, no order was entered changing custody as set forth in the May 5, 1998 Divorce Decree. The court's January 21 and 28, 2000 orders in effect placed temporary physical custody of the children with [Mother] pending the trial herein.

4. [Father] has sole physical custody of the children pursuant to the Divorce Decree. Although [Mother's] move to Texas may affect the opportunities for visitation she had been permitted by [Father], the court concludes it is not sufficient reason to change physical custody of the children as set forth in the May 5, 1998 Divorce Decree. There being no evidence that [Father] is an unfit parent or that his care of the children is somehow lacking, the court concludes there is no basis to set aside or alter the conclusion reached in the May 5, 1998 Divorce Decree that it was in the best interest of the children for [Father] to have sole physical custody of them. The children live in a safe home environment, have lived almost all of their lives here in Hawaii, have developed relationships with friends and relatives in Hawaii, and have the support of relatives in Hawaii. The court concludes it is in the best interest of the children to remain with [Father].

5. Awaiting a hearing, the disputed drug test results for the presence of cocaine in [Father's] hair raised the implication that he was a chronic cocaine abuser, placing his fitness as parent in question.

6. However, the court found that the NMS test results were invalid and, therefore, there was no basis to question [Father's] fitness as [sic] parent on the basis of cocaine use.

7. The court having found that the parties cannot work together to amicably agree on most things and, with the parties living in different states, joint decision making becomes even more difficult. The court concludes that it is in the best interest of the children for [Father] to have not only sole physical custody but sole legal custody of the children.

. . . .

10. [Mother] shall have reasonable visitation.

On October 20, 2000, Mother filed a motion for reconsideration of Judge Kochi's October 12, 2000 Order, which

was denied by an order entered by Judge Kochi on November 16, 2000.

Mother now appeals, claiming that Judge Kochi: (1) applied an incorrect legal standard in continuing sole physical custody and awarding sole legal custody of the children to Father, (2) clearly erred in entering FsOF that were not supported by substantial evidence in the record and CsOL that were based on such FsOF, (3) abused his discretion by concluding that the award of sole physical and legal custody of the children to Father was in the children's best interests without making FsOF that were "sufficiently comprehensive and pertinent to the issues in the case," and (4) violated the law of the case doctrine and principles of judicial restraint "by overruling Judge Warrington's ruling that Mother had demonstrated a material change in circumstances."

DISCUSSION

A. The Legal Standard for Determining Custody of the Children

Hawaii Revised Statutes (HRS) § 571-46 (2002) states now, as it did when the proceedings below occurred, in relevant part, as follows:

> **Criteria and procedure in awarding custody**. . . . In awarding the custody [of a child], 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.
>
> . . . .

> (6) Any custody award shall be subject to modification or change whenever the best interests of the child require or justify the modification or change and, wherever practicable, the same person who made the original order shall hear the motion or petition for modification of the prior award[.]

(Emphases added.)

Mother claims that CsOL Nos. 4, 5, 6, and 7 are erroneous because Judge Kochi ignored the "best interests of the child" standard in deciding that the children should remain with Father. According to Mother, Judge Kochi focused on Father's fitness as a parent in deciding whether to modify the prior custody award to Father and, thus, improperly imposed the burden on her to prove that Father was an "unfit parent."

We disagree. Judge Kochi expressly concluded in COL No. 4 that "it is in the best interest of the children to remain with [Father]" and stated several reasons for this conclusion: (1) Mother's move to Texas was "not sufficient reason to change physical custody of the children"; (2) there was "no evidence that [Father] is an unfit parent or that his care of the children is somehow lacking"; and (3) "[t]he children live in a safe home environment, have lived almost all of their lives here in Hawaii, have developed relationships with friends and relatives in Hawaii, and have the support of relatives in Hawaii." Additionally, in COL No. 7, Judge Kochi concluded that "it is in the best interest of the children for [Father] to have not only sole physical custody but sole legal custody" as well because "the parties cannot work together to amicably agree on

most things and, with the parties living in different states, joint decision making becomes even more difficult." The family court thus applied the correct legal standard in denying Mother's motion to modify the custody award portion of the divorce decree.

