

NO. 24020

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MARK KENT MELTON, Plaintiff-Appellee, v.
WING YING MELTON, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 00-0838)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Defendant-Appellant Wing Ying Melton (Wing Ying)

appeals the December 13, 2000 divorce decree of the family court of the first circuit, the Honorable Bode A. Uale, judge presiding. Specifically, Wing Ying appeals the family court's denial of her motion for continuance of the October 24, 2000 divorce trial. Wing Ying had moved for a continuance of trial because the custody guardian ad litem (CGAL) appointed by the family court had changed his recommendation, five days before trial, from joint legal and physical custody of the two minor daughters of the parties, to sole legal and physical custody to Plaintiff-Appellee Mark Kent Melton (Mark).¹ The decree issuing out of the trial granted sole legal and physical custody to Mark, subject to Wing Ying's "rights of reasonable supervised

¹ Plaintiff-Appellee Mark Kent Melton (Mark) did not file an answering brief.

visitation." Because we conclude the family court did not abuse its discretion in denying Wing Ying's motion to continue trial, we affirm.

I. Background.

Wing Ying and Mark married on May 8, 1989. They had two daughters, born on April 6, 1992 and January 1, 1990, respectively.

On March 14, 2000, Mark filed a complaint for divorce from Wing Ying, asking for sole legal and physical custody of their daughters, subject to an award of supervised visitation to Wing Ying. Contemporaneously, Mark filed a motion for pre-decree relief, seeking an award of sole legal and physical custody of the children *pendente lite*. Mark requested that visitation by Wing Ying be supervised pending her completion of anger management and parenting classes. This request was based upon Mark's allegations that Wing Ying had physically and verbally abused him and their daughters, and had threatened to abscond with the children. The hearing on the motion was set for March 29, 2000.

Previously, on March 6, 2000, Mark had filed an FC-DA *ex parte* petition for a temporary restraining order and an order for protection, based upon the same allegations. The temporary restraining order accompanying the *ex parte* petition was signed by a family court judge the same day. The temporary restraining

order enjoined Wing Ying from contacting, threatening or physically abusing Mark or their daughters, and ordered her out of the family residence. After a March 16, 2000 hearing on the FC-DA petition, the family court² entered a three-year order for protection against Wing Ying, containing protective provisions consonant with the superseded temporary restraining order. The order for protection also granted Mark temporary sole legal and physical custody of the children, with supervised visitation to Wing Ying at the Parents and Children Together (PACT) visitation facility. These custody and visitation provisions were effective until March 29, 2000, the date set for hearing Mark's motion for pre-decree relief in the divorce action.

On March 29, 2000, Wing Ying filed her answer to Mark's divorce complaint. The answer denied Mark's allegation that he should be awarded sole legal and physical custody of their two daughters. Throughout the extremely fractious divorce proceedings that followed, Wing Ying consistently maintained that she should be awarded sole legal and physical custody of the children.

Also on March 29, 2000, a hearing was held on Mark's motion for pre-decree relief. A family court officer recommended that the custody and PACT visitation provisions contained in the FC-DA order for protection continue for the time being, and that

² The Honorable Darryl Y.C. Choy presided over the FC-DA proceedings initiated by Mark.

a CGAL be appointed. The family court³ order entered at the hearing followed suit, and set a further hearing for April 19, 2000. The further hearing on Mark's motion for pre-decree relief was continued or rescheduled several times by stipulation to allow the CGAL time to work up his report and the parties time to continue working on their issues with the CGAL and a parenting therapist. Eventually, a psychological evaluator (whom the CGAL referred to as "mom's therapist") and a therapist for the children also became enmeshed in the divorce proceedings. With the agreement of the CGAL, the parties filed a May 30, 2000 stipulation amending the visitation provisions, from PACT visitation to visitation supervised by Wing Ying's parents. The stipulation required, however, that Wing Ying immediately enroll in anger management and parenting classes, and provided that should Wing Ying not complete the classes by the end of August 2000, visitation would revert back to PACT visitation.⁴

On August 15, 2000, the CGAL filed a report to the court. The report recommended, *inter alia*, joint legal and physical custody of the children. This recommendation was made in order to facilitate what the CGAL saw as progress on the part of the parties "toward a more cooperative attitude to begin to consider the true needs and wants of the children[.]" (Citation

³ The Honorable Paul T. Murakami, judge presiding.

⁴ The Honorable Linda K.C. Luke signed the May 30, 2000 stipulation.

and internal quotation marks omitted.) Wing Ying filed a response to the CGAL's report, arguing that joint custody is inappropriate in this case, that Wing Ying should be awarded sole custody immediately, and that the case should be set for trial. On September 19, 2000, the family court⁵ scheduled trial for the week of October 23, 2000.

