

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28595

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STATE OF HAWAII, CHILD SUPPORT ENFORCEMENT AGENCY and
JANE DOE, Petitioners-Appellants, v. JOHN ROE
Respondent-Appellee

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STATE OF HAWAII

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APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
(FC-P No. 97-0092K)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding J., Foley, and Fujise, JJ.)

In this appeal arising from a paternity action, Petitioner-Appellant Jane Doe (Mother) challenges the following post-judgment orders entered by the Family Court of the Third Circuit (family court), which modified earlier child-custody and child-support orders by the family court¹ and awarded Respondent-Appellee John Roe (Father) sole physical and legal custody of Mother and Father's (collectively, parties or parents) son and daughter (collectively, Children), and modified the parties' child-support obligations: (1) the "Decision Re: Evidentiary Hearing on July 20, 2006 Re: Custody & Visitation" filed on August 3, 2006 (August 3, 2006 Decision); (2) the "Custody and Visitation Order" filed on November 15, 2006; (3) the "Order After Hearing" entered after a January 29, 2007 hearing; and (4) the "Order After Hearing" filed on August 10, 2007.

We affirm in part and vacate in part the August 3, 2006 Decision and the November 15, 2006 Custody and Visitation Order. In all other respects, we affirm.

¹ In 1998, the family court awarded to the parties joint legal and physical custody of Children and ordered Father, among other obligations, to pay child support of \$92.50 per child per month for a total monthly child support obligation of \$185.00.

A.

Initially, we reject Father's contention that this court lacks appellate jurisdiction over Mother's appeal because Mother filed her notice of appeal on June 7, 2007, more than thirty days after Mother's November 27, 2006 "Motion for Reconsideration [of the family court's November 15, 2006 Custody and Visitation Order] or, in the Alternative, for New Trial" (Motion for Reconsideration) was deemed denied on February 26, 2007, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 4(a)(3).² At the time Mother's Motion for Reconsideration was deemed denied, the family court had not yet resolved the issue of whether the family court should modify the parties' child-support obligations. It was not until May 8, 2007 that the family court entered a written order resolving the child-support issue, and Mother timely filed her notice of appeal within thirty days after the May 8, 2007 order was entered.

B.

Mother initially contends that the family court reversibly erred in denying her motion to disqualify per diem

² HRAP Rule 4(a)(3) provides:

(a) Appeals in civil cases.

. . . .

(3) TIME TO APPEAL AFFECTED BY POST-JUDGMENT MOTIONS. If any party files a timely motion for judgment as a matter of law, to amend findings or make additional findings, for a new trial, to reconsider, alter or amend the judgment or order, or for attorney's fees or costs, the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion; provided, that the failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion.

The notice of appeal shall be deemed to appeal the disposition of all post-judgment motions that are timely filed after entry of the judgment or order.

The 90-day period shall be computed as provided in Rule 26.

Judge Jeanne L. O'Brien (Judge O'Brien) because Judge O'Brien was biased against Mother's attorney and paralegal.

In light of the Hawai'i Supreme Court's decision in State v. Ross, 89 Hawai'i 371, 377, 974 P.2d 11, 17 (1998), we are unable to conclude that Judge O'Brien reversibly erred in failing to disqualify herself from hearing the proceedings below.

C.

Mother argues that the family court reversibly erred in denying her motion to continue the trial (Motion to Continue) due to the unavailability of her therapist, Dr. Jeffrey Cumes (Dr. Cumes).

A trial court's decision to grant or deny a motion to continue is reviewed on appeal for abuse of discretion. Onaka v. Onaka, 112 Hawai'i 374, 378, 146 P.3d 89, 93 (2006). Our review of the record confirms that the family court did not abuse its discretion when it denied Mother's Motion to Continue.

