

Kumangai v. Decherong, 13 ROP 275 (Tr. Div. 2006)
PAULEEN KUMANGAI,
Plaintiff,

v.

GUNAGAND SEMDIU DECHERONG,
Defendant.

CP/CIVIL ACTION NO. 05-139

Supreme Court, Trial Division
Republic of Palau

Decided: June 21, 2006

KATHLEEN M. SALII, Associate Justice:

Plaintiff filed this action for custody and support seeking orders awarding her joint legal custody and sole physical custody of the parties' twin sons, Ethen Delekuu and Ezra Tulop Decherong. She also seeks support for the twins, either in-kind or in the amount of \$200.00 bi-weekly, from Defendant. Defendant filed an answer and counterclaim, in which he seeks sole custody of the twins. Trial lasted six days over a two-month period. Based on the evidence presented, the following findings of fact and conclusions of law constitute the Court's decision.

1276 FACTUAL FINDINGS

Plaintiff and Defendant began dating when they were both still living in Guam and within the first year of their relationship, Plaintiff became pregnant. From the outset, the parties were both nervous and excited at becoming parents, and even more so when they learned they were having twins. In Guam, Defendant was very involved with Plaintiff's prenatal care and accompanied her to prenatal clinics whenever he could. He looked after the needs of the Plaintiff and the unborn twins. Defendant accepted a job in Palau, and the parties agreed to relocate before the birth of the twins. They also agreed that Defendant would take care of the expenses associated with moving from Guam to Palau.

The parties moved to Palau within a month of the birth of the twins. At first, they lived with Defendant's relatives in Ngerbeched and later moved into their own apartment in Medalaii, paid for by Defendant. The twins were born on November 29, 2002, with relatives of both parties in attendance. When the twins were born, they were diagnosed with a medical condition that required several operations, two of them here in Palau and one of them in Hawaii. The most recent, mostly cosmetic, procedure was done in May 2006.

The parties lived together as a family until Plaintiff moved out in October 2004. While they were living together, Defendant worked and provided income for the family. Plaintiff stayed home during that time and was primarily responsible for cleaning the house, cooking

Kumangai v. Decherong, 13 ROP 275 (Tr. Div. 2006)

meals, and caring for the twins. This is not to say that Defendant did not spend time with the twins; indeed, much of Defendant's time when he was away from work was with the twins. He took an active role in helping to feed and bathe the twins, and he did household chores so that Plaintiff could concentrate on the newborns.

The couple also received help from various family members, particularly when the twins were first born. Plaintiff's mother was in Guam when the twins were born, so Plaintiff's aunt, Edith, and Defendant's mother, Erica, were the two relatives who provided the most help to the couple with caring for twin newborn boys. They helped bathe and feed the babies and took turns watching them. They also helped with general household chores including laundry and kitchen duty. During this time, as Defendant was starting his new job and the parties were adjusting to life in a new environment with their newborns, the help from their respective family members was welcomed by both.

When Plaintiff first moved out "for good" in October 2004, she continued to stay with the twins at Defendant's apartment during the days while he worked. Defendant's mother and cousin also helped watch the twins. Eventually, this visitation schedule became a problem when Plaintiff started working and when Defendant began dating his current wife, Lolita. Plaintiff felt uncomfortable with her visits at the apartment because one of Defendant's relatives was always present. Over time, she was also advised to ask Defendant before taking the twins out of the house.

Defendant, for his part, also felt uncomfortable having Plaintiff continue to come to the apartment to visit the twins, particularly when his relationship with Lolita became more serious and she moved in to the apartment. Plaintiff, in Defendant's opinion, was continually disrespectful and intrusive; on at least one occasion, she took it upon herself L277 to look through Defendant's cupboards, making a list of items she felt needed to be purchased, and she also looked in the bedroom closet asking about Lolita's clothes that were hanging, despite the fact that she (Plaintiff) and Defendant were no longer in a relationship. It was for these reasons that the parties arranged scheduled visitation hours. When Plaintiff first moved out, she was able to go to the apartment to visit the twins with very little restrictions. When both parties felt uncomfortable with Plaintiff seeing the twins at the apartment, the previously unrestricted visitation schedule was revised. The current visitation schedule allows Plaintiff to see the boys for four hours on Tuesdays and Thursdays and all day on Saturdays. She does not, however, get to have them for any overnight visits. Each party testified that the other's proposed visitation schedule was not reasonable. It is undisputed, however, that the boys have spent nights either with Defendant's mother or one of his sisters.

