NO. 27866

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

IN THE INTEREST OF G CHILDREN:
V.G. AND H.G.

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-S NO. 99-06067)

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

Both of the G Children (the children) are males. The first was born on August 12, 1994. The second was born on March 28, 1998. This Hawaii Revised Statutes (Supp. 2006) Child Protective Act case was commenced on July 19, 1999, when the State of Hawai'i Department of Human Services (DHS) filed a Petition for Temporary Foster Custody of the children. Ultimately, this case was finally decided when the March 3, 2006 Order Awarding Permanent Custody, and March 30, 2006 Orders Concerning Child Protective Act were entered in the Family Court of the First Circuit.[1] On April 7, 2006, the mother (Mother) of the children filed a notice of appeal. On May 18, 2006, the family court filed the Findings of Fact and Conclusions of Law (FsOF and CsOL). We affirm.

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[1] Judge William J. Nagle, III, presided.

DISCUSSION

The opening brief states in part:

> Arguments are made that although an appellant is contesting the finding of permanent custody, that if each and every one of the findings and conclusions are not contested, that appellant therefore agrees with each one not contested. That is a false argument.
>
> There are 32 pages of Findings of Fact and Conclusions of Law. A total of 129 Findings and 10 Conclusions of Law. If I list each and everyone I will go way over the amount of pages allowed in this brief. So only the main ones are listed. On top of that, Finding no. 129 states that if a conclusion can be construed as a finding, said conclusions are incorporated as a finding and Conclusion no. 1 s[t]ates to the extent that some of the Findings can be construed as Conclusions of Law, said findings are incorporated herein.
>
> Since just about anything can be construed as something else we now have 139 Findings and 139 Conclusions. This becomes a daunting task to list and contest. I will do my best.

This argument exhibits a gross misunderstanding of appellate law and rules. Even when mis-labeled, findings of fact are not conclusions of law and conclusions of law are not findings of fact. Even mixed findings of fact and conclusions of law can be separated into their fact parts and law parts. In a bench trial, alleged facts that are not validly judicially noticed, admitted or stipulated are not facts unless they are stated as facts in the findings of fact. In a bench trial, the judge views the evidence, decides what the facts are, and then states the facts in the findings of fact. The judge then considers the facts, decides and applies the applicable law, and enters conclusions of law.

On appeal, all unchallenged findings of fact are facts for purposes of the appeal. When a finding of fact is validly

challenged on appeal, the appellate court applies the clearly erroneous standard of review when deciding whether or not to affirm it. Under the clearly erroneous standard of review, when one or more witnesses testifies an event occurred, and one or more witnesses testifies that the event did not occur, the trial judge's decision as to which witnesses are the credible witnesses will be affirmed.[2]

When a conclusion of law is challenged on appeal, the appellate court applies the right/wrong standard of review.

> This court views conclusions of law *de novo* under the "right [or] wrong" standard. *Roxas v. Marcos*, 89 Hawai'i 91, 115, 969 P.2d 1209, 1223 (1998) (reviewing conclusions of law *de novo* under the right or wrong standard); *State v. Camara*, 81 Hawai'i 324, 329, 916 P.2d 1225, 1230 (1996) (reviewing the interpretation of a statute *de novo*). Findings of fact are reviewed under the clearly erroneous standard. *Child Support Enforcement Agency v. Roe*, 96 Hawai'i 1, 11, 25 P.3d 60, 70 (2001). "[A finding of fact] . . . is clearly erroneous when (1) the record lacks substantial evidence to support the finding or determination, or (2) despite substantial evidence to support the finding or determination, the appellate court is left with the definite and firm conviction that a mistake has been made." *Id.* (quoting *In re Water Use Permit Applications*, 94 Hawai'i 97, 119, 9 P.3d 409, 431 (2000)).