On September 27, 2000, Mark filed a motion requesting that Wing Ying's visitation revert back to PACT visitation, because she had allegedly failed or refused to complete anger management and parenting classes by the end of August 2000. After an October 4, 2000 hearing on Mark's motion, the family court⁶ ordered that Wing Ying's visitation revert back to PACT visitation two evenings a week.

In anticipation of trial, Mark filed an October 13, 2000 position statement, asserting that he should be awarded "the sole care, custody and control of the minor children of the parties[.]" Mark also maintained that Wing Ying should continue PACT visitation with the children until she completes anger management classes, at which time standard visitation schedules could kick in. Mark reiterated these positions in his October 20, 2000 trial memorandum.

⁵ The Honorable Darryl Y.C. Choy, judge presiding.

⁶ The Honorable Darryl Y.C. Choy, judge presiding.

On October 19, 2000, the CGAL filed a supplemental report to the court in which he changed his custody recommendation, from joint legal and physical custody, to sole legal and physical custody in favor of Mark. The CGAL based the change upon his observations of and interactions with the parties during the course of counseling and attempts at settlement. The CGAL concluded:

Since [Wing Ying] has made it clear that she is unwilling or incapable to participate in a co-parenting relationship with [Mark] for the best interest of the children, in contrast to [Mark's] continued involvement in parenting classes, compliance with services and follow through (including enrolling and paying the children[']s tuition at Sacred Hearts Academy, to which [Wing Ying] has refused to contribute), it is no longer practical to hold onto hopes for Joint Physical and Legal Custody in the foreseeable future. Therefore, the difficult, but unavoidable decision needs to be made.

The divorce trial began on Tuesday, October 24, 2000. At the outset, the family court⁷ entertained Wing Ying's motion to continue the trial:

[WING YING'S COUNSEL]: Your Honor, the bottom line is that the [CGAL] changed his recommendation last week Thursday [(October 19, 2000)]. I found out about it on Thursday afternoon, picked it up on Friday, and that's when I discovered what's the substance of the supplemental report. I thought it was a supplemental report that would be consistent with his prior recommendations or give the Court additional information regarding the case. And when I found out on Friday that he had changed and essentially drastically modified his recommendation in a very short three, four pages, that, basically, Your Honor, has created a very, very big problem for our trial preparation.

We had -- I had -- essentially was prepared to present a case based on the [CGAL's] recommendation of joint legal and physical custody and the underlying

⁷ The Honorable Bode A. Uale, judge presiding.

reasons therefore [(sic)], with the assumption that the [CGAL] would be consistent in his reasoning for finding that it was in the best interest of the children that there be joint legal and physical custody. At this time, Your Honor he has now taken a turnabout and now is saying that there should be sole legal and physical custody to father.

There just simply isn't enough time, Your Honor -- there wasn't enough time on Friday to -- till now to fully and adequately prepare a new strategy and a new -- and all of the evidence that we would need to rebut that testimony, rebut the findings and conclusions of the new report, Your Honor. And it's as if we, you know, essentially we've been blindsided. And based on that, Your Honor, it would be imperative that we receive additional time to prepare adequately to address the issues raised by the supplemental report.

The supplemental report in and of itself also is not very much explanatory in terms of underlying details. The initial [CGAL] report was also very -- by the [CGAL's] own admission, very much lacking in detail, because he stated he didn't want to, quote, inflame the case, and he wanted to try to resolve the case. And I think that the [CGAL's] initial focus has been more as a mediator as opposed to actually making the kind of study and investigation that the normal [CGAL] might in the case.

We don't -- simply don't have the details in this [CGAL] report. And what I would want -- one of the things that I need to do in order to prepare for this case, Your Honor, is to depose the [CGAL] to determine what underlying facts he did or did not consider so that we can then proceed to prepare for trial based on what the [CGAL's] underlying reasonings were.

In addition, Your Honor, there would be documentation that we would need to receive, because we believe that many of the underlying facts that the [CGAL] may have been told by [Mark] are untrue, and we would need additional time to gather the documentary evidence to prove that and properly present it for the Court.

THE COURT: Okay. [Counsel for Mark].

[MARK'S COUNSEL]: Thank you, Your Honor. Yes, we would oppose strenuously, Your Honor. Number one, is [Wing Ying's counsel], I believe, was involved in the case since August. She had more than enough time to do discovery, more than enough time to depose the [CGAL] should she had chose [(sic)] to do so. [Mark's] witnesses are here. He has had to fly in his sister from the mainland to be here today.

THE COURT: From Minnesota?

[MARK'S COUNSEL]: Yes, from Minnesota. We are ready to proceed to trial, Your Honor. There's no reason to delay this. [The CGAL's] recommendation is a supplemental report. A supplemental report is up to

the [CGAL] to prepare, and now it's a matter of whether or not [Wing Ying's counsel] can, I guess, cross-examine the [CGAL] as to his reasoning for that, and that's why we're here today. The [CGAL] will testify. We'll call him as a first witness. And [Wing Ying's counsel] will have the opportunity then to ask questions of [the CGAL].