The Motion to Continue was filed ex parte on July 19, 2006, the day before the July 20, 2006 trial was scheduled to commence. The trial had originally been set for January 27, 2006 but was continued to July 20, 2006 due to the illness of Mother's counsel. Despite the six-month advance notice of the trial date, Mother did not list Dr. Cumes on any witness list submitted to the court before the hearing, and the record does not indicate that Mother subpoenaed or made any other effort to secure Dr. Cumes's presence at trial. In denying the Motion to Continue, the family court also expressed concern that Dr. Cumes had not "filed any report that would have given [Father] adequate notice in order to prepare for [Dr. Cumes's] testimony" and that it was not in Children's best interest to continue the trial a second time.

D.

Mother maintains that the family court abused its discretion by giving undue weight to the custody evaluator's recommendations and failing to fully and fairly consider the

custody evaluator's report in its entirety, resulting in findings unsupported by the evidence.

"[T]he family court is given much leeway in its examinations of the reports concerning a child's care, custody, and welfare[,] "In re Doe, 95 Hawai'i 183, 197, 20 P.3d 616, 630 (2001) (internal brackets and quotation marks omitted), and an appellate court will not "reassess the credibility of the witnesses or the weight of the evidence, as determined by the family court[.]" Id.

[T]he question on appeal is whether the record contains "substantial evidence" supporting the family court's determinations, and appellate review is thereby limited to assessing whether those determinations are supported by "credible evidence of sufficient quality and probative value." In this regard, the testimony of a single witness, if found by the trier of fact to have been credible, will suffice.

Id. at 196, 20 P.3d at 629 (citation omitted). The record on appeal contains substantial evidence, including the custody evaluator's recommendations, to support the family court's decision as to custody and visitation of Children.

E.

The transcript of the July 20, 2006 trial indicates that Mother's counsel requested the family court to "judicially notice the restraining order case" that Mother had filed against Father and which resulted in a three-year family-court order for protection against Father. In its August 3, 2006 Decision, the family court, after stating that "[it] took judicial notice of the file in FC-DA 01-1-0162K [(protective-order case)] by agreement of the parties[.]" chronicled the history of the protective-order case by summarizing the contents of various documents filed in that case.

In State v. Kotis, 91 Hawai'i 319, 984 P.2d 78 (1999), the Hawai'i Supreme Court explained that

a trial court may take judicial notice of "the pleadings, findings of fact and conclusions of law" filed in a separate court proceeding. See also State v. Akana, 68 Haw. 164, 165, 706 P.2d 1300, 1302 (1985) ("This court has validated the practice of taking judicial notice of a court's own

records in an interrelated proceeding where the parties are the same."). . . . [A] number of other jurisdictions have held that a trial court may take judicial notice of its own acts or of the existence of records on file in the same case.

However, . . . [a] distinction must be carefully drawn between taking judicial notice of the *existence* of documents in the Court file as opposed to the *truth* of the facts asserted in those documents. While a Court may take judicial notice of each document in the Court's file, it may only take judicial notice of the truth of facts asserted in documents such as orders, judgments and findings of fact and conclusions of law because of the principles of collateral estoppel, res judicata, and the law of the case.

Id. at 341-42, 984 P.2d at 100-01 (emphasis added; format altered; citations, footnote, and internal brackets omitted). The supreme court also noted that "as a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it[.]" Id. at 342, 984 P.2d at 101 (internal quotation marks and brackets omitted).

Mother asserts that the family court, in violation of Kotis, improperly took judicial notice of and made findings on certain documents and letters in the protective-order case file that were not in evidence, nor subjected to scrutiny of trial counsel at trial. We disagree.

As previously noted, Mother expressly requested the family court to take judicial notice of the protective-order case file. Moreover, it does not appear from the record that the family court relied on the truth of the allegations set forth in the documents in the protective-order case to determine custody. Rather, the family court set forth the history of the protective-order case because that history was relevant to the question of whether Father had been determined to be a perpetrator of family violence in that case, thus triggering the presumption in Hawaii Revised Statutes (HRS) § 571-46(9) against awarding custody to a perpetrator of family violence.

F.

