NOT FOR PUBLICATION

NO. 23958

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

ARLEEN SCHUETTE, Plaintiff-Appellee, v.
MICHAEL LEO SCHUETTE, Defendant-Appellant.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D No. 98-1970)

SUMMARY DISPOSITION ORDER
(By: Burns, C.J., Lim and Foley, JJ.)

In this divorce action, FC-D No. 98-1970, Defendant-Appellant Michael Leo Schuette (Defendant) appeals the November 20, 2000 judgment of the family court of the first circuit, the Honorable Lillian Ramirez-Uy, judge presiding, that awarded Plaintiff-Appellee Arleen Schuette (Plaintiff) sole legal and physical custody of the minor son of the parties,[1] and awarded Defendant visitation with the child that was to be supervised until October 31, 2000.

Upon an exhaustive review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Defendant's twenty-five points of error, which we believe

[1] The minor child was almost five years old at the time of the divorce trial.

can be distilled to seven,[2] as follows:

1. Defendant contends the family court erred in granting the oral motion *in limine* Plaintiff brought just before the start of the July 17, 2000 divorce trial, to collaterally estop Defendant from denying the allegations of family violence that were previously found by the family court to justify issuance of an order for protection of Plaintiff in FC-DA No. 98-0597 (the Protective Proceeding),[3] thus invoking in the divorce trial the rebuttable presumption against a grant of custody to Defendant mandated by Hawaii Revised Statutes (HRS) § 571-46(9) (Supp. 1998).[4] Defendant argues, in various places and points

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[2] The rambling style and orotund mannerisms of the opening and reply briefs serve only to obscure the arguments and points of error. In addition, we note numerous violations of Hawai'i Rules of Appellate Procedure (HRAP) Rule 28 (2000) in the opening and reply briefs. Counsel is reminded and put on notice that future violations will be dealt with pursuant to HRAP Rule 30 (2002) ("When the brief of an appellant is . . . not in conformity with these rules, the appeal may be dismissed or the brief stricken and monetary or other sanctions may be levied by the appellate court. When the brief of an appellee is not . . . in conformity with these rules, the brief may be stricken and monetary or other sanctions may be levied by the appellate court. In addition, the appellate court may accept as true the statement of facts in the appellant's opening brief.").

[3] The Honorable Darryl Y.C. Choy, judge presiding in FC-DA No. 98-0597.

[4] When the divorce proceeding was filed, Hawaii Revised Statutes § 571-46(9) (Supp. 1998) provided:

> (9) In every proceeding where there is at issue a dispute as to the custody of a child, a determination by the court that family violence has been committed by a parent raises a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence. In addition to other factors that a court must consider in a proceeding in which the custody of a child or visitation by a parent is at issue, and in which the court has

of error, (a) that the timing of the motion *in limine* prevented him from adequately preparing his opposition to the motion; (b) that he was not given enough time to argue the motion or the oral motion he brought the next day to vacate the order *in limine*; (c) that the motion *in limine* lacked adequate supporting evidence; (d) that the granting of the motion *in limine* and the denial of his motion to vacate were in any event substantive error; (e) that as to one alleged instance of physical abuse of his son, Defendant enjoyed the protection of the HRS § 703-309(1) (1993) parental discipline defense to criminal liability; (f) that the family court erroneously applied the order *in limine* during the divorce trial by allowing Plaintiff to introduce evidence of the family violence while preventing Defendant from introducing evidence in demurral or mitigation; (g) that the family court in the Protective Proceeding conducted the April 28, 1998 hearing on the order for protection in a cursory manner that deprived him of substantive and procedural due process of law; (h) that the

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made a finding of family violence by a parent:

(A) The court shall consider as primary the safety and well-being of the child and of the parent who is the victim of family violence;

(B) The court shall consider the perpetrator's history of causing physical harm, bodily injury, assault, or causing reasonable fear of physical harm, bodily injury, or assault, to another person; and

(C) If a parent is absent or relocates because of an act of family violence by the other parent, the absence or relocation is not a factor that weighs against the parent in determining custody or visitation[.]

family court in the Protective Proceeding erred in not reporting the alleged abuse of the minor child to the Department of Human Services for investigation and report, pursuant to HRS § 586-10.5 (1993); and (i) that the family court in the Protective Proceeding erred in not convening a child protective proceeding, pursuant to HRS § 587-11 (1993) (regarding family court proceedings initiated by the Department of Human Services for the protection of "a child whose physical or psychological health or welfare is subject to imminent harm, has been harmed, or is subject to threatened harm by the acts or omissions of the child's family").