Without reciting too many incidents, the evidence is that while the parties do love their sons, there is a discernible lack of communication and perhaps lack of respect between the parties. Even the relatives who helped out with the newborns observed the absence of affection between the two people; the couple disagreed about many things, some of which were inconsequential, and the couple even argued when others were around. Defendant's mother witnessed several incidents in which Plaintiff's anger towards Defendant seemed out of context with the situation. Defendant's aunt testified that Plaintiff did not seem too concerned with the welfare of the twins, and recited at least one occasion after Plaintiff moved out where Plaintiff

Kumangai v. Decherong, 13 ROP 275 (Tr. Div. 2006)

returned the twins with soiled diapers and once when she left them to walk down the stairs on their own. Plaintiff's aunt and cousin testified that while Defendant is a loving father, he is overprotective and does not seem to think that anything Plaintiff does is right. Plaintiff's aunt recited to one particular incident where the twins had been fed but were still fussy and would not sleep, so she had one of them in her lap and was trying to put him to sleep. The baby had a pacifier in his mouth, and when Defendant saw this, he walked over and angrily pulled the pacifier out of baby's mouth, saying that Plaintiff knows that pacifiers are not good for the babies. He and Plaintiff ended up in an argument that night about the use of pacifiers and other child-rearing issues.

The testimony at trial suggests that neither party is without fault in raising the twins or creating objectionable situations. Plaintiff once left the apartment in anger around 9:00 p.m. and did not return until the next morning even though the twins' schedule had them breast-feeding every two hours. Defendant and his mother took turns feeding the twins with bottles until Plaintiff returned. In addition, she has thrown objects at Defendant and has also shoved and punched him on more than one occasion. She goads Defendant into arguments and rarely has anything positive to say. Defendant, for his part, has also gotten violent with Plaintiff, shoving or choking her, throwing a paddle and breaking it, throwing a knife towards her, reversing the car while she was still partly in the car, has grabbed one of the boys out of her arms during an argument, and has shoved a phone against her chin hard enough to leave a mark. He has shown little consideration for her opinions.

The parties' disagreements followed them off-island when the boys had to undergo surgery in May of 2005. In Hawaii, they had an argument while getting the twins ready to go to the zoo, which escalated into a physical fight for which the police were called and 1278 Plaintiff was eventually taken into custody. Despite this fight, Defendant nevertheless brought the twins to spend Mother's Day with Plaintiff at her aunt's house in Hawaii. Because Defendant would not let her see the twins before their return to Palau, however, Plaintiff ended up walking to the airport to see the twins before they got on the plane. She returned to Palau a week later.

Back in Palau, the parties continued to have the boys spend three days a week with Plaintiff, but never with overnight visits. The rest of the twins' time was spent with Defendant. When Defendant could not be with the boys, either his mother or another relative would babysit. He has never asked Plaintiff to watch the boys. Each parent accused the other of not following the agreed-upon visitation schedule, or of not informing the other relating to the twins' health or any medications they needed to take.

When the twins went to the hospital this past May for their latest procedure, Plaintiff, Defendant, and his wife were all in attendance. The testimony reveals that this was an extremely emotional experience for all, especially when the twins were taken in for surgery; Defendant escorted one twin into the operating room and Plaintiff escorted the other. The twins had to spend three nights in the hospital. Although Plaintiff expressed her desire to sleep with the twins while they were admitted and Defendant did not deny this request outright, she never did sleep with the twins in the hospital because when she would arrive in the evenings, Defendant would be sleeping with one of the boys in one bed and his wife would be sleeping with the other twin in

Kumangai v. Decherong, 13 ROP 275 (Tr. Div. 2006)

the other bed. Plaintiff did not feel comfortable sleeping in the same room with Defendant, his wife, and the twins under those circumstances. When the twins were discharged and Plaintiff told them that she would see them later that day since it was on one of the scheduled days for her visitation, Defendant told her he did not think it was a good idea to move the twins around too much since they had catheters and too much movement would make them uncomfortable. Yet, Plaintiff had experience watching the twins following surgeries and dealing with catheters since she has been with them throughout their previous treatments. Despite Defendant's concern for the twins' comfort, however, this did not prevent him from taking the twins for a visit at his sister's house. It was also during this time that Defendant made no effort to have the twins either call or spend time with Plaintiff on Mother's Day.