Mother alleges that the family court "abused its discretion by taking judicial notice of certain alleged facts that are not generally known and/or are subject to reasonable dispute and ma[king] findings, conclusions, and orders in reliance thereon." Specifically, Mother complains about the following "statements of alleged facts" that "riddled" the August 10, 2006 Order:

"While there is controversy over the harm of marijuana that we are not going to resolve here, what is uncontroverted is that all of these substances impair a parent's ability to be responsible for the child while under the influence of alcohol or drugs[";]

"This condition (adrenal fatigue), especially when it is aggravated by drinking coffee causes [Mother] to be physically exhausted. That is not a condition conducive to keeping up with or caring for two teenagers";

"The court feels it is important for [Children] to have outlets for their creative and physical energies and to learn teamwork or self-discipline through activities, and that it (sic) a parental responsibility to see that [Children] have access to these activities[";]

"As a basis to change custody Mother expressed concern that [D]aughter will get into abusive relationships with men. While Mother did not elaborate on that thought, the court finds that such a statement shared with [D]aughter by Mother, based on the fact that [Father] has custody, would seem to be an inappropriate disparagement of the father-daughter relationship";

"For example, there is a definite and undeniable link between poor motivation to do schoolwork, short term memory loss, erratic class attendance...and so forth when a child smokes marijuana. This is especially so when the child has underlying emotional problems..."

(Ellipses in original; citations omitted.)

Contrary to Mother's assertion, the record does not indicate that the family court took "judicial notice" of these five "statements of alleged facts."

G.

HRS § 571-46(9) (2006) provides, in relevant part:

Criteria and procedure in awarding custody and visitation. In . . . any other proceeding where there is at issue a dispute as to the custody of a minor child, the court, during the pendency of the action, at the final hearing, or any time during the minority of the child, may

make an order for the custody of the minor child as may seem necessary or proper. In awarding the custody, the court shall be guided by the following standards, considerations, and procedures:

. . . .

(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 made a finding of family violence by a parent:

(A) The court shall consider as the primary factor 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, or assault or causing reasonable fear of physical harm, bodily injury, or assault to another person[.]

(Emphases added.)

Mother claims that the family court abused its discretion by granting sole physical and legal custody of Children to Father without finding that Father had successfully rebutted a presumption against awarding him custody as a perpetrator of family violence pursuant to HRS § 571-46(9). Mother rests her argument on the family court's finding in the protective-order case that "a protective order [against Father] is necessary to prevent domestic abuse or a recurrence of abuse[.]"

For the following reasons, we disagree with Mother.

First, in Rezentes v. Rezentes, 88 Hawai'i 200, 965 P.2d 133 (App. 1998), this court explained that the term "family violence[.]" as used in HRS § 571-46(9), is defined in HRS

§ 571-2 (Supp. 1997)³ and refers to the following acts by a family or household member: "[a]ttempting to cause or causing physical harm to another family or household member"; "[p]lacing a family or household member in fear of physical harm"; and "[c]ausing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress." *Id.* at 206, 965 P.2d at 139. Mother's petition against Father in the protective-order case did not allege that Father committed any of the acts of family violence set forth in HRS § 571-2. Mother testified that she sought the protective order against Father due to "verbal and emotional abuse" against her, not "physical violence." Mother also testified that she requested the protective order because she was concerned about the behavior of Children when they returned from visits with Father. Since there is no indication in the record of the protective-order case that Father engaged in "family violence[,]" the statutory presumption under HRS § 571-46(9) did not apply in this case.

Second, in its August 3, 2006 Decision, the family court found that

[p]ursuant to HRS Sec. 571-46(9), when there has been domestic violence found to exist it can be cause to deny custody to a natural parent, unless such presumption is rebutted. The court considered the issue of alleged domestic violence and finds that although a [temporary restraining order (TRO)] was issued against Father in 2001, there had been no violence or threats of violence toward Mother or [Children] at that time or at any other time.

³ The definition of "family violence" in HRS § 571-2 has not changed since this court's opinion in *Rezentes* was issued. The term is defined as follows:

"Family violence" means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self-defense:

- (1) Attempting to cause or causing physical harm to another family or household member;
- (2) Placing a family or household member in fear of physical harm; or
- (3) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force, or duress.

Mother's testimony was that when she tried to get the TRO renewed in 2004 it was denied because there was no evidence of spousal abuse.