Even assuming, *arguendo*, that all of the above constituted error, they were harmless. The allegations the family court found true in issuing the order for protection in the Protective Proceeding -- and thus the facts purportedly preclusively established in the divorce trial -- were that Defendant forced Plaintiff to have sex, that Defendant slapped his son on the back with excessive force, and that Defendant slammed his son's head into a car windshield. Putting these three to one side as preclusively established erroneously in the divorce trial (again, solely for the sake of argument), we nonetheless note there was a fourth allegation of family violence: that Defendant kicked Plaintiff in the abdomen while

she was pregnant with their son. The family court in the Protective Proceeding expressly stated that it would not consider this allegation in deciding whether to issue the order for protection, despite the fact that Defendant admitted the act at the April 28, 1998 hearing.

During the divorce trial, however, Defendant's counsel twice confirmed Defendant's admission. Also during the divorce trial, Plaintiff testified that Defendant kicked her while she was pregnant with their son. Moreover, in letters to Plaintiff and the minor child stipulated into evidence at the divorce trial, Defendant admitted kicking Plaintiff. And on appeal, Defendant again admits that he kicked Plaintiff.

Hence, as Defendant conceded at trial and concedes again on appeal, the fourth act of family violence was established during the divorce trial independently of the grant of Plaintiff's motion *in limine*, and thus independently invoked the HRS § 571-46(9) presumption. The invocation of the presumption in the divorce trial was the only express consequence of the family court's finding that family violence had occurred.[5] Consequently, any errors in connection with the

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[5] The family court's May 24, 2000 findings of fact (FOF, or plural, FsOF) and conclusions of law contain the following FsOF regarding the issue of family violence:

> [FOF 25]. Defendant Michael Schuette [(Defendant)] committed family violence against Plaintiff Arleen Schuette [(Plaintiff)] and the parties' [minor child], during the parties' marriage.

order *in limine* were harmless. In any event, the only evidence in demurral or mitigation Defendant says he would have offered with respect to the kick is that,

> although he did kick his wife, he immediately apologized. And . . . although [Defendant] felt bad, he felt even worse when she told him that her dad used to beat her. And further that, no, she did not go out into the street [as a result of the kick], was not almost hit by a car, and otherwise did not suffer massive pelvic bleeding.

Opening Brief at 27. All of the foregoing, along with the abundant evidence not relating to family violence that supports the awards of custody and visitation, convince us that Defendant's contentions with respect to the order *in limine* lack merit.

> [FOF 26]. The abuse included Defendant kicking Plaintiff in the abdomen – at a time when she was pregnant with [the minor child] - while the parties were on a vacation in San Francisco, forced sex, hitting [the minor child] so hard the Defendant's handprint was seen on the child's skin, shoving [the minor child] into a car windshield, and recklessly driving to catch up with Plaintiff as she drove her son to Tripler Army Medical Center immediately after that incident, as well as repeated violations of the restraining order after it was issued in FC-DA No. 98-0567.
> [FOF 27]. As a result of the family violence, pursuant to [HRS] § 571-46(9) there was a rebuttable presumption that any type of custody award to [Defendant] would be detrimental to [the minor child] and not in his best interest.
> [FOF 28]. There was no evidence presented at the trial rebutting the presumption against an award of custody to the Defendant.
> [FOF 29]. In addition, Defendant voluntarily waived all cross-examination of the [custody guardian ad litem], except for 55 minutes of questioning on the first day of trial. Further, Defendant voluntarily waived all cross-examination of the Plaintiff, waived his right to testify, and did not call any other witnesses to rebut the finding of family violence.
> [FOF 30]: On the other hand, the evidence supporting an award of sole physical and legal custody of [the minor child] to [Plaintiff] was credible and substantial:

What follows the colon in the above quote are twenty six more FsOF supporting the family court's awards of custody and visitation that do not relate to family violence.

2. Defendant asserts that the family court's award of sole legal and physical custody to Plaintiff, and the temporary supervision it placed upon his visitation award, both based upon the best interests of the child, violated his "fundamental liberty, privacy, and pursuit of happiness rights to the care, companionship, control and custody of his son[,]" because "the state" failed to "show a compelling interest and that its interference is narrowly drawn so as to meet only that compelling interest"; in other words, "the state" failed to show circumstances of "imminent or threatened harm to [Plaintiff] and/or the child[.]" Opening Brief at 6-7. We trust these assertions are mere rhetorical flourishes and not seriously meant to be legitimate points of error. If the latter, they have absolutely no support in the law. See HRS §§ 571-46(1), (2) & (7) (Supp. 1998) (in a divorce action, the family court has discretion to award custody of and visitation with a minor child, in accordance with the best interests of the child); Doe v. Doe, 98 Hawai'i 144, 155, 44 P.3d 1085, 1096 (2002) ("A guiding principle for family courts in awarding custody under Hawai'i law is the best interests of the child." (Citing HRS § 571-46 (Supp. 1999).)); Fujikane v. Fujikane, 61 Haw. 352, 354, 604 P.2d 43, 45 (1979) ("The critical question to be resolved in any custody proceeding is what action will be in the best interests of the child." (Citations omitted.)); Blackshear v. Blackshear, 52 Haw.