Your Honor, we feel there's absolutely -- there's no good cause to continue a trial just because of the fact that now [Wing Ying's counsel] feels that she needs additional time to depose the [CGAL] because of a supplemental report. So we would strenuously oppose, Your Honor, request that the Court deny the motion, and we go on with the trial.

The parties also, Your Honor, they need closure. It's a very high conflict case, and I believe the [CGAL] recognized that fact, Your Honor. So we believe that this would just be a very disadvantageous delay to both parties, Your Honor.

THE COURT: Anything else?

[WING YING'S COUNSEL]: Your Honor, these are serious issues that relate to the custody and best interest of these children. My client feels -- and, I believe, that in order for her to proceed on the basis that she has had a fair trial regarding the best interest of her children and custody, that we need adequate time to prepare because of basically a turnabout on the [CGAL's] part. We were definitely prepared to proceed on a joint legal and physical custody recommendation by the [CGAL], and he's basically torn our trial strategy out from under us. And, Your Honor, I believe that it would be unfair for [Wing Ying] to proceed on that basis.

THE COURT: Okay. Well, I'm ready to rule on the motion. I don't believe and I don't hear any assertion there's going to be different evidence. And I don't believe that there'll be any different evidence, even if I gave you a continuance. According to his supplemental report, allegedly, it's because of conduct on the part of your client, . . . and I don't see as giving you any extra time would do anything to change [the CGAL's] mind. I don't think it has to do with anything that anybody told him. I think it has purely to do with his observations.

I cannot suspend these proceedings, because in the best interest of the children, they need closure, they need to know what's going to go on and what's going to happen with them. They cannot be left hanging in the air and wondering for another 30 to 45 days what's going to be their final disposition. Therefore, it's not in their best interest that this matter be continued. Both sides are here. [Mark's counsel] has indicated his witnesses are all here, people have come from the mainland. The request and the motion to continue is hereby denied.

All right. Let's proceed with the case at this time.

During the balance of the trial, Wing Ying did not again raise a request for continuance or otherwise object to the ongoing proceedings. The evidentiary part of the trial commenced with Mark's proffer of various exhibits, including the CGAL's August 15, 2000 initial report and his October 19, 2000 supplemental report. Both were admitted into evidence without objection from Wing Ying's counsel: "No, objection, Your Honor, subject to cross-examination." The CGAL did testify in Mark's case, and was subject to a long and exhaustive cross-examination and recross-examination by Wing Ying's counsel.

The family court entered its divorce decree on December 13, 2000. The family court essentially adopted the position advocated by Mark and recommended by the CGAL. It awarded sole legal and physical custody of the children to Mark, "subject to [Wing Ying's] rights of reasonable supervised visitation[.]" The family court decreed that Wing Ying's PACT visitation continue until such time as she successfully completes anger management and parenting classes to the satisfaction of the children's therapist, at which time standard visitation provisions would govern. Wing Ying filed her timely notice of this appeal on January 12, 2001.

II. Discussion.

Wing Ying's sole contention on appeal is that the family court abused its discretion in denying her motion to

continue the October 24, 2000 divorce trial.

"[I]t is well-established that the granting or denial of a continuance is a matter that is addressed to the sound discretion of the trial court and is not subject to reversal on appeal absent a showing of abuse. Generally, to constitute an abuse it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Kam Fui Trust v. Brandhorst, 77 Hawai'i 320, 324, 884 P.2d 383, 387 (App. 1994) (citations and internal quotation marks omitted).

Wing Ying's entire argument on appeal, after her citation of the foregoing standard of review, follows verbatim:

The Family Court Rules related to contested divorce cases are attached to the Appendix hereto as Exhibit 1. Part V(B)(13) provides that in cases where a Social Study Conference has been set by the Court, the conference will proceed to deal with all issues in the same manner as a Motion To Set Conference. Part V(E)(2) provides that all GAL reports are to be completed prior to the Motion To Set/Social Study Conference unless otherwise ordered by the Court. Part V(D) provides for a Settlement Conference in the third week prior to the week set for trial. Part V(E)(6) provides that Exhibits not exchanged by twenty-one (21) days before the Settlement Conference will not be admitted into evidence except as ordered for good cause upon a written motion made prior to the commencement of trial.

In this case on Thursday, October 19, 2000, the CGAL issued his supplemental report, changing and modifying his prior recommendation of joint legal and physical custody of the minor children to a new recommendation of sole legal and physical custody to [Mark] with supervised visitation to [Wing Ying].