(Emphases added.) In its April 22, 2008 findings of fact and conclusions of law, the family court found that "[Father] had rebutted the presumption adequately by the preponderance of the evidence." Therefore, contrary to Mother's contention, the family court did determine that Father had successfully rebutted the statutory presumption.

Because a tenuous link exists between the physical harm or threatened physical harm referred to in HRS § 571-46(9) and the "domestic abuse" referred to in the protective order Mother obtained against Father, and because the family court specifically determined that Father had rebutted the presumption in HRS § 571-46(9), the family court did not abuse its discretion in granting custody of Children to Father.

H.

Mother contends that the family court manifestly abused its discretion in awarding sole physical and legal custody of Children to Father because the family court apparently "failed to take into consideration" the relevant factors set forth in the Hawai'i Divorce Manual, 1 Hawai'i State Bar Association, Family Law Section § 3, at 14 (2006), for determining an award of custody, "including keeping siblings together, and the necessity of frequent, continuing, and meaningful contact of each parent with the child." We disagree.

First, the Hawai'i Divorce Manual is not binding legal authority and expressly states that "the court is guided by the standards, considerations, and procedures contained in HRS § 571-46 . . . [and the Hawai'i Divorce Manual] is intended to aid the attorney when applying HRS § 571-46 to the facts of a custody dispute." Id. at 18 (emphasis added).

Second, the family court stated in its November 15, 2006 order that it had considered all the factors in HRS § 571-46.

Third, "frequent, continuing, and meaningful contact of each parent" is just one of the many factors described in HRS § 571-46 that guides a custody decision. HRS § 571-46(1). The statute does not deem this, nor any other factor, as the most influential or dispositive in a custody decision.

Fourth, HRS § 571-46(3) describes another factor to be considered in custody awards: "If a child is of sufficient age and capacity to reason, so as to form an intelligent preference, the child's wishes as to custody shall be considered and be given due weight by the court[.]" At the July 20, 2006 hearing, the custody evaluator explained that Children said they felt they did better at school when they stayed with Father and that they wanted to be with Father on school nights and share their free time equally between Mother and Father. Father also testified that Children told him they preferred living with him rather than with Mother and that Mother had even told Children to live with Father. In accordance with HRS § 571-46(3), the family court took Children's preference into consideration in awarding Father sole custody of Children.

Fifth, HRS § 571-46(5) provides that in awarding custody, the family court "may hear testimony of any person or expert . . . whose skill, insight, knowledge, or experience is such that the person's or expert's testimony is relevant to a just and reasonable determination of what is for the best physical, mental, moral, and spiritual well-being of the child whose custody is at issue[.]" The testimonies of the custody evaluator, Father, and Mother provide ample support for the family court's custody decision.

Finally, our review of the record indicates that substantial evidence was adduced that sufficiently related to the criteria and guidelines outlined in HRS § 571-46 and supported the family court's custody determination.

I.

Mother's final point of error is that the family court abused its discretion by ordering the parties to take the following specific actions with respect to Children, thereby "improperly encroaching upon parental and personal authority over medical, educational, disciplinary, and recreational decisions":

(1) That Children "discontinue with the weekly chiropractic treatments until and unless the Orthopedist recommends further chiropractic treatment[,] " despite the lack of objection or evidence to suggest that chiropractic care was objectionable or inappropriate;

(2) That

[n]either party shall quiz the child about his or her time with the other parent or about the other parent's lifestyle. To clarify this, it is okay to ask [Children] if he or she had a nice time, but not okay to demand details about the visit or the other parent's boyfriends/girlfriends, for example, that is not volunteered by the child[;]

(3) That "[n]either party shall say anything disrespectful about the other parent to or in front of [Children] and shall correct [Children] if they do so" (emphasis added by Mother in original);

(4) That

[f]or the exchanges where the parents are present or at any other time when both parents attend events involving [Children], both parties shall say hello to one another, smile, and shall not make any negative comments to one another or discuss any other issue other than directly related to the child's visit or event, if necessary[; and]

(emphases added)

(5) That "[b]oth parents shall encourage both Children to become involved in no less than one extra-curricular activity such as participation in sports teams, drama, student government, school clubs, or community service[.]"

