NO. 26545

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

LEE-ANN NOELANI AU, Plaintiff-Appellant, v.
RYAN KEONE AU, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D No. 02-1-1780)

SUMMARY DISPOSITION ORDER
(By: Watanabe, Presiding J., Lim, and Fujise, JJ.)

Plaintiff-Appellant Lee-Ann Noelani Au (Lee-Ann) appeals from the Decree Granting Absolute Divorce and Awarding Child Custody (the Decree), dissolving the marriage of Lee-Ann and Defendant-Appellee Ryan Keone Au (Keone), entered by the Family Court of the First Circuit[1] (the first circuit family court) on April 12, 2004. Among other things, the Decree awarded Keone and Lee-Ann joint legal and physical custody of their minor child (Child) and apportioned a $19,689.46 debt jointly between the parties. This appeal was filed on April 29, 2004 and assigned to this court on November 30, 2004.

Lee-Ann asserts that: (1) "legal theories of comity, law of the case, collateral estoppel, and res judicata were not observed by the [the first circuit family] court" in issuing the Decree because the Decree altered the child custody and visitation arrangement established by the Family Court Order for

[1] The Honorable William K. Wallace, III, per diem judge, presided.

Protection (the protective order), issued by the Family Court of the Third Circuit (the third circuit family court)[2] on February 11, 2002; (2) the first circuit family court erred in failing to give binding effect under the doctrine of collateral estoppel to the third circuit family court's findings in the protective order that Keone physically abused Lee-Ann and abused alcohol; (3) assuming that the first circuit family court had authority to make a custody determination in the divorce proceedings, the first circuit family court erred in failing to award sole legal and physical custody of Child to Lee-Ann; and (4) the first circuit family court erred in finding that $19,689.46 received by Keone and Lee-Ann from Keone's parents, Leslie and Karen Au, was a loan rather than a gift because (a) "in cases of close kinship, there is a presumption that a gift was intended and the presumption must be rebutted by clear and convincing evidence[,]" Almeida v. Almeida, 4 Haw. App. 513, 517-18, 669 P.2d 174, 178-79 (1983); and (b) Keone failed to present clear and convincing evidence to overcome this presumption at trial.

After carefully reviewing the record on appeal and the brief submitted by Lee-Ann,[3] and duly considering and analyzing the statutory and case law relevant to the arguments and issues

[2] The Honorable Aley K. Auna, Jr. issued the Family Court Order for Protection.

[3] Defendant-Appellant Ryan Keone Au did not file an answering brief.

raised by Lee-Ann, we disagree with Lee-Ann and affirm the Decree.

The record reflects that two days before filing for divorce in the third circuit family court, Lee-Ann obtained a protective order from the third circuit family court, which prevented Keone from "threaten[ing] or physically abus[ing] [her] or any other persons residing with [her]." The protective order granted Lee-Ann temporary legal and physical custody of Child "[u]ntil this Court Order expires or is modified," permitted Keone supervised visitation with Child on specified days, and allowed Keone's visitation rights to be modified by agreement of Keone and Lee-Ann.

In granting the protective order, the third circuit family court struck out five words of the first paragraph of the pre-printed form used for the protective order, as indicated below:

> An application for an order for protection (restraining order) was heard on the date indicated above. After full consideration of the positions of the parties and/or the evidence, the Court finds that the parties have failed to show cause why the order previously issued should not be continued, that a protective order is necessary to prevent domestic abuse ~~or a recurrence of abuse~~, and that jurisdiction exists under Hawaii Revised Statutes Chapter 586. . . .

According to Keone, the reason the third circuit family court struck the five words was because it did not find that any abuse had occurred that needed to be prevented from recurring, but entered the order to prevent abuse from ever occurring.

Following the recusal of a third circuit family court judge from hearing the divorce case, the parties stipulated that the divorce case would be handled by the first circuit family court. Lee-Ann argued before the first circuit family court that the protective order issued by the third circuit family court was binding on the first circuit family court and precluded the granting of joint legal and physical custody of Child to Keone.

However, based on the report of the guardian ad litem appointed for Child, as well as the testimony proffered by witnesses for both parties, the first circuit family court concluded that Keone was "not abusive, has had no Protective Order issued against him that entered an affirmative finding of abuse, . . . and that [Keone] is not violent to [Lee-Ann] or [Child] . . . ." The first circuit family court also found creditable the testimony of Keone's witnesses, who recounted how "closely and intricately and intimately involved" Keone has been "with [Child's] care and treatment since her birth" and how Keone's family "is an integral part of [Child's] life, and that [Child] is loved and supported by paternal grandparents, is properly, competently and appropriately raised and supervised by [Keone] with the quality and appropriately limited assistance of his parents[.]" The first circuit family court then granted joint legal and physical custody of Child to Lee-Ann and Keone. We conclude that the first circuit family court did not abuse its discretion in doing so.

As to Lee-Ann's argument that the $19,689.46 received from Keone's parents and used for a down payment on land purchased by Lee-Ann and Keone during the marriage constituted a gift, we conclude that there was substantial evidence adduced below to support the first circuit family court's finding that the monies were a loan that was to be repaid.

Accordingly, we affirm the April 12, 2004 Decree Granting Absolute Divorce and Awarding Child Custody from which this appeal was taken.

DATED: Honolulu, Hawai'i, July 28, 2006.

Corinne K.A. Watanabe

On the brief:

Stephen T. Hioki for
plaintiff-appellant.