Clearly, the submission of the supplemental CGAL report was a violation of the rules of the Family Court, as stated previously. Given the change in the CGAL recommendations prior to trial [Wing Ying] should have been granted a continuance to address the supplemental report in preparation for trial. The denial of that request was clearly a substantial

detriment to [Wing Ying] at trial.

Opening Brief at 7-8. However, none of the purported "Family Court Rules" cited by Wing Ying appear anywhere in the Hawai'i Family Court Rules (2000). Instead, they appear to be "procedures and policies" promulgated by the family court of the first circuit for its domestic division. See 2000 Hawai'i Divorce Manual, volume 2, section 19 at 170-80. Assuming, *arguendo*, that "the submission of the supplemental CGAL report was a violation of [these procedures and policies]," as Wing Ying contends, we do not believe that such a violation, in and of itself, rendered the family court's denial of Wing Ying's motion to continue an abuse of discretion.

Nor do we discern, upon our independent review of the record, an abuse of discretion in this connection.

First, we question the purported need for the continuance. Wing Ying claimed below that she was prejudicially surprised by the CGAL's supplemental report, because she was "prepared to present a case based on the [CGAL's initial] recommendation of joint legal and physical custody and [his] underlying reasons[.]" Given Mark's unwavering claim to sole legal and physical custody, and Wing Ying's equally adamant but diametrically opposed claim to the same, we ponder why and how Wing Ying prepared her case based on the CGAL's initial recommendation of joint custody, especially in light of the fact that the family court would have been free to reject its CGAL's

initial recommendation and adopt Mark's position. Wing Ying nowhere enlightens us in this respect. We come away similarly unenlightened as to the specifics of how Wing Ying was prejudiced in her trial preparations -- as opposed to the strength of her trial position -- by the CGAL's changed recommendation. Indeed, as the change was based primarily upon the CGAL's negative observations of and interactions with Wing Ying, the source for verification or refutation of the factual bases for the CGAL's supplemental report was presumably close at hand. Cf. Sapp v. Wong, 62 Haw. 34, 41, 609 P.2d 137, 142 (1980) (where the plaintiffs' motion for continuance of trial was based upon the defendants' evasion of trial subpoenas, and the defendants were crucial witnesses, the trial court's denial of the motion was an abuse of discretion because it was prejudicial to the plaintiffs and not prejudicial to or inconvenient for the defendants). And if, as Wing Ying noted below, "[t]he initial [August 15, 2000 CGAL] report was also very -- by the [CGAL's] own admission, very much lacking in detail," we question the sudden need to depose the CGAL on his supplemental report when Wing Ying made no effort to depose him on his purportedly cornerstone initial report. Cf. Nadeau v. Nadeau, 10 Haw. App. 111, 118, 861 P.2d 754, 758 (1993) ("A request for a continuance based on the unavailability of a crucial witness may properly be denied (1) when the requesting party could have obtained the testimony of the crucial witness in

the form of a deposition or (2) when the denial is not prejudicial." (Citing 9 Wright and Miller, Federal Practice and Procedure: Civil § 2352 (1971).)).

Second, it is evident that Wing Ying was not in fact prejudiced by the family court's denial of her motion for continuance. Wing Ying did not object to the admission into evidence of the CGAL's supplemental report. The CGAL testified in Mark's case, and Wing Ying's counsel cross-examined and recross-examined the CGAL intensively and comprehensively, over the course of more than sixty pages of transcript, about his recommendations, the reasons underlying his recommendations and the factual bases for his recommendations. Moreover, if, as Wing Ying suspected, "many of the underlying facts that the [CGAL] may have been told by [Mark] are untrue," we observe that Wing Ying's counsel also cross-examined Mark. There is no indication in the record that either cross-examination was fettered by the family court in any way. It appears, instead, that both cross-examinations proceeded and concluded as and when Wing Ying's counsel saw fit. Wing Ying did not thereafter repeat her request for a continuance of trial, or otherwise complain of or specify a need for further discovery. Cf. Sapp, supra; Nadeau, supra.

Finally, there is some indication in the record that Mark would have been prejudiced by a continuance of the trial. As Mark's attorney indicated to the family court, they were then and there prepared to proceed with the scheduled trial. Indeed,

two of the witnesses who testified for Mark at trial were mainland residents. Cf. Sapp, supra (motion for continuance of trial should have been granted where, *inter alia*, delay would not have been prejudicial to parties opposing the motion).

Given the foregoing, we cannot conclude that the family court abused its discretion in denying Wing Ying's motion for continuance of trial.

III. Conclusion.

Accordingly, the family court's December 13, 2000 divorce decree is affirmed.

DATED: Honolulu, Hawaii, August 15, 2002.

On the briefs:

Charles H. Brower
for defendant-appellant.

Acting Chief Judge

Associate Judge

Associate Judge