NO. 23622

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

FARRIS ODEH, Plaintiff-Appellant, v.
OLGA ODEH, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-D NO. 97-0365)

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

Plaintiff-Appellant Farris Odeh (Father or Plaintiff) appeals from the June 27, 2000 "Order on Defendant's Motion for Post-Decree Relief Filed 4/18/00 and Plaintiff's Motion for Post-Decree Relief Filed 5/25/00" (June 27, 2000 Order) entered in the Family Court of the Second Circuit by District Family Judge Eric G. Romanchak. We affirm.

BACKGROUND

Father and Defendant-Appellee Olga Odeh (Mother or Defendant) were married on May 21, 1993. Their daughter was born on July 8, 1995. Father filed a complaint for divorce on August 6, 1997.

On February 4, 1998, the family court entered its "Order Following January 15, 16, 23, and 29, 1998 Trial Regarding Child Custody, Access and Family Support" (February 4, 1998 Order) stating, in relevant part, as follows:

> 1. The parties are awarded joint legal custody and shared physical custody of the minor child, [Daughter]. As long as both parties remain on Maui, they shall share the responsibility of the

> care of the minor child on an equal basis with equal access time. Every other week, starting on February 4, 1998, Plaintiff shall have the care[,] custody and control of the minor child from Wednesday at 5:00 pm until Sunday at 9:00 am. On alternating weeks, Plaintiff shall have the care, custody and control of the minor child from Thursday at 9:00 am until Sunday at 5:00 pm. The Defendant shall have the remaining time with the minor child. The parent receiving the minor child shall be responsible for picking up the minor child and transporting her. . . .
>
> 2. Neither party shall remove the minor child from the island of Maui without the prior written consent of the other party. . . .
>
> . . . .
>
> 4. If either parent moves off the island of Maui, the parties may agree in writing to a new access schedule. If they are unable to agree on [a] new access schedule, they must seek further order of this Court.
>
> . . . .
>
> 14. If any modification of this parenting schedule such as out of state travel, vacations or a permanent move to another jurisdiction, the parties shall first attempt to come to an agreement between themselves. If the parties are unable to come to an agreement they must then attempt to resolve the issue through mediation. If the parties are unable to come to an agreement using mediation, they may then make a motion to return to this Court to make any such changes to the parenting schedule contained herein.

The March 18, 1999 Divorce Decree incorporated by reference the February 4, 1998 Order.

On April 18, 2000, Mother moved for a change of legal and physical custody and visitation of Daughter based on her plan to relocate with Daughter to New York. On May 25, 2000, Father moved for a change of legal and physical custody of Daughter to him.

After a trial on June 16 and 19, 2000, the family court, in it's June 27, 2000 Order, decided, in relevant part, as follows:

1. Physical and Legal Custody: Legal custody of the parties' minor child, [Daughter], shall be awarded jointly to Mother and Father. Physical custody of the child is awarded to Mother subject to Father's rights of shared access as set forth below. Each party shall keep the other informed of their current telephone number and residence and mailing addresses for so long as the child is a minor.

. . . .

3. Relocation: Mother, if she so chooses, is free to relocate with the child to New York on July 20, 2000, ...

4. Access Schedule:

A. While Both Parties Are Living Within 75 Miles of Each Other: . . . .

. . . .

B. While Both Parties Are Not Living Within 75 Miles of Each Other: Mother shall have physical custody of the child, except as follows and subject to Father maintaining regular contact with the child by telephone, letters, cards and photographs:

1) Winter Breaks - The child shall spend all Winter Breaks (anticipated to be two weeks long) that begin in even numbered years with her Father. . . .

2) Spring Breaks - The child shall spend all spring breaks (anticipated to be one week long) with Father. . . .

3) Summer Breaks - During Summer 2000, the child shall spend two continuous weeks with her Father prior to relocating to New York. Thereafter, summer visitation for the year 2001 shall be for four weeks and increase by one week each year thereafter until six continuous weeks are achieved.

4) Flight Arrangements & Travel Expenses: Mother shall be responsible for making all round-trip flight arrangements for the child in coordination with Father's schedule. Father shall reimburse Mother one-half of the round-trip airfare for the child during all summer, spring and winter visits in Hawaii at least one month prior to departure.