While the family court concluded that there was "no evidence that [Father] is an unfit parent" and that "there was no basis to question [Father's] fitness as a parent on the basis of cocaine use[,]" these conclusions, when taken in context, seem to address Mother's specific claim that Father's alleged cocaine habit made giving sole custody to Mother in the "best interests of the children." Since this alleged cocaine habit was Mother's primary argument in support of modifying the custody order and the family court found no credible evidence to support this allegation, the family court saw no reason to switch physical custody of the twins from Father to Mother.[8]

Judge Kochi's oral decision, announced on September 15, 2000, provides further insight into why Mother's motion was denied:

> At the time that the divorce decree was entered, [Father] was awarded -- or was awarded sole physical custody and joint legal custody between [Father and Mother]. So at the time that the decree was entered, the court had made a determination that it was in the best interest of the children that children stay with -- with [Father] with visitation rights to [Mother]. Okay. And [Mother] in this instance was asking through her post-decree -- request for post-decree relief that that

[8/] In 1998, as part of the stipulated divorce decree, Mother adopted Mitchell J. Werth's custody guardian ad litem report, which recommended that it would be in the best interests of the children if Father had physical custody.

> custody arrangement be changed because of her impending move to -- to Texas. Okay.
>
> The evidence which was presented at trial with regard to the -- fitness of [Father] as a -- as a parent, basically the argument was that he was unfit because of a chronic cocaine habit. Other than that, no testimony was presented that he was an unfit parent. I know that both parents love their children and have cared well for the -- the children while in their -- in their respective custody.
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> So the issue at hand is the question of the hair -- hair sample testing for -- for cocaine. . . .
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> . . . .
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> . . . Okay, so on that basis, the court is leaving custody with [Father] because there have been -- there has not been a showing that there has been a significant change in circumstances to warrant changes or a change of custody from [Father to Mother].
>
> Okay, now, the court can see from what has transpired through this process, and it's not a pretty picture from both sides. And it doesn't appear that the parties will be able to work together and agree with regard to matters concerning the children. And, also, inasmuch as [Mother] will be moving to Texas and the children being here in Hawaii, the court will award sole legal and physical custody to [Father] with reasonable visitation to [Mother].

We therefore conclude that the family court applied the correct legal standard in modifying the divorce decree to award sole physical and legal custody to Father.

B. Whether There Was Substantial Evidence in the Record to Support the Family Court's FsOF

Mother attacks FsOF Nos. 5, 6, 12, 15, 16, 18, 39, 40, 41, 42, 43, 49, 51, and 58, as well as COL No. 4, which was based on the foregoing FsOF, on grounds that they are not supported by substantial evidence in the record.

We agree with Mother that FsOF Nos. 12 and 15 erroneously state that Father's hair sample was collected on

December 21, 1999 since the substantial evidence in the record indicates that Father's hair sample was collected on December 23, 1999. However, we conclude that the misstatements are harmless.

As to the other challenged FsOF and COL No. 4, Mother essentially contends that Judge Kochi erred in: (1) believing the testimony of Father's witnesses that the NMS cocaine test was faulty; (2) determining that "[t]here is nothing in the reports or evidence which indicate that [Father] is not a good father, did not take good care of the children while in his custody, [and] . . . did not provide a safe home environment or that he was unfit as a parent" when there was substantial evidence to the contrary; and (3) disregarding the substantial evidence in the record that the children thrived while under Mother's sole care and their best interests would be protected if Mother was awarded custody.

Mother is essentially asking this court to agree with her view of the credibility of the witnesses and to substitute this court's determination of the credibility of the witnesses for those of the family court. That is "not the province of [an] appellate court[.]" In re Doe, 95 Hawai‘i 183, 197, 20 P.3d 616, 630 (2001).

The record reveals that both Mother and Father provided substantial evidence to support their versions of the facts. According to Mother and Mother's witnesses, Father is a chronic cocaine user, who is deceitful, manipulative, controlling, aggressive, and unable to distinguish his needs

from the needs of the children. According to Father and Father's witnesses, Mother is a lying, manipulative, morally unfit, and irresponsible individual who has used her new husband's wealth to aggressively litigate the custody issue and make Father and the children's lives miserable.

The Hawai‘i Supreme Court has stated that the family court's FsOF

> are reviewed under the "clearly erroneous" standard . . . . Thus, the question on appeal is whether the record contains "substantial evidence" supporting the family court's determinations, and appellate review is thereby limited to assessing whether those determinations are supported by "credible evidence of sufficient quality and probative value." In this regard, the testimony of a single witness, if found by the trier of fact to have been credible, will suffice. Because it is not the province of the appellate court to reassess the credibility of the witnesses or the weight of the evidence, as determined by the family court, the family court "is given much leeway in its examinations of the reports concerning a child's care, custody, and welfare."

Id. at 196-97, 20 P.3d at 629-30 (2001) (citations and brackets omitted). Judge Kochi, in entering his FsOF and CsOL, carefully weighed the credibility of all the witnesses who testified during the trial below. His evaluations are entitled to considerable respect on appeal, and this court will not second guess his determinations of credibility.

