

NO. 28068

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

J.B., Mother, Petitioner-Appellee,  
 and  
 CHILD SUPPORT ENFORCEMENT AGENCY,  
 STATE OF HAWAII, Petitioner,  
 v.  
 L.A., Respondent-Appellant

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APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT  
 (FC-PATERNITY NO. 96-0277)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

Respondent-Appellant L.A. (Father) appeals from the "Order Re: Respondent's Motion to Change Permanent Legal and Physical Custody of Minor Child, Filed 5/25/04" filed on June 30, 2006 in the Family Court of the First Circuit<sup>1</sup> (family court).

On appeal, Father contends in his Opening Brief that the family court erred by

(1) awarding Petitioner-Appellee J.B. (Mother) sole legal custody of the minor child (Child), and

(2) rejecting the recommendation of the Custody Evaluator (CE) that Father be awarded sole legal and physical custody of Child because the CE's recommendation "rested upon the manifest weight of the evidence, and the Family Court contradicted it with no explanation or analysis."

<sup>1</sup> The Honorable Jennifer L. Ching presided.

In his Supplemental Brief,<sup>2</sup> Father contends that Findings of Fact (FOFs) 34, 39, 41, 42, and 43 were erroneous and Conclusion of Law (COL) 3 was wrong.

Upon careful 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, as well as the relevant statutory and case law, we conclude that Father's appeal is without merit.

Generally, the family court possesses wide discretion in making its decisions and those decisions will not be set aside unless there is a manifest abuse of discretion. Thus, we will not disturb the family court's decisions on appeal unless the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant and its decision clearly exceeded the bounds of reason.

. . . .

The family court's FOFs are reviewed on appeal under the clearly erroneous standard. A FOF is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made. Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

On the other hand, the family court's COLs are reviewed on appeal de novo, under the right/wrong standard. COLs, consequently, are not binding upon an appellate court and are freely reviewable for their correctness.

. . .

Moreover, the family court is given much leeway in its examination of the reports concerning a child's care, custody, and welfare, and its conclusions in this regard, if supported by the record and not clearly erroneous, must stand on appeal.

In re Jane Doe, 101 Hawai'i 220, 227, 65 P.3d 167, 174 (2003) (internal quotation marks, citations, ellipses, and brackets in original omitted; block quote format changed) (quoting In re Jane Doe, 95 Hawai'i 183, 189-90, 20 P.3d 616, 622-23 (2001)).

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<sup>2</sup> Father filed his Opening Brief on March 5, 2007. On March 24, 2008, this court remanded the case to the family court to enter findings of fact and conclusions of law. On April 22, 2008, the family court entered its Findings of Fact and Conclusions of Law (FOFs/COLs). Father filed a motion on May 8, 2008 to file a supplemental brief regarding the FOFs/COLs. This court granted Father's motion, and Father filed his Supplemental Brief on May 28, 2008.

The family court's FOFs challenged by Father are not clearly erroneous, and the challenged conclusion of law is not wrong.

(1) FOF 34. On July 1, 2004, the family court appointed the CE to "conduct an objective investigation of the family and prepare an Evaluator's Report to assist the Court in making its final custody and visitation rulings." The family court found in FOF 34:

34. The Report of the [CE] to the Court ("CE Report") filed on August 23, 2004 states on page 2, second paragraph that "[t]he court appointed a custody evaluator to make recommendations as to whether [Child] should be allowed to relocate to Pennsylvania or remain in Hawaii with [F]ather." The CE Report did not address custody if Mother returned to Hawaii.

Father claims the family court ignored parts of the CE Report and incorrectly interpreted other parts of the report. He criticizes FOF No. 34 for ignoring sections of the CE Report that discussed possibly negative factors concerning Mother. Father's criticism misses the point of FOF 34. FOF 34 addresses the purpose and scope of the CE Report rather than its specific findings, which are addressed in other FOFs. FOF 34 notes that the family court had not asked the CE to address the question of legal custody if Mother were to return to Hawai'i. Although the CE Report did make a statement regarding legal custody if Mother were to return to Hawai'i, the family court was apparently indicating that it chose to disregard that opinion because it was outside the scope of evaluation it had sought from the CE. FOF 34 simply indicates what question the family court asked the CE to make recommendations on, but it does not contain a finding on the issue of parental fitness. It was not an abuse of discretion for the family court to restate the scope of the CE Report it had requested and to indicate that it would assign no weight to an opinion by the CE that the court had not requested. Therefore, FOF 34 is not erroneous.