On July 26, 2000, Father filed a notice of appeal. Father filed an opening brief on December 27, 2000. Mother filed an answering brief on February 1, 2001.

On October 8, 2001, the family court entered an order directing the parties to file proposed findings of fact and

conclusions of law. On October 31, 2001, the family court entered its Findings of Fact and Conclusions of Law. On November 7, 2001, the family court entered its Amended Findings of Fact and Conclusions of Law (Amended FsOF and Amended CsOL). In it, the court expressly decided "that this custody and visitation award is in the best interest of the minor child."

This court's May 2, 2002 "Order for Supplemental Record on Appeal and Order Permitting Rebriefing" ordered that the record on appeal be supplemented with transcripts that had been filed in the family court and with the Amended FsOF and Amended CsOL. It also permitted the filing of amended opening and answering briefs.

Father filed an amended opening brief on May 17, 2002, and Mother filed an amended answering brief on May 28, 2002.

DISCUSSION

In the original opening brief, Father argued in his first point on appeal

> that the Family Court committed error by awarding custody to [Mother] and allowing the minor child to relocate to the State of New York with [Mother] without making the specific and requisite findings of fact that such modification was in the "best interest of the child", or that there was a "substantial change" that occurred requiring modification since the initial decree. . . . [Father] submits that without any specific findings, an appellate court will be precluded from reviewing and/or making a determination as to whether a Family Court has in-fact been properly guided by the specific statutory standards as set forth in HRS section 571-46.

In his second point on appeal, Father argued "that the Family Court abused its discretion in modifying custody by

implicitly finding that [Mother] had met her burden of proof in her motion for post-decree relief." He did not state the basis for his conclusion that the family court abused its discretion.

In the "CONCLUSION" part of the original opening brief, Father asked this "court to reverse the Family Court's order, or in the alternative remand this case directing the Family Court to make the appropriate findings of fact."

Father did not challenge this court's May 2, 2002 Order for Supplemental Record on Appeal and Order Permitting Rebriefing.

In the amended opening brief, Father asserted the same two points he asserted in his original opening brief and added a third as follows.

> [T]he family court was wrong in filing i[t]s . . . Amended Findings of Fact and Conclusions of Law, nearly a year and three months AFTER [Father] filed his notice of appeal, and AFTER the appellate briefs had been submitted. [Father] also submits that the appellate court should not consider nor rely upon the Amended Findings of Fact and Conclusions of Law.
>
> . . . .
>
> . . . [R]ather than reflecting the family court's decision following trial, the findings and conclusions reflected and bolstered [Mother's] appellate arguments while refuting [Father's] arguments. [Father] submits that the family court's actions circumvents not only his right to appeal the family court's decision, but also circumvents the entire appellate process.

(Emphases in original.)

In the "CONCLUSION" part of the amended opening brief, however, Father again asked this "court to reverse the Family Court's order, or in the alternative remand this case directing the Family Court to make the appropriate findings of fact."

In other words, after asking for an order requiring the Family Court to enter "the appropriate findings of fact," Father now complains that his right to appeal and the entire appellate process have been circumvented by the entry of the findings of fact requested by him.

Hawai‘i Family Court Rules (HFCR) Rule 52,[1] as amended effective January 1, 2000, states as follows:

> **FINDINGS BY THE COURT.**
>
> **(a) Effect.** In all actions tried in the family court, the court may find the facts and state its conclusions of law thereon or may announce or write and file its decision and direct the entry of the appropriate judgment; except upon notice of appeal filed with the court, the court shall enter its findings of fact and conclusions of law where none have been entered, unless the written decision of the court contains findings of fact and conclusions of law. To aid the court, the court may order the parties or either of them to submit proposed findings of fact and conclusions of law, where the written decision of the court does not contain the findings of fact and conclusions of law, within 10 days after the filing of the notice of appeal, unless such time is extended by the court. Requests for findings are not necessary for purposes of review. Findings of fact if entered shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If a decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.
>
> **(b) Amendment.** Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made by the court,

---

[1] This court has previously noted that "HFCR [Hawai‘i Family Court Rules] Rule 52(a) evinces a somewhat different approach than that of HRCP [Hawai‘i Rules of Civil Procedure] Rule 52(a). HFCR Rule 52(a) does not impose the obligation to make any findings or conclusions prior to an appeal[,]" whereas HRCP Rule 52(a) does so require. State v. Gonsales, 91 Hawai‘i 446, 448, 984 P.2d 1272, 1274 (1999).