Clark v. Clark, 110 Hawai'i 459, 465, 134 P.3d 625, 631 (App. 2006), cert. denied, 111 Hawai'i 12, 136 P.3d 288 (2006). Under this standard of review, the appellate court considers the unchallenged facts and the challenged-but-affirmed facts, decides

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[2] *See Fisher v. Fisher*, 111 Hawai'i 41, 46, 137 P.3d 355, 360 (2006) ("It is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact.") (Citations omitted.); *State v. Mitchell*, 94 Hawai'i 388, 393, 15 P.3d 314, 319 (App.2000) ("The appellate court will neither reconcile conflicting evidence nor interfere with the decision of the trier of fact based on the witnesses' credibility or the weight of the evidence.") (Citations omitted.); *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 116-17, 839 P.2d 10, 28 (1992) ("Moreover, '[a]n appellate court will not pass upon issues dependent upon credibility of witnesses and the weight of the evidence; this is the province of the trial judge.'") (Brackets in original; citations omitted).

whether the trial judge's challenged conclusion(s) of law is (are) right or wrong, and if wrong, states the right conclusion(s) of law.[3]

Appellate counsel is required to comply with the applicable Hawai'i Rules of Appellate Procedure (HRAP). HRAP Rule 28 (2007) states, in part:

> **Briefs.**
>
> (a) *Format, service and page limitation.* All briefs shall conform with Rule 32 and be accompanied by proof of service of two copies on each party to the appeal. Except after leave granted, an opening or answering brief shall not exceed 35 pages, and a reply brief shall not exceed 10 pages, exclusive of indexes, appendices, and statements of related cases. . . .
>
> (b) Opening brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:
>
> > (1) A subject index of the matter in the brief with page references and a table of authorities listing the cases, alphabetically arranged, text books, articles, statutes, treatises, regulations, and rules cited, with references to the pages in the brief where they are cited. Citation to Hawai'i cases since statehood shall include both the state and regional reporters. Citation to foreign cases may be to only the regional reporters. Where cases are generally available only from electronic databases, citation may be made thereto, provided that the citation contains enough information to identify the database, the court, and the date of the opinion.
> >
> > . . . .
> >
> > (3) A concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court or agency appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement

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[3] The concurring opinion in Cho Mark Oriental Food, Ltd. v. K & K International, 73 Haw. 509, 524-25, 836 P.2d 1057, 1066 (1992), states in part:

> The question of whether the relevant facts in a particular case constitute "agency" as defined by the law is a question of law reviewed pursuant to the de novo or right/wrong standard of appellate review. It is a question of law because in any given factual situation there can be only one right answer. If it was categorized as a question of fact or mixed fact and law reviewable pursuant to the clearly erroneous standard of appellate review, then in any given factual situation [any one of] two or more contradictory right answers would be permitted.

of fact or mention of court or agency proceedings. In presenting those material facts, all supporting and contradictory evidence shall be presented in summary fashion, with appropriate record references. Record references shall include page citations and the volume number, if applicable. References to transcripts shall include the date of the transcript, the specific page or pages referred to, and the volume number, if applicable. Lengthy quotations from the record may be reproduced in the appendix. There shall be appended to the brief a copy of the judgment, decree, findings of fact and conclusions of law, order, opinion or decision relevant to any point on appeal, unless otherwise ordered by the court.

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

> (A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;
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> (B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;
>
> (C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;
>
> (D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

(5) A brief, separate section, entitled "Standard of Review," setting forth the standard or standards to be applied in reviewing the respective judgments, decrees, orders or decisions of the court or agency alleged to be erroneous and identifying the point of error to which it applies.

. . . .

(7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor,

> with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.
>
> (8) Relevant parts of the constitutional provisions, statutes, ordinances, treaties, regulations, or rules pertaining to the points of error set out verbatim, unless otherwise provided in the brief. If lengthy, they may be cited and their pertinent text set out in the appendix.
>
> (9) A conclusion, specifying with particularity the relief sought.
>
> (10) An appendix. Anything that is not part of the record shall not be appended to the brief, except as provided in this rule.