Plaintiff, 24 years old at the time of trial, has a high school diploma and currently works at Medalaii Head Start making approximately \$181.00 every two weeks, with a take-home pay of \$58.00 after deductions for taxes, utilities, and household expenses. She lives with her mother, brother, and her niece, in a one and one-half bedroom house in Ngerbeched, although there was testimony about plans to build a 4-bedroom house some time in the near future.

Defendant remarried in December of 2005, and he continues to reside in the Medalaii apartment with the twins and his new wife. Defendant, 32 years old at the time of trial, has a Masters in Business Administration and currently earns approximately \$38,500 a year as the Executive Commissioner of the Financial Institutions Commission, while his wife earns approximately \$23,000 a year as Director of Koror State's Planning and Zoning Commission. Their combined annual household income is therefore approximately \$61,500. There is no dispute that Defendant's wife is willing and able to help Defendant provide for the twins and that she and the 1279 twins have formed a loving relationship. The twins have even taking to calling Lolita "mommy" and, as Defendant testified, his wife is "a second loving mother to the twins."

ANALYSIS

Palau's statutes governing orders for custody and child support are set forth in 21 PNC, Domestic Relations, Chapter 3, Annulment and Divorce. Section 302 directs the court to make such orders for custody as part of either annulment or divorce proceedings as may be deemed just and in the best interest of all the concerned parties. Section 335 requires payment of support to a child of a marriage under 18 years of age, and a biological parent shall provide support for a child under 18 years of age unless the child is adopted legally or in accordance with established custom.

Because there is no Palauan statute setting forth factors for consideration in determining an award of child custody, the common law applies. 1 PNC § 303; *accord Renguul v. Airai State Public Lands Authority*, 8 ROP Intrm. 282, 284 (2001). Although the parties were never married, it is fitting to look to issues of custody as part of divorce or separation proceedings. The general rule in the United States is that matters of child custody rest within the sound discretion of courts. *See* 24A Am. Jur. 2d *Divorce and Separation* § 929 (1998). In exercising discretion, there is an array of considerations which the court looks at in determining custody issues. These include the wishes of the parents; the wishes of the child; interaction and interrelationship of the child with his parents, siblings, and other persons who may significantly affect the child's best

Kumangai v. Decherong, 13 ROP 275 (Tr. Div. 2006)

interests; adjustment to home, school, community; and the mental and physical health of all individuals involved.

One option is to award joint custody, which allows parents to have an equal voice in making decisions and recognizes the advantages of shared responsibility for raising children. Such an award is proper where the arrangement is in the best interest of the child and where both parents are fit and proper persons to be awarded custody. *Id.* § 940. In this case, the court finds that both parents are fit and proper persons to be awarded custody. Although both parents presented evidence denigrating the other's parenting abilities,¹ the Court finds that each parent loves the twins and wants only the best for them. It is also obvious that neither parent questions each other's love for the twins. In addition, each parent has stable work and familial environments that are conducive to raising a child. Nevertheless, joint custody is not in the best interest of the twins.

At least one commentator has identified two critical criteria that should exist before a court awards joint custody. First, the parties should agree to joint custody, and second, the parties must have a mutual ability to cooperate in reaching shared decisions in the matters of their children. Vitauts Gulbis, Annotation, *Propriety of Awarding Joint Custody of Children*, 17 A.L.R. 4th 1013, 1016 (1982). With respect to the first criterion, the parties have expressed a willingness to share custody. More importantly, however, the parties' background does not reveal a unified decision-making foundation. In fact, the parties' problems have stemmed from their differences with respect to how their children are raised.

¶280 Almost from the beginning of their relationship, the parties had differing points of view, which differences were perhaps only exacerbated by a combination of factors, including not only the high-risk pregnancy and the move to Palau before the arrival of the twins, but also perhaps added to by the stress from adjusting to a different environment, particularly for Plaintiff, who had never lived in Palau. The couple's poor communication skills only intensified when the twins were born, and their differences pervade every aspect of child-rearing, whether on proper nutrition and vitamins, medical treatment, education, religion, discipline, or entertainment.