480, 482, 478 P.2d 852, 854 (1971) (the court has jurisdiction over a minor child of the parties to a divorce, "to insure his [or her] continuing well-being" (citations omitted)); In re Thompson, 32 Haw. 479, 485 (1932) (there is no constitutional, inalienable right in a natural father to the care and custody of his minor child, and he may be deprived of that care and custody if required by "the best interests of the child").

3. Defendant complains, generally, that the family court erred in awarding Plaintiff sole legal and physical custody of their son and in placing temporary supervision upon Defendant's award of visitation. On the contrary, there was substantial -- indeed, abundant -- evidence adduced at trial to support the family court's judgment in these respects, evidence that was "credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." In re Doe, 84 Hawai'i 41, 46, 928 P.2d 883, 888 (1996) (citation and internal quotation marks omitted). And we do not presume to review the family court's determinations with respect to the credibility of the witnesses and the weight of evidence. In re Doe, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001). Hence, the family court's supporting findings of fact were not clearly erroneous. Id. Upon our independent review of the whole record, we do not believe the family court otherwise "disregarded rules or principles of law or practice to the

substantial detriment of a party litigant," or "clearly exceeded the bounds of reason"; therefore, the family court did not abuse its discretion in making its awards of custody and visitation. Doe, 84 Hawai'i at 46, 928 P.2d at 888 (brackets, citation and internal quotation marks omitted).

4. Defendant argues at length and on various bases that the family court erroneously denied his December 28, 1999 pretrial motion to change his then-supervised visitation with his son to unsupervised visitation. This is a moot point. The family court's November 20, 2000 final judgment superseded all pretrial orders concerning visitation, and the final judgment's provision for supervised visitation expired on October 31, 2000. As far as the record shows, Defendant now enjoys unsupervised visitation with his son on a standard visitation schedule.

5. Defendant maintains that the family court "erred in appointing a [custody guardian ad litem (CGAL) for the minor child] with party status[,]" and "erred in allowing the CGAL, a member of the Bar of the Supreme Court of the State of Hawaii on active status, to both function as advocate and testify as a witness in the same proceeding." Opening Brief at 24 (citations to the record omitted). These assertions have no merit. Defendant stipulated to the family court's order appointing a CGAL who was to assume the status of a party, and whose duties were to include the duty to "appear[] at all hearings to

represent the ward's interest, providing testimony when required[.]" See also HRS § 571-46(8) (Supp. 1998) ("The court may appoint a guardian ad litem to represent the interests of the child and may assess the reasonable fees and expenses of the guardian ad litem as costs of the action, payable in whole or in part by either or both parties as the circumstances may justify[.]"). Defendant also complains that the CGAL violated Hawai'i Rules of Professional Conduct Rule 3.7 (2000) by testifying in a proceeding in which she was the lawyer for a party. We disagree. We do not believe that a CGAL appointed "to represent the interests of the child[,]" HRS § 571-46(8)(Supp. 1998), thereby becomes the lawyer for the child simply by the happenstance of his or her status as an attorney.

6. Defendant claims that the CGAL was biased against him, and that her reports and her testimony at the divorce trial were unreliable, incredible and wrong. We do not, however, presume to review the family court's determinations with respect to the credibility of the witnesses and the weight of evidence. Doe, 95 Hawai'i at 190, 20 P.3d at 623. This point is without merit.

7. Defendant argues that the family court erred in ordering that he pay the CGAL her regular hourly billing rate for any time spent in preparing for and attending her deposition, a deposition Defendant had noticed. This point is moot. As far as

the record shows, Defendant did not take the CGAL's deposition.

Therefore,

IT IS HEREBY ORDERED that the November 20, 2000 judgment of the family court is affirmed.

DATED: Honolulu, Hawai'i, March 19, 2003.

On the briefs:

Richard Lee,
Paul D. Hicks,
(Law Office of Richard Lee)
for defendant-appellant.

Chief Judge

Associate Judge

Mei Nakamoto,
(Law Office of Mei Nakamoto),
Shawna J. Sodersten,
(Domestic Violence Clearinghouse & Legal Hotline),
for plaintiff-appellee.

Associate Judge