When a point on appeal challenges the validity of the trial, the appellant need not challenge each finding of fact and conclusion of law. It is obvious that if the trial was invalid, the findings and conclusions that resulted from it are also invalid.

In the instant case, the May 18, 2006 FsOF state, in part:

> 2. On April 13, 1999, DHS received a report of susbstance [sic] abuse by parents and that domestic violence between parents occurred in the presence of and sometimes involving the children. . . .
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> . . . .
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> 4. During the initial DHS investigation into the family Mother admitted a long-term substance abuse problem dating back to approximately 20 years ago, while she attended intermediate school.
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> . . . .
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> 10. Mother engaged in services and the children were returned to her care on December 25, 2000. The case closed on December 4, 2001.
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> 11. On July 5, 2002, DHS received a report of threatened neglect and abuse to the children by Mother. Mother admitted to the investigating social worker, who had been the family's case manager during the previous intervention, that she was again abusing drugs. DHS confirmed the allegations of threatened neglect and abuse. Mother agreed to temporarily place the

children in the care of paternal grandfather and paternal step-grandmother while she participated in another substance abuse treatment program. Mother completed the substance abuse treatment and the case was closed without court intervention. The family was advised to alert DHS if Mother suffered another relapse.

12. On July 3, 2003, DHS received a report of a threatened abuse and neglect to the children by parents. Mother again relapsed into substance abuse and Father resided on Maui and was unable to provide care for the children. Mother admitted that she used "ice" on July 1, 2003, right before she entered Hina Mauka residential treatment program. Mother agreed to temporarily place the children in paternal grandfather and paternal step-grandmother'[s] care while she completed substance abuse treatment.

. . . .

14. On September 16, 2003, DHS filed a Petition for Foster Custody . . . .

. . . .

18. Present at the initial return date hearing held on October 16, 2002 [sic], were Mother, her court appointed counsel Tae Chin Kim, Esq., DHS social worker, Grace Gabat, and DHS' counsel, and Daniel E. Pollard, Esq., the GAL. . . .

. . . .

20. By the Order Appointing Guardian Ad Litem filed on November 23, 2004, Randal Shintani, Esq., replaced Daniel E. Pollard, Esq. as GAL for the children, effective July 1, 2004.

21. Present at the September 1, 2004 hearing were Mother, her court appointed consulting counsel, Leland Look, Esq., Father, DHS social worker, Keith Spencer for Grace Gabat, and DHS' counsel, and Randal Shintani, Esq., the GAL. . . .

22. . . . Mother admitted that she relapsed again on December 7, 2004 . . . .

23. On March 24, 2005, the children were removed from Mother's care and re-placed in foster custody with paternal grandfather and paternal step-grandmother due to Mother's substance abuse relapse. . . .

. . . .

28. On November 7, 2005, DHS filed a Motion for Permanent Custody and Establishing a Permanent Plan.

29. . . . [A]t the November 15, 2005 hearing . . . [t]he assigned social worker, at the time, Grace Gabat, informed the court that she was moving out of the jurisdiction and

would be unable to appear in person to testify at trial and DHS requested for permission to testify by telephone at the trial. The court granted the DHS' request and also ordered the social worker supervisor for the unit to be present at the hearing and available to testify, if necessary. . . .

. . . .

31. On January 26, 2006, GAL filed a Motion to Excuse Guardian Ad Litem from Hearing, ...

32. . . . [A]t the January 31, 2006 hearing . . . GAL requested that his presence at trial be waived due to a scheduling conflict and the facts that he did not intend to produce witnesses for direct examination, nor cross-examine any of the other witnesses. GAL stated that he would rest on . . . his Pretrial Statement filed on December 27, 2005, which stated that parents could not provide a safe family home for the children even with the assistance of a service plan neither now nor in the reasonable [sic] foreseeable future. None of the parties objected to the motion and the court granted GAL's motion and he was excused from the trial.