C. Whether the Family Court Abused Its Discretion by Awarding Sole Physical and Legal Custody of the Children to Father

Mother contends that Judge Kochi abused his discretion when he concluded that the award of sole physical and legal custody of the children to Father was in the children's best interests. A family court's decision as to what custodial

arrangements are in the best interests of a child is a question of ultimate fact reviewable on appeal under the "clearly erroneous" standard. In re Doe, 89 Hawai'i 477, 487, 974 P.2d 1067, 1077 (App. 1999). The family court "is given much leeway in its examination of reports concerning a child's care, custody and welfare, and its conclusions, if supported by the record and not clearly erroneous, must stand on appeal." Id. (internal quotation mark and brackets omitted).

"A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." Id. (internal quotation marks omitted).

Mother claims that even if each of Judge Kochi's fifty-nine FsOF are "supported by substantial evidence in the record, when examined as a whole, the findings are not 'sufficiently comprehensive and pertinent to the issues of the case to form a basis for the conclusions of law,' and they fail to 'include sufficient subsidiary facts to disclose the steps by which the lower court reached its ultimate conclusions' on custody of the [c]hildren in light of the best interests standard[.]" (Internal brackets, ellipsis, and footnote omitted.) Additionally, Mother argues:

> Assuming arguendo that the record does contain sufficient evidence to support the court's specific findings and conclusions, the totality of the evidence presented

> supports a "definite and firm conviction that a mistake has been made." Doe[,] 89 Hawai'i at 487, 974 P.2d at 1077. "Uncontroverted reliable, probative, and substantial evidence," Sifagaloa v. Board of Trustees of the Employees' Retirement System, 74 Haw. 181, 194, 840 P.2d 367, 373 (1992), in the record demonstrates that Mother provided a safe, nurturing home and that the [c]hildren thrived in her care. Thus, the best interests standard set out in HRS § 571-46(1) and (6) requires that sole physical and legal custody of the [c]hildren be awarded to Mother.

(Internal brackets and ellipsis omitted.)

Mother is correct that the record demonstrates that she provided a safe, nurturing home to the children and that the children thrived in her care. Even Judge Kochi expressly recognized that she was a good parent. However, Judge Kochi concluded that Father could also provide a "safe home environment" and that the primary negative influence on the children was not one parent or the other, but rather the endless conflict between them.

Based on our review of the record, we cannot conclude that Judge Kochi's decision, that it was in the best interests of the children that Father continue to have sole physical and have sole legal custody of them, is clearly erroneous. Additionally, based on our review of the record, we are not left with "a definite and firm conviction that a mistake has been made" by the family court.

D. Whether the Law of the Case Doctrine and Principles of Judicial Restraint Were Violated

Relying on Wong v. City and County of Honolulu, 66 Haw. 389, 665 P.2d 157 (1983), Mother contends that Judge Kochi violated the law of the case doctrine and principles

of judicial restraint "by overruling Judge Warrington's ruling that Mother had demonstrated a material change in circumstances."

Judge Warrington's specific ruling was as follows:

> [T]he [c]ourt finds that due to [Mother's] regular and frequent visitation with the children since the entry of the [divorce decree], the fact of [Mother's] proposed relocation to Austin, Texas constitutes a material change in circumstances sufficient to warrant an investigation of the current custody and visitation arrangements to determine what custody and visitation arrangements, now and in the future, are in the best interests of the parties' two (2) children[.]

Judge Warrington merely ruled that Mother's proposed relocation was a material change in circumstances that warranted a reexamination of the custody issues. Although Judge Warrington subsequently suspended Father's time with the children pending the reexamination, she did not conclude that Mother's proposed move to Texas warranted a change in the custody of the children. Therefore, the law of the case doctrine and principles of judicial restraint are not implicated by Judge Kochi's subsequent ruling that Mother's "move to Texas . . . is not sufficient reason to change physical custody of the children[.]"

E. The Order Denying Mother's Motion for Reconsideration

Mother argues that the family court abused its discretion when it denied her motion for reconsideration of the family court's order denying Mother's Motion for Post-Decree Relief. In light of the discussion above, we conclude that there is no merit to this argument.

CONCLUSION

For the reasons discussed above, we affirm the Findings of Fact, Conclusions of Law and Order, filed on October 12, 2000, and the "Order Denying [Mother's] Motion for Reconsideration Filed on October 20, 2000," filed on November 16, 2000.

DATED: Honolulu, Hawai‘i, June 16, 2003.

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