

NO. 27524

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

HEE JUNG TERRY, nka HEE JUNG KAKAZU,
Plaintiff-Appellee,

v.

CURTIS JEROME TERRY, JR.,
Defendant-Appellant

EMILIANO
OF THE
APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 01-1-3315)

SUMMARY DISPOSITION ORDER

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

Curtis Jerome Terry, Jr. (Father) appeals from the July 19, 2005 "Order Regarding Short Trial on Plaintiff's Motion for Post-Decree Relief Filed February 3, 2005" (July 19, 2005 Order) and the August 29, 2005 "Order Denying Without Hearing Defendant's Motion for Reconsideration Filed August 29, 2005" (August 29, 2005 Order). Both orders were entered by Judge Nancy Ryan.

Father and Hee Jung Terry, now known as Hee Jung Kakazu (Mother), were married on May 15, 1995, and have two sons (the Children), one born on December 28, 1995, and the other born on February 7, 1998.

On October 1, 2001, Mother filed a Complaint for Divorce. On December 31, 2001, pursuant to the agreement of the parties, Judge William J. Nagle, III entered a Divorce Decree that, in part, ordered Father to pay Mother spousal support of

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\$500 per month for twenty-four months, awarded the parties joint legal custody of the Children, awarded physical custody of the Children to Father subject to Mother's rights of reasonable visitation, and ordered Mother to pay Father child support in the amount of \$50 per child per month.

In October 2001, Father sent the Children to live with his mother (Paternal Grandmother) in Lynchburg, Virginia. In September 2003, Father moved from Hawai'i to Falls Church, Virginia. The Children continued to live with Paternal Grandmother. The Findings of Fact (FsOF) and Conclusions of Law entered on November 18, 2005, state in part:

FINDINGS OF FACT

16. The [C]hildren lived with [P]aternal [G]randmother in Lynchburg, Virginia from 2001 until they returned to Hawaii to live with Mother in June 2004. The [C]hildren did not live with Father during this three (3) year time period.

17. On June 15, 2004, Father brought the [C]hildren to Mother in Hawaii. The [C]hildren arrived in Hawaii with all of their personal possessions, clothing and belongings which were packed by [P]aternal [G]randmother.

18. Since June 15, 2004 until the present, Mother has been the [C]hildren's primary caretaker and the [C]hildren have been in Mother's physical custody.

19. Since June 15, 2004, the [C]hildren have lived with Mother, her husband and his parents in a five (5) bedroom home in Mililani, Hawaii.

Although Father challenges all four of these FsOF, the only specific disagreement he states pertains to the failure of FOF no. 16 to recognize that the Children lived with Father for "a little over one (1) week prior to [the Children's] relocation to Hawaii on 15 June 2004[.]"

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On February 3, 2005, Mother filed a Motion and Affidavit for Post-Decree Relief (February 3, 2005 Motion), requesting sole legal and physical custody of the Children, subject to Father's right of reasonable visitation.

On March 2, 2005, after a hearing, Judge R. Mark Browning entered an "Order Re: Plaintiff's Motion For Post Decree Relief Filed 2/3/05" which awarded temporary physical custody of the Children to Mother, continued the hearing to May 18, 2005, and reserved the issue of child support.

On May 13, 2005, in opposition to Mother's February 3, 2005 Motion, Father filed a declaration stating in part:

29. I left [the Children] in [Paternal Grandmother's] care in Lynchburg because I simply did not have the time or the money to adequately care for their needs. As the Court can imagine, going to school full time and working full time does not leave much time for raising children and in light of my then existing alimony obligation . . . I was not earning enough money as a security guard to provide for both myself and [the Children].

. . . .

33. In March of 2004[,] I graduated from the American Military University with a bachelor's degree . . . in international relations.

[34.] In May of 2004, I began my employment with Booz Allen Hamilton, a firm that provides consulting services with regard to intelligence, counter-intelligence, and terrorism.

On May 18, 2005, pursuant to Hawaii Revised Statutes § 571-45 (1993) and the agreement of the parties, Judge Nancy Ryan appointed Carolene Neely, MSW, M.D., as Custody Evaluator. On July 1, 2005, Dr. Neely filed a report recommending that Mother be awarded the sole physical custody of the Children.