33. The trial on DHS' Motion for Permanent Custody began on February 9, 2006. Present at the February 9, 2006 Trial were Mother, Mother's court appointed trial counsel, Leslie Maharaj, Esq., Father, his court appointed trial counsel, Herbert Ham[a]da, Esq., DHS social worker, Garner Enoki, and DHS' counsel. Mother had new trial counsel appointed due to a scheduling conflict of the previously appointed trial counsel. The new trial counsel orally requested a continuance, which was denied by the court for lack of prior written motion and notice. The court granted Mother's request for an additional day for the testimony of Mary Lou Lomaka, whom the [S]tate would make available, over DHS' objection, due to the DHS' counsel['s] failure to notify opposing counsel that Mary Lou Lomaka, who was listed as a DHS witness, would not be called as a witness contrary to the January 6, 2006 Orders [C]oncerning Child Protective Act. Testimony was taken from the prior DHS social worker, Grace Gabat, by telephone, DHS social worker supervisor, Kristine Tuitama, Mother[and Father]. At the conclusion of the first day of trial, the court continued foster custody, continued all prior consistent orders, ordered all parties to appear at a continued trial date on March 3, 2006, over DHS objection, ordered DHS to make Mary Lou Lomaka available to testify on March 3, 2006, denied Mother's request for a continuance, excused Father from appearing at the March 3, 2006 hearing and authorized written closings if appropriate.

34. DHS' counsel informed the court by a letter dated March 1, 2006, which was distributed to all parties, that the counsel for the parties agreed that the testimony of Mary Lou Lomaka was not necessary and that the only matter for the March 3, 2006 continued trial would be for closing arguments.

. . . .

51. Mother was born on April 20, 1972.

. . . .

64. At the time of trial, Mother was pregnant with her third child and was participating in the Salvation Army's Women's Way substance abuse treatment program.

. . . .

67. The psychological evaluation diagnosed Mother with Methamphetamine Dependence; Rule out Bipolar Disorder, and Personality Disorder Not Otherwise Specified with Histrionic and Borderline components. Dr. [Russell] Loo[, Ph. D.,] recommended intensive and long-term substance abuse treatment and psychiatric services for Mother.

. . . .

70. Throughout this case, Mother has exhibited a pattern of alternating between compliance and non-compliance, participation and non-participation, and improvement and regression.

. . . .

78. Mother continues to pose a serious risk of further harm to the children because she has not complied with the service plan and thus has not addressed all of the safety issues.

. . . .

80. Mother is not presently willing and able to provide these children with a safe family home, even with the assistance of a service plan because her problems posing threatened harm to the child[ren] continue to exist despite the services which have been offered and provided to her over the last 20 months.

81. It is not reasonably foreseeable that Mother will become willing and able to provide these children with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed two years from the time foster custody was first ordered by the court, based on her history and present circumstances.

. . . .

105. The children are bonded to both parents and both DHS and GAL recommend continued contact between the children and parents as long as the contact remains in the children's best interests.

106. The current foster parents are related to the children and the children are bonded to the foster parents.

. . . .

> 108. In light of the children's need for stability, and parents' lack of progress in services, further delay in determining whether parents can regain custody of the children is not in the children's best interest.
>
> . . . .
>
> 110. The goals of the permanent plans, legal guardianship for the children by their current care takers, are in the children's best interests due to their need for a permanent, safe and secure home with responsible and competent substitute parents and family.
>
> . . . .
>
> 115. Mother was found by the court not to be credible with respect to her testimony on the issue of her ability to provide a safe family home now, or in the reasonably foreseeable future, even with the assistance of a service plan.

The following is an example of a finding of fact that is mis-labeled as a conclusion of law: "6. [Mother] is not presently willing and able to provide the children with a safe family home, even with the assistance of a service plan."

The following are findings of fact that merely state the testimony, but fail to find that the testimony was credible or that it states facts:

> 125. Father testified that he works 50-60 hours a week and usually 6 days per week.
>
> 126. Father testified that although he currently lives in a home which could accommodate the children, he will soon be moving to a smaller residence that cannot accommodate the children.