The lack of cooperation has surfaced on numerous occasions, as evidenced by the violent arguments between the two parties. In addition, there are several incidents and circumstances that stand out as indicators of the parties' inability to set aside their differences when it comes to the welfare of their children. One episode relates to their celebration of the twins' third birthday in 2005. At that point in time, the parties had been living apart for over one year. On the actual date of their birth, which fell on a Thursday, Plaintiff planned a dinner at her house and invited Defendant to stop by and get some food. He declined, but did arrive on time to pick them up and did not allow them time to open all their gifts. Later that weekend, Defendant and his wife had a birthday party for the twins at a local resort. The guest list primarily included Defendant's family and friends. Plaintiff was not invited to the party and only learned of it from another person.

¹ For example, Plaintiff testified that Defendant is too rigid and controlling and Defendant argued that Plaintiff is an inattentive parent who is concerned more for her needs and wants rather than those of the twins.

Kumangai v. Decherong, 13 ROP 275 (Tr. Div. 2006)

A second incident relates to the parties difficulty in expressing their concerns or desires for the twins' welfare to each other. As of the last day of trial, Defendant still could not communicate why he was so hesitant to let the twins spend one night with their mother. If there were serious concerns with her ability to take care of the twins, this trial was the time to make such concerns known to the Court.

A third indicator relates to the present care-taking responsibilities of the twins. Since Plaintiff moved out of their apartment, Defendant has replaced Plaintiff with a number of people to help him watch his sons while he works—namely, his mother, aunts, sisters, nieces, and wife. Noticeably absent from this group of caregivers is Plaintiff, who has continued to be willing, and able, to watch her sons while Defendant was at work. The evidence indicates that Plaintiff would be the last person Defendant would consider watching the twins when he is not able to do so.

Jurisdictions that have not awarded joint custody made such determinations when it became evident that the parties have serious differences regarding any child-rearing issues, where these differences may have been a significant contributing factor which resulted in the parties' separation, and where there is no indication that these differences will abate as a result of any custody orders entered by the court. In this case, the Court is of the opinion that joint custody is not feasible at this time. The acrimonious relationship between the parties, evident during the trial, certainly cannot be said to be in the twins' best interest, neither can it be in their best interest to be subjected to the continued sense of hostility between their parents which has been present even before the parties separated.

Another option would have each parent have primary physical custody of one twin. Although some courts have permitted separation of siblings in certain 1281 circumstances, nearly all courts state that it is in the best interest of the children to keep the siblings in the same household. See Annotation, *Propriety of Separating Children by Awarding Custody to Different Parents*, 98 A.L.R. 2d 926, 928 (1964) (citing two cases that separated siblings even though the cases stated that ordinarily siblings should stay in the same household). This Court agrees that siblings should be raised in the same household in most cases so that the children may share their lives together as brothers and sisters. Such a preference is even more important in the context of twins, and therefore, an award of custody of one twin to each parent is unjustified.

The remaining option is to award custody to one parent. In the United States, when joint custody is not feasible, the law generally presumes that the best interests of young children is best served by placing them in the custody of the parent who has been the primary caretaker. However, where the court is unable to establish that one parent has clearly taken the primary responsibility for caring and nurturing duties, neither parent shall have that presumption. In this case, both parents were caretakers when the parties lived together, although it is clear that Plaintiff was the primary caretaker for the first nearly two years of the twins' lives since she stayed at home. Since Plaintiff left, however, Defendant claims to have taken over this role, primarily by replacing Plaintiff with a number of people to help him watch his sons while he works—namely, his mother, aunts, sisters, nieces, and wife. This causes the Court some

Kumangai v. Decherong, 13 ROP 275 (Tr. Div. 2006)

concern, as it would seem appropriate for the father to have the mother take care of their children when he was at work and she was available. Because both parents have been primary caretakers of the twins, neither receives the presumption that he or she should be awarded custody of the twins. Nevertheless, Defendant's action of having his family take care of the twins, instead of having Plaintiff watch them when she was not working, and the lack of evidence that Plaintiff is not fit to watch the twins, raises a question of his judgment. This weighs in favor of awarding custody to Plaintiff.