Presently, the HFCR do not require notification to the family court that a notice of appeal has been filed nor do they require the findings and conclusions to be filed by the family court within a certain period of time after the notice of appeal has been filed.

> the question of sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the family court an objection to such findings or has made a motion to amend them or a motion for judgment.
>
> **(c) Submission of Draft of a Decision.** At the conclusion of a hearing or trial, or at such later date as matters taken under advisement have been decided, the judge for convenience may designate the attorney for one of the parties to prepare and submit a draft of a decision, containing such provisions as shall have been informally outlined to such attorney by the judge. The attorney requested to prepare the proposed decision shall, within 10 days, unless such time is extended by the court, deliver a draft of the decision to the division clerk. Upon review and finalization of form by the judge, the decision shall be entered.

The family court did not enter a written decision in this case. Thus, as noted above, when Father filed the notice of appeal, HFCR Rule 52(a) required the family court to enter its findings of fact and conclusions of law.

Although HFCR Rule 52(a) does not require a request for the entry of findings of fact and conclusions of law where none have been entered, much time and expense is wasted if the appellant does not make a reasonable effort to cause the entry of such findings and conclusions by the family court before the appellant files an opening brief. This is because the usual response to a point on appeal complaining of the absence of findings and conclusions is a temporary remand to the family court for entry of findings and conclusions and an order for transcripts and re-briefing after such entry. Thus, Father should have (1) sought to have the family court comply with its duty pursuant to HFCR Rule 52(a) and (2) sought permission,

pursuant to Hawai'i Rules of Appellate Procedure Rule 29,[2] to delay the filing of his opening brief until a reasonable time after the family court complied with its duty pursuant to HFCR Rule 52(a) and until he could obtain any relevant transcripts deemed necessary for the appeal.

The family court had jurisdiction to enter its Amended FsOF and Amended CsOL. "Once an appeal is filed, . . . a family court's obligation to enter findings and conclusions is triggered. Such findings and conclusions, then, were intended to be made a part of every appellate record." State v. Gonsales, 91 Hawai'i 446, 448, 984 P.2d 1272, 1274 (App. 1999).

Father does not challenge any of the Amended FsOF. The record supports the Amended FsOF. The Amended FsOF satisfy the requirements of HRS § 571-46 (Supp. 2001).

---

[2] Hawai'i Rules of Appellate Procedure Rule 29 states as follows:

EXTENSIONS OF TIME FOR BRIEFS

(a) By the Appellate Clerk. Upon timely (1) oral request, or (2) written motion, or (3) letter request by a party, the appellate clerk shall grant one extension of time for no more than 30 days for the filing of an opening or answering brief and no more than 10 days for the filing of a reply brief. The appellate clerk shall note on the record that the extension was granted and the date the brief is due. The requesting party shall notify all other parties that the extension was granted and shall file a copy of the notice in the record. A request is timely only if it is received by the appellate clerk within the original time for filing of the brief.

(b) By the Appellate Court. Motions for further extensions of time to file briefs will be approved by a judge or justice only upon good cause shown.

The submission of a request or motion for extension does not toll the time for filing a brief.

CONCLUSION

Accordingly, we affirm the family court's June 27, 2000 "Order on Defendant's Motion for Post-Decree Relief Filed 4/18/00 and Plaintiff's Motion for Post-Decree Relief Filed 5/25/00."

DATED: Honolulu, Hawaiʻi, July 24, 2002.

On the briefs:

Herman H. M. Ling
for Plaintiff-Appellant.

Chief Judge

Linda N. Monden
(Rush Moore Craven Sutton
Morry & Beh)
for Defendant-Appellee.

Associate Judge

Associate Judge