

NOT FOR PUBLICATION

NO. 26701

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

DUSTIN P. MEUSE, Plaintiff-Appellant, v.
AMANDA D. TUCKER-MEUSE, nka AMANDA D. TUCKER
Defendant-Appellee

K HANAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-D NO. 00-1-0179)

SUMMARY DISPOSITION ORDER

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

Plaintiff-Appellant Dustin Meuse (Dustin) appeals from the following orders entered in the Family Court of the Second Circuit:¹ (1) the June 24, 2004 Order on Defendant's Motion for Post-Decree Relief Filed December 23, 200[3]; (2) the July 26, 2004 Amended Order on Defendant's Motion for Post-Decree Relief Filed December 23, 2003; (3) June 24, 2004 Order on Plaintiff's Motion for Post-Decree Relief Filed January 28, 2004; and (4) the July 26, 2004 Order Denying Motion for Reconsideration and/or Further Hearing.

Dustin and Defendant-Appellee Amanda D. Tucker-Meuse (Amanda) were married on December 12, 1993. Their daughter was born on October 30, 1996. Their son was born on February 20, 1998. On April 14, 2000, Dustin filed a complaint for divorce. The Divorce Decree was entered on March 20, 2002, and stated, in relevant part:

¹

Judge Eric G. Romanchak presided.

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4. Custody and Timesharing. The parties shall be awarded joint legal custody of the minor children and [Mother] be awarded physical custody of the minor children, subject to [Father's] timesharing rights as set forth below.

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The parties shall also protect the minor children from disputes arising from the parties' divorce and other issues between the parties. In this regard, the parties shall adhere to the following:

(1) Neither parent shall engage in, . . . any criticism, disparagement, insults, or other "bad-mouthing" of the other parent . . . in the presence or hearing of the minor children. This prohibition shall apply even to information that is truthful and accurate.

(2) Neither parent shall fight (verbally or physically) in person or by telephone with the other parent in the presence or hearing of the minor children.

(3) Neither parent shall align or attempt to align the minor children against the other parent Neither parent shall directly or indirectly ask the minor children to choose between parents, to choose to reside with one parent instead of the other, or to choose one household over the other household.

(4) Neither parent shall ask the minor children to pass orders or instructions or uncomplimentary messages to the other parent (orally or in writing). Complimentary messages shall be allowed and encouraged.

(5) Neither parent shall ask the minor children to "keep secrets from" the other parent or ask or encourage the minor children to lie to the other parent about events or persons the children experienced during a visit with the other parent, grand-parent or relative.

(6) Neither parent shall ask the minor children to "spy on" the other parent or the other parent's lifestyle or household or ask any detailed "probing" questions about the other parent or lifestyle or household of the other parent.

(7) Both parents shall encourage a positive parent-child relationship between the minor children and both parents and not say or do anything (including "grimace" or put on a "long face") to adversely affect the minor children's love for the other parent.

(8) Neither parent shall interfere with the parent-child relationship with the other parent and neither parent shall conceal the minor children from the other parent during the other parent's period of responsibility for the children.

As joint legal custodians, the parties shall confer on major decisions affecting the children, including but not limited to their elementary and secondary education, their higher education, major medical or dental care required by either one of them, their school and afterschool activities of note,

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Each party shall consult with the other party and give great deference to the other party's wishes and opinions with respect to all major decisions affecting the children. The parties shall also communicate openly and freely with each other regarding the children and those matters which affect the children's well-being.

On April 9, 2003, the court entered a Stipulated Order Appointing Guardian Ad Litem (GAL) appointing Jacque Ford, Ph.D., as GAL for the children. From time to time, the GAL made modifications to the timesharing schedule set forth in the Divorce Decree.

On December 23, 2003, Amanda filed a motion requesting sole legal custody of the children and permission to relocate to the mainland with the children because it was in the best interests of the children. Amanda is an anesthesiologist. She planned to relocate with the children to Aspen, Colorado.

On January 28, 2004, Dustin filed a motion requesting (1) reinstatement of the specific custody and time sharing agreement contained in the divorce decree, (2) an order for a social study, and (3) an order dissolving the order appointing Jacque Ford as the GAL.

The GAL filed two reports, one on May 1, 2004, and the other on July 7, 2004. Both were in favor of Amanda's December 23, 2003 motion.

On June 24, 2004, after hearings, the family court entered an Order on Defendant's Motion for Post-Decree Relief Filed December 23, 200[3], awarding Amanda sole legal and physical custody of the children, authorizing Amanda to relocate to the mainland with the children after August 13, 2004, and

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specifying Dustin's rights of visitation with the children upon their relocation to the mainland.

Also on June 24, 2004, the court entered an Order on Plaintiff's Motion for Post-Decree Relief Filed January 28, 2004, denying Dustin's January 28, 2004 motion.

On July 26, 2004, the court entered an Amended Order on Defendant's Motion for Post-Decree Relief Filed December 23, 2003. This amended order did not change the substance of the June 24, 2004 order.

On July 6, 2004, Dustin filed a Motion for Reconsideration and/or Further Hearing. On July 19, 2004, Dustin filed a notice of appeal. On July 26, 2004, the court entered an order denying Dustin's July 6, 2004 motion.

On October 27, 2004, the court entered the Findings of Fact and Conclusions of Law (FsOF and CsOL). COL no. 2 states that "Considering the totality of the circumstances of this case, it is in the children's best interests that [Amanda] be permitted to relocate with the minor children to Aspen, Colorado."

This appeal was assigned to this court on March 23, 2005.

Precedent and Hawaii Revised Statutes § 571-46 (Supp. 2004) specify that the court may change its child(ren) custody/visitation order when (1) there has been a material change in circumstances, and (2) the party seeking the change of the court's child(ren) custody/visitation order proves that the change is for the best interests of the child(ren). Dustin

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contends that there is no evidence (1) of a material change in circumstances or (2) that such a change is for the best interests of the children.

We agree with the family court that evidence of circumstances existing before the 2002 Divorce Decree was irrelevant. As noted above, the Divorce Decree specified what the parties were required to do and not do for the best interests of the children. The reasonable expectation was that the parties would comply with these orders. Their failure to do so was a material change in circumstance that authorized and necessitated a change of the custody/visitation orders.

The GAL decided that the requested relocation was for the best interests of the children. The court agreed with the GAL. We conclude that the record and the evidence support the court's decision. We disagree with Dustin's conclusion that the family court shifted the burden of proof to him.

Therefore, 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 that the following are affirmed:
(1) the June 24, 2004 Order on Defendant's Motion for Post-Decree Relief Filed December 23, 2003; (2) the July 26, 2004 Amended Order on Defendant's Motion for Post-Decree Relief Filed December 23, 2003; (3) the June 24, 2004 Order on Plaintiff's

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Motion for Post-Decree Relief Filed January 28, 2004; and
(4) the July 26, 2004 Order Denying Motion for Reconsideration
and/or Further Hearing.

DATED: Honolulu, Hawai'i, March 3, 2006.

On the briefs:

Peter Van Name Esser
for Plaintiff-Appellant.

Elizabeth C Melehan
for Defendant-Appellee.


Chief Judge


Associate Judge


Associate Judge