The Court accepts Plaintiff's testimony as credible. Plaintiff testified that she wanted to be able to show she could support both herself and the twins before seeking custody, and this she has done. She first took a night job so that she could be with the twins during the days while Defendant was working. She then successfully applied for a position at the Head Start in the neighborhood where the twins live so that she could be closer to them. She has made plans to build a bigger house. She has essentially taken steps that Defendant feels are important in order for her to be able to spend more time with the twins than she currently has under the visitation schedule. She also enjoys a civil relationship with Defendant's wife, testifying that she probably talked more to his wife than to Defendant, who simply disregards her even while she is talking to him. In short, Plaintiff has shown that she is able to be more flexible than Defendant with respect to the children's interest and when it comes to allowing for changes in their lives.

Defendant's convictions on raising good, productive children is to be commended. Children need to learn and appreciate structure and discipline in their lives. Yet, children also need to learn flexibility and compassion as well. Defendant testified that Plaintiff is still very young, is inattentive to the twins, and is not able to provide as much as he can for the twins given her current employment and living situation. He also testified that he feels it is important for Plaintiff to have her own place in a stable 1282 home environment where she can establish her own rules so that the twins are not confused when they visit her. Is Plaintiff a young mother with perhaps much to learn about child-rearing, patience, humility, attentiveness, and compassion? Perhaps. But the issue of raising children differs with each individual, and even if the Court did not necessarily agree with some of the beliefs of either party, that is not to say that Plaintiff is such a terrible person or has been shown to be unfit to raise her own children. Maybe Plaintiff *should* show more concern when one of the twins falls off furniture; maybe she *should* take more care with their eating and cleaning habits; maybe her idea of discipline for the twins is not age-appropriate. However, there has been no evidence presented to show that the welfare of the twins is in jeopardy whenever they spend time with their mother. Certainly there has been no evidence that when the twins spend time with Defendant's relatives or share a common babysitter or spend time at one of Defendant's relatives' house, they become confused; neither has there been any evidence that the twins' spending time with Plaintiff causes them confusion. Why would the situation be any different were the twins to be in Plaintiff's custody? The Court therefore finds no evidence that Plaintiff's current home environment, where she lives with her family, is not a good environment to raise children. Neither has Defendant convinced the Court that Plaintiff is either unwilling or unable, or unfit, to nurture the twins and to ease any fears or confusion.

The Court also takes into consideration the testimony of Defendant and his wife that the

Kumangai v. Decherong, 13 ROP 275 (Tr. Div. 2006)

twins have bonded with Lolita, and that Lolita is “a second loving mother to the twins.” The Court is reassured to know that Defendant’s wife and kids have a good relationship. All too often, step-parents and children do not harmonize well together, and this causes increased stress on every part of the family. The fact that Lolita and the twins have bonded does not convince the Court that this relationship takes anything away from the bond between the twins and their natural mother.

Plaintiff walked away from Defendant and their volatile relationship. That is not to say, however, that she abandoned her children. The evidence clearly shows that when she left the Medalaii apartment on October 1, 2004, and contrary to Defendant’s testimony, she did not choose to leave voluntarily. She left an unhappy relationship in which the violence escalated with each argument. Neither party was getting the respect from the other, and each was unhappy. Instead of staying in an unhealthy environment, for her sake as well as for the children, she left Defendant. However, Defendant’s evidence is not enough to convince the Court that Plaintiff abandoned her sons or that she is not a good mother.

Defendant has strong convictions when it comes to child-rearing, and this is a trait which, in a perfect world, every parent should possess, wanting only the best for their children. However, when such convictions leave little or no room for flexibility with respect to differing schedules of either the mother or the twins, or to allow room for mistakes to be made, this becomes a concern. The Court is hopeful that all the parties herein will continue to use their best efforts to promote a nurturing environment for these two young boys, who are so fortunate to be loved by so many people. Thus, while the court finds it appropriate to award custody to Plaintiff with reasonable visitation to Defendant, there is certainly no reason why custody cannot be revisited and modified to one of joint custody upon a showing of good **1283** cause for any such modification.

CONCLUSION

For all the reasons discussed above, the Court awards custody of the parties’ minor sons, Ethen and Ezra Decherong, to Plaintiff, with reasonable visitation to Defendant. The parties shall take steps to ensure a relatively smooth custody transition from Defendant to Plaintiff, and Defendant shall deliver the twins to Plaintiff on June 30, 2006, at Plaintiff’s residence. The parties shall also submit a proposed visitation schedule for the Court’s review and information within the same time frame. The Court retains jurisdiction over this case until further orders. A separate judgment in accordance herewith will be filed.