The opening brief uses eight pages to state what it says are the points on appeal. In one and one-half pages, the opening brief summarizes these points on appeal:

> Finally there are two major points that [Mother] intends to rely upon:
>
> 1. The family court erred and abused its discretion in finding and concluding that it was not reasonably

> foreseeable that Mother will become willing and able to provide the children with a safe family home, even with the assistance of a service plan, within a reasonable period of time not to exceed two years from the date upon which the children were first placed under foster custody by the court. (col 8)
>
> 2. The State and family court erred and abused its discretion and denied Mother's Due process rights by the following acts, each of which can be construed as a denial of due process but when taken together add up to an obvious denial of [M]other's due process rights. They were:
>
> > A. The appointment of a third attorney for the trial itself. (fof 33)
> >
> > B. The denial of the third attorney[']s request for a continuance to be able to properly represent Mother. (fof 33)
> >
> > C. The appointment of a second GAL for the second half of the case. (fof 20)
> >
> > D. The excusing of the second GAL from the trial so that [M]other could not cross examine the GAL. (fof 32)
> >
> > E. The allowance of the second GAL's pretrial statement to be used instead of his live testimony wherein he stated that the parents could not provide a safe home. (fof 32)
> >
> > F. The excusing of the main social worker, Grace Cabat, from the trial. (fof 29, 33)
> >
> > G. The taking of social worker, Grace Cabat's trial testimony by telephone, as this denied [M]other the real ability to properly cross examine this main social worker and also denied her the right to confront this main witness against her. (fof 29, 33)

Point on appeal no. "1" challenges mislabeled COL no. 8 which, from Mother's point of view, is a repeat of correctly labeled FOF no. 81. In effect, this point challenges FOF no. 81 and all of the challenged FsOF supporting FOF no. 81, such as FsOF nos. 70, 78, and 115. Upon a review of the record, we conclude that none of these challenged FsOF are clearly erroneous.

Point on appeal no. "2" does not challenge the facts stated in FsOF nos. 20, 29, 32, and 33. It agrees that they are facts and contends that separately and together they prove a denial of Mother's constitutional right to due process.

With the exception of the denial of her request for a continuance, Mother did not object to any of the facts stated in these FsOF. Mother's reasons for requesting a continuance were as follows:

> [COUNSEL FOR MOTHER]: . . . The reasons for the continuance are, I have recently come on as counsel for [Mother] and we need additional time to prepare. As I have had a chance to review the file, I believe there is [sic] some additional things that should be done in this case, for example, having the children revisit Mary Lou Laumaka [sic]. My understanding is the children have not gone to see her since December 2004, and this case started up again in early 2005.
>
> We believe that terminating [M]other's parental rights may actually cause more psychological harm to the children than continuing on the course that had previously been implemented, which is getting mom into services and getting her back on track. She has had periods -- quite a long time being clean and sober, and we believe that she can again accomplish this now that she's in residential rather than outpatient treatment.
>
> In addition, my understanding is that my client went to an ohana conference for permanency issues without benefit of counsel, and we have made a request off the record that we be given a little bit of additional time to have another ohana conference where [M]other could be represented by counsel so that we could discuss those issues once again. And for those reasons, we are asking to continue the trial.

Any harm that might have been caused to Mother by the denial of the continuance, as described in FOF no. 33, was rendered harmless by the facts stated in FsOF nos. 33 and 34.

Applying the right/wrong standard of appellate review, we conclude that point on appeal no. "2" is wrong.

CONCLUSION

Accordingly, we affirm the March 3, 2006 Order Awarding Permanent Custody, and the March 30, 2006 Orders Concerning Child Protective Act.

DATED: Honolulu, Hawai'i, April 16, 2007.

On the briefs:

Joseph Dubiel
for Mother-Appellant.

Kurt J. Shimamoto and
Mary Anne Magnier,
Deputy Attorneys General,
for Petitioner-Appellee.

Chief Judge

Associate Judge

Associate Judge