In Bencomo v. Bencomo, 112 Hawai'i 511, 516, 147 P.3d 67, 72 (App. 2006), this court held that

when the family court awards one person "sole legal and sole physical custody of" a child, the family court is not authorized to enter additional orders as if it was the legal and physical custodian of that child. On the contrary, it

must allow that custodial person the decision-making authority exercisable by the person who has been awarded the sole legal and physical custody of that child.

Applying the foregoing principle in Bencomo, we vacated the portions of the family court judgment that (1) restricted the parties' discussion of divorce proceedings, court dates, and reports; (2) required the child to be reevaluated for psychiatric conditions and to take medication and other treatment recommended by a pediatrician or psychiatrist; (3) required the child to continue aggressive therapy without interference of either parent, and demanded that the parties follow all of the attending doctor's recommendations; (4) required the parties to encourage the child to play soccer, but restricted which team and coach the child could play for; (5) required the parties to read a specific parenting book; and (6) gave the guardian ad litem the power to determine the child's telephone access. Id. at 516-17, 147 P.3d at 72-73.

As Mother points out, the family court's orders discussed above are akin to the orders vacated in Bencomo.

CONCLUSION

In light of the foregoing discussion, we vacate the following parts of the August 3, 2006 Decision:

(1) The second and third sentences of paragraph 52.a., which state:

Neither party shall say anything disrespectful about the other parent to or in front of [Children] and shall correct [Children] if they do so. Neither party shall quiz the child about his or her time with the other parent or about the other parent's lifestyle. To clarify this, it is okay to ask [Children] if he or she had a nice time, but not okay to demand details about the visit or the other parent's boyfriends/girlfriends, for example, that is not volunteered by the child[;]

(2) The last sentence of paragraph 52.j., which states: "The [C]hildren are to discontinue with the weekly chiropractic treatments until and unless the Orthopedist recommends further chiropractic treatment["; and]

(3) The second sentence of paragraph 52.n., which states as follows:

For the exchanges where the parents are present or at any other time when both parents attend events involving [Children], both parents shall say hello to one another, smile, and shall not make any negative comments to one another or discuss any other issue other than directly related to the child's visit or event, if necessary.

We also vacate the following parts of the Custody and Visitation Order filed on November 15, 2006:

(1) The second, third, and fourth sentences of paragraph 1, which state as follows:

1. . . . Neither party shall say anything disrespectful about the other parent to or in front of [Children] and shall correct [Children] if they do so. Neither party shall quiz the child about his or her time with the other parent or about the other parent's lifestyle. To clarify this, it is okay to ask [Children] if he or she had a nice time, but not okay to demand details about the visit or the other parent's boyfriends/girlfriends, for example, that is not volunteered by the child[;]

(2) The last sentence of paragraph 10, which states as follows: "The [C]hildren are to discontinue with the weekly chiropractic treatments until and unless the Orthopedist recommends further chiropractic treatment["; and]

(3) The second and third sentences of paragraph 14, which state as follows:

14. . . . For the exchanges where the parents are present or at any other time when both parents attend events involving [Children], both parties shall say hello to one another, smile, and shall not make any negative comments to one another or discuss any other issue other than directly related to the child's visit or event, if necessary.

Finally, we vacate the last sentence of paragraph 17 of the "Order After Hearing" filed on August 10, 2007, which reads as follows:

Both parents shall encourage both [C]hildren to become involved in no less than one extra-curricular activity such as participation in sports teams, drama, student government, school clubs, or community service and the parents shall cooperate with transporting the child[ren] for these activities.

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In all other respects, we affirm: (1) the "Decision Re: Evidentiary Hearing on July 20, 2006 Re: Custody & Visitation" filed on August 3, 2006; (2) the "Custody and Visitation Order" filed on November 15, 2006; (3) the "Order After Hearing" entered after a January 29, 2007 hearing; and (4) the "Order After Hearing" filed on August 10, 2007.

DATED: Honolulu, Hawai'i, October 24, 2008.

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