(2) FOF 39. The family court in its FOF 39 found that adopting the CE's recommendation "would not be in the best interests of the Child":

39. The CE's recommendation was sole legal and sole physical custody to *continue* {italics added} with [F]ather, with timesharing between the parents. (As to the word in italics, note that on September 15, 2004 the court ordered temporary joint legal custody.) The Court finds that the following or adopting the CE's recommendation would not be in the best interests of the Child.

The record contains substantial evidence to support FOF 39. In the course of the custody hearing, the family court received testimony and factual evidence not considered by the CE. The family court did not err in giving little weight to the CE Report concerning legal custody of Child.

(3) FOF 41. FOF No. 41 provides:

41. Dr. Merrill did psychological evaluations on both parents. Dr. Merrill did not do a custody evaluation. Dr. Merrill had no opinion as to which individual should be awarded custody.

It is undisputed that Dr. Merrill did psychological evaluations of both parents pursuant to a court order and gave no opinion as to which parent should be given sole legal custody. Dr. Merrill testified unambiguously that he "didn't do a custody evaluation." As to whether he had an opinion regarding custody issues, Dr. Merrill testified "no, I don't." FOF 41 is not erroneous.

(4) FOF 42. Father challenges the family court's determination of credibility in FOF 42. The Hawai'i Supreme Court has long held 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." In re Jane Doe, 95 Hawai'i at 190, 20 P.3d at 623.

FOF 42 provides:

42. When Mother was pregnant with the Child, Father pushed her out of the bed, shook her, pushed her, spat at her, and called her "cunt." Mother suffered bruises as a result of the incident.

After testimony presented at the hearing, the family court chose to give credence to Mother's account of an alleged incident of physical abuse by Father. We will not invade the province of the family court in determining the credibility of a witness. LeMay v. Leander, 92 Hawai'i 614, 626, 994 P.2d 546, 558 (2000).

(5) FOF 43. Father claims that FOF 43 is erroneous for not finding it was Mother's fault that Mother and Father could not get along. FOF 43 provides:

43. It is in the best interests of the Child for Mother to have sole legal custody of the Child. Joint legal custody is not appropriate. The parents will not work together cooperatively to make decisions about the Child.

This finding is not clearly erroneous. Regardless, the family court made a determination that Child's best interests would be served by awarding sole legal custody to Mother, not a determination as to who was at fault in Mother and Father's inability to get along.

(6) COL 3. Father asserts that in COL 3 the family court did not serve the best interests of Child in its conclusion that sole legal custody should be awarded to Mother. COL No. 3 provides:

3. It is in the best interests of the Child for Mother to have sole legal custody of the Child. It was proper for the Court to award and order legal custody of Child to Mother.

The family court concluded that dual legal custody did not appear to be an option under the circumstances.

THE COURT: Okay. With respect to joint legal, I would have done it, but they're not getting along, so I don't think joint legal works if -- if they don't get along.

There was substantial evidence adduced at the hearing from numerous expert and lay witnesses. In choosing to award legal custody to Mother, the family court concluded it was in the best interests of Child.

The family court weighed the evidence in making its COL 3. The family court left the door open to revisit the issue

of sole legal custody versus joint custody in a future hearing after parenting counseling and careful reflection by the parents on the need to get along for the benefit of Child.

THE COURT: Well, another thing we could do is you both can go to parenting, and we can set a review in three months, four months, and see if you can get along enough to agree. I mean, I think it would be in [Child's] best interest for you to be cooperative about what he's doing.

The family court did not err in awarding sole legal custody of Child to Mother. Nowhere in the family court's FOFs or COLs are we are "left with a definite and firm conviction that a mistake has been made." In re Jane Doe, 101 Hawai'i at 227, 65 P.3d at 174.

Therefore,

The "Order Re: Respondent's Motion to Change Permanent Legal and Physical Custody of Minor Child, Filed 5/25/04" filed on June 30, 2006 in the Family Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, November 19, 2008.

On the briefs:

David J. Gierlach  
for Respondent-Appellant.

Steven J. Kim  
(Lynch Ichida Thompson Kim &  
Hirota)  
for Petitioner-Appellee.

  
Presiding Judge

  
Associate Judge

  
Associate Judge