After a trial on July 8, 2005, the July 19, 2005 Order (a) awarded the parties, pursuant to their agreement, joint legal

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custody of the Children; (b) awarded sole physical custody of the Children to Mother; (c) awarded Father "visitation every Summer break, Christmas break and Spring break. Visitation to commence the day after the last day of school and the [C]hildren to be returned no later than two (2) days before school resumes"; (d) ordered that

[Mother] shall pay for one-half of each child's airfare for Christmas, Summer and Spring break visitation with [Father] which shall be equal to the cost of the most direct flight, coach class. An adult escort shall be provided to the [C]hildren's travel for visitation and both parents are to split the cost equally. If there is no agreement on who is to accompany the [C]hildren, the parent who is sending the [C]hildren on the flight must accompany them[;]

and (e) ordered Father to pay child support of \$670 per child per month.

The August 29, 2005 Order denied Father's July 29, 2005 motion for reconsideration.

Father filed a notice of appeal on September 28, 2005. This appeal was assigned to this court on June 20, 2006.

A.

PHYSICAL CUSTODY OF THE CHILDREN

Father offers various reasons in support of his view that the family court abused its discretion in awarding physical custody of the Children to Mother. In general, those reasons are as follows:

1. Father has indicated his willingness to "support the other parent's positive and continued involvement" with the Children while Mother has not.

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2. Mother is not proficient in the English language and is unable to help the Children with their schooling.

3. The quality of the school in Falls Church, Virginia, is better in than the school in Mililani, Hawai'i, and the students in the Virginia school are more proficient in English and math than the students in the Hawai'i school.

4. "While Hawaii may have Virginia 'beat' in the weather department, Virginia wins the proverbial prize for having all of those things that can help to better educate and stimulate [the Children's] desire to learn."

5. "[T]he cultural and ethnic diversity that [the Children] would be exposed to by living in the greater Washington, D.C. area" would be greater than in Hawai'i.

6. The family court "limited its consideration of [the Children's] educational and other needs to the present and entirely disregarded their long-term interests."

7. Father states that

he was the parent who left [the Children] with [Paternal Grandmother] so that he could work full time and otherwise obtain that college degree that would enable him to earn a greater income, which greater income would obviously work to the benefit of [the Children], while on the other hand, [Mother] has done nothing to improve her financial circumstance except become wholly, financially dependent on someone else[.]

8. Father further argues,

If you wanted your children to be a "success in life," would you have them raised by someone who has done nothing to improve her circumstance except for becoming wholly dependent on another, or would you have them raised by someone who dearly loves the [C]hildren but was willing to part with their daily care, companionship and nurture for a time so that he could obtain that college degree that would allow him to obtain that employment which would and will secure ensure [sic] that they have the quality of life that not only these children, but all children, deserve?

9. Father is truly independent while Mother is wholly dependent.

10. "[Q]uality is just as important as quantity, and in terms of quality, [Father] can simply provide [the Children] with just that much more."

11. "[Father] is simply left to wonder whether he lost custody of [the Children] simply because some still believe, consciously or otherwise, that mothers make better parents than fathers."

B.

CHILD SUPPORT

Father argues that the court-ordered child support exceeds the "children's reasonable needs at the appropriate standard of living", and a "deviation from the child support guidelines is warranted." In his view, the award "constitute[s] the imposition of an unauthorized obligation." He alleges that Mother has no housing expense because she and her husband live with her husband's parents in their fully-paid home, and asserts that Mother "should find suitable employment wherein she could presumably make more than the minimum wage monthly income that she is willing to impute to herself."

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,

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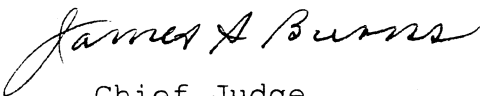
IT IS HEREBY ORDERED that the July 19, 2005 "Order Regarding Short Trial on Plaintiff's Motion for Post-Decree Relief Filed February 3, 2005" and the August 29, 2005 "Order Denying Without Hearing Defendant's Motion for Reconsideration filed August 29, 2005" are affirmed.

DATED: Honolulu, Hawai'i, September 11, 2006.

On the briefs:

Lynnae Lee,
Paul D. Hicks, and
Curtis Kam
(Lynnae Lee & Associates)
for Defendant-Appellant.

Stacy R. Miyatake
(Doi Luke & Miyatake) and
Emlyn H. Higa
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge